

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

2009

Volume I

*Summary records
of the meetings
of the sixty-first session
4 May–5 June and
6 July–7 August 2009*

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 ... 2009*).

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 sixty-first session of the Commission (A/CN.4/SR.2998–A/CN.4/SR.3035), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/2009

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Second Vice-Chairperson: Mr. Salifou FOMBA

Chairperson of the Drafting Committee: Mr. Marcelo VÁZQUEZ-BERMÚDEZ

Rapporteur: Ms. Marie G. JACOBSSON

Ms. Patricia O'Brien, Under-Secretary-General of Legal Affairs, United Nations Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the United Nations Legal Counsel, represented the Secretary-General.

AGENDA

The Commission adopted the following agenda at its 2998th meeting, held on 4 May 2009:

1. Organization of the work of the session.
2. Filling of a casual vacancy in the Commission (article 11 of the statute).
3. Reservations to treaties.
4. Responsibility of international organizations.
5. Shared natural resources.
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. Treaties over time.
11. The most-favoured-nation clause.
12. Programme, procedures and working methods of the Commission and its documentation.
13. Date and place of the sixty-second session.
14. Cooperation with other bodies.
15. Other business.

ABBREVIATIONS

AALCO	Asian–African Legal Consultative Organization
CADHI	Committee of Legal Advisers on Public International Law
GATT	General Agreement on Tariffs and Trade 1994
IAJC	Inter-American Juridical Committee
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
ILO	International Labour Organization
IMF	International Monetary Fund
ISDR	International Strategy for Disaster Reduction
KEDO	Korean Peninsula Energy Development Organization
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OAS	Organization of American States
OCHA	Office for the Coordination of Humanitarian Affairs
OPANAL	Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean
PCIJ	Permanent Court of International Justice
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural 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>PCIJ, Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>PCIJ, Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40–80: beginning in 1931)
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

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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 <http://legal.un.org/ilc>.

CASES CITED IN THE PRESENT VOLUME

<i>Case</i>	<i>Nature and source of the decision</i>
<i>Abdulaziz et al. v. the United Kingdom</i>	Judgement of 28 May 1985, European Court of Human Rights, <i>Judgments and Decisions: Series A</i> , No. 94.
Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo	Order of 17 October 2008, <i>I.C.J. Reports 2008</i> , p. 409.
<i>Air Service Agreement of 27 March 1946 between the United States of America and France</i>	<i>Decision of 9 December 1978</i> , UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 417–493.
<i>Al-Jedda case</i>	<i>R. (on the application of Al-Jedda) v. Secretary of State for Defence</i> , Judgement of the House of Lords, 12 December 2007, [2007] UKHL 58.
<i>Ana Cajamarca Arizaga and her daughter Angélica Loja Cajamarca v. Belgium</i>	Application no. 07/5726/B, Order of 30 July 2007, Brussels, Tribunal de première instance.
<i>Application of the Interim Accord of 13 September 1995</i>	<i>(the Former Yugoslav Republic of Macedonia v. Greece)</i> , <i>Application instituting proceedings</i> , 17 November 2008, 2008 General List No. 142.
<i>Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)</i>	Provisional Measures, Order of 15 October 2008, <i>I.C.J. Reports 2008</i> , p. 353.
<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> , Preliminary objections, Judgment, <i>I.C.J. Reports 1996</i> , p. 595.
	<i>(Bosnia and Herzegovina v. Serbia and Montenegro)</i> , Judgment, <i>I.C.J. Reports 2007</i> , p. 43.
	<i>(Croatia v. Serbia)</i> , Preliminary Objections, Judgment, <i>I.C.J. Reports 2008</i> , p. 412.
	<i>(Croatia v. Serbia)</i> , Order of 20 January 2009, <i>I.C.J. Reports 2009</i> , p. 54.
<i>Avena</i>	<i>Avena and Other Mexican Nationals (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>Behrami and Saramati</i>	<i>Behrami and Behrami v. France and Saramati v. France, Germany and Norway</i> , Application nos. 71412/01 and 78166/01, Grand Chamber decision of 2 May 2007 (Admissibility), European Court of Human Rights, available from the Court's HUDOC database, http://hudoc.echr.coe.int .
<i>Belilos</i>	<i>Belilos v. Switzerland</i> , Application no. 10328/83, Judgement of 29 April 1988, European Court of Human Rights, <i>Judgments and Decisions: Series A</i> , vol. 132.
<i>Border and Transborder Armed Actions</i>	<i>(Nicaragua v. Honduras)</i> , Jurisdiction and Admissibility, Judgment, <i>I.C.J. Reports 1988</i> , p. 69.
<i>Bosphorus</i>	<i>Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland</i> , Grand Chamber, Application no. 45036/98, Judgement of 30 June 2005, European Court of Human Rights, <i>Reports of Judgments and Decisions 2005-VI</i> .
<i>Boyce et al. v. Barbados</i>	Judgement of 20 November 2007, Preliminary Objection, Merits, Reparations and Costs, Inter-American Court of Human Rights, <i>Series C</i> , No. 169.
<i>C. v. Belgium</i>	Judgement of 7 August 1996, European Court of Human Rights, <i>Reports of Judgments and Decisions 1996-III</i> .
<i>Canepa v. Canada</i>	Human Rights Committee, <i>Giosue Canepa v. Canada</i> , Communication no. 558/1993, Views adopted on 3 April 1997, <i>Official Records of the General Assembly, Fifty-second Session, Supplement No. 40 (A/52/40</i> , vol. II), annex VI, p. 115.
<i>Case of Soering v. the United Kingdom</i>	Judgement of 7 July 1989, Application no. 14038/88, European Court of Human Rights, <i>Judgments and Decisions: Series A</i> , vol. 161.
<i>Certain Expenses of the United Nations</i>	(Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, <i>I.C.J. Reports 1962</i> , p. 151.
<i>Claude Reyes et al. v. Chile</i>	Judgement of 19 September 2006, Merits, Reparations and Costs, Inter-American Court of Human Rights, <i>Series C</i> , No. 151.
<i>Costa v. E.N.E.L.</i>	Judgement of 15 July 1964, Case 6/64, Court of Justice of the European Communities, <i>European Court Reports 1964</i> , p. 587.
<i>Cruz Varas and Others v. Sweden</i>	Application no. 15576/89, Judgement of 20 March 1991, European Court of Human Rights, <i>Judgments and Decisions: Series A</i> , vol. 201.

<i>Delalić</i>	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as “Pavo”, Hazim Delić, Esad Landžo also known as “Zenga”,</i> Case No. IT-96-21-T, Judgement of 16 November 1998, International Tribunal for the Former Yugoslavia, <i>Judicial Reports 1998</i> , vol. II, p. 951.
<i>Dispute regarding Navigational and Related Rights English Channel</i>	(<i>Costa Rica v. Nicaragua</i>), Judgment, <i>I.C.J. Reports 2009</i> , p. 213. <i>Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic</i> , decisions of 30 June 1977 and 14 March 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 3 and 271.
<i>Furundžija</i>	<i>Prosecutor v. Anto Furundžija</i> , Case No. IT-95-17/1-T, Trial Chamber II, Judgement of 10 December 1998, and ILM, vol. 38, No. 2 (March 1999), p. 317.
<i>Gabčíkovo–Nagymaros Project</i>	(<i>Hungary/Slovakia</i>), Judgment, <i>I.C.J. Reports 1997</i> , p. 7.
<i>Golder v. the United Kingdom</i>	Application no. 4451/70, Judgement of 21 February 1975, European Court of Human Rights, <i>Judgments and Decisions: Series A</i> , No. 18.
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<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/604	Expulsion of aliens: Comments and information received from Governments	Reproduced in <i>Yearbook ... 2009</i> , vol. II (Part One).
A/CN.4/605	Provisional agenda for the sixty-first session	Mimeographed. For agenda as adopted, see p. vii above.
A/CN.4/606 and Add.1	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat	Mimeographed.
A/CN.4/607 [and Corr.1] and Add.1	Shared natural resources: Comments and observations received from Governments	Reproduced in <i>Yearbook ... 2009</i> , vol. II (Part One).
A/CN.4/608	Shared natural resources: Paper on oil and gas prepared by Mr. Chusei Yamada, Special Rapporteur on shared natural resources	<i>Idem.</i>
A/CN.4/609	Responsibility of international organizations: Comments and observations received from international organizations	<i>Idem.</i>
A/CN.4/610	Seventh report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur	<i>Idem.</i>
A/CN.4/611 [and Corr.1]	Fifth report on expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur	<i>Idem.</i>
A/CN.4/612	The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>): Comments and information received from Governments	<i>Idem.</i>
A/CN.4/613 and Add.1	Filling of casual vacancies in the Commission: Note by the Secretariat	A/CN.4/613 reproduced in <i>Yearbook ... 2009</i> , vol. II (Part One). A/CN.4/613/Add.1 mimeographed.
A/CN.4/614 [and Corr.1] and Add.1-2	Fourteenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	Reproduced in <i>Yearbook ... 2009</i> , vol. II (Part One).
A/CN.4/615 [and Corr.1]	Second report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur	<i>Idem.</i>
A/CN.4/616	Reservations to treaties in the context of succession of States: Memorandum by the Secretariat	<i>Idem.</i>
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A/CN.4/618	Expulsion of aliens: New draft workplan presented by the Special Rapporteur, Mr. Maurice Kamto, with a view to structuring the draft articles	<i>Idem.</i>
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A/CN.4/L.744 [and Corr.1-2] and Add.1	Reservations to treaties: Text and title of the draft guidelines provisionally adopted by the Drafting Committee on 5, 6, 18, 19, 27, 28 and 29 May 2009	<i>Idem.</i>
A/CN.4/L.745	Draft Report of the International Law Commission on the Work of its Sixty-first Session: chapter I (Organization of the work of the session)	<i>Idem.</i> See the text approved in <i>Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10 (A/64/10)</i> . The final text appears in <i>Yearbook ... 2009</i> , vol. II (Part Two).

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.746	<i>Idem</i> : Chapter II (Summary of the work of the Commission at its sixty-first session)	<i>Idem</i> .
A/CN.4/L.747 and Add.1	<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.748 and Add.1–2 [and Add.2/Corr.1]	<i>Idem</i> : Chapter IV (Responsibility of international organizations)	<i>Idem</i> .
A/CN.4/L.749 and Add.1–7	<i>Idem</i> : Chapter V (Reservations to treaties)	<i>Idem</i> .
A/CN.4/L.750 [and Corr.1] and Add.1	<i>Idem</i> : Chapter VI (Expulsion of aliens)	<i>Idem</i> .
A/CN.4/L.751	<i>Idem</i> : Chapter VII (Protection of persons in the event of disasters)	<i>Idem</i> .
A/CN.4/L.752	<i>Idem</i> : Chapter VIII (Shared natural resources)	<i>Idem</i> .
A/CN.4/L.753	<i>Idem</i> : Chapter IX (The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>))	<i>Idem</i> .
A/CN.4/L.754	<i>Idem</i> : Chapter X (Immunity of State officials from foreign criminal jurisdiction)	<i>Idem</i> .
A/CN.4/L.755	<i>Idem</i> : Chapter XI (The most-favoured-nation clause)	<i>Idem</i> .
A/CN.4/L.756	<i>Idem</i> : Chapter XII (Treaties over time)	<i>Idem</i> .
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A/CN.4/L.758	Protection of persons in the event of disasters. Text and title of draft articles 1, 2, 3, 4 and 5 as provisionally adopted by the Drafting Committee	Mimeographed.
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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-FIRST SESSION

Held at Geneva from 4 May to 5 June 2009

2998th MEETING

Monday, 4 May 2009, at 3.20 p.m.

Acting Chairperson:

Mr. Edmundo VARGAS CARREÑO

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Caflich, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Opening of the session

1. The ACTING CHAIRPERSON declared open the sixty-first session of the International Law Commission.

Statement by the Acting Chairperson

2. The ACTING CHAIRPERSON reported briefly on the discussion held in the Sixth Committee of the General Assembly on the Commission's report on the work of its sixtieth session,¹ including the topical summary contained in document A/CN.4/606 and Add.1.² The International Law Week had provided an opportunity for delegations to engage in dialogue with members of the Commission and special rapporteurs present in New York, as they had been encouraged to do by the General Assembly in paragraph 12 of its resolution 59/313 of 12 September 2005. The dialogue had focused on the topics of immunity of State officials from foreign criminal jurisdiction, responsibility of international organizations and the most-favoured-nation clause. The dialogue had been continued at the meetings of legal advisers. On the basis of the report of the Sixth Committee on the work of its sixtieth session,

¹ *Yearbook ... 2008*, vol. II (Part Two), document A/63/10.

² Mimeographed; available on the Commission's website.

the General Assembly had adopted resolution 63/123 of 11 December 2008, on the report of the Commission, paragraph 9 of which requested the Secretary-General to submit to the General Assembly, in accordance with established procedures and bearing in mind its resolution 56/272 of 27 March 2002, a report on the assistance currently provided to special rapporteurs and options regarding additional support of the work of special rapporteurs. That request related to paragraph 358 of the Commission's report, on the question of honoraria. The General Assembly had also adopted resolution 63/124 of 11 December 2008, on the law of transboundary aquifers, which contained in annex the draft articles adopted by the Commission.

Election of officers

Mr. Petrič was elected Chairperson by acclamation.

Mr. Petrič took the Chair.

3. The CHAIRPERSON paid a tribute to Ms. Mahnouch H. Arsanjani, who had been Secretary to the Commission for many years before becoming Director of the Codification Division and who had retired in March 2009. He welcomed back the new Secretary to the Commission, Mr. Václav Mikulka, who thus resumed his earlier functions. He also welcomed the new member of the Commission, Sir Michael Wood, who had been elected following the resignation of Mr. Ian Brownlie.

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

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

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

Mr. Vázquez-Bermúdez was elected Chairperson of the Drafting Committee by acclamation.

Adoption of the agenda

4. The CHAIRPERSON suggested that a new item 2, entitled "Filling of a casual vacancy in the Commission (article 11 of the Statute)", should be added to the

provisional agenda in order to fill the vacancy created by the resignation of Mr. Chusei Yamada and that the agenda of the sixty-first session, as amended, should be adopted without prejudice to the order in which the topics would be considered.

The provisional agenda (A/CN.4/605), as amended, was adopted.

Tribute to the memory of Nicholas Jotcham

5. The CHAIRPERSON informed the Commission of the death in 2008 of Nicholas Jotcham, reviser of the summary records of the Commission, and recalled his jovial personality, expertise, valuable knowledge and tremendous sense of responsibility.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence in memory of Nicholas Jotcham.

The meeting was suspended at 3.50 p.m. and resumed at 4.30 p.m.

Organization of the work of the session

[Agenda item 1]

6. The CHAIRPERSON drew attention to the programme of work for the following two weeks, which had just been circulated. The Commission would begin with consideration of the topic of responsibility of international organizations at the current meeting, following the election of a new member in accordance with the new item 2 of the agenda ("Filling of a casual vacancy in the Commission (article 11 of the Statute)"). It would then consider the fifth report on expulsion of aliens. The Drafting Committee would begin its work on reservations to treaties, several draft guidelines having been referred to it at the previous session after the consideration of the thirteenth report of the Special Rapporteur, Mr. Pellet. It would also take up a number of draft articles on expulsion of aliens. Members who were interested in participating in the Drafting Committee on those two topics were invited to contact the Chairperson of the Drafting Committee. The Commission would also have a meeting with the United Nations Legal Counsel and another with legal advisers of international organizations within the United Nations system, as recommended at the previous session.³

The programme of work for the first two weeks of the session was adopted.

The meeting was suspended at 4.35 p.m. and resumed at 4.50 p.m.

Filling of a casual vacancy in the Commission (Article 11 of the statute)

[Agenda item 2]

7. The CHAIRPERSON announced that Mr. Shinya Murase (Japan) had been elected to fill the vacancy resulting from the resignation of Mr. Chusei Yamada.

Responsibility of international organizations⁴ (A/CN.4/606 and Add.1, sect. D,⁵ A/CN.4/609,⁶ A/CN.4/610,⁷ A/CN.4/L.743 and Add.1⁸)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

8. The CHAIRPERSON invited the Special Rapporteur, Mr. Gaja, to introduce his seventh report on responsibility of international organizations (A/CN.4/610).

9. Mr. GAJA (Special Rapporteur) said it was unfortunate that his report had only just become available in all official languages, even though he had submitted it two months earlier. Delays in the translation and editing of documents affected the quality of the Commission's work.

10. The seventh report on responsibility of international organizations contained a survey of comments made by States and international organizations as well as new elements that had emerged in practice and the views of a number of authors. The time had come to analyse them and to make some amendments to the draft articles, not only to show States that their comments were taken into consideration in a reasonable period of time, but also because the points they made were often relevant. The Commission should recall that, with the exception of the chapter on countermeasures, States and international organizations had been able to consider the draft articles only once they had been provisionally adopted. The Commission should take the opportunity afforded by the meeting planned with the legal advisers of the United Nations system to hear additional views. He hoped that Commission members would focus on the points he had singled out as requiring consideration and on his proposals thereon. It would not be possible at the current stage to reopen a discussion in plenary on all the draft articles without risking a premature second reading. By concentrating on points that posed problems, the Commission ought to be able to adopt the draft articles in first reading at the current session. That way there would be a complete text that was easier to read, because provisions that might seem problematic when viewed in isolation were often easier to understand when taken as a whole.

11. He proposed reorganizing the draft articles in the following manner: the first two articles, on scope and use of terms, should form a new Part One entitled "Introduction", since both concerned responsibility of international organizations and those aspects of State responsibility covered by the draft, i.e. the responsibility of a State arising in connection with the act of an international organization. Part Two would follow and could keep the title currently used for Part One (The internationally wrongful act of an international organization); it would consist of all the articles dealing with the incurring of responsibility by an international organization: one chapter containing a single article on

⁴ For the draft articles provisionally adopted by the Commission so far, see *Yearbook ... 2008*, vol. II (Part Two), chap. VII, sect. C.

⁵ Mimeographed; available on the Commission's website.

⁶ Reproduced in *Yearbook ... 2009*, vol. II (Part One).

⁷ *Idem*.

⁸ Mimeographed; available on the Commission's website.

³ *Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 355.

general principles followed by all the remaining chapters up to, but not including, the chapter on the responsibility of a State in connection with the act of an international organization. In order to maintain continuity in the provisions relating to the responsibility of international organizations, the current Part Two and Part Three, concerning the content and invocation of responsibility, would follow immediately and would become Part Three and Part Four. Chapter (x), on responsibility of a State in connection with the act of an international organization, would become Part Five. The draft articles would then be concluded by a Part Six, containing general provisions which, like the first two articles, applied to the international responsibility of both international organizations and States.

12. He then turned to his proposals for changes to the draft articles. On chapter II (Attribution of conduct), he suggested that the definition of the term “rules of the organization” should be moved from article 4, paragraph 4, to article 2 (Use of terms) and made more general, so that it would refer to the purposes of all the draft articles and not only, as it currently read, to those of article 4.

13. Questions of attribution were discussed at length in the seventh report, chiefly in the light of decisions by the European Court of Human Rights and the House of Lords, which referred extensively to the draft articles adopted by the Commission. Those decisions did not make any direct criticism of the draft articles or the commentaries thereto, but the European Court had used a different criterion from the one that the Commission had suggested. In his opinion, the solution adopted by the Court in *Saramati v. France, Germany and Norway* was somewhat strange, and he was not persuaded by the idea of attributing to the United Nations conduct that had not been specifically authorized by the Security Council, especially since the United Nations had little knowledge of the conduct of national contingents.

14. The only change that he proposed on attribution concerned the definition of the term “agent” of an international organization in article 4, paragraph 2. Given the concerns expressed by the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), he had tried to make the criteria of attribution more precise by borrowing from the advisory opinion of the International Court of Justice (ICJ) on *Reparation for Injuries*. The new wording in paragraph 23 of the report would read: “2. For the purposes of paragraph 1, the term ‘agent’ includes officials and other persons or entities through whom the international organization acts, when they have been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions.”

15. The main question raised by chapter III (Breach of an international obligation) concerned the definition of obligations under international law as applied to an international organization. In their comments, a number of international organizations had proposed that the subject matter of the rules of the organization (for example, those governing the employment of officials) should be taken into account in order to exclude them from the category of rules of international law. However, although the subject matter might give some indication of the legal nature of

the rules of the organization, it could not be taken as decisive. He therefore proposed that article 8, paragraph 2, should be rephrased to read: “The breach of an international obligation by an international organization includes in principle the breach of an obligation under the rules of that organization” (para. 42 of the report).

16. With regard to chapter IV (Responsibility of an international organization in connection with the act of a State or another international organization), he observed that the comments of States and international organizations had related mainly to draft article 15, which was designed to prevent an international organization from successfully circumventing one of its international obligations by availing itself of the separate legal personality of its members. On the whole, that article had been well received, in spite of its novelty. However, in order to take account of the comments and suggestions made, it might be useful to restrict responsibility in paragraph 2 by using slightly different wording, namely by replacing the phrase “in reliance on” with the words “as the result of”. Thus rephrased, article 15, paragraph 2 (b), would read: “that State or international organization commits the act in question as the result of that authorization or recommendation.” He also proposed the inclusion of a new draft article in view of the fact that chapter IV currently contained no provision contemplating the possibility that an international organization might incur responsibility as a member of another international organization. The conditions set out in articles 28 and 29 in relation to a member State of an international organization should be the same for an international organization that was a member of another international organization. The new text, provisionally to be called article 15 *bis*, would read: “Responsibility of an international organization that is a member of another international organization may arise in relation to an act of the latter also under the conditions set out in articles 28 and 29 for States that are members of an international organization” (para. 53 of the report).

17. With regard to chapter V (Circumstances precluding wrongfulness), he proposed two changes. First, in view of the many critical comments made by States and international organizations, he suggested that article 18 on self-defence be deleted, without prejudice to the general question of inviolability of self-defence. Secondly, since the Working Group on responsibility of international organizations had decided at the previous session⁹ that there should be articles on countermeasures taken against an international organization, he was submitting draft article 19. The inclusion in this article of a reference to countermeasures taken against States was justified since, while countermeasures could be taken by international organizations against another international organization, it was more likely that they would be taken by an international organization against a State that engaged in a wrongful act. It was difficult to take a different approach to the matter from the one followed in the draft articles on responsibility of States for internationally wrongful acts.¹⁰ In principle, the same rules should be applied; there was, however, the additional problem that a reference to those rules could only be stated

⁹ *Yearbook ... 2008*, vol. II (Part Two), chap. VII, paras. 130–134.

¹⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

in general terms, because of the undefined status of the draft articles on State responsibility. Paragraph 1 of draft article 19 (Countermeasures) would thus read: "Subject to paragraph 2, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a lawful countermeasure on the part of the former international organization." The commentary would clarify what was intended by "lawful countermeasure".

18. He had drafted a separate paragraph addressing the possibility that an international organization might take countermeasures against States or international organizations that were its members. The following text, which was modelled on article 55 of the draft article on State responsibility, was proposed for draft article 19, paragraph 2: "An international organization is not entitled to take countermeasures against a responsible member State or international organization if, in accordance with the rules of the organization, reasonable means are available for ensuring compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation."

19. Turning to the section of his report dealing with chapter (x) (Responsibility of a State in connection with the act of an international organization), he noted that the reception given to draft articles 28 and 29 had been remarkably positive. That was particularly true for article 28. The idea underlying those articles was that a State could not escape responsibility when it circumvented one of its obligations by availing itself of the separate legal personality of an international organization of which it was a member. Various proposals had been made, such as to replace the word "circumvention" with a reference to "some element of bad faith, specific knowledge or deliberate intent" or "misuse". He was not entirely persuaded by that idea, since it would be difficult to determine whether there was intent or not. It would be better to refer to a set of objective circumstances from which one could make a reasonable assumption about intention.

20. It was important to clarify that it was not the time when the transfer of competence to an international organization took place that was relevant, but rather the time when the competence in question was exercised. The transfer of competence could well have taken place in good faith, but what mattered was how the member State took advantage of that competence, under circumstances that perhaps had not been foreseen.

21. He therefore suggested that article 28, paragraph 1, should be reworded to read:

"A State member of an international organization incurs international responsibility if:

"(a) it purports to avoid compliance with one of its international obligations by availing itself of the fact that the organization has been provided with competence in relation to that obligation, and

"(b) the organization commits an act that, if committed by the State, would have constituted a breach of the obligation."

22. The new wording did not abandon the original idea, but made it more defensible.

23. He was making no proposal with regard to article 29, except for the one formulated in paragraph 92 of the report. This article had received only limited criticism and reflected the compromise reached within the Commission.

24. In general, and although he was aware that the commentaries could be improved, he had not made any proposals concerning them, for he believed that it would be better to resubmit them as a whole, indicating the passages where changes had been made or ought to be made.

25. The CHAIRPERSON thanked the Special Rapporteur for introducing his seventh report and invited members of the Commission to comment on it.

26. Mr. PELLET said that he had read the seventh report with interest, although he regretted that it was not easier to consult. At the end of each section, the Special Rapporteur neatly summarized his proposals, but the reader was obliged to refer back to the original articles to see what changes were being made; it would have been more useful to have a short passage reproducing them. As to the content of the report, there were few points on which he disagreed, save two of a general nature.

27. First, despite the explanations just given by the Special Rapporteur, he himself was not persuaded by the approach that the latter had taken: it seemed to challenge the traditional division of work into first and second readings, which had the advantage of allowing States to draw informed conclusions about a comprehensive first draft to which the Commission, drawing on its expertise, provided logical and analytical coherence as it saw fit, without concerning itself unduly with the possible reaction of States. Attempting to follow the reasoning of States while elaborating a draft tended to detract from the Commission's uniqueness in its capacity as a body of independent experts; the Commission had to come up with drafts on first reading that did not necessarily gain the approval of States. It was the second reading that was designed to take account of the political concerns of States and the Sixth Committee and, where necessary, translate them into a final draft that would be more acceptable, all the while endeavouring to ensure that it retained a degree of coherence. That was why the hybrid exercise in which the Special Rapporteur was inviting the members of the Commission to engage was so disturbing: it was not a true second reading but a sort of "first reading *bis*" that was not essentially aimed at improving the draft but instead sought to address the comments and suggestions made by States and international organizations.

28. Secondly, he had on several occasions objected to the Special Rapporteur's highly restrictive interpretation of his topic whereby he limited it to the responsibility incurred by international organizations, an interpretation that was consistent, it was true, with the wording of the topic but not with the overall logic that had led to its adoption. When the topic had been included in the agenda, the idea had been to be done with issues of responsibility associated with the activities of international organizations

once and for all, irrespective of whether such activities incurred the responsibility of an organization or that of States. Like the States who intervened during the Sixth Committee cited in the second footnote to paragraph 8 of the report, he continued to think that the draft should also cover the invocation by an international organization of the international responsibility of a State. The Special Rapporteur's reply was not really a reply at all since he maintained that the matter lay outside the scope as defined in article 1. Yet it was precisely that definition that needed changing, and he regretted the fact that the opportunity offered by the "first reading *bis*" to revise the draft had been missed once again.

29. Moreover, it was entirely unrealistic to proceed as the Special Rapporteur proposed to do in paragraph 8 of his report, in which he wrote: "Various articles of Part Three on State responsibility, such as articles 42, 43, 45 to 50, 52 and 54, could conceivably be extended to cover also the invocation of responsibility by international organizations." At the present stage, it was wrong to think that the draft articles on responsibility of States could be rewritten. The next two years should be used to complete the current draft without trying to "play ping-pong" with the draft articles on State responsibility. It would be more reasonable, then, to amend article 1, paragraph 2, of the text under consideration to read: "The present draft articles apply also to the international responsibility of a State for a wrongful act by an international organization or against an international organization." Since the Commission was still at the first reading stage, even if it was a first reading *bis*, that was a formal proposal that should obviously be discussed, not by the Drafting Committee but by the Commission in plenary meeting. Of course, if it was adopted, then either the Special Rapporteur should be asked to prepare a number of additional draft articles to expand the topic accordingly, or a working group should be established for that purpose. The texts in question included, but were not limited to, article 16 and, in particular, the explanation given by the Special Rapporteur in paragraph 45 of his report. Otherwise, he had no profound disagreements with the Special Rapporteur; at a subsequent meeting he would merely raise a few minor points.

The meeting rose at 6 p.m.

2999th MEETING

Tuesday, 5 May 2009, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Sir Michael Wood, Ms. Xue.

Responsibility of international organizations (*continued*) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the seventh report on responsibility of international organizations (A/CN.4/610).

2. Mr. PELLET recalled that at the previous meeting he had voiced general criticisms both of the Special Rapporteur's methodology and of what seemed to him an unduly narrow conception of the topic, and he had put forward a formal proposal to amend article 1. With the exception of the extremely perplexing article 19, he was generally in favour of all the other draft articles and wished only to touch on a number of details.

3. First, although he was a firm believer in the objective personality of international organizations, for which recognition of an organization was not a precondition, he also saw the rules of an organization as flowing from the legal order of organizations, which itself fell within the realm of international law, *pace* the judgement of the Court of Justice of the European Communities in the *Costa v. ENEL* case. Thus, the inclusion in article 2 of a definition of the "rules of the organization" was not problematic for him, nor was the proposed reorganization of the articles. If, however, article 3 was placed by itself in a new Part Two, to be entitled "General principles", then he wondered what the title of the article would become. Perhaps the Special Rapporteur could explain whether he wished to send the draft articles back to the Drafting Committee or to have the plenary ratify his thinking.

4. As to the contents of article 3, unlike the Special Rapporteur, he did not disagree with the argument by the International Monetary Fund (IMF) set out in the footnote to paragraph 20 of the report. The responsibility of international organizations came into play in different ways, depending on whether a member State or a third State was implicated in an allegedly wrongful act. If the organization was acting in compliance with its constituent agreement, it could not incur responsibility in respect of one of its members: it was covered in advance by that agreement. On the other hand, it might incur responsibility in relation to non-member States even while complying with its constituent agreement. The issues raised by IMF thus deserved to be considered in greater depth, and perhaps an article 3 *bis* setting out the relevant principles could be included in the draft.

5. On a related point, he said that he did not agree with the new approach to attribution of conduct elaborated by the Special Rapporteur in paragraph 18—the idea that an international organization that coerced another international organization or a State to commit an internationally wrongful act incurred responsibility even if the conduct was not attributable to it. That seemed odd to him, since if the organization bore responsibility without having committed the act, it was precisely because the act was or became attributable to it. The very definition of

attribution was an intellectual exercise through which responsibility was ascribed to an entity for an act that it had not committed.

6. In paragraph 53 of his report, the Special Rapporteur proposed a new draft article 15 *bis* that in his own view ought to become a new article 3 *ter* in Part Two or an article 2 *bis* in Part One. The proposed text concerned the regime of responsibility applicable to an international organization that was a member of another international organization. However, its scope was circumscribed by the phrase “under the conditions set out in articles 28 and 29” of the draft. He did not see why the principle should be limited; it would be preferable to state once and for all, at the beginning of the draft articles, that they applied both to States and to international organizations that were members of other international organizations.

7. In paragraph 23 of his report, the Special Rapporteur proposed a minor drafting change to draft article 4 which in itself posed no particular problem but sparked a question: why did the draft articles contain no provision paralleling draft article 9, on the responsibility of official authorities, in the draft articles on responsibility of States for internationally wrongful acts?¹¹ A reference to an official authority or *de facto* agent of the international organization would not be out of place, especially as more and increasingly varied public service missions were carried out by international organizations. Consideration should be given, perhaps at the current session or on second reading, to the inclusion of an article on the subject.

8. Article 5 raised some thorny issues. The European Court of Human Rights had sought to resolve them in its own fashion, while the Court of Justice of the European Communities and the Special Rapporteur espoused a differing view. He himself had nothing against the criterion of effective control as used by the ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* and 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)*, although the Court’s argument about effective control had not been particularly persuasive and he was not keen on simply repeating it. There were in fact too many points both for and against that criterion for him to begrudge its retention in the draft. However, he did not agree with the explanation given in paragraph 30 of the report for the criticism of the decision by the European Court of Human Rights in *Behrami and Saramati*. States were responsible for the *ultra vires* acts of their officials, and he did not see why international organizations should not bear the same responsibility.

9. Nor was he convinced by the final sentences of paragraph 33: while it was true that conduct implementing an act of an international organization should not necessarily be attributed to that organization, the argument based on article 4 of the draft articles on State responsibility for internationally wrongful acts seemed unfounded, since article 57 of that draft adduced the responsibility of a State for the conduct of an international organization.¹²

That left the Commission free to adopt a specific solution in its draft articles on responsibility of international organizations. Thus the Special Rapporteur’s dubious argument that the Commission must not depart from article 4 of the draft on State responsibility was contradicted by article 57 of the same draft. The Special Rapporteur was bouncing between the two texts, but he himself did not wish to take part in such a ping-pong game, for what mattered was covering all eventualities.

10. As for the contention that the problems raised by wrongful conduct were identical for States and for international organizations, he had serious doubts. A State could engage in wrongful conduct because, according to the 1949 advisory opinion of the ICJ in the *Reparation for Injuries* case, it had all the competences recognized by international law. That was not true of international organizations, whose action was limited by their specificity. While that situation did not justify the redrafting of article 7, it did call for something more than the simple assertion at the end of paragraph 36 of the report that it seemed preferable to “keep the same wording that was used in article 7 of the draft on State responsibility”.¹³ The Special Rapporteur was right to hew to that draft where there was no cause for departing from it, but where there were good reasons to do so, he should. Such reasons existed in connection with article 7, since a State and an international organization did not have the same type of competence, a State not being constrained by the principle of speciality.

11. He was not opposed to the amending of article 8, paragraph 2, as proposed in paragraph 42 of the report, but would prefer a more straightforward formulation than “includes in principle”, the French version of which, “*s’entend en principe de*”, was far from felicitous. If an obligation existed, then its breach entailed responsibility, and he saw no reason for the timorous “*en principe*”: the phrase should simply read “includes” (“*inclut*”) or—to soften the wording slightly—“includes where appropriate” (“*inclut, le cas échéant,*”).

12. The new wording for article 15, paragraph 2 (*b*), proposed by the Special Rapporteur in paragraph 51 of the report was not ideal. Although he agreed with the underlying concept of the rephrased text, he would prefer to stick to the original wording, which was stronger and more precise. However, if the new version was retained, he would prefer to replace the words “as the result of” (“*comme suite à*”) by “on the basis of” (“*sur le fondement de*”).

13. He agreed with the proposal to recast article 28, paragraph 1, as indicated in paragraph 83 of the report. He also agreed, in that instance at least, with the Special Rapporteur’s justification for doing so. With regard to article 29, paragraph 1, he noted that paragraph 88 of the report seemed to reject the comment made by Greece that a State had to accept responsibility for an internationally wrongful act *vis-à-vis* the victim of the act. He himself thought the comment was well founded and that any ambiguity would be removed if paragraph 1 (*a*) was reworded as suggested in paragraph 88, with the replacement of the words “*vis-à-vis*” in the French text by “*en faveur de*”.

¹¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 49.

¹² *Ibid.*, pp. 40–42 and 141–142, respectively.

¹³ *Ibid.*, p. 45–47.

14. Lastly, on circumstances precluding wrongfulness he wished to say only two things. First, it was surprising that the issue of self-defence was not addressed. That issue pertained to the Charter of the United Nations, not to international responsibility, and it had been included—wrongly, in his view—in the draft articles on State responsibility for internationally wrongful acts, although he had never succeeded in convincing anyone of the veracity of his argument. Rightly or wrongly, then, the Commission had deemed self-defence to be a circumstance precluding wrongfulness *par excellence* and as such had included it in the draft on State responsibility. He therefore saw no reason why the Commission should not do likewise in the draft on responsibility of international organizations. The existence of the North Atlantic Treaty Organization (NATO) and the bodies working to consolidate regional non-nuclear-weapon zones made it all the more strange to exclude self-defence from the draft.

15. Turning to article 19, he said he would refrain from drawing attention once again to the absurdity inherent in pronouncing countermeasures to be circumstances precluding wrongfulness when they were in fact a response to a wrongful act. Still, there was something that astounded him in paragraph 2 of the new draft article 19. The Special Rapporteur refused, wrongly, to include in the draft the subject of responsibility of States *vis-à-vis* international organizations, yet paragraph 2 did precisely that. He himself welcomed that inclusion with open arms, suggesting only that the new text should be placed, not in article 19, but in the section on countermeasures. It was an excellent provision and he hoped it would be retained, even though it had no place in the draft as the Special Rapporteur had conceived it. In fact, it anticipated what he himself had proposed the day before in his amendment to article 1, a development for which he was infinitely obliged to the Special Rapporteur.

16. Mr. GAJA (Special Rapporteur) said that, as the Commission's consideration of the draft articles on first reading drew to a close, Mr. Pellet seemed to be trying to torpedo it. Although the best response would be to take evasive action, he preferred not to. Mr. Pellet had made a formal proposal to extend the scope of the draft to cover cases in which an international organization could invoke the responsibility of a State. That point of view had been prominently reflected in the Commission's report on the work of its sixtieth session,¹⁴ and certain States in the Sixth Committee had agreed with it. He had referred to that fact in the second footnote to paragraph 8 of his seventh report, while his own views had been expressed in paragraphs 8 and 9.

17. Mr. Pellet had addressed only part of the argument, namely that, according to the definition of the scope of the topic provisionally adopted by the Commission in 2003,¹⁵ the draft articles applied to the international responsibility of an international organization for acts that were wrongful under international law and also to the international responsibility of a State for the internationally wrongful act of an international organization. In his report he had also

urged that the responsibility that a State might acquire towards an international organization was essentially covered by the draft articles on State responsibility, although in dealing with such issues as invocation, circumstances precluding wrongfulness and content of responsibility, those articles referred only to inter-State relations. In paragraph 9 of his seventh report, he showed how the text of article 20 on State responsibility might read if a reference to international organizations was incorporated in it. Furthermore, article 57 of the draft articles on State responsibility provided that “[t]hese articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization”¹⁶ One way to address Mr. Pellet's criticism, then, would be to argue that international organizations were included in the draft articles on State responsibility by analogy and that it was thus not necessary to mention them, although if those draft articles were ever examined by a conference of States, it would be preferable to insert a reference to international organizations.

18. If one followed Mr. Pellet's suggestion, the alternative would be either to propose the insertion of additional articles to the draft articles on State responsibility for internationally wrongful acts, amending the 2001 text, or to enlarge the scope of the draft articles under consideration. Either way, the Commission would in substance be suggesting amendments to the draft articles on State responsibility. In his opinion, that was unnecessary and, pending an examination of the final status of the draft articles on State responsibility, unwise. James Crawford, with whom he had discussed the question, agreed and also thought that the argument of analogy would be sufficient.

19. Ms. ESCARAMEIA commended the Special Rapporteur for the clear structure of his report and for the survey of the provisionally adopted articles with commentaries by States and international organizations. She did not think that the incorporation of such comments needed to be left until the second reading, for the point of chapter III of the Commission's annual report to the General Assembly was in fact to solicit the opinions of States in advance.

20. On a general matter, she said that the current draft articles followed those on State responsibility for internationally wrongful acts too closely and did not make the necessary exceptions for international organizations.

21. With regard to the scope of the draft articles, she recalled that at the previous meeting Mr. Pellet had noted that no provision had been made for addressing the implementation by an injured international organization of the responsibility of a wrongdoing State, since the draft articles on State responsibility dealt only with inter-State relationships, while the current draft dealt only with the relationship between States or international organizations and wrongdoing international organizations. There was thus a lacuna in the draft that was evident in many places—for example, where the draft articles dealt with the questions of invocation, countermeasures and implementation of responsibility. Those lacunae needed to be

¹⁴ *Yearbook ... 2008*, vol. II (Part Two), para. 147.

¹⁵ *Yearbook ... 2003*, vol. II (Part Two), pp. 18–19, draft article 1 and the commentary thereto.

¹⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 141.

addressed, but it was difficult, in a topic on the responsibility of international organizations, to address the responsibility of a State that was not directly connected to the act of an international organization.

22. The question also arose as to whether the Commission was exceeding its mandate. At the previous meeting, Mr. Pellet had said that he did not think so, because when the topic had been proposed, it had been understood that it would also cover the possibility of international organizations invoking and implementing the responsibility of States. However, that did not appear to be the Special Rapporteur's position. Mr. Pellet's proposal to insert the phrase "or in relation to an international organization" at the end of draft article 1, paragraph 2, while ingenious, would not entirely solve the problem. It might be possible to include the issue in the current draft articles, although the right place would have been in the draft articles on State responsibility for internationally wrongful acts. The Commission could recommend to the Sixth Committee that it should be included in the draft articles on State responsibility or that those draft articles should be amended to that effect; alternatively, it could deal with the matter through extensive commentaries to article 1, paragraph 2, of the draft articles on responsibility of international organizations and it could entrust the Special Rapporteur with making the relevant changes in several other draft articles. In any event, she continued to believe that General Assembly approval for any such change was needed and might not be difficult to obtain. The easiest way would be to include the question in the current draft articles with the help of extensive commentaries and with a decision explaining to the Sixth Committee why the Commission had proceeded as it had.

23. Her question with regard to the invocation of the responsibility of an international organization had to do with the possibility of entities other than States and international organizations invoking the wrongful act of an international organization. Actually, international organizations had caused many more injuries to individuals than to other international organizations or to States, a fact that had clearly emerged in the Special Rapporteur's sixth report,¹⁷ where all the examples given had been of injuries to individuals rather than to other international organizations or States. Individuals had been victims of very serious crimes committed by agents of international organizations, including rape and other forms of abuse perpetrated by members of United Nations forces. It thus seemed strange to exclude from the scope of the current draft articles the most common situation involving wrongdoing by an international organization. At her insistence, the Special Rapporteur had agreed to include a "without prejudice" clause in draft article 53, but that was not sufficient. Moreover, it was not only individuals who were affected, but also other international bodies that did not fit the definition of international organization contained in the draft articles, for example, non-governmental organizations (NGOs). The draft articles specified that an injury could affect not just one entity, but the international community as a whole. Some NGOs might be the guardians of the international community's interests, such as the environment or human rights. The Commission should

therefore extend the possibility of invoking the responsibility of an international organization not only to States and individuals but also to much larger entities, such as NGOs.

24. As to the reorganization of the draft articles, she did not object to the Special Rapporteur's suggestion to include draft articles 1 and 2 in a short Part One under the heading "Introduction" or to add a draft article 2, paragraph 2, on the rules of the organization. She also agreed with his suggestions in paragraph 21 of the seventh report on structure and placement.

25. Turning to draft article 4 (General rule on attribution of conduct to an international organization), she said that she did not see the need to add anything new to the previous definition of "agent", but was not opposed to the new version of paragraph 2 of that article.

26. She agreed with the Special Rapporteur on the need to retain draft article 5 (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization). The criterion of the exercise of effective control was preferable to the criterion of "ultimate authority and control" applied by the European Court of Human Rights in the *Behrami and Saramati* decision. The arguments put forward by the Special Rapporteur were very persuasive; if an international organization did not have the capacity to change behaviour, she did not see how delegation could work. Capacity must be effective.

27. On draft article 6 (Excess of authority or contravention of instructions), she was in favour of introducing a clarification along the lines of the proposal by Malaysia reflected in paragraph 34 of the report, because the current wording was unclear.

28. With regard to draft article 8 (Existence of a breach of an international obligation), she said that she would prefer to retain the original version of paragraph 2. Far from clarifying the issue, the words "in principle" in the proposed new version actually confused matters, and might even suggest that responsibility arose mainly from breaches of the rules of an international organization and not from other sources of international law, whereas in reality it usually arose from the latter.

29. As to the responsibility of an international organization in connection with the act of a State or another international organization (paras. 45–54 of the report), she supported the proposal in paragraphs 53 and 54 concerning draft article 15, paragraph 2 (*b*), and a new draft article 15 *bis*.

30. Although it was not popular among States and had been the subject of considerable criticism, she was nevertheless in favour of retaining draft article 18 (Self-defence) because it reflected the reality of territories under United Nations administration. An attack on such a territory was not an attack on the administering State (such a State might not even exist) or on States whose nationals were in the United Nations forces: it was an attack on the United Nations or any other international organization administering the territory.

¹⁷ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/597.

31. She did not like the phrase “in accordance with the rules of the organization” in paragraph 2 of draft article 19 (Countermeasures) because such rules generally referred to internal means for dispute settlement and only rarely to external ones, such as courts or tribunals. If courts had jurisdiction in such cases, countermeasures should not be allowed. In her opinion, the phrase “in accordance with the rules of the organization” should be deleted.

32. In draft article 28 (International responsibility in case of provision of competence to an international organization), she found the Special Rapporteur’s proposed new wording for draft paragraph 1 (para. 83 of the report) to be an improvement. It should therefore be retained.

33. Mr. NOLTE commended the Special Rapporteur on his comprehensive, thorough and subtle report. By and large, he agreed with its content and had relatively few comments on it.

34. He wished to refer first to the Special Rapporteur’s somewhat unusual approach of revisiting the draft articles before the formal second reading. Like Mr. Pellet, he believed that the distinction between a first and a second reading served an important purpose and should, as a general rule, be maintained. However, the special nature of a law of responsibility of international organizations warranted an exception from that rule, as it concerned an area which so far was based on very little practice and yet had begun to develop rapidly during the course of its consideration by the Commission, as the decision in the *Behrami and Saramati* cases showed.

35. Turning to the second issue raised by Mr. Pellet at the previous meeting, he said that it would be unfortunate if the Commission, after completing its work on the responsibility of international organizations, should leave a lacuna in the law of international responsibility where the responsibility of States *vis-à-vis* international organizations was concerned. At the same time, he also understood the Special Rapporteur’s concern for keeping the responsibility of States outside the scope of draft article 1. If Mr. Pellet’s proposal was adopted, it would be tantamount to adding a paragraph to a law on apples stating that the law also applied to oranges. Such an additional paragraph would then also require that the “law on apples” should be renamed the “law on apples and oranges”. He wondered whether a different compromise could not be struck between the Special Rapporteur’s and Mr. Pellet’s positions. Perhaps a working group could find a way to meet Mr. Pellet’s legitimate concern not to leave a lacuna in the law of international responsibility and the formal concern of the Special Rapporteur to avoid a misleading title of the draft articles. One way might be for the Commission to draft a separate related statement on issues of State responsibility with respect to international organizations.

36. He had several comments to make on individual draft articles. He endorsed the Special Rapporteur’s proposal in paragraph 10 of the report to move the definition of the “rules of the organization” from draft article 4, paragraph 4, to draft article 2 and to make it more general.

37. As to the definition of the term “international organization” in draft article 2, he believed that the commentary

to article 2 should make it clear that, while such international organizations must not necessarily be exclusively composed of States, they should at least be predominantly composed of or influenced by States and/or predominantly serve State functions.

38. With regard to the words “established practice”, discussed in paragraphs 14 to 16, he said that while the draft articles should clearly contain a reference to the “practice” of the organization, the word “established” implied a usage over a longer time, which was not necessarily required. On the other hand, the expression “generally recognized practice”, which had been suggested by the European Commission (in the footnote whose reference is located in paragraph 16 of the report, after “established practice”), implied that specific acts of recognition must have occurred, which was not necessarily the case either. In his view, the Commission should consider using the words “relevant practice” in order to accommodate the diversity of international organizations; the matter could probably be dealt with in the Drafting Committee.

39. Paragraph 13 of the report considered the question of whether an international organization could be held responsible only by a State that had recognized its separate legal personality, and he wondered whether that raised a real issue. The fact that a State invoked the responsibility of an international organization typically implied that the State recognized that organization’s separate legal personality—except, of course, if the contrary had been made clear and the invoking State did not adopt a contradictory position.

40. It followed from all the remarks he had made that he agreed with all the changes proposed by the Special Rapporteur in paragraph 21 of the report.

41. Turning to the question of attribution of conduct (paras. 22–38), he agreed with the Special Rapporteur’s proposal to rephrase draft article 4, paragraph 2, in order to specify as the decisive factor that a person or entity had been charged by an organ of the international organization with carrying out, or helping to carry out, one of the functions of that organization (para. 23 of the report).

42. The most important issue concerned draft article 5 (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization) and the interpretation given to it by the European Court of Human Rights in *Behrami and Saramati*. The Special Rapporteur criticized the reasoning of the Court on legal and policy grounds and thus defended what he regarded as the original approach taken by the Commission, finding confirmation of his position in a number of statements by States and academics as well as by the Secretary-General of the United Nations. While the Special Rapporteur’s point of departure was correct, he could not follow him in all his conclusions.

43. He shared the Special Rapporteur’s view that the criterion of “effective control” stipulated in draft article 5 was the correct one in cases where a State or an international organization put an organ at the disposal of another international organization. He also agreed that the European Court of Human Rights had incorrectly or too broadly

interpreted article 5 in the joined cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* when it had attributed the conduct of a State to the United Nations in a case in which the Organization had not in fact exercised the degree of control required under draft article 5. In his view, however, the Court's determination did not warrant the conclusion that the Court had taken the wrong decision from either a legal or policy standpoint. After all, the Special Rapporteur had himself agreed that the United Nations Security Council could modify the general rules for the attribution of conduct, and he had acknowledged as much in paragraphs 120 to 124 of his report, where he had proposed a new draft article on *lex specialis*. From his own perspective, the question was whether the Security Council, in its resolution 1244 (1999) of 10 June 1999, had implicitly modified the rules of attribution. If it had, the European Court of Human Rights should have indicated as much. The fact that the Secretary-General had rejected the Organization's responsibility in cases like *Behrami and Saramati* was not a convincing argument to the contrary, since the Secretary-General might well have had in mind different United Nations interests than did the Security Council and its members.

44. If there was general agreement that the European Court of Human Rights had misinterpreted article 5 but might nevertheless have ultimately taken the correct decision, the Commission should perhaps limit itself to reaffirming, as a general rule, the wording and the strict interpretation of draft article 5. It should also make clear, as the Special Rapporteur had suggested in paragraph 30 of his report, that the overly broad interpretation of the criterion of "effective control" in the *Behrami and Saramati* decision could not be "applied as a potentially universal rule". The Commission should not, however, criticize the policy aspect of the Court's decision and should leave open the possibility that the decision might be justified on the basis of the *lex specialis* exception—without, however, taking a definite stand on the matter.

45. The *lex specialis* provision was also helpful in determining whether the implementation of a binding act of an international organization by a State, acting *de facto* as an organ of that organization, warranted a different rule of attribution. If the Commission accepted that it did, then the suggestion of the European Commission and the position of the World Trade Organization (WTO) panel, on the one hand, and the judgements of the European Court of Human Rights in the *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* case and the European Court of Justice in the *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council of the European Union and Commission of the European Communities* cases on the other, were not necessarily contradictory. It was entirely possible that the implementation by a State of a binding act of an international organization had to be attributed to the State where its human rights aspects were concerned but to the international organization where its trade aspects were concerned. It should also be recalled that the European Courts derived their positions on attribution chiefly from the primary norms at issue.

46. With regard to draft article 6, he supported Ms. Escarameia's suggestion to include the term "clearly", which better conveyed what the Special Rapporteur himself had

intended. As to the issue of the breach of an international obligation, he agreed with the Special Rapporteur's suggestion that article 8, paragraph 2, should be reworded to indicate more clearly that the rules of organizations were, in principle, part of international law, a situation that left room for certain exceptions. However, he questioned whether the proposed wording expressed that idea clearly enough.

47. He wished to make two comments with regard to the chapter of the report on responsibility of an international organization in connection with the act of a State or another international organization (paras. 45–54). First, while he agreed with the rule contained in draft article 12, he would welcome a statement in the commentary to the effect that responsibility for merely making a recommendation could be established only if the conditions of the special rule contained in draft article 15 were met. Without such a provision, responsibility for aiding and assisting was too broad. Secondly, he supported the Special Rapporteur's view, expressed in paragraph 51 of his report, that draft article 15, paragraph 2, should emphasize the role played by the authorization or the recommendation in causing the member to cooperate with the act committed by the international organization. He wondered, however, whether the proposed wording had successfully done so; he would prefer to retain the original text.

48. On the question of circumstances precluding wrongfulness (paras. 55–72), he said that he could not support the Special Rapporteur's suggestion to delete draft article 18 on self-defence, given the risk that States and other interpreters of the articles might conclude that the Commission did not recognize a right of self-defence for international organizations at all, despite subtle indications to the contrary in the commentary. He suggested that reference should be made in draft article 18 to the special situation of international organizations with regard to the right of self-defence by inserting the word "appropriately" before "constitutes". That would address the concerns expressed by States and international organizations while preserving the right of self-defence, which was a general principle of law and which international organizations might in certain circumstances—such as administering territories, for example—legitimately have to invoke.

49. On the issue of countermeasures as circumstances precluding wrongfulness, he fully agreed with the Special Rapporteur's statement in paragraph 65 of his report that the principle of cooperation that restricted recourse to countermeasures in relations between an international organization and its members appeared to be relevant, not only in the case of countermeasures taken by an international organization against its members (the situation covered in draft article 19), but also in the case of countermeasures taken by a member State against an international organization (the situation covered in draft article 55).

50. Nevertheless, it seemed to him that the restriction necessitated by the principle of cooperation was not conveyed strongly enough in draft article 19, paragraph 2, and draft article 55, according to which countermeasures were not allowed if, under the rules of the organization, reasonable means were available for ensuring compliance with the obligations of the responsible State or international organization concerning cessation of the breach

and reparation. While international organizations had procedures through which pressure could be exerted on recalcitrant member States, most did not possess the “means” to “ensure” that their members complied with their obligations. The proposed wording therefore had the effect of a residual rule: if the rules of the organization did not provide otherwise, and in the event of doubt, countermeasures could be applied in relations between an international organization and its member States.

51. As he had indicated at the previous session, the main reason there should not be a residual rule allowing a member State to take countermeasures against an international organization, or *vice versa*, was that international organizations were typically governed by special regimes and had renounced, at least implicitly, taking the law into their own hands. In setting up international organizations, States had created the mutual expectation that the application of the rules of the organization would ultimately lead to the settlement of any dispute that might arise. Yet even if they did not, the existence and operation of the organization should not be jeopardized by unilateral countermeasures. That was true not only for organizations such as the European Community, which had a system of judicial remedies, but also for the United Nations and its specialized agencies. The Charter of the United Nations had, after all, established the organized international community of States and had created a legal framework and procedures that risked being undermined if secondary rules which, while making sense in the context of the responsibility of reciprocally sovereign States, were formally imposed on relations between an international organization and its members. Accordingly, he proposed replacing the word “means” with “procedures” and replacing the word “ensuring” with “seeking” in both draft article 19, paragraph 2, and draft article 55.

52. Turning to the chapter of the report on responsibility of a State in connection with the act of an international organization (paras. 73–92), he endorsed the Special Rapporteur’s attempt to restrict the responsibility of the States members of an international organization under draft article 28 if they used an international organization to circumvent their own obligations. He was not satisfied, however, that that restriction was adequately conveyed by the wording proposed by the Special Rapporteur in paragraph 83 of his report. The expressions “purports to avoid compliance” and “by availing itself of the fact” were too abstract and left open the possibility that, contrary to the Special Rapporteur’s intentions, draft article 28 might be interpreted more broadly. In his own opinion, the original term “circumvention” better conveyed the stated objective of the draft article.

53. Lastly, he wished to note his agreement with the Special Rapporteur’s reasoning regarding the issue of the content of international responsibility, as well as with the suggested new general provisions contained in draft articles 61 to 64.

54. Sir Michael WOOD thanked the members of the Commission for the welcome they had shown him in the past few days and cautioned that, as he was new to the Commission, his comments on the increasingly important topic of the responsibility of international organizations would be very tentative.

55. It was obvious that, unlike States, international organizations were legally different from one another: there was no principle of the equality, much less sovereign equality, of international organizations. Thus when considering the proposal for an article on *lex specialis*, the Commission should examine whether the current draft article was sufficient to capture the idea that each organization was different and that the rules in question must therefore be, in his view, residual ones.

56. Like other members, he tended to agree with Mr. Pellet’s proposal that the draft articles under consideration ought to cover the invocation by an international organization of the responsibility of a State. Failure to do so would leave a curious gap between the two sets of draft articles, which future readers would tend to read together. At the very least, then, the Commission ought to give full consideration to Mr. Pellet’s suggestion. While it might not go so far as to draft new texts so as not to delay completion of the first-reading draft at the current session, it could agree to study the matter with a view to preparing a proposal for submission to the Sixth Committee.

57. The definition of an international organization contained in draft article 2 did not include the term “intergovernmental”, which nevertheless appeared in other instruments drawn up on the basis of the Commission’s work. It was only by implication from the second sentence of draft article 2 that one understood that the international organizations in question were composed of States. He therefore proposed, in the first sentence, to insert the word “intergovernmental” before the second occurrence of “organization”. The second sentence would then make it clear that such an organization might also include other entities.

58. As far as the commentary to draft article 2 was concerned, the Commission should examine very carefully any examples that it decided to include. It was not entirely clear to him, for instance, that the Organization for Security and Co-operation in Europe, despite its name, was an organization, or that the United Nations Conference on Trade and Development was an organization separate from the United Nations itself.

59. The addition proposed by the Special Rapporteur to draft article 4, paragraph 2, which contained a definition of the term “agent”, must also be given careful consideration. He wondered whether the effect of that addition might be too restrictive since, if an organization acted beyond its functions, it might well bear international responsibility. He shared the doubts expressed by Ms. Escameia as to the desirability of the proposed amendment; perhaps the idea embodied in it could be reflected in the commentary and the existing text of the draft article retained.

60. He also shared the doubts of other members as to whether the insertion of the words “in principle” in draft article 8, paragraph 2, offered additional clarity. For that matter, he wondered whether paragraph 2 was necessary at all, since paragraph 1 referred in completely general terms to an act that was not in conformity with what was required of an international organization under its international obligations, regardless of their origin. He consequently saw no need to add a special paragraph to address

obligations that might flow from the rules of the organization. That matter, too, might be better dealt with in the commentary to the draft article. If, on the other hand, members felt that a special paragraph was necessary, then the existing text ought to be retained.

61. Draft article 15 appeared to raise many difficult issues, beginning with the terminology it employed: “a decision binding a member State”, “authorization”, “recommendation” and “act”. Like others, he was not convinced that the suggestion to replace the phrase “in reliance on” in paragraph 2 (b) with “as a result of” solved the problem. The matter would have to be referred to the Drafting Committee.

62. On a more fundamental level, he wondered why an international organization should be responsible for merely making a recommendation to a State that the State subsequently decided of its own volition to follow. As far as he was aware, there was nothing in the provisions of the draft articles on responsibility of States that attributed responsibility to a State for recommending to another State that it should perform an act that was illegal. He favoured deleting the references to “recommendation” in draft article 15 where it referred to incurring the responsibility of the international organization. The references to “authorization”, on the other hand, which included, *inter alia*, authorizations by the Security Council under Chapter VII of the Charter of the United Nations obviously concerned very serious matters. In terms of their consequences, such matters were on a level with binding decisions. But in that case as well, he was somewhat hesitant to endorse draft article 15 in its existing form, and felt that it warranted further consideration before the Commission’s second reading or during the second reading, if necessary.

63. He had been ready to support the deletion of article 18 on self-defence but had reconsidered his position after hearing some of the reasons given by members for its retention. If it was retained, he wondered whether the phrase “in conformity with the principles of international law embodied in the Charter of the United Nations” was necessary, or even appropriate, given that those words had been taken from the provision in the Vienna Convention on the Law of Treaties (hereinafter the “1969 Vienna Convention”) that dealt with the threat or use of force.

64. He would prefer to delete draft article 22 (Necessity) and would even have preferred deleting it from the provisions of the draft articles on State responsibility. It seemed particularly unlikely that an organization would rely on the possibility of invoking necessity as a ground for precluding wrongfulness.

65. Lastly, he supported Mr. Nolte’s comments regarding draft article 28 and agreed that the Commission needed to analyse the text of that article very carefully.

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

[Agenda item 1]

66. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of reservations to treaties would be composed

of 11 members: Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. McRae, Mr. Melescanu, Mr. Nolte, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue and Ms. Jacobsson (*ex officio*), including the Special Rapporteur, Mr. Pellet.

The meeting rose at 11.35 a.m.

3000th MEETING

Wednesday, 6 May 2009, at 10.10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Sir Michael Wood, Ms. Xue.

Responsibility of international organizations (*continued*) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the seventh report on responsibility of international organizations (A/CN.4/610).

2. Mr. McRAE said that the meeting with the legal advisers of organizations of the United Nations system would be useful for the Commission’s work on the topic. It would also be desirable to meet with the legal advisers of organizations outside the United Nations system, such as the European Commission, which had actively commented on the draft articles, and the WTO, whose practice was often cited.

3. Notwithstanding Mr. Pellet’s views, the approach proposed by the Special Rapporteur was not tantamount to pre-emptively engaging in a second reading, which should be the time to deal with the comments of States on the draft articles as a whole. Mr. Pellet did, however, raise an important point. What in fact was the best way for the Commission to incorporate in its work the views expressed in response to specific questions? Either the comments could be taken into account each year as they were received, or they could be analysed cumulatively towards the end of the first reading, as the Special Rapporteur recommended; either approach was appropriate.

4. On the other hand, Mr. Pellet was right to insist that the question of the invocation by an international organization of the international responsibility of a State should be included in the draft articles: the Commission could not

finish its work on the topic without addressing the issue. At the very least, it should say how the matter should be dealt with, for example by saying that the draft articles on responsibility of States for internationally wrongful acts¹⁸ applied *mutatis mutandis*.

5. He endorsed the Special Rapporteur's proposed restructuring of the draft articles. However, he shared the view of Ms. Escameia and Sir Michael Wood that the new wording of draft article 4, paragraph 2, did not provide greater clarity. The Special Rapporteur had attempted to include the decisive factor of attribution established in the advisory opinion of the ICJ on *Reparation for Injuries*, namely the fact that an individual or an entity had been charged by the organization with carrying out one of its functions. The problem lay in the insertion of those words after the existing wording and, more particularly, in the phrase "through whom the organization acts", which in his view should be deleted. Paragraph 2 would thus be clearer and would read: "For the purposes of paragraph 1, the term 'agent' includes officials and other persons or entities who have been charged by an organ of an organization with carrying out, or helping to carry out, one of its functions."

6. With regard to draft article 8 (Existence of a breach of an international obligation), he welcomed the change made to paragraph 2. As originally worded, the paragraph had created a dichotomy between obligations under international law in general and obligations under international law established by a rule of an international organization. Paragraph 2 had initially provided that obligations established under a rule of an international organization were also covered by paragraph 1, as if they were a separate category, whereas the new wording included them under all international obligations. Yet while that change dispelled the initial ambiguity, it created another with the use of the words "in principle". The Special Rapporteur had chosen to say that the breach of an international obligation by an international organization included the breach of an obligation under the rules of an organization only "in principle" in an effort to accommodate the concern that not all rules of international organizations created obligations. Some rules of an international organization did create binding obligations on States, whereas others did not, and a case-by-case evaluation of the rules was required to distinguish which of them did and which did not. To say that the rules of the organization were in principle part of international law added to the confusion rather than dispelling it. It would suffice to say that "the breach of an international obligation by an international organization includes the breach of an obligation under the rules of an international organization", with the words "in principle" deleted; the reference, then, would not be to all the rules of an international organization but only to those that created an obligation. If there was any concern that a misunderstanding might persist, the matter could be dealt with in the commentary.

7. With regard to the responsibility of an international organization in connection with the act of a State arising out of a recommendation or other non-binding formulation by the international organization, the Special

Rapporteur suggested that the wording in draft article 15, paragraph 2 (b), should be changed to read that an international organization incurred international responsibility if the State committed the act in question "as a result of", rather than "in reliance on", a recommendation. That introduced a more objective criterion by establishing a causal link between the organization's recommendation and the act of the State. However, he was not certain whether that causality was adequate—for example, if the recommendation was only one of the factors motivating the act. At issue was an international organization's responsibility for an act committed by a State, and it was therefore necessary to have an idea of the degree of causation required to engage such responsibility. Sir Michael Wood had suggested the deletion of the provision because of the many recommendations made by international organizations, but that very variety was reason for keeping the paragraph. Some recommendations could be worded in a way that seriously encouraged action and should thus incur responsibility if States acted on them. The solution might be to reverse the order of the sentence to indicate that an international organization incurred international responsibility for the act of a State to which it had given an authorization or recommendation if "that authorization or recommendation was the principal or predominant cause for the State to commit the act in question".

8. Turning to the chapter on circumstances precluding wrongfulness, he said he favoured retaining draft article 18 because the fact that the question of self-defence was unlikely to arise for international organizations was not a reason for totally excluding that possibility in the future. The objective of draft article 19, paragraph 2, was to restrict the use of countermeasures against a member State or a member international organization if the rules of the organization provided an alternative means of redress. He was not certain that a sufficient distinction was drawn between the resort to countermeasures in general and the resort to countermeasures against a member State or member international organization. The paragraph should establish a specific rule and not simply make explicit something that was more generally implicit in paragraph 1. It might then read: "An international organization is not entitled to take countermeasures against a responsible member State or international organization if means are available under the rules of the organization for ensuring compliance with the obligations of the responsible State ...". That would, of course, narrow the scope of the article, whereas other members of the Commission wanted to broaden it.

9. Mr. SABOIA said that the Special Rapporteur's revision and restructuring of the draft articles provisionally adopted by the Commission had been most useful as it provided a view of the whole before the first reading was completed. The Special Rapporteur had also been quite selective in his use of the comments by States.

10. The proposal by Mr. Pellet to include provisions regarding the invocation by an international organization of the responsibility of a State in order to fill the lacunae left in the draft articles on responsibility of States for internationally wrongful acts¹⁹ seemed justified. The question

¹⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

¹⁹ *Ibid.*

was not, however, an easy one. Perhaps the Commission could propose to the General Assembly a draft decision to enable the Commission to broaden the scope of its mandate to that end.

11. The chapter on attribution of conduct dealt with very delicate issues, such as whether a particular wrongful act should be attributed to the international organization or to the State, depending on the nature and effectiveness of the control exercised over the conduct. For example, military action taken by NATO in Kosovo and by the “coalition of the willing” in Iraq had been legally questionable, whatever the reasons invoked. The Commission must therefore be careful, both in the draft articles and in the commentary, not to give the impression that international organizations could lawfully use force outside the legal framework foreseen in the Charter of the United Nations. He supported the Special Rapporteur’s position on the decisions of the European Court of Human Rights in the *Behrami and Saramati* case and his reasons for preferring the retention of the current wording of draft article 5. The original language of draft article 4, paragraph 2 was also better because with the new wording, as UNESCO had pointed out, there was a risk that the organization might attempt to rule out its own responsibility while subcontracting to an agent a task that might give rise to a wrongful act.

12. In the chapter on breach of an international obligation, the words “in principle” in draft article 8, paragraph 2, should be replaced with more precise language. With regard to circumstances precluding wrongfulness, he had initially been inclined to favour the deletion of draft article 18 (Self-defence), but the debate had convinced him of the need to retain it, mainly because of the role that international organizations might assume in administering territories under United Nations mandate. Lastly, he endorsed Mr. Nolte’s proposal to use the words “reasonable procedure” in paragraph 2 of draft article 19 (Countermeasures).

13. Ms. XUE expressed appreciation to the Special Rapporteur for submitting his report in due time and took note of his remarks about the delayed translation of the report into other working languages. She also shared the concerns voiced about the long-standing issue of honoraria, which special rapporteurs needed for their research. It was her understanding that the Secretariat was working on the issue.

14. She shared the Special Rapporteur’s analysis of the relationship of the draft articles under consideration to the draft articles on State responsibility as regarded their scope, use of terms and general principles. As to the responsibility of a State *vis-à-vis* an international organization, the question should be dealt with under the rules of State responsibility rather than under the current draft articles. The definition of the term “international organization” contained in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the “1986 Vienna Convention”) was clear and appropriate to the topic. Even though non-State entities could become members of international organizations, the nature of such organizations remained the same. In

her view, however, either the word “intergovernmental” should be inserted before “organization” in the first sentence of draft article 2 or the point should be emphasized in the commentary.

15. On the question of recognition, she agreed with the Special Rapporteur that the issue did not need to be settled for the purposes of the current draft. That said, the recognition of an international organization was a unilateral act which had a direct legal bearing on the bilateral relations of the relevant parties. If a State did not recognize an international organization, could it invoke its responsibility? If so, did such invocation constitute recognition? In any case, the Commission could assume, for the purposes of the draft articles, that the international organization had an objective personality.

16. With regard to the term “rules of the organization”, she agreed with the Special Rapporteur that the phrase “other acts taken by the organization in accordance with those instruments” should be retained, on the understanding that the commentary would provide a restrictive interpretation of it, indicating that such acts were those that had legally binding effects. On the other hand, she had doubts about the sweeping statement in paragraph 20 that the responsibility of an international organization could not be invoked by non-members. The matter very much depended on the identity of the party to whom an international obligation created by the rules of the organization was owed.

17. As to attribution of conduct, she agreed with the Special Rapporteur’s proposal with regard to the term “agent”, because the performance of functions of the international organization was decisive and should be explicitly stated in the draft article. With regard to the criterion of “effective or factual control” in draft article 5, it was interesting to note the differing conceptions of the European Court of Human Rights and the Secretary-General of the United Nations on that point. She could accept the wording proposed by the Special Rapporteur as secondary rules, but she doubted whether the draft articles could achieve the goal of determining the responsible party. She shared the view on draft article 6 that the rules on excessive acts which applied to States should apply also to international organizations, provided it was clear that the organ or agent of the organization was acting in that capacity.

18. Concerning breach of an international obligation, she was in favour of including a separate provision in draft article 8 that made special reference to the rules of the international organization because that would emphasize the nature of the obligations arising from such rules. However, she did not feel that the wording proposed by the Special Rapporteur in his seventh report was any better or clearer than the original text. The Drafting Committee should look into the matter further.

19. Draft article 15 posed more complicated questions. Apparently, paragraph 2 was intended to distinguish between two situations: one in which there was a clear authorization, such as a decision of the United Nations Security Council under Chapter VII of the Charter of the United Nations, and one in which the parties concerned could exercise some discretion. The proposed wording

still did not seem adequately to address the concerns expressed with regard to the latter situation. Substituting “as a result of” for “in reliance on” represented an attempt at improvement, but the underlying concern went unaddressed. Like the subject of effective control, the current question was linked to the nature of the decision and the operations concerned. The commentary should clarify what the article was meant to cover.

20. With regard to circumstances precluding wrongfulness, she agreed with some other members that draft article 18 (Self-defence) should be deleted. The current wording was problematic, particularly the reference to the provisions of the Charter of the United Nations. However, the argument put forward in paragraph 59 in favour of its deletion was not entirely convincing. If, as suggested, such a right was recognized in draft article 62, in the section on general provisions, she did not see why it could not be clearly stated in that part. Moreover, given the rule relating to attribution of conduct, if it was assumed that the act of an agent of an international organization must be attributed to the organization, it would be odd if the agent could not exercise self-defence in certain circumstances. Concerns about that term relating to possible abuse of right in a situation where an international organization resorted to the use of force should also be addressed. That was also a matter for the Drafting Committee.

21. She continued to have a general reservation about countermeasures. It was difficult to see why a countermeasure was qualified as “lawful” in draft article 19, as the Special Rapporteur proposed in paragraph 66 of the report. If countermeasures were accepted, that meant that they were lawful under international law, whereas a reference to “lawful countermeasures” suggested that there were also unlawful ones. If the intention was to say that countermeasures must fulfil the conditions set out in the following part, a cross-reference would suffice. Moreover, the phrase “in accordance with the rules of the [international] organization” in paragraph 2 was somewhat restrictive. Perhaps the wording of draft article 19 could be improved in the Drafting Committee.

22. To a large extent, the new draft articles in the section on general provisions followed the same pattern as the rules of State responsibility. Given the variety of international organizations and their practice, draft article 61 (*Lex specialis*) would constitute a major escape clause. She was not suggesting the deletion of the draft article at the current stage of work, but she believed that the Commission should re-examine its relevance in the light of the general practice of international organizations when it had completed its consideration of the draft articles. Although she was not in full agreement with the Special Rapporteur’s general approach, she understood why he had taken it. The theory of State responsibility was having a noticeable impact on international practice, even though the legal status of the draft articles on responsibility of States had not yet become established law. The Commission’s current work on international organizations would also help clarify the regime of international responsibility under international law. Given the great variety of international organizations, the Commission should proceed cautiously to ensure that the rules that it developed would be applicable in practice. In that connection, she commended

the Special Rapporteur for having taken the comments of States fully into account.

23. Mr. AL-MARRI commended the Special Rapporteur for the high quality of his report. The most important change that the Special Rapporteur had proposed was the deletion of draft article 18 (Self-defence). In his own view, self-defence was a “natural” right of States when exercised in accordance with international law. It was unfortunate that the Special Rapporteur had not examined the controversial idea that the rules governing international organizations should apply also to the United Nations, particularly in the context of peacekeeping operations. Lastly, draft article 15 (Decisions, recommendations and authorizations addressed to member States and international organizations) needed to be made clearer, particularly with regard to the invocation of the responsibility of an international organization.

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

[Agenda item 1]

24. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic “expulsion of aliens” would be composed of Ms. Escameia, Mr. Gaja, Mr. McRae, Mr. Niehaus, Mr. Perera, Mr. Saboia, Mr. Vasciannie, Sir Michael Wood and Ms. Xue.

The meeting rose at 11 a.m.

3001st MEETING

Thursday, 7 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Responsibility of international organizations (*continued*) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. FOMBA said that he wished to make some general comments on the seventh report on responsibility of international organizations (A/CN.4/610). An unusual approach had been taken by the Special Rapporteur, one which contrasted sharply with the normal split between

a first and second reading. However, the Commission would have to consider States' comments and observations at some point; if the Special Rapporteur believed that their consideration at the current stage would help him to move forward, then the Commission should demonstrate flexibility and not be too conservative.

2. As far as the scope of the draft articles was concerned, it was vital to bear in mind the specific nature of international organizations and to endeavour to devise as full a set of rules as possible. It would therefore be a mistake not to address the issue of the invocation by an international organization of the international responsibility of a State. Since the Special Rapporteur believed that the question should be dealt with in the context of State responsibility, the Commission must consider how best to link the two sets of rules on responsibility. Mr. Saboia's suggestion that the Commission seek the General Assembly's opinion on the matter merited consideration.

3. Turning to the connection between the responsibility of international organizations and their legal personality, he said that, as States were primary subjects of international law having full capacity, no act was necessary in order to confer legal personality upon them, whereas international organizations were only derived subjects of international law, governed by the speciality principle. Only rarely did the constituent instrument of an international organization establish the organization's legal personality. It was therefore legitimate to consider the question of international legal personality in different terms, according to the circumstances.

4. He was in favour of the two ideas put forward by the Special Rapporteur, namely that an international organization could be held responsible only if it possessed legal personality and, above all, that the requirement that legal personality must be recognized would not apply when it could be said that an international organization had objective personality.

5. He also supported the proposal to amend the definition of the term "agent", since it was based on the spirit and letter of the advisory opinion of the ICJ on *Reparation for Injuries*. He likewise approved of the choice of the criterion of "effective control".

6. In draft article 8, paragraph 2, he was inclined to accept the insertion of the phrase "in principle", because it appeared to offer a means of circumventing the controversy surrounding the nature and scope of the rules of an international organization. However, if a majority of members thought that its deletion would make it possible to confine the reference to rules imposing obligations, he could support that opinion.

7. In draft article 15, paragraph 2 (b), he was in agreement with replacing the expression "as a result of" with "on the basis of", as suggested by Mr. Pellet. He had no particular difficulties with draft article 15 *bis*. He was against the deletion of draft article 18 (Self-defence) because it concerned not an abstract concept but an important question which ought to be covered. Noting that the discussion of draft article 19 (Countermeasures) had centred on the terms "lawful" and "reasonable means", he said that if

the word "lawful" was understood to mean the obligation to abide by procedural and substantive conditions, then it would be correct to employ that term. As difficulties apparently arose with the adjective "reasonable", it might be advisable to find another term, such as "appropriate", or quite simply to delete the word "reasonable", which in fact would seem to be the best solution at first sight. The wording of draft article 28, paragraph 1, seemed acceptable. Lastly, he was in broad agreement with the views expressed by the Special Rapporteur in paragraph 86 of his excellent report with regard to the relevance of the rules of an organization to the responsibility of its member States.

8. Mr. WISNUMURTI welcomed the headway made on the topic owing to the Special Rapporteur's efforts to accommodate the comments and observations of Member States and international organizations in amendments to the draft articles provisionally adopted by the Commission. That "first-reading-plus" approach, while unconventional, would facilitate work during the second reading. In the future, however, such a hybrid working method should be adopted only when it was absolutely necessary in order to advance the Commission's work.

9. The new order of the draft articles proposed by the Special Rapporteur in paragraph 21 of his report would make their structure more logical. As for the scope of the draft articles, while he understood the Special Rapporteur's reasons for excluding a provision dealing with the responsibility of States *vis-à-vis* international organizations, namely that it lay outside the ambit of the topic under consideration, he personally felt that the issue should be considered in more detail so as to enable the Commission to decide whether a provision along the lines of that proposed by Mr. Pellet was in fact necessary. Mr. Nolte's suggestion that a working group should be established therefore had merit.

10. He agreed with the Special Rapporteur's proposal in paragraph 23 of his report to rephrase draft article 4, paragraph 2, which would clarify the provisions on attribution of conduct to make them consonant with the advisory opinion of the ICJ on *Reparation for Injuries*. The key element was whether the agent was acting on the basis of authorization given by the international organization concerned. Mr. McRae's suggestion to delete the phrase "through whom the organization acts" would also make the paragraph clearer.

11. Draft article 5, concerning the conduct of organs or agents placed at the disposal of an international organization, by a State or another international organization, specified that the criterion for attribution of conduct was the organization's effective control over that conduct, and had proved to be of relevance to real situations that had formed the subject matter of recent cases heard by the European Court of Human Rights, the British House of Lords and the District Court of The Hague. In the case of *Behrami and Saramati*, however, it was hard to see how the application of the criterion of effective control had led the European Court of Human Rights to attribute acts of forces placed at the disposal of the United Nations (such as the United Nations Interim Administration Mission in Kosovo) or authorized by the United Nations (such as the

International Security Force in Kosovo) to the Organization simply because their presence in Kosovo or the powers they were exercising were based on a Security Council resolution. He understood why the Secretary-General of the United Nations had rejected the attribution of conduct by United Nations Interim Administration Mission in Kosovo and the International Security Force in Kosovo to the Organization, and he agreed with the Special Rapporteur that any conduct must be attributed both to the lending State and to the receiving international organization. He was in favour of retaining the formulation of draft article 5 because decisions on attribution should indeed be based on the criterion of effective control, a notion that should be spelled out in the commentary.

12. With regard to a breach of an international obligation, the subject of draft articles 8 to 11, he agreed with Mr. McRae that the Special Rapporteur's proposal to include the phrase "in principle" in draft article 8, paragraph 2, in an endeavour to clarify the extent to which the rules of an international organization were part of international law did not resolve the problem. He therefore suggested that paragraph 2 should read: "The breach of an international obligation by an international organization could include the breach of an obligation under the rules of that organization."

13. He concurred with the Special Rapporteur that the instances in which self-defence could have relevance for an international organization as a circumstance precluding wrongfulness were limited and sometimes unclear, and he therefore shared the reservations of Member States and the World Health Organization with regard to draft article 18. That article could be deleted, since a general provision in draft article 62, which would not prejudice questions of responsibility not regulated by the draft articles, would adequately compensate for the absence of a specific provision on self-defence.

14. He had no particular comments on the text proposed by the Special Rapporteur in paragraph 66 of his report for draft article 19 on countermeasures, as it reflected a broad consensus among the members of the Commission. The fear of possible abuses of countermeasures had been adequately addressed in paragraph 2 of that article, although he was concerned that the phrase "in accordance with the rules of the [international] organization" might be too restrictive. Other means of ensuring compliance ought to be permissible even if no provision was made for them in the rules of the organization. He therefore supported Mr. McRae's suggestion to delete the phrase in question.

15. Mr. MELESCANU said that he wished to make two general comments. First, the Special Rapporteur had structured his report very cleverly. The reader had the initial impression that it would be possible to comment on the amended draft articles after simply perusing the conclusions and proposals at the end of each section, whereas in fact it was necessary to study the Special Rapporteur's preceding analysis, the positions expressed by States in the General Assembly and the Commission's previous reports in order to see how the draft articles had evolved. Thus the Special Rapporteur had made the Commission's work easier while at the same time encouraging members to probe more deeply into the topic.

16. His second comment concerned the Commission's approach to the topic. The Commission had accepted two working hypotheses. The first was that it would be easy to draw up articles on the responsibility of international organizations because draft articles on the responsibility of States for internationally wrongful acts²⁰ already existed; all that would have to be done was to replace the word "State" with "international organization" and to make a few cosmetic changes. In fact, things had turned out somewhat differently, because the situations of international organizations and of States as subjects of international law differed in many aspects, including that of responsibility. Some of the difficulties encountered in the Commission's debates and in the formulation of draft articles had arisen because of that assumption.

17. The second erroneous assumption that had complicated the debate had been the belief that it was possible to refer in general terms to the responsibility of international organizations in the same way as to the responsibility of States, whereas in reality the generic term "international organization", which had been accepted from the outset, covered a multiplicity of organizations, making it hard to define the term. Given the vast differences that existed even among intergovernmental organizations, the insertion of the adjective "intergovernmental" would be futile. He was in favour of taking a very general approach in the hope that the Commission would be able to find a formula covering the wide variety of international organizations in existence.

18. Despite those difficulties, remarkable progress had been made, and the Commission should be able to present the General Assembly later in the year with a set of draft articles that took into account the observations of Member States and international organizations. To that end, the Drafting Committee or a special working group should concentrate on finalizing a set of draft articles for adoption on first reading at the current session. He realized that the approach taken by the Special Rapporteur, which had led the Commission to the stage of a "first reading *bis*", was a departure from normal procedure, but the comments of Member States and international organizations could not be ignored. The most intelligent solution would be to try to reconcile those comments with the Commission's viewpoint to the extent possible.

19. Turning to the main issues under consideration, he expressed support for the Special Rapporteur's proposals in paragraph 21 of his report concerning the scope of the draft articles and endorsed the proposed revision of draft article 28. He also endorsed Mr. Pellet's formal proposal to include provisions on the responsibility of States for assistance provided to an international organization in the commission of an internationally wrongful act, an area not covered in the draft on State responsibility. Such responsibility should come into play for the direction, control or coercion of an international organization in the commission of a wrongful act. Ms. Xue and others had suggested that another solution might be to amend the draft on State responsibility. The Commission would need to seek guidance from the General Assembly in either case, but it would probably be easier to gain approval for a revision of the

²⁰ *Ibid.*

Commission's mandate on an ongoing project than to try to amend a text whose legal status was still not very clear.

20. On attribution of conduct, he agreed with the Special Rapporteur's proposal in paragraph 23 of his report to reword article 4, paragraph 2. However, he was also sympathetic to the proposals that had been made to expand that provision. It might be useful, as had been suggested, to deal with *ultra vires* acts in the manner employed in the draft articles on State responsibility. The wrongful acts of international organizations were often the acts of their agents and as such could well be *ultra vires* acts. That issue should be addressed in the interest of citizens who might be affected by the field operations of international organizations.

21. On the breach of an international obligation, he expressed support for the proposed new wording for article 8, paragraph 2, in paragraph 42 of the report, which deleted the words "in principle". The new article 15 *bis* and the redrafting of article 15, paragraph 2 (b), seemed to have been generally well received.

22. On circumstances precluding wrongfulness, especially countermeasures, he said he supported the wording proposed for article 19 but also endorsed Mr. Nolte's suggestion to replace the words "reasonable means" with "reasonable procedure", which seemed more appropriate. Mr. Fomba had rightly pointed to the numerous interpretations that could be given to the word "reasonable", but for the time being there seemed to be no better solution. On the other hand, a decision had to be taken about the words "means" and "procedures". Organizations could have reduced means but formidable procedures for dealing with other organizations or States.

23. Lastly, on the question of self-defence, he wished to note that self-defence was a right that by its very nature applied only to States. However, implementation of the draft articles might be undermined if the question was ignored. It was true that self-defence as understood in the draft article was not the institution contemplated in the Charter of the United Nations, yet failure to mention the concept might be seen as acquiescing to the idea that international organizations and their agents did not have the right to exercise self-defence under their mandates during their field operations. Perhaps the simplest solution would be to include one or two paragraphs on the matter in the commentary.

24. Mr. CANDIOTI said that the Special Rapporteur on responsibility of international organizations had submitted a timely and useful revision of the draft articles in the light of comments by Governments, recent practice and judicial decisions that ought to enable the Commission to complete its consideration on first reading at the current session. He fully agreed with the Special Rapporteur's proposal to restructure the draft articles and endorsed the points made in paragraph 8 of his report about an issue not yet dealt with, invocation by an international organization of the international responsibility of a State. The Commission must deal with that issue in an appropriate manner, which might be, as Mr. Nolte had suggested, the formation of a working group to exchange ideas and formulate proposals or alternatives. Another option would be its consideration

by the Planning Group or by the Working Group on the long-term programme of work. In any event, the Commission must take a position on the matter, especially as it was now coming to the close of its extensive analysis of a topic that would have yielded several texts.

25. Turning to the specific proposals made by the Special Rapporteur in his report, he said that he agreed with the rephrasing of draft article 4, paragraph 2, on attribution of conduct, and the new definition of the term "agent". On the other hand, he would prefer not to alter the existing text of draft article 8, paragraph 2, concerning the breach of an international obligation established by a rule of an organization, which to his mind was sufficiently clear and did not prejudge the issue of whether all or some rules of the organization were rules of international law. He endorsed the proposed rephrasing of draft article 15, paragraph 2 (b), and the proposed new draft article 15 *bis* on responsibility of an international organization for the act of a State or of another international organization. The new wording proposed for draft article 28, paragraph 1, more clearly elucidated the responsibility of a State for an act of an international organization when the State improperly attributed competence to that organization in order to circumvent one of its international obligations. All those revisions could be referred to the Drafting Committee along with the useful comments and suggestions made during the current discussion.

26. Turning to circumstances precluding wrongfulness, he said that he agreed with those who favoured retaining draft article 18 on self-defence, as it would be useful to anticipate situations that might arise in the actual practice of the United Nations and other international organizations. The proposed draft article 19, paragraph 1, was consistent with the approach taken in the previously adopted draft articles 54 to 60, on recourse to countermeasures by a State or international organization injured by a wrongful act of another international organization. He would simply suggest the deletion of the adjective "lawful" before the word "countermeasures", since, as the Special Rapporteur noted in paragraph 111 of his report, countermeasures were *per se* unlawful and were currently admissible under international law only under strict conditions, such as those stipulated in the draft articles. Indeed, article 22 of the 2001 draft articles on responsibility of States for internationally wrongful acts²¹ refrained from characterizing authorized countermeasures as "lawful" and simply referred to the relevant chapter of the draft, which governed recourse to countermeasures.

27. While he endorsed the substance of draft article 19, paragraph 2, the wording could be improved and the text might be better placed in the chapter specifically devoted to countermeasures, along with the other conditions set out in draft articles 54 to 60.

28. Lastly, he endorsed draft articles 61 to 64, "General provisions", which the Special Rapporteur proposed in chapter IX of his excellent report.

29. Mr. DUGARD said that the Special Rapporteur had presented another thoroughly researched and carefully

²¹ *Ibid.*, pp. 75–76.

reasoned report characterized by a refreshing transparency. Unlike some Special Rapporteurs who preferred a dictatorial style, he openly shared with the Commission the problems he encountered.

30. The approach set out in paragraph 4 of the report was a good one: it was wise to review the texts already adopted before the completion of the first reading, to enable the Commission to take account of new developments and new judicial decisions, even though the decision in the joined cases *Behrami and Saramati* and other decisions seemed not to have been given sufficient weight.

31. On the question of attribution, he said that he preferred article 4, paragraph 2, in its original form. It was unclear whether the new phrase, “when they have been charged by an organ of the organization ...”, referred to the word “acts” or was intended to describe whoever was an agent. An agent was someone who acted on behalf of an international organization, and clearly that included an employee of the organization or an independent expert appointed to act on its behalf, but did it cover a member of the International Law Commission? One might argue that the Commission had been charged by an organ of the organization, namely the General Assembly, with the task of progressive development and codification; did that mean, then, that the United Nations acted through the Commission? He doubted that it did and thought it would be unwise to include the new phrase, because it might be interpreted as extending the meaning of the term “agent”. The original wording was sufficient and was consistent with the language adopted by the ICJ in its 1949 advisory opinion in the *Reparation for Injuries Suffered in the Service of the United Nations* case.

32. Turning to draft article 5, he said that he was worried by the ease with which the Special Rapporteur had discarded the *Behrami and Saramati* decision and subsequent cases. The Commission had generally paid much more attention to judicial decisions. During the work on the draft articles on State responsibility, an entire session had been devoted to deciding whether to criticize the 1966 judgment of the ICJ in the *South West Africa* cases. Some members of the Commission had taken the view that one could never disagree with a decision of the ICJ, which was nonsense, of course, but showed how seriously judicial decisions, whether of the ICJ or the European Court of Human Rights, were taken.

33. A substantive debate was therefore needed on whether to redraft article 5 to incorporate the test of ultimate authority. That could also provide an opportunity for looking at other developments relevant to the issue of effective control, such as the ICJ decision 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)*. In paragraph 30 of his report, the Special Rapporteur placed undue emphasis on the fact that the Secretary-General had distanced himself from the criterion laid down in *Behrami and Saramati*, whereas, frankly speaking, he often distanced himself from anything controversial. In general, therefore, the policy considerations put forward by the Special Rapporteur with regard to article 5 needed to be more carefully scrutinized.

34. He agreed with the retention of draft article 6.

35. Concerning draft article 8, paragraph 2, and the breach of an international obligation, he said that while there might be reasons for amending the provision, he did not think it wise to include the phrase “in principle”. It was a phrase avoided by both domestic and international lawmakers, and the Commission should avoid it as well. He agreed with the changes suggested for draft article 15, paragraph 2 (b), and endorsed the new draft article 15 *bis*.

36. With regard to circumstances precluding wrongfulness, he said that he was in favour of retaining draft article 18 (Self-defence). It was true that Article 51 of the Charter of the United Nations dealt with attacks on States and self-defence undertaken by States; on the other hand, that article had been drafted before the advisory opinion of the ICJ on *Reparation for Injuries* and the era in which the legal personality of international organizations had been recognized. Moreover, the interpretation of Article 51 itself had been expanding. For example, attempts had been made to have it include defence against terrorism, and the Security Council had supported resolutions to that effect. Thus, the Commission would not be enlarging the concept of self-defence illegitimately by including the notion of self-defence for an international organization. In certain circumstances, an international organization could in fact resort to self-defence measures, an obvious example being the case of an international organization that was administering a territory. If the territory was attacked, the organization must have the lawful capacity—the right—to respond. That made him wonder about cases such as NATO. Article 5 of the North Atlantic Treaty provided that an armed attack against one member State was to be considered an attack against all, but the role of NATO was evolving, too. For instance, if a vessel registered in Panama and having crew members who were nationals of several different NATO countries was attacked by pirates, did that constitute an attack on Panama, on the States of the individual crew members or on NATO as an organization? As he saw it, there were circumstances in which an organization would want to take measures of self-defence and should have a right to do so. He would not like to see the matter dealt with through a “without prejudice” clause.

37. He agreed with Mr. Candiotti that countermeasures were by definition unlawful. Their unlawfulness was “cured” only by the fact that they constituted a response to an unlawful or wrongful act—unless, of course, they were permitted by the rules of an organization, as in the case of the IMF, mentioned in paragraph 63 of the report. It was worth noting that the draft articles on responsibility of States (arts. 49 *et seq.*),²² did not generally use the word “lawfulness” and spoke only of countermeasures. Only article 54 employed the word “lawful”, but that article was a provision *de lege ferenda*, dealing with countermeasures taken by a non-injured State. Even at the time, the Commission had been aware that the issue was controversial; article 54 employed the words “lawful measures” rather than “countermeasures” because the article fell within the realm of progressive development. It made no sense to speak of “lawful countermeasures”: the word “countermeasures” was sufficient.

²² *Ibid.*, pp. 129 *et seq.*

38. Mr. GAJA (Special Rapporteur), referring to a point raised by Mr. Dugard and Mr. Candioti, said that, as Mr. Fomba had rightly noted, the use of the word “lawfulness” did not imply that countermeasures were generally lawful but merely reflected the existence of conditions that must be complied with in order for them to be lawful. Mr. Dugard and Mr. Candioti had both cited the example of the draft articles on State responsibility, a context in which a reference to the articles on countermeasures was feasible. The current draft articles might contain a reference to the articles on countermeasures only insofar as such countermeasures were directed by an international organization against another international organization, because chapter II in Part Three of the draft articles dealt with that topic. When addressing circumstances precluding wrongfulness, however, it should be borne in mind that the Commission needed also to deal with the case in which countermeasures were taken against a State, because if such countermeasures were lawfully taken, that was a circumstance precluding wrongfulness. However, as it was not possible to include a reference to the draft articles on State responsibility, general language would have to be found that covered a reference, to be elucidated in the commentary, both to the chapter in the current draft articles and to whatever rules applied to countermeasures taken against States. In any case, the Drafting Committee might find a better term than “lawful”.

39. Ms. XUE said that she agreed with Mr. Dugard that draft article 5 required more in-depth debate. With regard to his remark on international judicial decisions, however, she said that she understood the Special Rapporteur to be saying in his seventh report that the decisions of the European Court of Human Rights cited in the report were not conclusive. That did not mean that the Commission was criticizing the decisions of the Court, but it was nevertheless important to draw a distinction between the decisions of the European Court of Human Rights and those of the ICJ.

40. On the question of self-defence, she noted that the concerns which States had raised about draft article 18 had had to do with the case cited by Mr. Dugard, namely that an attack on one member State was regarded as an attack on the organization. She had been in favour of retaining the draft article, but not in connection with the example just cited, which was precisely the kind of case in which it was vital to proceed with extreme caution.

41. Mr. CANDIOTI thanked the Special Rapporteur for his explanation concerning the use of the word “lawful” in draft article 19, paragraph 1. In any case, such wording should not be employed when speaking of countermeasures, and it illustrated the lacuna to which Mr. Pellet had drawn attention in connection with the invocation and implementation of State responsibility when an international organization was injured. The problem of how to address countermeasures applied by international organizations against States remained.

42. Mr. DUGARD, responding to Ms. Xue’s comment on the role of judicial decisions, said he agreed that decisions of the ICJ were perhaps more persuasive than those of the European Court of Human Rights. He came from

a common-law background, in which judicial decisions played an important role in the development of the law, whereas other lawyers might be less inclined to be guided by them. The Commission should look more closely at the *Behrami and Saramati* and *Al-Jedda* cases and at the test which they had adopted, as well as at subsequent decisions, because legal opinion on the subject appeared to have evolved.

43. Mr. CAFLISCH began by making several comments of a general nature. On the question of principle, posed by Mr. Pellet, as to whether the Commission should make changes to the text of the draft articles at the present stage or whether it was preferable to wait until States had given their reaction to the entire text when it was completed, he thought that the Commission should take a pragmatic approach, making changes where it could do so without too much difficulty. That had the advantage of not overburdening the second reading while showing States that the Commission was listening to their views.

44. He endorsed the Special Rapporteur’s proposal for reorganizing the draft articles. However, with regard to the lacuna in the title and the body of the draft articles where the responsibility of States *vis-à-vis* international organizations was concerned, he said that he would prefer, like Sir Michael Wood, to use the word “intergovernmental”, and he agreed that the lacuna must not be allowed to remain. He left it to the Special Rapporteur to decide how to address that problem. Lastly, the proposal to delete the provision on self-defence was not as attractive as it had seemed at first glance, and he thus favoured retaining draft article 18.

45. He also wished to make a number of comments on individual provisions. With regard to draft article 4, he said that he had initially endorsed the reference in paragraph 4 to “established practice”, a phrase that had been used in a number of conventions, but Mr. Nolte’s remarks had convinced him that it would be preferable to employ the words “relevant practice”. He also endorsed the new wording for paragraph 2 proposed by the Special Rapporteur in paragraph 23 of his report.

46. It was clear that the text of draft article 5 posed difficult problems. In its practice, the European Court of Human Rights had replaced the criterion of “effective control” with that of “ultimate authority and control”, provided “that operational command only was delegated”. He agreed with the Special Rapporteur that this criterion concerned the Court’s jurisdiction *ratione personae* and not the organization’s international responsibility, and that there was thus no need for the Commission to alter the thrust of draft article 5. He also did not believe that it was correct to speak of a hierarchy between the ICJ and the European Court of Human Rights.

47. Turning to draft article 8, he noted that in paragraph 42 of his report, the Special Rapporteur proposed a new version of paragraph 2, although to his mind the earlier version had been perfectly clear. The new version did not show that it was linked to paragraph 1; moreover, the words “in principle” implied that the violation of an obligation resulting from a rule of an organization was not always a violation of an international obligation.

If that was indeed the case, it would be necessary to specify when it was a violation and when it was not. The words “in principle” were in fact very vague; they might be acceptable in a commentary, but not in the articles themselves.

48. Regarding draft article 15 (Decisions, recommendations and authorizations addressed to member States and international organizations), he doubted, as had Sir Michael Wood, whether an international organization could incur responsibility for an unlawful act originating in a recommendation made to a State. In deciding to act on the recommendation, it was the State that incurred responsibility, not the organization.

49. With regard to draft article 19, on countermeasures, he endorsed Mr. Nolte’s proposed version for paragraph 2 and urged that the Commission should give it due consideration. He also pointed out that in the French version, the phrase “*au titre des*” was unclear and should be replaced by “*dans le cadre des*”.

50. Mr. NOLTE said that if the Commission deleted the reference to responsibility for recommendations, the problem might resurface in the context of responsibility incurred by an international organization for aiding and assisting a State in the commission of an internationally wrongful act.

51. Mr. GAJA (Special Rapporteur) said that he agreed that there was a partial, albeit not total, overlap between draft article 12 (Aid or assistance in the commission of an internationally wrongful act) and draft article 15. However, in the case of aid and assistance, adhering to the principles established in the draft articles on responsibility of States, the act needed to be wrongful for the international organization and the State, whereas in the case of draft article 15, that condition was not present. In the case of aid and assistance, the conduct was unlawful for both the assisted State and the assisting organization, whereas in draft article 15, the conduct of the State to which the recommendation was addressed might well be lawful. When an international organization addressed a recommendation to a member State, it could not be said that since the recommendation was irrelevant it was not binding. One should assume that some members would take the recommendation seriously and act upon it. The point was to ensure that there was a strong causal link for responsibility to arise according to draft article 15, paragraph 2. In the light of comments made by States in the Sixth Committee, his suggestion was to reduce the cases in which such responsibility occurred, but to retain that concept and accept the partial overlap with the provision on aid and assistance.

52. Mr. VASCIANNIE thanked the Special Rapporteur for his thought-provoking seventh report on responsibility of international organizations and largely endorsed his approach to the topic. He did not share Mr. Pellet’s concern about considering the views of Member States during the first reading of the draft articles. The Special Rapporteur had efficiently assimilated them into his work, and given that case law on the topic had flourished recently, the Commission should take advantage of it.

53. He did, however, agree with Mr. Pellet and other members that a gap was apparent when the draft articles under consideration were read in conjunction with the draft articles on responsibility of States for internationally wrongful acts, namely an indication of the rules that ought to apply when an international organization sought to invoke the responsibility of a State for a wrongful act. The main argument for filling that gap was that the Commission should cover the topic of responsibility fully where both States and international organizations were concerned. Mr. Pellet had suggested somewhat strongly that certain provisions in the draft articles on responsibility of international organizations already touched upon the question of the responsibility of States *vis-à-vis* international organizations and that, logically, the question should be addressed more systematically. On the other hand, since one would not automatically expect to find rules relating to the responsibility of States *vis-à-vis* international organizations in a document on State responsibility, the insertion of rules governing State responsibility in the draft articles before the Commission was not logically compelling, although it would help to fill a significant gap in the Commission’s overall work on international responsibility.

54. Mr. Pellet had countered the arguments of those members who advocated the continued exclusion of provisions on the responsibility of States *vis-à-vis* international organizations with his personal recollection of the intent that lay behind the topic mandate. While he attached considerable importance to institutional memory, he was not convinced that Mr. Pellet’s position was decisive. The Special Rapporteur had proceeded on the assumption that the mandate did not require incorporation of rules on State responsibility, and there did not seem to be majority support within the Commission for Mr. Pellet’s position to date, although that did not necessarily amount to acquiescence. The Special Rapporteur had also recalled that some if not all of the relevant rules would be picked up by analogy from the draft articles on State responsibility while others would evolve in customary law. Thus the gap in the Commission’s work on the topic under consideration would not imply a gap in general international law. With those considerations, he supported the approach adopted by the Special Rapporteur, but he suggested that the commentary on the scope of the draft articles should explain why the gap had not been filled. He also expressed support for the proposals relating to the scope of the draft articles contained in paragraph 21 of the report.

55. Turning to the chapter of the report on attribution of conduct (paras. 22–38), he questioned whether the proposed reformulation of draft article 4, paragraph 2, was an improvement. The words “when they have been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions” were superfluous, because if an entity was one through which the organization acted, then the entity would have been charged, implicitly or explicitly, with carrying out or helping to carry out one of the organization’s functions. Also, the term “charging” suggested that an entity required an explicit mandate in order for it to be an agent, and the Commission might not wish to rule out the possibility that an agency could arise by implication.

56. The Special Rapporteur had provided a useful analysis of recent case law in which the criterion of effective control had been invoked, which lent weight to the notion that that criterion had become a part of customary international law. However, he had also demonstrated how the way in which the criterion had been applied in the *Behrami and Saramati* decision was somewhat misleading. He hoped that the commentary to draft article 5 would explain further how the test of effective control could be applied in practice in order to avoid any misunderstanding.

57. Turning to the chapter of the report on breach of an international obligation (paras. 39–44), Mr. Vasciannie agreed that a breach of an international obligation might arise when an international organization did not act in conformity with its rules, but the new wording of draft article 8, paragraph 2, proposed in paragraph 42 did not convey that idea clearly, particularly because of the phrase “in principle”. In fact, it was quite possible that paragraph 1 of that article implicitly addressed the point made in paragraph 2 with the words “regardless of its origin”. He suggested that the matter should be taken up by the Drafting Committee.

58. Concerning the chapter of the report on responsibility of an international organization in connection with the act of a State or another international organization (paras. 45–54), he questioned whether the amendment to draft article 15, paragraph 2 (b), proposed in paragraph 51, would actually improve the text. More fundamentally, he had serious doubts about whether authorizations and recommendations should give rise to responsibility in the circumstances contemplated by draft article 15. Where in cases of authorization or recommendation no binding obligation was placed on a State or other international organization to act, it was unlikely that responsibility would automatically pass to the authorizing or recommending organization. It was a different matter, however, when the organization obliged a State or other organization to act. While he took note of the Special Rapporteur’s comments that the matter had already been discussed, he considered that the proposed amendment reopened it for consideration.

59. With regard to the chapter of the report on circumstances precluding wrongfulness (paras. 55–72), he expressed support for retaining draft article 18 on self-defence. There were instances in which international organizations, through their agents, might be called upon to exercise self-defence. There might be some resistance to the draft article caused by the fear that self-defence might be invoked in inappropriate circumstances, but that should not lead the Commission to conclude that international law ruled out the possibility of self-defence for international organizations. A solution might be to delete the phrase “embodied in the Charter of the United Nations”, given that Article 51 of the Charter of the United Nations referred to the inherent right of States to self-defence.

60. While he generally supported the text of draft article 19 on countermeasures, he preferred the words “effective means” to “reasonable means” in paragraph 2—another matter to be taken up by the Drafting Committee.

61. Mr. PERERA commended the Special Rapporteur on his comprehensive seventh report. He endorsed the approach of reviewing the draft articles adopted so far in the light of comments made by Member States and international organizations. Given the fact that relevant practice, while evolving, was sparse, it was imperative for the Commission to take on board their views.

62. He agreed with those members who had urged that, for the sake of completeness, the scope of the topic should be extended to cover invocation of the international responsibility of a State by an international organization. If that raised an issue in terms of the Commission’s mandate, an appropriate recommendation could be addressed to the General Assembly.

63. He endorsed the definition of the term “international organizations” given in draft article 2, which reflected current international reality. He also supported the Special Rapporteur’s recommendation to retain the criterion of the exercise of effective control for the attribution of conduct of organs or agents placed at the disposal of an international organization by a State or another international organization. The Special Rapporteur had argued cogently in paragraphs 26 to 30 of his report in favour of its retention on the basis of an analysis of recent jurisprudence, taking due account of the practical considerations involved. He noted with interest the comment by Mr. Caflich regarding the decision of the European Court of Human Rights, which had been taken in the context of that Court’s jurisdiction, and he agreed with Mr. Vasciannie that the matter could be expanded in the commentary.

64. He was inclined to support the Special Rapporteur’s suggestion to delete draft article 18 on self-defence (para. 72), given that, as several States had pointed out, self-defence was a concept which by its very nature was applicable only to the actions of States. However, the Commission seemed to be divided on the matter. If it did decide to retain the article, he would be in favour of Sir Michael Wood’s suggestion to delete the reference to the Charter of the United Nations, since essential aspects of the concept, such as proportionality, were not expressly referred to in it but drawn from principles of international law. He also took due note of Mr. Vasciannie’s comment regarding Article 51 of the Charter of the United Nations.

65. He recalled that during the sixtieth session, some members of the Commission had urged caution regarding the inclusion of a draft article on countermeasures,²³ given the limited practice in that area, the uncertainty surrounding the legal regime of countermeasures and the risk of abuse that recourse to countermeasures entailed. They had also been mindful of the divisive nature of the debate that had taken place in the Commission and in the Sixth Committee on the same issue during the consideration of the draft articles on State responsibility. The Commission had nevertheless proceeded with the formulation of draft article 19 on the understanding that it should be subject to specific safeguards against abuse and that countermeasures should remain exceptional.

²³ *Yearbook ... 2008*, vol. II (Part Two), para. 149.

66. However, the example of countermeasures provided by the IMF, which, as the Special Rapporteur pertinently observed in paragraph 63 of his report, pertained to sanctions that an international organization might take against one of its members and should not be considered as countermeasures, underscored the need for a cautious approach to the question. He therefore endorsed Mr. McRae's suggestion to restrict the scope of draft article 19 by deleting the word "reasonable" in the phrase "reasonable means" in paragraph 2. He also had some difficulty with the words "lawful countermeasures" in paragraph 1, although the Special Rapporteur had explained that his intention had been to emphasize the lawful nature of the countermeasures in the context of circumstances precluding wrongfulness. The Drafting Committee might wish to give those and other points further consideration. He also looked forward to the forthcoming meeting with the legal advisers of international organizations for additional clarifications in the light of their organizations' practice.

67. Mr. DUGARD said that he held a minority view in that he wished draft article 5 to be reconsidered in the light of relevant judicial decisions. He wished to know how the Special Rapporteur intended to deal with the Commission's discussion of that matter. If the majority agreed that the text of draft article 5 should remain unchanged, he presumed that substantial changes would be made to the commentary thereto in order to reflect the discussion.

68. Mr. GAJA (Special Rapporteur) said that his intention was to draw conclusions on the basis of the discussion of the topic and submit certain proposals to the Drafting Committee. Once the Drafting Committee had reviewed these proposals and the relevant draft articles had been adopted by the plenary, he would revise the commentaries to reflect any changes made and also refer to elements of practice. It would seem strange for the Commission to produce commentaries to the draft articles without considering *Behrami and Saramati*, although the commentaries were not the appropriate place to express critical views of that decision. He therefore intended to refer briefly to how the criterion of effective control had been applied in the decision of the European Court of Human Rights. The commentaries would, of course, be submitted to the plenary for approval.

69. Mr. NOLTE said that while he shared Mr. Dugard's view regarding the European Court of Human Rights decision in the *Behrami and Saramati* case, he would be reluctant for the Commission to reopen the debate on draft article 5. The Court had not purported to try to change the approach of the Commission, but merely to apply draft article 5 to the special situation of the United Nations.

70. Mr. CAFLISCH agreed with Mr. Nolte: the Court had not had international responsibility in mind when dealing with the case, but instead the jurisdiction *ratione personae* of the Court. The Commission was therefore not obliged to take into account the Court's jurisprudence, not because it was in any way inferior, but because it dealt with a different issue.

The meeting rose at 12.35 p.m.

3002nd MEETING

Friday, 8 May 2009, at 10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Responsibility of international organizations (continued) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the seventh report on responsibility of international organizations (A/CN.4/610).

2. Mr. HASSOUNA said that the fact that the Special Rapporteur had enriched his report with the views of Member States for the first reading of the draft articles was perhaps a break with tradition, but it was certainly a valuable one in a field where there was little practice. The Commission was faced with the dilemma of how to deal with the issue of invocation by an international organization of the international responsibility of a State, a matter lying outside the scope of the draft articles as defined in article 1. The issue proved the close interrelationship between the responsibility of States and the responsibility of international organizations. The question thus arose as to whether those two issues should not have been dealt with simultaneously by the Commission several years previously; history alone would judge that. He supported Ms. Escarameia's view that individuals, who had become subjects of international law, should also be entitled to invoke the responsibility of international organizations.

3. He favoured a broad definition of the term "international organization" in article 2, since international organizations now included entities other than States, namely NGOs or other regional or subregional entities. It might be appropriate to add the word "regulations" to the definition of "rules of the organization", which referred to the specific directives issued by most international organizations. It was also a term used in the definition provided by the Institute of International Law in its 1995 resolution (art. 2 (c)).²⁴ He supported the Special Rapporteur's proposals in paragraph 21 of his report concerning the restructuring of the draft articles.

²⁴ *Institute of International Law, Yearbook*, vol. 66 (1996), Session of Lisbon (1995), Part II, p. 447.

4. Turning to the chapter on attribution of conduct (paras. 22–38), he concurred with the proposed definition of the term “agent” in article 4, paragraph 2, as it was based on the criterion of attribution provided by the ICJ in its advisory opinion on the *Reparation for Injuries* case. However, in the new wording proposed for the paragraph, he suggested that the term “charged” in the phrase “charged by an organ of the organization” should be replaced with the word “entrusted”. With regard to the criterion of “effective control” referred to in article 5, he said that if the judicial decisions adopted by the European Court of Human Rights in a number of cases had been prompted merely by the need to determine the Court’s jurisdiction *ratione personae*, then the Court’s rationale would be understandable. If, on the other hand, they reflected a trend to absolve national contingents from international responsibility and to shift the entire responsibility to the United Nations, that would fully justify legal criticism of them.
5. In the chapter of the report on breach of an international obligation (paras. 39–44), the Special Rapporteur acknowledged that it was debatable whether obligations under rules of an international organization were obligations under international law, and he proposed to rephrase article 8, paragraph 2, in order to state more clearly that the rules of the organization were “in principle” part of international law. Although the term “in principle” sought to convey the existence of exceptions, he found it inappropriate in that context and would welcome a further rephrasing of the paragraph, focusing on determination in the light of the circumstances of each organization.
6. On the chapter on responsibility of an international organization in connection with the act of a State or another international organization (paras. 45–54), he supported the view of some States that the meaning of “circumvention” of an international obligation should be clarified, perhaps in the commentary. He agreed with other States that when an international organization circumvented an obligation through a non-binding act such as a recommendation or authorization, it should not incur responsibility if its members took the authorized or recommended action. He therefore agreed with the new wording of article 15, paragraph 2 (b), proposed by the Special Rapporteur, in which the words “in reliance on” were replaced with “as the result of” in order to restrict the responsibility entailed. He also agreed with the proposal to include a new article 15 *bis* to address the issue of the responsibility of an international organization that was a member of another international organization.
7. Turning to the chapter of the report on circumstances precluding wrongfulness (paras. 55–72), he noted that different views had been expressed on article 18, on self-defence, both in the General Assembly and by members of the Commission. While it was true that the concept of self-defence under the Charter of the United Nations applied mainly to States, there were also circumstances where an international organization could and should be allowed to invoke self-defence as a circumstance precluding wrongfulness. In such a case, the legal basis of its action would be not the Charter of the United Nations but the general principles of international law. Consequently, he was not in favour of deleting article 18 as proposed in paragraph 59 of the report.
8. With regard to draft article 19, on countermeasures, he recalled that the Commission had already underlined the uncertainty of the relevant legal regime. However, there was growing acceptance of a restrictive approach to countermeasures taken by an international organization such as the one the Special Rapporteur proposed in draft article 19, paragraph 2. While he agreed with the general concept, he believed that the term “reasonable means” should be replaced with a more accurate term, such as “adequate procedure”.
9. Under article 22, necessity did not preclude the wrongfulness of an act of an international organization, save when it purported to protect an essential interest of the international community. He did not share the view expressed in the General Assembly that a regional organization would be precluded from protecting an essential interest of the international community. Regional organizations applied universal principles of international law and adhered to world standards and were thus clearly qualified to protect an essential interest of the international community. The concept of “essential interest” was highly controversial, but he supported the States that had endorsed it and likewise endorsed the Special Rapporteur’s preference for not proposing any amendments to article 22. Lastly, he supported the proposals concerning articles 25 to 30 relating to the issue of responsibility of a State in connection with the act of an international organization, and he favoured the adoption on first reading, hopefully at the current session, of the draft articles under discussion.
10. Mr. KAMTO questioned the relevance of article 1, paragraph 2, which read: “The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.” If the provision was retained in its current location, then the title of the topic must be changed to refer to “Responsibility of international organizations and States”, and that, of course, was meaningless. Retention of that provision had been advocated on the grounds that it filled in a gap in the draft articles on responsibility of States for internationally wrongful acts. While he understood that argument, he believed that in that case it might be better to place the provision in a separate part that could be entitled “Final and miscellaneous provisions”.
11. Concerning article 5 (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization), he noted that the criterion of “effective control” was the one established by the jurisprudence of the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* and the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* cases. Accordingly, the case law of regional courts, even European ones, was of little importance. The problem was certainly not one of hierarchy between the ICJ and the European Court of Human Rights, for example, but one relating to the difference in scope of their decisions: judgments of the ICJ had universal scope, whereas the scope of judgements of the European Court of Human Rights was regional.
12. Article 18 (Self-defence) had no place in the draft under consideration. It should be deleted, as many States

had suggested and as the Special Rapporteur proposed in paragraph 59 of his report. That deletion was warranted since self-defence, as established in Article 51 of the Charter of the United Nations, covered cases in which a State Member of the United Nations was the target of armed aggression. However, only States were Members of the United Nations, and therefore only armed aggression against a State provided the legal justification for the inherent right of self-defence. In addition, the right of self-defence could be exercised only in response to an act of aggression. Under the definition contained in General Assembly resolution 3314 (XXIX) of 14 December 1974, aggression referred to a number of acts in relation to the territory of a State. Since an international organization had no territory of its own apart from that of its member States, it could hardly be given the right to respond to acts of armed aggression against a territory.

13. Concerning article 19 (Countermeasures), he recalled that at the previous session he had expressed strong reservations about giving international organizations the right to take such measures. Technically, such a provision was unnecessary in respect of an organization's States members, since the organization ought to have provisions for control and sanction mechanisms in respect of its member States in its own constituent instrument or regulations deriving therefrom. If the provision was intended to cover the use of countermeasures against third States or against another international organization, then granting the right to apply countermeasures was cause for concern. If article 19 was retained, he wished to point out that the phrase "lawful countermeasure" in paragraph 1 was likely to cause problems and generate confusion. As Mr. Fomba had noted at the previous meeting, countermeasures were by definition lawful, as could be seen from the draft articles on responsibility of States for internationally wrongful acts. To speak of lawful countermeasures would give the impression that there might be unlawful countermeasures under international law. If the provision was retained, it should simply refer to "countermeasures" in order to maintain coherence with regard to the meaning and interpretation of the concept. He supported the proposal to replace the words "reasonable means" in article 19, paragraph 2, with the phrase "means available under the rules of the organization".

14. Mr. COMISSÁRIO AFONSO thanked the Special Rapporteur for having given Commission members an opportunity to review the entire text of the draft articles before the completion of the first reading, thereby enabling them to consider it in the light of the comments made by Governments, international organizations, judicial bodies and scholars. In general, he agreed with the proposals made by the Special Rapporteur, in particular those contained in paragraph 21 of his seventh report and the proposal regarding the invocation by an international organization of the international responsibility of a State.

15. He had been one of the Commission members who had defended the alignment of the definition of an international organization with the definition contained in the 1986 Vienna Convention, with the possible addition of a few elements to take account of new developments. However, he now accepted the consensus that had emerged within the Commission.

16. Regarding the important issue of the attribution of conduct, he considered that the Commission had taken the correct stand. He agreed with the rephrasing of article 4, paragraph 2, which reflected the advisory opinion of the ICJ in *Reparation for Injuries*, since it had the merit of making the definition clearer and more precise.

17. He also agreed with the Special Rapporteur's reasoning in paragraph 30 of his report concerning draft article 5, in particular the idea that no change should be made to that provision, which corresponded to article 6 of the draft on responsibility of States for internationally wrongful acts.²⁵ Both provisions were guided by the criterion of effective control. He nevertheless found disquieting the apparent divergence between that approach and the judgments of the European Court of Human Rights, the House of Lords and the District Court of The Hague, and he wondered whether those divergences were dictated solely by differences in the legal criteria adopted or by compelling policy issues. A deeper analysis would be useful.

18. Regarding article 8, paragraph 2, he shared the view of some members of the Commission that the expression "in principle" suggested by the Special Rapporteur in paragraph 42 of his report was not particularly helpful and that the text should be left as it stood.

19. As to article 15, paragraph 2 (b), he thought that neither the phrase "in reliance on" nor "as the result of" constituted a sufficiently strong link of causation. It would probably be necessary to stress the notion of compliance with the authorization or recommendation as elements that could determine that linkage. The Drafting Committee would undoubtedly be able to find the best solution to the problem.

20. On self-defence, he believed that draft article 18 should be retained. The suggestion that the phrase "embodied in the Charter of the United Nations" be deleted could solve the problem. It was clear, as Mr. Kamto had so eloquently recalled, that Article 51 of the Charter was intended to be applied to States, an assertion corroborated by General Assembly resolution 3314 (XXIX), on the definition of aggression. However, he was sensitive to the argument presented by Mr. Dugard as to the need to take account of the evolution of international law and of international relations since 1945. It would be hard to imagine United Nations peacekeeping operations in which the right to self-defence did not come into play. Conceptually, it could be a different right, certainly not an inherent right like the one prescribed in the Charter of the United Nations, but a necessary right—the right to survive in dangerous operations. It was true that weaker States might turn to regional organizations for their self-defence, individual or collective, but strong organizations might abuse that right and make it an instrument of aggression.

21. With regard to countermeasures, he agreed on the whole with the Special Rapporteur's suggestions in paragraphs 66 and 72 (b) of his report. He was also prepared to accept the word "lawful" in draft article 19, paragraph 1, on the understanding that it meant "justifiable". That

²⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 43–45.

seemed to be how the term was understood by the ICJ in the *Gabčíkovo–Nagymaros Project* case, and the commentaries to the draft articles on responsibility of States for internationally wrongful acts reflected that interpretation. However, after having heard Mr. Candioti and Mr. Kamto, he was prepared to follow the consensus on that matter.

22. Mr. VÁZQUEZ-BERMÚDEZ endorsed the decision made by the Special Rapporteur in his seventh report to deal with the topic as a whole, amending some draft articles and adding some necessary clarification in the commentaries in the light of recent comments by States and international organizations, judicial decisions and the legal literature.

23. The invocation of the international responsibility of a State by an international organization lay outside the scope of the draft articles, as the Special Rapporteur pointed out. However, as some members of the Commission had noted, in order to fill a gap, the Commission should submit a proposal to the General Assembly as to the way forward, following an exchange of views in a working group, as proposed by Mr. Nolte, or in the Planning Group or the Working Group on the long-term programme of work, as Mr. Candioti had suggested. In any event, discussions on the matter and the Commission's ultimate conclusion should in no way hinder the adoption of the draft articles on first reading at the current session.

24. The definition of an international organization in draft article 2 was apt and undoubtedly represented an important contribution by the International Law Commission. The 1969 and 1986 Vienna Conventions confined themselves to describing an international organization as an "intergovernmental organization", a definition that was not very informative, even though at the time it had proved useful in distinguishing between intergovernmental organizations and non-governmental organizations. During the debate, a proposal had been made to incorporate the adjective "intergovernmental" in the definition of the terms "international organization" in order to emphasize the fact that States were included among the members of an international organization. He did not think that was necessary, since the second part of the definition said that "international organizations may include as members, in addition to States, other entities". In reality, the term "inter-State" would be more appropriate, since it was States, not Governments, that were members of an organization. That would make it possible to avoid including, through the use of the word "intergovernmental", entities other than States, such as international organizations that were members of other international organizations. Lastly, if the term "intergovernmental" was construed as referring back to the constituent instrument of an international organization, then there was no need to include it, since the definition expressly indicated that the organization must be established by a treaty or other instrument governed by international law.

25. It was fitting that the definition of "rules of the organization" in draft article 4 should be transferred to draft article 2 in order to make it understood that the definition was a general one for the purposes of the draft articles as a whole. The definition was satisfactory, particularly in its reference, after decisions and resolutions, to "other acts"

taken by the organization, a useful addition in the light of the definition given in the 1986 Vienna Convention. The reference to the "established practice of the organization", regularly mentioned by most of the international organizations, should also be retained.

26. In connection with the attribution of conduct to an international organization, Mr. Vázquez-Bermúdez endorsed the way the Special Rapporteur had added to the definition of the term "agent" in draft article 4, paragraph 2, drawing on the advisory opinion of the ICJ in the *Reparation for Injuries* case. The Drafting Committee might nevertheless wish to consider Mr. McRae's proposal to delete the phrase "through whom the international organization acts". On draft article 5, he agreed with the Special Rapporteur who, after having rigorously analysed recent judicial decisions, had concluded that the criterion of "effective control" over the conduct of an organ of a State or of an agent placed at the disposal of an international organization must be retained.

27. Regarding draft article 8, on the breach of an international obligation, he said that he understood the reasons put forward by the Special Rapporteur for submitting a revised version of paragraph 2 concerning the obligations created by the rules of an organization; however, he agreed with those who had criticized the use of the phrase "in principle" to indicate that all the rules of an international organization did not necessarily create international obligations. Yet he did not think that simply deleting that phrase in the new paragraph 2 proposed by the Special Rapporteur would solve the problem. It was true, as Mr. Vasciannie had pointed out, that the words "regardless of its origin and character" in paragraph 1 implicitly covered the international obligations set out in the rules of the organization, but it would be useful to include an express reference to that fact in the article itself, and not merely in the commentary. Instead of adding a new paragraph 2, the Commission could add the phrase "including when it is set out in a rule of the organization" at the end of paragraph 1.

28. In his view, draft article 18, on self-defence as a circumstance precluding wrongfulness, should be retained. Even if situations in which that article might be relevant for an international organization occurred only rarely, the very fact that they might arise—in connection with the administration of a territory or a peacekeeping operation, for example—justified the retention of the provision. It should, of course, be stated in the commentary that self-defence was a relevant factor only for some organizations, e.g. the United Nations, which was not the case with States. In order to take account of Mr. Comissário Afonso's warning about preventing abuse of the provision, article 8 should be retained, thereby averting the possibility that an international organization might invoke self-defence on the basis of a general "without prejudice" clause such as the one in draft article 62.

29. With regard to draft article 19, on countermeasures, he said that in general he endorsed its content but that, like Mr. Candioti, he thought that the adjective "lawful" in paragraph 1 should be deleted. As to paragraph 2, he thought Mr. Nolte's proposal would be helpful to the Drafting Committee in limiting the options for the use of countermeasures.

Expulsion of aliens²⁶ (A/CN.4/604,²⁷ A/CN.4/606 and Add.1, sect. E, A/CN.4/611,²⁸ A/CN.4/617,²⁹ A/CN.4/618³⁰)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

30. Mr. KAMTO (Special Rapporteur), introducing his fifth report on expulsion of aliens (A/CN.4/611), recalled that in his fourth report³¹ he had considered the issue of expulsion in cases of dual or multiple nationality and that of loss of nationality or denationalization. While his analysis of those issues had given rise to heated discussion in the Commission, most of its members had shared the Special Rapporteur's conclusion that it would not be worthwhile for the Commission to set out draft rules specific to those issues, even in the interest of progressive development of international law, since the topic dealt not with the nationality regime but with the expulsion of aliens.

31. He also recalled that the working group that had been established in 2008, at the sixtieth session of the Commission,³² to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion had concluded that, first, the commentary to the draft articles should indicate that, for the purposes of the draft articles, the principle of the non-expulsion of nationals applied also to persons who had legally acquired one or several other nationalities and that, secondly, the commentary should include wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals. Those conclusions had been approved by the Commission, which had requested the Drafting Committee to take them into consideration in its work. It was clear from the discussion in the Sixth Committee in 2008 that most of the delegations that had spoken on the topic shared the Special Rapporteur's view regarding the treatment of the issues of expulsion in cases of dual or multiple nationality, loss of nationality and denationalization (A/CN.4/606, paras. 71–74). It could thus be considered that the question of approach had been settled.

32. The fifth report continued the study of rules limiting the right of expulsion begun in the third report,³³ where he had stated that the right of expulsion must be exercised in accordance with the rules of international law.

33. Following on the consideration in the third report of the limits relating to the person to be expelled, the fifth report addressed the limits relating to the requirement of respect for fundamental human rights. Persons being

expelled, for whatever reason, remained human beings who, as such, must continue to enjoy all their fundamental rights. In its judgement in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, the European Court of Human Rights had recalled that in exercising their sovereign right to control their borders and the entry and stay of aliens, States must comply with their international obligations, including those assumed under the European Convention on Human Rights. According to the Court, "the States' interest in foiling attempts to circumvent immigration rules must not deprive aliens of the protection afforded by [the European Convention on Human Rights and the Convention on the Rights of the Child] or deprive foreign minors, especially if unaccompanied, of the protection their status warrants" [para. 81 of the judgement].

34. There was thus a general obligation to respect human rights, and that general obligation was reflected in draft article 8. However, it was unrealistic to require that a person being expelled be able to benefit from all the human rights guaranteed by international instruments and by the domestic law of the expelling State. For example, how would it be possible to guarantee, throughout the expulsion process, the exercise of their right to education, to freedom of assembly and association or to free enterprise, or their right to work, to marry and so forth? It seemed more realistic and more consistent with State practice to limit the rights guaranteed during expulsion to the fundamental human rights. He had discussed in detail the concept of "fundamental rights", a term found in a number of international legal instruments, including the Charter of the United Nations, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, but also widely used in legal theory and approached indirectly in the case law of the European Court of Human Rights, notably in the judgement that it had handed down in the case of *Golder v. the United Kingdom*.

35. What constituted fundamental rights was not, however, set in stone. Legal theory had identified a "hard core" of human rights considered to be inviolable. More particularly, where protection of the rights of the person being expelled was concerned, those inviolable rights, which derived from international legal instruments and were reinforced by international case law, were: the right to life; the right to dignity; the right to integrity of the person; the right to non-discrimination; the right not to be subjected to torture or to inhuman or degrading treatment or punishment; and the right to family life.

36. The general obligation to respect human rights had been set out very clearly in the judgment of the ICJ in the *Barcelona Traction* case, although legal theory had referred at length to the existence of that obligation much earlier. In that judgment, the Court had stated:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In 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*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human

²⁶ For the discussion by the Commission of draft articles 1 to 7, see *Yearbook ... 2007*, vol. II (Part Two), pp. 61–69, paras. 189–265. See also *Yearbook ... 2008*, vol. II (Part Two), chap. VIII.

²⁷ Reproduced in *Yearbook ... 2009*, vol. II (Part One).

²⁸ *Idem*.

²⁹ *Idem*.

³⁰ *Idem*.

³¹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/594.

³² *Ibid.*, vol. II (Part Two), paras. 170–171.

³³ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character. [paras. 33–34 of the judgment]

That decision was of fundamental importance, because with it the Court had established the basis in jurisprudence of the general obligation to respect human rights, which was imperative for all States regardless of whether they were parties to a convention. In the same vein, the Court had noted, in its judgment of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua*, that “the absence of ... a commitment [with regard to human rights] would not mean that [a State] could with impunity violate human rights” [para. 267]. That general international obligation to respect human rights was all the more imperative when it applied to persons whose legal situation made them vulnerable, as was the case with aliens who were being expelled. For that reason, on the strength of the elements of international case law mentioned earlier and the degree of agreement on the subject in the legal literature, which was widely supported by the work of authoritative codification bodies, he proposed draft article 8, entitled “General obligation to respect the human rights of persons being expelled”, which read: “Any person who has been or is being expelled is entitled to respect for his or her fundamental rights and all other rights the implementation of which is required by his or her specific circumstances.”

37. The first right in the “hard core” of fundamental rights relating to the expulsion of aliens was the right to life. He had analysed that concept and its application in paragraphs 53 to 65 of his report and had then drawn conclusions in paragraph 66. First, the right to life of every human being was an inherent right, formally enshrined in international human rights law. As such, it applied to persons in a vulnerable situation such as aliens who were the subject of extradition, expulsion or *refoulement*. In that regard, it could be understood as an obligation on the part of the expelling State to protect the lives of the persons in question, both in the host country and in the State of destination. Such was the tenor of article 22, paragraph 8, of the American Convention on Human Rights: “Pact of San José, Costa Rica”, which imposed significant restrictions on expulsion and placed an obligation on the expelling State to protect the right to life of the alien. Secondly, the right to life did not necessarily imply the prohibition of the death penalty or of executions. It was certainly the case in terms of treaty law and regional jurisprudence in Europe that any extradition or expulsion to a State where the person concerned might suffer the death penalty was in and of itself prohibited. However, it would not be appropriate to generalize the rule, since it was not a customary norm, and many regions of the world had yet to follow European practice. Thirdly, a State that had abolished the death penalty could not extradite or expel to another country a person sentenced to death without having previously obtained guarantees that the death penalty would not be carried out in that instance; however, that obligation applied only to States that had abolished the death penalty. On the basis of those conclusions, he proposed draft article 9, entitled “Obligation to protect the right to life of persons being expelled”, which read:

“1. The expelling State shall protect the right to life of a person being expelled.

“2. A State that has abolished the death penalty may not expel a person who has been sentenced to death to a State in which that person may be executed without having previously obtained a guarantee that the death penalty will not be carried out.”

38. The second right comprising the hard core of fundamental human rights was the right to dignity. The concept of dignity had been the subject of great interest in recent legal literature. At the international level in particular, the concepts of human dignity and fundamental rights had emerged and developed concomitantly. In that process, dignity was both a justification and a framework principle within which other rights were forged. As the ethical and philosophical foundation of fundamental rights, the principle of respect for human dignity provided the basis for all other individual rights. He drew attention in that connection to the various international instruments that he analysed in paragraphs 69 to 72 of his report. It was fair to say that international jurisprudence had reinforced the positive quality of the concept of human dignity in international human rights law in the decision rendered by the Trial Chamber of the International Tribunal for the Former Yugoslavia in the *Furundžija* case. Human dignity was a fundamental precept in human axiology that conveyed the concept of the absolute inviolability of fundamental rights, or the “hard core” of human rights. It was thus, in addition to the right to life, which was a basic right, a fundamental right of every human being. Accordingly, it appeared that the rule did exist and that it could be codified, and that had led him to propose, in paragraph 72 of his report, draft article 10, entitled “Obligation to respect the dignity of persons being expelled”, which read:

“1. Human dignity is inviolable.

“2. The human dignity of a person being expelled, whether that person’s status in the expelling State is legal or illegal, must be respected and protected in all circumstances.”

Greater weight could be lent to the expelling State’s obligation to respect human dignity by reworking the second paragraph. If the Commission decided to refer that draft article to the Drafting Committee, that paragraph could be reformulated to read: “The expelling State must respect and protect the dignity of a person being expelled in all circumstances, irrespective of whether that person is legally or illegally present in its territory.”

39. The third obligation related to the individual’s right to integrity, a necessary precondition of which was the prohibition of torture and of cruel, inhuman or degrading treatment or punishment embodied in the International Covenant on Civil and Political Rights. That prohibition was backed up by a wide range of international legal instruments, as well as by international and regional jurisprudence, especially the case law of the European Court of Human Rights, to which reference was made in paragraphs 75 and 76. With regard to torture, one could cite, in addition to the *Furundžija* case, which he had already mentioned, the case of *Mutombo v. Switzerland*, which was described in

paragraphs 84 to 87 of the report, as well as other decisions on the subject which were discussed in paragraphs 88 to 119, especially the *Delalić* case, which had preceded the *Furundžija* case. In the light of those precedents, in paragraph 120 he proposed draft article 11, entitled “Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment”, which read:

“1. A State may not, in its territory, subject a person being expelled to torture or to cruel, inhuman or degrading treatment.

“2. A State may not expel a person to another country where there is a serious risk that he or she would be subjected to torture or to cruel, inhuman or degrading treatment.

“3. The provisions of paragraph 2 of this article shall also apply when the risk emanates from persons or groups of persons acting in a private capacity.”

40. The notion of “serious risk” in paragraph 2 was drawn from case law. Paragraph 3 was likewise based on legal precedent, namely a case involving a Colombian national who was to have been expelled to Colombia, where he would have been likely to be subjected to cruel treatment not by the Government of Colombia but by drug cartels. Thus the risk might stem from the State but also from clearly identified groups of private individuals, and he had considered those developments to be sufficiently significant and interesting to form the subject of proposals for codification. The case law likewise stipulated that children should receive special protection; that was apparent from the analysis contained in paragraphs 121 to 127 of the report, which rested chiefly on the ruling delivered in the case of *Ana Cajamarca Arízaga and her daughter Angélica Loja Cajamarca v. Belgium*, where the specific protection that must be enjoyed by children in such circumstances had been distinguished from that to which adults were entitled. In the *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* judgement, the European Court of Human Rights had found Belgium guilty of inhuman and degrading treatment because it had detained a five-year-old child for two months in Transit Centre No. 127. After studying that decision from the point of view of the Convention on the Rights of the Child and regional child protection instruments, the Special Rapporteur had been led to propose draft article 12, entitled “Specific case of the protection of children being expelled”, which read:

“1. A child being expelled shall be considered, treated and protected as a child, irrespective of his or her immigration status.

“2. Detention in the same conditions as an adult or for a long period shall, in the specific case of children, constitute cruel, inhuman and degrading treatment.

“3. For the purposes of the present article, the term ‘child’ shall have the meaning ascribed to it in article 1 of the Convention on the Rights of the Child of 20 November 1989.”

41. The fourth obligation related to the right to family life of the person being expelled, which was embodied

in international legal instruments and on which case law, especially that of the European Court of Human Rights, had placed great emphasis. He had listed the universal and regional legal instruments which enshrined that right in paragraphs 128 to 130 of his report, and he had examined the relevant jurisprudence in paragraphs 131 to 146, where he had focused in particular on the precedents established by the Human Rights Committee, namely in *Canepa v. Canada* and *Stewart v. Canada*. The European Court of Human Rights had taken that jurisprudence a step further in several cases, for example, in *Abdulaziz et al. v. the United Kingdom* and *C. v. Belgium*, which he had considered in paragraph 133, showing how jurisprudence had developed and how a distinction had emerged between private and family life. He therefore proposed in paragraph 147 draft article 13, entitled “Obligation to respect the right to private and family life”, which read:

“1. The expelling State shall respect the right to private and family life of the person being expelled.

“2. It may not derogate from the right referred to in paragraph 1 of the present article except in such cases as may be provided for by law and shall strike a fair balance between the interests of the State and those of the person in question.”

42. That notion of a fair balance between the interests of the State and those of the individual in question derived directly from the jurisprudence of the European Court of Human Rights which, of all the universal and regional courts, was the one that had the most abundant and highly developed case law on the notion of a right to private and family life. It went without saying that if the Commission decided to refer that draft article to the Drafting Committee, it would be necessary to clarify the content of that notion and the criteria used by the Court in such cases.

43. The last right that he had singled out was the right to non-discrimination, which encompassed two elements: first, the alien being expelled must not be subjected to discrimination *vis-à-vis* nationals of the expelling State and must enjoy the same fundamental rights; and, second, there must be no difference in treatment among aliens being expelled. He had examined that principle in the light of the advisory opinion of the Permanent Court of International Justice (PCIJ) on *Settlers of German Origin in Poland* and of its judgment in *Minority Schools in Albania*. In paragraphs 149 to 151 of his report he had then scrutinized international human rights instruments, almost all of which incorporated that principle. He had subsequently considered the way in which the principle was construed in international jurisprudence, in particular that of the Human Rights Committee in the case of *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, showing how the Committee had interpreted the principle of non-discrimination; in that instance the discrimination had been based on sex. On 28 May 1985, the European Court of Human Rights had then followed the position taken by the Human Rights Committee in the Mauritian women case in its judgement in *Abdulaziz et al. v. the United Kingdom*. His analysis of that jurisprudence had led him to propose, in paragraph 156 of his report, draft article 14, entitled “Obligation not to discriminate”, which stated:

“1. The State shall exercise its right of expulsion with regard to the persons concerned without discrimination of any kind, on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

“2. Such non-discrimination shall also apply to the enjoyment, by a person being expelled, of the rights and freedoms provided for in international human rights law and in the legislation of the expelling State.”

44. In conclusion, he explained that, owing to the deadline for the submission of his report, he had been unable to investigate the principle of prohibiting disguised expulsion. He would deal with that point in an addendum that could be considered at the second part of the Commission's sixty-first session, and he would tackle procedural questions in his sixth report.

The meeting rose at 11.55 a.m.

3003rd MEETING

Tuesday, 12 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Expulsion of aliens (*continued*) (A/CN.4/604, A/CN.4/606 and Add.1, sect. E, A/CN.4/611, A/CN.4/617, A/CN.4/618)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the fifth report on expulsion of aliens (A/CN.4/611).

2. Ms. ESCARAMEIA commended the Special Rapporteur for the thoroughness of his research and endorsed his decision to consider both the limits relating to the obligation to respect the human rights of persons being expelled and some practices that were prohibited by international law on expulsion.

3. With regard to draft article 8, she wished to raise two basic issues. First, it was not entirely clear what criterion had been used to establish the list of fundamental or “hard-core” rights which persons who had been or were being expelled enjoyed. If, as stated in paragraph 37, the

operative criterion for identifying such rights was their inviolability and if, as the report seemed to imply, their inviolability was related to their non-derogability, then it was hard to understand why the Special Rapporteur had not included in his list of fundamental rights the prohibition of slavery, *nullum crimen sine lege, nulla poena sine lege*, the right to legal personality, freedom of thought and religion or any mention of the judicial guarantees that protected those rights. All those rights were generally recognized as non-derogable in the three major international instruments the Special Rapporteur had cited by way of example.

4. Secondly, she disagreed with the general principle in draft article 8 that persons being expelled were entitled to respect of only their fundamental rights and rights whose implementation was required by their specific circumstances. Persons being expelled were human beings like all others, and even if it was factually impossible for them to exercise certain rights, that did not change the fact that they theoretically possessed those rights. She therefore suggested that draft article 8 should contain a statement to the effect that any person being expelled was entitled to respect for all of his or her human rights.

5. She had no argument with the contents of draft article 9 or the justifications provided by the Special Rapporteur in his report. Nevertheless it seemed that neither the report nor the text of the draft article, particularly paragraph 2, was entirely clear as to whether the issue being discussed was expulsion or extradition. Her impression was that the draft article referred to extradition, and she thought that the matter could perhaps be clarified in the commentary.

6. Turning to draft article 10, she concurred with the Special Rapporteur's assessment that human dignity was broader than an individual right, constituting a general principle that provided the basis for all other individual rights.

7. Drawing attention to paragraph 78 of his report, she noted that the Special Rapporteur made reference there to a norm that prescribed that there should be no derogation from the prohibition of torture and inhuman or degrading treatment, even in time of war or other public emergency threatening the life of the nation. She wondered whether, in the Special Rapporteur's opinion, that norm gave rise to rights of *jus cogens* and, if so, what specific rights were involved. She also sought clarification as to whether the Special Rapporteur considered those rights to be among the fundamental rights enumerated in paragraph 52 of his report.

8. Furthermore, she was surprised to note that among the many references that the Special Rapporteur had included to international instruments and case law relating to the prohibition of torture, he made no mention of the most recent negotiations on the definition of torture as a crime against humanity in the Rome Statute of the International Criminal Court. Having personally been involved in those negotiations, she recalled that a particular effort had been made not to stipulate in that definition any requirement of motivation or of exercise of a public function on the part of the torturer. According to that definition, a victim

had only to be in the custody of the torturer, who might or might not be exercising a public function and who might or might not have had any motivation to commit the torture.

9. In draft article 11, she proposed that the phrase “of paragraph 2”, should be deleted from paragraph 3 so that the provisions of both paragraphs 1 and 2 would apply when the risk of torture emanated from persons or groups of persons acting in a private capacity. She also had a problem with the standard of “serious risk” proposed by the Special Rapporteur in paragraph 2, as it seemed to be higher than the standard set in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which referred to “substantial grounds for believing” that the person concerned would be in danger of being subjected to torture. In addition, in the various cases of the European Court of Human Rights cited by the Special Rapporteur, such as *Cruz-Varas and Others v. Sweden*, *Vilvarajah and Others v. the United Kingdom* and *N. v. Finland*, the standard mentioned was “real risk”, which was also lower than “serious risk”. Consequently, her preference would be to replace the word “serious” in paragraph 2 with either “real” or even “substantial”.

10. With regard to draft article 12, on the protection of children being expelled, she suggested that the word “child” in paragraph 1 should be qualified in order to highlight the fact that what was intended was the legal definition of the child, since legal and non-legal definitions did not always coincide perfectly.

11. In draft article 13, she had a preference for inserting the word “international” before “law” in paragraph 2, which would have the effect of limiting derogations provided for in domestic law to those also provided under international law.

12. In draft article 14, on the obligation not to discriminate, the Special Rapporteur listed various grounds for discrimination. In her view, there were at least two additional grounds—disability and age—that should be added, as they elicited no controversy and, regrettably, were common bases for discrimination in cases of expulsion. Moreover, in various places in his report the Special Rapporteur had referred to those grounds when providing examples of legal instruments and case law.

13. The reference to non-discrimination in paragraph 2 seemed to concern more a principle than an individual right, and she suggested that it should be moved and inserted after draft article 8, on the general obligation to respect the human rights of persons being expelled.

14. Mr. VARGAS CARREÑO commended the Special Rapporteur for his excellent report, which reflected an in-depth knowledge of European, inter-American and African instruments on the expulsion of aliens as well as the cases in which those instruments had been used. Regional solutions were particularly relevant when considering the topic of expulsion of aliens. As in previous reports, the Special Rapporteur had taken as his starting point the notion that the expulsion of aliens was governed primarily by the domestic law of the States concerned, despite the

fact that there were norms of international law that must be respected and that certain practices could be prohibited or banned by international law. He would limit his own comments to the six draft articles proposed by the Special Rapporteur.

15. Although he was satisfied with both the text of draft article 8 and its justification, the important distinction made in that article by the Special Rapporteur between persons who had been expelled and persons who were being expelled had not been maintained elsewhere in the draft articles where the distinction might also be applicable. While he supported the inclusion of provisions on most of the rights suggested by the Special Rapporteur, he believed that the draft articles must include other rights, particularly in the case of draft article 8, where reference was made both to persons who had been expelled and to those who were in the process of being expelled. Some of the additional rights, such as those mentioned by Ms. Escarameia, belonged to the non-derogable hard core, while others could be considered fundamental in the context of the expulsion of aliens. It seemed essential, for example, to include a provision on the need to guarantee the right to recourse to a court of law so as to ensure that persons who had been expelled or were being expelled benefited from procedural safeguards during the expulsion process.

16. The text of draft article 9 was acceptable and, in principle, ought to be endorsed by the Commission. He could not, however, say the same for draft article 10. Although there was no question that the principle of respect for human dignity was, as the Special Rapporteur had noted in his report, the ethical and philosophical underpinning of all human rights, he questioned the advisability of including separate provision on it as a distinct category of rights. It might be preferable to include a reference to human dignity in the preamble or in other provisions of the draft articles.

17. A provision such as draft article 11, which protected expellees from torture and cruel, inhuman or degrading treatment, was vital because it was essential both to protect persons during the expulsion process and to ensure that they were not sent to a country where there was a serious risk of their being subjected to torture or to cruel, inhuman or degrading treatment. Both objectives were achieved by the first two paragraphs of draft article 11. On the other hand, it was inadvisable to prohibit expulsion in paragraph 3 when such a risk emanated from a person or group of persons acting in a private capacity because, according to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at least one of the torturers must be a public official, acting either in an official capacity or with the consent or acquiescence of the State. The Inter-American Convention to Prevent and Punish Torture contained a similar provision. In other words, those conventions did not encompass action performed in a personal capacity.

18. Admittedly, when the Rome Statute of the International Criminal Court had been adopted in 1998, that instrument had redefined torture in such a way that, under exceptional circumstances, it could be deemed to have been committed by a private individual. However, draft

article 11, paragraph 3, did not contain any reference to such exceptional conditions, which in any case rarely occurred in practice. Moreover, the broad terms in which paragraph 3 had been cast might pose difficulties for a State that had to reach a decision on expulsion, and they fell short of one of the goals of the draft articles, namely that of reconciling international human rights standards with the legislation and sovereignty of the expelling State.

19. Referring to paragraph 97 of the report, which outlined the findings of the European Court of Human Rights in the case of *Cruz Varas and others v. Sweden*, he paid a tribute to the admirable conduct of Sweden during the Pinochet dictatorship, when that country had given asylum and refuge to hundreds of Chileans. The case cited in that paragraph, which the Special Rapporteur had done well to include, demonstrated the need to strike a balance in resolving cases of expulsion.

20. He was grateful to the Special Rapporteur for the inclusion of draft article 12 on the protection of children being expelled. He was in full agreement with the three paragraphs proposed, which approached that important matter in a suitable manner.

21. Turning to draft article 13 (Obligation to respect the right to private and family life), he said that the maintenance of family links was a vital legal interest of expellees that merited protection. Although the right to private life was clearly a human right which must be safeguarded, it did not always have a direct bearing on the question of the expulsion of aliens. Conversely, it was essential to defend the family unit in that context and to prevent, insofar as possible, expellees from being separated from their nuclear families. He therefore proposed that the reference to the right to private life in the first paragraph of draft article 13 should be deleted, leaving only the reference to the right to family life. It would then be advisable to add a new paragraph to the draft article stipulating that when States decided to expel an alien, they must take into account family ties to permanent residents of the expelling State and the length of time the alien had resided in that State. There was a precedent for such a clause in international treaty law. With the addition of a new paragraph, existing paragraph 2 would then become paragraph 3.

22. His objections to draft article 14, although serious, related more to the form of that provision: in his view, the general obligation not to discriminate, which was acquiring greater weight in international human rights law, should relate to more than just a State's right of expulsion and should be established as one of the underlying principles of the draft articles. The draft articles must make it clear that an expulsion could never be valid if it was founded on discrimination on grounds of race, sex, language, religion, national origin or other status. He therefore suggested that the first paragraph should be replaced with one prohibiting the expulsion of aliens based on discrimination *vis-à-vis* the nationals of the expelling State.

23. The Special Rapporteur had begun his report by focusing on the "hard core" of rights from which no derogation was permitted. In the sphere of expulsion there were, however, other rights that were extremely important even if they did not amount to fundamental rights. Some

of those rights were embodied in international instruments such as the Declaration on the human rights of individuals who are not nationals of the country in which they live, contained in General Assembly resolution 40/144 of 13 December 1985. Accordingly, in subsequent reports the Special Rapporteur might wish to investigate the rights of aliens who had been expelled from the country in which they had been living. There were two rights in particular which ought to be codified and progressively developed in that connection. The most important right was the right of any alien who had been, or was being, expelled to file an appeal with a judicial authority of the expelling State on the grounds that the expulsion was inconsistent with the requirements of domestic law or of due process. Provision had already been made for such a right of appeal in the International Covenant on Civil and Political Rights and in the American Convention on Human Rights: "Pact of San José, Costa Rica".

24. Another important right of expellees that deserved protection was the right to property. Unfortunately, in practice there were cases in which expellees had also had their property confiscated. The draft articles should not tackle such complicated issues as foreign investments or the nationalization or expropriation of foreign assets; however, if they were to be useful and efficacious, they should deal with the confiscation of expelled aliens' property. He looked forward to finding draft articles on those subjects in forthcoming reports.

25. Mr. GAJA said that the fifth report on the expulsion of aliens took the Commission to the heart of the subject matter and contained a wealth of references to the precedents of human rights bodies, as well as to doctrine. Yet, despite the fact that the Special Rapporteur had not shied away from discussing difficult theoretical problems, such as whether a distinction should be drawn between core and other human rights, his general line of enquiry was not entirely satisfactory: while many relevant questions were discussed, they were not always placed in an appropriate context, and the relevance of some of the other issues considered was at times unclear.

26. An examination of the expelling State's obligations to protect human rights showed that most of those obligations applied to nationals and aliens alike, irrespective of whether the alien in question was subject to expulsion proceedings. The State in whose territory an alien was present was under an obligation to respect all the human rights of that person, not just the core rights, to the extent that general international law or human rights treaties ratified by that State provided for such an obligation. In that connection, he agreed entirely with the comments of Ms. Escameia and Mr. Vargas Carreño. The Commission might wish to state that principle somewhere in the draft articles, perhaps in wording along the lines of the text suggested in draft article 8, but care would have to be taken to ensure that the wording chosen contained nothing that might detract, even by implication, from the rights that a person facing expulsion already enjoyed under international law.

27. It seemed unnecessary to discuss which human rights obligations lay with the expelling State since those obligations could vary: there were certain rights

that existed if only general international law applied, but additional rights were also guaranteed if treaties had been ratified by the State concerned. As the Commission was not in a position to list all the rights imposed on States by general international law, it should concentrate on the rights of particular relevance to expulsion, such as rights pertaining to conditions of detention pending expulsion, for example. The specific reference in draft article 12 to the protection that should be afforded to children in detention prior to expulsion was a good idea, but the problem was much more general in nature and arose in many other cases of pre-expulsion detention. Extensive case law already existed, for example, on the permissible length of such detention. Issues of particular relevance to a person who was about to be expelled should be dealt with in the draft articles from the perspective of general international law. The text should likewise encompass procedural rights and the remedies available to persons facing expulsion.

28. The Commission should also enquire into the conditions under which expulsion could be regarded as lawful under international law. Some of those conditions had to be fulfilled by the expelling State irrespective of the situation prevailing in the receiving State. They concerned, *inter alia*, the right to non-discrimination, protection of the right to family life and the fact that expulsion had to be in accordance with law, as stipulated in many treaty provisions.

29. The right to non-discrimination appeared to be relevant to expulsion only if it referred to non-discrimination among aliens. He therefore found some passages of paragraph 151 of the report that referred to non-discrimination between aliens and nationals somewhat disturbing, since nationals should not on the whole be subject to expulsion. The point was that there should be no discrimination among aliens, such as had occurred in the *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius* case, which had been considered by the Human Rights Committee.

30. The difficulty of stipulating that the right to family life had to be protected in order for an expulsion to be lawful lay in the fact that this right appeared to be protected mainly within the framework of the European Convention on Human Rights, although the report had also quoted the findings of the Human Rights Committee in the *Stewart v. Canada* case. The European Court of Human Rights had given a very restrictive interpretation of that right in its jurisprudence, and draft article 13, paragraph 2, which spoke of striking “a fair balance between the interests of the State and those of the person in question”, did not afford the expellee much protection either.

31. A more general question concerned the nature of the instrument being drafted by the Commission. If the draft articles were intended as a statement of general international law, the Commission was probably going too far by including provisions on the protection of family life. On the other hand, if it was drafting a human rights instrument that a State could accept or reject, it was not going far enough, because it was adding very little to existing instruments. He assumed that the Commission was taking the first course of action, in which case it should emphasize that the draft articles were not intended to be

a norm applicable to all cases of expulsion wherever they occurred, but only a minimum standard, and that it was expected that States would have further obligations under regional treaties and universal conventions.

32. The condition that decisions on expulsion must be taken in accordance with law, as required by the International Covenant on Civil and Political Rights, the American Convention on Human Rights: “Pact of San José, Costa Rica” and the African Charter on Human and Peoples’ Rights, although mainly a procedural requirement, also had a substantive element in that it implied a reference to the substantive conditions set forth in the relevant municipal law. Hence expulsion must not be arbitrary but must comply with the relevant provisions of municipal law. That condition should be added to the others which he had already mentioned.

33. Much of the report concerned conditions relating to the risk of infringement of rights in the receiving State. Draft article 11 was designed to ensure that even if the first set of conditions for expulsion had been satisfied, a person could not be sent to a country where the prevailing conditions would place his or her life and safety in danger. A real problem in the context of expulsion lay in the situation obtaining in receiving countries. Since it was necessary to ascertain that a potential expellee would not face an unacceptable risk if repatriated, many Governments were faced with the conundrum of deciding what to do when they could not find a country to which they could expel the person in question.

34. Practice had so far focused mainly on the risk of torture and cruel or inhuman treatment. According to General comment No. 20 of the Human Rights Committee,³⁴ to which an express reference would be appropriate, States must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. While there was indeed such a prohibition in draft article 11, paragraphs 2 and 3, it should be expanded to cover some other rights. Something should also be said about the degree of risk and the extent to which assurances from the receiving State could be viewed as justification for expulsion.

35. By way of summing up, he suggested that the draft articles should be restructured to indicate, first of all, that they contained minimum conditions regarding expulsion and that an alien enjoyed all the rights granted by general international law and human rights treaties. Something more specific should be said about detention. Article 12 should be expanded to consider not only children but all persons detained pending expulsion. Lastly, the conditions for expulsion should be expanded, starting with the relevant aspects of article 9, paragraph 2, and articles 11, 13 and 14.

36. He suspected that the Special Rapporteur would not be too pleased by his suggestions, but they would in fact lighten his burden considerably, saving him from the

³⁴ Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, Annex VI, p. 193.

nearly impossible task of identifying core rights under general international law and allowing him to focus on those rights that were relevant to the expulsion of aliens. He had full confidence in the ability of the Special Rapporteur to accomplish that task successfully.

37. Mr. McRAE thanked the Special Rapporteur for his fifth report, which was a very interesting study of the development of certain aspects of human rights law and of the debate over the concept of fundamental rights. As was the case with all of the Special Rapporteur's work, it was closely researched and carefully argued; however, the direction being taken raised some concerns. He agreed that it was necessary to move from the basic proposition of a right to expel to the limitations placed on that right by international and human rights law, yet the Special Rapporteur's proposals seemed both too limited where the scope of the rights considered was concerned and too detailed in their articulation of the content of certain rights.

38. The draft articles set out a series of rights of expelled persons, but not in terms of the obligations they imposed on States. Some of the draft articles apparently applied to the expelling State, while others, more general, presumably applied to both the expelling State and the receiving State. It would thus have been clearer if the obligations placed on expelling States had been more clearly differentiated from those of receiving States. He agreed with the Special Rapporteur's starting point, namely that persons being expelled were entitled to respect for their human rights, but he was not convinced that those rights should be restricted to a category of "fundamental" human rights.

39. In paragraphs 16 and 17 of the report, the Special Rapporteur raised the issue of whether aliens being expelled were entitled to enjoy all human rights or whether the specific nature of their status required that only their fundamental rights be guaranteed. Putting aside the interesting debate about what constituted "fundamental" rights, he wondered why the rights of an alien should be curtailed in that way. The Special Rapporteur's argument in paragraph 17 was that it was unrealistic to require that a person being expelled be able to benefit from all the human rights guaranteed by international instruments, and that it seemed more realistic and more consistent with State practice to limit the rights guaranteed to fundamental rights.

40. He wondered why it was more realistic to limit rights. A State that denied medical treatment to an individual for the duration of an expulsion procedure was surely violating human rights, so why did the same not hold true if the State denied access to education? A number of rights that the Special Rapporteur had listed were perhaps not relevant during the expulsion process, but it was not clear that a State had the right to deny them to an alien *ab initio* simply because expulsion was in progress. The 1977 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, contained in General Assembly resolution 40/144, did not contemplate that those rights could be taken away simply through the commencement of an expulsion process. It would be interesting to know whether there was really any State practice to show that States routinely

denied such rights to individuals who were in the process of being expelled.

41. The basic proposition that was truly relevant in the context of the topic was that any person who had been or was being expelled was entitled to respect for any applicable human rights. It was because the rights were applicable to the individual, and not because they were fundamental, that they should be respected. In paragraph 14 of his report, the Special Rapporteur cited the judgement of the European Court of Human Rights in the *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* case to support the proposition that a State must respect the fundamental rights of aliens, including children, even during expulsion proceedings. In that case, however, the European Court had said that the provisions of the European Convention on Human Rights and the Convention on the Rights of the Child were relevant, not because they were fundamental but because they were applicable to Belgium with respect to the particular case and the individuals involved.

42. The proposition that an expelled individual or a person in the process of being expelled was entitled to respect for all applicable human rights was valid whether one was speaking of the expelling State or of the receiving State. There was no reason to think that a receiving State could deny an individual rights that did not fall within the category of fundamental rights just because he or she had arrived in the country by way of expulsion from another country. Such individuals should enjoy the same right to work, to freedom of assembly and to health regardless of whether they had arrived by way of expulsion from another country or by some other means.

43. Thus, draft article 8 (General obligation to respect the human rights of persons being expelled) should stipulate that such persons were entitled to respect for all "applicable human rights", not just "fundamental rights". It was not clear whether the reference to "all other rights the implementation of which is required by his or her specific circumstances" was to be construed as meaning all applicable human rights. If that was the case, then there was no need to refer to "fundamental rights".

44. His questioning of the appropriateness of limiting the rights protected to "fundamental rights" had implications for several other draft articles. If the rights protected were not to be limited to fundamental rights, then there was no need to list the various rights separately. It might be useful to refer in the commentary to the types of rights that might be more relevant than others without drawing up an exhaustive list, which Ms. Escameia had shown would be difficult to do. There was no rationale for including a partial list, either. Mr. Gaja's suggestion of focusing on rights applicable to the receiving State in the context of expulsion seemed better than the more general list of rights currently in the draft. Moreover, the draft articles should not enter into difficult and perhaps controversial questions about the definition and scope of particular human rights that clearly had implications well beyond the topic.

45. Since he did not see any need for provisions on specific rights, he would not comment on draft articles 9 through 11 and 13. However, he did think a case could

be made for retaining the reference to the treatment of children in draft article 12, paragraph 1. Draft article 14, on non-discrimination, was also an important provision and he supported it, although he agreed with Mr. Gaja that it was about discrimination between aliens rather than between aliens and nationals, amounting to a kind of “most-favoured-alien” provision. In addition, it indicated an appropriate direction for other draft articles, as Mr. Vargas Carreño had pointed out, by looking at the procedural guarantees States must observe when expelling aliens.

46. In sum, he was opposed to proceeding on the basis that persons subject to expulsion were entitled only to the protection of “fundamental human rights”. In the footnote to paragraph 8, regarding “fundamental rules of international law”, the Special Rapporteur indicated that he had abandoned the idea of speaking about fundamental rules of international law because of comments about the difficulty in distinguishing between rules that were fundamental and those that were not. That was a welcome development, and he believed that the adjective “fundamental” should likewise be eliminated when referring to human rights. The draft articles would then simply guarantee the protection of all applicable or relevant human rights during the expulsion process.

47. Mr. NIEHAUS said that the Special Rapporteur’s fifth report, remarkable in its clarity and depth of legal analysis, was a valuable contribution to the elaboration of legal rules that placed the right to expel within the framework of the fundamental principles of international law—in other words, respect for the fundamental rights of the human individual. The basic principle was that all persons, regardless of their race, ethnic origin, sex, religion or nationality, were equally entitled to enjoy their fundamental rights by virtue of what had been called the universal identity of human beings. That principle had been amply developed in the legal literature, judicial decisions and international legal instruments.

48. Indisputably, a fundamental element of the topic under consideration was that aliens present in the territory of a State, whether lawfully or unlawfully, who were about to be expelled, must have full assurances of respect for their fundamental rights. Alien status and the prospect of expulsion made the individual particularly vulnerable to the danger that that principle would not be upheld. There was thus a need for the prompt elaboration of national and international legal standards to protect such individuals. While in principle an alien being expelled ought to be able to count on respect for all the inherent rights of human beings, the Special Rapporteur maintained in paragraph 17 of his report that that was unrealistic, and that it would be more consistent with State practice to limit the rights guaranteed during expulsion to fundamental human rights, a view with which he agreed. The problem lay in determining what constituted fundamental rights and which were the most important among them. The question was a simple one, but the answer was not.

49. The use of different terms to refer to fundamental rights further complicated the task of identifying them, as did the argument of many legal experts that classifying rights as either first-tier—i.e. basic or fundamental—or

second-tier—i.e. less important or complementary—might undermine the very concept of human rights. The Special Rapporteur was right in noting that—despite some reluctance, the idea that a category of inviolable human rights existed had ultimately prevailed. Although a precise definition and detailed list of such rights were lacking, there was a clear sense that within the broader notion of human rights there existed rights that were essential and fundamental to the human person.

50. It was more difficult, however, to identify within those fundamental human rights a so-called “inviolable core”, a small set of rights from which there could be no derogation, which represented the minimum that was needed to protect the physical integrity and security of the individual, and which were binding everywhere and on all authorities. Despite criticism of that idea, and he did not entirely accept the Special Rapporteur’s view in paragraph 31 that such criticism was ideological rather than legal, he could accept the notion that a hard core of rights did exist.

51. The next, more difficult question was how to determine which rights fell into that exclusive category. The legal literature suggested a variety of answers, and it was hard to discern a consensus on such rights in international legal instruments. The Special Rapporteur had suggested six rights that might form the hard core. Some of them unquestionably did, such as the right to life, for example, but the choice of others would be more problematic.

52. Turning to the texts proposed by the Special Rapporteur, he said that draft article 8 (General obligation to respect the human rights of persons being expelled) was acceptable and constituted a logical preamble to the following articles. Draft article 9, on protection of the right to life, was also logical and valuable, for as the Special Rapporteur noted in paragraph 66 (a) of his report, the right to life was by definition an inherent right. Thus, paragraph 1 of draft article 9 was entirely acceptable; paragraph 2, however, was worded in a confusing manner, although that might be a translation problem. The reference to a State “that has abolished the death penalty” might be better phrased to read: “A State in which the death penalty does not exist”. He was also concerned by the lack of any mention, of what a “guarantee that the death penalty will not be carried out” might consist of.

53. In draft article 10 (Obligation to respect the dignity of persons being expelled), the definition or content of the term “dignity” posed a major problem. In reality, the term was so broad as to cover respect for all fundamental rights, so that to cite respect for the dignity of persons as part of the hard core of fundamental rights was equivalent to making all human rights part of the hard core, since they were all integrally bound up with human dignity. The problem could be avoided by using a term other than “dignity” or by spelling out what the term covered, and that would not be an easy task.

54. Draft article 11, on the obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment, paralleled the obligation spelled out in draft article 9 to protect the life of persons being expelled, and he had no difficulties with it. He also had no problems

with draft article 12, which dealt specifically with the protection of children facing expulsion. The obligation to respect the private and family life of persons being expelled was less clearly explained than the obligations relating to the right to life and protection from torture, but he had no objection to its inclusion in the hard core of fundamental rights or to its treatment in draft article 13.

55. The obligation not to discriminate set out in draft article 14 should obviously be reflected in the special group of inviolable human rights, but he wished to point out that both the draft article and the majority of international instruments failed to cite sexual orientation among the grounds for discrimination. One exception was the Charter of Fundamental Rights of the European Union, as the Special Rapporteur pointed out in paragraph 150, where he went on to say that the current state of the law of Western countries was far from reflecting the general situation with regard to sexual orientation, and in the related footnote, where he referred to numerous precedents in European and North American case law and the fact that many countries in Africa, the Arab world and Asia had retained their laws penalizing homosexuality. The Special Rapporteur's intention in making those remarks, however, was not clear. In draft article 14, he gave a list of prohibited grounds for discrimination that followed the best-known precedents. Yet it might be more in keeping with the Commission's responsibility for the progressive development of international law to adopt a more modern and comprehensive approach, such as that used in the Charter of Fundamental Rights of the European Union. That instrument also mentioned age and disability, two additional criteria that had been suggested for inclusion in draft article 14 by Ms. Escarameia.

56. Mr. SABOIA thanked the Special Rapporteur for his well-researched and clear fifth report and recalled that at its previous session, the Commission had decided that it would not be necessary to have a draft article dealing with the issue of persons of dual or multiple nationality.³⁵ The debate had been helpful in clarifying the Commission's understanding that the principle of non-expulsion of nationals was equally applicable to dual and multiple nationals.

57. The fifth report undertook to examine the legal obligations that a State purporting to expel an alien must meet, which derived from the rules of international human rights law and other provisions of international law that prohibited certain practices. In paragraphs 10 to 14 of the report, the Special Rapporteur rightly drew attention to the basic principle that all human beings, whether nationals or aliens, were entitled to the protection of their human rights, regardless of the lawfulness of their status in the country, even during expulsion proceedings. In support of that principle, the Special Rapporteur referred to the judgement of the European Court of Human Rights in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (2006), in which the Court recalled that in exercising their sovereign right to control their borders and the entry and stay of aliens, States must comply with their international obligations, including those established in the European Convention on Human Rights.

³⁵ See *Yearbook ... 2008*, vol. II (Part Two), paragraphs 191–197, especially paragraph 195.

58. In discussing the concept of “fundamental rights” in the following paragraphs, however, the approach taken by the Special Rapporteur was problematic. He started, in paragraph 17, by saying that it would be “unrealistic to require that a person being expelled be able to benefit from all the human rights guaranteed by international instruments and by the domestic law of the expelling State”. That appeared to contradict the principle laid down by the European Court of Human Rights and supported by the Special Rapporteur in his previous section, particularly in paragraph 14. On the other hand, as human rights were inherent, no one could lose their entitlement to those rights, irrespective of their status or condition. He also disagreed with most of the arguments developed by the Special Rapporteur regarding the indivisibility and interdependence of human rights, but he did not think it necessary to launch into a discussion of that topic at the current stage.

59. The enjoyment of some rights might, of course, be subject to certain limitations, which must be strictly essential to ensure the exercise by the expelling State of legitimate and proportional interests linked to its security and public order, and it must also be subject to judicial control. In other words, in the field of human rights it was the limitations that should be subject to a restrictive interpretation, not the rights; such limitations must also be admitted by law and be proportional to the interest of the society that was meant to be protected by them.

60. There was no reason to consider that during the expulsion process an alien should be deprived of certain economic, social and cultural rights, such as those mentioned by the Special Rapporteur in paragraph 17. That was particularly true as the expulsion process could take a long time and affect both the alien and his or her family, with consequences that might endanger their future ability to resume normal life. Important rights in that connection included the right to access to health services, to a lawyer and to information about one's legal situation. The subject of limitations on or derogations from human rights had been dealt with in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The International Covenant on Civil and Political Rights stipulated in article 4 that in time of public emergency which threatened the life of the nation, States parties could take measures derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation, provided that such measures were not inconsistent with their other obligations under international law and did not involve discrimination. Pursuant to that provision, whose threshold was very high, certain rights, such as the right to life and the prohibition of torture, could not be derogated from.

61. The concept of non-derogable rights in the Covenants was not dissimilar to the principle of “fundamental rights” or “hard core” rights which Mr. Kamto discussed in paragraphs 28 to 44 of his report, but the context in the former was one of public emergency, not expulsion of aliens. On the other hand, article 4 of the International Covenant on Economic, Social and Cultural Rights established that “the State may subject such rights only to such limitations as are determined by law only in so far as this

may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". Thus, even if the exercise of some of their rights was somehow limited, aliens did not cease to enjoy all their rights during the expulsion process, and any limitations on those rights must be restricted to what was necessary for the protection of the essential and legitimate interests of the State and must be subject to due process.

62. With regard to draft article 8 (General obligation to respect the human rights of persons being expelled), he basically agreed with the text but considered that the word "fundamental" should be deleted. A reference to possible limitations could be inserted, with the proviso that such limitations must be justified to protect legitimate interests of national security and public order, proportional to the threat perceived, and subject to due process.

63. Draft article 9 (Obligation to protect the right to life of persons being expelled), as proposed in paragraph 67 of the report, was acceptable. In paragraph 2 of that article, however, additional wording should be added to reflect the idea that expulsion to a State where the alien might be subject to the death penalty should also be prohibited—as currently worded, the draft article covered only the case of a person who had already been sentenced to death.

64. He welcomed the approach taken to the obligation to respect the dignity of persons being expelled in draft article 10, and particularly the fact that the Special Rapporteur had combined respect with protection. He therefore endorsed the proposed wording.

65. The analysis of the prohibition of torture and cruel, inhuman or degrading treatment or punishment and its effect on expulsion (para. 73) was adequate. Draft article 11 was thus acceptable on the whole, but the expression "in its territory" in paragraph 1 might provide a loophole in the prohibition of torture. In view of recent flagrant examples of torture at Guantanamo, Abu Ghraib and elsewhere, and the practice of rendition, whereby prisoners were sent to other locations in order to be interrogated under "special procedures", a more comprehensive formulation might be preferable, such as "in any territory or place under its jurisdiction or control". An alternative would be to delete the words "in its territory".

66. He endorsed the Special Rapporteur's approach to the situation of children (paras. 121–126) and the proposed text of draft article 12 on that subject. Children constituted a category of aliens who were especially vulnerable when they were about to be expelled. However, other categories should also be addressed, including women, in particular pregnant women, persons with physical or mental disabilities and the elderly. Other members of the Commission had made useful suggestions to that effect. There were international instruments that dealt with the protection of those categories of persons, and a new draft article could cover such cases.

67. He also agreed with the wording of draft articles 13 (Obligation to respect right to private and family life) and 14 (Obligation not to discriminate), although Mr. Vargas Carreño and other members had argued that the notion

of non-discrimination should refer to a more general prohibition that should be covered at the beginning of the draft articles.

68. Mr. KAMTO (Special Rapporteur) said that he would not respond at the current stage to the substance of the comments made, but he wished to make a brief remark in order to ensure that the discussion stayed on track.

69. The topic of expulsion of aliens was unique in that it lay at the crossroads of the general rules of international law and international human rights law. It was perhaps for that reason, then, that some members had been impatient from the outset to take up certain aspects of the topic at an early stage. During the consideration of his second report³⁶ in particular, many members had expressed a preference for specifying which rights of expelled persons limited the State's right to expel, yet that could not be done until other issues had been addressed.³⁷ There must first be a debate on the overall approach of the topic. Previous speakers had also shown impatience with procedural questions, even though he had repeatedly explained that such issues would be taken up later, as would questions that were partly procedural and partly substantive in nature, such as conditions of detention. It was, of course, a fact that not all expelled persons were initially placed in detention centres; when a decision to expel was taken, some aliens were immediately removed from the national territory. Thus, the question of conditions of detention should be addressed when the Commission considered questions relating to the detention process, such as the principle of an expelled alien's right of appeal.

70. Similarly, while he agreed entirely that there could be no derogation from the right to property, that question should not be taken up at the current stage, because it did not affect all expelled aliens; it would be preferable to address it in the part of the report devoted to responsibility and to consider how diplomatic protection might help expelled persons protect that right if it was violated. The problem of when to consider certain questions arose in connection with many other issues. It was in fact difficult to give the topic structural consistency, which was not the case with the topic of responsibility of international organizations, where a model existed in the form of the draft articles on responsibility of States for internationally wrongful acts.³⁸

71. The current debate indicated that there was a problem with the approach. Should the Commission speak of a hard core of rights or of rights in general? It could decide to speed matters up by merely stating that all rights of aliens must be protected, but that would mean leaving the situation as it currently stood. The Commission must decide which core rights specifically linked to alien status must be respected without fail during the expulsion process. Yet in detention centres, on the other hand, it was essential to protect not only the hard core of human rights but also others relating specifically to the situation of

³⁶ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573. The Commission decided to postpone the discussion of this article to its fifty-ninth session, in 2007 (*ibid.*, vol. II (Part Two), p. 185, para. 252).

³⁷ *Yearbook ... 2007*, vol. II (Part Two), p. 63, paras. 206–207 and p. 65, para. 222.

³⁸ See footnote 10 above.

detainees. Thus there were clearly two schools of thought in the Commission, one maintaining that what mattered was human rights as a whole, and another arguing that there was a hard core of rights which conditioned the respect of other rights.

The meeting rose at 12.30 p.m.

3004th MEETING

Wednesday, 13 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel

1. The CHAIRPERSON welcomed Ms. O'Brien, Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, thanked her for her interest in the Commission's work and invited her to address the Commission.

2. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that a number of significant developments in connection with the Sixth Committee had taken place during the sixty-third session of the General Assembly. The Assembly, in its resolution 63/123 of 11 December 2008, had expressed its appreciation to the Commission for the work accomplished at its sixtieth session. It had particularly emphasized the completion of the first reading of the draft articles on the effects of armed conflicts on treaties³⁹ and of the second reading of the draft articles on the law of transboundary aquifers.⁴⁰ The latter articles had been taken note of, without prejudice to the question of their future adoption. The General Assembly would go back to the item at its sixty-sixth session, and States had been requested to take into account the principles embodied in the articles in their interactions. The General Assembly had also taken note of the Commission's decision to include the topics "Treaties over time"⁴¹ and "The most-favoured-nation clause"⁴² in its programme of work. In addition, it had requested the Secretary-General to prepare a report on the assistance currently provided to Special Rapporteurs and options regarding additional support of the work of Special Rapporteurs. The Assembly had also adopted resolution 63/118 of 11 December 2008

entitled "Nationality of natural persons in relation to the succession of States", a topic previously considered by the Commission.⁴³ Deciding to revert to that item in 2011, the General Assembly had invited Governments to indicate whether they deemed it advisable to elaborate a legal instrument on the question.

3. The promotion of the rule of law at the national and international levels remained one of the salient items on the United Nations agenda. In the Sixth Committee, delegations had appreciated the useful contribution made by the Commission on that topic in its report on the work of its sixtieth session.⁴⁴ In its resolution 63/128 of 11 December 2008 on the rule of law at the national and international levels, the General Assembly had reaffirmed its own role in encouraging the progressive development of international law and its codification and, *inter alia*, invited the Commission to continue to comment in its reports on its current role in promoting the rule of law. For the next three sessions to come, the Sixth Committee had selected specific subtopics for its debate: "Promoting the rule of law at the international level" in 2009, "Laws and practices of Member States in implementing international law" in 2010 and "Rule of law and transitional justice in conflict and post-conflict situations" in 2011. Throughout the United Nations system, the rule of law had become an issue of the utmost importance and efforts were being made to improve the coordination, coherence and effectiveness of related activities system-wide.

4. The criminal accountability of United Nations officials and experts on mission had been on the agenda of the General Assembly since 2006. To supplement resolution 62/63 of 6 December 2007 on criminal accountability of United Nations officials and experts on mission, in which the Assembly strongly urged all States to consider establishing jurisdiction, particularly over crimes of a serious nature, as known in their existing domestic criminal laws, committed by their nationals while serving as United Nations officials or experts on mission, the General Assembly had adopted resolution 63/119 of 11 December 2008, aimed at enhancing international cooperation to ensure the criminal accountability of United Nations officials and experts on mission. The new elements concerned, *inter alia*, mutual assistance in connection with criminal investigations and criminal or extradition proceedings, including with regard to evidence; the facilitation of the use, in criminal proceedings, of information and material obtained from the United Nations; effective protection of witnesses; and enhancement of the investigative capacity of host States. The General Assembly had decided that work on that topic should continue in 2009 in the framework of a working group of the Sixth Committee. The possibility of elaborating a legally binding instrument on the matter remained an open question.

5. The reform of the system of administration of justice at the United Nations was another salient issue on the agenda of both the Sixth and Fifth Committees. The adoption of resolution 63/253 of 24 December 2008 marked

³⁹ *Yearbook ... 2008*, vol. II (Part Two), paras. 65–66.

⁴⁰ *Ibid.*, paras. 53–54.

⁴¹ *Ibid.*, paras. 25 and 353 and annex I.

⁴² *Ibid.*, paras. 25 and para. 354 and annex II.

⁴³ For the draft articles on the nationality of natural persons in relation to the succession of States adopted by the Commission at its fifty-first session, see *Yearbook ... 1999*, vol. II (Part Two), paras. 47–48.

⁴⁴ *Yearbook ... 2008*, vol. II (Part Two), paras. 341–346.

significant progress in that area. By that resolution the General Assembly had, in particular, adopted the statutes of the new United Nations Dispute Tribunal and the United Nations Appeals Tribunal, which were to become operational as of 1 July 2009. The judges of both Tribunals, as well as three *ad litem* judges appointed to the Dispute Tribunal, had been elected by the General Assembly on 2 and 31 March 2009.⁴⁵ As a consequence of the reform, the current joint appeals boards and disciplinary committees, as well as the United Nations Administrative Tribunal, would be abolished in the course of 2009. A number of legal aspects of the reform, however, were still outstanding. They included the issue of ensuring that effective remedies were available to the various categories of non-staff personnel of the United Nations and questions of legal assistance and of the possibility of staff associations filing applications before the Dispute Tribunal. Those outstanding issues had been addressed by the Ad Hoc Committee on the Administration of Justice at the United Nations, which had met in late April 2009, and would continue to be discussed at the sixty-fourth session of the General Assembly.

6. With regard to measures to eliminate international terrorism, since 2001 a Working Group of the Sixth Committee and an Ad Hoc Committee had been exploring ways of resolving outstanding issues in the elaboration of the draft comprehensive convention on international terrorism, relating essentially to the elements to be excluded from the scope of application of the convention. In its resolution 63/129 of 11 December 2008, the General Assembly had decided that the Ad Hoc Committee would meet from 29 June to 2 July 2009 in order to fulfil its mandate.

7. At its February 2009 session, the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization had completed its consideration of the working paper submitted by the Russian Federation on fundamental norms and principles governing the introduction and implementation of sanctions imposed by the United Nations, which would shortly be submitted to the General Assembly for consideration with a view to its adoption.⁴⁶

8. As to other activities of the Office of Legal Affairs, there had been several developments in connection with the International Court of Justice during the past year. Following elections held in November 2008, three members of the Court had been re-elected and two members had been newly appointed. Following those elections and the retirement of the Court's former President, Judge Rosalyn Higgins, the new President, Judge Hisashi Owada of Japan, had visited United Nations Headquarters in April 2009 and had met with the Secretary-General, the President of the General Assembly, the Chairperson of the Fifth Committee, the Chairperson of the Advisory Committee on Administrative and Budgetary Questions and herself. In October 2008, the General Assembly had requested an advisory opinion from the Court on the *Accordance with International Law of the Unilateral*

Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo. As part of the Secretary-General's statutory duties under the Statute of the Court, the Secretariat had submitted a voluminous dossier for the Court's consideration on the matter, which could be viewed on the Court's website.

9. With regard to the International Criminal Court (ICC), 108 States were parties to the Rome Statute of the International Criminal Court⁴⁷ and 139 were signatories. The Court had been active on a number of cases relating to different situations. In the Democratic Republic of the Congo, where cooperation from the United Nations was essential, former Ituri warlords Germain Katanga and Mathieu Chui had been surrendered to the Court and the arrest warrant against Bosco Ntaganda had been unsealed. The charges against Katanga and Chui had since been confirmed, and the case was being prepared for trial. In January 2009, the case of *The Prosecutor v. Thomas Lubanga Dyilo* had entered the trial phase. The Lubanga trial, the first in the Court's short history, had been widely hailed as a historic event, which probably would not have been possible without the committed support of the United Nations, including, false modesty aside, the Office of Legal Affairs. In 2008, the Office of the Prosecutor had opened a formal investigation on the situation in the Central African Republic, in particular into allegations of rape and other acts of sexual violence against women. The arrest and surrender to the seat of the Court of Jean-Pierre Bemba Gombo by Belgian authorities on 3 July 2008 had been a major success for the Court. There had been important developments also with regard to the situation in northern Uganda, where at the request of the Government of Uganda, the Prosecutor was carrying out an official investigation. Within 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 more than two decades of conflict. While the framework final peace agreement had not yet been signed by the leader of the Lord's Resistance Army, the peace process had not failed. Following the military campaign mounted by the armed forces of Uganda, the Democratic Republic of the Congo and Southern Sudan, the Juba peace process had taken centre stage again. Beyond the fate of the surviving leaders of the Lord's Resistance Army, Uganda must now find ways to reconcile sustainable peace and its people's desire for justice. With regard to the investigation of the situation in Darfur, opened by the Prosecutor at the request of the Security Council, an arrest warrant had been issued against the President of Sudan, the third individual against whom an arrest warrant had been issued in connection with Darfur.

10. Only a few years into its existence, the ICC had emerged as the centrepiece of the international system of criminal justice. As it advanced in its judicial mission, the United Nations would accompany and support it in every respect.

11. At the heart of many judicial and non-judicial accountability mechanisms lay the dilemma of peace and justice. With the growing involvement of the United Nations

⁴⁵ See *Official Records of the General Assembly, Sixty-third Session, 76th plenary meeting (A/63/PV.76)* and *78th plenary meeting (A/63/PV.78)*.

⁴⁶ *Ibid.*, *Sixty-fourth session, Supplement No. 33 (A/64/33)*, paras. 14–20.

⁴⁷ Report of the International Criminal Court for 2007/08 (A/63/323), para. 71.

in post-conflict situations—both in facilitating the negotiations of peace agreements and in establishing judicial and non-judicial accountability mechanisms—the Organization was frequently called upon to express its position on the relationship between peace and justice, on the validity and lawfulness of amnesty, on the relationship between the ICC and other judicial accountability mechanisms, notably national ones, and on the interaction between United Nations representatives and persons indicted by international and United Nations-based tribunals who continued to hold positions of authority in their respective countries. In the past decade, countries emerging from years of internal conflicts and large-scale violations of international humanitarian law had been caught in the dilemma of peace versus justice. Peacemakers had opted for large-scale amnesties, and that had overridden, for a while at least, the need for justice. In paving the way for calling to account those responsible for genocide, crimes against humanity and war crimes, the United Nations had redefined the lawful contours of amnesty. In Angola, Burundi, Cambodia, Sierra Leone and Sudan, amnesty for genocide, crimes against humanity and war crimes had been rejected, invalidated or declared not to constitute a bar to prosecution. Justice had thus become a component of peace, although in the sequence of events it had sometimes ranked second. After a decade-long debate over how to reconcile peace and justice and whether to pursue them simultaneously or sequentially, it seemed the choice now was no longer between peace and justice, but between peace and the kind of justice.

12. With regard to matters concerning oceans and the law of the sea, in particular the tasks currently performed by the Division for Ocean Affairs and the Law of the Sea, the Commission on the Limits of the Continental Shelf (for which the Division served as secretariat) had adopted recommendations regarding the submissions made, respectively, by New Zealand, Norway and Mexico and the joint partial submission made by France, Ireland, Spain and the United Kingdom. For many States parties to the United Nations Convention on the Law of the Sea, the time period for making such submissions had expired on 12 May 2009. The Commission had received 50 submissions made by coastal States, individually or jointly, pursuant to article 76, paragraph 8, of the Convention. In addition, 39 States had submitted preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles. The Division was expecting to receive sets of preliminary information from States not in a position to fulfil the time-limit requirements pursuant to a decision adopted at the eighteenth Meeting of States Parties to the Convention. In September 2008, the Division had completed its three-year cycle of training to assist developing States in the preparation of submissions to the Commission. A total of 299 scientific and technical experts from 53 developing States had benefited from that training.

13. In the context of fisheries governance, the Division continued to report to the General Assembly on issues relating to illegal, unreported and unregulated fishing and the impact of bottom fisheries on vulnerable marine ecosystems. On the basis of a report to be prepared in cooperation with the Food and Agriculture Organization of the United Nations, in late 2009 the General Assembly would conduct a review of actions taken by States and

regional fisheries management organizations to regulate bottom fishing and protect vulnerable marine ecosystems with a view to formulating further recommendations where necessary. The Division had also begun preparations for the resumption, in 2010, of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, convened by the Secretary-General with a view to assessing the Agreement's effectiveness in securing the conservation and management of straddling fish stocks and highly migratory fish stocks.

14. With regard to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, the Division was currently preparing for the third meeting of the Ad Hoc Open-ended Informal Working Group to study those issues which would be held in 2010 and would provide recommendations to the General Assembly.

15. In order to assist States in the implementation of the provisions on marine scientific research contained in the United Nations Convention on the Law of the Sea, the Division had prepared a revised version of its earlier publication on that subject with the assistance of a group of experts, which had met in April 2009. The Division had also developed a comprehensive training manual and a training course on the implementation of ecosystem approaches to ocean management.

16. The United Nations had designated 8 June as World Oceans Day, beginning in 2009.⁴⁸ The inaugural event would include a high-level panel to discuss, in particular, challenges in fully utilizing the benefits and opportunities of the oceans.

17. The work of the Division had increasingly focused on activities taking place in areas beyond national jurisdiction. Incidents of piracy off the coast of Somalia had raised a number of legal issues relating, *inter alia*, to the exercise of jurisdiction, the use of force, international human rights law and prosecution of alleged offenders. The Division provided reports to the General Assembly on relevant developments at the global and regional levels. In addition, it provided advice and assistance to States and intergovernmental organizations on the uniform and consistent application of the provisions of the United Nations Convention on the Law of the Sea relating to piracy, including by reference to the commentary on the draft articles relating to piracy adopted by the International Law Commission in 1956.⁴⁹ For its part, the Office of the Legal Counsel had been monitoring proposals for an international judicial response to incidents of piracy.

18. The International Trade Law Division served as the substantive secretariat of the United Nations Commission on International Trade Law (UNCITRAL). The mandate of UNCITRAL included the enhancement of international

⁴⁸ General Assembly resolution 63/111 of 5 December 2008, para. 171.

⁴⁹ *Yearbook ... 1956*, vol. II, document A/3159, pp. 260–261 (articles concerning the law of the sea, in particular articles 38–45).

trade and development by the promotion of legal security in international commercial transactions, in particular through the promulgation and dissemination of international norms and standards. To that end, it addressed relevant aspects of public sector governance as well as private international commercial transactions. With regard to public sector governance, UNCITRAL was engaged in public procurement law reform at the national level and was scheduled to discuss revisions to its 1994 Model Law on Procurement of Goods, Construction and Services⁵⁰ at its June–July 2009 session.⁵¹

19. Concerning private international commercial transactions, in 2008 the General Assembly had adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”) on the basis of the text prepared and approved by UNCITRAL. That instrument aimed at creating a contemporary and uniform law for modern door-to-door container transport. UNCITRAL was also currently revising one of the most successful international instruments of a contractual nature in the field of arbitration, the 1976 UNCITRAL Arbitration Rules,⁵² so as to take account of developments in arbitration practice over the past years. In the area of electronic commerce, it was in the process of developing standards applicable to single window facilities. In the area of insolvency, UNCITRAL was promoting cooperation and coordination between courts, and between courts and insolvency representatives, including the use of cross-border agreements, and it was promulgating standards with respect to the treatment of enterprise groups in insolvency.⁵³ Lastly, in the area of security interests, UNCITRAL was harmonizing and modernizing secured financing law through the 2007 UNCITRAL Legislative Guide on Secured Transactions,⁵⁴ which was being broadened to include security over intellectual property assets. In addition to assisting UNCITRAL in fulfilling its legislative mandate, the International Trade Law Division was carrying out technical assistance and cooperation activities to promote the dissemination and effective and uniform implementation of UNCITRAL texts, coordinating activities in related fields among international organizations and assisting the Commission in undertaking a comprehensive review of its working methods.

20. With regard to the dissemination of international law, in 2008 the Codification Division had continued to expand its websites dedicated to international law, including through the establishment of three new websites, one of which was the United Nations Audiovisual Library of International Law, launched in October 2008 (www.un.org/law/avl/). The new site was the result of a decision

⁵⁰ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1)*, annex I. Also available from the UNCITRAL website: www.uncitral.org/uncitral/en/publications/publications.html.

⁵¹ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, chap. IV.

⁵² *Ibid.*, *Thirty-first Session, Supplement No. 17 (A/31/17)*, chap. V, sect. C.

⁵³ In particular, UNCITRAL Model Law on Cross-Border Insolvency in the 2004 UNCITRAL Legislative Guide on Insolvency Law, *ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, chap. III.

⁵⁴ *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, Part two, para. 100.

by the Secretariat to revive the Audiovisual Library as an important tool for disseminating information on international law, especially in developing countries. It had three main components: the Lecture Series, which provided video lectures by eminent international law scholars and practitioners from different countries on virtually every subject of international law; the Historic Archives, containing introductory notes prepared by internationally recognized experts, audiovisual materials tracing the history of the negotiation and adoption of significant legal instruments, the procedural history as well as the text of the legal instruments and other key documents; and lastly the Research Library, which provided an extensive online library of international law materials—treaties, jurisprudence, United Nations documents, yearbooks and legal publications as well as scholarly writings. Thanks to a generous contribution from Germany, the Codification Division had initiated a pilot project providing for the interpretation of the lectures into all official languages of the United Nations. All of those materials were available free of charge to any user of the website. The website had already been accessed by thousands of students and practitioners of international law in over 150 countries representing 61 different languages. It would continue to be updated and expanded in the coming years.

21. The Codification Division had also established a new website for the *United Nations Juridical Yearbook* (www.un.org/law/UNJuridicalYearbook/index.htm). It had digitized and placed on the Internet almost all the official records of major diplomatic conferences that had resulted in the adoption of international conventions, in particular those based on the work of the International Law Commission. In addition, it was now possible not only to search the full text of individual series, such as the *Yearbook of the International Law Commission*, but also to search across all the legal publications that the Division had placed on the Internet. Recently, the Secretariat had negotiated an agreement with HeinOnline, a major Internet distributor of legal materials available in most regions of the world, whereby a number of United Nations publications, including the *Yearbook of the International Law Commission*, would be made available to its subscribers. That was in addition to the free access to the *Yearbook* available to users of the Commission’s website. The Division had also continued to prepare *ad hoc* and regularly mandated publications. A new edition of the *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice*, covering the period 2003–2007, had just been issued.⁵⁵

22. She also wished to say a few words about the new and substantially enhanced website, in both English and French, launched in September 2008 by the Treaty Section (treaties.un.org). The United Nations Treaty Collection website was the authoritative source of information on multilateral treaties deposited with the Secretary-General and treaties registered with the Secretariat. The user registration requirement had been discontinued and the treaty collection was now completely free for all categories of users. The new website offered expanded possibilities for

⁵⁵ ST/LEG/SER.F/1/Add.3, United Nations publication (Sales No. E.08.V.6), available from: <http://www.un.org/law/ICJsummaries> (accessed 5 July 2013).

legal research and training. Among its features were convenient and timely access to the world's largest database of treaties deposited or registered with the Secretary-General, daily updates on the participation status of over 500 multilateral treaties deposited with the Secretary-General (openings for signature, signatories, parties, reservations, declarations), full-text search capability for treaties registered with and published by the Secretariat online in the *United Nations Treaty Series*, monthly statements of treaties and international agreements registered with the Secretariat, automated subscription to the latest depositary notifications and the latest treaty texts in their authentic languages and related information made available online shortly after registration by the Secretariat.

23. The "2009 Treaty Event: Towards Universal Participation and Implementation" would be held from 23 to 25 and 28 and 29 September 2009 in the treaty-signing area in the General Assembly building in New York. It would coincide with the general debate at the sixty-fourth session of the General Assembly. As in previous years, the occasion would provide a distinct opportunity for States to demonstrate their continuing commitment to the central role of the rule of law in international relations.

24. As for funding related to the work of the Commission in what were obviously times of dwindling resources, the United Nations had been proceeding on a zero-growth budget for quite some time, which had imposed budgetary constraints on programmes, from which the Commission's activities had not been spared. Creative ways of meeting the Commission's objectives had to be found if the situation did not improve. Members of the Commission were aware that there had been limitations on budgetary growth at the United Nations for the past several bienniums. That had meant that funding for travel and daily subsistence allowances for members had not been able to grow to meet increasing costs. In other words, it had been costing more and more in United States dollars to make payments in Swiss francs for the Commission's expenditures. In recent years, it had been possible to overcome such shortfalls by identifying other available funds within the overall budgetary allocations made to the Office of Legal Affairs, but the scope for alleviation of shortfalls in the future was likely to be much reduced.

25. In conclusion, the work of the International Law Commission exemplified the important effort that the General Assembly was making to encourage the progressive development of international law and its codification. The Commission's sixtieth anniversary celebrations had demonstrated its continuing relevance, and it could count on the continuing support of the Legal Counsel at a time when the reaffirmation of the central role of the rule of law in international relations had become so essential.

26. Mr. GALICKI stressed the importance of the special role played by the Secretariat and in particular the Codification Division in introducing technological and institutional innovation in the assistance given to the Commission. Those who had long been members of the Commission like himself could remember the gradual introduction of electronic versions, on the Internet, of such materials as the *Yearbook*, the reports and other documents of the Commission. Such materials were

continuing to be introduced and their scope was enlarging significantly every year. Another significant achievement had been the opening in 2008 of the United Nations Audiovisual Library of International Law, a formidable tool for the members of the Commission and one that was also stimulating interest in international law in general and facilitating its wider dissemination, something that was of crucial importance both for enhancing friendly relations among States and for making international law more accessible to a greater number of people. Members of the Commission, being also either academicians or diplomats, could enjoy the benefits of using the Audiovisual Library and other electronic tools made available through the dedicated work of the Secretariat. They were grateful to the Secretariat for that, and hoped that such activities would be continued and developed in future and that appropriate funds would be found in the United Nations budget, even in times of economic crisis. Opening international law to States, societies and individuals, making it accessible and understandable for all, was of priceless value and worth all the expenditure involved. The investment would foster a true interest in strengthening international understanding, cooperation and peace.

27. Mr. PELLET expressed admiration for the formidable work done by the Codification Division, especially on the Commission's Internet site and the Audiovisual Library, which were extraordinary achievements, as shown by the fact that HeinOnline had "grabbed" them. He was grateful to the Office of Legal Affairs for having discontinued paid access to those sites, a step that constituted a great advance in the dissemination of international law. Nevertheless, he regretted that the United Nations did not always provide the Commission the information it needed, particularly on the responsibility of international organizations, even though it held the key to practice in that field. It made one think that the Commission's special ties with the United Nations were an impediment rather than an advantage. The previous Legal Counsel, lamenting the fact that Special Rapporteurs did not always participate in the work of the General Assembly, although some did so with funding by their Governments, had hinted that United Nations might take such expenditure upon itself. Given the Legal Counsel's not very encouraging account of the Organization's finances, he wished to know whether the possibility was still open.

28. Mr. DUGARD said that he wished to raise yet again the question of payment of honoraria to members of the Commission, particularly to special rapporteurs. The United Nations seemed to take the view that independent experts did not need to be paid. Normally, they did four to five months of work free of charge, and that was grossly unfair. Speaking on behalf of past and future special rapporteurs, he said it was necessary to reconsider the question of payment of honoraria to them, even in a time of funding crisis, and that the matter weighed very heavily with members of the Commission.

29. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs, Legal Counsel), replying to Mr. Pellet's remarks, said that at the meeting of legal advisers on responsibility of international organizations, she had promised that the United Nations would provide the Commission in a timely

fashion with the information it needed for its work on the topic of responsibility of international organizations. With regard to the issue of payment for special rapporteurs, she said she understood and was sympathetic to the position of members of the Commission but that she had not been informed of the indication given by her predecessor and that the era was unfortunately one of fiscal rectitude. She would ensure that the question was duly examined but did not wish to create false expectations or provide any guarantees, in view of the extreme pressure under which the United Nations was now operating.

30. Ms. ESCARAMEIA, referring to the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization and to the adoption of the document on sanctions submitted by the Russian Federation,⁵⁶ asked whether it was to be discussed next in a working group of the Sixth Committee or in the Committee itself. The future of the document was of great interest since the issue of sanctions had been central to the Special Committee's discussions for many years. Regarding the law of the sea and the considerable number of submissions to the Commission on the Limits of the Continental Shelf, she wished to know whether the United Nations had set a target date for responding to those submissions, in view of the human and financial resources required for that purpose in a time of budgetary constraints. Concerning the websites, which were remarkable, more publicity for them would be useful, since it often seemed the United Nations did excellent work that was unfortunately not well known to the public. It would also be useful to offer training on how to navigate the sites, since using them to do research was often difficult. Lastly, on the status of members of the Commission, she pointed out that special rapporteurs often did a great deal of work on their topics outside the Commission session and that Commission members carried out activities in post-session periods. However, their *laissez-passer* expired on the final day of each session, so they were no longer able even to enter United Nations premises to do research, their passes no longer being valid for entry. That was not a budgetary but an organizational question, which could undoubtedly be resolved easily through the Legal Liaison Officer.

31. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that the document submitted by the Russian Federation would be considered by the Sixth Committee, which would decide whether it should be adopted unchanged; so far the establishment of a working group had not been suggested. The launch of the Audiovisual Library had provided an opportunity to publicize the websites of the United Nations in Member States, but she had been interested to hear Ms. Escarameia's observations on that subject and would transmit them upon her return to New York. She had also taken note of the difficulties encountered by members of the Commission and assured them that there would be further discussion of these issues in New York and that the United Nations would try to find satisfactory solutions insofar as resources permitted.

32. Mr. HASSOUNA, noting that the Legal Counsel had given her views on the activities of the International Court of Justice and the International Criminal Court, said that it would also be interesting to hear her opinions about the *ad hoc* tribunals created by the United Nations. Many wondered if they had the necessary legal means and sufficient support of Member States to carry out their missions. Divergent views had been heard, for example, concerning the International Tribunal for Rwanda. One might also wonder how the Special Tribunal for Lebanon would tackle the resolution of the problems, both domestic and international, that had been tearing Lebanon apart for so long. The Tribunal's recent order to release suspects detained in Lebanon had stirred up a great deal of controversy, some people saying that the suspects should not have been detained in the first place, while others saw that measure as proof that the Tribunal was independent and was not politicized.

33. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs, Legal Counsel) said that the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, established in 1993 and 1994, respectively, had come to the completion phase of their work. The Security Council's Informal Working Group on International Tribunals was attempting to determine which residual mechanisms should be left in place to carry out the remaining activities of the two tribunals and address the issues that remained outstanding after their closure. One of those issues was the prosecution of fugitives, of which there were 2 in the case of the International Tribunal for the Former Yugoslavia and 13 in the case of the International Tribunal for Rwanda. The aim was to finish trials and appeals in both tribunals by the end of 2010, but a certain amount of flexibility would be called for. As to the Special Tribunal for Lebanon, it had been established only recently, in March 2009, thus achieving the transition from the International Independent Investigation Commission established following the assassination of Rafiq Hariri. The suspects detained in Lebanon had been released by order of the pretrial judge at the request of the Prosecutor, in the context of the transfer of the case, a procedure which, under the statute of the Tribunal, also included the possible transfer of detainees. In fact, the order had not been for the transfer of the detainees, but for their release, which had been considered necessary. It was a judicial decision; the Office of Legal Affairs respected it; and it was not for her to comment on the political implications. Another international court was the Extraordinary Chambers in the Courts of Cambodia for the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, which was very active, its first trial having involved five detainees. Maintaining it nevertheless posed a number of difficulties, principally due to its hybrid nature and also to issues of corruption within the national component of the tribunal. The Office of Legal Affairs was assiduously following that very sensitive issue. Lastly, the question about the capacity for action of the various international tribunals could be discussed during the private session that was to follow.

34. Mr. MIKULKA (Secretary to the Commission), replying to the questions relating to the law of the sea, said that the deadline initially set for submitting requests for the

⁵⁶ See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 33 (A/63/33)*, para. 20 and annex.

extension of the continental shelf had been 10 years from the entry into force of the United Nations Convention on the Law of the Sea. That deadline had long ago expired, however, and the Meeting of States Parties had decided to consider that the 10 years began to run from the date of adoption of guidelines by the Commission on the Limits of the Continental Shelf. That new deadline had expired on 12 May 2009 for the first group of States to ratify the Convention. As the Legal Counsel had stated, 50 submissions had been received to date, two thirds of them just before the deadline. In addition, 39 States had indicated they were not in a position to make a submission in due form but had submitted some information. Making a submission was an extremely lengthy and costly process for coastal States. That was why at their most recent meeting, the States parties had decided to give yet another interpretation to the deadline contained in the Convention by construing it to be met *bona fide* if a coastal State provided some information on the progress of its work on the submission and on the expected limits of the continental shelf. The consideration of the growing number of submissions was indeed a major challenge for the Commission on the Limits of the Continental Shelf, as Ms. Escarameia had remarked.

The public part of the meeting was suspended at 11.20 a.m. and was resumed at 12.25 p.m.

Expulsion of aliens (continued) (A/CN.4/604, A/CN.4/606 and Add.1, sect. E, A/CN.4/611, A/CN.4/617, A/CN.4/618)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

35. The CHAIRPERSON invited members of the Commission to continue their consideration of the fifth report on the expulsion of aliens (A/CN.4/611).

36. Mr. DUGARD said that the fifth report on expulsion of aliens offered an interesting survey of the relevant international human rights rules. He agreed with the Special Rapporteur on the need to distinguish the different kinds of human rights, as long as that distinction was made in the specific context of the topic under consideration, because not all rights were relevant to the expulsion of aliens. Some, like the right to life, the right not to be subjected to torture and the right to non-discrimination, had an obvious role to play, but others, such as many of the political, economic, social and cultural rights, could not be exercised in the context of expulsion. He was not sure, however, that it was wise to distinguish between fundamental and non-fundamental human rights, the concept of fundamental rights being just as imprecise as the concept of *jus cogens*, which the Special Rapporteur had preferred not to apply precisely because of its uncertain content. For example, the right not to be tried twice for the same offence (*non bis in idem*) was a fundamental right under the European Convention on Human Rights, but clearly was not going to feature as such under the topic being considered. Other rights not mentioned by the Special Rapporteur were also important in the context of expulsion, such as the right to due process and the right to counsel—perhaps they would be dealt with later in a

chapter on procedure. Another important right was the right to property. The Special Rapporteur referred to it in draft article 14, but how it fit in with the obligation of non-discrimination was not clear.

37. Prior to 1945, the rule had been that a State in the exercise of its sovereignty had the right to expel aliens, as long as it did not contravene international minimum standards, but those rules were vague and had merged with international human rights norms. In general, a more pragmatic approach would be preferable, particularly in draft article 8, which might read: “Any person who has been or is being expelled is entitled to respect for all human rights that may be relevant to the expulsion.” Another solution would be to add a “without prejudice” clause to state that article 8 was without prejudice to other human rights.

38. Protection of the right to life, covered in draft article 9, was obviously of crucial importance. He could not understand, however, why only States that had abolished the death penalty were the subject of paragraph 2, and not those that still had the death penalty on their books but did not apply it. In article 10, it would be wiser to focus on torture and other cruel, inhuman or degrading treatment rather than on human dignity, which was a very vague concept. Draft articles 11, 12 and 13 should be retained as worded. The same was true for draft article 14, although he was surprised that the Special Rapporteur considered that the principle of non-discrimination did not fall into the category of “hard-core rights”. It was enshrined in Article 55 of the Charter of the United Nations and had been central to the *Barcelona Traction* case dealing with obligations *erga omnes*.

39. Mr. GALICKI said that the question of the expulsion of aliens elicited an unavoidable confrontation between the traditional right of States to expel aliens from their territories and the right of persons not to be subjected to discrimination in the enjoyment of their fundamental rights guaranteed by the relevant provisions of specific international treaties. He wished to concentrate his remarks on draft articles 8 and 14, which in his opinion were the most important and the most meaningful of all the draft articles dealing with human rights in the context of the expulsion of aliens.

40. His first serious objection concerned draft article 8, which stated: “Any person who has been or is being expelled is entitled to respect for his or her fundamental rights and all other rights the implementation of which is required by his or her specific circumstances.” To make a precise determination of both kinds of categories of human rights cited might be very difficult and even impossible in practice. The term “fundamental rights” was used in various national and international legal instruments that differed significantly in respect of both the content and the scope of fundamental rights. Some of these instruments, such as the Charter of Fundamental Rights of the European Union, used the term “fundamental rights” in a very broad sense, while others, like the European Convention on Human Rights and the International Covenant on Civil and Political Rights, identified a set of non-derogable rights without labelling them as “fundamental rights”. Since the Special Rapporteur admitted in paragraph 28 of his report that

“[t]here is no legal definition of the concept of ‘fundamental human rights’”, it was not logical for him simultaneously to propose in draft article 8 to use the concept of fundamental rights as the basis for a general obligation to respect the human rights of persons being expelled. It seemed more advisable to include a short catalogue of the human rights which were to be considered particularly relevant to the expulsion of aliens. In fact, the Special Rapporteur had already identified some of those rights and described them in paragraph 51 of his report as “[s]pecially protected rights of persons being expelled”.

41. Another problem was the question of the obligation not to discriminate, formulated in draft article 14. There were two sides to that obligation, as reflected in the two paragraphs of the article: the first related to the exercise by the State of its right of expulsion with regard to the persons concerned, while the second related to the enjoyment by a person being expelled of the rights and freedoms provided for in international human rights law and in the legislation of the expelling State. The question seemed to reside in how the concept of non-discrimination should actually be treated *vis-à-vis* both the “right of expulsion” and the “the rights and freedoms provided for in international human rights law”. As the Special Rapporteur correctly noted in paragraph 154 of his report, “[t]he prohibition of discrimination with respect to human rights in general, and expulsion in particular, ‘does not exist independently’ in that it is meaningful only when it is observed in relation to a given right or freedom”.

42. In article 14 of the European Convention on Human Rights, the prohibition of discrimination appeared not as a separate protected right, but as an additional, auxiliary principle that must always be connected to a right or freedom directly protected by the Convention or its Protocols. It was worthy of note that an attempt to transform that rule into an independent right to non-discrimination, undertaken in Protocol No. 12, had not been very successful. The Special Rapporteur rightly concluded in paragraph 155 of his report that the rule of non-discrimination should not be formulated in terms of rights which all beneficiaries should enjoy without discrimination. But then to suggest that it should be formulated in terms of the State’s obligation not to apply the rights in question in a discriminatory fashion seemed to go too far. Instead of referring to an “obligation”, it might be more appropriate to use a phrase employed earlier, “the rule (or principle) of non-discrimination”.

43. Sir Michael WOOD said that, whenever possible, the Commission should take an early decision on the form that it wished to give, even provisionally, to its final output on a topic, something that so far had not been done for the current topic. He wished to make two main points, both of which raised questions of principle. First, he shared the view of the many Commission members who had said that persons being expelled, being persons in the territory or under the jurisdiction of the State, were entitled to the enjoyment of all applicable human rights, in other words, those rights set forth in the treaties to which the State was a party and under customary law. Second, he also agreed with those who had said that the right to dignity was best viewed not as a separate human right but

rather as a principle underlying all civil and political, economic, social and cultural rights.

44. On the first issue, Ms. Escameia had rightly pointed out that persons being expelled were entitled to the enjoyment of all applicable human rights and that it was therefore unnecessary to seek to draw up a list of “fundamental rights”. In paragraph 17 of his report, the Special Rapporteur said that he “considers it unrealistic to require that a person being expelled be able to benefit from all human rights guaranteed by international instruments and by the domestic law of the expelling State” and he went on to say: “It seems more realistic and more consistent with the State practice to limit the rights guaranteed during expulsion to the fundamental human rights.” With regard to State practice, he himself did not interpret the description of State practice in the report as justifying a limitation of the rights of persons being expelled to a supposed category of “fundamental human rights”. In the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, the European Court of Human Rights had not been suggesting that persons being expelled were entitled only to respect for their fundamental human rights. The fact that the Court had stressed the fundamental nature of the rights at issue in that case did not carry the contrary implication that other rights would not be applicable. If the Special Rapporteur’s aim was to determine which human rights were likely to be relevant and important for a person being expelled and which rights were less likely to be relevant, that would be understandable, though not necessarily very useful. It might well be that some rights of some persons being expelled were restricted in accordance with the terms of a treaty, as was the case with prisoners, for example, but any restrictions had to be justified as being in accordance with the law and necessary in a democratic society. On the other hand, it was wrong in principle to say that only some rights and not others should be available to such persons, and he could not support such an affirmation.

45. The idea of a category of non-derogable rights did not appear to be a particularly helpful one in the present context. The list of non-derogable rights differed from instrument to instrument, as did the reasons why a certain right was non-derogable. The circumstances of individuals subject to expulsion were infinitely variable from one person to another, and it would be very difficult to come up with an exhaustive list of their rights. Given the basic point that all human rights were potentially engaged in the case of persons being expelled, it was unclear to him why a listing of particular rights such as was found in draft articles 9 (Obligation to protect the right to life of persons being expelled), 11 (Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment) and 13 (Obligation to respect the right to private and family life) had a place in the draft articles. Draft article 8, suitably worded, could suffice to cover all the rights in question.

46. Turning to his second point, he agreed with those who did not see the “right to dignity” envisaged in draft article 10 as a distinct human right. It was, rather, a basic principle mentioned, among other places, in the preamble to the Charter of the United Nations, which underlay all human rights.

47. With regard to draft article 8, he agreed with those who had proposed the deletion of the concluding words “the implementation of which is required by his or her specific circumstances”, for the reasons of principle outlined earlier. He pointed out also that the category of persons who had been expelled was not included in other articles and that perhaps the draft articles should be made consistent in that regard.

48. Regarding draft article 11, he shared the view that the words “in its territory” were unnecessary and potentially harmful. Lastly, in respect of draft article 14 (Obligation not to discriminate), he agreed with the members who had suggested that other grounds for discrimination, such as those listed in the Charter of Fundamental Rights of the European Union, should be expressly mentioned.

49. Mr. KAMTO (Special Rapporteur) requested that speakers state whether or not they were in favour of referring the draft articles to the Drafting Committee. One could not say, on the one hand, that a given provision was unnecessary, yet, on the other hand, give the impression that it could be textually improved. He had selected only those human rights that had a link with expulsion. If members did not want the Commission to speak of them, they should so say clearly, so that there would be no ambiguity.

The meeting rose at 1 p.m.

3005th MEETING

Thursday, 14 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Later: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood, Ms. Xue.

Expulsion of aliens (*continued*) (A/CN.4/604, A/CN.4/606 and Add.1, sect. E, A/CN.4/611, A/CN.4/617, A/CN.4/618)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. CAFLISCH said that the topic under consideration was particularly difficult. If the Commission had to decide again, he probably would not be in favour of retaining it. Yet the choice had been made, and the Commission must now make the best of it. The topic’s main difficulty lay in the fact that it was situated at the

crossroads of national law, international law and human rights. The fifth report focused on principles relating to what were called the hard core of human rights. As he saw it, all human rights, and not just some of them, were applicable in the context of the expulsion of aliens. Why, for example, should freedom of thought not extend to an alien who was being expelled? While it might not be possible for aliens—aliens who were being detained, for example—to exercise some rights with the same intensity as others, that did not mean that those rights were not applicable. Thus it would probably be sufficient to state that all human rights apply; the reference to “fundamental rights” should be deleted.

2. In his first report on the effects of armed conflicts on treaties,⁵⁷ the Special Rapporteur on that topic had listed a number of examples of applicable rights, and the Commission might wish to adopt a similar practice in the case of the topic currently under consideration, enunciating in draft article 8 the general principle of the applicability of human rights and citing in draft articles 9 to 14 examples of highly important human rights that were particularly relevant in the area of the expulsion of aliens.

3. He had a number of comments to make on individual articles. With regard to draft article 10 (Obligation to respect the dignity of persons being expelled), he favoured retaining only paragraph 2, if that, since in his view the content of the article was quite abstract.

4. In draft article 11 (Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment), the word “cruel” did not add anything: torture and inhuman or degrading treatment were cruel by definition.

5. He endorsed the wording of draft article 12 (Specific case of the protection of children being expelled), but thought that it would be preferable to insert a reference to the extreme vulnerability of children, something which the European Court of Human Rights had underscored in paragraph 55 of its judgement in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*. Other groups of persons, such as the elderly, also deserved special consideration.

6. If draft articles 9 to 13 were retained, then draft article 14 (Obligation not to discriminate) should be, too, although he agreed with Mr. Gaja that it was non-discrimination between aliens that was at issue. Admittedly, article 14 of the European Convention on Human Rights referred solely to protected rights, and the general prohibition set out in Protocol No. 12 to that instrument only concerned the 17 States that had ratified it. However, if all those articles were to be retained as examples, the prohibition of discrimination ought to be retained and should be general in nature.

7. In closing, he said that the proposed articles could be referred to the Drafting Committee, but not before the Commission decided how to resolve the problem he

⁵⁷ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, pp. 220–228, paras. 62–118. For the draft articles adopted by the Commission on first reading and the commentaries thereto, see *Yearbook ... 2008*, vol. II (Part Two), paras. 65–66, especially draft article 5 and the related annex.

had posed at the outset, namely whether it should confine itself to a draft article 8 which simply provided that aliens being expelled enjoyed all human rights, or whether a list of examples of human rights of particular relevance to expulsion should follow.

8. Mr. MELESCANU said that the Special Rapporteur's analysis of comments by States set out in paragraphs 3 to 7 of the fifth report testified to the complexity of the topic. He supported the Special Rapporteur's decision to focus on the question of limitations stemming from the need to respect the fundamental human rights of persons being expelled.

9. He shared the Special Rapporteur's position, set out in paragraphs 10 and 11 of the report, that persons being expelled remained human beings who continued to enjoy all their fundamental rights, and that the equal protection of all people was the cornerstone of all human rights regimes. That approach was supported by the rich international practice which the Special Rapporteur considered in paragraphs 10 to 15.

10. Like most other members, he had serious doubts as to the use of the concepts "fundamental rights" and "inviolable" or "non-derogable rights", which were rather vague and might even be dangerous when developing a legal rule in such a sensitive area.

11. He then turned his attention to the individual draft articles. As he saw it, the Commission could have confined its debate at the current session to the adoption of just one draft article, namely draft article 8, which must clearly stipulate that there was a general obligation to respect all the human rights, without exception, of persons being expelled. Once it had agreed on that essential principle and made it clear that it could not be subject to any limitation, the Commission could then decide whether any details or explanations should be added. As to the list of rights which the Special Rapporteur proposed to insert in the draft articles that followed, he shared Mr. Gaja's point of view: it was dangerous to list such rights, even if they served only as examples. If clarification was needed on any fundamental rights that applied specifically to the expulsion of aliens, then the Commission could endeavour to formulate a number of relevant rules. He suggested that the words "and all other rights the implementation of which is required by his or her specific circumstances" should be deleted from draft article 8 because they could give rise to interpretations contrary to the aim expressed by the Special Rapporteur and endorsed by virtually all the previous speakers on the topic. Since a general and imprecise formulation did not add anything to the protection of persons being expelled, draft article 8 should be recast.

12. If the Commission did agree that a number of rights should be enumerated which were directly related to expulsion, then respect for the right to life, dealt with in draft article 9, should be one of them because of its relevance in the context of persons being expelled. In paragraph 2 of that article, however, he found it difficult to see what kind of guarantee a State must obtain to ensure that the death penalty was not carried out—would it be a political or a legal guarantee? He wondered also what was

meant by a guarantee that was obtained previously. As it stood, the provision was very general, and its application might well create difficulties. The Drafting Committee should try to find a better wording.

13. He had no observations on the substance of draft article 10 (Obligation to respect the dignity of persons being expelled), which was an important provision, but he had been convinced by the arguments put forward by Ms. Escarameia and other members that the obligation to respect the dignity of persons was not a right relating to expulsion but constituted the very basis of all other rights and determined the manner in which all other rights must be applied to persons being expelled. He had also taken due note of Mr. Vargas Carreño's point that this obligation was the ethical foundation of all other rights and did not belong in the draft articles. Once again, the Drafting Committee should attempt to produce a wording to reflect the concerns voiced.

14. He endorsed the proposal made by Ms. Escarameia with regard to draft article 11, concerning protection from torture. The commentary should refer to the definition of torture embodied in the Rome Statute of the International Criminal Court.

15. He recognized the importance of draft article 13 (Obligation to respect the right to private and family life) for the topic of expulsion, and he endorsed the proposal by Mr. Vargas Carreño to differentiate between private and family life. A person's family life should be taken into consideration before any decision on expulsion was made. Perhaps the Drafting Committee could find wording to that effect.

16. With regard to draft article 14, he said that the obligation not to discriminate was another essential element in the context of the limitations that must be imposed on expulsion. Had he drawn up the draft articles himself, he would have produced just two, the first one stipulating that all human rights were applicable and the second one prohibiting discrimination during expulsion procedures. The wording of paragraph 1 should therefore be strengthened to prohibit any expulsion having its basis in discrimination. He agreed that paragraph 1 should be expanded to cover persons with disabilities, pregnant women and other vulnerable categories mentioned by Ms. Escarameia, Mr. Niehaus and Mr. Saboia.

17. He shared Mr. Gaja's concern as to the need to restructure the draft articles and to take a clear decision on the legal nature of the instrument that the Commission intended to submit to the General Assembly. In order not to delay the work of the Commission in plenary meeting, it would be best to refer draft articles 8 to 14 to the Drafting Committee and to request the Bureau to discuss the proposals relating to structural questions made by Mr. Gaja and others and make suggestions to the Commission as soon as possible so that a decision could be taken at the second part of the current session.

18. Ms. JACOBSSON commended the Special Rapporteur on his well-researched and intellectually stimulating report. The starting points of the topic were the classic right of States to expel aliens, on the one hand,

and the need, on the other hand, to take into account modern developments in international law—i.e. the focus on human rights—when expulsion was about to take place. Human rights applied in all situations, regardless of time or place. She agreed with Mr. Saboia that human rights were indivisible and interdependent, a view that had been upheld in the 2005 World Summit Outcome document, in which States had reaffirmed that “all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing”.⁵⁸ That was not the same as saying that they were perceived as being equally important, particularly not in the case of someone faced with a serious threat to his or her person; it simply meant that no person could be denied the enjoyment of his or her human rights.

19. At least four different legal scenarios influenced the assessment of a particular case. First, there might be situations in which certain human rights were not relevant in the specific circumstances; secondly, there might be situations in which a particular human right was derogable; thirdly, a State might have to fulfil a human rights obligation the nature and extent of which were not entirely clear; and fourthly, universal and regional human rights obligations might not be identical—regional standards might in fact be stricter or more detailed. Such situations were temporary and did not reflect the main rule or the status quo. If a State wished to disregard a human rights obligation, it could do so only if it had a clear legal ground for it.

20. It was against that background that she questioned the need to draw a distinction between fundamental rights and what must be regarded as non-fundamental rights. Although reference was made to fundamental rights in a number of treaties, she did not think that making such a distinction would be useful to the Commission in establishing specific guidelines. Ms. Escarameia’s comments had shown the difficulty of identifying even the most obvious candidates for the category of fundamental rights. The crucial question was not whether a human rights obligation could be categorized as fundamental, but whether it was relevant to the situation in question and whether there was a legal ground for derogating from it. Consequently, the starting point should be the applicability of all human rights to a person who had been or was being expelled, and not a preset division between fundamental and non-fundamental rules.

21. While welcoming the fact that the right to life was explicitly addressed in draft article 9, she expressed concern about the background information contained in the report concerning the death penalty. There was a growing trend towards abolition of the death penalty, and not only in Europe. Moreover, General Assembly resolution 62/149 of 18 December 2007, entitled “Moratorium on the use of the death penalty”, clearly stated that the use of the death penalty undermined human dignity. Such a trend must be reflected in the Commission’s work; at the very least, the wording of draft article 9, paragraph 2, should be stronger, and she endorsed Mr. Dugard’s proposal to that end.

22. Turning to draft article 10, she said that she was not convinced that the concept of the obligation to respect human dignity warranted a separate draft article. The problem with that concept was its lack of clarity. For example, it had been used by States that sought to avoid implementing clear-cut human rights obligations, and it also had different meanings in different legal systems. Moreover, the fact that it could have a theological dimension meant that its legal content could be blurred.

23. She welcomed the inclusion of draft article 14, on the obligation not to discriminate, but believed that it failed to address one important aspect: the obligation not to discriminate on the grounds of sexual orientation. She did not share the Special Rapporteur’s view that such an obligation existed only in Western countries, given that same-sex marriage was allowed in South Africa, for example. Furthermore, in its Views on the *Toonen v. Australia* case, the Human Rights Committee had found that the reference to “sex” in articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights was to be taken as including sexual orientation [para. 8.7]. She therefore agreed with Mr. Niehaus that the Commission’s mandate relating to the progressive development of international law required that the draft articles should contain an explicit reference to that particular ground of discrimination.

24. In conclusion, she said that the Commission needed to decide whether it wished to work on the assumption that it had to identify certain fundamental human rights. If draft article 8 was to be retained, it should be redrafted along the lines suggested by Mr. Dugard. The need for draft articles 11, 12 and 13 would then have to be assessed in the light of the decision on draft article 8. Draft articles 9 and 14 were necessary because they related directly to the expulsion of aliens.

25. THE CHAIRPERSON commended the Special Rapporteur on his well-researched report which had provided the Commission with much food for thought as it considered a topic of increasing importance in contemporary society. By and large he shared the views expressed by many members, including Mr. Dugard, Ms. Escarameia, Mr. Gaja, Mr. McRae and in particular Sir Michael Wood, who had expressed uncertainty about where the Commission was trying to go with the topic. In his view, the Commission should endeavour to draft a legal instrument regulating the expulsion of aliens for the purpose of the codification or possibly even the progressive development of international law. The Commission should also bear in mind the importance of having the instrument ratified by as many States as possible. The Special Rapporteur should therefore broaden the scope of his research to ensure that the instrument was based on the most relevant contemporary State practice and jurisprudence on the topic, including those of States outside the Schengen area and non-European States.

26. The point of departure for the topic, the sovereign right of States to expel aliens, was a right *de lege lata*. The instrument to be drafted by the Commission would impose certain limitations on that right, taking into account the human rights of persons to be expelled. It should comprise a set of rules of international law that balanced the rights of States against those of persons to

⁵⁸ General Assembly resolution 60/1 of 16 September 2005, para. 121.

be expelled. Maintaining that balance, which was no easy task, was a *sine qua non* for the successful completion of the Commission's task.

27. He understood the term "aliens" to mean all aliens legally and illegally in the territory of a State, including refugees and stateless persons. All aliens should enjoy the same human rights as all other human beings. He shared the view that drawing a distinction in draft article 8 between different categories of human rights was not necessary and could even be misleading in the context of expulsion. All persons subject to expulsion should be granted all human rights, although not all human rights were equally applicable or relevant in every case. Draft article 8 was thus extremely important and should therefore be referred to the Drafting Committee and redrafted so as to offer a basic guarantee of all human rights relevant or applicable in the context of the expulsion of any alien.

28. The human rights associated with due process, mentioned by Ms. Escarameia, were of special importance in cases of expulsion. Expulsion should always be the result of due process and should be decided by a judicial authority, possibly a court. He had taken due note of the fact that the Special Rapporteur intended to deal with those rights in his sixth report.

29. Draft articles 9 to 14 set forth the rights the Special Rapporteur considered to be fundamental. However, it was not clear that all of them were specifically relevant to cases of expulsion and ought to be included in the instrument. Draft article 9, which dealt with the right to life, was of particular relevance, since no person should be expelled from a State that had abolished the death penalty to one in which it could be applied. With some amendments, including the one suggested by Mr. Dugard, draft article 9, paragraph 2, had a place in the instrument and should therefore be referred to the Drafting Committee.

30. He believed that the obligation to respect human dignity was a reflection of respect for all human rights. It was not a human right *per se*, and reference to it as such in the instrument would merely lead to confusion. Of course, a person's dignity should be respected at all times, but such respect was not specifically relevant to cases of expulsion, and there was thus no special reason to include draft article 10 in the instrument.

31. He likewise saw no need to include draft article 11, paragraph 1, since the basic human right it addressed—not to be subjected to torture—was dealt with in many international legal instruments. However, he was in favour of retaining paragraphs 2 and 3, which were of particular relevance to the expulsion of aliens and should be referred to the Drafting Committee.

32. Children and possibly other categories of people, such as the elderly and pregnant women, should be afforded special protection in cases of expulsion. Accordingly, draft article 12 should be retained.

33. The right to private and family life referred to in draft article 13 was a general human right whose scope was sometimes disputed. The inclusion of the draft article might prove to be problematic.

34. Non-discrimination was a basic principle of international law. It was clear that in cases of expulsion there should be no discrimination between the persons being expelled and other persons, or between different categories of expellees. Nevertheless, he did not consider it necessary to include draft article 14, which dealt with the principle of non-discrimination in an instrument on expulsion.

35. In his next report, the Special Rapporteur should focus on rights that were of particular importance to cases of expulsion and essentially constituted guarantees that expulsion would be conducted according to law, in full observance of the relevant human rights. In addition to maintaining a balance between the rights of States to expel aliens and the human rights of expellees, however, he should also take into account the rights and obligations of the receiving State, which in most cases was the State of nationality. That triangle of rights to be balanced must be kept in mind at all times if work on the topic was to progress.

36. Mr. FOMBA welcomed the Special Rapporteur's fifth report, which was, as usual, instructive and well researched. It was regrettable, then, that the Special Rapporteur seemed to fall victim to his own legitimate concern for rigorous analysis, on the one hand, and his desire to comply strictly with the working methods set forth in the Commission's Statute, on the other, since members of the Commission occasionally had difficulty following him.

37. Focusing on the report in detail, he said that he shared the Special Rapporteur's conclusions regarding the comments and observations by States, which were outlined in paragraphs 3 to 7 of the report. Turning to the part concerning the protection of the rights of all human beings, he endorsed the basic ideas put forward in paragraph 10. He welcomed the overview of legal instruments that established the protection of human rights as an obligation (paras. 11–15), drawing particular attention to the important role played by the African Charter on Human and Peoples' Rights. In his view, the reference to persons "subject to the jurisdiction" of the State in the European Convention on Human Rights (para. 13) did not conflict with the principle of universality or ubiquity. He agreed that unlawful residence could not justify a lessening of fundamental human rights and therefore endorsed the position taken by the European Court of Human Rights in its judgement in the *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* case. The Special Rapporteur's criticism of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live⁵⁹ was justified, and the approach that he proposed at the end of paragraph 15 was logical and effective.

38. The question regarding the concept of fundamental rights in paragraph 16 was correctly framed. It was important to remember that this concept was not the same in different legal systems and that the contingency of fundamental rights was a subject of major controversy. Although he had some hesitations in the matter, he believed that

⁵⁹ General Assembly resolution 40/144 of 13 December 1985, annex.

a category of inviolable human rights did exist. It was important to recall in that connection that no precise definition of the concept of fundamental rights existed. He shared the view that although there was no ready analogy between the theory of the fundamental rights of States and that of fundamental human rights, the same basic idea underpinned both, namely the notion of rights that were essential to existences. He welcomed the Special Rapporteur's references to the notions of fundamental human rights and fundamental freedoms in paragraph 24 of the report and endorsed his conclusions in paragraph 25 concerning the inconsistency of the terminology used in the Charter of the United Nations. The Special Rapporteur had provided a thorough analysis of the European Court of Human Rights judgement in the case of *Golder v. the United Kingdom*; it was regrettable that jurists had shown little interest in the matter (para. 27).

39. Turning to the section of the report dealing with fundamental rights and the "inviolable" or "non-derogable core" of human rights, he agreed that the term "fundamental rights" should be understood as being synonymous with the "hard core" of human rights and the rationale behind it. Finding an operative identification criterion was crucial, and the writings of Frédéric Sudre⁶⁰ had provided useful clarifications in that connection. The Special Rapporteur was right to say that the existence of a "hard core" was based on *lex lata*, and that all human rights were neither protected in the same manner nor shared a single legal regime. He agreed that the notion of the "hard core" was useful from both a legal and practical standpoint.

40. On the subject of which criteria should be used to identify the rights forming the hard core, he endorsed the criticism of *jus cogens* set out in paragraph 36 of the report. He agreed with the Special Rapporteur's choice of the criterion of inviolability and thought that the indicative list of fundamental rights forming the "hard core" provided by the Special Rapporteur was helpful, but the fact that the content of such rights would vary in time and space must be emphasized. Various lists were proposed in the report, and he favoured the idea of making a synthesis and identifying the "lowest-common-denominator" human rights. The list of fundamental rights contained in paragraph 43 seemed to reflect the basic protection needs of persons being expelled. He endorsed the view expressed in paragraph 44 to the effect that the protection afforded by respect for fundamental rights should lead to the implementation of the right to dignity—in other words, it was the implementation of fundamental human rights that gave effective content to the right to dignity.

41. The general obligation to respect human rights was firmly anchored in international law, jurisprudence and doctrine, and he shared the Special Rapporteur's views concerning the consequences of a breach of that obligation by States. That obligation was of particular significance when the legal situation of the persons in question—i.e., aliens facing expulsion—made them vulnerable.

⁶⁰ In particular, *Les grands arrêts de la Cour européenne des droits de l'homme*, 5th rev. ed., Paris, Presses universitaires de France, 2009; and *Droit européen et international des droits de l'homme*, 9th rev. ed., Paris, Presses universitaires de France, 2008.

42. Turning to the draft articles, he suggested that the title of draft article 8 should be aligned with the text of the operative paragraph to read "General obligation to respect the human rights of persons who have been expelled or are being expelled". More generally, the Commission might wish to harmonize the titles of other draft articles with the operative text for the sake of consistency. The distinction drawn in draft article 8 between fundamental rights and all other rights was useful, as it offered a pragmatic approach that covered all possible scenarios. In that connection, the phrase "the implementation of which is required by his or her specific circumstances" was highly significant.

43. With regard to the specially protected rights of persons being expelled, he emphasized that aliens should be viewed first of all as human beings who enjoyed general protection of their human rights. Only subsequently should they be considered in their specific circumstances of being expelled and thus benefitting from special protection. The complaint that such persons were deprived of all their human rights seemed to him unfounded.

44. The right to life was the basis of all other human rights. The current text of draft article 9, dealing with that right, posed no problem and should be retained.

45. Draft article 10 (Obligation to respect the dignity of persons being expelled) was an essential provision, and he had no reservations about either of its two paragraphs. Some members of the Commission had maintained that "dignity" was a vague notion and that it was not in itself a human right but rather a basic principle underpinning all human rights. It had further been suggested that dignity should be considered without reference to torture and cruel, inhuman or degrading treatment. However, torture and cruel, inhuman or degrading treatment manifestly constituted a grave infringement of human dignity. In fact, human dignity was not a vague notion or a basic principle, but a human right, a kind of "conditional right", so to speak. Moreover, in paragraph 44 of his report, the Special Rapporteur rightly underlined the cause-and-effect link between the right to dignity and other human rights. If there was a problem, it derived from the fact that, logically speaking, draft article 10 seemed to be in the wrong place in the text.

46. Draft article 11 (Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment) was another vital provision. Paragraph 1 did not pose any problems. Paragraph 2 was important because it established a balance between the expelling State and the receiving State. The term "serious risk" did not appear to raise any major problems of interpretation, inasmuch as it was easy to identify and assess such a risk in an era when it was clear whether a State was governed by the rule of law or had a democratic government. Reservations predicated on the scope of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been expressed about paragraph 3, but the scope of the Convention was not sufficient reason to exclude acts committed by persons or groups of persons acting in a private capacity: such acts were a reality that could not be ignored.

47. Draft article 12 (Specific case of the protection of children being expelled) was crucial. He had no comments

to make on paragraphs 1 and 3, and he welcomed the important observation made in paragraph 2.

48. Draft article 13 (Obligation to respect the right to private and family life) allowed for the safeguarding of family links, thereby ensuring that the life of the individual concerned was viewed from a sufficiently broad perspective. Paragraph 2 was a well-balanced saving clause, insofar as it took into account both the interests of the State and those of the person in question. However, he wished to draw attention to an error in the French version of that paragraph: the word “*alinéa*” had been used, whereas the correct term was “*paragraphe*”.

49. Draft article 14, on non-discrimination, was clearly a key provision. Although the point had rightly been made that the discrimination at issue was that between aliens and not discrimination between nationals and aliens, the underlying principle of equal treatment of nationals and aliens remained valid nevertheless, since special protection did not do away with general protection.

50. He noted that the Special Rapporteur was not categorically opposed to extending the list of fundamental rights and that in draft article 8 he had referred to “fundamental rights” and “all other rights”. The addition of various rights had been proposed, and it seemed that future draft articles might encompass procedural rights or the protection of an expellee’s property. The Commission should therefore demonstrate flexibility and leave the door open to such additions.

51. Draft articles 8, 9, 11, 12 and 13 could be sent to the Drafting Committee. If the majority of Commission members considered that draft articles 10 and 14 raised questions of principle that called for a decision by the plenary Commission, it would be necessary to ask the Special Rapporteur to recast those provisions, giving him clear guidance on the matter, or to set up a working group to discuss their fate. If there was a consensus to take that line of action, he would support it, but he himself saw no valid reason for proceeding in that manner and would prefer to send draft articles 10 and 14 to the Drafting Committee as well.

52. Mr. NOLTE praised the Special Rapporteur’s extensive analysis of the jurisprudence of the Human Rights Committee and the European Court of Human Rights. His use of European jurisprudence was of particular relevance for the interpretation of non-derogable human rights, such as the right to life and the right to freedom from torture.

53. Although there was merit in the Special Rapporteur’s assumption that it was necessary to identify a hard core of fundamental human rights which specifically protected persons subject to expulsion, that approach required some qualifications. All human rights applied to persons who were in the process of being expelled. Draft article 8 should therefore be formulated accordingly. For example, the Commission should make it clear that every State must respect its obligations under the human rights treaties to which it had acceded. Those treaties conferred certain rights on all persons, including persons who were being expelled. While some of those rights might be limited for a certain period or to a certain degree, they

must be recognized in principle so that the extent and proportionality of the restrictions placed on them could be judicially verified. For that reason, he suggested that draft article 8 should speak of “human rights” and not of “fundamental rights”.

54. In cases where a State had not ratified a particular human rights treaty, the applicable human rights regime was customary international law. At first sight, the Special Rapporteur’s approach of concentrating on a few particularly important rights that might appear to be appropriate, but in fact all human rights recognized in customary international law were applicable in expulsion proceedings. They might be subject to more far-reaching limitations than rights arising from treaty obligations, but those more extensive limitations could never affect what the Special Rapporteur termed the “hard core” of human rights, which was derived from the source of all human rights, namely the principle of human dignity.

55. While he welcomed the fact that the Special Rapporteur stressed the concept of human dignity, he did not concur with the Special Rapporteur’s proposal to formulate a draft article—article 10—enunciating a right to human dignity in the middle of several other draft articles reaffirming certain human rights that were particularly relevant in the context of expulsion. Human dignity was not a human right, but a general principle from which all human rights flowed and which was harder to apply than specific human rights. The draft articles should therefore reaffirm that general principle before mentioning all the other specific human rights which flowed from it. That was how the principle of human dignity was conceived in the Charter of the United Nations, in most human rights treaties and in most national constitutions. The Commission should avoid referring to human dignity as a specific human right, since it was a rather vague, broad term. Nevertheless, in certain exceptional cases where specific human rights did not provide an appropriate solution, the principle of human dignity could be invoked. The *Furundžija* case, to which reference was made in paragraph 71 of the report, did not, however, establish the existence of a human right to dignity, since the International Tribunal for the Former Yugoslavia had based its reasoning on a provision of its statute and had not claimed that it was directly applying a human right. He therefore suggested that draft article 10 should be deleted and that a reference to human dignity as a general principle informing all human rights should be inserted in draft article 8.

56. Like other members, he did not think that it was necessary to identify a “hard core” of human rights, either in general or for the purposes of the draft articles, but if the Commission did decide to take that approach, it should follow the example of some constitutional systems, such as the German system, and endeavour to identify the extent to which certain rights, such as the right to life, gave expression to the principle of human dignity. The decision of the Federal Constitutional Court of Germany cited in paragraph 20 of the report was based on an explicit constitutional provision that could not easily be transposed to the level of international law, where it would be difficult and potentially divisive to try to identify the human-dignity element of every human right. For the Commission’s purposes, then, it would not be helpful to postulate

a new subcategory of human rights that were supposedly more fundamental than others. The terminology of the Charter of the United Nations and a number of human rights treaties, which seemed to draw a distinction between “human rights” and “fundamental freedoms”, was not supposed to denote a substantive difference between various categories of rights.

57. In the light of the Special Rapporteur’s explanation that the main reason for characterizing some categories of rights as more fundamental than others was to emphasize those human rights that were of particular importance for persons who were being expelled, he would not object to the adoption of that approach, provided that in doing so the Commission did not create the impression that it wished to de-emphasize other human rights.

58. He readily agreed that in the context of expulsion special mention should be made of the right to life, the right to physical integrity and the right to freedom from torture. The same was true in principle of the right to family life and the right not to be subjected to discrimination. However, the right to life and the right to freedom from torture were clearly defined, whereas assessing the exact implications of the right to family life and the right not to be subjected to discrimination was a more complicated process. The Special Rapporteur seemed to accept that distinction, since he added a rather vague limiting clause to his formulation of the right to family life in draft article 13 but did not add any such clause in the provision on the right to life, although the latter could be restricted in certain circumstances according to the main human rights treaties. The Commission should be consistent in that respect; it should include clauses limiting any human rights it mentioned if they were generally subject to such a restriction. The draft articles should also mention the right to due process, since it was pertinent in the context of expulsion and the exact implications of that right in that context could be spelled out in a separate chapter.

59. As to whether the draft articles should be sent to the Drafting Committee, or whether the various objections raised indicated that the Special Rapporteur’s approach should be modified and that the Commission should content itself with a general provision along the lines of draft article 8, stipulating merely that all human rights must be protected when aliens were expelled, he observed that there were inherent pros and cons in either approach and it would be premature to decide on the matter at the present juncture. He therefore suggested that the Commission should follow the course of action it had adopted the previous year when it had been unsure whether to include a chapter on countermeasures in the draft articles on the responsibility of international organizations:⁶¹ in other words, it should establish a working group to ascertain whether agreement could be reached on a list of human rights deserving specific mention as particularly relevant in the context of expulsion. If no agreement could be reached, the Commission should follow Sir Michael Wood’s suggestion and formulate a general provision on human rights along the lines of draft article 8.

⁶¹ *Yearbook ... 2008*, vol. II (Part Two), paras. 128–131 and 148–162.

60. Draft article 12, paragraph 2, should be recast to reflect more clearly the fact that children’s special need for protection sometimes required that children not be detained in the same conditions as adults, while at other times it required that they be kept with adults. Otherwise the draft article could lead to the conclusion that the prolonged separation of children from their parents might be justified. It should be recalled in that connection that article 37, subparagraph (c), of the Convention on the Rights of the Child stipulated that “every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so”. A number of States had formulated reservations to the Convention with a view to permitting juveniles to be detained with and in the same conditions as adults, but those reservations were not necessarily of decisive importance for the Commission’s consideration of the topic of expulsion.

61. He endorsed the view expressed by other members of the Commission that sexual orientation should be included among the other prohibited grounds of discrimination listed in draft article 14. He agreed with Mr. Gaja that the draft article presupposed that there was a possibility of discriminating between nationals and aliens with respect to expulsion; moreover, there might be legitimate grounds for discriminating between different categories of aliens when it came to expulsion, for example, between citizens of States belonging to the European Union and citizens of non-member States. The Convention implementing the Schengen Agreement envisaged special expulsion procedures for aliens, who were defined therein as “any person other than a national of a Member State of the European Communities” [art. 1]. Readmission agreements might likewise constitute legitimate grounds for treating different groups of aliens differently with respect to expulsion.

Mr. Wisnumurti (Vice-Chairperson) took the Chair.

62. Mr. VASCIANNIE said that the Special Rapporteur had provided the Commission with an intellectual treat, as his fifth report was a stimulating exposition that was attentive to important points of law and policy. While he agreed with some aspects of the Special Rapporteur’s approach, he was nevertheless concerned that the idea that the topic lay at the crossroads of human rights law and general international law might be construed as implying that human rights law and general international law provided different sets of answers to expulsion issues. The rules of human rights law constituted part of general international law once they had passed into the corpus of customary international law, an approach which the Special Rapporteur accepted in parts of his report. Thus, some human rights rules formed part of general international law, others might be binding on States parties as treaty rules and some human rights concepts were policy prescriptions that might or might not be accepted *de lege ferenda*. He preferred that perspective to the crossroads analogy, because the term “crossroads” implied that legally binding human rights rules and rules of general international law met at a point and then went off in different directions. That was not the case, because legally binding human rights rules were part of general law, except for human rights treaty rules that had not become custom. The crossroads was not therefore between human rights and general law, but rather between policy prescriptions and law favouring the

individual on the one hand and policy prescriptions and law based on ideas such as State sovereignty, security and national self-interest on the other. He wished to make that point in order to suggest that the proper significance of human rights law in the area of expulsion should not be reduced by contrasting it with general international law.

63. Turning to the draft articles, he said that draft article 8 should be sent to the Drafting Committee, but in modified form. The distinction between any person “who has been or is being expelled” was useful and should be retained. The Special Rapporteur might, however, wish to consider whether the phrase “being expelled” was too imprecise for the purposes of the draft articles. At what point was someone “being expelled”? The decision of the European Court of Human Rights in the case of *Vijayanathan and Pusparajah v. France* clearly suggested that “being expelled” might be different from being the subject of an expulsion order. The process of being expelled was presumably broader than being placed under an expulsion order and so, from the individual’s standpoint, the Special Rapporteur’s wording might be preferable, although it might also give rise to some degree of uncertainty. In any event, the title of the draft article needed to be amended to encompass persons who had been and were being expelled.

64. More fundamentally, draft article 8 had been criticized justifiably for its treatment of the question of fundamental versus other rights. He agreed with those members of the Commission who took the view that the general obligation referred to in the title of the article should cover not just fundamental rights but all human rights that might be relevant in the case of an individual who had been or was being expelled. Perhaps the Special Rapporteur was trying to achieve that result, but that was not clear from the current wording of draft article 8. Apart from anything else, the reference to “other rights the implementation of which is required by [a person’s] specific circumstances” could mean any right at all, including private law rights such as contractual rights. In short, draft article 8 should be revised to refer to established human rights, such as those set out in international covenants on human rights, as applicable in the case of the individual concerned. The distinction between fundamental rights and other rights was not very helpful in that context.

65. It could also be argued that draft article 8, as currently worded, implied that if a person was being expelled and if such expulsion was contrary to his or her fundamental rights, then the expulsion should not take place. That led him to wonder whether the Special Rapporteur had a specific remedy in mind for persons who had already been expelled contrary to the terms of draft article 8. Should the solution lay in the right of return, compensation or some other form of restitution? Taking the matter further, he wondered whether possible remedies should be proposed in the draft articles or in the commentary, or whether they should be consigned to the Commission’s draft articles on the responsibility of States for internationally wrongful acts.⁶²

66. Draft article 9, concerning the obligation to protect the right to life of persons being expelled, should be sent

to the Drafting Committee. It had been suggested that the concepts of the person who had been expelled and the person who was being expelled should be applied generally, but that approach would be impossible in draft article 9, paragraph 1. That paragraph dealt with the situation of a person being expelled, and the person’s right to life applied at that time. Once the person had been expelled, it would be unrealistic to expect the expelling State to protect the person’s right to life. Liability for expulsion would be incurred but the person would in all likelihood be outside the jurisdiction of the expelling State. He therefore supported the first paragraph of draft article 9 as it stood.

67. He also supported the submission of the second paragraph of draft article 9, on the death penalty, to the Drafting Committee. While that provision represented an important policy position, it was not necessarily a statement of the law prevailing outside Europe. Significantly, the Special Rapporteur did not offer much in the way of evidence in support of the paragraph; although he cited the cases of *Ng v. Canada* and *Soering v. the United Kingdom*, he correctly noted that, in the final analysis, neither case was about extradition or expulsion in breach of the right to life *per se*. None of the cases from the Inter-American human rights system that he had cited in the report—*Hugo Armendáriz v. United States*, *Marino López et al. (Operation Genesis) v. Colombia* and *Haitians and Dominicans of Haitian origin in the Dominican Republic*—had been decided on the merits, and although they concerned the right to life at least in part, they had nothing to do with expulsion, extradition or deportation to face the death penalty. Thus they were not directly relevant to draft article 9, paragraph 2. The Special Rapporteur did discuss *Judge v. Canada*, which was directly relevant and which provided firm support for draft article 9, paragraph 2. However, he did not consider the decision in the case of *Kindler v. Canada*, which the Human Rights Committee had had to reinterpret in order to reach its position in *Judge v. Canada*, nor did he assess the extent to which the views of the Human Rights Committee in one case might be said to reflect the *lex lata*.

68. It could thus be argued that draft article 9, paragraph 2, was a policy position, and the Commission could therefore consider going further. In the context of expulsions, the Special Rapporteur might indicate that a State could not expel a person who had been sentenced to death to a State in which the person might be executed unless it had previously received a guarantee that the death penalty would not be carried out. He therefore suggested that the paragraph should be amended to read: “A State may not expel a person to face the death penalty”. That amendment would bring the wording of article 9, paragraph 2, more into line with the progressive development of policy outlined by Ms. Jacobsson earlier in the meeting.

69. As for article 10, he shared the view that human dignity provided the rationale for several human rights but might not constitute a right on its own. A reference to human dignity could be an important element of the preamble to the final outcome of the Special Rapporteur’s work, but he was against sending draft article 10 to the Drafting Committee, because the meaning of human dignity as a free-standing right seemed to lack clarity.

⁶² See footnote 10 above.

70. Draft article 11 should be sent to the Drafting Committee, but he agreed with those members who would prefer to delete the phrase “in its territory” from paragraph 1 in order to broaden the scope of the prohibition against torture or cruel, inhuman or degrading treatment. Mr. Saboia had provided telling examples of why it would be useful to delete that phrase. Ms. Escarameia’s point that private persons should be prohibited from committing acts of torture or engaging in inhuman or degrading treatment in either the expelling State or the receiving State was well made. He also supported her proposal to delete the phrase “of paragraph 2” from paragraph 3.

71. Draft article 12 should likewise be sent to the Drafting Committee because it properly sought to protect children, who formed a vulnerable group in need of special attention. The actual formulation of that article might, however, need to be reconsidered. For example, the implications of being “considered, treated and protected as a child” in the context of expulsion might be elucidated further. Mr. Gaja’s suggestion that human rights should be linked specifically to expulsion was pertinent in that context.

72. Draft article 13 should also be sent to the Drafting Committee: the Special Rapporteur’s discussion of the case law applicable in respect of family life was noteworthy for its clarity and precision. Family life issues were central in the context of expulsion. He hoped that the commentary to draft article 13, paragraph 1, would explain some of the implications of the right to private life in cases of expulsion.

73. Draft article 14 on non-discrimination should be sent to the Drafting Committee, subject to the inclusion of the additional grounds of age and disability. It should also be made clear that the discrimination prohibited was discrimination among aliens.

74. Lastly, thought might be given to including three additional provisions, one of which might indicate that expulsion procedures lasting for an inordinately long time could amount to inhuman or degrading treatment, not only for children, as stated in draft article 12, but for adults as well. The Special Rapporteur might consider including a criterion of reasonableness in that connection. The second additional provision might stipulate that, for human rights reasons, expulsion should not be used as a form of reprisal or as a countermeasure. Lastly, a provision might be included to say that the declaration of a state of emergency did not allow a State to derogate from the human rights that were listed in the draft articles.

75. Mr. HASSOUNA thanked the Special Rapporteur for his comprehensive report. In seeking to define the limits of the obligation to respect the human rights of persons being expelled and identify the practices relating to expulsion that were prohibited by international law, he had courageously dealt with issues that were clearly open to differing legal interpretations. However, while he had drawn on a wide range of sources for his specific proposals, including legal instruments, judicial decisions, academic opinions and the practice of human rights bodies, he had neglected to cite the Arab Charter on Human Rights among the regional human rights

instruments listed. In its prohibitions of discrimination, physical and psychological torture and slavery and human trafficking and its reaffirmation of the indivisibility of human rights, the inherent right to life and respect for the inherent dignity of the human person, the Arab Charter on Human Rights embodied what the Special Rapporteur had described as fundamental human rights, or the hard core of human rights.

76. As to the wisdom of incorporating the concept of fundamental rights in draft article 8, he subscribed to the view that no distinction should be drawn between the fundamental and non-fundamental human rights of expelled persons. Consequently, draft article 8 should be redrafted to include all human rights relevant to the case of expulsion, while at the same time omitting the reference to the implementation of rights required by specific circumstances.

77. The Special Rapporteur seemed to reject *jus cogens* as a criterion for identifying the hard core of non-derogable rights on the grounds that it remained controversial and was subject to contrary interpretations. Under established international practice, however, certain non-derogable rights were also *jus cogens*, and the significance of that equivalence could be considered in the commentary to the draft articles. While the report stressed the fact that the prohibition of torture was a rule of *jus cogens*, the Special Rapporteur might say the same thing about the right to life and the prohibition of discrimination on grounds of race.

78. The fact that draft article 9, paragraph 2, referred to the death penalty was a policy development, as previous speakers had pointed out. That paragraph also mentioned the need to obtain from the receiving State a guarantee that the death penalty would not be carried out, but the term “guarantee” was somewhat ambiguous. It raised a number of issues that might be dealt with in the commentary, including what constituted a guarantee, when it was deemed sufficient, what follow-up to a guarantee might be envisaged by the expelling State and what the implications of a breach of the assurances given by the receiving State might be.

79. Regarding draft article 10 and respect for dignity, he recalled that dignity was the overriding principle of all human rights protection; it was the rationale of human rights law and was mentioned in most human rights conventions and legal instruments. Respect for human dignity could be mentioned in the preamble to the draft articles or as part of a general obligation to respect the human rights of the expelled person as contained in the redrafted article 8.

80. Draft article 11, on protection against torture and other forms of ill-treatment, assumed great importance in the light of contemporary State practice. An extensive discussion had recently been held in the United States Congress on that very sensitive issue. In paragraph 1, the reference to the territory of a State should be supplemented by a reference to territory under a State’s jurisdiction and territory under foreign occupation. With regard to the practice of rendition, mention could be made in paragraph 2 of the need to obtain a guarantee

from the receiving State that the expelled person would not be tortured or subjected to ill-treatment. Lastly, there was a strong need to reaffirm in the draft article or in the commentary that the right of protection against torture and other forms of ill-treatment could not be suspended in emergency situations such as conflicts, natural disasters or situations that might threaten the security of the State. That rule should always take precedence over any contrary rule enshrined in national legislation.

81. The draft articles could also provide for a right to basic medical assistance pending expulsion proceedings for those aliens who were sick and under immigration detention. The right to health was a fundamental human right enshrined in the International Covenant on Economic, Social and Cultural Rights. By focusing not only on civil and political rights but also on social rights, the Commission would be adopting an approach to the topic that was more in line with the principle of indivisibility of all human rights.

82. With those remarks, and subject to his views on the redrafting of certain articles, he would agree to refer the draft articles as a whole to the Drafting Committee.

Mr. Petrić resumed the Chair.

83. Mr. WISNUMURTI thanked the Special Rapporteur for his excellent report and comprehensive study of the observations of Member States and international organizations, legal instruments and judicial precedents relevant to the topic of expulsion of aliens. He agreed with the view expressed in paragraph 3 of the report that the Commission should not undertake the preparation of draft articles on dual or multiple nationality, loss of nationality and denationalization in the context of expulsion, thereby keeping the focus of the work on expulsion of aliens. He also agreed that there should be a balance between the sovereign right of States to expel aliens and the limits imposed by international law on that right, particularly the rules relating to the protection of human rights and the treatment of aliens.

84. One of the most discussed aspects of the report was the Special Rapporteur's fundamental-rights-based approach to his work. Despite the Special Rapporteur's strong arguments in support of that approach, he himself agreed with those who had expressed reservations about the idea of singling out fundamental rights as the primary rights to be protected. Why should persons being expelled enjoy only their fundamental rights? True, fundamental rights, or the hard core of human rights, were non-derogable and as such were important as a minimum guarantee of protection, but the approach unnecessarily limited the degree of protection afforded to the person being expelled. There were other rights that a person who had been expelled or was being expelled should continue to enjoy insofar as they were applicable to a particular case of expulsion.

85. For those reasons, it was essential to replace the words "fundamental rights and all other rights" in draft article 8 with the words "all rights" or "all applicable rights". It had been proposed that the reference in the last part of the draft article to rights "the implementation of

which is required by his or her specific circumstances" should be deleted. Although he could live with the retention of those words, he could also agree to the proposed deletion as long as his proposal to replace "fundamental rights and other rights" was adopted.

86. Concerning draft article 9 (Obligation to protect the right to life of persons being expelled), paragraph 1 presented no difficulty but paragraph 2 did because it applied only to States that had abolished the death penalty. Did it mean *a contrario* that a State in which the death penalty still existed could expel a person who had been sentenced to death to States in which he or she might be executed? Paragraph 2 was based on the findings of the Human Rights Committee in *Judge v. Canada*, yet relying solely on that case, involving a State that happened to have abolished the death penalty, did not serve the Commission's purpose. There would probably be cases in which a State that had the death penalty or that had a self-imposed moratorium on its implementation should also be subjected to the prohibition contained in article 9, paragraph 2. He therefore proposed the deletion of the words "that has abolished death penalty".

87. He shared the doubts expressed by Mr. Dugard and Sir Michael Wood regarding draft article 10, on the obligation to respect the dignity of persons being expelled. The notion of "dignity" was indeed vague: there were still differences of opinion as to whether it was a legal concept or an ethical or philosophical concept. References to dignity appeared in the preamble of the Charter of the United Nations and in the Universal Declaration of Human Rights; accordingly, the rightful place for a reference to respect for the dignity of persons being expelled should be in the preamble of the draft articles, and not in the body of the instrument.

88. Turning to draft article 11 (Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment), he noted that Mr. Saboia had suggested that the words "in its territory" in paragraph 1 be replaced by "in any territory", in order to cover a situation where a State exercised jurisdiction or control—real or presumed—over a territory outside its own. He could see the justification for that suggestion but thought that it would be better simply to delete the words "in its territory". He agreed with Ms. Escarameia's proposal to replace the words "serious risk" in paragraph 2, with "real risk", a term used consistently in the decisions of the European Court of Human Rights in *Cruz Varas and Others v. Sweden*, *H.L.R. v. France* and in *N. v. Finland*. The Commission would thereby maintain consistency with those sources.

89. In its decision in *H.L.R. v. France*, the European Court of Human Rights had stated that article 3 of the European Convention on Human Rights might be applicable where a danger emanated from persons or groups of persons who were not public officials, but that it must be shown that the risk was real and that the authorities of the receiving State were not able to obviate the risk by providing appropriate protection. Paragraph 3 of draft article 11 omitted that important requirement, which should be added at the end of the paragraph, so that it would then read: "The provisions of paragraph 2 of this article shall

also apply when the risk emanates from persons or groups of persons acting in a private capacity and the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.”

90. He had no particular comments on draft articles 12, 13 or 14, although he agreed that, since article 14 was general in nature, it should perhaps be moved up to follow draft article 8.

91. He was of the view that the draft articles should go to the Drafting Committee, where all the proposals made in plenary would be adequately addressed.

92. Ms. XUE said that the Special Rapporteur was to be commended for his comprehensive research and in-depth analysis of the topic of expulsion of aliens. The underlying policy guidance seemed clear and sound, and in principle she had no objection to sending the draft articles to the Drafting Committee for technical improvement.

93. The question of whether the Commission was drafting another human rights treaty was a pertinent one, but since the draft articles started with the provision stipulating that a State had the right to expel an alien from its territory, the Commission's premise was definite and clear: while there were limitations on a State's exercise of such a right under international law, the legitimate interests of the State were also recognized by the rule of law. Thus, while the Commission placed emphasis on the importance of the protection of individuals, it must also bear in mind that various interests should be taken into account.

94. She agreed with some of the criticisms of the section of the report dealing with fundamental human rights, but she could also fully appreciate the Special Rapporteur's rationale in reaching out to address the “hard-core” issue. He had apparently not intended or even attempted to define what constituted the hard core or fundamental human rights in general but had asserted the basic rights that must be respected in the case of aliens undergoing expulsion and the conditions that must be observed at all stages of the expulsion process. Domestic legislation governing the expulsion process and law enforcement operations at the national level must comply with those minimum international standards. The scope of those basic rights and conditions was not necessarily identical to that of other international human rights instruments, but those rights were essential to aliens who were undergoing the expulsion process. It was in that context that such rights were regarded as “hard-core” or non-derogable. One might argue that since the aliens being expelled in each case were different persons, the rights that were fundamental for some were not necessarily so for others, given their different circumstances. That argument only proved that the Special Rapporteur was correct in trying to identify the hard-core rights for aliens, irrespective of the specific circumstances of the expulsion. Nevertheless, she agreed that the Special Rapporteur had not made that point clearly enough in the report, although he had subsequently explained it in the course of the discussion.

95. The analysis of fundamental human rights in the report was a bit too broad and could cause confusion for the reader. She welcomed the constructive suggestion that

had been made to have the draft articles or at least the commentary stated explicitly that, notwithstanding the provisions on hard-core rights set out in the draft articles, general international human rights law continued to apply to aliens.

96. Draft articles 9 to 13 spelled out the most relevant and important rights for aliens, and she did not share the doubts expressed about them. In reality, aliens who were being expelled were frequently subject to humiliation and ill-treatment, and their lives could even be placed in danger. For such persons, the right to life, respect for dignity, the prohibition of torture and cruel treatment, special protection for children and preservation of family life were extremely pertinent rights that called for special protection under international law. Respect for dignity was particularly relevant in the context of the treatment to which illegal immigrants were subjected daily during the expulsion process. Thus, the provisions on those rights in the draft articles were not a simple repetition of existing law, but afforded enhanced human rights protection to a special vulnerable group. She agreed that as far as substantive rights were concerned, a major omission was the report's failure to mention property rights. In view of the nature of the expulsion process, procedural human rights guarantees could be even more important under certain circumstances for the aliens concerned.

97. With regard to the specific articles, she thought that draft article 8 was generally clear, but that the phrase “the implementation of which is required by his or her specific circumstances” could be interpreted by expelling States as an excuse for not ensuring the rights of aliens. The inapplicability of such rights should be determined by both law and fact.

98. The right to life was addressed in draft article 9, which focused on capital punishment, with paragraph 2 applying primarily to extradition and judicial assistance in criminal matters. The main issue of the text, then, was not the basic idea of the right to life but the conditions applying to capital punishment. What was unclear was why the issue of capital punishment arose if the alien had not committed a criminal offence under the law of his or her country and whether expulsion should be characterized as legal cooperation between the States concerned or regarded as a unilateral act under international law. In existing human rights instruments, the right to life had a broader interpretation, and that right should also be given a broader scope as it applied to aliens.

99. The application to aliens of article 13, on the right to private life, was likewise not very clear, and the criterion of striking a fair balance would be hard to measure in practice. A large number of grounds relating to the principle of non-discrimination were given in article 14, but further examination was needed in the light of existing human rights instruments to see whether all the necessary grounds for the protection of aliens from discrimination were covered. The second paragraph of that article was somewhat vague: did it mean that aliens were entitled to enjoy the rights and freedoms established in human rights treaties as well as those enjoyed by nationals of the expelling State as long as national law so provided? If that understanding was correct, there were several problems.

First, at the international level, aliens were indeed entitled to all rights under human rights law. That point should be made in a general clause, not just in the context of non-discrimination. Secondly, at the national level, once they were involved in expulsion proceedings, aliens might be subject to certain legal constraints that should not be regarded as discrimination.

The meeting rose at 1.05 p.m.

3006th MEETING

Friday, 15 May 2009, at 10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Expulsion of aliens (*continued*) (A/CN.4/604, A/CN.4/606 and Add.1, sect. E, A/CN.4/611, A/CN.4/617, A/CN.4/618)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the fifth report on expulsion of aliens (A/CN.4/611).

2. Mr. OJO said that the topic of the expulsion of aliens was extremely difficult, in that it was tempting to fashion a new human rights charter out of the applicable legal regime. That was undoubtedly why, in draft article 8, the Special Rapporteur made a reasoned attempt to set out the expelling State's general obligation under international law to respect the human rights of persons being expelled. The question was whether the draft article needed to reaffirm the well-established notion of international protection for human rights and, in addition, to refer to "all other rights" of persons being expelled. Divergent views had been expressed by previous speakers, merely confusing the situation. Even if the Commission was uncertain which position to adopt, it should not forget that its goal was the codification and progressive development of international law. Although the draft articles specifically addressed the legal aspects of expulsion of aliens and did not purport to constitute a human rights instrument, there was nothing wrong with referring explicitly to the fundamental human rights of persons subject to expulsion, so as to dispel any doubt. To do otherwise would be to shirk the responsibility conferred on the Commission by the United Nations. The Special Rapporteur had concluded

that those rights were the "hard-core" human rights. Naturally, the expelling State must protect all the other rights, and the international community must ensure that it did so, given the *erga omnes* obligation imposed by international law. He therefore proposed that draft article 8 should be reworded to read: "Any person who has been or is being expelled is entitled to respect for his or her fundamental rights, and in particular those rights set out in the present draft articles."

3. Draft article 9 was entirely satisfactory and he would therefore refrain from commenting on it. Draft article 10 did not purport to be a human rights charter any more than did draft article 8. Numerous international and regional human rights instruments, and customary international law as well, established the inviolability of certain categories of human rights, including the right to the dignity of the person. It therefore seemed pointless for paragraph 1 to state explicitly that the right to human dignity was inviolable. If that was to be done, however, the reference should be to the beneficiary of the right, namely the person being expelled. Paragraph 1 might therefore be reworded to read: "The inviolability of human dignity under international law shall apply to a person who has been or is being expelled."

4. The in-depth research that had gone into draft article 11 was praiseworthy. He endorsed the proposed text, which flowed naturally from an analysis of all the relevant international and regional human rights instruments and, in particular, from judicial opinions on the rights that were to be guaranteed. With regard to draft article 12, the Special Rapporteur had given a brilliant exposition of the current jurisprudence, which held that the separation from a family of one of its members was a disruption of the right to privacy and family life. However, in some cases the problem of expulsion of a family that included a child might arise, and there, the best interests of the child must always be given utmost consideration: it must not be assumed that it was systematically in the child's best interests to remain with his or her parents. The principle of the best interests of the child should therefore be included as an opening paragraph that would read: "In all cases of expulsion involving a child, the best interests of the child shall be given the utmost consideration."

5. As to draft article 13, he said that the right to privacy and family life was a fundamental and inviolable right, non-derogable under international law. To subordinate that right to "such cases as may be provided for by law", as in paragraph 2, might be to subject a rule of international law to the vagaries of local legislation that did not always meet the exigencies of international law. In order to strike a fair balance between the interests of the State and those of the person concerned, the laws of the expelling State that might authorize such a derogation needed to be examined. Paragraph 2 might consequently be reformulated to read: "The expelling State may, in giving effect to paragraph 1, strike a fair balance between the interests of the State and those of the person in question." Lastly, with regard to draft article 14, whose importance could hardly be overestimated, he said that although the State did have the right to expel a person, it was not entitled to make distinctions that were unfair, unjustifiable or arbitrary or to impose an exclusion, restriction, privilege

or preference that had the effect of nullifying a particular right of the person being expelled. Thus, an expulsion that would ordinarily be lawful might incur the responsibility of the expelling State if the *modus operandi* adopted to implement it violated the provisions of international law prohibiting discrimination. He endorsed draft article 14 and suggested that the whole set of draft articles, as amended, should be referred to the Drafting Committee.

6. Mr. PELLET commended the Special Rapporteur for daring to adopt a lucid and laudable personal stance on difficult issues and on specific cases. That independent thinking and humanist perspective imbued the entire report, especially in its treatment of the right to dignity which, while going beyond positive law, was a logical and persuasive demonstration of the progressive development of international law. He strongly favoured the inclusion in the draft articles of a provision on the right to dignity, not simply as part of codification but rather as progressive development. That said, he was more convinced than ever that the topic would have lent itself better to diplomatic negotiation than to progressive development and codification. After having read the report in two sittings—the general rules, through paragraph 50, and then the draft articles and the reasoning behind them—he had been perplexed by the discussion of fundamental rights and “hard-core” rights. It seemed patently obvious to him—as, no doubt, to most members of the Commission—that persons who had been or were being expelled were entitled to respect for their rights in general and for their human rights in particular, like all human beings. Nevertheless, after reading the second part of the report, he had begun to understand better the reasons why the Special Rapporteur had emphasized that distinction. All persons who had been or were being expelled were indisputably entitled to all the rights granted to human beings under general international law and, in certain cases, under the applicable treaty law. He firmly believed, however, that in respect of certain specific rights—the right to life, the right not to be subjected to inhuman and degrading treatment (the adjective “cruel” seemed superfluous), the right to dignity and, no doubt to a lesser extent, the right to private and family life—expelling and receiving States alike were required to provide certain guarantees, expelling States being under an obligation not to expel in particular cases. Along with the rights listed by the Special Rapporteur, he would include the right to a fair trial, which both expelling and receiving States must ensure, thereby preventing expulsion in cases where the receiving State gave no reliable assurances of the holding of a fair trial.

7. In other words, although he did not disagree fundamentally with the Special Rapporteur on substance, he did believe that the structure of the draft articles under consideration needed to be thoroughly re-examined. A new first article should be drafted for that portion of the text, stating that persons who had been or were being expelled were entitled to full respect for their human rights, without conditions or restrictions. A second draft article should specify the situations in which the possibility that the receiving State might fail to respect those rights would preclude expulsion. Such situations included the risk of torture or inhuman treatment, the lack of a fair trial and the danger of receiving the death penalty, where the expelling State itself had abolished it. That, in his

view, fell within the domain of the progressive development of international law, not of existing positive law. As such, it might not be possible to go further in the drafting, although he thought the Special Rapporteur had reconciled his opposition to the death penalty with positive law in a very sensible manner. The risk of violating the dignity of the person, an issue that he fervently hoped the Commission would consent to take up as part of the progressive development of the law, could certainly be included in the second draft article, which might be formulated along the lines of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The two basic draft articles should be supplemented by two other provisions: an article prohibiting all forms of discrimination, modelled on but more tightly worded than draft article 14, and an article expanding on the current draft article 12 to address the protection of vulnerable persons—children, of course, but also persons with disabilities, older persons and women—where their particular situation was not already covered by the provision on non-discrimination. Using those four draft articles, the Commission would have dealt with the issue just as thoroughly as the Special Rapporteur wished, only—in his own opinion—more logically. But that left him facing a dilemma: since he had no objection to the substance of the draft articles, he had no reason to oppose their referral to the Drafting Committee. Yet he firmly believed that they needed to be entirely recast, and that was not the job of the Drafting Committee, which was supposed to improve the wording, not the structure, of a text. He therefore asked whether the Special Rapporteur could agree to draft a conference room paper, restructuring his proposals based on those made during the plenary debate, or, failing that, if an informal working group with the sole task of dealing with the restructuring problem could be established.

8. The CHAIRPERSON, speaking as a member of the Commission, asked whether he had correctly understood Mr. Pellet to say that a person being expelled could not be expelled to a State where he or she risked being subjected to unlawful treatment, but could be expelled to another State.

9. Mr. PELLET said that it was exactly what he had meant to say.

10. Mr. KAMTO (Special Rapporteur), thanking Mr. Pellet for his specific proposals for restructuring, said that they blurred the distinction between the categories of persons subject to expulsion, between aliens residing lawfully in the territory of the expelling State and those unlawfully present. To stipulate that an expelling State could not expel an alien unlawfully present in its territory was directly to challenge that State's right of admission, from which the right of expulsion was derived. To prohibit a State from expelling a person, including an illegal alien, to a State where he or she might be subjected to ill-treatment, was to undermine the right granted to the State in draft article 2 *et seq.* Even if the wording proposed by Mr. Pellet seemed very logical and rational, account must be taken of the wide variety of situations that existed.

11. Mr. PELLET said that he was disconcerted by the Special Rapporteur's response since, on the one hand, he believed that everyone was entitled to respect for

their rights, irrespective of the manner in which they had entered the territory of a State, and on the other, he saw nothing in the Special Rapporteur's proposals, except perhaps in draft article 12, which protected a child who was being expelled, that alluded to an alien's residence status. As far as he was concerned, draft article 8 was irrefragable: it was sufficient to say that any person who had been or was being expelled was entitled to respect for his or her human rights. Certainly, the specific circumstances that entitled a person subject to expulsion to certain rights could be addressed, but that had no bearing on the restructuring he had proposed.

12. Mr. WAKO said he shared the views expressed by most of the earlier speakers on the topic and would limit himself to a few comments. Despite the fact that the Commission had extensively discussed draft articles 1 to 7, he believed that it would have to reconsider them, if only to take into account some of the issues raised during its consideration of draft articles 8 to 14.

13. He agreed with members who felt that draft article 8 should be reworded, since its reference to "fundamental rights" might cause unnecessary confusion or create a loophole in interpretation. He regarded draft article 8 as a general provision that should simply state that all human rights were applicable to the expulsion process, subject only to such limitations as prescribed by law, provided that the latter was consistent with customary international law or the treaties to which the State was a party. Draft article 8 should be resubmitted to the Drafting Committee, which might be guided by the wording suggested by Mr. Ojo. Once it was acknowledged that all human rights were applicable to the expulsion process, it was important to refer, if only for the sake of emphasis, to some of the rights considered essential in that process. As Mr. Pellet had rightly pointed out, one of the rights that warranted inclusion in a separate provision was the right to access to a competent authority and to the courts. In order for that right to be enjoyed by an alien, it must be protected by the availability of an effective remedy, without which it would be meaningless. Any text the Commission eventually adopted must elaborate on article 13 of the International Covenant on Civil and Political Rights, according to which:

An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

14. Although the Special Rapporteur was opposed to equating legal and illegal aliens, it was his own view that the right to a fair trial and the right to access to a competent authority applied to everyone without distinction. He took solace in the fact that article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live⁶³ said the same thing.

15. In any event, the draft articles should make explicit reference to access to the courts, taking into account article 4, paragraph 2, of the International Covenant on Civil

and Political Rights, which spelled out the articles that could not be derogated from, even in situations of public emergency that threatened the life of the nation, particularly article 16, according to which "[e]veryone shall have the right to recognition everywhere as a person before the law." Even refugees had the right, under article 16 of the Convention relating to the Status of Refugees, of "free access to the courts of law on the territory of all Contracting States", which supplied further justification for granting aliens a similar right. Having access to a competent authority or to the courts presupposed that aliens possessed certain procedural rights, in accordance with the rules of natural justice. The provision should apply not only to the process culminating in expulsion but also, following expulsion, to the right to institute legal proceedings with a view to returning to the expelling State or to obtain restitution or compensation.

16. Draft article 10 on the dignity of the person was aimed at protecting one of the most important rights of aliens being expelled, since the way they were treated invariably entailed affronts to their dignity. The right to respect for the dignity of the person had been recognized as a separate right in article 5 of the African Charter on Human and Peoples' Rights. In addition, article 10 of the International Covenant on Civil and Political Rights stated that all persons deprived of their liberty—which was usually the situation of aliens in the process of expulsion—must be "treated with humanity and with respect for the inherent dignity of the human person". Devoting a separate draft article to that right therefore seemed warranted. However, since many members were against it, arguing that any human rights violation was an affront to or a violation of the dignity inherent in a human being and that the obligation to respect such dignity would be better placed in the preamble or at the beginning of the draft articles, draft article 3 could be reworded to include the fundamental principle that the expulsion of an alien must be carried out with respect for his or her dignity.

17. The same applied to draft article 14, since the principle of non-discrimination was too important to be placed at the end of the draft articles. In most of the international and regional human rights instruments, it was mentioned in the first few articles as being essential for the enjoyment of all human rights. That was true of the Universal Declaration of Human Rights,⁶⁴ the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights. Non-discrimination was also included among the values and principles recognized in the United Nations Millennium Declaration,⁶⁵ which had been adopted by the United Nations General Assembly and whose importance had recently been reaffirmed during the Durban Review Conference.⁶⁶

18. In conclusion, he proposed that articles 10 to 14 should be referred to the Drafting Committee so that it

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

⁶⁵ General Assembly resolution 55/2 of 8 September 2000.

⁶⁶ Report of the Durban Review Conference, Geneva, 20–24 April 2009 (A/CONF.211/8), Outcome document of the Durban Review Conference, para. 6, p. 1.

⁶³ See footnote 59 above.

could review their wording and placement. He agreed with the suggestions made on refining draft articles 9, 11, 12 and 13 and proposed that they, too, should be referred to the Drafting Committee.

19. The CHAIRPERSON invited the Special Rapporteur on expulsion of aliens to sum up the discussion and present his conclusions.

20. Mr. KAMTO (Special Rapporteur) thanked members for their comments. The discussion had revealed the complexity of the topic of expulsion of aliens, belying its apparent simplicity. In particular, it had highlighted the difficulties the Commission faced in dealing with human rights issues, since certain impassioned, not to say militant, views on those rights seemed to infuse the arguments advanced, occasionally giving rise to the expression of subjective opinions at the expense of objective analysis of existing law and practice, the usual foundation for the codification and progressive development of the law.

21. Some members had stated that they could not see where the consideration of the topic would lead; however, it had been proposed some time ago, and its inclusion in the Commission's long-term programme of work⁶⁷ had been approved by the Sixth Committee.⁶⁸ Representatives of only two States—Portugal and the United Kingdom—had expressed doubts about the timeliness of entrusting the issue of expulsion of aliens to the Commission.⁶⁹ The Commission had held a fruitful debate on the topic without ever considering that it should be abandoned. One was certainly entitled to disagree with the approach he had taken as Special Rapporteur—that was the very essence of debate—but it might be going too far to conclude that the work of the Commission on the topic as a whole had gotten off to a bad start.

22. The approach he had taken in his fifth report had been to elaborate additional rules that seemed to be essential in the context of expulsion of aliens, without prejudice to the exercise of all other human rights. In draft article 8, the phrase “and all other rights the implementation of which is required by his or her specific circumstances” was intended precisely to show that, in addition to a few essential rules, set out in the preceding articles, whose implementation was indispensable because they were most directly related to expulsion, all other rights must also be respected. He had no objection to simply stating that any alien who was to be expelled was entitled to the protection of his or her rights, without distinction or qualification, as the majority of members of the Commission desired. However, it would seem strange for the Commission to disregard all the relevant contemporary legal developments in its drafting work on expulsion of aliens.

⁶⁷ *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729 and annex 4, p. 142, and General Assembly resolution 55/152 of 12 December 2000, para. 8.

⁶⁸ General Assembly resolution 59/41 of 2 December 2004, para. 5.

⁶⁹ See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session, prepared by the Secretariat (A/CN.4/549 and Add.1), available from the Commission's website, documents of the fifty-seventh session, para. 132; see also *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 12th meeting* (A/C.6/60/SR.12), paras. 38–39 (statement by Portugal).

In his own work, he had drawn not only on existing instruments but also on case law, which was useful not only for explaining but also for confirming new texts. The case law in question was that of the Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights. The African Charter on Human and Peoples' Rights, for its part, did not offer much of a perspective. From those sources, he had chosen to include only those rules that had been developed through practice and whose application had been guided by precedent, in order not to engage exclusively in progressive development. In his view, among the rights linked to the specific circumstances of the alien being expelled, it was those that had been recognized in a convention and confirmed through consistent practice that the Commission should codify. He therefore welcomed the fact that the Commission had agreed to refer draft article 8 to the Drafting Committee, which could reformulate it on the basis of the suggestions made. In that regard, the suggestion by Mr. Ojo, who had proposed wording that might form the basis for a specific provision, seemed a good solution.

23. In draft article 9, he had likewise drawn on examples of judicial interpretation of international instruments. Despite the trend towards abolition of the death penalty in certain parts of the world, the issue of the right to life and the death penalty remained controversial, as explained in paragraphs 53 to 66 of his report. It had been discussed by the General Assembly, precisely in the context of that body's consideration of the draft articles on expulsion of aliens. The declaration of a moratorium did not mean that the death penalty had been abolished, however: there was a distinction between a moratorium established by law and one that was actually implemented. The wording he had proposed took all those factors into account.

24. He welcomed the support expressed for draft article 10, about which he felt very strongly. It was from affronts to their dignity that aliens invariably suffered the most when being expelled. Such offences were not limited to cruel, inhuman or degrading treatment: that was only one aspect. The *Furundžija* judgement was significant precisely in that it constituted one of the first attempts to ascribe to the notion of dignity a meaning that went beyond merely prohibiting cruel, inhuman or degrading treatment. It stated that the general principle of respect for the dignity of human beings was “intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well-being of a person” [para. 183 of the judgement]. Contempt and insults were aspects of the violation of human dignity, without necessarily constituting cruel, inhuman or degrading treatment. Even though the right to respect for one's dignity was an overarching human right, in a way serving as the foundation for most other human rights, it could still be the subject of a separate provision. Moreover, it was recognized as a separate right in article 1 of the Charter of Fundamental Rights of the European Union, to which several members had frequently referred in substantiating other arguments. Mr. Cafilisch's proposal to delete paragraph 1 of draft article 10 was very much to the point, because it was human dignity in the specific context of expulsion that was important. The placement of the draft

article within the entire text was a minor matter that could be re-examined at a later date.

25. As for draft article 11, paragraph 1, some members had proposed to delete the phrase “in its territory” or to add the words “or in any other territory under its control” at the end of the paragraph. He had no problem with that, but pointed out that the reference was to a logical sequence whereby the State first protected from torture, in its own territory, any person being expelled (para. 1) and then ensured that it did not expose them to the risk of torture elsewhere (para. 2)—in other words, in the territory of the country to which they were being expelled. Doing away with that logical sequence might blur the distinction between the obligations of the expelling State and those of the receiving State. The Drafting Committee would have to review the wording in that light. With regard to the proposal to add “whenever the State cannot itself ensure such protection” at the end of paragraph 3, he said that the phrase nicely rounded out the provision, which applied to exceptional cases when the expelling State could not in its own territory ensure the protection of the person concerned.

26. As to draft article 12, he endorsed the proposals that the best interests of the child should be emphasized, in line with the international instruments on the rights of the child and case law in that field.

27. With regard to draft article 13, he had no objection to deleting the reference to the right to private life, since the most important aspect of that article was respect for the right to family life. Since several members of the Commission considered the phrase “such cases as may be provided for by law” to be ill-advised, he was in favour of replacing it with the words “in accordance with general human rights standards”. With regard to the phrase “a fair balance between the interests of the State and those of the person in question”, he said that the obligation to protect privacy was not of such an absolute nature as to preclude the expelling State from taking into account considerations relating to public order, for example. It should indeed be possible to strike a fair balance by referring to the rules of international law, which would address the concerns expressed by several members.

28. On the subject of draft article 14, Mr. Galicki had pointed out that the obligation of non-discrimination was not necessarily a separate principle, but was linked to the realization of other human rights. Although that was no doubt a correct observation, it was more in keeping with the general notion of respect for human rights as defined, for example, in the European Convention on Human Rights. In his own view, irrespective of whether one referred to it as a rule or a principle rather than an obligation, what was essential was the specific content of the provision that laid down an individual principle or rule clearly enunciating a prohibition of discrimination between aliens—and not solely between nationals and aliens—in expulsion matters.

29. He had no objection whatsoever to the idea put forward by some members to add to the body of rules the right to a fair trial, viewed as a substantive rather than a procedural right. However, the placement of such a

provision within the draft articles was problematic: he had envisioned it as an introductory article in the part relating to expulsion procedures, but he was not at all opposed to including it as an introductory article in the part relating to the general protection of expelled persons. Likewise, he was in favour of the proposal to extend the protection provided for in the draft articles to persons with disabilities. On the other hand, as far as women were concerned, such protection should be extended only to pregnant women and not to women in general. As to protection for older persons, the difficulty would lie in determining the age beyond which a person was deemed to be an older person. Lastly, the proposal to add a general provision stating that no one could be expelled to a country where there might be a threat to his or her life owing to the person’s race, sex, etc., risked meeting with opposition in the Sixth Committee unless a distinction was drawn between persons residing lawfully in a country and those with irregular status—a distinction made, it might be added, in article 13 of the International Covenant on Civil and Political Rights, cited by Mr. Wako. Persons with irregular status whose life would be at serious risk if they were expelled always had the option of applying for asylum.

30. In conclusion, he requested the Commission to refer the draft articles to the Drafting Committee.

31. Ms. ESCARAMEIA said that she was not in favour of referring the draft articles, particularly draft article 8, to the Drafting Committee after reformulation by the Special Rapporteur. Draft article 8 raised fundamental issues that could not be resolved by the Drafting Committee. Such issues included possible restrictions of the human rights of persons being expelled, to which many members were opposed.

32. Mr. KAMTO (Special Rapporteur) said that his intention had been to reformulate certain draft articles, in particular draft article 8, in keeping with the wishes of the majority of members of the Commission. He would therefore not propose a provision incorporating any restrictions on limiting the human rights of persons being expelled.

33. Mr. GAJA said he would have preferred for the Commission to set up a working group to consider the issue rather than to refer the draft articles to the Drafting Committee. That said, he was not opposed to doing so, provided the Drafting Committee was given a broader mandate than usual in order to examine certain points, in particular the distinction between the rights that expelling States must respect in general and those linked to particular circumstances in the receiving State.

34. Mr. NIEHAUS said that he was opposed to referring the draft articles to the Drafting Committee because substantive changes had been proposed. Those should be discussed in a plenary meeting before the Drafting Committee took them up, since its mandate was limited to making drafting changes.

35. Sir Michael WOOD said that, given the Special Rapporteur’s demonstrated flexibility with regard to fundamental aspects of the draft articles, he would support his proposal to refer them to the Drafting Committee, provided that certain conditions were met. First, draft

article 8 should be reformulated so as to cover all human rights; second, specific rights should be listed merely as examples of the most relevant rights in the context of expulsion. Third, the right to dignity should be seen as an overall right and should consequently be the subject of a separate draft article to be placed earlier in the text, perhaps together with a draft article on non-discrimination. Fourth, the various restructuring proposals could be considered by the Drafting Committee as long as they did not affect the substance of the draft articles.

36. Mr. SABOIA said he supported Mr. Gaja's proposal to broaden the mandate of the Drafting Committee in order to take into consideration members' comments such as those on categories of vulnerable persons. If that was done, he would be in favour of referring the draft articles to the Drafting Committee.

37. Mr. VARGAS CARREÑO, supported by Mr. WISNUMURTI, suggested that the Special Rapporteur should draft a new version of the draft articles that had elicited reservations, taking into account members' comments, for subsequent referral to the Drafting Committee for consideration.

38. Mr. CAFLISCH said he supported Sir Michael Wood's proposal to refer the draft articles to the Drafting Committee, under the conditions he had enumerated.

39. The CHAIRPERSON, speaking as a member of the Commission, said that he was inclined to favour Sir Michael Wood's compromise proposal. In addition, he pointed out that Mr. Vargas Carreño's proposal, which was supported by Mr. Wisnumurti, required the Special Rapporteur's prior consent.

40. Mr. KAMTO (Special Rapporteur) said he could accept the proposal made by Mr. Vargas Carreño, which took up the one made earlier by Mr. Pellet, who had suggested either that he (the Special Rapporteur) should restructure the draft articles himself or that an informal group or a working group should undertake to do so. As a matter of principle, he was firmly opposed to appointing working groups because they were all too often made up of those who espoused the minority viewpoint, which then paradoxically became the majority viewpoint. He therefore agreed to submit to the Commission a new version of the draft articles that took into account the discussion held and the concerns expressed.

41. Mr. HASSOUNA said he had considered suggesting that the Commission should accept Sir Michael Wood's proposal to refer the draft articles to the Drafting Committee and to expand the Committee's usual role but also request the Special Rapporteur to submit a working paper to the Drafting Committee. He would certainly be open to the proposal just made by the Special Rapporteur, however.

42. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to accept the Special Rapporteur's proposal to submit to it a new set of draft articles, to be based on the views of the majority of members.

It was so decided.

Responsibility of international organizations (continued)* (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

43. The CHAIRPERSON invited the Special Rapporteur to conclude the introduction of his seventh report (A/CN.4/610).

44. Mr. GAJA (Special Rapporteur), referring to the section of his seventh report on content of international responsibility (paras. 93–101 of the report), said that the discussion in the Sixth Committee had mainly centred on draft article 43 (see paragraphs 95–98 of the report), for which the Commission had presented two alternatives, one to be placed in the text and the other in a footnote. The majority of the States that had expressed views on the subject had endorsed the first alternative, which read: "The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation under this chapter." In paragraph 97 of his report, and following a suggestion by some States, he proposed to add a second paragraph to article 43, to read: "The preceding paragraph does not imply that members acquire towards the injured State or international organization any obligation to make reparation." The purpose of that addition was merely to clarify a point that was already touched on in draft article 29; no substantive changes were introduced.

45. The section of the seventh report on implementation of international responsibility (paras. 102–119) contained no proposals for change. The reason was that draft articles 46 to 53 had been adopted by the Commission only the previous year, and their consideration had been arranged for the sixty-third session of the General Assembly, where they had met with general approval (see paragraph 102 of the report). The Commission might nevertheless wish to reconsider draft article 55, which did not seem to convey well enough the restrictive attitude that the Commission intended to adopt in stating a residual rule concerning resort to countermeasures by a State or international organization against an international organization of which it was a member. A view similar to the one he had advanced in paragraph 116 of his report had found support in the plenary Commission's recent debate on draft article 19, paragraph 2, a new text proposed in paragraph 66 of his seventh report that addressed the opposite case: countermeasures taken by an international organization against one of its member States or international organizations. Since draft article 19, paragraph 2, was modelled on draft article 55, the two texts should be considered together. If the Commission decided to review draft article 55 in an effort to find more appropriate wording or, using a residual rule, to restrict resort to countermeasures by the members of an international organization, that would address some of the concerns expressed at the meeting on responsibility of international organizations with legal advisers of international organizations.

* Resumed from the 3002nd meeting.

46. The section on general provisions (paras. 120–134) covered issues relating to the international responsibility of international organizations as well as questions relating to the international responsibility of a State for the internationally wrongful act of an international organization. This section would be placed in the last part of the draft articles. Draft article 61 (*Lex specialis*) reflected the residual nature of the draft articles in the preceding parts: special rules could supplement or replace the rules set forth in those parts. Special rules also applied to State responsibility, but they were likely to take on particular importance in the case of international organizations, given the wide variety of international organizations and the variety of relations they could establish with their members. One group of special rules that particularly deserved attention was the rules of the organization as they applied to the relations between the organization and its members. Many provisions in the draft articles could be made subject to the rules of the organization. Draft article 61, which placed particular emphasis on the rules of the organization as *lex specialis*, was a general provision designed to avoid repeating the same idea in some 20 draft articles.

47. As in the draft articles on the responsibility of States for internationally wrongful acts,⁷⁰ it seemed appropriate to state in a general provision that matters of international responsibility were covered by the current draft articles only to the extent that they were regulated by them. That seemed obvious, particularly with regard to matters that lay outside the scope of the draft articles, but it should be borne in mind that the draft articles covered some matters only partially. The main purpose of the provision was to convey that the draft did not address all the issues of international law that might be relevant in establishing the responsibility of an international organization. One of those issues was whether an international organization possessed legal personality under international law. The draft articles did not address that question: it was assumed that the responsibility of an international organization would arise only where it had legal personality.

48. Draft article 63 (Individual responsibility) was a “without prejudice” clause that replicated the one in draft article 58 of the text on State responsibility.⁷¹ Its main purpose was to establish that the international responsibility of an international organization or a State had no implications whatsoever with regard to the individual responsibility of a person. Thus, the fact that an individual acted as an agent of an international organization did not necessarily exclude his or her international criminal responsibility. Nor could one say that the international responsibility of an international organization necessarily entailed the responsibility of an individual who acted as an agent of the organization. Those matters were not regulated in the draft articles, or, for that matter, in the draft articles on State responsibility. Given the description of the scope of the draft articles in article 1, article 63 might appear to be superfluous—but the same could be said of the parallel provision in the draft articles on State responsibility.

⁷⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

⁷¹ *Ibid.*, pp. 142–143.

49. Draft article 64 (Charter of the United Nations) reproduced the text of draft article 59 on State responsibility.⁷² The position of international organizations with regard to the Charter was more problematic than that of States. In draft article 64, the reference to the Charter of the United Nations was not limited to the principles embodied therein, which were binding on international organizations by virtue of general international law. Rather, it concerned Security Council resolutions, which could affect the international responsibility of a State, but also of an international organization, in a variety of ways.

50. The CHAIRPERSON invited members of the Commission to offer comments and observations.

51. Mr. OJO said that he welcomed the Special Rapporteur’s proposal concerning the section entitled “Scope of the articles, use of terms and general principles” (paras. 7–21). The proposed rearrangement suggested in paragraph 21 of his report was especially instructive; however, simply moving article 4, paragraph 4, to article 2, as a new paragraph, would create some drafting problems, given that article 4, paragraph 4, and article 2, both began with the phrase “For the purposes of the present draft articles”. In order to avoid that repetition, he suggested that the new draft article 2 should read: “For the purposes of the present draft articles, the term (a) ‘International organization’ [...]; (b) ‘Rules of the organization’ [...]”

52. In the section on attribution of conduct (paras. 22–38), the Special Rapporteur had suggested, based on the advisory opinion of the ICJ in *Reparation for Injuries*, that the phrase “when they have been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions” should be added at the end of the definition of the term “agent”. In his view, the additional text was not necessary because, as an international legal person, an international organization could only act through its organs, and once an act was carried out on the instruction of such an organ, it was attributable to the organization. That was the principle of *qui facit per alium facit per se*.

53. With regard to breach of an international obligation (paras. 39–44), he noted that the current version of draft article 8, paragraph 2, stated that paragraph 1 also applied to the breach of an obligation under international law established by a rule of an international organization. Given the very nature of relations between States in an international organization, there was no doubt that, *prima facie*, the rules of international organizations were rules of international law. That was all the more true in that, by their rules—which applied to the majority of members of the international community—many international organizations had shaped the development of international law. As currently worded, however, draft article 8, paragraph 2, appeared to rest on the premise that the rules of international organizations were not rules of international law except in certain isolated cases, which were construed as exceptions. He therefore endorsed the Special Rapporteur’s proposed new version of paragraph 2, which stated that a breach of the rules of an organization was,

⁷² *Ibid.*

in principle, a breach of an international obligation. The phrase “in principle” appropriately conveyed the idea that the general rule allowed for certain exceptions, depending on the particular circumstances of each case.

54. As to responsibility of an international organization in connection with the act of a State or another international organization (paras. 45–54), draft article 15, paragraph 1, stated that an international organization incurred international responsibility if it adopted a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the organization itself. According to the Special Rapporteur, that article was designed to prevent an international organization from successfully circumventing one of its international obligations by availing itself of the separate legal personality of its members, whether they were States or other international organizations. It followed from paragraph 1 that a decision that bound a member of an international organization to commit an internationally wrongful act was manifestly an illegal decision. By the same token, an international organization that bound one of its members to commit such an act incurred international responsibility. However, the text did not address the case of a member State which, knowing that such a decision was a breach of international law, refrained from carrying out the required act. Such disobedience was likely to incur the wrath of the international organization, and the member in question would need to be protected from punishment by the organization. To that end, a new paragraph could be inserted immediately following the current draft article 15, paragraph 1, and could read: “No member of an international organization shall be subjected to proceedings under the rules of the international organization by reason only of non-compliance with or non-implementation of the decisions referred to in paragraph 1 of this article.”

55. The Special Rapporteur had suggested the creation of a new article 15 *bis* in order to fill in the gaps in chapter V of the draft articles, which contained no provision relating to the possibility that an international organization might incur responsibility as a member of another international organization (para. 52 of the report). The new article 15 *bis* would read: “Responsibility of an international organization that is a member of another international organization may arise in relation to the act of the latter also under the conditions set out in articles 28 and 29 for States that are members of an international organization.” However, the Special Rapporteur had conceded that international organizations were not frequently members of other international organizations. His proposal therefore did not seem to be sufficiently justified by practice, custom or judicial decision. In his own opinion, the isolated comment of the representative of the Netherlands⁷³ cited by the Special Rapporteur (para. 52) did not justify the insertion of a new draft article.

56. With regard to the circumstances precluding wrongfulness (paras. 55–72), he agreed with the numerous comments that “self-defence was, by its very nature,

applicable only to the actions of a State”. He therefore supported the proposal of the Special Rapporteur to delete draft article 18 on self-defence from the circumstances precluding wrongfulness.

57. With regard to the content of international responsibility (paras. 93–101), he noted that in paragraph 97 of his report, the Special Rapporteur had suggested adding a second paragraph to article 43 in order to clarify that when it stated that the members of a responsible international organization were required to take appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under chapter VIII, article 43 was not implying that member States had an obligation to provide reparation to the injured State or international organization. In his opinion, such a clarification would merely make the text of article 43 verbose. As the Special Rapporteur had acknowledged, “the current text does not appear to convey that there would be an obligation for members towards the injured entity”. Draft article 43 as it stood clearly showed that the primary and, in fact, only obligation fell on the international organization, not on its members.

58. As to the current wording of draft article 43, reference should be made to the fact that it was not in all cases that the rules of an international organization required member States or entities to take the measures envisaged in the draft article. Where such a gap existed in the rules of an international organization, it was likely to give member States an escape valve to evade international responsibility. Consequently, the obligation envisaged should not be dependent on the rules of the international organization concerned. That appeared to be the reason why New Zealand had warned that the reference to the rules of the organization “should not be interpreted as justifying inaction by the members of an organization in the absence of suitable rules”. The phrase “in accordance with the rules of the organization” should thus be deleted.

59. Lastly, Mr. Ojo endorsed the text of draft articles 44 to 64 as proposed by the Special Rapporteur.

The meeting rose at 1 p.m.

3007th MEETING

Tuesday, 19 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

⁷³ *Official Records of the General Assembly, Sixty-first Session, Sixth Committee, 14th meeting (A/C.6/61/SR.14)*, para. 20.

Reservations to treaties⁷⁴ (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Add.1–2,⁷⁵ A/CN.4/616,⁷⁶ A/CN.4/L.744 and Corr.1–2 and Add.1⁷⁷)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE (A/CN.4/L.740⁷⁸)

1. The CHAIRPERSON recalled that at the end of the sixtieth session,⁷⁹ the Chairperson of the Drafting Committee had introduced the Committee's final report on the topic "Reservations to treaties" (A/CN.4/L.740). The Commission had taken note of that report without formally adopting the draft guidelines, as that would have meant that the draft guidelines and the commentaries thereto would have had to be included in the Commission's report to the General Assembly, an unrealistic objective owing to a lack of time. In order to allow the Special Rapporteur sufficient time to prepare commentaries on the draft guidelines, he invited the Commission to adopt those contained in the report of the Drafting Committee.

Draft guideline 2.8.1 (*Tacit acceptance of reservations*)

Draft guideline 2.8.1. was adopted.

Draft guideline 2.8.2 (*Unanimous acceptance of reservations*)

Draft guideline 2.8.2 was adopted.

Draft guideline 2.8.3 (*Express acceptance of a reservation*)

Draft guideline 2.8.3 was adopted.

Draft guideline 2.8.4 (*Written form of express acceptance*)

Draft guideline 2.8.4 was adopted.

Draft guideline 2.8.5 (*Procedure for formulating express acceptance*)

Draft guideline 2.8.5 was adopted.

Draft guideline 2.8.6 (*Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation*)

Draft guideline 2.8.6 was adopted.

Draft guideline 2.8.7 (*Acceptance of a reservation to the constituent instrument of an international organization*)

Draft guideline 2.8.7 was adopted.

Draft guideline 2.8.8 (*Organ competent to accept a reservation to a constituent instrument*)

Draft guideline 2.8.8 was adopted.

⁷⁴ For the text of the draft guidelines and the commentaries thereto provisionally adopted so far by the Commission, see *Yearbook ... 2008*, vol. II (Part Two), chap. VI, sect. C.

⁷⁵ Reproduced in *Yearbook ... 2009*, vol. II (Part One).

⁷⁶ *Idem.*

⁷⁷ Mimeographed; available on the Commission's website. See also the 3014th meeting below, paras. 35 *et seq.* and the 3025th meeting, paras. 68 *et seq.*

⁷⁸ Mimeographed; available on the Commission's website, documents of the sixtieth session.

⁷⁹ See *Yearbook ... 2008*, vol. I, 2988th meeting, paras. 45–78.

Draft guideline 2.8.9 (*Modalities of the acceptance of a reservation to a constituent instrument*)

Draft guideline 2.8.9 was adopted.

Draft guideline 2.8.10 (*Acceptance of a reservation to a constituent instrument that has not yet entered into force*)

Draft guideline 2.8.10 was adopted.

Draft guideline 2.8.11 (*Reaction by a member of an international organization to a reservation to its constituent instrument*)

Draft guideline 2.8.11 was adopted.

Draft guideline 2.8.12 (*Final nature of acceptance of a reservation*)

Draft guideline 2.8.12 was adopted.

The draft guidelines contained in the report of the Drafting Committee (A/CN.4/L.740), as a whole, were adopted.

Responsibility of international organizations (continued) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. The CHAIRPERSON invited the Commission to resume its consideration of the seventh report on responsibility of international organizations (A/CN.4/610).

3. Ms. ESCARAMEIA said that the Special Rapporteur had proposed expanding draft article 43 (Ensuring the effective performance of the obligation of reparation) with a new second paragraph. The new text reflected the concerns that had led to the proposal of an alternative for article 43 at the Commission's previous session.⁸⁰ Since she shared those concerns, she supported the proposed new paragraph. The new text made it clear that there was no obligation on members of an international organization that had committed a wrongful act to make reparation to an injured State or international organization. As to the placement of article 43, she thought that it ought to be included among the general principles in chapter I because it clarified the responsibilities of international organizations and their members; however, she could also go along with its placement elsewhere.

4. She endorsed articles 44 and 45 as they stood.

5. Turning to article 46, she said that the fact that remarks by Mr. Pellet (2998th meeting above, para. 28) had raised anew the issue of enlarging the scope of the draft had emboldened her to reopen a debate from the fifty-ninth session. Under article 46, the responsibility of an international organization could be invoked by States or international organizations, but she thought that other entities—specifically, individuals—should be entitled to do so as well. In practice, the invocation of the

⁸⁰ *Yearbook ... 2008*, vol. II (Part Two), chap. VII, sect. C, para. 164, footnote 539. For the commentary to this draft article, see *Yearbook ... 2007*, vol. II (Part Two), pp. 91–92, para. 344.

responsibility of an international organization by other international organizations or States members of an international organization was rare. What happened instead was that international organizations—for example, peace-keeping forces—injured people, who sometimes had real, and not just theoretical, means of invoking the responsibility of the organization concerned. Thus a reference to individuals would give the draft articles a practical application.

6. Furthermore, if the rules of an organization were considered to constitute international law, then a breach of those rules could and should be covered by the draft on responsibility of international organizations. The text could then also address relations between international organizations and their employees, for example, labour disputes or other conflicts, and thus reflect real-life situations.

7. She was grateful that, after much insistence on her part, Mr. Gaja had inserted draft article 53 as a “without prejudice” clause to take account of the other entities—not only individuals but also moral persons or associations—that could invoke responsibility to international organizations and States.⁸¹ Article 53 should be retained to cover entities other than individuals, but it would be good also to have a reference to individuals in draft article 46. That would not constitute a major change and would in fact be quite simple to do: in both draft articles 46 and 47, the words “or an individual” could be inserted after the phrase “a State or an international organization”. Minor adjustments would then be required in only a few other places.

8. She still thought there were problems with the distinction that was drawn between countermeasures taken against international organizations that engaged in wrongful acts and those taken against States. The first type could undermine an organization’s functioning and even its very existence. The proportionality test in draft article 57 did not necessarily solve that problem, because a countermeasure might be proportional to the harm done by the organization but fail to take into account the organization’s weaknesses, which might prevent it from surviving the countermeasure. On the other hand, unlike States, international organizations might have as part of their functions the defence of the interests of the international community as a whole: that was often the very reason why they had been created. Thus, when the functions of certain international organizations were impaired, the defence of certain ideals was also undermined. Accordingly, great care should be taken with the draft articles dealing with countermeasures that could be applied against international organizations. Article 54, paragraph 4, addressed that point, but the wording remained a bit weak: countermeasures must “as far as possible” be taken in such a way as to “limit their effects” on the organization’s exercise of its functions. That did not, however, cover a situation in which the very existence of an organization might be imperilled. She would prefer to delete the phrase “as far as possible” and to insert a reference to the need to take into account the specific nature and particular needs of the organization.

⁸¹ For the commentary to this draft article, see *Yearbook ... 2008*, vol. II (Part Two), chap. VII, sect. C, para. 164.

9. The problem was even more complicated because of the unique relationship that existed between international organizations and their members. She agreed with the statements made by the representatives of Germany,⁸² France⁸³ and Greece⁸⁴ in the Sixth Committee to the effect that countermeasures should not enter into that relationship. Article 55 should be redrafted to minimize the chances that countermeasures might be used by members against an organization. The phrase “reasonable means” was ambiguous—did it imply means that were effective or means that were available? Perhaps such means permitted a rapid response or provided reparation. While those questions would be dealt with in the commentary, the draft article itself should say something more than just “reasonable”. In addition, it was unclear whether the word “means” was intended to refer to an institutionalized settlement mechanism, a procedure or a mere rule.

10. The phrase “available in accordance with the rules of the organization” was likewise unclear. The internal rules of an organization probably did not address the issue of countermeasures, yet the expression “in accordance with” implied that they did.⁸⁵ An earlier version of the text had used the phrase “not inconsistent with”,⁸⁶ which she preferred. Furthermore, the text ought to indicate whether means external to the international organization, such as courts, could also be used. She thought that they could, but the text did not make that clear.

11. Lastly, draft article 55 had to be harmonized with draft article 19. Whereas draft article 55 covered countermeasures taken by members against an international organization, draft article 19, paragraph 2, covered countermeasures taken by an international organization against its members. Both situations should be contemplated in both articles.

12. Turning to the general provisions proposed in paragraphs 120 to 134 of the report, she noted that draft article 61 on *lex specialis* was similar to article 55 in the draft on responsibility of States for internationally wrongful acts.⁸⁷ Instead of merely referring to the rules of the organization applicable to the relations between an organization and its members, however, article 61 should go further and mention the relevant practice, which might even be customary law. Draft article 62 likewise paralleled article 56 in the draft on State responsibility, and she endorsed it, but wished to offer some drafting suggestions. The phrase “continue to govern” was puzzling, and she would like to know why it had been chosen. Why not simply use the word “govern”? To her mind, the phrase “continue to govern” suggested that only rules that had existed when the text was adopted were applicable; however, rules not foreseen at that time might later be found

⁸² *Official Records of the General Assembly, Sixty-third Session, Sixth Committee, 19th meeting* (A/C.6/63/SR.19), para. 86.

⁸³ *Ibid.*, 20th meeting (A/C.6/63/SR.20), paras. 40–41.

⁸⁴ *Ibid.*, 21st meeting (A/C.6/63/SR.21), para. 2.

⁸⁵ See article 55 [52 bis] as provisionally adopted by the Drafting Committee at the sixtieth session (A/CN.4/L.725/Add.1, mimeographed; available on the Commission’s website). See also *Yearbook ... 2008*, vol. II (Part Two), chap. VII, para. 130.

⁸⁶ *Yearbook ... 2008*, vol. II (Part Two), para. 141, footnote 481.

⁸⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 140–141.

to be applicable. In addition, the phrase “internationally wrongful act” should be followed by the qualifying phrase “of the international organization” in order to make it clear that the internationally wrongful act in question was not one committed by a State.

13. She endorsed draft articles 63 and 64.

14. To sum up, she favoured referring new draft articles 61 to 64 to the Drafting Committee, with due regard taken for the comments made in plenary. Draft article 55 could also be sent to the Drafting Committee for a second look at the distinction between countermeasures taken in the context of the relationship between international organizations and their members and those taken outside that relationship. Draft article 55 and draft article 19, paragraph 2, should be harmonized so that both referred to all situations in which members applied countermeasures to international organizations and vice versa.

15. Notwithstanding her proposed changes, she found the report to be a remarkable piece of scholarship.

16. Mr. NOLTE observed that Ms. Escarameia favoured maximum restrictions on countermeasures to which, she argued, international organizations were particularly vulnerable; when such organizations represented the common good, then countermeasures should not impede their functioning. He suggested that a distinction should perhaps be made between international organizations that represented the common good in a universal sense and those that represented only the aggregate common good of individual States. If that was a reasonable distinction, then the logic whereby international organizations should be protected owing to their particular vulnerability might be inverted to suggest the need for stronger countermeasures against international organizations which merely represented the aggregate common good of their member States.

17. Ms. ESCARAMEIA said that Mr. Nolte’s point, as she understood it, was that an international organization was the sum total of several States. If it committed a wrongful act, that was equivalent to all those States having cumulatively committed the act and required a very strong response, not a very restricted one as she had suggested. She agreed with Mr. Nolte that not all international organizations were working for the common good, hence the need to have some reference in the draft articles to the specific nature of particular organizations. On the other hand, she found it difficult to view international organizations as a composite of their members. After all, such organizations were defined in the draft articles as having international legal personality. A countermeasure taken against a powerful organization did not have the same effect as one taken against a smaller, more regionally oriented one. In addition, much depended on the internal dynamics of the organization: for instance, some had many members but were dominated by one or two countries. It did not make sense, then, to penalize such organizations for something that one country had done.

18. Sir Michael WOOD said that Ms. Escarameia’s suggestion to amend draft article 46 to cover the possibility that individuals might invoke the responsibility of international organizations, far from being simple, as she had described it, would greatly complicate the Commission’s

task. He saw no reason why that idea should be included in the draft on responsibility of international organizations when it had not been included in the draft on State responsibility, as there was no real difference between the two sets of articles in that respect. The issue, though important, would be better left aside.

19. He agreed with the Special Rapporteur’s proposals to make certain limited improvements in Parts Two and Three, on the content and the implementation of international responsibility, respectively, and thought that together with the suggestions made in other parts of the seventh report, they should be referred to the Drafting Committee.

20. In introducing his report, the Special Rapporteur had invited the Commission to reconsider the wording of draft article 55 to see whether the limits on the possible use of countermeasures by the members of an organization could be stated more clearly and in a way that indicated how exceptional such countermeasures should be. He supported that proposal and suggested that the Drafting Committee should attempt to find appropriate language.

21. However, he had three specific comments to make regarding that text. First, in the phrase “if some reasonable means ... are available”, he was in favour of deleting the word “reasonable”, which did not add much, if anything, in that particular context, and he agreed with the implication of Ms. Escarameia’s questions about its meaning. Secondly, he suggested that the emphasis in that phrase might be changed by saying “unless, in the particular circumstances, no means ... are available”. Thirdly, instead of referring to “means for ensuring compliance”, which seemed unlikely to exist, “ensure” being a very strong word, the text could adopt the wording used in draft article 54, paragraph 1, and refer to “means to induce compliance”, a formulation that corresponded more closely to the nature of countermeasures. With those changes, draft article 55 would then read:

“In addition to the other conditions set out in the present Chapter, an injured member of an international organization may not take countermeasures against that organization unless, in the particular circumstances, no other means to induce that organization to comply with its obligations under Part Two are available to the injured member in accordance with the rules of the organization.”

22. He shared Ms. Escarameia’s doubts about the phrase “in accordance with the rules of the organization”, which should be deleted. Countermeasures should not be permitted when other procedures outside the rules of the organization were available. He also agreed with Ms. Escarameia that if a change was made in draft article 55, the Drafting Committee should propose a similar change to the parallel provision in draft article 19, paragraph 2, which dealt with countermeasures by an international organization against one of its members.

23. Turning to the new draft articles proposed in paragraphs 120 to 134 of the report, on general provisions, he endorsed draft article 62 (Questions of international responsibility not regulated by these articles), draft article 63 (Individual responsibility) and draft article 64 (Charter of the United Nations). In the explanation of

draft article 62 given in paragraph 129 of the report, it would have been more accurate, or at least less controversial, to have referred to those “whose action constitutes a crime under international law” rather than to “those who are instrumental for the serious breach of an obligation under a peremptory norm of general international law”. He asked the Special Rapporteur to take that point into account when preparing the commentary to draft article 63.

24. He also supported draft article 61 (*Lex specialis*), although its current wording required further elaboration. Draft article 61 was perhaps even more important in the context of the current draft articles than it was in the draft articles on responsibility of States for internationally wrongful acts. A central question to be addressed in the context of the current topic was how to adequately reflect the diversity of international organizations. Unlike States, international organizations were not all equal in law; they had limited competences and a limited capacity to act on the international stage; they had specific powers and functions laid down in their individual constituent instruments; and their relations with their own members and with non-members varied greatly.

25. It was against that background that draft article 61 was important. It would disapply the articles “where and to the extent that” the rules contained in the draft articles were “governed by special rules of international law”. Moreover, it rightly gave as an example “the rules of the organization that are applicable to the relations between an international organization and its members”. He agreed with that as far as it went.

26. However, something more was needed, perhaps in draft article 61, but probably elsewhere. In paragraph 121 of his report, the Special Rapporteur wrote: “These special rules (*lex specialis*) may supplement the more general rules that have been drafted in the current text or may replace them, in full or in part.” By confining draft article 61 essentially to what was contained in article 55 of the draft articles on State responsibility for internationally wrongful acts, the Special Rapporteur had failed to capture the full range of what was meant by “supplementing” the general rules. As the text of the draft article suggested, and as was clear from the commentary to article 55 of the draft articles on State responsibility,⁸⁸ the scope of the provision on *lex specialis* was rather limited. While, as the 2001 commentary stated, the provision applied to all the draft articles, it seemed only to apply in cases where States, when defining the primary obligations that applied between them, made special provision for the legal consequences of a breach of those obligations or for determining whether there had been a breach. Other limitations were also suggested in the 2001 commentary.

27. In the current context, then, assuming that it wished to permit the flexibility that the diversity of international organizations seemed to demand, the Commission should allow for cases in which the general rules were not so much disapplied, in full or on part, by express provisions, but were instead applied taking into account the specificities of the organization in question. However, that would only

be done to a limited extent if, as the Special Rapporteur suggested, the Commission incorporated into many of the draft articles a notion that was apparently implicit (or, in the case of draft article 61, explicit), namely, the provision “subject to the special rules of the organization”. As he recalled, the Special Rapporteur had said that the phrase could have been inserted in about 25 of the draft articles. If the Special Rapporteur could indicate, in the commentary to article 61 or in the commentaries to the relevant articles, just which 25 draft articles those were, it might help to clarify matters, provided that it could be done without creating any misleading *a contrario* implications.

28. Yet, even that would not fully address his concern. In order to cover the notion of supplementing the rules in the draft articles by applying them in the light of the specificities of the organization concerned, he proposed adding new text that might read: “In applying these articles to a particular organization, any special considerations that result from the specific characteristics and rules of that organization shall be taken into account.” Ms. Escarameia had used similar language in the context of countermeasures. Such a provision might become a new draft article rather than being incorporated into draft article 61. The notion he was trying to express was conceptually different from that of *lex specialis*. Consequently, the inclusion of a new draft article, probably in the general provisions, would be his preference, but if others, and the Special Rapporteur in particular, felt that the idea was better covered in the commentary, then he would consider that alternative, in which case it should probably be dealt with in the introductory commentary, where presumably the point would be made about the varied nature of international organizations.

29. In conclusion, he said that all four draft articles proposed in the Special Rapporteur’s seventh report should be sent to the Drafting Committee.

30. Mr. VALENCIA-OSPINA said that the Special Rapporteur’s constructive proposal to have the Commission review, prior to completing its first reading of the draft articles, some of the provisions already adopted in the light of comments by States and international organizations, had enabled new members of the Commission to gain a broader picture of the draft articles. He shared the Special Rapporteur’s conclusion that some of the changes to be made would make a certain restructuring of the draft articles necessary.

31. He had a number of comments on specific draft articles. With regard to draft article 4 (General rule on attribution of conduct to an international organization), he endorsed the Special Rapporteur’s proposal to insert paragraph 4, which contained a definition of the term “rules of the organization”, as a new paragraph 2 in draft article 2 (para. 21 of the report), where the word “article” would be rendered in the plural. That would mean that paragraphs 1 and 2 would both be covered by the single *chapeau* “For the purposes of the present draft articles”, a phrase that did not need to be repeated at the beginning of each defined term.

32. Whereas article 4 of the draft articles on State responsibility contained a description of what constituted

⁸⁸ *Ibid.*, pp. 140–141.

an organ of the State, the draft articles before the Commission did not, much less a definition of an organ of an international organization, despite the proposal made by the Special Rapporteur in his second report⁸⁹ to include the following wording for draft article 4, paragraph 2: “Organs, officials and persons referred to in the preceding paragraph are those so characterized under the rules of the organization.” The commentary to draft article 4⁹⁰ explained why the Commission had decided not to follow the State responsibility model in describing an organ of an international organization, as the Special Rapporteur had originally intended.

33. The Commission had again departed from the State responsibility model by including, in article 4, paragraph 2, a definition of “agent”, a term that did not appear in the draft articles on responsibility of States. Yet while the possibility had been expressly foreseen in a footnote to the article in successive annual reports of the Commission,⁹¹ the Special Rapporteur had not proposed transferring paragraph 2 to article 2, as he had in the case of article 4, paragraph 4. The term “agent” appeared in draft articles 5 and 6, as well as in paragraph 3 of draft article 4 itself, the very article that contained its definition, but the definition was expressly limited “for the purposes of paragraph 1” of article 4 only. No explanation had been given for the difference in treatment proposed for the terms “agent” and “rules of the organization”, although they were both defined in the same article. It might be that the context in which each term was used throughout the draft might justify the differentiation, but the transfer of the definition of “agent” from article 4, paragraph 2, to become article 2, paragraph 3, appeared to be warranted.

34. In view of the many critical comments by States and international organizations, the Special Rapporteur proposed that draft article 18 (Self-defence) should be deleted. The article had been adopted by the Commission on first reading at its fifty-eighth session⁹² on the basis of a text included in the Special Rapporteur’s fourth report.⁹³ Following closely the corresponding article in the draft on responsibility of States, the Special Rapporteur’s text had referred to a “lawful measure of self-defence taken in conformity with the Charter of the United Nations”. In adopting an article on self-defence, the Commission, taking into account “the fact that international organizations are not members of the United Nations”, had replaced the reference to the Charter of the United Nations with a reference to “principles of international law embodied in the Charter of the United Nations”, wording that already appeared in the articles concerning the invalidity of treaties because of coercion in the 1969 Vienna Convention and the 1986 Vienna Convention. That change in wording clearly suggested the nature of the debate to which the inclusion of an article on self-defence in the context

of the responsibility of international organizations had given rise within the Commission and the Sixth Committee, a debate that was further reflected in the written comments of international organizations.⁹⁴ He was in favour of retaining an article on self-defence in the current draft for reasons that included those more convincingly advanced by the Special Rapporteur in his report than the ones given by the Commission in its commentary. The wording adopted by the Commission, although an improvement on that originally proposed by the Special Rapporteur, was still far from satisfactory for many States and international organizations, and for himself as well, as it still pointed in the only direction in which a reference to the right of self-defence under the Charter of the United Nations could lead, namely Article 51. As the ICJ had stated in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence. Other requirements are specified in Article 51.

The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. ... This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed. [paras. 40–41 of the opinion]

35. In so holding, the Court had confirmed its dictum in its 1986 judgment in *Military and Paramilitary Activities in and against Nicaragua* that there was “a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law” (para. 176 of the judgment). As Bruno Simma, a former member of the Commission and currently a judge on the Court, had written in the second edition of *The Charter of the United Nations: A Commentary*,⁹⁵ “[w]ith regard to the requirement of an ‘armed attack’, the ICJ considers that Art. 51 and the right of self-defence under customary international law coincide” and “[a]s regards UN members, ... Art. 51, including its restriction to armed attack, supersedes and replaces the traditional right to self-defence”. Although the Commission had taken note in its commentary to draft article 18 of “the fact that international organizations are not members of the United Nations”,⁹⁶ ultimately the current drafting could only lead to Article 51, a provision which, moreover, specified in its first sentence that the right of self-defence could be used only until the Security Council had taken measures necessary to maintain international peace and security. There was no need to dwell on the implications of that provision if the right of self-defence was to be invoked by the United Nations acting through one of its organs, namely the Security Council.

36. Accordingly, the retention of article 18 in the current draft might be better assured if the draft article was worded in a way that made a clearer distinction between the position of States and that of international organizations or

⁸⁹ *Yearbook... 2004*, vol. II (Part One) document A/CN.4/541, p. 10, para. 28.

⁹⁰ *Yearbook... 2004*, vol. II (Part Two), pp. 48–50, especially paragraphs 9, 11 and 12 of the commentary.

⁹¹ *Yearbook ... 2005*, vol. II (Part Two), p. 40, footnote 101; *Yearbook ... 2006*, vol. II (Part Two), p. 118, footnote 569; *Yearbook ... 2007*, vol. II (Part Two), p. 82, footnote 394; and *Yearbook ... 2008*, vol. II (Part Two), chap. VII, sect. C.1, footnote 492.

⁹² *Yearbook ... 2006*, vol. II (Part Two), pp. 122–123.

⁹³ *Ibid.*, vol. II (Part One), document A/CN.4/564 and Add.1–2.

⁹⁴ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/582, p. 25, comments by the European Commission and the International Monetary Fund on draft article 18.

⁹⁵ B. Simma (ed.), in collaboration with H. Mosler *et al.*, Munich, Verlag C. H. Beck, 2002, 2nd ed., vol. I, pp. 793 and 806, respectively.

⁹⁶ *Yearbook ... 2006*, vol. II (Part Two), p. 122, para. (5) of the commentary.

between international organizations in the exercise of the right of self-defence. To that end, the Commission might wish to avail itself of the solution it had adopted in its draft articles on the law of treaties between States and international organizations or between international organizations,⁹⁷ the basis for the 1986 Vienna Convention. The comparison was appropriate, since the position of that Convention with respect to the 1969 Vienna Convention was similar to that of the current draft with respect to the draft articles on State responsibility. When elaborating article 2, on use of terms, of the draft that had eventually become the 1986 Vienna Convention, the Commission had concluded that in the case of international organizations, it could not speak of “ratification” in paragraph 1 (b), the term that had been used in the corresponding provision of the 1969 Vienna Convention. As the Commission had explained in its commentary, “[t]he use of the term ‘ratification’ to designate a means of establishing the consent of an international organization to be bound by a treaty, however, gave rise to considerable discussion within the Commission in the context of the consideration of article 11 on means of expressing consent to be bound by a treaty”. Bearing in mind that the draft articles (i.e., the future 1986 Vienna Convention), like the 1969 Vienna Convention, “make use of a terminology accepted ‘on the international plane’ (art. 2, subpara. 1 (b), of the Vienna Convention)”, the Commission had considered that “the term ‘ratification’ should be reserved for States”, whereas for international organizations, the term should be “act of formal confirmation”. The Commission had explained its position thus: “When necessary, international organizations, using a different terminology, can thus establish on an international plane their consent to be bound by a treaty by means of a procedure which is symmetrical with that which applies to States.”⁹⁸

37. On the basis of the above approach, Mr. Valencia-Ospina proposed the following wording for draft article 18 (Self-defence): “The wrongfulness of an act of an international organization is precluded if the act constitutes under international law an act corresponding to a lawful measure of self-defence taken by a State in conformity with the Charter of the United Nations.”

38. Turning to draft article 19 (Countermeasures), he recalled that at its previous session, when considering Part Three of the draft, on the implementation of the international responsibility of an international organization, the Commission, through a working group, had accepted the premise that informed the Special Rapporteur’s proposals in his sixth report,⁹⁹ namely that international organizations, like States, could take countermeasures against a responsible international organization. On that basis, the Drafting Committee had adopted chapter II of the current Part Three, comprising draft articles 54 to 60, which had yet to be adopted in plenary.¹⁰⁰ The Special Rapporteur maintained that when discussing circumstances precluding wrongfulness it was necessary to start from the same

premise, and on that basis had proposed a text for draft article 19 in his seventh report (para. 66). In its first paragraph, the text of the draft article was modelled closely on article 22 of the draft articles on State responsibility for internationally wrongful acts,¹⁰¹ except that instead of characterizing a countermeasure as an act taken in accordance with chapter II of Part Three, as article 22 did, it sought to achieve the same objective by characterizing the act as a “lawful” countermeasure.

39. Since chapter II of Part Three of the draft articles covered countermeasures taken both by injured States and by injured international organizations, the Special Rapporteur concluded in paragraph 64 of his report that a reference to the conditions that States needed to fulfil in order for their countermeasures to be considered lawful could be made only in general terms, given the still undefined status of the draft articles on responsibility of States. He therefore considered it preferable to refer to the conditions for the lawfulness of countermeasures by requiring simply that they should be “lawful”—a term that would apply also to the conditions under which an international organization could take countermeasures against another international organization. That line of reasoning seemed doubtful even in the case of States, since the conditions for the lawfulness of countermeasures taken by States were spelled out in draft articles 54 to 60, which closely followed the corresponding provisions of the draft articles on State responsibility. That reasoning did not apply at all to the conditions that international organizations were required to meet in order to obtain the same result, and in any case it was misleading to qualify countermeasures as “lawful”, since they were legitimate by operation of law, as had been pointed out by several members.

40. The use of the adjective “lawful” was even less called for in draft article 19 (Countermeasures), since paragraph 1 of that article concerned countermeasures that an international organization could take, not only against another international organization, as indicated in paragraph 61 of the report, but also against a State. In both cases, he agreed with the Special Rapporteur’s assessment that it would be coherent to consider that a circumstance precluding wrongfulness justified an otherwise wrongful act, subject to the conditions set out in chapter II of Part Three.

41. For draft article 43 (Ensuring the effective performance of the obligation of reparation), the Special Rapporteur had proposed the retention of the single-paragraph article adopted by the Commission at its fifty-ninth session¹⁰² as paragraph 1; that paragraph placed emphasis on the members of a responsible international organization, rather than on the organization itself, in the context of the measures to be taken to provide the organization with the means for effectively fulfilling its obligations under chapter II of Part Two. As currently worded, paragraph 1 appeared to indicate that a member State that failed to meet the stipulated requirement would be committing an internationally wrongful act entailing its international responsibility *vis-à-vis* the organization in question. The proposal to add a second paragraph to article 43 seemed to

⁹⁷ *Yearbook ... 1982*, vol. II (Part Two), pp. 17 *et seq.*

⁹⁸ *Ibid.*, p. 19, paras. (6)–(9) of the commentary to article 2.

⁹⁹ See footnote 17 above.

¹⁰⁰ Document A/CN.4/L.725/Add.1, available on the Commission’s website, documents of the sixtieth session. See also *Yearbook ... 2008*, vol. I, 2989th meeting, paras. 2–20.

¹⁰¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 75–76.

¹⁰² *Yearbook ... 2007*, vol. II (Part Two), pp. 91–92.

reinforce that conclusion, and while it expressly provided that member States had no obligation to make reparations, thereby possibly suggesting that such an obligation might be implicit in the first paragraph, the Special Rapporteur clearly indicated in paragraph 97 of his report that such was not the case. Thus the concerns expressed by a few States in the Sixth Committee in that regard did not seem to warrant the addition of the second paragraph proposed by the Special Rapporteur.

42. As author of the proposed alternative text for draft article 43, which had been reproduced in the commentary to draft article 43 contained in the report of the Commission on the work of its fifty-ninth session,¹⁰³ he fully subscribed to the arguments in favour of the alternative that had been presented by a number of delegations—in particular, the delegation of Austria.¹⁰⁴ According to the representative of Austria, the current wording of draft article 43 was “out of line with the logic of the draft articles, which concerned the responsibility of international organizations, not of States”, and his delegation therefore favoured the aforementioned alternative. As the representative of Austria understood it, the rationale of that proposal was “to commit the responsible organization to organizing its budget in a manner which ensured the satisfaction of an injured party. At the same time, it would oblige the members of an international organization to provide the means to meet the financial consequences of illegal activities or *ultra vires* acts attributed to their organization. If the responsible organization were to be dissolved before compensation was paid, the proposal would make possible proper budgetary liquidation of the outstanding liability”.

43. Draft article 55 (Countermeasures by members of an international organization) was based on paragraph 4 of draft article 52 (Object and limits of countermeasures), which had been proposed by the Special Rapporteur in his sixth report.¹⁰⁵ However, when the Commission had adopted draft article 55, it had replaced, in both paragraphs 4 and 5 of draft article 52, the phrase “only if this is not inconsistent with the rules of the ... organization”, proposed by the Special Rapporteur, with the phrase “if some reasonable means for ensuring compliance with its obligations under Part Two are available in accordance with the rules of the organization”. In the comments and observations received from international organizations on the topic of responsibility of international organizations (A/CN.4/609), UNESCO, noting that countermeasures were often not specifically provided for by the rules of international organizations, had expressed support for the notion that an injured member of an international organization might be able to resort to countermeasures that were not explicitly allowed by the rules of the organization. In the light of that observation and others made by States in the Sixth Committee, the Special Rapporteur proposed in his seventh report that the Commission might wish to reconsider draft article 55 as currently worded. He

himself supported that proposal on the grounds advanced by UNESCO.

44. As the Special Rapporteur explained in his report, draft article 62 (Questions of international responsibility not regulated by these articles) contemplated issues of State responsibility other than those dealt with in the current chapter X of the draft articles, even if they were not expressly covered in the draft articles on responsibility of States. One such issue, which had been raised repeatedly in the Commission’s debates, concerned the invocation by an international organization of the international responsibility of a State. According to the Special Rapporteur, that was a matter that lay outside the scope of the current draft as outlined in draft article 1, a position that had been echoed by some members. His own view was that the Commission enjoyed complete flexibility as to the provisions that would ultimately constitute its final product on the topic. What was certain was that it would be inappropriate for the Commission to recommend that the draft articles on responsibility of States, which had been submitted in final form to the General Assembly and were still under consideration by the latter insofar as their future status was concerned, should be extended to include the invocation of the responsibility of a State by an international organization. If it was deemed inconvenient to include an express provision to that effect in the present draft articles, then a compromise solution might be to include a reference to the issue at the end of draft article 62 by way of example. He suggested that the phrase “such as the invocation by an international organization of the international responsibility of a State” might fill that purpose.

45. In conclusion, he favoured referring to the Drafting Committee the articles comprising the chapter on general provisions as well as those for which specific proposals for improvement had been made by the Special Rapporteur in the light of the debate in the Commission and the drafting suggestions of members. Draft article 18 (Self-defence) should be referred to the Drafting Committee on that same basis.

46. Mr. McRAE said that he found the new draft articles proposed by the Special Rapporteur to be generally acceptable; with a few exceptions, he was in favour of referring them to the Drafting Committee. One of those exceptions concerned the addition of a new second paragraph to draft article 43, to which he was decidedly opposed. On that point, he agreed with Mr. Valencia-Ospina, although perhaps for slightly different reasons. Draft article 43 had been the subject of much controversy at the fifty-ninth session, relating not only to the choice between the two proposed alternatives, but also to the question of whether such a provision should be included at all.¹⁰⁶ Article 43 reflected one of the basic difficulties with the draft, which was that the Commission had started out with a notion of legal personality but had been unable to look beyond that notion when considering decisions made by organizations. In reality,

¹⁰³ *Ibid.*, p. 85, footnote 441; see also p. 91, para. (4) of the commentary to the draft article.

¹⁰⁴ *Official Records of the General Assembly, Sixty-second Session, Sixth Committee, 18th meeting (A/C.6/62/SR.18)*, paras. 53–54.

¹⁰⁵ See footnote 17 above.

¹⁰⁶ See *Yearbook ... 2007*, vol. I, 2935th meeting, p. 137, para. 1 and pp. 144–146, paras. 70–84; see also the 2932nd meeting, pp. 119–120, paras. 20–26; the 2933rd meeting, pp. 131–132, paras. 77–83; and the 2934th meeting, pp. 135–136, paras. 10–11 and 16–18. See also *ibid.*, vol. II (Part Two), p. 85, footnote 441, and the commentary to this draft article, pp. 91–92.

States were the decision-makers of international organizations, but they had made it clear that they rejected the idea that the international responsibility of an international organization devolved to its member States. Draft article 29 set out the limited circumstances in which a member State could be responsible for the wrongful act of an international organization, which were confined to the member State's acceptance of responsibility or to its leading the injured party to rely on its responsibility. The irony was that international legal personality was much more impenetrable than domestic legal personality; in the case of a corporation, for example, it was possible to attribute responsibility to those who had actually made the decisions in question. Moreover, the draft made no allowances for differences between international organizations: accordingly, all international organizations were protected, even those composed of only a small number of member States, who were the *de facto* collective decision-makers of the organization. While he could understand the difficulty and undesirability of devolving responsibility to the States members of large organizations, many of which might not have voted for—or might even have voted against—the action incurring responsibility, it was less justifiable in the case of smaller organizations whose actions were generally taken with the agreement of all member States. If it was solely up to him, he would make the members of some organizations responsible for the actions of their organization, but he could understand that the Commission, basing itself on the notion of international legal personality, was not prepared to make such distinctions.

47. In the light of that reality, draft article 43 represented an attempt to place a minimum obligation on States to take measures when the organization of which they were members committed an internationally wrongful act. From that perspective, draft article 43 was on the right track. He was surprised that it had not been rejected outright by States, and that aside from some queries about its interpretation, most States seemed to be in basic agreement with its inclusion. That being said, the addition of a second paragraph to draft article 43 was simply unnecessary: it reinforced the obvious fact that States sought to avoid responsibility when acting through an international organization. That had not been stated explicitly in draft article 29, and there was no reason why it should be stated indirectly in draft article 43. If it was still considered necessary to include that point somewhere, he felt that the only proper place for it was in the commentary.

48. If draft article 43 was retained as it currently stood, then practice could develop around that provision without the need for a second paragraph. Such a paragraph detracted somewhat from the obligations set out in paragraph 1, which stipulated that member States had at the very least had an obligation to provide the international organization with the means to fulfil its international responsibility. As Mr. Valencia-Ospina had pointed out, failure to do so could give the injured State some basis for invoking the responsibility of the member States.

49. He shared the view that draft article 55 should be aligned as far as possible with draft article 19, paragraph 2. However, at the risk of swimming against the tide, he would caution against going too far in limiting the resort to countermeasures by member States. While he could

agree that an international organization that had rules, mechanisms or means should be limited to using them, it did not seem to make sense to introduce, in the case of member States, what essentially amounted to a broad rule requiring the exhaustion of all possible remedies when a parallel rule had not been established regarding the resort to countermeasures by a State or international organization in a general sense. Moreover, member States could interact with international organizations in many different ways—in their capacity as host States, for example—and it seemed unreasonable to limit their rights simply on the basis of that status. Moreover, such a rule might end up having a broader effect than the Commission intended.

50. He supported the proposal made by Sir Michael Wood to add a paragraph or a new article after draft article 62 or near the beginning of the draft to indicate that the rules relating to responsibility should take into account the specificity of each international organization.

51. On a final point, he said that he had found the meeting with the United Nations Legal Counsel to be very helpful in allowing the Commission to learn first-hand her views on the draft articles. He would welcome a similar meeting with the legal counsels of other international organizations, particularly regional organizations outside the United Nations system, to learn more about how they would be affected by the draft articles.

52. Mr. PELLET, responding to points raised by previous speakers about the specificity of international organizations, said that there was no doubt that considerable differences existed between them, as could be seen from a comparison of the European Community, the United Nations, NATO and the International Bureau of Weights and Measures, for example. Yet while considerable differences also existed between States, as a comparison of China, Latvia and San Marino, for example, revealed, that had not precluded the formulation of common rules applicable to all States. Hence, even though at its core the law tended to level differences, the fact that common rules could nevertheless be developed and applied was equally true in the case of international organizations.

53. Apart from the issue of sovereignty, there was also a vast difference, as far as the Commission's work was concerned, between States and international organizations, and that difference had an unavoidable impact on the law of international responsibility as it applied to each. To borrow the wording employed by the ICJ in its 1949 advisory opinion on *Reparation for Injuries*, whereas States possessed the totality of international rights and duties recognized by international law, the rights and duties of international organizations were necessarily limited by the principle of speciality. Even though Sir Michael had been right to draw attention to that point, the Special Rapporteur's insistence on the rules of the organization would seem sufficient to address Sir Michael's concerns, thereby eliminating the need for the new article the latter had proposed.

54. He had relatively few comments about the amendments proposed by the Special Rapporteur in paragraphs 93 to 101 of his report. He welcomed the fact that

the majority of the States that had expressed an opinion had approved the principle contained in draft article 43, as it was one of the key provisions for fulfilling the objective of the draft articles, which was to provide reparation for damages caused by international organizations. Without wishing to dwell on that positive outcome—after all, the draft articles were only at the stage of first reading—he nonetheless saw no reason why draft article 43 should be rejected in second reading, in view of the positive reactions of States, which had surprised him as much as they had Mr. McRae. It was gratifying to have reached such a satisfactory conclusion to what had been a long and drawn-out controversy.

55. On the other hand, like most previous speakers, he was opposed to the addition of a second paragraph to draft article 43 or, in any event, to the categorical statement it contained: namely, that paragraph 1 did not imply that members acquired towards the injured State or international organization any obligation to make reparation. Surely it must be clear that paragraph 1 implied nothing of the sort. Nevertheless, it was not possible to completely rule out such an obligation in all circumstances; there could well be instances in which, by virtue of the rules of the organization or for other reasons, such an obligation might arise. Although he was opposed to it, he would prefer a “without prejudice” clause to the current wording if members insisted on including additional text at all costs.

56. He had no major problems with the last section of the report, not even with regard to countermeasures, despite attempts to demonize them, an effort that had the effect of continually reopening the debate on the subject. In his view, it would be better to regulate them than to ignore them: by regulating them, one could limit their abuse, whereas by ignoring them one gave them free rein. Given Ms. Escarameia’s desire to reopen the debate, however, he wished to respond with two comments. First of all, countermeasures, for lack of anything better, existed for the sole purpose of obliging an international organization that had failed to do so to respect the law of international responsibility. As such, they constituted a necessary mechanism and one that appeared consistent with the notion of an international community governed by the rule of law. That being so, if the draft articles were going to address both countermeasures taken by an international organization against a State and those taken by a State against an international organization, as well they should, and since that would be consistent with draft article 19, paragraph 2, it was probably necessary to draw a distinction between countermeasures taken against member States and those taken against non-member States. That coincided perfectly with the distinction that must necessarily be drawn between countermeasures and sanctions. Yet not all international organizations had the right to impose sanctions on their members, and when they did, such sanctions were often extremely limited. Accordingly, where the possibility of imposing sanctions existed, recourse to countermeasures should not be allowed, but where the constituent instrument or the rules of the organization made no provision for imposing sanctions, there did not appear to be any compelling reason to deny international organizations recourse to countermeasures.

57. His other main comment had to do with draft article 48, which he could not accept, despite the explanations provided by the Special Rapporteur in paragraph 103 of his report, which were not entirely lucid. It was still unclear to him why the draft should be silent on the issue of the functional protection of the officials of an international organization by that organization. If he understood it correctly, the reason was essentially the Special Rapporteur’s refusal, notwithstanding the welcome, though isolated, second paragraph of draft article 19, to address the implementation by an international organization of the responsibility of another entity. It had no doubt appeared illogical to the Special Rapporteur to include the claims of international organizations against responsible States in the current draft articles, even though it was precisely through such claims that functional protection was exercised. Although the inclusion of functional protection in the draft might not be in line with the Special Rapporteur’s reasoning, it nevertheless seemed necessary and logical in its own right. In response to requests from members for the draft to cover the possibility that an international organization could invoke the responsibility of a State, the Special Rapporteur had replied that in order for it to do so, the draft articles on responsibility of States would have to be amended. Quite frankly, that was not a realistic response, and the result would be a major gap in the law of international responsibility. Since functional responsibility was linked to the activity of the international organization, it would be infinitely more coherent to include functional protection in the draft on the responsibility of international organizations rather than in the articles on responsibility of States.

58. Turning to the section on general provisions, which appeared to be the standard ones, he said that he had no particular quarrel with them, except to say what had been said many times before, which was that it was highly regrettable that the draft articles did not address problems relating to the responsibility of States *vis-à-vis* international organizations. While he did not expect his insistence on that point to lead to an amendment of draft article 62, the scope of that article nevertheless depended on the content of the draft itself. He therefore wished to reiterate the need to amend, or at least to supplement, the draft articles along those lines.

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

[Agenda item 1]

59. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic “Responsibility of international organizations” would be composed of Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Hmoud, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Perera, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue and Ms. Jacobsson (Rapporteur), *ex officio*.

The meeting rose at 11.40 a.m.

* Resumed from the 3000th meeting.

3008th MEETING

Wednesday, 20 May 2009, at 10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Responsibility of international organizations (*continued*) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the seventh report on responsibility of international organizations (A/CN.4/610).

2. Mr. MELESCANU thanked the Special Rapporteur for his presentation of Part Two of the draft articles entitled “Content of the international responsibility of an international organization”, which raised some important issues, and said that he would like to make a few comments on it. He noted that in paragraphs 95 to 100 of his report, the Special Rapporteur provided a very detailed account of the views expressed by States Members of the United Nations on draft article 43 (Ensuring the effective performance of the obligation of reparation). Unfortunately, the Commission’s endeavours to find acceptable wording had not been crowned with success, despite agreement in principle that it was necessary to address the question of how to involve the member States of an international organization in the effective performance of the obligation of reparation by which the organization was bound. The Special Rapporteur had tried to find an acceptable solution by proposing the addition of a second paragraph, although admittedly that option had not enjoyed wide support from the members of the Commission; Mr. Pellet had been in favour of adding a “without prejudice” clause, while Mr. McRae had suggested that the proposed provisions should be placed in the commentary to draft article 43.

3. He was personally of the opinion that the right place for the additional paragraph proposed by the Special Rapporteur was in the draft articles themselves, since it was necessary to find a solution that made it clear that the member States of an international organization were not being burdened with subsidiary or joint obligation, but that the purpose of the draft articles was simply to create mechanisms securing the effective performance of the obligation of reparation. The Special Rapporteur was correct in stating that, since draft article 43 concerned the

performance of the obligation of reparation, it should normally be placed in the chapter of the draft text referring to reparation. However, in view of the delicate nature of the problem, the European Commission’s proposal¹⁰⁷ that draft article 43 should be moved to the part devoted to general principles should not be ignored. Draft article 43 could in any event be referred immediately to the Drafting Committee.

4. Turning to draft article 48 (Admissibility of claims), he said that it was unthinkable that draft articles on the responsibility of international organizations should contain no provisions on the functional protection of officials of international organizations, since they were in the front line in the field. For example, when Romanian policemen had taken part in an action to defend the Parliament during peacekeeping operations in Kosovo, in which one of them had been killed, Romania had found itself in an awkward position because it could not itself exercise protection on behalf of the police officers whom it had placed at the disposal of the United Nations. But the United Nations, as an international organization, could not exercise protection on their behalf either. Despite the obstacles which had to be overcome, and although some States Members of the United Nations, such as Slovenia,¹⁰⁸ were opposed to it, the Commission must find a way of providing for the functional protection of officials of international organizations. It should at least address that specific question and make sure that the future draft convention was more than just a general, theoretical framework.

5. As for draft article 55 on countermeasures, he drew attention to the fact that the Commission had already decided that it should deal with that matter,¹⁰⁹ so that all that remained was for it to ask itself how that should be done. In that connection, it was essential to distinguish clearly between countermeasures against States members of the international organization and countermeasures against non-members. It should be stipulated that countermeasures against member States could be adopted only after internal means of redress within the organization had been exhausted. That seemed to be a logical solution to the problems raised by that draft article.

6. With regard to draft article 61 (*Lex specialis*), he recalled that the Commission had proceeded on the assumption that, since international organizations, like States, were subjects of international law, it could base itself on the draft articles on responsibility of States for internationally wrongful acts¹¹⁰ when formulating draft articles on responsibility of international organizations. It had likewise assumed that, notwithstanding the great variety of international organizations, they had a number of common features which might serve as a basis for working out general rules. The aim of the proposal relating to *lex specialis* was to cater for the huge differences between international organizations. Sir Michael had drawn up a

¹⁰⁷ *Official Records of the General Assembly, Sixty-second Session, Sixth Committee, 21st meeting (A/C.6/62/SR.21)*, para. 115.

¹⁰⁸ *Ibid.*, *Fifty-eighth session, 17th meeting (A/C.6/58/SR.17)*, para. 9.

¹⁰⁹ *Yearbook ... 2008*, vol. II (Part Two), paras. 129–134, 141 and 148–153.

¹¹⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76, especially article 55 and the commentary thereto, pp. 140–141.

non-exhaustive list of those differences, to which could be added the system for adopting decisions. While the decision-making mechanisms of States were well known and all the consequences in terms of responsibility could be drawn therefrom when it came to international organizations, there were almost as many decision-making mechanisms as organizations. The application of the principle of *lex specialis* should therefore provide a general solution to the problem of the specificities of international organizations, a question that should be addressed in the chapter dealing with general principles. In that connection, support should be given to Sir Michael's proposal that the general principles should clearly state that the specific characteristics of international organizations should be taken into account. Perhaps it was time to urge the Special Rapporteur to accept a different approach. Hitherto the Commission had used the rules on State responsibility as its model and had adapted them to the specific features of international organizations, but the exercise seemed to be reaching its limits. The time had come for the Commission to think about dealing with the specific characteristics of international organizations in a first chapter setting out the general principles of the responsibility of international organizations.

7. He agreed that the other draft articles should be referred to the Drafting Committee.

8. Mr. PERERA noted that the only change proposed by the Special Rapporteur with regard to the content of the international responsibility of international organizations was the addition of a second paragraph to draft article 43 (Ensuring the effective performance of the obligation of reparation) relating to the duty of providing an international organization with the means for effectively fulfilling its obligations under the chapter on reparation for injury. One of the concerns expressed during the Commission's debate at the fifty-ninth session had been that the draft article might be interpreted as placing the member States of an international organization under a subsidiary obligation to provide reparation. A minority of Commission members had proposed an alternative text, evidence of the diversity of views that had emerged on the issue.¹¹¹ Against that backdrop, the introduction of a new paragraph into draft article 43 was a positive development insofar as it provided the requisite clarification, did not place a subsidiary obligation on the States members of an international organization and established the necessary balance. Nonetheless, any further proposal concerning the draft article that might be put forward during the current debate would be welcome, including the incorporation of a "without prejudice" clause, provided that it was made clear that no subsidiary obligation would devolve upon the States members of an international organization.

9. The Special Rapporteur had not proposed any changes in Part Three concerning the implementation of the international responsibility of an international organization. In paragraph 117 of his report, however, the Special Rapporteur noted that one State had expressed the view that "as a general rule, countermeasures had no place in the relations between an international organization and its members". The Special Rapporteur also referred to the

doubts voiced as to whether that principle and the exceptions to it were adequately stated in draft article 55, and consequently he suggested that the Commission might wish to reconsider that provision. In that regard, it should be emphasized that the special nature of the relationship between an international organization and its members, which was governed by the constituent instrument and the rules of the organization, was a critical factor that needed to be taken into account when drawing up a set of draft articles on countermeasures. Caution was necessary. Concern had been expressed during the debate at the Commission's sixtieth session in 2008,¹¹² in the Sixth Committee at the sixty-third session of the General Assembly (A/CN.4/606, paras. 58–63) and at the meeting of legal liaison officers/advisers of the United Nations system held the previous week that countermeasures might affect an international organization's performance of its functions and might be abused by stronger member States to strangle an international organization, for example, by denying it funds. In that light, he agreed with Ms. Escameia that the language of draft article 54, paragraph 4, referring to the effect of countermeasures on an international organization's exercise of its functions, was somewhat weak and required reworking. The principle could perhaps be reformulated in the negative so that the paragraph would state that "countermeasures shall not be taken in a manner that would affect the exercise by the responsible international organization of its functions".

10. Draft article 55, like draft article 19, paragraph 2, posed difficulties, especially with regard to the use of the phrase "some reasonable means for ensuring compliance". That overly vague language might give rise to difficulties of interpretation and application. He therefore tended to agree with the wording proposed at the previous meeting by Sir Michael Wood, namely: "unless, in the particular circumstances, no means to induce that international organization to comply with its international obligations are available". The Drafting Committee could look into that question, and once the language of draft article 55 was settled, draft article 19, paragraph 2, could be aligned with it.

11. He was in broad agreement with the chapter of the report on general provisions (paras. 120–134). He welcomed draft article 61 (*Lex specialis*) in which express reference was made to the "special rules of international law, such as the rules of the organization". As the Special Rapporteur had indicated, a general provision would obviate the need to repeat the proviso "subject to the special rules of the organization" in the draft articles where it would otherwise be required. On the other hand, it might be useful, as suggested at the previous meeting, to refer in the commentary to the specific articles to which such a proviso would apply.

12. He approved of draft articles 62 (Questions of international responsibility not regulated by these articles), 63 (Individual responsibility) and 64 (Charter of the United Nations). Draft article 64 was particularly relevant to Security Council resolutions adopted under Chapter VII of the Charter of the United Nations and to possible limitations on countermeasures. He likewise endorsed the

¹¹¹ See footnote 106 above.

¹¹² *Yearbook ... 2008*, vol. II (Part Two), paras. 148–153.

suggestion made by several Commission members to add a draft article reflecting the diversity of international organizations and the specificity of each individual organization. In conclusion, he recommended that draft article 19, paragraph 2, as well as draft articles 55 and 61 to 64 should be referred to the Drafting Committee.

13. Mr. HMOUD, referring to the scope of the draft articles, agreed that the regime of international responsibility did not currently cover the question of the invocation of State responsibility by an international organization. The Special Rapporteur was, however, right in saying that that was an extraneous issue which should have been dealt with in the articles on State responsibility. There was a procedural matter involved, which could be settled by a decision of the General Assembly to supplement the articles on State responsibility for internationally wrongful acts with an article on that question.

14. As for the placement of the definition of the "rules of the organization" in the draft articles, it would be wise, as the Special Rapporteur suggested, to move it from draft article 4 to draft article 2 (Use of terms). Since the rules of the organization had been mentioned not only in relation to the attribution of conduct, but also in some other draft articles, their definition should apply generally to all relevant articles.

15. With regard to the attribution of conduct, it was important that the Special Rapporteur had accepted the premise that attribution of an act by an agent of an international organization to that organization should rest on a "factual test". If that point were made in the commentary, it should clearly indicate that attribution depended not only on how the organization's rules defined the notion of an agent performing the organization's functions, but also on whether the person in question had actually been instructed to carry out one of the functions of the organization. Draft article 4 referred to "other persons", for example, contractors, who carried out certain functions of the organization. If they committed a wrongful act, there was no reason why it should not be attributed to the organization, provided, of course, that the other conditions of attribution had been met.

16. The criterion of effective control exercised by an organization over the conduct of another entity which committed a wrongful act had recently received attention in the wake of the decision of the European Court of Human Rights in *Behrami and Saramati*. While the Court had not contradicted the test set forth in draft article 5, it had significantly lowered the threshold of control in finding that the delegation of operational command to an organ of another entity was sufficient for the wrongful act to be attributable to the delegating organization. Although that position had been criticized, it did raise a question of legal policy: was it preferable for the international organization which had given its authorization to another entity to be responsible for the wrongful act committed by that entity, or for the organ or the entity in question to be responsible under the criterion of attribution. Whatever position was taken, there was no reason at that point for the Commission to change the "effective control test", or to lower the threshold, since that criterion seemed to be that most generally recognized with respect not only to

the responsibility of international organizations, but also to other forms of responsibility under international law. The effective control test had also been criticized on the grounds that it had been tailored for military operations and was not appropriate for other forms of cooperation between international organizations and other entities. The Special Rapporteur's reply was that, in doubtful cases, the test could lead to double attribution, which was allowed under international law. In his own opinion, it constituted a factual test, which introduced some flexibility when dealing with a variety of situations and which would produce the desired result with regard to attribution.

17. As for the Special Rapporteur's proposal to amend draft article 8, paragraph 2, on a breach of the rules of an organization constituting a breach of international law, the new wording might relieve the concerns of those who feared that paragraph 2, as it stood, might suggest that all the rules of an organization formed part of international law, which was not the case. The current wording of paragraph 2 did not support that interpretation, something that could have been made clear in the commentary. He could, however, accept the new formulation.

18. The Special Rapporteur's proposal that in draft article 15, paragraph 2 (*b*), the phrase "in reliance on" should be replaced with "as the result of" would bring out the link between the wrongful act committed by a member of an international organization and the authorization or recommendation of that organization. But he wondered whether the subject matter of the authorization or recommendation giving rise to the internationally wrongful act had to fall within the functions of an organization before the organization's responsibility could be incurred. For example, if an organization recommended that its members should adopt sanctions against a third party and those sanctions were unlawful under international law, should the organization be held responsible if it was not competent to impose sanctions? Conceivably, international organizations might issue recommendations of a political nature that did not necessarily fall within their functions. That point deserved further elucidation in paragraph 2 (*a*) or (*b*), or in a new subparagraph.

19. On circumstances precluding wrongfulness, he fully agreed with the Special Rapporteur that draft article 18 on self-defence should be deleted, because international law made no provision for the institution of self-defence in the case of an international organization and the creation of such a regime was not supported by any emerging *opinio juris*. Self-defence was directly related to State sovereignty, a notion that did not apply to an international organization. The same was not true of the regime of countermeasures, which international organizations, like States, could adopt. An international organization could be subject to countermeasures or take them itself. In the latter instance, for wrongfulness to be precluded, the measure must be lawful, in other words, it must, *inter alia*, be in accordance with the rules of the organization and in keeping with its functions as regulated by those rules. Draft article 19 would be clearer if that condition were expressly stated.

20. He welcomed the amendment made to draft article 28, paragraph 1, to the effect that the State must have acted intentionally, or in bad faith, when transferring its

competence in order for it to incur responsibility. But the new wording (“purports to”) did not obviate the need to assess intent. The injured entity would still have to prove bad faith on the part of the State, just as it would have to prove the other elements of the breach. At all events, the burden of proof should not be shifted to the respondent State by the inclusion of a reference to “what may be reasonably assumed from the circumstances”.

21. With regard to the proposal to add a second paragraph to draft article 43, he drew attention to the fact that that draft article had been the fruit of intensive negotiations within the Commission, which had finally adopted the principle that members should cooperate in fulfilling an organization’s obligations to an injured party. It had, however, been understood that draft article 43 would not in any way entail a member’s direct responsibility towards the injured party. The current version of draft article 43 did not convey the idea that a member was directly responsible for reparation or that the injured party could not rely on the organization’s rules regulating legal relations within the organization and between the latter and its members. But if the Commission thought that the second paragraph made for greater clarity, it should be adopted; otherwise, the commentary would suffice.

22. He had already voiced his support for the inclusion of a countermeasures regime in the draft articles, not only because there was no reason to differentiate between States and international organizations with regard to the relevance of such a regime, but also because it would make it possible to regulate and limit the application of countermeasures to international organizations. Furthermore, the General Assembly was generally in favour of including such a regime in the draft articles. In paragraph 117 of his report, the Special Rapporteur said that the Commission might wish to reconsider the question of countermeasures in relations between an international organization and its members. That suggestion was based on comments that draft article 55 did not sufficiently limit the application of countermeasures between members and an organization. Nevertheless, the question had to be asked whether there were any other legal or policy reasons, apart from the scope of the rules of an organization, its nature and its ability to perform its functions, that would warrant extending the limitations that were already applicable under the general conditions governing the use of countermeasures.

23. As far as *lex specialis* was concerned, it was important to include a draft article stating that special rules on responsibility took precedence over the draft articles, which were general in nature. There were matters that the Special Rapporteur and the Commission had consistently stressed were hard to regulate owing to a lack of practice or theory in the matter. In view of the diverse nature and structure of international organizations, it was imperative to include in the draft articles a provision stating that *lex specialis* prevailed. Moreover, there were other matters that were not dealt with either by special rules or by the current draft articles. Hence the importance of draft article 62, which stated that they were regulated by the applicable rules of international law. Nor did the draft articles seem to deal with some other matters that were not regulated by either *lex specialis* or the other rules of international law. Although the system established in the draft

articles should not be disturbed by making their application dependent upon the nature of the organization, if developments in the future warranted the formulation of specific rules applicable to a particular kind of organization, the Commission could tackle the issue when it considered the draft articles on second reading. In conclusion, he recommended that draft articles 19 and 61 to 64 be referred to the Drafting Committee.

The meeting rose at 10.50 a.m.

3009th MEETING

Friday, 22 May 2009, at 10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Responsibility of international organizations (*continued*) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. DUGARD said that he disagreed with the suggestion put forward in paragraph 97 of the seventh report on responsibility of international organizations (A/CN.4/610) that another paragraph might be added to draft article 43 in order to specify that States were not obliged to make reparation for wrongful acts of an international organization. In fact, it would be best to leave that question open.

2. Commenting on draft article 48, on admissibility of claims, he recalled that when the Commission had considered paragraph 1 of that article,¹¹³ he had pointed out that when a State or an international organization brought a claim relating to an obligation owed to the international community as a whole, the situation addressed by draft article 52, it was obviously unnecessary to establish nationality of the claim. The omission of a clause to that effect had been an oversight in the draft articles on responsibility of States for internationally wrongful acts,¹¹⁴ and the Commission had decided not to rectify it. He was surprised that States had not noticed that lacuna in either the draft articles on State responsibility or the draft articles currently under consideration, and he supposed that it was too late to remedy it.

¹¹³ *Ibid.*, vol. I, 2962nd meeting, para. 26.

¹¹⁴ See footnote 10 above.

3. The question of functional protection referred to in paragraph 103 had been considered by the Commission in the context of diplomatic protection.¹¹⁵ When the Commission had elaborated its text on that topic, he had prepared a draft article on functional protection,¹¹⁶ which the Commission had decided to omit. At the time, it had been suggested that the best place for such a provision would be in the draft articles on responsibility of international organizations. However, he shared the Special Rapporteur's misgivings as to whether such a provision did belong in the current draft and therefore thought that it might be advisable for the Commission to embark upon a separate study of the question.

4. Draft article 52 as proposed by the Special Rapporteur, should be retained. It would be unwise to limit that article along the lines suggested by Belarus and Argentina,¹¹⁷ since it was a very important provision that bolstered article 48 of the draft articles on responsibility of states and clearly represented an exercise in progressive development. It was, however, interesting that draft article 52 seemed to be gaining support among international tribunals and States. Moreover, the fact that States had not objected to that draft article indicated that it was becoming an accepted part of international law.

5. Although some States had doubts about including provisions on countermeasures, he was pleased that the Commission was not going to repeat the debate it had held on that subject during its consideration of the draft articles on State responsibility,¹¹⁸ during which many members had sought to exclude the subject of countermeasures solely on the grounds that they were an unfortunate feature of international law to which no allusion should be made. The Commission should, however, mention the unmentionable, and he therefore urged the Special Rapporteur to retain the provisions on countermeasures. He agreed with the Special Rapporteur that there was no need to draw a distinction between countermeasures and sanctions.

6. Turning to the new provisions proposed by the Special Rapporteur, he said that draft article 61, dealing with *lex specialis*, was essential, although he wondered whether the last phrase was necessary. It would be wiser to end the sentence after the phrase "are governed by special rules of international law", since the phrase "such as the rules of the organization that are applicable to the relations between an international organization and its members" might be construed as exempting a State from the rules contained in the draft articles.

7. He had no objection to draft article 62. As for draft article 63, on individual responsibility, while the commentary thereto should make it plain that the responsibility in

question was individual criminal responsibility, he was unsure whether that should be spelled out in the text of the draft article itself.

8. Draft article 64 was a standard clause. Such a provision was necessary and self-explanatory in any set of draft articles relating to States, but in the case of international organizations it posed greater problems because Article 103 of the Charter of the United Nations, which dealt with conflicts between obligations under the Charter of the United Nations and those under treaties, clearly applied solely to States and not to international organizations. The Commission must face the fact that the relationship between international organizations and the Charter of the United Nations was an unexplored area. For decades, it had been a moot point whether the provisions of the North Atlantic Treaty on collective self-defence were consonant with Article 51 of the Charter of the United Nations, and a debate was currently under way on whether the provisions of the Constitutive Act of the African Union that allowed humanitarian intervention were compatible with Article 2, paragraph 4, of the Charter of the United Nations. Of course, the provisions which he had just mentioned were primary rules, whereas the draft articles were concerned with secondary rules, but it was by no means certain that international organizations were subject to the precepts of the Charter of the United Nations in respect of either primary or secondary rules. While he was not suggesting that draft article 64 should attempt to address that issue, the Special Rapporteur should consider it in the commentary and thus demonstrate that the Commission was aware of the dilemmas it posed.

9. Mr. FOMBA, commenting on the last three chapters of the report (paras. 93–134), said that the addition of a second paragraph to draft article 43 would shed light on whether a member State or member international organization might have a subsidiary obligation to provide reparation. He endorsed the opinion of the Special Rapporteur on the placement of that draft article.

10. The Special Rapporteur was right to contend that the concern that had been raised regarding the need to take into account an international organization's ability to act under its mandate was adequately addressed in the commentary to draft article 45.

11. Two arguments relating to functional protection were put forward in the section of the report dealing with implementation of international responsibility (paras. 102–119). First, it was maintained that a claim made in the context of diplomatic protection had a different basis than that of a claim made in the context of functional protection. That position echoed the advisory opinion of the ICJ on *Reparation for Injuries*. Secondly, it was argued that it would be difficult to establish a general rule that would be applicable to all international organizations. Although that line of argument had merit from a legal and practical standpoint, the Commission still had to deal with functional protection. How that should be done was a matter for discussion.

12. For an international organization, functional protection involved bringing a claim against a State or another international organization that was responsible for an

¹¹⁵ *Yearbook ... 2006*, vol. II (Part Two), p. 26, para. (3) of the general commentary to the draft articles.

¹¹⁶ *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/538, paras. 14–18.

¹¹⁷ *Official Records of the General Assembly, Sixty-third Session, Sixth Committee, 19th meeting (A/C.6/63/SR.19)*, paras. 60 and 78, respectively.

¹¹⁸ See *Yearbook ... 1992*, vol. II (Part Two), pp. 19–41, paras. 121–276. See also *Yearbook ... 1993*, vol. II (Part Two), p. 38, paras. 227–229, and *Yearbook ... 1999*, vol. II (Part Two), chap. V, pp. 87–88, paras. 438–449.

internationally wrongful act against one of its agents. It was termed “functional” because it rested on the functional link between the international organization and the agent. In the 1949 advisory opinion of the ICJ on *Reparation for Injuries*, the Court had found that “it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intentment out of the Charter” [p. 184 of the opinion]. In cases in which functional protection might conflict with diplomatic protection, the Court had stated that “there is no rule of law which assigns priority to the one or to the other” [p. 185 of the opinion]—i.e., to the diplomatic protection that was the prerogative of a State or to the functional protection that could be exercised by an international organization. That consideration should be taken into account during the debate and in any solution proposed.

13. Turning to the requirement that local remedies must be exhausted, he tended to agree with the view expressed by the representative of France in the Sixth Committee¹¹⁹ that the term “local remedies” needed to be clearly defined, especially as the commentary to draft article 48 did not appear to be entirely satisfactory. He also concurred with the Special Rapporteur that it was difficult to state a general rule regarding a time limit after which a claim could be treated as having lapsed.

14. In absolute terms, it might be tempting to say that all international organizations had the right to invoke responsibility in the event of a breach of an international obligation owed to the international community as a whole, but if one argued that the speciality rule applied, it would be logical to adhere to the Commission’s position. However, he agreed with the Special Rapporteur that limiting that right to international organizations that had a “universal vocation” failed to take account of all possible scenarios.

15. On the question of countermeasures, he agreed that it was not so much a matter of deciding whether it was necessary to deal with them as it was of how to do so. He thus approved of the approach which entailed placing substantive and procedural restrictions on them. Draft article 54, paragraph 4, seemed to offer a useful way of preventing countermeasures from paralysing the functioning of international organizations. Generally speaking, the risk of such paralysis should not constitute an argument for categorically rejecting countermeasures.

16. As to the question of relations between an international organization and its members and, more specifically, of determining whether an injured member of a responsible organization could take countermeasures against that organization, he believed a residual rule must be established to fill any possible gaps in the rules of international organizations, since it was essential to establish the principle of the *modus operandi* of countermeasures and to specify the limitations to it. In his view, the restrictions on the obligations that might be breached when taking countermeasures had been correctly interpreted. In the light of the Special Rapporteur’s explanations and arguments then, there was certainly no need to propose any amendments to draft articles 46 to 60.

17. Moving on to the section of the report dealing with general provisions, he said he found the proposal to restructure the draft articles acceptable. It was clear that the large body of *lex specialis* already in existence was due to the legal and structural diversity of international organizations and to their varied functions.

18. Deciding whether, generally speaking, the conduct of a State or international organization in implementing a decision of another international organization of which it was a member was attributable to the latter organization was a sensitive and complex matter that required thorough consideration. However, both the letter and the spirit of draft article 61, on *lex specialis*, were acceptable. He also agreed with the reasoning underpinning draft article 62 and its current wording, and he concurred with the reasons given in paragraphs 128 and 129 for draft article 63 as it stood.

19. Turning to draft article 64, he said that the impact of the Charter of the United Nations on issues of responsibility was an important question owing to both the role played by the Organization and the position of the Charter of the United Nations in general international law. The impact of the Charter of the United Nations flowed directly from the Charter itself and from law derived from that text. He endorsed the Special Rapporteur’s interpretation of the scope of Article 103 of the Charter of the United Nations, illustrated by a convincing example in paragraph 132. Like the Special Rapporteur, he thought it unwise to attempt to define the extent to which international responsibility of an international organization might be affected, directly or indirectly, by the Charter of the United Nations.

20. In conclusion, he was in favour of including the four new provisions proposed by the Special Rapporteur in the draft articles and sending them to the Drafting Committee.

21. Mr. HASSOUNA said that, having already spoken on the first several sections of the Special Rapporteur’s report at an earlier meeting, he would confine his comments to paragraphs 93 to 134.

22. The rule incorporated in draft article 43, which required the members of an international organization to provide it with the means for fulfilling its obligations, had been a source of deep controversy at the previous session. While he supported the wording that was eventually agreed upon, he was sceptical as to the appropriateness of adding a second paragraph to that article, since the terms of the draft article and the scope of member States’ responsibility under those terms were perfectly clear. However, if clarification was needed, it could be provided in the commentary to the draft article.

23. He shared the view of Ms. Escameia that draft article 46 and other relevant articles should establish the right of individuals or groups of individuals to invoke the responsibility of international organizations. Although draft article 48 contemplated situations in which a State might act on behalf of its nationals where their rights had been violated by an international organization, it should be noted that States had wide discretion when exercising diplomatic protection and were under no obligation to

¹¹⁹ *Official Records of the General Assembly, Sixty-third Session, Sixth Committee, 20th meeting (A/C.6/63/SR.20)*, para. 39.

provide an individual with reparation once they had exercised such protection. Allowing individuals to invoke the responsibility of an international organization would confer a more autonomous role on the individual, in keeping with current trends in international law.

24. Moreover, international practice had demonstrated that individuals had *locus standi* at the international level to obtain redress for their rights. For example, individuals and groups of individuals had used the World Bank's Inspection Panel to hold the Bank accountable when their human rights had been violated as a result of its projects and policies.¹²⁰ In many cases, the World Bank had paid financial compensation to the injured parties. The inclusion of articles on the responsibility of international organizations *vis-à-vis* individuals would enhance the relevance of the Commission's work, given the criticism of the activities of some international organizations as having had a detrimental impact on the human rights and lives of communities in developing countries.

25. As far as draft article 48 was concerned, he agreed that functional protection should be granted to the officials of international organizations, in view of the difficult situations they often encountered in practice, which had been described by Mr. Melescanu.

26. The importance of draft article 52 had been underscored in Governments' comments and by the support it had received from States Members of the United Nations. The article raised the question of whether an international organization comprising a small number of States could invoke responsibility in the event of a breach of an international obligation owed to the international community as a whole. He tended to agree with the Special Rapporteur that the Commission should not *a priori* exclude that eventuality. The articles should be as comprehensive as possible and envisage all conceivable situations, however remote, that might give rise to the responsibility of international organizations. The Commission should try to cover the entire normative dimension of the responsibility of international organizations, since what was at stake was ensuring their accountability through the effective implementation of international law.

27. Despite the divergence of views on the draft articles on countermeasures, expressed in the Commission and in the Sixth Committee, those articles should be included and accompanied with clear substantive and procedural rules, since he concurred with Mr. Pellet that it would be better to regulate them than to demonize them (3007th meeting above, para. 56). For that reason, he supported draft articles 54 to 60 as proposed because they attempted to clarify the scope of countermeasures and the conditions warranting their use and termination, and they made it plain that countermeasures must comply with the proportionality principle. It was to be hoped that the commentary to those articles would provide examples from international practice and explain how countermeasures differed from other coercive measures such as sanctions, retortion or reprisals.

¹²⁰ See World Bank, *The Inspection Panel: we can help make your voice be heard*; see also The Inspection Panel, *Accountability at the World Bank: the Inspection Panel at 15 Years*, Washington, D.C., 2009 (available from: www.inspectionpanel.org).

28. While he acknowledged that in principle an injured State could not take countermeasures against an organization of which it was a member, he wondered if such action might be possible if the international organization had violated *erga omnes* or *jus cogens* rules.

29. In draft article 61 (*Lex specialis*), the Commission must take into account the very diverse nature, composition and functions of international organizations because their diversity had wider legal implications than did that of States. He therefore supported Sir Michael Wood's suggestion that a new draft article should be added to the general provisions, or that the subject should be addressed in the introductory commentary.

30. The distinction drawn in draft article 63 between the responsibility of an international organization and the personal responsibility of an official of that organization under international criminal law would ensure the draft articles' consistency with the other norms of international law. Like Mr. Dugard, he believed that draft article 64 required some clarification in the commentary to explain the extent to which the responsibility of international organizations under the Charter of the United Nations differed from that of States.

31. Lastly, he was in favour of sending all the draft articles on which he had commented to the Drafting Committee.

32. Mr. MURASE expressed his sincere appreciation to all the members of the Commission for his election and thanked them for their kind words of welcome. Judge Roberto Ago had once said that a freshman member of the Commission should just listen to the debate and not speak during the first year. Going against that prescription, he wished to make a few comments on responsibility of international organizations and, first of all, to congratulate the Special Rapporteur for his splendid and untiring work in elaborating draft articles on the topic.

33. He had long wondered whether the Commission could reconsider the scope of the draft articles with a view to including the question of the responsibility of international organizations *vis-à-vis* third parties, meaning banks, corporations and private companies, depending on their particular contractual relations. He was well aware that, in his first report,¹²¹ the Special Rapporteur had indicated that questions of civil liability should remain outside the scope of the draft articles because the Commission had been given a mandate to deal with internationally wrongful acts. While it was not his intention to reopen the issue, he did think that debates on the question of the third-party responsibility of international organizations would shed light on the Commission's current work on the plurality of responsibility and the effective performance of the obligation to make reparation. He also hoped that at some time in the future, third-party liability could be considered by the Commission as an exercise in the progressive development of international law.

¹²¹ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/532, paras. 29–31.

34. From a practical point of view, it was far less likely for international organizations than for States to commit wrongful acts intentionally or knowingly. The most likely case in which an international organization could be held responsible was when it was faced with dissolution or bankruptcy, leaving large debts owed to third parties. In such a situation, the crux of the matter was who bore responsibility—the international organization itself or its member States. Discussions on third-party responsibility would provide the Commission with important lessons for the formulation of certain parts of the draft under consideration, in particular draft articles 51 and 43.

35. There were numerous precedents in the area of third-party responsibility, such as the case involving the Arab Organization for Industrialization of 1975 (*Westland Helicopters Ltd.*), and the famous case of the International Tin Council in the early 1980s. A more recent example involved the Korean Peninsula Energy Development Organization (KEDO), an international organization composed of 12 countries and the European Union, with 19 other contributing non-member States. In May 2006, the KEDO Executive Board had decided, for reasons that were well known, to terminate its planned installation of nuclear power plants in the Democratic People's Republic of Korea.¹²² KEDO was seeking reparation from that country for the damage caused by its alleged non-fulfilment of obligations under the relevant supply agreement, and the negotiations between the two parties would certainly continue. What was relevant to the Commission's work was the responsibility of KEDO toward the third parties that had been involved in the project, notably an electric power corporation that had been designing and developing the basic plan for the project. After KEDO had decided to terminate its contract with that corporation in December 2006, it had owed a substantial amount of debt to the export/import banks that had supplied funds for the project. The question was who was going to pay those debts.

36. Such a situation was conceivable for any international organization involved in commercial, financial or economic activities. In most cases, however, the constituent instruments of international organizations did not have provisions that could be applied in such situations to determine the allocation of third-party responsibility between the international organization and its member States, or among the member States. Nevertheless, international organizations wishing to participate in economic activities as responsible actors in the world market had to be equipped with proper legal safeguards against such unexpected events as gross deficit, bankruptcy or dissolution of the organization. To his knowledge, the only organization that was equipped with such a provision, was the European Space Agency. Article XXV, paragraph 3, of the Convention for the establishment of a European Space Agency provided that “[i]n the event of a deficit, this shall be met by the ... [member] States in proportion to their contributions as assessed for the financial year then current”. Given the absence of such provisions in most of the constituent treaties of international organizations, the Commission could do much to help avoid or solve actual or potential disputes in that area by providing adequate guidelines.

¹²² See the KEDO website (www.kedo.org).

37. In academic circles, much had been written on the subject of the responsibility of international organizations *vis-à-vis* third parties, including works by Moshe Hirsch,¹²³ Rosalyn Higgins,¹²⁴ C. F. Amerasinghe,¹²⁵ Ignaz Seidl-Hohenveldern¹²⁶ and himself. The writers had divided the various regimes, existing or proposed, into several types. First was a regime establishing the direct and primary responsibility of member States, in which the international organization in question tended to be characterized as an unincorporated body to which the principle of “lifting the corporate veil” was applied. Other categories included indirect responsibility, concurrent responsibility, secondary responsibility and limited responsibility of member States, all of which implied that member States shared responsibility with the international organization in one way or another. Lastly, several international organizations, including KEDO, had provisions stating that there was no responsibility on the part of member States.

38. In light of the foregoing, he would submit that the commentaries to draft article 51 (Plurality of responsible States or international organizations) and draft article 43 (Ensuring the effective performance of the obligation of reparation) should try to provide clear and detailed guidelines regarding the allocation of responsibility. The Special Rapporteur rightly stated in paragraph 107 of his report that whether responsibility was subsidiary or concurrent depended on the pertinent rules of international law. He suggested that the manner in which the “pertinent rules” might operate should be elaborated in more detail in the commentary, as had been done with the regimes described in the precedents and the works he had just mentioned. There was a danger that, without such guidelines, the articles would end up creating problems rather than helping to solve them.

39. Draft article 18, on self-defence, was most likely to address situations in which peacekeeping operation units came under military attack. Unfortunately, the use of terms in the documents emanating from the Department of Peacekeeping Operations was sometimes misleading. For instance, the General Guidelines for Peacekeeping Operations¹²⁷ issued in October 1995 stated that the “use of force” was permitted in two situations: first, in the case of “self-defence”, and second, when it was required for the performance of the authorized official missions of peacekeeping. In the context of peacekeeping, however, “self-defence” actually meant the self-protection of peacekeeping personnel and units, which had nothing to do with the right of self-defence accorded to States

¹²³ *The Responsibility of International Organizations Towards Third Parties: Some Basic Principles*, Dordrecht, Martinus Nijhoff, 1995.

¹²⁴ “The legal consequences for member States of the non-fulfilment by international organizations of their obligations towards third parties”, preliminary exposé, *Institute of International Law, Yearbook*, vol. 66 (1996), Session of Lisbon (1995), Part I, pp. 249–259.

¹²⁵ “Liability to third parties of member States of international organizations: practice, principle and judicial precedent”, *American Journal of International Law*, vol. 85, No. 2 (April 1991), pp. 259–280.

¹²⁶ “Liability of member States for acts or omissions of an international organization”, in *Liber Amirocum Ibrahim F.I. Shihata: International Finance and Development Law*, S. Schlemmer-Schulte and Ko-Yung Tung (eds.), 2001; *Corporations in and under International Law*, Cambridge, Grotius, 1987.

¹²⁷ United Nations, General Guidelines for Peacekeeping Operations, New York, 1995.

under international law or Article 51 of the Charter of the United Nations. Nor was the term “use of force” appropriate, since Article 2, paragraph 4, of the Charter prohibited the use of force by States. The use of military means by United Nations peacekeeping units should be characterized as “use of weapons” rather than “use of force”. In the second situation, the military activities performed by official peacekeeping units were comparable to the use of weapons by police officers in the performance of their official duties in the domestic context.

40. The Commission should not introduce inaccuracies or confusion through its use of legal terms in its draft articles, and from that perspective, he was in favour of deleting draft article 18 altogether. If it was necessary to retain it, however, he proposed that the words “a lawful measure of self-defence” should be replaced by the phrase “a lawful measure of self-protection or for the performance of its authorized mission”.

41. Mr. VASCIANNIE said that the main argument for adding the new paragraph proposed for draft article 43 was that it clarified the article and defined its limits. Paragraph 1 said that the members of an organization were required to take appropriate measures to ensure that the organization met its obligations, while the new paragraph said that the State itself was not liable for reparation in respect of those obligations. As the commentary to draft article 43 noted, that approach was built on the idea that the legal personality of the organization was separate from that of its members; the liability of the collective did not imply liability on the part of the individual components of the collective. While that approach was plausible and perhaps reflected the majority view within the Commission, paragraph 2 appeared to negate paragraph 1.

42. If an international organization committed a wrongful act giving rise to the obligation to make reparation, yet claimed that it could not afford to do so, then, following the reasoning outlined by Judge Sir Gerald Fitzmaurice in his separate opinion relating to the advisory opinion of the ICJ on *Certain Expenses of the United Nations*, the members still had to do something to meet the organization’s obligation, namely, provide funds [pp. 207–208 of the opinion]. However, the new paragraph 2 exempted the members from their responsibility if they were unable to come up with the funds. Thus, taken as a whole, article 43 now indicated that the members of an organization had an obligation to find the money to make reparation but that they could not be sued by the injured State over that obligation. That was not a satisfactory formulation; the Commission should say either that member States were obliged to provide funds in such a situation or that they were not. His preference would be not to include the proposed new paragraph. As to the placement of article 43, he thought the Special Rapporteur was correct and that it should remain in the chapter on reparation for injury.

43. Turning to the provisions on the invocation of responsibility, he said that when draft article 46 was applied in practice, issues might arise over whether the breach of an obligation “specially affected” a State or organization (subpara. (b) (i)) and was “of such a character as radically to change” the position of other States or organizations (subpara. (b) (ii)). As an example of the former phrase,

the commentary to draft article 46 referred to pollution of the high seas that particularly affected coastal States, but he thought that obligation was to the coastal State individually and was thus covered by draft article 46 (a). In explaining the latter phrase, the commentary referred to a party to a disarmament treaty or any other treaty where each party’s performance was effectively conditioned upon and required the performance of each of the others. Many, if not most, treaties effectively made performance by one side conditional on performance by others, however, so the category of obligations under draft article 46 (b) (ii) might be very broad. Including other examples in the commentary might sharpen the understanding of the two types of obligation contemplated in draft article 46 (b).

44. Draft article 47, paragraph 2, was now well settled in the draft and was accepted by States and organizations. It said very little, however, except that States or international organizations “may”, but were not required to, specify the form reparations should take. Presumably they might also choose not to specify the form of reparations and, in addition, they might choose to specify other things, since the text did not appear to be exhaustive. The uncertainty as to what was ruled in and ruled out by paragraph 2 should be clarified, perhaps in the commentary.

45. Some Commission members had launched a significant challenge to the inclusion in the draft articles of provisions on countermeasures against international organizations. That challenge had been met with the counterargument that there was no evidence in practice that countermeasures could not be applied in certain circumstances by States or international organizations *vis-à-vis* an international organization that engaged in a wrongful act. The reactions of States and international organizations to draft articles 54 to 60 tended to bear out that counterargument. So, too, did the approach taken in the arbitral award in the case concerning the *Air Service Agreement of 27 March 1946 between the United States of America and France*, even though it had been about relations between States and was therefore not precisely relevant to relations between States and international organizations. The arbitral tribunal had observed that negotiations towards judicial settlement did not bar the application of countermeasures and that, under international law as it then stood, States had not renounced their right to take countermeasures in such situations, regrettable though that might be. Thus the tribunal had considered that States had to do something in order to demonstrate that they had renounced their right to take countermeasures against other States. He questioned whether they had done anything. Similarly, even though the Committee on Economic, Social and Cultural Rights, in its General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights,¹²⁸ adopted a restrictive attitude to the implementation of sanctions and, by extension, countermeasures, it did not proceed on the assumption that international organizations could not take countermeasures or that countermeasures could not be taken against international organizations.

¹²⁸ *Committee on Economic, Social and Cultural Rights, Report on the sixteenth and seventeenth session, Official Records of the Economic and Social Council, Supplement No. 2 (E/1998/22-E/C.12/1997/10), annex V, p. 119.*

46. Mr. Pellet had raised a policy argument in defence of keeping countermeasures in the draft, namely, that it might be better to have them there and to regulate them than to leave them to the vagaries of general law. In fact, draft articles 54 to 60 set out at least 15 limitations or pre-conditions for the taking of countermeasures, something that might help to restrict the possibility of their abuse.

47. As to whether an injured member of an organization could take countermeasures against the organization, while on rare occasions there might be a relevant rule of the organization that would apply as *lex specialis*, in other cases, a provision like draft article 52 might be helpful. He agreed that the phrase “reasonable means” for ensuring compliance was perhaps not sufficient, and he preferred the terms “effective means”, which provided greater assurances to the injured member of an organization. The Drafting Committee might also wish to consider the idea of “necessary means”, a phrase used by the arbitrators in *Air Service Agreement of 27 March 1946 between the United States of America and France*.

48. He wondered whether in draft article 53, paragraph 1 (a), it might not be better to refer to the obligation to refrain from the threat or use of force, not “as embodied in the Charter of the United Nations”, but “in international law”, given that Article 2, paragraph 4, of the Charter of the United Nations referred to States and not to international organizations.

49. The general provisions contained in draft articles 61 to 64 were acceptable, although the Drafting Committee might need to examine the wording of draft article 61. In general, there was a strong argument for not departing from the terms in the draft articles on responsibility of States. In particular, he did not believe that the idea of individual responsibility should be included in draft article 63, for that might give rise to problems in other parts of the draft and weaken the overall acceptability of the final product to States: the “without prejudice” clause was sufficient.

50. He was in favour of referring all the new draft articles, with the exception of draft article 43, paragraph 2, to the Drafting Committee.

51. Mr. SINGH thanked the Special Rapporteur for his comprehensive report which, in addition to putting forward some new articles, proposed amendments to some of the draft articles already provisionally adopted and introduced some further clarifications in the commentary. He concurred with the Special Rapporteur’s view that the suggestion of some States that Part Three of the draft articles should also cover the invocation by an international organization of the international responsibility of a State lay beyond the scope of the topic as set out in article 1.

52. He agreed that article 4, paragraph 4, which defined the term “rules of the organization”, should be moved to article 2 as a new paragraph, and he supported the other drafting proposals made in paragraph 21 of the report. The term “agent” was defined in article 4, paragraph 2, with reference to paragraph 1 of that article, but the term was also used in other articles; accordingly, article 4, paragraph 2, should also be moved to article 2 so that it did not apply solely to article 4, paragraph 1. The Special

Rapporteur had proposed that article 4, paragraph 2, should be rephrased in the light of the concerns expressed by the ILO and UNESCO that the definition of “agent” was too wide. However, he thought that the text was quite clear and favoured retaining it in its present form (para. 23 of the report).

53. He agreed with the Special Rapporteur’s recommendation that article 18 on self-defence should be deleted in the light of critical comments by States stressing that self-defence was applicable only to the actions of a State.

54. With regard to draft article 19, he noted that the Commission’s members held differing views on whether an international organization could take or be subjected to countermeasures. Since international organizations were established by States, they could only have such competence and powers as were provided for under their constitutive instruments, and therefore the rules of the organization should be decisive in determining whether an organization could resort to countermeasures or be the target of countermeasures by its members. Considering the uncertainty over the legal regime for countermeasures and the risk of abuse that they entailed, the concerns expressed by the Commission, the Sixth Committee and some international organizations, and the exceptional nature of countermeasures, the circumstances in which an international organization could resort to them should be strictly limited. He therefore supported the proposal to delete the word “reasonable” in draft article 19, paragraph 2. He had some difficulty with the use of the term “lawful countermeasures” in paragraph 1 of that article; it seemed to indicate that there existed rules on the basis of which the lawfulness of the measure was to be judged. Further clarification was needed.

55. Draft article 43 required the members of a responsible international organization to take appropriate measures to provide the organization with the means for effectively fulfilling its obligations. The Special Rapporteur proposed the addition of a new paragraph to address the view that the article should not be understood as implying that member States or international organizations had a subsidiary obligation to provide reparation. While the Special Rapporteur’s proposal provided a useful clarification, draft article 43 was still an obligation of member States, and not one of the responsible international organization.

56. He agreed that the inclusion of draft article 61 (*Lex specialis*) would make it unnecessary to repeat the proviso in different draft articles, and he endorsed the suggestion made during the debate to refer in the commentary to the specific articles for which that proviso was relevant. Paragraph 121 of the report noted that the “great variety of international organizations” made it essential to acknowledge the existence of special rules on international responsibility that applied to certain categories of international organizations or to one specific international organization. As some members had stressed during the debate, that idea should be reflected in the text of the draft article.

57. In closing, he said that draft articles 61 to 64, as well as all other draft articles on which the Special Rapporteur had made proposals for review or amendment, should be referred to the Drafting Committee.

58. Mr. VÁZQUEZ-BERMÚDEZ said that draft article 43 placed proper emphasis on making effective the right of the injured entity to receive full reparation for the injury caused. The Special Rapporteur had proposed the insertion of a new second paragraph to make it clear that the right did not imply that members were under an obligation to repair the injury suffered by that entity. However, he did not think it was necessary to include such a text in draft article 43 because the original wording did not suggest the contrary. Similarly, draft article 34 clearly established that the responsible international organization must repair in full the injury caused by its wrongful act—after all, it was a general principle that the responsible party was under an obligation to make reparation for the injury suffered.

59. Former chapter X, which would become the new chapter VII, referred to cases in which the members of an international organization incurred responsibility—including subsidiary responsibility, as in the case covered by draft article 29—in connection with the wrongful act of an international organization, and therefore had an obligation to make reparation. The idea contained in the Special Rapporteur's proposed paragraph 2 should be incorporated and expanded in the commentary to draft article 43.

60. He had supported the inclusion of a chapter on countermeasures, which, to prevent abuse, must be limited, strictly regulated and allowed only as an exception. Indeed, in relations between international organizations and their members, they should be even more exceptional, given that the principle of cooperation should prevail. He agreed with the Special Rapporteur, who, noting that some States had maintained that, as a general rule, countermeasures had no place in the relations between an international organization and its members, had suggested that the Commission might wish to reconsider the wording of draft article 55 to make it reflect more adequately the importance of the rules of the organization with respect to countermeasures and, again bearing in mind the principle of cooperation between members and the organization, to ensure that countermeasures were subject to even stricter limitations. That could be done during the current session or during the Commission's second reading of the draft articles.

61. On the whole, he agreed with the comments made by the Special Rapporteur on the other issues discussed in the second part of the seventh report, and he endorsed the sending of draft articles 61 to 64 to the Drafting Committee.

62. Mr. SABOIA agreed with Ms. Escameia and Mr. Hassouna that the invocation of responsibility by individuals should be considered. The example cited by Mr. Hassouna in which the World Bank had agreed to pay compensation to injured parties showed that individuals could be injured by actions of international organizations and that they must be entitled to invoke responsibility for an organization's wrongful acts. He also shared the view that it was important to state clearly, either in the draft articles themselves or in the commentary, that international organizations were entitled to exercise functional protection of their officials in the course of missions, since their protection was important for the discharge of the duties of the international organization.

63. With regard to the issue, raised by the Special Rapporteur in paragraph 132 of his report, of whether and to what extent international organizations were bound by Article 103 and other provisions of the Charter of the United Nations, he was somewhat concerned at the statement by Mr. Dugard. At first glance, he found it difficult to accept that the terms of Article 103 should not be extended to include international organizations: as international organizations were understood as being composed mostly of States, he failed to see the logic of keeping them outside the scope of that important provision of the Charter of the United Nations. Moreover, Chapter VIII of the Charter of the United Nations specified that regional arrangements and their activities must be consistent with the purposes and principles of the United Nations. In paragraph 132 of his report, the Special Rapporteur noted that the impact of the Charter of the United Nations was not limited to obligations of members of the United Nations and that the Charter might well affect obligations—and hence the responsibility—of an international organization. The Special Rapporteur had concluded that it was not necessary to discuss the issue, but in his own opinion, that was an important point that should be addressed in the commentary, because it would be very harmful for the development and strengthening of the rule of law at the international level to suggest that international organizations were less subject to an important source of law, namely the Charter of the United Nations, than States. The danger of such an assumption was that it would encourage States to use international organizations to circumvent important rules of international law.

64. Mr. GAJA (Special Rapporteur) said that, in summing up the debate on the topic, he wished to focus on the comments concerning the draft articles for which he had made proposals for amendments. Some important questions which had been raised could be discussed again during the second reading.

65. Two lacunae to which some speakers had referred had actually been covered in part. First of all, the question of the responsibility of international organizations towards individuals was in fact addressed in draft article 36, paragraph 2, in a "without prejudice" provision that specifically indicated that individuals could acquire rights as a consequence of a breach of an international obligation by an international organization. Secondly, draft article 29 and the related commentary had given extensive consideration to the issue of subsidiary responsibility of member States. Two new proposals had been made during the debate and had attracted some support, one by Mr. Pellet relating to the invocation of State responsibility by an international organization, and the other by Sir Michael Wood, on the need to emphasize the specificity of international organizations. He would comment on these proposals at the end of his summing up.

66. Many speakers had approved his proposal to restructure the draft articles, which would now be broken down into the following parts: Part One, headed "Introduction" and comprising the first two draft articles; Part Two, entitled "The internationally wrongful act of an international organization" and including draft articles 3 to 24; Parts Three and Four, corresponding to the current Parts Two and Three; Part Five, consisting of the current chapter X

(arts. 25 to 30); and Part Six (General provisions), comprising the final articles yet to be adopted. He believed that it would facilitate the Commission's work on the topic if the plenary would indicate to the Drafting Committee that the text should be reorganized accordingly, thereby allowing the Drafting Committee to focus on the revision of the draft articles.

67. He then turned his attention to the individual draft articles on which the debate had focused. There seemed to be general agreement about moving paragraph 4 of draft article 4 to draft article 2. As a number of speakers had pointed out, that transposition would entail some redrafting of article 2. Although several remarks had been made regarding the definition of the terms "international organization" and "rules of the organization", he would be reluctant to see the discussion reopened on those questions in the Drafting Committee, which should simply be requested to incorporate draft article 4, paragraph 4, into draft article 2. In another proposal, Mr. Valencia-Ospina, supported by Mr. Singh, had suggested that the definition of "agent" in draft article 4, paragraph 2, should be placed in draft article 2, and he had rightly pointed out that the term "agent" was also used in places other than in draft article 4, paragraph 1. The Drafting Committee might therefore wish to state that the definition was applicable throughout the entire chapter on attribution of conduct. However, since the definition of the term "agent" was central to the chapter on attribution and not to any other chapter, his preference would be to retain the definition in draft article 4.

68. In any event, article 4, paragraph 2, should be referred to the Drafting Committee. His proposal for rewording the definition of "agent", which was based on the longer version in the advisory opinion of the ICJ on *Reparation for Injuries* and was reflected in paragraph 23 of his report, had appeared to receive the support of the majority, but there had also been other views endorsing the current text. Some speakers had been in favour of a revised version of his proposal, deleting the words "through whom the international organization acts" and using only the first part of the language of the advisory opinion on *Reparation for Injuries*. Those matters could be left for the Drafting Committee to discuss, and it appeared that the Committee's prospects for reaching a consensus on a revised text of article 4, paragraph 2, were good.

69. While he intended to consider only those draft articles on which he had made proposals, he wished to make an exception in the case of draft article 5, given the importance that it had assumed in the debate and elsewhere. There was some curiosity among legal experts as to how the Commission would react to the decision by the European Court of Human Rights in the *Behrami and Saramati* case; indeed, many references had been made to that ruling during the debate. He was pleased to note the virtually unanimous opinion in the Commission that, notwithstanding *Behrami and Saramati*, draft article 5 should not be amended and that the criterion of effective control should be retained. The commentary on draft article 5 would need to be expanded in order to refer to the *Behrami and Saramati* decision, the judgement by the House of Lords in the *Al-Jedda* case and the

judgement of the District Court of The Hague (*H. N. v. the Netherlands*). All those decisions had been handed down after the commentary had been provisionally adopted, and thus some updating was called for. In revising the commentary to draft article 5, the Commission might wish to specify, as had suggested by Mr. Caffisch, that the *Behrami and Saramati* decision had considered issues of relevance to draft article 5, in the context of establishing whether the Court had jurisdiction *ratione personae*, which to some extent diminished the importance of the precedent.

70. The text he had suggested for draft article 8, paragraph 2, had not been well received, in particular the words "in principle". In fact, there had been little enthusiasm for the entire paragraph. Some proposals had been made for its redrafting, and perhaps the Commission should try to arrive at more felicitous wording. During the debate, Mr. Vázquez-Bermúdez had suggested that a possible solution might be to add wording at the end of paragraph 1 and to delete paragraph 2. That option should be left open for the Drafting Committee, to which the entire draft article 8 should be referred.

71. During the debate on draft article 15, some speakers had expressed doubts that an international organization should be held responsible for having recommended a certain course of conduct to its members. However, the issue before the Commission now seemed to be whether suitable wording could be found that would make it clear when such responsibility was incurred and prevent a broad interpretation of the text, which some States in the Sixth Committee had feared. A majority of speakers saw a need to clarify and, to some extent, restrict draft article 15, paragraph 2 (*b*). He had suggested replacing the words "in reliance on" by "as the result of" as a way of restricting the text, but he had not persuaded all members that this change achieved what was intended. Some members had made other suggestions: Mr. McRae, for instance, had argued that in order for an international organization to be responsible, a recommendation had to be "the principal or predominant cause for the State to commit the act in question". Given the prevailing dissatisfaction with the current wording, and although the Commission did not yet have a proposal that had met with broad acceptance, it would be preferable to refer draft article 15, paragraph 2 (*b*), to the Drafting Committee to see whether it could produce a better wording.

72. No criticism had been expressed regarding draft article 15 *bis*, which was a new article and should be referred to the Drafting Committee.

73. Draft article 18, on self-defence, should be retained, since the majority of speakers had not endorsed his proposal to delete it. Various drafting suggestions had been made during the debate, including, in particular, the deletion of the reference to the Charter of the United Nations. He therefore proposed that draft article 18 be referred to the Drafting Committee so that its wording could be improved.

74. Draft article 19, on countermeasures, was a new article that was generally considered necessary, given that the Commission had already provisionally adopted draft

articles concerning countermeasures that an international organization could take against another international organization. His proposal to characterize countermeasures as “lawful” in paragraph 1 of that draft article had elicited much criticism, yet, as Mr. Fomba had pointed out, that term was intended to refer to the substantive and procedural conditions imposed on countermeasures by international law. Perhaps the Commission could develop that reference more fully and include, in the case of an international organization resorting to countermeasures against another international organization, a cross-reference to the conditions set out in draft articles 54 to 60. That would not, however, address the problem of countermeasures taken by international organizations against States, and the Commission could not refer to the draft articles on the responsibility of States for internationally wrongful acts, despite the fact that such a reference would, at least by analogy, establish the conditions that an international organization would have to fulfil in order to resort to countermeasures against a State. Consequently, a reference could perhaps be made in paragraph 1 to international law, on the assumption that the reader would understand it as an implied reference to the draft articles on responsibility of States.

75. Another question that should be referred to the Drafting Committee was how to improve the proposed wording of paragraph 2 of draft article 19. The text of that paragraph had been based on draft article 55, reflecting the idea that there were hardly any reasons for differentiating between countermeasures taken by States members of an international organization against that organization (the subject of draft article 55) and countermeasures taken by an international organization against its members (the subject of draft article 19, paragraph 2). During the discussion in plenary, many drafting suggestions had been made with a view to improving the text of either article 19, paragraph 2, or article 55. For example, a significant trend towards the deletion of references to “the rules of the organization” had emerged, and Mr. Nolte’s suggestion to refer to “reasonable procedures” instead of “reasonable means” had also received support. He therefore proposed that those and other suggestions relating to draft articles 19 and 55 should be considered by the Drafting Committee, a proposal that had received almost unanimous support. Moreover, draft article 19 was a new article that would have to be referred to the Drafting Committee in any case before it could be adopted.

76. In response to criticism from States, he had proposed a rewording of draft article 28, paragraph 1. The new text was intended to convey that the transfer of competence by a State to an international organization did not *per se* imply circumvention—in other words, it was not the fact of transferring competence, but the use of the international organization’s separate legal personality that entailed responsibility. His proposed new text did not contain the verb “circumvent”, which appeared in both draft articles 15 and 28. Given the element of subjectivity implied in the concept of circumvention, he had proposed a more objective formulation that did not specifically refer to circumvention or intent. Since most members had been in favour of that wording, he proposed that draft article 28, paragraph 1, should be referred to the Drafting Committee for revision.

77. The proposed addition of a new second paragraph to draft article 43 had proved to be quite controversial, and the majority of members who had expressed an opinion appeared to be against it. The idea expressed in paragraph 2 had already been reflected in the commentary to draft article 43, and it might be best to leave it at that. Those who were not satisfied with that solution would have another opportunity to propose changes during the revision of the commentary, which would be necessary for adopting the text on first reading.

78. Although the Commission had adopted draft article 55 at its sixtieth session following an extensive debate,¹²⁹ the fact that that article served as a model for draft article 19, paragraph 2, implied the need to reconsider it when draft article 19 was revised. He therefore proposed that draft article 55 should also be referred to the Drafting Committee for revision.

79. The general provisions contained in draft articles 61 to 64 had received wide support, and he consequently proposed that they should be referred to the Drafting Committee. It would be useful to mention in the commentary that draft article 63 was not a new article and corresponded to article 58 of the draft articles on State responsibility for internationally wrongful acts.¹³⁰ When the Drafting Committee turned its attention to draft article 61, on *lex specialis*, it might wish to consider the issue of the specificity of international organizations, bearing in mind Sir Michael Wood’s proposed text, which read: “In applying these articles to a particular organization, any special considerations that result from the specific characteristics and rules of that organization shall be taken into account”. As had been suggested during the debate, initially by Sir Michael himself, that text could become a new paragraph under draft article 61, a separate article or a passage in the introductory commentary. Prior to adopting that text, however, the Commission needed to reflect further on the implications of that statement. There was general agreement that there was a wide variety of international organizations, and the draft articles had repeatedly been criticized for not reflecting that situation sufficiently. His answer had always been that the Commission was drafting very general provisions, which could then be applied in a differentiated manner. The suggested text, however, seemed to be hinting that, beyond differences in application, there might also be differences in the rules themselves, given the specificity of individual organizations. In that case, it would be useful to know which draft articles were likely to be affected and in what way. The Commission would also have to consider the fact that the draft articles applied, not to international organizations directly, but to the relations between an international organization and other entities. For that reason, he appealed to Sir Michael and to other like-minded speakers to shed more light, for the benefit of the Drafting Committee, on the implications of the proposed text or a similar text that would be incorporated in draft article 61 or placed elsewhere in the draft.

¹²⁹ *Yearbook ... 2008*, vol. I, 2989th meeting, pp. 250–251, paras. 8–11.

¹³⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 142–143.

80. Turning to the question of the lacuna concerning the invocation by an international organization of the responsibility of a State, he said that while he was attracted by Mr. Valencia-Ospina's proposal to include an express reference to that issue at the end of draft article 62 in order to demonstrate the Commission's awareness that a lacuna existed, that proposal did not address the problem of how to fill the lacuna. Discussion of that problem had initially been polarized between the position taken by Mr. Pellet, who favoured the inclusion of some 30 new articles in the current draft, and his own position, which was that the Commission could not resolve the matter in the current draft because doing so would affect the articles on State responsibility, whose status was still under consideration in the General Assembly.

81. The invocation of a State's responsibility by an international organization did not constitute the only lacuna in the regime of State responsibility as it related to international organizations. A much broader range of issues was potentially involved and affected, in the draft articles on responsibility of States, not only articles 42 to 48, on invocation, but those on countermeasures and many other provisions as well, some of which had been referred to in paragraphs 8 and 9 of his seventh report.

82. Article 6 of the draft articles on State responsibility was a case in point, as it had originally included a reference to international organizations that had subsequently been dropped. As it currently stood, draft article 6 referred only to the case in which the conduct of an organ placed at the disposal of a State by another State was considered an act of the former State, but did not contemplate the parallel case involving the conduct of an organ placed at the disposal of a State by an international organization. While it was recognized that States frequently placed certain of their organs at the disposal of international organizations, the reverse was occasionally also true, and thus that situation needed to be covered by the draft articles on State responsibility. Given the number of articles in that draft that would require revision, there did not seem to be any reason for the Commission to address only the lacuna in the draft articles on invocation of responsibility.

83. The Commission had thus far avoided making any reference in the current draft to the draft articles on State responsibility because the status of that text had yet to be defined. Had it been able to do so, the Commission could have pre-empted another frequent criticism, which was that the current draft was too repetitive of the articles on State responsibility. A general reference to the earlier draft articles would have allowed the Commission to confine the current draft to those issues that related specifically to international organizations. Since that had not been possible, it had been considered necessary to err on the side of repetition and to include the full text in each case.

84. If the solution to be adopted was to incorporate additional text to cover all the omissions in the draft articles on responsibility of States that dealt with State responsibility as it related to international organizations, it would require rewriting a long list of draft articles and reproducing them in an amended form. In the case of draft article 6, which he had cited previously,

the amended text would read: "The conduct of an organ placed at the disposal of a State by another State or an international organization shall be considered an act of the former State."

85. He did not believe that most members favoured such an approach, since during the debate they had appeared to move away from that eventuality—at times by referring to the problem of the Commission's mandate and at others by exploring imaginative ways in which the lacunae could be filled. One suggestion that might eventually be taken up was to make States aware of the omissions and then to try to find ways to address them. Rather than suggesting to the Sixth Committee that it was necessary to amend the draft articles on State responsibility, the Commission could study the issues involved more carefully, even if the result was ultimately the same.

86. In summing up his reflection on the discussion of the lacunae, his own suggestion would be to invite States to give their views as to how the Commission ought to proceed in its study of the issues of State responsibility that affected international organizations. It could then draw attention to the invocation of the responsibility of a State by an international organization and, in particular, the question of functional protection by an international organization. One way to proceed in requesting States' views on the matter would be to include some carefully drafted questions in chapter III of the Commission's annual report to the General Assembly and invite States and international organizations to comment.

87. In conclusion, he proposed that the following draft articles should be referred to the Drafting Committee: draft article 2; draft article 4, paragraph 2; draft article 8; draft article 15, paragraph 2 (*b*); draft article 15 *bis*; draft articles 18 and 19; draft article 28, paragraph 1; draft article 55; and draft articles 61 to 64. The Drafting Committee should bear in mind that articles 15 *bis*, 19 and 61 to 64 were new articles, whereas the others had been provisionally adopted and were to be revised. He also proposed that the Drafting Committee should be invited to reorganize the draft articles into six parts.

88. Ms. ESCARAMEIA said that her questions had to do with two draft articles that were not being referred to the Drafting Committee. The first concerned draft article 46 and an issue that had been raised during the debate concerning the invocation of the responsibility of an international organization by an individual or group of individuals. She was not suggesting that the issue should be reopened in the Drafting Committee, since it had received only minor support; however, it was encouraging to note that there would be another opportunity to address it during adoption of the draft articles on second reading. Accordingly, she wondered whether the Commission would consider including among the questions to be addressed to States and international organizations in chapter III a question along the following lines: "Have individuals or groups of individuals invoked the responsibility of your organization, and, if so, what was the result of such action?" She had formulated that question in keeping with the Special Rapporteur's recommendation that such questions should be specific. It would be

helpful to learn about the practice of international organizations and to hear the views of States on the subject.

89. Her second question had to do with draft article 43, paragraph 2, which the Special Rapporteur had not proposed to refer to the Drafting Committee. Although he had noted that opinions had been fairly evenly divided on whether to retain that paragraph (paras. 96–97 of the report), the Special Rapporteur had ultimately concluded that a slight majority was opposed to doing so. She was not contesting that conclusion, even though she would have preferred to have the article referred to the Drafting Committee, but she nevertheless wondered what would become of the paragraph or, for that matter, of Mr. Valencia-Ospina's alternative proposal to it, which had been included in a footnote to the article.¹³¹ Her own preference would be to place the proposed paragraph 2 in a footnote to draft article 43 in the list of draft articles.

90. Mr. DUGARD, referring to Ms. Escarameia's comments, said that the Special Rapporteur had discussed submitting a number of very important questions to States and international organizations for their comments. Although such questions were not normally considered by the Drafting Committee, in view of their unusual significance, he wondered whether, subject to the opinion of the Special Rapporteur, those questions might be formulated by the Drafting Committee in order to ensure that they reflected a more collective viewpoint.

91. Sir Michael WOOD said that he was in total agreement with the Special Rapporteur's excellent summary and proposals but would appreciate clarification about what action the Special Rapporteur suggested the Commission should take regarding the proposals he himself had made in connection with draft article 61 (3007th meeting above, para. 28). As to the Special Rapporteur's recommendation that the implications of the text should be clarified, he wished to make it clear that he had merely intended to state expressly what was perhaps implicit, which was that, in applying the rules of the organization, any special considerations that resulted from the characteristics or rules of a particular organization should be taken into account. Given that his proposal had received a certain amount of support, he hoped that it would be considered by the Drafting Committee.

92. Mr. GAJA (Special Rapporteur) reiterated that, in its consideration of draft article 61, the Drafting Committee should consider Sir Michael's proposal or some variation thereof. The Committee had enough flexibility to determine what form the new text should ultimately take.

93. It was not the usual role of the Drafting Committee to draft questions for inclusion in chapter III of the Commission's annual report, and while there was no harm in advancing ideas, such questions were usually considered by the plenary during the second part of the session. If international organizations, which had tended not to reveal much of their practice with regard to individuals, were in future willing to disclose more, then the

time might indeed be ripe to pose the question proposed by Ms. Escarameia. The practice of international organizations in respect of individuals had a bearing on their practice in respect of States or international organizations, and there was a kind of continuity in the law that made such information relevant. Having said that, however, he urged the Commission to refrain from drafting questions on chapter III at present; it would perhaps be wise first to discuss the delicate matters concerned, and the Chairperson could hold consultations about how best to handle the issue of the lacunae.

94. The Commission had followed an unusual procedure in respect of draft article 43 in that it had gone along with the Drafting Committee's decision to place an alternative provision both in a footnote and in the commentary to the draft article itself. In 2007, the Commission had invited States to indicate whether they preferred the text provisionally adopted by the Commission or the alternative text continued in the footnote.¹³² Since the prevailing view in the Sixth Committee had been that the actual text of draft article 43 was preferable to the alternative text contained in the footnote,¹³³ the Commission should probably not go back on the matter by retaining the text in the footnote, which he assumed would now be deleted.

95. The CHAIRPERSON said he took it that the Commission wished to refer the draft articles indicated by the Special Rapporteur to the Drafting Committee.

It was so decided.

96. The CHAIRPERSON said that, as proposed by the Special Rapporteur, the Drafting Committee would also be entrusted with the task of reorganizing the draft articles into six parts.

The meeting rose at 1 p.m.

3010th MEETING

Tuesday, 26 May 2009, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Sir Michael Wood, Ms. Xue.

¹³² *Ibid.*, p. 14, para. 29.

¹³³ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-second session, prepared by the Secretariat (A/CN.4/588, mimeographed; available on the Commission's website, documents of the sixtieth session), para. 152–156, especially para. 154.

¹³¹ *Yearbook ... 2007*, vol. II (Part Two), p. 85, footnote 441. For the commentary to this draft article, see *ibid.*, pp. 91–92.

Reservations to treaties (continued)* (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur, Mr. Pellet, to introduce his fourteenth report on reservations to treaties (A/CN.4/614 and Add.1–2).

2. Mr. PELLET (Special Rapporteur) said that his fourteenth report on reservations to treaties should, in principle, be the last report for purposes of the first reading on the topic. Unfortunately, he could not introduce the report in full, since only the first part had been translated in time. The introduction and the annex, which constituted the bulk of the report so far, were available only in French. The introduction (paras. 1–66) was divided into five sections, A to E. Sections A, B and C discussed the reception accorded the tenth,¹³⁴ eleventh,¹³⁵ twelfth¹³⁶ and thirteenth reports¹³⁷ in the Commission and in the Sixth Committee and the written comments that the Special Rapporteur had received from some States. In his view, however, they did not justify reworking the draft guidelines that the Commission had already provisionally adopted. The purpose of the three sections was to take note of the positions of States with a view to the second reading. The important thing was to put before them a coherent draft adopted on first reading.

3. Section D (paras. 47–64) summarized recent developments with regard to reservations and interpretative declarations. In that regard, the Special Rapporteur would like to call attention in particular to the judgment rendered by the ICJ on 3 February 2009 in the case concerning *Maritime Delimitation in the Black Sea*. In that dispute, which turned on whether, from a legal standpoint, a certain isolated island should be considered an island in the general sense of article 121 of the United Nations Convention on the Law of the Sea or a rock in the sense of paragraph 3 of that article. Romania had invoked the interpretative declaration it had made upon signing the Convention and had confirmed upon ratifying it in order to convince the Court that the island in question should be considered a rock. The Court, however, dismissed that argument, stating: “Romania’s declaration as such has no bearing on the Court’s interpretation” [para. 42 of the decision]. That position would tend to discourage one from formulating interpretative declarations or even from taking an interest in them.

4. For their part, the human rights treaty bodies had continued to take a pragmatic interest in reservations to their constituent instruments. In its 2007 report,¹³⁸ the sixth inter-committee meeting of the human rights treaty

bodies noted with appreciation the report of the working group on reservations.¹³⁹ The working group, in its report, recognized that the general reservations regime was applicable to reservations to human rights instruments. It also recognized that permitted reservations could contribute to the attainment of the objective of universal ratification, and it reaffirmed that treaty bodies were competent to assess the validity of reservations, a view shared by the Special Rapporteur. The working group appeared to look favourably on the Commission’s attempts to identify criteria for determining the compatibility of reservations with the object and purpose of the treaty. It was in agreement with the proposal of the Special Rapporteur, later accepted by the Commission, according to which an invalid reservation was null and void. The working group also recommended that the treaty bodies should question States about the nature and scope of their reservations or interpretative declarations, which might weaken observance of the conventions.

5. In paragraph 54 of his fourteenth report, the Special Rapporteur called attention to an important development in the views of the human rights treaty bodies, which had earlier taken an inflexible position as to the consequences of the invalidity of a reservation, asserting that the author of an invalid reservation would be bound by the treaty in its entirety. They had come around to the more nuanced position that “a State will not be able to rely on such a reservation and, unless its contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation” (para. 53, recommendation 7). Thus the State could be deemed not to be bound by the treaty if its reservation was essential to its consent. The Special Rapporteur was of the view that, although the above formulation was somewhat too restrictive, it represented a significant step towards the position he himself had arrived at following a fruitful dialogue with the treaty bodies.

6. The Special Rapporteur drew the attention of the Commission to the annex to his fourteenth report, which contained the report he had prepared on the Commission’s meeting with human rights treaty bodies in May 2007. He said that the encounter had been fruitful and useful; the question arose whether the Commission wished to hold another with a view to finalizing the preliminary conclusions it had adopted in 1997 on reservations to normative multilateral treaties, including human rights treaties.¹⁴⁰ He might point out in that regard that in the context of the Universal Periodic Review, the Human Rights Council had urged a number of States to withdraw, or at any rate to explain, their reservations to some of the international human rights instruments (para. 55).

7. Among the new developments at the regional level, the Inter-American Court of Human Rights had had to address the issue of reservations in *Boyce et al. v. Barbados*. In that case, Barbados had argued that its reservation to the American Convention on Human Rights: “Pact of San José, Costa Rica” prevented the Court from ruling on the question of

* Resumed from the 3000th meeting.

¹³⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2.

¹³⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

¹³⁶ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584.

¹³⁷ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600.

¹³⁸ A/62/224, annex, paras. 20–22.

¹³⁹ Report of the meeting of the working group on reservations (HRI/MC/2007/5 and Add.1). The recommendations of the working group on reservations are reproduced in paragraph 53 of the fourteenth report of the Special Rapporteur.

¹⁴⁰ *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

capital punishment.¹⁴¹ In its judgement, the Court held that in principle reservations should be strictly interpreted and that, in the case at hand, it could not accept the contention of Barbados. The European Court of Human Rights had also had occasion, in April 2007, to rule on the extent of the effects of a valid reservation. In two cases against Finland (*Laaksonen v. Finland* and *V. v. Finland*), the Court had considered the application of the reservation of Finland to article 6 of the European Convention on Human Rights concerning the right to a hearing.¹⁴² The European Court had also adhered to a rather strict interpretation of the reservation of Finland, while acknowledging that the reservation, within the limits strictly defined by its wording, did exempt Finland from applying article 6 of the Convention. Moreover, the European Observatory of Reservations to International Treaties, a body of the Council of Europe with responsibility for drawing the attention of the Committee of Legal Advisers on Public International Law (CAHDI) to invalid reservations, considered, not only reservations formulated less than 12 months previously, to which in principle it was still possible to react, but older reservations as well (para. 64). In the view of the Special Rapporteur, that development confirmed the relevance of draft guideline 2.6.15 on late objections.

8. Section E (paras. 65–66) of the report set out the plan for the fourteenth report on reservations. The first addendum (paras. 80–178), which the Special Rapporteur had recently submitted to the secretariat for translation, would complete the study of the third part of the Guide to Practice and would deal with the validity of interpretative declarations and of reactions to reservations and interpretative declarations. It contained relatively few draft guidelines since, in order to take into account the Commission's reactions¹⁴³ to his tenth report, the Special Rapporteur had decided that some of the provisions that could have appeared in that part would be better placed in the third part of the report dealing with the effects of reservations and interpretative declarations, currently being drafted.

9. The Codification Division of the Secretariat had prepared a remarkable study on "Reservations to the treaties in the context of the succession of States" (A/CN.4/616). The Special Rapporteur approved the general approach taken, which meant that he did not need to draft a full report on that difficult topic. Therefore, based on that excellent study, he proposed to submit to the Commission, at its sixty-second session in 2010, draft guidelines on the issue, which would form his sixteenth report. Lastly, he planned to follow the report with two sections, one dealing with the "reservations dialogue" and the other with the settlement of disputes concerning reservations; they would be introduced in his seventeenth session at the sixty-third session in 2011.

10. Introducing paragraphs 67 to 79 of document A/CN.4/614, the Special Rapporteur noted that they constituted the first chapter of the fourteenth report. They concerned the procedure for the formulation of interpretative declarations and introduced draft guidelines 2.4.0

and 2.4.3 *bis*, relating to the form and communication of interpretative declarations. He had originally thought that there was no need for draft guidelines on those matters, but, since the Commission had regretted their absence, he had decided to provide them. With regard to the communication of interpretative declarations, he had always been of the opinion that formalism was not appropriate, since interpretative declarations could be made at any time, in any form their author wished. On the other hand, since the Commission had developed the habit of including recommendations to States and international organizations in the Guide to Practice, it might be useful to adopt a draft guideline recommending to States and international organizations that they should observe certain forms and follow certain procedures when formulating interpretative declarations. As he had pointed out in paragraph 75 of his report, if the authors of interpretative declarations wanted their positions to be taken into account, it would be in their interest to formulate their declarations in writing and to follow, *mutatis mutandis*, the same communication and notification procedure applicable to reservations and other declarations relating to treaties. Accordingly, the Special Rapporteur proposed the following two draft guidelines in paragraph 76 of his report:

"2.4.0 *Written form of interpretative declarations*

"Whenever possible, an interpretative declaration should be formulated in writing.

"2.4.3 *bis* *Communication of interpretative declarations*

"Whenever possible, an interpretative declaration should be communicated, *mutatis mutandis*, in accordance with the procedure established in draft guidelines 2.1.5, 2.1.6 and 2.1.7."

11. The Special Rapporteur did not consider it useful to have a provision modelled on draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations), chiefly because, as a matter of principle, he did not think that one could really speak of the validity or invalidity of an interpretative declaration, as he would show in paragraphs 128 to 150 of the fourteenth report. Moreover, he had decided not to propose a draft guideline on the statement of reasons for interpretative declarations. As he had explained in paragraph 78 of his report, an explanation of the reasons for an interpretative declaration did not appear to be necessary or logical, since the declaration itself already contained such an explanation. The situation was different with respect to reactions to interpretative declarations, which clearly should be explained. Therefore draft guideline 2.9.6 (Statement of reasons for approval, opposition and reclassification), proposed in the thirteenth report and referred to the Drafting Committee,¹⁴⁴ continued to be relevant. In conclusion, the Special Rapporteur asked the Commission to refer draft guidelines 2.4.0 and 2.4.3 *bis* to the Drafting Committee.

The meeting rose at 10.40 a.m.

¹⁴¹ United Nations, *Treaty Series*, vol. 1298, No. A-17955, pp. 441–442.

¹⁴² *Ibid.*, vol. 2158, No. A-2889, pp. 140–141.

¹⁴³ *Yearbook ... 2005*, vol. II (Part Two), pp. 68 and 70–71, paras. 398 and 430.

¹⁴⁴ *Yearbook ... 2008*, vol. II (Part Two), para. 74, and *ibid.*, vol. I, 2978th meeting, paras. 28–29.

3011th MEETING

Wednesday, 27 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Mellescanu, Mr. Murase, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Tribute to the memory of Sir Derek Bowett, former member of the Commission

1. The CHAIRPERSON said that he had received the sad news that Sir Derek Bowett, a member of the Commission from 1991 to 1996, had passed away several days previously. A disciple of Sir Hersch Lauterpacht, Sir Derek had enjoyed an illustrious career in international law, both as a scholar and practitioner. His outstanding achievements, which were recognized by the international academic community, included his unrivalled experience in international litigation, his active involvement in solving boundary disputes and his contribution to the development of a regime for the mineral resources of the deep sea floor of the world's oceans.

2. In the International Law Commission his wisdom and experience had been greatly appreciated by all who had worked with him, and his contribution to the Commission's work on international relations had been instrumental. His sharp legal mind, enthusiasm for international law and courteousness would be remembered by all.

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

3. Mr. VARGAS CARREÑO said that, as a member of the Commission from 1992 to 1996, he could testify to Sir Derek's intellectual and moral qualities. He had been a great academic, international civil servant and litigant. Of his many writings that had had a major impact on international law, those on the subjects of self-defence in international law and the International Court of Justice in particular reflected his vast practical experience of international litigation at the highest level.

4. Sir Derek was noteworthy for his good judgement and his ability to sum up an important debate in a clear and concise way, as exemplified by his contribution to the debate on the 1996 draft code of crimes against the peace and security of mankind¹⁴⁵ and on the topics of succession of States¹⁴⁶ and State responsibility.¹⁴⁷ Through his

¹⁴⁵ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

¹⁴⁶ In particular, the draft articles on nationality of natural persons in relation to the succession of States, *Yearbook ... 1999*, vol. II (Part Two), p. 20.

¹⁴⁷ The text of the draft articles on State responsibility was provisionally adopted by the Commission on first reading, *Yearbook ... 1996*,

teaching, publications, participation in the Commission and other activities, Sir Derek had left a great legacy for international law.

5. Mr. PELLET said that he had first met Sir Derek in 1988, during the oral pleadings at the ICJ in the case concerning *Border and Transborder Armed Actions*, where he, a newcomer, had represented Nicaragua and Sir Derek, a respected litigant before the Court, had represented Honduras. Sir Derek had not taken umbrage at some of the rather impertinent remarks he had made during the pleadings, but had in fact encouraged him in his career, and they had subsequently worked together on many cases. Sir Derek had always been open and straightforward, ready to listen and to give advice without imposing it.

6. As a member of the Commission, Sir Derek had been discreet but extremely effective, a man of few words that nonetheless often tipped the balance. Many key decisions had been made under his chairpersonship of the Working Group on the long-term programme of work;¹⁴⁸ the review of the Commission's working methods spearheaded by him had also proved successful. A great internationalist, a great lawyer and a dear friend, he would be sadly missed.

7. Mr. FOMBA said that from 1992 to 1996 he had been honoured to work on the Commission alongside Sir Derek. Above all, he had been an extraordinary lawyer who had made a colossal contribution to doctrine and jurisprudence in international law. He had also provided valuable input to the work of the Commission in its selection of topics, both as Chairperson of the Drafting Committee when important topics such as State responsibility were under consideration, and as Chairperson of the Working Group on the long-term programme of work.

8. Mr. HASSOUNA, recalling Sir Derek as a lecturer at the University of Cambridge, said that he had been a modest man, always accessible to students and popular with them because of his balanced and practical approach to problems. His many publications included *Law of International Institutions* and *United Nations Forces: A Legal Study of United Nations Practice*.¹⁴⁹

9. Sir Derek's experience in the United Nations had given him a good understanding of the international community, and as a legal adviser to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) he had had a firm grasp of issues in the Middle East. He had worked with Sir Derek at the time of the *Taba* arbitral decision, when Sir Derek had been the main legal adviser to the Government of Egypt, while his friend and sometimes foe, Sir Elihu Lauterpacht, had been the adviser to the Government of Israel. That case, which

vol. II (Part Two), p. 58; the text of the draft articles on State responsibility for internationally wrongful acts, adopted by the Commission on second reading, is reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

¹⁴⁸ *Yearbook ... 1996*, vol. II (Part Two), p. 12, para. 10, p. 97–98, paras. 244–248, and annex II, pp. 133 *et seq.*

¹⁴⁹ P. Sands and P. Klein (eds.), *Bowett's Law of International Institutions*, 6th ed., London, Sweet and Maxwell, 2009; *United Nations Forces: A Legal Study of United Nations Practice*, New York, Frederick A. Praeger, 1964.

had eventually been won by the Government of Egypt, was a good example of how a contentious international case could be settled through legal means. However, he wished to note that Sir Derek had not only been a prominent member of the Commission and an excellent teacher, but had been a wonderful human being as well.

10. Sir Michael WOOD said that he had been introduced to international law by Sir Derek at the University of Cambridge. Sir Derek had possessed that combination of idealism and realism which was so important for an academic and practising lawyer, and which had been exemplified by his work for UNRWA during very difficult times in Beirut.

11. Mr. DUGARD said that, when he had been a student at the University of Cambridge, it had been Sir Derek's writings and, above all, his personality, that had influenced his decision to pursue a career in international law. Sir Derek had been both a realist and idealist who had made people aware of the important role played by international law in modern society.

12. The CHAIRPERSON said that he would send a letter conveying the Commission's condolences to Sir Derek's family.

Reservations to treaties (*continued*) (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL
RAPPORTEUR (*continued*)

13. The CHAIRPERSON invited the Commission to resume its consideration of the fourteenth report of the Special Rapporteur on reservations to treaties (A/CN.4/614 and Add.1–2).

14. Ms. ESCARAMEIA thanked Mr. Pellet for his fourteenth report and in particular for the section (paras. 47–64) containing a summary of recent developments with regard to reservations and interpretative declarations in various international and regional human rights courts and mechanisms. She had two questions regarding the information contained in the summary. First, according to paragraph 64 of the report, the European Observatory of Reservations to International Treaties was reviewing the validity of reservations to anti-terrorism treaties, including some reservations that had been formulated more than 12 months previously. The Special Rapporteur concluded that the European Observatory considered that objections to reservations could still be raised even after 12 months had elapsed, which confirmed the need for draft guideline 2.6.15 (Late objections). She did not understand the relevance of the reference to the draft guideline, since it merely stated that a late objection did not produce the legal effects of an objection made within a period of 12 months. If the European Observatory was suggesting that if States formulated late reservations, those reservations might produce some legal effect, that would contradict draft guideline 2.6.15. She therefore requested clarification of that point.

15. Her second question concerned the recommendations made by the working group on reservations at the sixth inter-committee meeting of the human rights treaty bodies.¹⁵⁰ In its recommendation No. 5, the working group had affirmed the competence of the treaty bodies to assess the validity of reservations. It had also endorsed the Special Rapporteur's proposal to the effect that an invalid reservation should be considered null and void, and had concluded that unless a State's contrary intention was incontrovertibly established, it would remain a party to the treaty without the benefit of the reservation (recommendation No. 7). She expressed surprise at the Special Rapporteur's comment at the end of paragraph 54 of his report that the conclusion of the working group did not reflect his position, and she requested him to provide some further explanation. Recommendation No. 7 was based on the presumption that a State would prefer to remain party to a treaty even when its reservation was considered invalid. In her view that was a logical position, and one that was supported by paragraph 18 of the report of the working group on reservations.

16. Concerning draft guideline 2.4.0, she agreed that, whenever possible, an interpretative declaration should be made in writing, for the reasons given in paragraph 75 of the fourteenth report. However, the commentary to the draft article should reflect the idea that interpretative declarations could be formulated orally, and that even though a formal communication procedure might not exist, such declarations could still have probative value, as the ICJ had found in its 1950 advisory opinion on the *International Status of South-West Africa*. Furthermore, she suggested that the word "written" should be deleted from the title of the draft guideline.

17. As far as draft guideline 2.4.3 *bis* was concerned, she believed that reference should be made not only to draft guidelines 2.1.5 to 2.1.7 but also to draft guidelines 2.1.8 (Procedure in case of manifestly invalid reservations) and 2.1.9 (Statement of reasons). The Special Rapporteur held that there was no need to mention draft guideline 2.1.8, since the validity or invalidity or an interpretative declaration was far from clear (para. 77). However, she considered that there were at least two cases in which a treaty could indicate the invalidity of an interpretative declaration: one in which a treaty stated that no interpretation of the text was possible and a State chose to interpret it; and one in which a treaty contained definitions of certain concepts or situations, yet a State interpreted differently. In such cases, the procedure for manifestly invalid reservations set out in draft guideline 2.1.8 should apply.

18. She took issue with the views expressed by the Special Rapporteur in paragraph 78 of the report: he had previously held that it would be useful and desirable to supply a statement of reasons for interpretative declarations, yet in the report he contended that such a statement was out of the question because it was "not necessary, or even possible, to provide explanations of explanations". That about-turn was rather confusing, especially as paragraph 78 seemed to assume that there was some sort of explanation behind every interpretative declaration. In reality, States often merely indicated the interpretation

¹⁵⁰ See footnote 139 above.

they wished to give without providing any reason for it. For example, in its interpretative declaration in respect of the Convention on the Prevention and Punishment of the Crime of Genocide, the United States of America had merely specified, without further elucidation, that it understood “intent” to mean “specific intent” and that “acts in the course of armed conflicts committed without the specific intent required by article II are not sufficient to constitute genocide as defined by this Convention”.¹⁵¹ She failed to comprehend why the Commission should not recommend that States provide an explanation of the intent of their declarations. Moreover, she would be grateful if the Special Rapporteur could confirm that many such statements, which were often called “understandings”, were in fact the same thing as interpretative declarations.

19. She was unhappy with the drafting of draft guideline 2.4.3 *bis*, which stated that, whenever possible, an interpretative declaration should be made in accordance with the procedure established in three other draft guidelines, since she was uncertain whether an interpretative declaration should be made by using the procedure that was employed for the communication of reservations. If that was the proper procedure, the draft guideline should be recast to read: “Whenever possible, draft guidelines 2.1.5, 2.1.6, 2.1.7, 2.1.8 and 2.1.9 should apply *mutatis mutandis* to interpretative declarations.”

20. Draft guidelines 2.4.0 and 2.4.3 *bis* should be sent to the Drafting Committee together with the changes that had been suggested in the plenary discussion.

21. Mr. GAJA said that when the Special Rapporteur had introduced his fourteenth report he had offered the Commission a wonderful menu, but so far he had provided no more than an appetizer. The current discussion should in fact be confined to paragraphs 67 to 79 of the report, as they were the only ones currently available in all languages of the Commission. A single language, even if it was the language of Voltaire, should not be given more favourable treatment.

22. Simple interpretative declarations bore little similarity to reservations. While that was not a recent discovery, it was significant that the ICJ had confirmed that fact in its judgment of 3 February 2009 in the case concerning *Maritime Delimitation in the Black Sea*.

23. Draft guidelines 2.4.0 and 2.4.3 *bis* were quite acceptable, although their wording could still be improved. They had been submitted rather late, given that similar draft guidelines on statements approving an interpretative declaration had been sent to the Drafting Committee at the sixtieth session in 2008.¹⁵² Now the Special Rapporteur maintained that not only approvals but also interpretative declarations should be made in writing. While it would therefore have been more logical to present the draft guidelines in the reverse chronological order, the two guidelines in question should be sent to the Drafting Committee.

¹⁵¹ *Multilateral Treaties Deposited with the Secretary-General* (available at <http://treaties.un.org/pages/ParticipationStatus.aspx>), chap. IV.1 .

¹⁵² *Yearbook ... 2008*, vol. II (Part Two), para. 74. For a summary of the debate in plenary on draft guidelines 2.9.1 to 2.9.10 and the concluding remarks of the Special Rapporteur, see *ibid.*, paras. 95–122.

24. Draft guideline 2.4.3 *bis* contained no reference to draft guideline 2.1.8 because, according to the Special Rapporteur, it was “far from clear that an interpretative declaration can be ‘valid’ or ‘invalid’”. The same conclusion should be drawn in respect of draft guideline 2.9.7 (Formulation and communication of an approval, opposition or reclassification), which had already been sent to the Drafting Committee.

25. He understood from the Special Rapporteur’s explanations to the Drafting Committee that validity might be at issue when a treaty prohibited any interpretative declaration. Such cases were rare, however. He was personally unconvinced that the consequence of prohibiting an interpretative declaration was that it should be deemed invalid. If an interpretative declaration was held to have no legal effect, he failed to see what purpose could be served by raising the question of its validity.

26. In any event, it was vital that the Commission should adopt a consistent position on the validity of interpretative declarations in the draft guidelines dealing with the communication and approval of such declarations, which were already before the Drafting Committee.

27. Mr. McRAE, commenting on draft guideline 2.4.3 *bis*, said that his starting point was different from that of Ms. Escarameia in that he had misgivings about including a reference to draft guideline 2.1.7 in it, partly because he considered that it was inappropriate to term an interpretative declaration either valid or invalid. Such declarations might offer an incorrect or wrong interpretation, but a depositary had very little scope for determining if they were valid or invalid, except in the highly unusual case in which interpretative declarations were deliberately prohibited. For the same reason, he was against including a reference to draft guideline 2.1.8. Moreover, the inclusion of a reference to draft guidelines 2.1.7 and 2.1.8 raised the difficult question of whether an interpretative declaration was in fact a reservation. If mention was made of draft guideline 2.1.7, the commentary to draft guideline 2.4.3 *bis* would have to provide a thorough explanation of the reason for doing so.

28. He was not entirely convinced by the Special Rapporteur’s arguments against the inclusion of a draft guideline on statements of reasons for interpretative declarations. Although two years earlier he himself had questioned the need for requiring that reasons should be given in a number of circumstances, because doing so seemed to impose an unnecessary burden on States, he had since been won over by the idea of a reservations dialogue, because the content of a reservation would be better understood if the reasons underpinning it were specified. If one accepted the idea of a reservations dialogue, the corollary was that it would be helpful to know the reasons for interpretative declarations, and that they should therefore be supplied. In many cases the explanation for an interpretative declaration might be self-evident, but in others it might not be so obvious. For example, a State could add a comment to the effect that it was making an interpretative declaration because it thought that the action was consistent with the legislative history or *travaux préparatoires* of a treaty. Alternatively, a State might believe that making an interpretative declaration was consistent with State

practice. In both cases, the explanation of the reasons for the interpretative declaration would contribute to any subsequent reservations dialogue when other States approved or opposed the declaration.

29. The Special Rapporteur should therefore revisit the idea that in some instances it would be useful and appropriate to supply a statement of reasons. The provision in question could be worded as follows: "An interpretative declaration shall, where appropriate, be accompanied by reasons." The Commission could then explain in the commentary why that might not happen in many cases.

30. Mr. MELESCANU endorsed the Special Rapporteur's request that the Secretariat study on the effects of the succession of States on reservations to treaties (A/CN.4/616) be circulated to members even if it was unavailable in all languages.

31. The judgment of the ICJ in the case concerning *Maritime Delimitation in the Black Sea* had dealt a serious blow to the idea of closely aligning the draft guidelines on interpretative declarations with those on reservations. Such an approach had been proposed in the knowledge that, in practice, States sometimes preferred to make interpretative declarations that were in fact reservations, especially in cases where a treaty prohibited the entering of reservations. Draft guideline 2.8.1, which read "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", suggested that it might take a long time before a reservation could be deemed to have been accepted, in which case it might be preferable for States to make an interpretative declaration.

32. Mr. Gaja had raised the interesting question of the distinction between the validity and effectiveness of an interpretative declaration, but a declaration which was valid but not effective was worthless. Serious thought should therefore be given to deciding how to align the guidelines on interpretative declarations to which there were no objections with the guidelines on reservations, otherwise the regime of interpretative declarations would be of little interest to States parties to treaties, save as a means of expressing a political position.

33. Although he was not dissatisfied by the outcome of the case concerning *Maritime Delimitation in the Black Sea*, he was concerned by the way in which the ICJ had disregarded the declaration of Romania on the delimitation of maritime spaces, particularly as one of the most significant conclusions reached by the working group on reservations at the sixth inter-committee meeting of the human rights treaty bodies had been that reservations and interpretative declarations could contribute to the attainment of the objective of universal ratification of treaties.¹⁵³

34. He supported the proposal made in paragraph 66 of the Special Rapporteur's report to accompany the Guide to Practice with two annexes, and he agreed with the proposed content thereof.

35. The text of draft guideline 2.4.0 posed no major problems. An interpretative declaration should be made in writing whenever possible, since it was clearly in States' interest to publicize their point of view, even if the legal impact of the declaration was debatable. On the other hand, he would be reluctant to recommend that States should state the reasons for their interpretative declarations, since that was not normally done in practice and could greatly complicate the mechanism for making such declarations. Given that interpretative declarations were in any case of limited effectiveness, it did not seem worthwhile to create a complicated and highly restrictive system that would be of little value if the reasoning of the ICJ in *Maritime Delimitation in the Black Sea* was accepted.

36. Draft guideline 2.4.3 *bis* was worded in suitably broad terms. He was quite prepared to discuss in the Drafting Committee Ms. Escarameia's proposal to add a reference to certain draft guidelines and Mr. McRae's proposal to omit any reference to draft guidelines 2.1.7 and 2.1.8.

37. Draft guidelines 2.4.0 and 2.4.3 *bis* could therefore be sent to the Drafting Committee, provided that everyone agreed that the Committee could discuss whether to broaden or restrict the reference to other applicable draft guidelines.

38. Mr. FOMBA said that the first three sections (paras. 2–46) of the fourteenth report provided a useful summary of the Commission's previous work on the topic. He welcomed the Special Rapporteur's intention to discuss the practical implications of the judgment of the ICJ of 3 February 2009 in *Maritime Delimitation in the Black Sea* during the debate on the effects of interpretative declarations and reactions to them. The recommendations made by the working group on reservations at the sixth inter-committee meeting of the human rights treaty bodies were most enlightening. He commended the Special Rapporteur for the caution he displayed in paragraph 54 of the report. The approach taken by the Inter-American Court of Human Rights in identifying the criteria for interpreting reservations, which was outlined in paragraph 58, was rather original but most useful. Moreover, he agreed that the practice of the Council of Europe, through CAHDI, in its capacity as the European Observatory of Reservations to International Treaties, tended to confirm the pertinence of draft guideline 2.6.15. He endorsed the Special Rapporteur's plan for his fourteenth report, especially his proposal to accompany the Guide to Practice with two annexes.

39. It was quite acceptable that the Special Rapporteur should reiterate the conclusion he had drawn in his sixth report¹⁵⁴ regarding the procedure for the formulation of interpretative declarations, and that he should decide not to reconsider it. He agreed with the Special Rapporteur's recommendations in paragraph 75 and said that draft guidelines 2.4.0 and 2.4.3 *bis* did not pose any particular difficulties. It was unnecessary to mention draft guideline 2.1.8 in draft guideline 2.4.3 *bis* for the reasons set out in paragraph 77. He concurred with the

¹⁵³ See footnote 139 above.

¹⁵⁴ *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3.

Special Rapporteur that it was also unnecessary to state the reasons for an interpretative declaration because of the explanatory nature of the latter. However, he was in favour of supplying reasons for reactions to interpretative declarations and consequently thought that draft guideline 2.9.6 was of value.

40. The two draft guidelines contained in the fourteenth report should be referred to the Drafting Committee.

41. Mr. CAFLISCH said that he agreed with the view expressed at the sixth inter-committee meeting of the human rights treaty bodies by the working group on reservations in its recommendation No. 7, which was reproduced in paragraph 53 of the Special Rapporteur's report, although, like the Special Rapporteur, he could do without the word "incontrovertibly", as something was either established or it was not.

42. Turning to paragraph 69 of the report, he said that he fully agreed with the Special Rapporteur that there was no need to specify the form that an interpretative declaration should take, or the procedure by which it should be communicated, or to indicate the reason that it was made. However, he also concurred with the Special Rapporteur that interpretative declarations should be made in writing.

43. In draft guideline 2.4.0 he would prefer the deletion of "whenever possible", since the use of the word "should" was sufficient to convey the idea that there was no legal obligation.

44. That said, he considered that draft guidelines 2.4.0 and 2.4.3 *bis* could be referred to the Drafting Committee.

The meeting rose at 11.20 a.m.

3012th MEETING

Friday, 29 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caflich, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Tribute to the memory of John Alan Beesley, former member of the Commission

1. The CHAIRPERSON said that he had received the sad news that John Alan Beesley, a member of the Commission from 1987 to 1991, had passed away. A distinguished diplomat and eminent jurist, he had spent a good

part of his career at the Department of External Affairs of Canada. It was unusual, especially in the modern era, to be both a diplomat and a jurist specialized in international law, but John Alan Beesley had combined both activities with great skill, as evidenced by the many awards and honours he had received in the course of his career. It would be recalled that he had negotiated a number of important agreements on behalf of the Government of Canada, which had also benefited from his expertise in various fields, in particular the law of the sea.

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

2. Mr. PELLET recalled that John Alan Beesley, as a high-ranking diplomat and legal counsel of the Government of Canada, had served as head of delegation in many international negotiations, notably in the area of disarmament. He would be remembered in particular for his participation in the work of the third United Nations Conference on the Law of the Sea. In the Commission, the quality of his contributions to debate, which were always rich in specific examples drawn from his own experience, had also been outstanding. Particularly memorable was a statement he had made during the Commission's work on State responsibility in which he had stressed that the Commission risked getting bogged down in past case law, whereas its mandate was to codify rules for the future, not necessarily in an idealistic sense but in keeping with actual developments in the modern-day world.¹⁵⁵ Pragmatic and prudent but nonetheless forward-looking, John Alan Beesley had also been a pioneer in environmental law.

3. At a sad time when the field of international law was losing some of its most illustrious representatives, he would also like to pay tribute to memory of one who, although not a member of the Commission, had been the conscience of contemporary international law and a close friend, namely, Thomas Franck, who had passed away just two days earlier.

4. Mr. DUGARD said that he would like to join in paying tribute to the memory of Thomas Franck, who had been a distinguished professor of international law at New York University and had served as President of the American Society of International Law and an arbitrator and judge *ad hoc* of the International Court of Justice. As Mr. Pellet had rightly said, he had been the conscience of international law. His writings were characterized by independence of thought, wisdom and clarity of language. His passing was a great loss to international law.

5. Mr. McRAE recalled that John Alan Beesley had considered international law a key instrument of human progress, one that must be adapted to meet new needs. For that reason, he had been more interested in progressive development of international law than in codification. He had followed closely the work of the Commission on the law of the non-navigational uses of international watercourses and on international liability for injurious consequences arising out of acts not prohibited by international law and had advocated turning the "soft law" in the

¹⁵⁵ *Yearbook ... 1990*, vol. I, 2173rd meeting, p. 184, para. 63.

outcome of the United Nations Conference on the Human Environment¹⁵⁶ (Stockholm Declaration) into “hard law”. As both diplomat and lawyer, he had seen his role as defending the interests of his Government in accordance with international law and acting when necessary to promote changes in that law. He had played a central role in Canada’s assertion of environmental jurisdiction in the Arctic in 1970 and had led Canadian delegations at the Stockholm Conference and the conference resulting in the International Convention for the Prevention of Pollution from Ships, 1973 (“MARPOL Convention”) in their efforts to gain international acceptance of that position. Those efforts had been crowned with success when the provisions of what became articles 2, 3 and 4 of the United Nations Convention on the Law of the Sea had been adopted. At the third United Nations Conference on the Law of the Sea, for which he had served as Chairperson of the Drafting Committee, his single-minded approach, particularly on environmental issues, had not always been universally appreciated, but some believed that, thanks to his energy and skill, he had been a key contributor to the success of the Conference, one of the most complex exercises in multilateral treaty-making ever undertaken. That record of service had gained him his election to the Commission by a wide margin the first time he had stood as a candidate.

Reservations to treaties (continued) (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL
RAPPORTEUR (continued)

6. The CHAIRPERSON invited the members of the Commission to resume their consideration of the fourteenth report on reservations to treaties (A/CN.4/614 and Add.1–2) and asked the Special Rapporteur, Mr. Pellet, to summarize the debate.

7. Mr. PELLET (Special Rapporteur) said that paragraph 54 of his report, in which he had expressed his cautious approval of the position of the treaty bodies, which was somewhat more nuanced than their earlier stance, as to the consequences of the formulation of an invalid reservation, had attracted some pointed, though few, comments. Ms. Escarameia had wanted to know why the Special Rapporteur did not fully support the new position of the treaty bodies, since the presumption in paragraph 7 of the recommendations of the working group on reservations to the sixth inter-committee meeting of human rights treaty bodies¹⁵⁷ was rebuttable. That was in fact the case, but the presumption was so narrowly rebuttable that a proper balance had not yet been achieved. Greater caution was called for in that regard, as Mr. Fomba had rightly stressed, and, as Mr. Cafilisch had remarked, the problem lay in the word “incontrovertibly”, which was too strong.

8. With regard to paragraph 64 of his report, Ms. Escarameia had asked whether CAHDI, in the context of its operation as European Observatory of Reservations to International Treaties, was recommending to the States members of the Council of Europe that they should object to certain reservations after the expiration of the one-year limit that applied in principle. That was in fact the case, and the Observatory was fully aware of what it was doing: even while noting that the one-year limit had passed, it still recommended that States should object. In consequence, the Commission should avoid ruling out late objections, and it might be better to be less non-committal in draft guideline 2.6.15 (Late objections); that point should perhaps be considered on second reading.

9. He did not share Mr. Melescanu’s view that the position expressed by the ICJ in its judgment of 3 February 2009 (*Maritime Delimitation in the Black Sea*) with regard to interpretative declaration of Romania on article 121 (Regime of islands) of the United Nations Convention on the Law of the Sea had dealt a fatal blow to the idea of closely aligning the regime of interpretative declarations with that of reservations. It was true that the Commission was posing the same questions about reservations and interpretative declarations, but it was answering them in quite a different way. For example, silence by one of the parties with respect to a reservation surely did not have the same effect as silence with respect to a declaration, and the Guide to Practice did not claim otherwise. As Mr. Gaja had pointed out, interpretative declarations actually bore little similarity to reservations, apart from the fact that both were declarations in respect of a treaty. In any case, there was no reason to become polarized over a phrase buried in a long judgment, since in other cases the Court had stressed the importance it accorded to States’ interpretations of treaties. With his customary common sense, Mr. Melescanu had said that it was unimportant to determine whether an interpretative declaration was valid if in any case it had no effect, and that might be true in practice. An act would, of course, have no effect if it was not valid, but one could not determine that independently of the legal effects that its author purported to produce. That was the difference between the logic of validity and the logic of opposability. Moreover, the distinction was consistent with the plan the Commission had adopted for the Guide to Practice. Even if an interpretative declaration did not produce the effect anticipated by its author with regard to the other parties, it was by no means clear that the interpretative declaration would not have an effect with regard to its author. In the above-mentioned case, the Court did, of course, hold that the declaration of Romania had no effect with regard to Ukraine, and it did not take it into account in arriving at its judgment (although no conclusion can be drawn from that, since it did not interpret article 121 of the United Nations Convention on the Law of the Sea), but it is not at all certain that it would have come to a similar conclusion if it had had to examine the effects produced by the declaration with regard to Romania itself.

10. As Ms. Escarameia had rightly pointed out in relation to draft guideline 2.4.3 *bis* (Communication of interpretative declarations), interpretative declarations could be invalid if the treaty prohibited any interpretative declaration or some specified types of interpretative

¹⁵⁶ *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.

¹⁵⁷ See footnote 139 above.

declarations. Examples were scarce, but some did exist, as was indicated in the second part of his fourteenth report (paras. 131–133), an advance copy of which had been circulated in French only. On the other hand, he was less convinced by the argument that, when a State put forward an interpretation that differed from a definition set forth in the treaty, its declaration was invalid. In such a case, the declaration was merely incorrect, which was quite a different problem.

11. It was true, nonetheless, that an interpretative declaration could, in fact, be invalid, and that raised the question of whether draft guideline 2.4.3 *bis* should refer to guideline 2.1.8 (Procedure in case of manifestly invalid reservations), as Ms. Escarameia and Mr. Gaja had proposed, or should not refer to it, as Mr. Fomba and Mr. McRae seemed to prefer. Without having a clear-cut position on the matter, the Special Rapporteur continued to lean towards not referring to guideline 2.1.8, since the hypothesis was academic and the question was of secondary importance. The Commission could refer the issue to the Drafting Committee. On the other hand, the Special Rapporteur did not share the view of Mr. McRae that draft guideline 2.4.3 *bis* should not refer to guideline 2.1.7 (Functions of depositaries); he did not see why the depositary could not, or should not, exercise the same functions, *mutatis mutandis*—that of a careful go-between—in relation to interpretative declarations, as it did in relation to reservations. That said, he had no objection to having the Drafting Committee debate the matter. On the other hand, he had far greater reservations about another proposal by Ms. Escarameia to insert a reference to draft guideline 2.1.9 (Statement of reasons) in draft guideline 2.4.3 *bis*, and he would be totally opposed to the idea if Ms. Escarameia and Mr. McRae agreed, as it seemed they would, despite some hesitation on the latter's part, that a separate draft guideline could be adopted on the statement of reasons for interpretative declarations.

12. On that last point, he did not have a firm opinion. He was not entirely convinced by the example given by Ms. Escarameia of the interpretative declaration formulated by the United States concerning intent in relation to genocide. However, he agreed with Mr. McRae that in some cases it would be useful to know whether a declaration had been inspired by the *travaux préparatoires*, or by a desire to be consistent with previous practice or by problems arising out of domestic law, and States did often justify their interpretation by considerations of that kind. On the other hand, Mr. Caffisch and Mr. Fomba had expressed themselves clearly as being in favour of omitting such a guideline, while Mr. Melescanu seemed to doubt that it would be useful. He himself was still not convinced that there was a need for a guideline recommending the statement of reasons for interpretative declarations. That said, since his ideas on the matter were not fixed where no decision of principle was concerned, he was willing to draft such a guideline if the Commission wished him to do so, and he proposed that the Commission should take an indicative vote in order to reach a decision.

13. To return to draft guideline 2.4.3 *bis* and to Ms. Escarameia's proposal to reverse the wording by making draft guidelines 2.1.5 and those following the subject

of the sentence, the Drafting Committee could consider that suggestion, making sure that the style of the draft guideline was more or less consistent with that of similar draft guidelines already adopted. Mr. Caffisch wished to delete the phrase “whenever possible”, which appeared in both draft guidelines 2.4.3 *bis* and 2.4.0 as proposed by the Special Rapporteur. The Drafting Committee could consider that suggestion, bearing in mind that the same phrase in French (“*autant que possible*”; rendered as “to the extent possible” in English) had been used only in draft guidelines 2.1.9 and 2.6.10, already adopted, which concerned the statement of reasons. With regard to draft guideline 2.4.0, Ms. Escarameia wanted the commentary to explain that an interpretative declaration, even when formulated orally, could produce effects—that would be done—and in consequence wished to amend the title of the guideline to read: “Form of interpretative declarations”. The Special Rapporteur hoped that the Drafting Committee would accept that excellent proposal.

14. Since all those who had spoken had been in favour of referring the draft guidelines to the Drafting Committee, the Special Rapporteur hoped that the Commission would agree. Lastly, he hoped that the Commission would agree to the publication of the study done by the Secretariat on reservations to treaties in the context of the succession of States, as Mr. Melescanu had requested; on the basis of that study he proposed to draft some guidelines with commentaries, if possible by the time the session resumed.

15. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission wished to refer draft guidelines 2.4.0 and 2.4.3 *bis* to the Drafting Committee.

It was so decided.

Following an indicative vote, the Commission decided not to take up the proposal to have the Special Rapporteur on reservations to treaties draft an additional guideline on the statement of reasons for interpretative declarations.

16. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission approved the Special Rapporteur's request that the study by the Secretariat on reservations to treaties in the context of the succession of States should be published in all official languages as a document of the Commission.

It was so decided.

Organization of the work of the session (continued)*

[Agenda item 1]

17. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission wished to appoint Mr. Caffisch the new Special Rapporteur for the topic “Effects of armed conflicts on treaties”.

It was so decided.

* Resumed from the 3007th meeting.

18. The CHAIRPERSON said that, following consultations, and if he heard no objection, he would take it that Mr. Nolte would chair the Study Group on the topic "Treaties over time" and that Mr. McRae and Mr. Perera would co-chair the Study Group on the topic "The most-favoured-nation clause".

It was so decided.

The meeting rose at 10.55 a.m.

3013th MEETING

Tuesday, 2 June 2009, at 10.10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood, Ms. Xue.

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

[Agenda item 1]

1. Mr. NOLTE (Chairperson of the Study Group on Treaties over time) announced that the Study Group would be composed of the following members: Mr. Cafilisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue and Ms. Jacobsson (Rapporteur), *ex officio*.

2. Mr. McRAE (Chairperson of the Study Group on The most-favoured-nation clause) announced that the Study Group would be composed of the following members: Mr. Cafilisch, Mr. Candioti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Hassouna, Mr. Hmoud, Mr. Kolodkin, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue and Ms. Jacobsson (Rapporteur), *ex officio*.

3. Mr. CANDIOTI (Chairperson of the Working Group on shared natural resources) announced that the working group would be composed of the following members: Mr. Cafilisch, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue and Ms. Jacobsson (Rapporteur), *ex officio*.

The meeting rose at 10.20 a.m.

3014th MEETING

Friday, 5 June 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIĆ

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Responsibility of international organizations (*continued*)* (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the draft articles on responsibility of international organizations provisionally adopted by the Drafting Committee and contained in document A/CN.4/L.743 and Add.1.

2. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) said that, at its 3009th meeting on 22 May 2009, the Commission had referred to the Drafting Committee the six new draft articles proposed by the Special Rapporteur in his seventh report, namely draft articles 15 *bis*, 19 and 61 to 64. It had also referred a proposal made by the Special Rapporteur to restructure those draft articles and to amend or revise seven draft articles which had already been provisionally adopted, in other words draft articles: 2; 4, paragraph 2; 8; 15, paragraph 2 (*b*); 18; 28, paragraph 1, and 55.

3. The Drafting Committee had completed its consideration of all the draft articles referred to it in six meetings on 25, 26 and 27 May and 2 June 2009. The structure of the draft articles and draft articles 2, 4, paragraph 2, 8, 15, paragraph 2 (*b*), 15 *bis*, 18, 19 and 55, as contained in the Drafting Committee's report, would be introduced at the current meeting, while the Drafting Committee's conclusions on the other draft articles would be presented during the second part of the session.

4. The Commission, meeting in plenary session, had agreed to the restructuring proposed by the Special Rapporteur in his seventh report. The Drafting Committee had endorsed that proposal on the understanding that, once it had finished its consideration of the topic, the general structure and position of the draft articles could be reviewed in order to ensure the consistency of the final text to be adopted at first reading.

* Resumed from the 3009th meeting.

5. As was clear from the report, the draft articles had been restructured with the result that draft articles 1 and 2 formed a new Part One entitled “Introduction”. The title of the previous Part One had become that of the current Part Two, i.e. “The internationally wrongful act of an international organization” and the title of the former Part Two had become that of Part Three. A new Chapter I entitled “General principles” had been introduced into the new Part Two. Chapter X had been moved and had become Part Five and the general provisions had been grouped in a final Part Six.
6. Draft article 2, entitled “Use of terms”, as provisionally adopted by the Commission, dealt with the term “international organization” solely for the purposes of the draft articles. The Special Rapporteur’s proposal to move draft article 4, paragraph 4, containing a definition of the rules of the organization, to draft article 2 had been accepted by the Commission meeting in plenary session. At the beginning of the seventh report, the proposal had been made also to move draft article 4, paragraph 2, concerning the term “agent”, to draft article 2, so as to offer a comprehensive definition of terms in the introductory part of the text.
7. Since no objection had been raised to the proposal to move the definition of the rules of the organization from draft article 4 to draft article 2, the Drafting Committee had reshaped that provision accordingly. It had also decided to turn the phrase “For the purposes of the present draft articles” into the *chapeau* of the various subparagraphs that defined the meaning of terms in that context. Furthermore, the words “the term” at the beginning of each subparagraph had been deemed superfluous in the English version.
8. In addition to those drafting suggestions, the Drafting Committee had considered the possibility of improving the wording of the new subparagraph (b). Some members had maintained that a distinction had to be drawn between purely internal rules and those defining the relationship between an international organization and other persons or entities. It had also been suggested that, for the purposes of the draft articles, the rules of an organization should be defined by reference to their binding character. Some members had feared that the phrase “in particular” might introduce an element of uncertainty.
9. As the Special Rapporteur had emphasized, the definition currently contained in draft article 2, subparagraph (b) closely resembled the wording of article 2, paragraph 1 (j) of the 1986 Vienna Convention, with the addition of “other acts” after the reference to the decisions and resolutions which an organization could adopt. The phrase “in particular”, which already appeared in the 1986 Vienna Convention offered the requisite flexibility and should be retained, as the rules of the organization also covered, for instance, an organization’s agreements with the host State.
10. Some members had contended that the definition of the rules of the organization contained in article 1, paragraph 1 (34) of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character was more appropriate, because it spoke of “relevant decisions and resolutions”. That wording did not, however, capture the scope needed for the draft articles which went beyond what was required for the representation of States. That being so, the Drafting Committee had not modified the substance of the provision and had made only a few drafting changes by replacing “taken” with “adopted” in draft article 2 (b) and altering the punctuation.
11. The second proposal made in respect of draft article 2 had been to turn the provision in draft article 4, paragraph 2, referring to the term “agent”, into a new subparagraph (c). The Commission had already foreseen such a possibility by indicating in a footnote to draft article 4 that all definitions of terms could be placed in draft article 2. The Drafting Committee had opted for that solution after considering some other possibilities. While it was true that the term “agent” was of particular significance in the chapter dealing with attribution of conduct to an international organization, it had been deemed preferable to place all the terms used for the purposes of the draft articles in a single article in the introduction. The definition of the term “agent” had therefore been moved and had become subparagraph (c) of draft article 2, for it was more logical to define the terms “international organization” and “rules of the organization” before explaining what was to be understood by “agent” of the organization.
12. The Drafting Committee had then studied the provision’s wording. In his seventh report, the Special Rapporteur had proposed that a phrase taken from the advisory opinion of the ICJ on *Reparation for Injuries*, namely “when they have been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions” should be inserted after “officials and other persons or entities through whom the organization acts”. Although that proposal had met with some approval in plenary session, some members had wished either to keep the previous wording, or to delete the phrase “through whom the organization acts”, if the new text were adopted.
13. That debate had been amply reflected in the opinions voiced by the members of the Drafting Committee. As the Special Rapporteur and some members of the Committee had acknowledged, some international organizations had expressed concerns about the exact scope of that provision, which did not seem to specifically address the issue of outsourcing the exercise of an organization’s functions. The proposal to add that phrase was intended to meet that concern. Other members of the Drafting Committee had nevertheless contended that the proposed phrase might give the misleading impression that the agent would have to be charged by the organization, a condition which would conflict with draft article 6. Several members had also been of the opinion that the retention of the phrase “through whom the organization acts” combined with the addition of the proposed phrase might be interpreted as an unnecessary limitation on the meaning of the term “agent”.
14. After an extensive debate, the Drafting Committee had decided to retain the phrase “through whom the organization acts” on the understanding that the commentary would indicate that, in most cases, the agent would have been charged by the organization to carry out one of its functions. That basic condition would not conflict with

the case, for which provision was made in draft article 6, of the conduct of an international organization's agent being attributed to it, even if that conduct exceeded the agent's authority.

15. The use of the verb "includes" had also been questioned. In the opinion of some members of the Drafting Committee, since subparagraph (c) encompassed all persons or entities who or which should be considered to be agents of the organization, the verb "means" would be more appropriate. In the end, the verb "includes" had been retained in order to meet the concern expressed by some international organizations which had argued that no undue restriction should be placed on the attribution of conduct, especially since the draft articles contained no provision comparable to article 8 of the draft articles on responsibility of States for internationally wrongful acts,¹⁵⁸ which dealt with the conduct of a person or group of persons acting under the direction or control of a State. The commentary would supply the necessary explanations by referring to the relevant provisions of the draft articles on State responsibility.

16. Draft article 4, entitled "General rule on attribution of conduct to an international organization" was also reproduced in document A/CN.4/743, although it had not been debated separately in the Drafting Committee. It had been thought necessary to submit to Commission members the new version of that draft article resulting from the transfer of the definition of "rules of the organization" and "agent" to draft article 2, subparagraphs (b) and (c). The commentaries to draft articles 2 and 4 would have to be adjusted to reflect those modifications.

17. In his seventh report, the Special Rapporteur had proposed the redrafting of draft article 8, paragraph 2, in order to make it clearer that, apart from some exceptions, the rules of an organization could create international obligations, a breach of which would come within the ambit of the draft articles. While that proposal had attracted some support in plenary session, it had also met with some criticism, insofar as some members had queried the use of the expression "in principle", while others had called for the deletion of paragraph 2, or the insertion of appropriate language in paragraph 1.

18. The Drafting Committee had not questioned the need for an express reference to breach of an international obligation deriving from an organization's rules. It had tried to find the best way of expressing that possibility without giving the impression that all obligations created by a rule of an organization would necessarily be international in character for the purposes of the draft articles. In the end, it had been decided to combine the current wording of draft article 8, paragraph 2, with that proposed by the Special Rapporteur. It had not kept the expression "in principle", but the verb "includes" had been deemed a suitable means of clarifying the relationship between the provision's two paragraphs. What was more important, the Drafting Committee had inserted the phrase "that may arise" between "international obligation" and "under the rules of the organization", in order to introduce a constructive ambiguity with regard to the creation of international

obligations through the rules of an international organization. Lastly, the term "international obligation" had been used in preference to "obligation under international law" for the sake of consistency throughout the text.

19. The Special Rapporteur had proposed that in draft article 15, paragraph 2 (b), the expression "in reliance on" should be replaced with "as a result of" in order to underscore the role that a recommendation or authorization would play in the commission of a wrongful act. Several suggestions had been put forward, both in plenary session and in the Drafting Committee, to express that linkage most clearly. Expressions such as "pursuant to", or "on the basis of" had been deemed too weak to indicate that the State or organization in question must have acted in response to an authorization or recommendation. On the other hand, it would be going too far to state that the act in question would not have been committed without that authorization or recommendation, thus making it the sole cause of the wrongful conduct. More generally, it had been held that the obligation to identify the specific cause of a given conduct would impose too heavy a burden and would be too difficult to apply in practice. The expression "because of" had ultimately been chosen, because it struck the right balance between the need for a more restrictive approach than that encapsulated in the words "in reliance on" and the need to preserve an effective, practical criterion.

20. Draft article 15 *bis* had been presented by the Special Rapporteur in an attempt to fill a gap and, in instances involving international organizations which were members of other organizations, to address a situation comparable with that contemplated in draft articles 28 and 29 in the case of States which were members of an international organization. As that proposal had been well received in plenary session, the Drafting Committee had simply considered the best way of conveying the exceptional nature of that situation, without implying that, if the conditions were met, responsibility could be avoided.

21. Some members of the Drafting Committee had expressed a preference for the text proposed by the Special Rapporteur, which stipulated that an international organization's responsibility "may arise" under the conditions set out in draft articles 28 and 29. In their view, that wording would have better reflected the rather improbable nature of such a situation. The Drafting Committee had, however, concluded that the formulation could be misleading because international responsibility necessarily arose when the conditions mentioned in the draft article were met. The adverb "also" had been added before "arise". Read in conjunction with the phrase "without prejudice to" at the beginning of the draft article, the phrase "also arises" was intended to convey the idea that the occurrence of responsibility contemplated in that draft article was additional to the instances listed in draft articles 12 to 15. Lastly, the Drafting Committee had considered that a simple title such as "Responsibility of an international organization member of another international organization", would be appropriate for draft article 15 *bis*.

22. Unlike the previous provision, draft article 18 had triggered an extensive debate in the Drafting Committee, something which was hardly surprising in view of the debate in plenary session surrounding the issue of

¹⁵⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 47-49.

self-defence. At the end of that discussion, the Special Rapporteur had withdrawn his initial proposal to delete draft article 18 and had proposed that the Drafting Committee should review the text.

23. Members of the Drafting Committee had expressed a variety of views. Some had contended that the term “self-defence” was inappropriate, because it would extend to other actors a right reserved for States and that the draft article should either refer to the notion of “self-protection” or should simply state that, if such a right did exist for international organizations, the wrongfulness of an act done in self-defence would be precluded. Others had taken the view that self-defence was an inherent right of every subject of international law and that, for the purposes of the draft articles, it was unnecessary to detail the content and scope of that right and that it was sufficient to recognize its effect on the wrongfulness of an international organization’s act.

24. The Drafting Committee had explored various options in an effort to reconcile those views. The insertion of a “without prejudice” clause, for example, had been seen as a way of still making it possible for an international organization to engage in self-defence, given the legal uncertainties surrounding that issue. It had, however, been considered possible to draft a provision stating more directly that the wrongfulness of an international organization’s act would be precluded if that act had been committed in exercise of the right of self-defence. In that regard, the Drafting Committee had given thorough consideration to the proposal made in plenary session to draw an analogy between an act of an international organization and a lawful measure of self-defence adopted by a State in accordance with the Charter of the United Nations. The fact that the principle of self-defence as a reaction to armed attack had been evolved for States was no reason to deny international organizations the same right. But since it was awkward simply to rely on Article 51 of the Charter of the United Nations when international organizations were concerned, the Drafting Committee was proposing a draft article which would refer *mutatis mutandis* to the conditions for the exercise of the right of self-defence laid down in the Charter of the United Nations. That provision had been well received by some members, who thought that the limitations prescribed in Article 51 could be regarded as part of general international law and therefore applied, as appropriate, to international organizations. Other members of the Drafting Committee had maintained that the drawing of an analogy between a right of international organizations and that of States under the Charter of the United Nations would unnecessarily create problems of interpretation.

25. More generally, two main reasons had prevented the Drafting Committee from including an express reference to the Charter of the United Nations in draft article 18. On the one hand, some members were reluctant to establish any kind of parallel between States and international organizations in respect of the exercise of self-defence because, in their opinion, the rights entailed were substantially different and if it was necessary to allow the exercise of self-defence by agents of the organization, that right was limited in scope and could not be equated with that of States. On the other hand, most members of the Drafting Committee thought that there was no need to

specify the conditions for the exercise of self-defence by international organizations in the text of draft article 18, as the issue could be dealt with in the commentary. In the text itself it would be sufficient to acknowledge the effect that the exercise of self-defence would have on the wrongfulness of an international organization’s act.

26. That being so, the Drafting Committee had ultimately decided to mention, in draft article 18, a lawful measure of self-defence that an international organization might take “under international law”. Although the adjective “lawful” might appear redundant, it was intended as an allusion to the conditions surrounding the exercise of self-defence by an international organization. Finally, the phrase “if and to the extent that” had been inserted to convey the idea held by most members of the Committee that international organizations also had a right of self-defence, albeit not in the same way as States.

27. Moving on to draft article 19 (Countermeasures), he recalled that during the debate in plenary session, several members had wondered whether it was enough, in paragraph 1, to speak of “lawful” countermeasures on the part of international organizations. The Special Rapporteur had therefore submitted to the Drafting Committee a revised version of that paragraph which incorporated the suggestions made on that occasion and which referred to the substantive and procedural conditions required under international law for the taking of countermeasures, including those set forth in Chapter II of Part Four on countermeasures directed against another international organization. The Special Rapporteur had explained that it was not sufficient to refer only to Chapter II, for it dealt solely with countermeasures against international organizations, whereas draft article 19 also covered countermeasures taken by an international organization against a State. The Drafting Committee had decided to retain the reference to Chapter II of Part Four. The commentary would make it clear that, as far as countermeasures taken by an international organization against a State were concerned, the articles on State responsibility applied by analogy.

28. Draft article 19, paragraph 2, turned on the more sensitive issue of an international organization’s use of countermeasures against one of its members. In his seventh report, the Special Rapporteur had proposed that such recourse should be made subject to the failure of the organization’s rules to provide for reasonable means of securing compliance with the obligations of cessation and reparation. The Drafting Committee had carefully considered the amendments proposed during the debate in plenary session, especially those pertaining to the term “reasonable means”. Some members would have preferred to talk about “procedures”, but in the end it had been decided to keep the word “means” in the wider sense, since it was more suited to a provision which sought to restrict an international organization’s possible recourse to countermeasures against its members.

29. The qualification to be applied to those means had likewise been discussed at length. Some members had contended that demanding that the means used should be “reasonable”, “appropriate” or “effective” would not prevent an organization from always finding some argument justifying recourse to countermeasures. It would be

sufficient to say that, if other means were available, countermeasures would be prohibited. But other members of the Drafting Committee had taken the view that a qualifier was necessary, especially if the reference to the rules of the organization were removed from the provision. They had maintained that an element of comparison between means and countermeasures was necessary, if only in order to avoid the paradoxical case where an organization would be entitled to take more drastic measures than countermeasures, such as expulsion or suspension. The qualifier “effective” had finally been rejected as setting too high a threshold and making the use of countermeasures too attractive. Similarly, the adjective “lawful” had been deemed too restrictive. On the other hand, the expression “appropriate means” seemed to convey the indispensable element of lawfulness which could be emphasized in the commentary, while allowing some flexibility in the choice of the most suitable means for halting a violation and obtaining reparation. That was therefore the term chosen.

30. On the basis of a revised version proposed by the Special Rapporteur, the Drafting Committee had decided to introduce a double negative in paragraph 2—“[a]n international organization may not take countermeasures ... unless” in order to bring out the exceptional nature of any recourse by an international organization to countermeasures against its members. In subparagraph (a), the phrase “not inconsistent with the rules of the organization” had been retained in order to ensure that an organization did not depart from its rules when taking countermeasures. In subparagraph (b), the Drafting Committee had kept the expression “appropriate means ... for otherwise inducing compliance with the obligations of the responsible State or international organization” in order to suggest that another solution might be possible if means were unavailable, but without creating an element of comparison with countermeasures. The word “inducing” had been preferred to “ensuring compliance” so as not to make the use of countermeasures too easy.

31. Lastly draft article 55 (countermeasures by members of an international organization) had been brought into line with draft article 19, paragraph 2. The commentary would explain that the “countermeasures” to which reference was made in common subparagraph (a) covered both countermeasures in general and those actually taken in a given situation. The Drafting Committee hoped that the Commission meeting in plenary would adopt the draft articles which had been presented to it.

32. The Chairperson thanked the Chairperson of the Drafting Committee for his presentation and invited the members of the Commission to proceed with the adoption of the draft articles contained in document A/CN.4/L.743.

Draft article 2 (*Use of terms*)

Draft article 2 was adopted.

Draft article 4 (*General rule on attribution of conduct to an international organization*)

Draft article 4 was adopted.

Draft article 8 (*Existence of a breach of an international obligation*)

Draft article 8 was adopted.

Draft article 15, paragraph 2 (b) (*Decisions, recommendations and authorizations addressed to member States and international organizations*)

Draft article 15, paragraph 2 (b) was adopted.

Draft article 15 bis (*Responsibility of an international organization member of another international organization*)

Draft article 15 bis was adopted.

Draft article 18 (*Self-defence*)

Draft article 18 was adopted.

Draft article 19 (*Countermeasures*)

Draft article 19 was adopted.

Draft article 55 (*Countermeasures by members of an international organization*)

Draft article 55 was adopted.

All the draft articles contained in document A/CN.4/L.743 were adopted.

33. The Chairperson invited the members of the Commission to proceed with the adoption of the draft articles contained in document A/CN.4/L.725/Add.1,¹⁵⁹ with the exception of draft article 55, the revised version of which had just been adopted. At the end of its previous session, the Commission had taken note of those draft articles, but had not formally adopted them,¹⁶⁰ because the Special Rapporteur had not had enough time to draft the commentaries thereto.

Draft article 54 [52] (*Object and limits of countermeasures*)

Draft article 54 [52] was adopted.

Draft article 56 [53] (*Obligations not affected by countermeasures*)

Draft article 56 [53] was adopted.

Draft article 57 [54] (*Proportionality*)

Draft article 57 [54] was adopted.

Draft article 58 [55] (*Conditions relating to resort to countermeasures*)

Draft article 58 [55] was adopted.

Draft article 59 [56] (*Termination of countermeasures*)

Draft article 59 [56] was adopted.

Draft article 60 [57] (*Measures taken by an entity other than an injured State or international organization*)

Draft article 60 [57] was adopted.

All the draft articles contained in document A/CN.4/L.725/Add.1, with the exception of draft article 55 [52 bis], were adopted.

¹⁵⁹ Mimeographed; available on the Commission’s website, documents of the sixtieth session.

¹⁶⁰ *Yearbook ... 2008*, vol. I, 2989th meeting, paras. 2–20.

Reservations to treaties (*continued*)* (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

34. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the Committee's report on reservations to treaties as contained in document A/CN.4/L.744.

35. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) recalled that at its 2891st meeting on 11 July 2006, the Commission had referred draft guidelines 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee. At its 2978th meeting on 15 July 2008, it had referred draft guidelines 2.9.1 to 2.9.10 to the Committee. Lastly, at its 3012th meeting on 29 May 2009, it had referred draft guidelines 2.4.0 and 2.4.3 *bis* to the Committee. The Committee had managed to complete work on 18 draft guidelines, including a new draft guideline 3.2.5, and to adopt provisionally the titles of section 2.8 (Formulation of acceptances of reservations) and 2.9 (Formulation of reactions to interpretative declarations). However, it had not been able to complete its work on draft guideline 3.3 and had yet to consider draft guideline 3.3.1. Of the 18 draft guidelines currently before the Commission, the first 2 dealt with the form and communication of interpretative declarations; 10 others related to reactions to interpretative declarations; and the remaining 6 concerned the assessment of the validity of reservations.

36. Following a suggestion made in the plenary Commission, draft guideline 2.4.0 was now entitled "Form of interpretative declarations"; the title no longer referred to written form, since there was no requirement that interpretative declarations be formulated in writing. It would be explained in the commentary that interpretative declarations formulated orally could also produce legal effects. The words in the text "whenever possible" had been replaced by "preferably" in order to emphasize that the guideline was in the nature of a recommendation, while also recognizing that in certain cases, such as in the framework of an international conference, it might not be appropriate for a State or international organization to make an interpretative declaration in writing.

37. Draft guideline 2.4.3 *bis* (Communication of interpretative declarations) provided for the application, *mutatis mutandis*, of several draft guidelines relating to reservations. The words "whenever possible" had been deleted, and the scope of the draft guideline had been limited to interpretative declarations formulated in writing. After careful consideration, the Drafting Committee had finally decided against the suggestion made in the plenary Commission to add a reference to guideline 2.1.8, which recommended the course of action to be followed when the depositary of a reservation considered it to be manifestly invalid. The issue of the validity of an interpretative declaration could arise in the rare cases in which a treaty

prohibited or restricted the formulation of interpretative declarations in general or of certain types of interpretative declarations. Some members had been of the view that the same course of action as that envisaged for manifestly invalid reservations should apply to invalid interpretative declarations, and that a failure to provide for that situation might even encourage the formulation of such declarations; however, other members had pointed out that an invalid interpretative declaration would be truly exceptional and that it was therefore unnecessary to transpose to interpretative declarations the content of a draft guideline which, even in the case of reservations, pertained to the progressive development of international law. A detailed explanation of the different positions would be provided in the commentary. Furthermore, bearing in mind that the Commission had decided during the current session against the elaboration of a draft guideline dealing with the statement of reasons for interpretative declarations, the Drafting Committee had decided not to follow a suggestion made in the plenary Commission to include a reference to draft guideline 2.1.9 on the statement of reasons for reservations. Draft guidelines 2.4.0 and 2.4.3 *bis* belong under section 2.4 of the Guide to Practice (Procedure for interpretative declarations), which would be renumbered accordingly.

38. Turning to the 10 draft guidelines dealing with reactions to interpretative declarations, he said that, since draft guideline 2.9.1 (Approval of an interpretative declaration) had been well received by the plenary Commission, the Drafting Committee had retained the formulation proposed by the Special Rapporteur, with two minor editorial changes, namely, the replacement of the phrase "in response to" by the phrase "in reaction to" in the English version and, towards the end of the text, the replacement of the word "proposed" by the word "formulated", which was thought to be more neutral. Several members of the Drafting Committee had emphasized that, in practice, reactions to interpretative declarations often presented a mixed character, in that they might contain elements of approval and elements of opposition. However, after due consideration, the Drafting Committee came to the conclusion that it was not appropriate to reflect the latter aspect in the text of a guideline that was simply intended to define "approval". It was agreed, however, that the point would be explained in the commentary to that draft guideline and also in the commentary to the draft guideline defining "opposition" to an interpretative declaration. Moreover, since the draft guideline was in the nature of a definition, the Drafting Committee did not think it was the appropriate place to address the question of the possible effects of the approval of an interpretative declaration.

39. Since draft guideline 2.9.2 (Opposition to an interpretative declaration) had also been well received by the plenary Commission, the formulation retained by the Drafting Committee was largely based on the text proposed by the Special Rapporteur. A few minor editorial changes had been made: as in draft guideline 2.9.1, the phrase "in response to" had been replaced by the phrase "in reaction to" in the English version and the word "proposed" had been replaced by the word "formulated". However, the Committee had also introduced some substantive changes in the text of the draft guideline.

* Resumed from the 3012th meeting.

Following a suggestion made by some members in the plenary debate, the Committee had decided to delete the words “with a view to excluding or limiting its effects” at the end of the text originally proposed by the Special Rapporteur. The main reason was that the effects, if any, of an interpretative declaration and of opposition thereto were yet to be determined and should not be alluded to in a guideline which only purported to define the notion of “opposition” to an interpretative declaration. It had also been thought that it was not appropriate to use a wording similar to that of draft guideline 2.6.1, which defined objections to reservations. Moreover, some had argued that the question of the motives for an opposition was too subjective to serve as an element of a definition of the notion of “opposition”. Lastly, the final phrase of the draft guideline had been modified in order to better convey the idea that the rejection of an interpretative declaration could also occur through the formulation of an alternative interpretation. The Drafting Committee had discussed whether the adjectives “incompatible” or “inconsistent” should be used, before finally opting for “alternative”, which was considered more neutral. Several members had considered that a requirement that the interpretation formulated must be “incompatible” or “inconsistent” with the interpretation contained in the interpretative declaration would be too strict and could create certain difficulties.

40. The title of draft guideline 2.9.3 had been changed to read “Recharacterization of an interpretative declaration”. The Drafting Committee had decided that the word “recharacterization” was more appropriate in English than the word “reclassification”. The title of the draft guideline remained unchanged in French. During the plenary debate in 2008, some members had been of the view that, since the recharacterization of an interpretative declaration as a reservation was to be regarded as a form of opposition to that declaration, it would be preferable to merge draft guidelines 2.9.2 and 2.9.3. However, the majority of members who had spoken in the plenary Commission had thought that it was better to have a separate draft guideline on the recharacterization of an interpretative declaration. The Drafting Committee decided to follow the majority view and had therefore retained a separate draft guideline on recharacterization. It had considered that the recharacterization of an interpretative declaration as a reservation was an issue that merited separate treatment, even if in most cases such a recharacterization would also convey an opposition to the interpretative declaration.

41. The Drafting Committee had made a number of changes to draft guideline 2.9.3. In order to harmonize it with the text and structure of draft guidelines 2.9.1 and 2.9.2, and to reflect the fact that an attempt to recharacterize an interpretative declaration was not in itself sufficient to change the nature of the declaration, the words “of an interpretative declaration” had been inserted in the first line after the word “recharacterization” and the qualifier “interpretative” had been inserted before the word “declaration” in the second line. The Drafting Committee had also thought that the last part of the first paragraph was somewhat redundant and could be simplified. The phrase “purports to regard the declaration as a reservation and to treat it as such” was replaced by the phrase “treats the declaration as a reservation”.

42. Although a suggestion had been made in the plenary Commission to delete the second paragraph of the draft guideline, the Drafting Committee had considered the paragraph useful and had decided to retain it, redrafting it slightly to avoid repetition of the word “recharacterization”. Moreover, it had changed the words in brackets “[take into account]” to “should take into account” to reflect the fact that the paragraph constituted a recommendation, and it had deleted the verb “[apply]” for the same reason. The Drafting Committee had also proposed that the commentary should clearly indicate that the recognition of the right of a State or an international organization to recharacterize an interpretative declaration as a reservation was without prejudice to whether such a recharacterization was legally correct.

43. Draft guideline 2.9.4 (Freedom to formulate an approval, opposition or recharacterization) had been well received in the plenary Commission; therefore the Drafting Committee had retained the text proposed by the Special Rapporteur with two minor editorial changes, namely, the replacement of the word “reclassification” by the word “recharacterization” in the English version and the replacement of the word “protest” by the word “opposition” in the title.

44. Draft guideline 2.9.5, now entitled “Written form of approval, opposition and recharacterization”, which had also been well received by the plenary Commission, was intended to mirror draft guideline 2.4.0, which stated that interpretative declarations should preferably be formulated in writing. The Drafting Committee had adopted the text proposed by the Special Rapporteur with two changes. In the English version, the word “shall” had been replaced by “should” in order to align it with the French version, which clearly indicated that the draft guideline was in the nature of a recommendation. In the same spirit, the words “whenever possible” had been added. The commentary would clarify that the adoption of the written form was a matter of choice on the part of the State or international organization concerned rather than a matter of capability.

45. Since draft guideline 2.9.6, now entitled “Statement of reasons for approval, opposition and recharacterization”, had also been well received in the plenary Commission, the Drafting Committee had adopted the text proposed by the Special Rapporteur with minor editorial changes. In the English version, the phrase “whenever possible” had been replaced by the phrase “to the extent possible” in order to convey more clearly the idea that States and international organizations were encouraged to state the reasons for their reactions as extensively as possible. The qualifier had been placed after the word “should” in order to mirror the structure of draft guideline 2.9.5. The Drafting Committee had discussed whether the draft guideline should also apply to approval of an interpretative declaration. The point had been made by some members that it might not be easy to understand the reasons why a State or an international organization wishing to approve an interpretative declaration should state the reasons for its approval. It had also been pointed out that the reasons provided in support of an approval could themselves raise questions, thus creating confusion. In the end, the Drafting Committee had decided that it was preferable not to exclude approval from the scope of

the draft guideline, bearing in mind that it was purely in the nature of a recommendation, as shown by the flexible wording employed.

46. It had been agreed that the commentary would make it clear that the statement of reasons for approval, opposition or recharacterization was optional. Moreover, the following explanations would be given with regard to approval of an interpretative declaration: (a) the question of the statement of reasons arose in different terms than in the case of opposition; (b) the statement of reasons for approval could be of interest in the context of a dialogue relating to the interpretation of a treaty; (c) in the rare instances in which approval of an interpretative declaration had been expressed, it happened that the reasons for approval had been stated.

47. Draft guideline 2.9.7, now entitled “Formulation and communication of an approval, opposition or recharacterization”, which concerned the modalities for formulating and communicating approval, opposition and recharacterization of an interpretative declaration, stated that certain draft guidelines relating to reservations were applicable *mutatis mutandis*. Since the draft guideline had been well received in the plenary Commission, the Drafting Committee had adopted the text proposed by the Special Rapporteur, merely replacing the term “reclassification” by “recharacterization” in the English version. The commentary would explain that the reference to draft guideline 2.1.7, which provided that the depositary should examine whether a reservation was in due and proper form, was justified by the existence of some treaties prohibiting or restricting the formulation of certain interpretative declarations.

48. The Drafting Committee had considered draft guideline 2.9.8 (Non-presumption of approval or opposition) in conjunction with draft guideline 2.9.9. It had retained the text and title of the draft guideline as proposed by the Special Rapporteur with some minor editorial changes and had added a new second paragraph. The new paragraph concerned the exceptional cases in which approval of an interpretative declaration or opposition thereto might be inferred from the conduct of the States or international organizations concerned, taking into account all relevant circumstances. The reference to draft guidelines 2.9.1 and 2.9.2 was intended to clarify that the second paragraph of draft guideline 2.9.8 dealt with exceptional cases in which approval or opposition not expressed by means of a unilateral statement pursuant to guidelines 2.9.1 and 2.9.2 might be inferred from certain conduct. In the draft guidelines originally proposed by the Special Rapporteur, the issue of conduct in reaction to an interpretative declaration was addressed only in the context of draft guideline 2.9.9, dealing with silence in response to an interpretative declaration, and only in relation to approval of such a declaration. The Drafting Committee had decided, however, that the issue of “conduct” deserved a more general treatment, in relation to both approval of and opposition to an interpretative declaration.

49. With regard to draft guideline 2.9.9, now entitled “Silence with respect to an interpretative declaration”, a suggestion had been made in the plenary debate in 2008 that the guideline should be deleted, mainly because it

appeared to contradict the absence of presumption of approval or opposition as stated in draft guideline 2.9.8. However, a majority of Commission members had been in favour of retaining the provision. After due consideration, the Drafting Committee had concluded that it would be useful to include it, provided that it was carefully drafted in order to circumscribe properly the role that silence could play in determining whether an interpretative declaration had been approved. The first paragraph, as adopted by the Drafting Committee, was a more concise version of the text proposed by the Special Rapporteur. The term “consent” had been replaced by the term “approval” for the sake of consistency with the other draft guidelines.

50. The Drafting Committee had made several changes to the second paragraph. In particular it had preferred the word “approved” instead of “acquiesced” in order to align the text with that of the other draft guidelines and to avoid the ambiguities that might surround the notion of acquiescence. At the beginning of the paragraph, the phrase “in certain specific circumstances” had been replaced by “in exceptional cases”. The reason for the change was that the Drafting Committee had not considered it appropriate to refer to “specific circumstances” that could not be easily defined and had found it preferable to use a wording that emphasized that cases where silence would be relevant to determining whether an interpretative declaration had been approved occurred infrequently. Furthermore, a discussion had taken place in the Drafting Committee on the relation between silence and conduct and on the way to reflect that relation in the text of the second paragraph. The formulation finally retained was intended to convey the idea that, in exceptional cases, silence as an element of conduct might be relevant in determining whether the State or international organization concerned had approved an interpretative declaration, “taking account of the circumstances”. That qualifier had been considered more accurate than the general formula “as the case may be” contained in the text originally proposed by the Special Rapporteur.

51. The Drafting Committee had decided to leave draft guideline 2.9.10 (Reactions to conditional interpretative declarations) in square brackets pending a decision by the Commission on the desirability of devoting specific provisions to conditional interpretative declarations. The reference to draft guideline 2.6 had been replaced by a reference to draft guideline 2.6.1, since 2.6 was the number of the title of the corresponding section.

52. Turning to the set of draft guidelines dealing with the assessment of the validity of reservations, he recalled that draft guidelines 3.2 to 3.2.4 had been referred to the Drafting Committee in 2006.¹⁶¹ Draft guideline 3.2 was now entitled “Assessment of the validity of reservations”. The Drafting Committee had had a long discussion on the purpose and meaning of the draft guideline and on the formulation that would best reflect its general and introductory character. Several changes had been made to the original text. In the *chapeau*, the verb “rule on” had been replaced by the verb “assess”, which had been

¹⁶¹ *Yearbook ... 2006*, vol. II (Part Two), p. 134, para. 103, and for the presentation of these draft guidelines by the Special Rapporteur and the summary of the debate, paras. 109–113 and p. 136, paras. 130–136, respectively.

deemed more appropriate since the pronouncements that could be made concerning the validity of a reservation by the entities and bodies listed in the draft guideline were not necessarily binding. The English wording of the *chapeau* was thus aligned with the French word “*apprécier*” and with the title of the draft guideline, where the word “assessment” was used. The commentary would indicate that the verb “assess” had been chosen because of its neutral character: while it alluded to the existence of an institutional basis for the pronouncements made by the bodies referred to in the draft guideline, the word did not prejudice the legal effect that such pronouncements might have. The replacement of the words “are competent to rule on” by the words “may assess, within their respective competences” had been intended to reflect the fact that the ability of certain bodies, in particular, dispute settlement bodies and treaty monitoring bodies, to assess the validity of a reservation was neither automatic nor unlimited, but depended on the extent of the competences conferred upon such bodies.

53. Under the first bullet point, the word “other” had been deleted in order to reflect the fact that, under certain circumstances, the judicial authorities of the reserving State might be competent to assess the validity of the reservation. However, taking into account the views expressed by the majority of members during the plenary debate in 2006, the Drafting Committee had decided to delete the reference to domestic courts, which appeared in square brackets in the original text, and had agreed that the possibility that domestic courts might, in certain cases as provided for by domestic law, be competent to assess the validity of a reservation would be referred to in the commentary. Under the second bullet point, which referred to dispute settlement bodies, the words “that may be competent to interpret or apply the treaty” had been deleted, because they had been considered to be unnecessary in the light of the addition, in the *chapeau*, of the words “within their respective competences”. The commentary would underline the role that judicial bodies might play in the assessment of the validity of reservations and would indicate that the case of dispute settlement bodies competent to adopt binding decisions was specifically addressed in draft guideline 3.2.5. Under the third bullet point, which referred to treaty monitoring bodies, the phrase “that may be established by the treaty” had been deleted in order to cover also monitoring bodies established subsequently to the adoption of a treaty but within its framework, such as the Committee on Economic, Social and Cultural Rights. That point would be clarified in the commentary. A number of issues relating specifically to the assessment of reservations by treaty monitoring bodies were addressed in draft guidelines 3.2.1 to 3.2.4.

54. Draft guideline 3.2.1 (now entitled “Competence of the treaty monitoring bodies to assess the validity of reservations”) had elicited very few comments during the plenary debate in 2006. For the reasons mentioned above, the words “established by the treaty” had been deleted from the title. The first paragraph, which provided that a treaty monitoring body might, for the purpose of discharging the functions entrusted to it, assess the validity of reservations, was a simplified version of the text initially proposed by the Special Rapporteur, with the replacement of the words “shall be competent to ... assess” by the words

“may ... assess”. The second paragraph, which circumscribed the legal effect of an assessment made by a treaty monitoring body regarding the validity of a reservation, was also based on the text proposed by the Special Rapporteur. It reflected paragraph 8 of the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, adopted by the Commission at its forty-ninth session in 1997.¹⁶² In the English version, the words “findings made” had been replaced by “conclusions formulated”, in order to restore consistency with the neutral formulation in the French text, which was clearly without prejudice to the question of any legal effect that might be attached to the conclusions of a treaty monitoring body regarding the validity of reservations. In the English text, the term “legal force” was replaced by “legal effect” (“*valeur juridique*”), and the commentary would explain what was meant in the context. Lastly, towards the end of the paragraph, the adjective “general” had been deleted in order to refer to the performance by treaty monitoring bodies of all the functions relating to their monitoring role, including the examination of individual communications.

55. Draft guideline 3.2.2, now entitled “Specification of the competence of treaty monitoring bodies to assess the validity of reservations”, had been inspired by paragraph 7 of the preliminary conclusions adopted by the Commission in 1997. It encouraged States, when providing bodies with competence to monitor the application of a treaty, to specify, where appropriate, the nature and the limits of the competence of such bodies to assess the validity of reservations. The first sentence had been reworked in order to avoid conveying the false impression that the draft guideline purported to recommend the establishment of treaty monitoring bodies. In addition, in order to make it clear that the draft guideline was purely in the nature of a recommendation, the placement of the words “where appropriate” had been shifted so that the qualifier applied to the recommendation as a whole. The second sentence of the draft guideline concerned those monitoring bodies that already existed. The text proposed by the Special Rapporteur envisaged the adoption of protocols in order to specify the competence of such bodies to assess the validity of reservations. The Drafting Committee had preferred a more general formulation, leaving open the question of the types of measures (protocols, amendments to existing treaties and so forth) that could be adopted to that end.

56. The title of draft guideline 3.2.3 (Cooperation of States and international organizations with monitoring bodies) was unchanged. It was inspired by paragraph 9 of the preliminary conclusions adopted by the Commission in 1997. The Drafting Committee had had an extensive discussion on the scope and formulation of the draft guideline and had decided that it would be better that the draft guideline deal only with treaty monitoring bodies, which were not vested with the power to adopt binding decisions, and that a separate draft guideline should be devoted to bodies that did possess that power, such as regional human rights courts. Consequently, the second sentence of the text proposed by the Special Rapporteur had been deleted. The wording of draft guideline 3.2.3

¹⁶² *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

as adopted by the Drafting Committee was based on the first sentence of the original draft guideline, modified to avoid giving the impression that States or international organizations would have a legal obligation to give effect to the assessment by a treaty body of the validity of reservations. Thus the words “are required ... to take fully into account” had been replaced by “should give full consideration to” (that body’s assessment). However, the enunciation of a general requirement for States and international organizations to cooperate with treaty monitoring bodies had been maintained as proposed by the Special Rapporteur. To mirror the draft guideline, the Special Rapporteur intended to present an additional draft guideline stating that treaty monitoring bodies should take into account the positions of States or international organizations.

57. Draft guideline 3.2.4, now entitled “Bodies competent to assess the validity of reservations in the event of the establishment of a treaty monitoring body”, which had not given rise to many comments during the plenary debate in 2006, was inspired in part by paragraph 6 of the preliminary conclusions adopted by the Commission in 1997. The title had been changed in order to indicate clearly that the draft guideline referred to the establishment of a treaty monitoring body within the meaning of the preceding draft guidelines, as opposed to a dispute settlement body vested with the power to make binding decisions. Some changes had been made to the original text. Apart from a few changes only intended to simplify the text, the Drafting Committee had decided to formulate the draft guideline as a “without prejudice” clause, indicating that the competence of a treaty monitoring body to assess the validity of reservations was without prejudice to the competence of the contracting States or contracting international organizations or of dispute settlement bodies to do so.

58. Draft guideline 3.2.5 (Competence of dispute settlement bodies to assess the validity of reservations) was new. It was a reformulation of the second sentence of draft guideline 3.2.3 as originally proposed by the Special Rapporteur, which the Drafting Committee had decided to delete. It applied only to dispute settlement bodies vested with the power to adopt decisions binding on the parties. It recognized that an assessment made by such bodies of the validity of a reservation was binding upon the parties when such an assessment was necessary for the discharge of the competence of those bodies. The indication that the assessment was binding “as an element of the decision” was intended to clarify that the draft guideline covered not only cases in which the validity of a reservation was the actual subject matter of the decision, but also situations in which the validity of a reservation was one of the elements to be assessed, even incidentally, by a dispute settlement body in order to arrive at a binding decision in a given case. The commentary would provide an explanation of that point.

59. In conclusion, he hoped that the plenary Commission would be in a position to adopt the draft guidelines presented.

60. The Chairperson thanked the Chairperson of the Drafting Committee for his presentation and invited the

members of the Commission to proceed to the adoption of the draft guidelines contained in document A/CN.4/L.744.

Draft guideline 2.4.0 (*Form of interpretative declarations*)

Draft guideline 2.4.0 was adopted.

Draft guideline 2.4.3 bis (*Communication of interpretative declarations*)

Draft guideline 2.4.3 bis was adopted.

Draft guideline 2.9.1 (*Approval of an interpretative declaration*)

Draft guideline 2.9.1 was adopted.

Draft guideline 2.9.2 (*Opposition to an interpretative declaration*)

Draft guideline 2.9.2 was adopted.

Draft guideline 2.9.3 (*Recharacterization of an interpretative declaration*)

Draft guideline 2.9.3 was adopted.

Draft guideline 2.9.4 (*Freedom to formulate an approval, opposition or recharacterization*)

61. Mr. VASCIANNIE said that he was surprised at the inconsistency in the titles of draft guidelines 2.9.4, 2.9.5 and 2.9.6, which in French sometimes used the definite and sometimes the indefinite article. In the English version, the indefinite article should be omitted in all three draft guidelines.

62. The CHAIRPERSON suggested that such questions of an editorial nature could be referred to the Secretariat.

Draft guideline 2.9.4 was adopted with that editorial reservation.

Draft guideline 2.9.5 (*Written form of approval, opposition and recharacterization*)

63. Mr. PELLET wondered why draft guideline 2.9.6 used the phrase “to the extent possible” while draft guideline 2.4.0 used the word “preferably”. He recalled that the Drafting Committee had begun by considering draft guidelines 2.9.5 and 2.9.6 and had then moved on to draft guideline 2.4.0. At the conclusion of those discussions, the phrase “whenever possible” [*“autant que possible”*] had been replaced by “preferably” [*“de préférence”*] in draft guideline 2.4.0 but retained in the other two. He proposed that “preferably” should be used in all three provisions.

64. Mr. NOLTE, supported by Mr. McRAE and Mr. CANDIOTI, recalled that the difference in wording related to the choice that had been made not to require the same things from the author of an interpretative declaration as from the author of an approval, opposition or recharacterization of an interpretative declaration.

65. Mr. Pellet said that he could agree with that reasoning for draft guideline 2.9.6, but not for draft guideline 2.9.5. The intention was the same in draft guideline 2.9.5 as in draft guideline 2.4.0. He proposed using “preferably” in draft guideline 2.9.5 and retaining “to the extent possible” in draft guideline 2.9.6.

Draft guideline 2.9.5, with the amendment proposed by Mr. Pellet, was adopted.

Draft guideline 2.9.6 (*Statement of reasons for approval, opposition and recharacterization*)

Draft guideline 2.9.6 was adopted.

Draft guideline 2.9.7 (*Formulation and communication of an approval, opposition or recharacterization*)

Draft guideline 2.9.7 was adopted.

Draft guideline 2.9.8 (*Non-presumption of approval or opposition*)

Draft guideline 2.9.8 was adopted.

Draft guideline 2.9.9 (*Silence with respect to an interpretative declaration*)

Draft guideline 2.9.9 was adopted.

Draft guideline 2.9.10 (*Reactions to conditional interpretative declarations*)

Draft guideline 2.9.10 was adopted.

Draft guideline 3.2 (*Assessment of the validity of reservations*)

Draft guideline 3.2 was adopted.

Draft guideline 3.2.1 (*Competence of the treaty monitoring bodies to assess the validity of reservations*)

Draft guideline 3.2.1 was adopted.

Draft guideline 3.2.2 (*Specification of the competence of treaty monitoring bodies to assess the validity of reservations*)

Draft guideline 3.2.2 was adopted.

Draft guideline 3.2.3 (*Cooperation of States and international organizations with treaty monitoring bodies*)

Draft guideline 3.2.3 was adopted.

Draft guideline 3.2.4 (*Bodies competent to assess the validity of reservations in the event of the establishment of a treaty monitoring body*)

Draft guideline 3.2.4 was adopted.

Draft guideline 3.2.5 (*Competence of dispute settlement bodies to assess the validity of reservations*)

Draft guideline 3.2.5 was adopted.

The draft guidelines contained in document A/CN.4/L.744, as a whole, as amended, were adopted.

The meeting rose at 12.30 p.m.

SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-FIRST SESSION

Held at Geneva from 6 July to 7 August 2009

3015th MEETING

Monday, 6 July 2009, at 3.05 p.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Protection of persons in the event of disasters¹⁶³ (A/CN.4/606 and Add.1, sect. F, A/CN.4/615,¹⁶⁴ A/CN.4/L.758¹⁶⁵)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON declared open the second part of the sixty-first session of the International Law Commission and welcomed the participants in the International Law Seminar, who would be observing the Commission's proceedings. He invited the Special Rapporteur, Mr. Valencia-Ospina, to introduce his second report on the protection of persons in the event of disasters, contained in document A/CN.4/615.

2. Mr. VALENCIA-OSPINA (Special Rapporteur), introducing his second report, said that he had been mindful of the recommendations of the General Assembly in its resolution 63/123 of 11 December 2008 that the Commission should take into account the comments

¹⁶³ See the Special Rapporteur's preliminary report in *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598. For the discussion of the preliminary report by the Commission, see *ibid.*, vol. II (Part Two), chap. IX.

¹⁶⁴ Reproduced in *Yearbook ... 2009*, vol. II (Part One).

¹⁶⁵ Mimeographed; available on the Commission's website. See also the 3029th meeting below.

and observations of Governments and undertake consultations with key humanitarian actors (para. 16); accordingly, in the introduction to his second report, he had highlighted the oral comments and observations of States in the Sixth Committee and his contacts with other entities in the United Nations system. Moreover, he would like to draw attention to two informal documents¹⁶⁶ containing observations of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and the International Federation of Red Cross and Red Crescent Societies (IFRC), submitted in response to a question addressed to them by the Commission¹⁶⁷ about how the United Nations system and the IFRC had institutionalized roles and responsibilities with regard to assistance to affected populations and States in the event of disasters. He greatly appreciated their prompt response to that question, which reflected concerns voiced by a number of Commission members.

3. With regard to other recent developments, paragraph 14 of his report listed three documents relevant to his topic that had been issued after the close of the Commission's sixtieth session. To those should be added the *2009 Global Assessment Report on Disaster Risk Reduction*,¹⁶⁸ which was the first biennial global assessment of disaster risk reduction prepared in the context of the International Strategy for Disaster Reduction (ISDR), adopted by the General Assembly in its resolution 54/219 of 22 December 1999. Mention should also be made of the second session of the Global Platform for Disaster Risk Reduction, on the theme of disasters, poverty and vulnerability, held in Geneva from 16 to 19 June 2009. Lastly, a report by the Secretary-General¹⁶⁹ on the progress made in the strengthening of the coordination of emergency humanitarian assistance of the United Nations had just been submitted to the substantive session of the Economic and Social Council now being held in Geneva. The report described the major humanitarian trends and challenges of the past year

¹⁶⁶ ILC (LXI)POPD/INFORMAL/1 and 2 (distribution limited to the members of the Commission).

¹⁶⁷ *Yearbook ... 2008*, vol. II (Part Two), para. 32.

¹⁶⁸ United Nations, *2009 Global Assessment Report on Disaster Risk Reduction: Risk and Poverty in a Changing Climate*, 2009 (available from www.preventionweb.net).

¹⁶⁹ A/64/84-E/2009/87.

and analysed two thematic issues: respecting and implementing guiding principles of humanitarian assistance at the operational level and addressing the impact of current global challenges and trends on the effective delivery of humanitarian assistance.

4. The General Assembly had devoted particular attention, from different perspectives, to disasters and their multiple implications, especially over the past two decades. At its sixty-third session, the Assembly had adopted no less than five resolutions devoted in a general way to distinct aspects of the disaster cycle in all its phases.¹⁷⁰ Five other resolutions dealt with concrete disaster situations around the globe.¹⁷¹ Reference to the subject of disasters could also be found in resolutions covering a variety of other matters: for example, resolution 63/90 of 5 December 2008 on international cooperation in the peaceful uses of outer space emphasized the need for space technology to be improved so as to help mitigate disasters and for international cooperation to minimize space debris.

5. The Special Rapporteur's second report sought to provide concrete guidance on the questions posed in the preliminary report, which had led to productive discussions in the Commission and in the Sixth Committee, chiefly with regard to the proper scope of the topic (A/CN.4/606, paras. 79–81). The discussions had centred on four main questions: what was the proper understanding of “protection of persons” in the context of the topic; whether the Commission's work should be limited to the rights and obligations of States or should provide a framework for the conduct of other actors; which phases of disaster the project should address; and what was the proper definition of a disaster. Members of the Commission and Governments in the Sixth Committee had offered varying opinions as to which principles should inform the Commission's work, and some had been particularly interested in the relevance of the emerging principle of the responsibility to protect.¹⁷² The draft articles proposed in the second report constituted an attempt to answer those questions in the light of the prevailing opinion emerging from the debates.

6. To properly identify the contours of the topic, it was necessary to determine how to approach the concept of protection applicable in the event of disasters. An illustrative definition might be the one provisionally formulated by the drafting committee of the second workshop

¹⁷⁰ General Assembly resolutions 63/139 on strengthening of the coordination of emergency humanitarian assistance of the United Nations, and 63/141 on international cooperation on humanitarian assistance in the field of natural disasters, from relief to development, of 11 December 2008; resolutions 63/147 of 18 December 2008, entitled “New international humanitarian order”; 63/216, entitled “International Strategy for Disaster Reduction”; and 63/217 of 19 December 2008, entitled “Natural disasters and vulnerability”.

¹⁷¹ In particular, General Assembly resolutions 63/136 entitled “Humanitarian assistance and reconstruction of Liberia” and 63/137 on strengthening emergency relief, rehabilitation, reconstruction and prevention in the aftermath of the Indian Ocean tsunami disaster, of 11 December 2008; and resolutions 63/211 entitled “Oil slick on Lebanese shores” and 63/215 on international cooperation to reduce the impact of the El Niño phenomenon, of 19 December 2008.

¹⁷² See, in this regard, General Assembly resolution 63/308 of 14 September 2009 and the report of the Secretary-General on implementing the responsibility to protect (A/63/677), in particular paragraphs 1–10.

on protection convened by the International Committee of the Red Cross (ICRC) in March 1998, according to which “[p]rotection, in the case of humanitarian actors, includes all activities designed to assist the competent authorities [to] prevent, put a stop to or avoid the occurrence or the recurrence of violations of international human rights, humanitarian law, refugee law and to ... persuade them to take the appropriate measures”.¹⁷³ The text reflected the agreement among participants that the definition should state that it included all activities designed to shield the individual from violations of inalienable universal human rights.

7. To circumscribe the concept of protection of persons for the purposes of the topic, his second report addressed two aspects of the question. Paragraphs 16 to 18 discussed the proposed rights-based approach and paragraphs 19 to 27 suggested that the rights and obligations of States should be understood with reference to the relationships both of States *vis-à-vis* each other and States *vis-à-vis* individuals. As noted in paragraph 8 of the report, many States in the Sixth Committee had supported a rights-based approach to the topic. That approach had also found support in the Commission;¹⁷⁴ some members had emphasized that since the main question was how individual rights would be enforced, the focus should be on the obligations of States and non-State actors.

8. The rights-based approach did not endeavour to set up a regime that would compete or overlap with human rights or related regimes. Rather, it would provide a framework in which the legitimacy and success of a disaster relief effort could be assessed according to how the rights of affected parties were respected, protected and fulfilled. Paragraphs 16 and 17 of the second report discussed the origins of the rights-based approach as a paradigm shift in the study of international development, as States had come to understand that rights standards were crucial to evaluating development agendas and formulating development policy.

9. Of particular significance were some of the key findings and recommendations of the *2009 Global Assessment Report on Disaster Risk Reduction*.¹⁷⁵ According to the report, global disaster risk was highly concentrated in poorer countries with weaker governance. Particularly in low- and middle-income countries with rapid economic growth, the exposure of people and assets to natural hazards was growing at a faster rate than risk-reducing capacities were being strengthened, leading to increasing disaster risk. Countries with small and vulnerable economies, such as small island developing States and landlocked developing countries, had the highest economic vulnerability to natural hazards. Poorer communities suffered a disproportionate share of disaster loss.

10. The rights-based approach was not exclusive and must be informed by other considerations when appropriate. In particular, the IFRC had suggested that the Commission focus on the needs of disaster victims (para. 17

¹⁷³ *Protection: toward Professional Standards, Report of the Workshop (17–19 March 1998)*, ICRC, 1998, p. 22 and annex 2, p. 82.

¹⁷⁴ *Yearbook ... 2008*, vol. II (Part Two), paras. 227–229 and 231.

¹⁷⁵ See footnote 168 above.

of the report). In the current inquiries into the subject by interested international organizations, the rights-based and needs-based approaches had been made to appear almost mutually exclusive. However, needs and rights were two sides of the same coin, and the difference in approaches could be reduced to a question of emphasis. Seen in that light, the suggestion of the IFRC could usefully complement a rights-based approach to the topic.

11. In pursuing that approach to the protection of persons, the Commission should be mindful that it was dealing with two essentially different relationships: that of States *vis-à-vis* each other, and that of States *vis-à-vis* affected persons. The conceptual distinction between those two axes, which was at the basis of the operation of the relevant rules of international law, had been articulated by the ICJ in recent decisions rendered in a variety of contexts, as discussed in paragraphs 19 to 27 of the report. Also of interest was the Court's pronouncement, in October 2008, in its order on the request for the indication of provisional measures submitted by Georgia in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*. The Court had indicated, with binding effect, the following provisional measure: "Both Parties shall facilitate, and refrain from placing any impediment to, humanitarian assistance in support of the rights to which the local population are entitled under the International Convention on the Elimination of All Forms of Racial Discrimination" [para. 149B of the order]. The conceptual distinction thus illustrated suggested a two-stage approach to the discussion, focusing first on the rights and obligations of States *vis-à-vis* each other. Once that relationship had been clarified, it should aid the Commission in its understanding and formulation of the rights and obligations of States *vis-à-vis* affected persons.

12. Disaster response involved a range of actors, including domestic and foreign governmental agencies and the military, the United Nations, intergovernmental and non-governmental organizations, the IFRC and private actors. Developing a comprehensive framework to guide the conduct of all those actors would not only prove to be a vast and time-consuming undertaking, it would also overlap significantly with the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance¹⁷⁶ adopted by the IFRC in 2007. For those and other reasons discussed in paragraph 28 of the report, the Commission would be well advised to begin by concentrating on the rights and duties of States, without prejudice to specific provisions that might be applicable to non-State actors. Doing so would place manageable limits on the work, and should the Commission later determine that it must more fully examine the rights and obligations of non-State actors, its work concerning the conduct of States would provide a useful point of departure.

13. The topic's focus on protection also suggested a broad temporal scope, one that might encompass preparedness and mitigation, response and early recovery

and long-term rehabilitation. That interpretation was supported by the fact that there was no clear demarcation between each of those phases, particularly in the case of so-called "creeping" or "slow-onset" disasters such as desertification. However, members of the Commission and the Sixth Committee had warned strongly against overextending the scope of the topic and had suggested that the Commission's work should be limited to the disaster proper and the immediate post-disaster relief phases (paras. 7 and 29 of the report). Moreover, the Commission should avoid needlessly duplicating the work of other bodies in the field of preparedness and risk-reduction, for example, under the ISDR. Still, as noted in paragraph 29 of the report, disaster preparedness was critical to protecting affected persons. The Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters¹⁷⁷ (hereinafter "Hyogo Framework for Action") noted that strengthening disaster preparedness was vital to strengthening a community's resilience, and the General Assembly, in resolution 63/141 of 11 December 2008, entitled "International cooperation on humanitarian assistance in the field of natural disasters, from relief to development", noted the importance of international cooperation to support preparedness efforts in countries with limited capacities. Given the central role of preparedness in reducing vulnerability and protecting affected persons, the Commission could not completely foreclose any discussion of the pre-disaster phase. Instead, it would be wise to follow the suggestion of many of its members and States in the Sixth Committee and focus on the response and early recovery stages, without prejudice to subsequent consideration of the pre-disaster phase (A/CN.4/606, para. 80).

14. Those considerations were reflected in the proposed text for draft article 1, contained in paragraph 30 of the report, which aimed to define the topic's scope *ratione materiae*, *ratione temporis* and *ratione personae*. The draft article read:

"Draft article 1. Scope

"The present draft articles apply to the protection of persons in the event of disasters, in order for States to ensure the realization of the rights of persons in such an event, by providing an adequate and effective response to their needs in all phases of a disaster."

15. In seeking to delimit the scope of the project by linking it to its purpose, the text kept the primary focus on the actions of States and their ability to realize the rights of persons in the event of disasters by providing for their needs. It reflected the fact that the Commission should be primarily concerned with the conduct of States in the exercise of their rights and the fulfilment of their obligations *vis-à-vis* the victims of disasters.

16. With respect to affected persons, draft article 1 adopted a rights-based approach, but also emphasized the paramount importance of meeting the needs of disaster victims. It was based on the assumption that the

¹⁷⁶ IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, 2008.

¹⁷⁷ Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005 (A/CONF.206/6 and Corr.1), resolution 2.

rights- and needs-based approaches were complementary, and that a disaster-response effort could not adequately protect the rights of affected persons without endeavouring to respond to their needs in the face of such an event. The phrase “in all phases of a disaster” underscored the primary focus on disaster response and early recovery and rehabilitation but did not preclude an effort to address preparedness and mitigation in the pre-disaster phase.

17. Proposed draft article 1 was not sufficient, however, to delimit the Commission’s work on the topic. In order to complete the task, paragraphs 31 to 49 of the report were devoted to formulating a definition of the term “disaster”. Although some international instruments had been able to be implemented without such a definition, one was indispensable in the current draft articles in order to identify the persons entitled to protection and the circumstances in which such protection was called for.

18. The definition of “disaster” in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations offered useful guidance. It adhered to the convention of defining “disaster” as a “serious disruption of the functioning of society”, implying that a disaster was to be identified by the degree of dysfunction it caused to the society in which it occurred. The Tampere definition also recognized that a disaster might be caused by a complex set of factors extending over a long period of time.

19. The proposed definition, contained in paragraph 45 of the report, read:

“Draft article 2. Definition of disaster

“ ‘Disaster’ means a serious disruption of the functioning of society, excluding armed conflict, causing significant, widespread human, material or environmental loss.”

20. The definition proposed in draft article 2 used the Tampere wording as a starting point, but with several notable changes. First, it expressly excluded armed conflict *per se*, since there was already a comprehensive body of international humanitarian law applicable in that situation. Second, whereas the Tampere definition included events that merely threatened harm to life, property or the environment, the definition in draft article 2 included a criterion of actual loss. The definition nevertheless remained sufficiently broad since it encompassed situations of widespread property damage or environmental degradation, both of which warranted protection inasmuch as they affected persons.

21. The proposed definition also omitted any requirement of causation, unlike several of the earlier definitions referred to in paragraphs 34 to 43 of the report which required some causal link. In some of those definitions, however, a mention of causes served only to reveal that an inquiry into causation was immaterial, since they provided that a disaster could be caused by virtually any set of factors, natural or otherwise, so that ultimately an event should be characterized according to its effects. That was particularly true in the case of complex causation where a single condition could not be said to be the sole and

sufficient cause of a disaster—a problem that took on added complexity when natural phenomena merged with and were reinforced by human activity. Moreover, as many representatives in the Sixth Committee had pointed out, attempts to draw such a distinction would be immaterial to the purpose of protecting disaster victims, since both natural and man-made disasters produced similar effects. An inquiry into causation should thus be omitted from draft article 2.

22. Lastly, the draft definition did not establish a criterion according to which a disaster, in order to be considered as such, had to overwhelm a society’s response capacity. The inclusion of such a criterion would, in effect, shift the focus of the topic away from the victims of a disaster, who were the persons in need of protection.

23. After determining the scope of the Commission’s work on the topic in draft articles 1 and 2, the next task would be to decide on the principles that would inform the remainder of the draft articles. Although the responsibility to protect had been mentioned as one such principle, recent developments¹⁷⁸ and discussions in the Commission and in the Sixth Committee had suggested that the responsibility to protect might not be applicable in the context of disasters. Although some Commission members regarded it as an emerging principle and thought that it would need to be considered, many members of the Commission and the Sixth Committee had doubted its relevance to the topic (A/CN.4/606, para. 87). Some had expressed doubt as to whether the responsibility to protect carried any legal weight whatsoever, and others thought that its legal effect was confined to gross violations of human rights and could not be transferred by analogy to disaster relief.

24. In the report of the Secretary-General on implementing the responsibility to protect, issued in January 2009, the Secretary-General had clearly stated that the responsibility to protect did not apply to disaster response.¹⁷⁹ His conclusion, noted in paragraph 14 (c) of the second report, was that the responsibility to protect applied only in the case of genocide, war crimes, ethnic cleansing and crimes against humanity, until Member States decided otherwise, and that extending it to cover other calamities, such as natural disasters, would “undermine the 2005¹⁸⁰ consensus and stretch the concept beyond recognition or operational utility”. Such a clear-cut statement by the highest United Nations official in his most recent and comprehensive report, devoted exclusively to the subject, was an authoritative indication that the responsibility to protect could not be regarded as the core principle of the current topic. That role more appropriately belonged to the legal duty of cooperation. In order successfully to accomplish its task of progressive development and codification of the rules of international law on the topic, the Commission did not need to base the draft articles on the doctrine of the responsibility to protect, as there were other more solid and pertinent legal grounds on which it could rely.

¹⁷⁸ See the report of the Secretary-General (A/63/677) and the related discussions of 21, 23, 24, and 28 July 2009 in *Official Records of the General Assembly, Sixty-third Session, 96th to 101st plenary meetings* (A/63/PV.96–101).

¹⁷⁹ A/63/677, para. 10 (b).

¹⁸⁰ 2005 World Summit Outcome document, General Assembly resolution 60/1 of 16 September 2005, paras. 138–139.

At most, the Commission might wish to frame its efforts in a way that would not prejudice any future agreement by States to extend that principle to situations of disaster.

25. In arguing against having recourse to the responsibility to protect, some Commission members had emphasized the primary responsibility of the affected State to provide protection and assistance, noting that the international community played a subsidiary role in conformity with the principles of international solidarity and cooperation. Even though the primary responsibility of the affected State was fundamental and should be reiterated, its international dimension was a direct function of the duty of the State to respect, protect and give effect to the human rights of affected persons within its territorial jurisdiction. On the other hand, a disaster—even if not transnational in its material effects—nevertheless gave rise to a legitimate concern that was inherently international and rooted in the principles of shared responsibility and solidarity, and that triggered the international legal duty to cooperate. The principles of international solidarity and cooperation jointly formed the lens through which the role to be played by foreign Governments and non-State actors in disaster situations could be placed in proper perspective.

26. Although several principles had been discussed in the memorandum by the Secretariat on the protection of persons in the event of disasters,¹⁸¹ including the principles of sovereignty, neutrality, impartiality, humanity and cooperation, the second report of the Special Rapporteur proposed, as a first step, a draft article on the core legal principle of cooperation, in recognition of the fact that even a highly localized disaster produced some consequences in the international realm, bringing into play the duty to cooperate. Other relevant principles also merited restatement and would be the subject of proposed draft articles in subsequent reports, particularly in connection with assistance and access in the event of a disaster. The proposed draft article read:

“Draft article 3. Duty to cooperate

“For the purposes of the present draft articles, States shall cooperate among themselves and, as appropriate, with:

“(a) competent international organizations, in particular the United Nations;

“(b) the International Federation of Red Cross and Red Crescent Societies; and

“(c) civil society.”

27. Cooperation was a fundamental principle of international law that was enshrined in the Charter of the United Nations and 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) of 24 October 1970. In its

memorandum, the Secretariat had noted that cooperation was “a *conditio sine qua non* to successful disaster relief actions”.¹⁸² The proliferation of international actors responding to a disaster required mutual cooperation in order to avoid inefficient, overlapping or conflicting relief efforts. The affected State had to cooperate with foreign Governments and non-State actors in order to ensure the effective delivery of external resources and funds and the prompt response of foreign aid workers. The General Assembly had recently reaffirmed the importance of cooperation in the context of disaster response, emphasizing in its resolution 63/141 that the affected State had the primary responsibility for disaster response, while at the same time recognizing the importance of international cooperation in all phases of a disaster, including preparedness, response and recovery. Numerous international instruments had recognized the importance of regional and global cooperation and the coordination of risk-reduction and relief activities, and many had focused specifically on efforts to improve the capacities of developing countries. International cooperation was thus essential to effective disaster response.

28. Solidarity and cooperation, as legal principles, did not constitute charity; rather, they provided for a system of mutual interaction in which reciprocal obligations were placed on all parties. The clearest expression of those principles could be found in international environmental law instruments, such as the Montreal Protocol on Substances that Deplete the Ozone Layer, which mandated that developed nations should provide technological and financial assistance to developing countries, while the latter were bound to comply with certain pollution control measures. Instruments such as the Declaration of International Economic Cooperation, in particular the Revitalization of Economic Growth and Development of Developing Countries, adopted by the General Assembly at its eighteenth special session in resolution S-18/3 of 1 May 1990, had noted that the revitalization of economic growth in developing nations required efforts on the part of all countries. Cooperation in those contexts entailed reciprocal obligations: both States providing assistance and those receiving it incurred a duty to act responsibly.

29. The principle of cooperation was by no means new to the Commission. In its work on shared natural resources¹⁸³ and prevention of transboundary harm from hazardous activities¹⁸⁴ the Commission had recognized that international law imposed a general duty on States to cooperate with one another. The commentary to the draft articles on non-navigational uses of international watercourses¹⁸⁵ explained that the duty of States to cooperate in the protection and development of a watercourse system could be enshrined in a treaty but did not depend on any international agreement. The duty to cooperate could therefore be understood to flow from principles that were inherent in the international legal order, giving rise to an

¹⁸² *Ibid.*, para. 18.

¹⁸³ *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54, draft articles on the law of transboundary aquifers with commentaries thereto.

¹⁸⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, draft articles on prevention of transboundary harm from hazardous activities with commentaries thereto.

¹⁸⁵ *Yearbook ... 1994*, vol. II (Part Two), para. 222, especially the commentary to draft articles 8 and 9.

¹⁸¹ A/CN.4/590 and Add. 1–3 (mimeographed; available on the Commission’s website, documents of the sixtieth session).

obligation to share information, work together in drafting emergency response plans and bring domestic laws or regulations into line with international obligations.

30. The principle of cooperation had played an important role in the Commission's final drafts on a range of topics. The Rome Statute of the International Criminal Court, modelled on a Commission draft,¹⁸⁶ had included in article 86 a general obligation to cooperate with the Court. The Commission's work on the law of the high seas had resulted in an obligation for States to cooperate in fighting piracy and preventing the pollution of the seas with radioactive waste.¹⁸⁷ Its work on the most-favoured-nation clause had led to recognition of the need for economic cooperation between developed and developing countries,¹⁸⁸ while its articles on State responsibility for internationally wrongful acts¹⁸⁹ required all States to cooperate in ending a breach of a peremptory norm of international law. In short, where the international community needed to work together to resolve a situation of concern to all its members, the Commission had not failed to find that States had an obligation to do so. The current topic evoked notions of international solidarity and interdependence to an extent far greater than any topic previously addressed by the Commission. Hence, any articles or guidelines to be developed on the topic by the Commission would be of limited use if they were not informed by a spirit of international cooperation.

31. Draft article 3 therefore reaffirmed the international legal duty of States to cooperate with one another and, in appropriate circumstances, with non-State actors, in recognition of the important and often crucial role the latter played in helping to ensure the effective protection of persons in the event of disasters. Draft article 3 thus delimited the topic's scope *ratione personae*. The layout of the text was intended to highlight the distinct status accorded by international law in the context of the present topic to the principal non-State actors, namely the United Nations and other intergovernmental organizations, the IFRC and civil society.

32. The three proposed draft articles were intended to offer guidance for future work on the topic by setting the limits of its scope, but they were drafted in such a way as not to prejudice any decisions the Commission might wish to make in the light of new developments.

33. Mr. MURASE, commending the Special Rapporteur for his excellent work on the topic, said that he had a few questions concerning some of the basic premises underlying the Special Rapporteur's second report. To begin with, he was puzzled by the approach to the topic described in paragraph 17, whereby "both rights and needs enter the equation, complementing each other when appropriate".

¹⁸⁶ *Yearbook ... 1996*, vol. II (Part Two), para. 50, draft code of crimes against the peace and security of mankind.

¹⁸⁷ *Yearbook ... 1956*, vol. II, document A/3159, para. 33, articles on the regime of the high seas and regime of the territorial sea and commentaries thereto, arts. 38 and 48, respectively.

¹⁸⁸ *Yearbook ... 1978*, vol. II (Part Two), para. 74, draft articles on most-favoured-nation clauses, especially draft articles 23–24. See also *Yearbook ... 2008*, vol. II (Part Two), annex II.

¹⁸⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, especially art. 41.

In his view, the word "rights" was a legal term, while "needs" referred to a factual situation, and accordingly the two notions were not on the same conceptual level. Needs were taken into account in determining the contents of the relevant rights and obligations. It was unclear whether the phrase "rights of persons" contained in draft article 1 referred to rights recognized under international law, rights recognized under the domestic law of the affected State or rights under some sort of natural law, independent of positive international or domestic law.

34. His second point concerned the definition of "disaster" in draft article 2. The definition was crucially important, because it would form the basis of the operation of the draft articles as a whole, providing the trigger for participation or intervention in an affected State by other States or intergovernmental or non-governmental organizations. Draft article 2 referred to "a serious disruption" and "significant, widespread ... loss", but it was essential to be clear on the meaning of those terms. An affected State might refuse outside assistance, claiming that the disaster was not really serious, since it had not resulted in either significant or widespread loss.

35. Although circumstances of armed conflict were excluded from the draft articles, some lessons could be learned from the law of armed conflict. Article 1 of the Convention on the prohibition of military or any other hostile use of environmental modification techniques ("the Environmental Modification Convention"), of 1976, restricted the application of the Convention to techniques having "widespread, long-lasting or severe effects". Because the three conditions were combined by the word "or", only one of them needed to be satisfied for the application of the Convention. According to one of the understandings of the Conference of the Committee on Disarmament,¹⁹⁰ "widespread" was to be understood as "encompassing an area on the scale of several hundred square kilometres", "long-lasting" as "lasting for a period of months, or approximately a season", and, "severe" as "involving serious or significant disruption or harm to human life, natural and economic resources or other assets".

36. By contrast, the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims or international armed conflicts (Protocol I) set much higher thresholds than the Environmental Modification Convention. The Protocol provided, in article 35, paragraph 3, that it was prohibited to employ methods or means of warfare that caused "widespread, long-term and severe damage" to the natural environment. In the Protocol, the term "long-term" was understood as meaning a period of decades rather than a few months and the terms "widespread" and "severe" were similarly understood as implying a much wider and heavier scale of damage than was contemplated in article I of the Environmental Modification Convention. Moreover, the three conditions were combined by the word "and" rather than "or", which meant that all three must be met. In draft article 2, however, neither "and" nor "or" appeared between the words "significant" and "widespread" and

¹⁹⁰ Report of the Conference of the Committee on Disarmament, *Official Records of the General Assembly, Thirty-first Session, Supplement No. 27 (A/31/27)*, vol. I, annex I, understanding relating to article I, p. 91.

he wondered what the Special Rapporteur's intention had been in dividing the words by a comma. The examples given showed the importance of defining the scale of loss, which had a direct bearing on the scope of application of the draft articles.

37. He also had some misgivings about draft article 3. First, he wondered whether the word "duty" in the subtitle signified a legal obligation, a moral obligation or something in between. Secondly, he had strong reservations about the term "civil society". Even if qualified by the phrase "as appropriate" in the *chapeau*, the term was very broad and ambiguous. Some groups and organizations were good, while others were not; a group might even be a front for terrorists. He had nothing against NGOs: he himself was a member of a relief organization founded by one of his former students that was active in post-disaster activities, not only in Japan, but also in various countries in Asia and Africa. It was, however, the case that NGOs had some intrinsic problems of representativeness and accountability. A stricter definition was therefore required.

38. If, as stated in paragraph 69 of the report, the civil society that the Special Rapporteur had in mind was "local", the Commission should be cautious in imposing on an affected State the obligation to cooperate with its own domestic groups and organizations, since that might be viewed as direct interference in matters within the State's domestic jurisdiction. In most countries, private groups were encouraged to participate in relief activities in the event of a disaster, but some Governments might not welcome their involvement, because it might be perceived as demonstrating the Government's inability to cope with the situation. He was not certain that a provision referring to domestic groups would be useful or appropriate in the draft articles.

39. On the other hand, the transnational elements of NGO activities should feature more positively in the draft articles. He wondered whether a competent international organization could, at the pre-disaster stage, establish a roster of qualified and reliable NGOs that could be accredited to conduct relief activities. Such NGOs should meet accepted international standards as being competent, reliable and effective relief organizations. The affected State could then choose suitable NGOs from the list in the event of a disaster. Such a mechanism might alleviate some of the concerns of an affected State.

40. His suggestion was based partly on his own country's experience. When something went wrong, even if it was a natural disaster, the Japanese would tend to see it as a disgrace and try to pretend that they could manage without outside help. Thus, in January 1995, when Kobe (Hyogo, Japan) was hit by a huge earthquake that killed more than 6,000 people, the Government's attitude to receiving foreign assistance had reportedly been negative. For example, trained rescue dogs brought in by a Swiss NGO had been required to go through the quarantine procedure and detained for 40 days at the airport, which, of course, had made no sense when victims were waiting for rescue from the rubble of collapsed buildings. The public had severely criticized the Government, which had changed its policy after a few days. Such a reaction might be unique to Japan. It would be useful, however, to

stress the importance of cultivating a culture of mutual assistance and willingness to receive foreign assistance in the event of a disaster or, as the Special Rapporteur had put it, solidarity and cooperation. The Convention on nuclear safety referred, in its preamble, to a "nuclear safety culture". A reference to a "culture of mutual assistance in case of a disaster" might be similarly appropriate in the preamble to the draft articles.

41. Mr. SABOIA said that the report was a carefully thought out and well-prepared document that would help the Commission to advance with the topic, while the Special Rapporteur's oral introduction was so thorough as almost to constitute an addendum to the report.

42. He wished to reiterate some of the positions that he had expressed on general issues in his intervention at the previous session. As he had said then, he supported the idea of a rights-based approach, which should not be seen as incompatible with a problem-based approach. It would take into account all categories of rights, but with particular emphasis on economic and social rights, which might be more seriously affected by disasters. Human rights—both individual and collective—were also important, because such groups as refugees, minorities or indigenous people might be more vulnerable in the event of disasters.

43. In his oral presentation, the Special Rapporteur had rightly emphasized the view of the Secretary-General in his report on implementing the responsibility to protect that it would be a mistake to extend such a responsibility to other calamities, such as HIV/AIDS, climate change or the response to natural disasters.¹⁹¹

44. The Special Rapporteur should place more emphasis in his work on the relationship between poverty, under-development and exposure to disaster situations. In paragraphs 16 and 17 of the report, the Special Rapporteur had shown how the notion of development had come to incorporate the aspects of both rights and needs. Although the Special Rapporteur was correct in saying that the Commission should avoid duplicating the work under the ISDR, it should not fail to take account of the important ISDR conclusions concerning the unequal distribution of exposure to the risk of disaster among different categories of countries, according to their level of development, their geographical location and other circumstances.

45. At a recent meeting in Bahrain, on 17 May 2009, attended by the Secretary-General to discuss the *2009 Global Assessment Report on Disaster Risk Reduction*,¹⁹² it had been stressed that the risk of disasters and their effects arose not only from the severity of the disaster itself, but also from factors related to social and economic development. As the Secretary-General had said, poor people in developing countries suffered most from disasters. For example, three quarters of those who had died from floods lived in just three countries, and 17 times more people had perished as a result of tropical cyclones in the Philippines than in Japan, although the two countries' exposure to cyclones was the same. The Commission could translate those realities into legal terms by giving special

¹⁹¹ A/63/677, para. 10 (b).

¹⁹² See footnote 168 above.

consideration to the needs of developing countries, particularly the least developed, and to the issue of poverty as a factor relevant to the risk and impact of disasters.

46. He agreed with the proposal to limit the scope *ratione temporis* by focusing on the disaster and post-disaster phases without prejudice to the examination at a later stage of the issues of prevention and preparedness.

47. He endorsed the view contained in paragraph 28 of the report on the need to focus on the rights and obligations of States, not only *vis-à-vis* other States, but also *vis-à-vis* persons in need of protection. A State affected by a disaster was most likely to have its ability to provide assistance and protect certain rights restricted by the effects of the disaster. That point should be taken into account when the Commission came to deal with the implementation by States of their obligations. He supported the Special Rapporteur's proposals regarding the treatment of States and non-State actors, giving priority to the examination of the rights and duties of States without excluding the consideration of the role of non-State actors at a later stage. He therefore endorsed draft article 1.

48. The material presented in paragraphs 31 to 37 of the report testified to the difficulty of finding a proper definition for the term "disaster". He had doubts, however, about using, as a first element, the idea of "serious disruption of the functioning of society", without at least some preceding causal elements. A society's functioning could be disrupted by factors unrelated to a natural disaster, such as a political crisis or a general strike. On the other hand, a serious disaster could cause severe damage without necessarily disrupting a society's functioning. He therefore suggested that the Commission should adopt the form of words "seriously affecting the functioning of society". The element of causation should not be overstressed, since that might exclude events with a complex origin. He would, however, favour using some elements of the definition used in the Agreement Establishing the Caribbean Disaster Emergency Response Agency, followed by a reference to "serious disruption of the functioning of society" (art. 1 (d)).

49. As for the issue of whether harm alone should be a requirement for the definition, or whether the risk of harm should be included, he considered that actual harm should be referred to, with a possible second clause indicating that an "imminent threat of serious harm" was also included in the scope, since persons seriously threatened by a disaster might need urgent assistance in order to limit the extent of the damage caused by the actual disaster.

50. The definition of disaster should also encompass situations that seriously undermined crops, such as severe drought or pests and plant diseases that caused famine. As for the question of a reference to destruction of, or damage to, property or environment, he considered that both should be included, to the extent that they affected people's ability to recover from disaster. Draft article 2 was a useful starting point for the definition of the word "disaster" and could be referred to the Drafting Committee, although further elaboration was required.

51. He commended the thorough analysis of the duty of solidarity and cooperation in the report. That duty was

firmly anchored in legal rules, including the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 2007). The concept had been further developed by the Stockholm Declaration,¹⁹³ the 1992 Rio Declaration on Environment and Development¹⁹⁴ and the Vienna Convention for the Protection of the Ozone Layer. All stressed the need to provide appropriate attention to the special situation and needs of developing countries. In that connection, he suggested that the important principle of "shared but differentiated responsibilities", which had become an accepted rule in international environmental law, should be mentioned specifically in the context of environmental damage caused by a disaster.

52. He expressed his support for the safeguards mentioned in paragraphs 63 and 64 of the report concerning the need not to extend the obligation of solidarity and cooperation to the point of trespassing on the prerogatives of sovereign States, which had primary responsibility for the protection of their people in the event of disasters. On the other hand, the international community should not be left in the position of a passive observer in situations where persons affected by disasters were deprived of their basic needs and rights. There must be a balance between the prerogative of the State and the legitimate concerns of the international community, which could result in ties of interdependence and cooperation between States and could, where appropriate, include a legitimate role for non-State actors that had emerged as important in the field. Draft article 3 provided an appropriate point of departure for discussion and could be referred to the Drafting Committee. He would, however, be in favour of adding a new subparagraph indicating the need to pay proper attention to the special needs of developing countries, in particular the least developed countries and those most vulnerable to disaster.

Responsibility of international organizations (concluded) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE (concluded)

53. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) introduced the titles and texts of draft articles 3, 3 *bis*, 28, paragraph 1, and 61 to 64 adopted by the Drafting Committee on 2 June 2009, as contained in document A/CN.4/L.743/Add.1, which read:

"Article 3. Responsibility of an international organization for its internationally wrongful acts

"Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

¹⁹³ See footnote 156 above.

¹⁹⁴ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigendum), vol. I: *Resolutions adopted by the Conference, resolution 1, Annex I.*

“Article 3 bis. Elements of an internationally wrongful act of an international organization

“There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

“(a) is attributable to the international organization under international law; and

“(b) constitutes a breach of an international obligation of that international organization.

“Article 28. Responsibility of a member State seeking to avoid compliance

“A State member of an international organization incurs international responsibility if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

“Article 61. Lex specialis

“These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State for an internationally wrongful act of an international organization, are governed by special rules of international law, including rules of the organization applicable to the relations between an international organization and its members.

“Article 62. Questions of international responsibility not regulated by these articles

“The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these articles.

“Article 63. Individual responsibility

“These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

“Article 64. Charter of the United Nations

“These articles are without prejudice to the Charter of the United Nations.”

54. Mr. Vázquez-Bermúdez recalled that, at its 3009th meeting, on 22 May 2009, the Commission had referred six new draft articles proposed by the Special Rapporteur in his seventh report (A/CN.4/610) to the Drafting Committee, together with a proposal for the restructuring of the draft and some modifications or revisions suggested in respect of draft articles which had

already been provisionally adopted by the Commission. In its earlier report on the topic “Responsibility of international organizations” (A/CN.4/L.743), presented on 5 June 2009, the Drafting Committee had introduced the new structure of the draft articles, as well as draft articles 2; 4, paragraph 2; 8; 15, paragraph 2 (b); 15 bis; 18; 19 and 55, which had been adopted by the Commission (see the 3014th meeting above). He would now introduce the results of the Drafting Committee’s consideration, on 2 June 2009, of the other draft articles referred to it.

55. He wished to pay tribute to the Special Rapporteur, whose invaluable expertise had placed the Commission in a position to adopt provisionally an entire set of draft articles on responsibility of international organizations.¹⁹⁵

56. Turning to draft articles 3 and 3 bis, he said that the proposal put forward by the Special Rapporteur in his seventh report to make article 3 the sole article of chapter I of Part Two of the draft articles, entitled “General Principles”, had been endorsed by the Drafting Committee. That modification made it necessary to reconsider the title of that draft article which, as provisionally adopted, embodied provisions parallel to those contained in two separate articles, namely articles 1 and 2, on responsibility of States for internationally wrongful acts.¹⁹⁶

57. As the draft article would be placed in a separate chapter of the text, the Drafting Committee had seen no obstacle to copying the structure adopted for the draft articles on State responsibility. It had therefore decided that former paragraph 1 of draft article 3 would be retained as draft article 3 (Responsibility of an international organization for its internationally wrongful acts), while former paragraph 2 would become a new draft article 3 bis entitled “(Elements of an internationally wrongful act of an international organization)”. The text of the two articles, as previously adopted by the Commission, remained unchanged.

58. He recalled that the Special Rapporteur, in his seventh report, had considered various ways of restricting the responsibility of member States when an international organization had been provided with competence in respect of a particular international obligation and that, to that end, he had proposed recasting draft article 28, paragraph 1, in order to clarify the conditions entailing responsibility in such circumstances and to avoid a reference to circumvention. A number of suggestions had been made in the Drafting Committee with a view to improving the text proposed in the seventh report. The phrase proposed by the Special Rapporteur, “purports to avoid compliance”, had been replaced with “seeks to avoid complying”, which added clarity while retaining the requisite subjective element of intent on the part of a member State. It had also been considered more appropriate to speak of a member State “taking advantage” rather than “availing itself” of a situation.

59. The Drafting Committee had further discussed whether it was necessary to retain an explicit reference to the provision of competence to an international organization.

¹⁹⁵ *Yearbook ... 2008*, vol. II (Part Two), chap. VII, sect. C.

¹⁹⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

Some Committee members had considered that the reference was needed in order to strengthen the linkage between the organization's act and the member State's intention. The view had, however, been expressed that the use of the phrase "by providing the organization with competence" would overemphasize the temporal element, namely the provision of competence prior to the commission of an act. In any case, stating that the organization "has competence" already implied that the member State must have contributed to the provision of that competence.

60. The Drafting Committee had also considered the need to establish a causal link between the advantage taken by a member State of an organization's competence and the commission of given act by that organization. Some Committee members had been of the view that such a linkage was unnecessary and indeed misleading, since it would favour the subjective element of the State's intention to the detriment of a description of an objective situation, in which an organization using competence provided to it by a State would commit an act which would be wrongful if committed by that State. Furthermore, demonstrating the existence of intent always proved difficult. It had also been suggested that a distinction should be drawn between exclusive or concurrent competence; if the organization had been provided with concurrent competence, it would be necessary to stress the link between the exercise of that competence and the impetus from the member State.

61. Other members of the Drafting Committee had been in favour of retaining a link between the advantage taken of an organization's competence and the commission of a given act. One member had argued that a State should be held responsible if it had sought to gain an illicit advantage by using the organization's competence, whether or not the organization had committed the act in question. While that opinion had been thought to rely too heavily on the element of intent, there had been broad consensus that a link should be established between a given act by an organization and the member State's conduct which had encouraged the act. Several options for expressing the appropriate degree of linkage had been considered: "because of", "as a result of" or a reference to an organization being "induced" to commit the act by a State. In the end, the Drafting Committee had opted for the words "thereby prompting", which was an apt description of the process by which responsibility was incurred.

62. A further issue which had to be addressed with regard to draft article 28, paragraph 1, was the reference to the subject matter of the obligation. The previous version of the provision and the redrafting proposal by the Special Rapporteur both seemed to allow some confusion to persist as to the respective obligations of the State and the international organization. The Committee had attempted to resolve that difficulty by referring to the organization's competence "in relation to the subject matter" of the member State's obligation. In addition, the title of draft article 28 had been changed to "Responsibility of a member State seeking to avoid compliance" in order to reflect the changes in the wording of paragraph 1.

63. As for the four draft articles which would make up Part Six (General Provisions), he said that the text of draft

article 61 (*Lex specialis*) adopted by the Committee was very similar to that which the Special Rapporteur had proposed in his seventh report. Within the Drafting Committee, the various proposals made in relation to that draft article had given rise to extensive discussion, which had mirrored the substance of the plenary debate.

64. The Drafting Committee's only modification to the text of draft article 61 proposed by the Special Rapporteur was the replacement in the last sentence of the phrase "such as the rules of the organization that are applicable" with the phrase "including rules of the organization applicable". As the Special Rapporteur had explained, the rules of the organization provided an obvious example of the special rules envisaged by draft article 61, although there could be other kinds of special rules, such as those relating to particular situations relevant to an international organization. Some members of the Drafting Committee had contended that the initial drafting of the provision could create the impression that all the rules of the organization were covered, regardless of their specificity. The modification of the last sentence was designed to address those concerns.

65. The purpose of the change was not, however, to deal with the broader issue, raised in the plenary Commission, of the need to take into account considerations resulting from the specific characteristics and great variety of international organizations. Some drafting suggestions had been made in that regard, including the addition of a new article to deal with that concern. A revised proposal of such a provision introduced in the Drafting Committee had stated in substance "in applying these draft articles, the specific characteristics of the particular organization shall be taken into account". The proponents of that proposal had maintained that it would lay some welcome emphasis on the diversity of existing international organizations and the corresponding need to apply the draft articles with flexibility and that it would merely highlight the importance of differentiating among international organizations when applying the draft articles.

66. Several members of the Drafting Committee, while not necessarily disputing the underlying idea, felt uncomfortable about the inclusion of a specific provision for that purpose. In their view, the proposed additional article, with its rather ambiguous drafting, could either be interpreted as stating the obvious, namely that the draft articles had to be applied in context, or could be used by some international organizations as a means of evading their responsibility. In other words, there had been some concern within the Committee that the inclusion of such a provision would jeopardize the draft articles, since an international organization might be tempted to invoke its specific characteristics in order to avoid altogether the consequences of its wrongful conduct. The argument that there was a huge variety of international organizations should not be used to undermine the whole codification exercise.

67. The Drafting Committee had ultimately decided not to include a provision along the lines suggested, but to add a sentence to the commentary to the introductory draft articles which would clearly indicate that particular factual or legal circumstances relating to the international

organization concerned might have to be taken into account when applying the draft articles. That addition to the commentary should not be interpreted to mean that an organization could plead its specific characteristics in order to claim that it was exempt from responsibility, or to obtain the application of double standards in the implementation of the draft articles.

68. Two issues had been discussed in relation to draft article 62 (Questions of international responsibility not regulated by these articles). The first concerned the words “continue to”, which could be interpreted as freezing the situation in time, so that questions of responsibility would have to be regulated by the rules of international law applicable at the time the articles were adopted. Nevertheless, it had been considered that the use of the phrase in the present tense, which was common in a number of conventions, made it sufficiently plain that the rules covering issues not otherwise regulated in the draft, to which proper consideration had to be given, were the rules in force at the time when the draft articles were applied.

69. The second issue had been the proposed addition, at the end of draft article 62, of an illustrative phrase which would have read “such as the invocation by an international organization of the international responsibility of a State”. The merit of such an addition would have been that it would have drawn attention to the gap existing between matters covered by the draft articles on the responsibility of international organizations and those dealt with by the articles on State responsibility. The Drafting Committee had, however, taken the view that the proposed addition would not fill that lacuna, especially as the draft articles on responsibility of international organizations were not intended to cover questions of State responsibility towards an international organization, which, arguably, had been addressed by analogy in the articles on State responsibility. The commentary to draft article 1 (Scope of the present draft articles) would refer to that lacuna and the possible application by analogy of the articles on State responsibility. The Drafting Committee considered that it would be misleading to add the phrase “of an international organization” after “internationally wrongful act”, because some issues of State responsibility in relation to the action of an international organization were covered in the text.

70. For that reason, draft article 62 as well as draft article 63 (Individual responsibility) and draft article 64 (Charter of the United Nations) remained unchanged. As far as the latter provision was concerned, the Drafting Committee had agreed to refer in the commentary to the effect that obligations under the Charter of the United Nations might have for international organizations, even when they were not formally bound by it. The commentary would also make it clear that draft article 64 was not intended to affect the application of the draft articles to the United Nations.

71. The Drafting Committee recommended that the Commission should adopt the draft articles just introduced.

72. The CHAIRPERSON invited the Commission to proceed to adopt the draft articles contained in document A/CN.4/L.743/Add.1.

Draft article 3 (*Responsibility of an international organization for its internationally wrongful acts*)

Draft article 3 was adopted.

Draft article 3 bis (*Elements of an internationally wrongful act of an international organization*)

Draft article 3 bis was adopted.

Draft article 28 (*Responsibility of a member State seeking to avoid compliance*)

Draft article 28 was adopted.

Draft article 61 (*Lex specialis*)

Draft article 61 was adopted.

Draft article 62 (*Questions of international responsibility not regulated by these articles*)

Draft article 62 was adopted.

Draft article 63 (*Individual responsibility*)

Draft article 63 was adopted.

Draft article 64 (*Charter of the United Nations*)

Draft article 64 was adopted.

The draft articles contained in document A/CN.4/L.743/Add.1, as a whole, were adopted.

The meeting rose at 5.30 p.m.

3016th MEETING

Tuesday, 7 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Cooperation with other bodies

[Agenda item 14]

STATEMENT BY THE PRESIDENT OF THE
INTERNATIONAL COURT OF JUSTICE

1. The Chairperson welcomed Judge Hisashi Owada, President of the International Court of Justice, and invited him to address the Commission.

2. Judge Owada (President of the International Court of Justice) said that, as the new President of the International Court of Justice, he was delighted to address the International Law Commission, in keeping with the decade-long tradition between the two bodies.

3. As had become the custom, he would begin by reporting on the judicial activities of the Court over the past year, drawing attention to those aspects that had particular relevance to the Commission's current programme of work. Following his report, he wished to hold an informal discussion with members of the Commission on certain issues that the Court would have to deal with in coming years and on the relationship between the Court and the Commission. Since his predecessor, Judge Rosalyn Higgins, had addressed the Commission in July 2008, the Court had rendered five decisions: one judgment on the merits, one judgment in a request for interpretation, one judgment on preliminary objections and two orders on requests for the indication of provisional measures. The five cases had involved States of Africa, Asia, Europe and North America. The subject matter varied widely, ranging from established issues such as the delimitation of maritime zones, through contemporary issues such as human rights and the status of individuals, to issues of international criminal law.

4. In chronological order, the first decision was the order on the request for the indication of provisional measures issued by the Court on 15 October 2008 in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*.

5. Georgia had filed its application on 12 August 2008, founding its claim on an alleged violation of the International Convention on the Elimination of All Forms of Racial Discrimination. It had asserted that:

The Russian Federation, acting through its organs, agents, persons and entities exercising elements of governmental authority, and through South Ossetian and Abkhaz separatist forces under its direction and control, has practised, sponsored and supported racial discrimination through attacks against, and mass-expulsion of, ethnic Georgians, as well as other ethnic groups, in the South Ossetia and Abkhazia regions of the Republic of Georgia. [para. 3 of the order]

6. Georgia had claimed that, by those actions, the Russian Federation had violated several provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. As the basis for the jurisdiction of the Court, Georgia had invoked article 22 of the Convention.

7. Two days later, on 14 August 2008, Georgia had filed a request for the indication of provisional measures before the Court, pending the Court's judgment in the proceedings, in order to preserve its rights under the Convention "to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries" [para. 24]. In particular, Georgia had requested the Court to order the Russian Federation to refrain from any acts of racial discrimination; to prevent groups or individuals from subjecting ethnic Georgians to such acts; to refrain from taking any actions or supporting any measures that obstructed the exercise of

ethnic Georgians' right of return to South Ossetia, Abkhazia and adjacent regions; and to facilitate the delivery of humanitarian assistance to all individuals in the territory under its control.

8. The Russian Federation had taken the position that Georgia's application did not involve a dispute under the Convention; that the relevant provisions of the Convention did not apply extraterritorially; that any breaches that might be found to have occurred could not be attributed to the Russian Federation; and that the preconditions in article 22 of the Convention had not been met. With regard to Georgia's request for the indication of provisional measures, it had furthermore argued that there was no imminent risk of irreparable harm or any urgency that would justify the indication of such measures.

9. In its order on the request for the indication of provisional measures, the Court had held that there was no restriction of a general nature in the Convention relating to its territorial application. The Court had concluded that "there appears to exist a dispute between the Parties as to the interpretation and application of [the Convention]" [para. 112]. It had further found that the procedural conditions laid down in article 22 of the Convention had been met, concluding, in particular, that although article 22 required that some attempt should be made by the parties to initiate talks among themselves on issues that fell under the Convention, it did not require the holding of formal negotiations. On those grounds, the Court had concluded that it had *prima facie* jurisdiction to deal with the case, and accordingly, it had held that "the ethnic Georgian population in the areas affected by the recent conflict remains vulnerable" [para. 143] and that there was thus an imminent risk that it might suffer irreparable prejudice. The Court had issued an order for the indication of provisional measures that required both parties to refrain from creating any impediment to humanitarian assistance to the local population and from engaging in any action that might prejudice the rights of the other party or aggravate the dispute.

10. On 18 November 2008, the Court had delivered a judgment on preliminary objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. The case had been brought before the Court in 1999 by Croatia, which had alleged that Serbia was responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide. Serbia had argued that the Court lacked jurisdiction, first, because Serbia did not have *locus standi* before the Court when Croatia had filed its application, and secondly, because the Court lacked jurisdiction under the compromissory clause of the Convention (article IX), as Serbia had not declared its consent to the jurisdiction of the Court under article IX.

11. Concerning the question of *locus standi* access to the Court, members of the Commission would no doubt recall that the Court had concluded in its 2004 judgments in the various cases concerning the *Legality of Use of Force* that Serbia did not have access to the Court in 1999 at the time of the filing of its applications against various NATO member countries. The same issue had arisen in 2007 in the case concerning *Application of the Convention on the*

Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). The Court had differentiated between that case and the 2004 cases on the issue of access to the Court on the grounds that, with regard to the 2007 case, the Court had already held in its 1996 judgment on preliminary objections that it possessed jurisdiction. In the view of the Court, the 1996 judgment, while not ruling specifically on the issue of access to the Court, contained “as a matter of logical construction” the finding that Serbia had access to the Court under the Statute, and “[t]he force of *res judicata* attaching to that judgment thus extends to that particular finding” [para. 136 of the 2007 judgment]. By contrast, in the 2008 case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the Court had noted that the *res judicata* principle obviously did not apply as it had in the 2007 Bosnia case.

12. The Court had observed that, while Serbia had not been a member of the United Nations on 2 July 1999, the date Croatia filed its application, it had been a member of the United Nations—and therefore a party to the Statute of the Court—as from 1 November 2000. While accepting that the Court’s jurisdiction was normally assessed on the date of the filing of the act instituting proceedings, the Court had nevertheless stated: “[T]he Court, like its predecessor, has also shown realism and flexibility in certain situations in which the conditions governing the Court’s jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction” [para. 81 of the 2008 judgment].

13. In that connection, the Court had referred to the 1924 judgment of the Permanent Court of International Justice in *Mavrommatis* case in which the PCIJ had held that “[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law” [p. 34 of the judgment]. The International Court of Justice had applied that principle to the question of access to the Court in the present case and had concluded that any initial lack of access that it might subsequently be able to establish did not, in itself, bar the claim of Croatia.

14. On the question of whether the Court had jurisdiction under article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, the Court had concluded that the declaration and note dated 27 April 1992¹⁹⁷—in which the Federal Republic of Yugoslavia had agreed to “strictly abide by all the commitments that the [Socialist Federal Republic] of Yugoslavia assumed internationally” [para. 44 of the 2008 judgment] and to “continue to fulfil all ... obligations assumed by the Socialist Federal Republic of Yugoslavia in international relations, including its ... participation in international treaties ratified or acceded to by Yugoslavia” [para. 99]—“had the effect of a notification of succession by the [Federal Republic of Yugoslavia] to the [Socialist Federal Republic of Yugoslavia] in relation to the [Convention on the Prevention and Punishment of the Crime

of Genocide]” [para. 117] and that the Court “had, on the date on which the present proceedings were instituted by Croatia, jurisdiction to entertain the case on the basis of Article IX” of the Convention [*ibid.*].

15. The Court had thus ultimately concluded that it had jurisdiction over the case and that the claim of Croatia was admissible. The case would now move to the merits phase. The Court, in its order of 20 January 2009, had fixed 22 March 2010 as the time limit for the filing of a counter-memorial by Serbia.

16. On 5 June 2008, Mexico had filed a request for interpretation, asking the Court to interpret paragraph 153 (9) of the judgment rendered by the Court on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*. In its request, Mexico had recalled that in paragraph 153 (9) of the *Avena* judgment, the Court had found “that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals” referred to in the judgment, taking into account both the violation of the rights set forth in article 36 of the Vienna Convention on Consular Relations and paragraphs 138 to 141 of the judgment [cited in para. 1 of the 2008 order].

17. On the same day, Mexico had also submitted a request for the indication of provisional measures, asking the Court, pending judgment on the request for interpretation of Mexico, to order the Government of the United States to take all measures necessary to ensure that José Ernesto Medellín Rojas and four other Mexican nationals were not executed pending the conclusion of the proceedings before the Court. Mexico had also asked that the Government of the United States be required to inform the Court of all measures it had taken in implementation of the *Avena* judgment and to ensure that no action was taken that might prejudice the rights of Mexico or its nationals with respect to any interpretation the Court might render with regard to paragraph 153 (9) of that judgment. A Texas court had scheduled the execution of Mr. Medellín Rojas for 5 August 2008.

18. The United States had maintained that there was no dispute between the parties as to the meaning and scope of the *Avena* judgment; that the Court was not competent to hear the case on the basis of article 60 of its Statute; and that the Court was therefore not competent to indicate provisional measures in the proceedings.

19. The Court, on the other hand, had found that there appeared to be a difference of opinion between the parties as to the meaning and scope of the Court’s finding contained in paragraph 153 (9) of the judgment. The Court had pointed out that the execution of a national the meaning and scope of whose rights were in question prior to the delivery of the Court’s judgment on the request for interpretation “would render it impossible for the Court to order the relief that [his national State] seeks and thus cause irreparable harm to the rights it claims” [para. 72]. It had found that it was apparent from the information before it that Mr. Medellín Rojas would face execution on 5 August 2008 and that four other Mexican nationals

¹⁹⁷ Letter dated 6 May 1992 from the Chargé d’affaires *ad interim* of the the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General (A/46/915), annex I.

were at risk of execution in the coming months; that their execution would cause irreparable prejudice to any rights, the interpretation of the meaning and scope of which was in question; that it was possible that the said Mexican nationals might be executed before the Court had delivered its judgment on the request for interpretation; and that, consequently, there undoubtedly was urgency. The Court had accordingly concluded that the circumstances required that it should indicate provisional measures to preserve the rights of Mexico, as provided by article 41 of its Statute.

20. On 19 January 2009, the Court had delivered its judgment in the case. A key question at that stage of the proceedings had been to determine definitively, for the purposes of article 60 of the Court's Statute, whether a dispute did in fact exist as to the meaning or scope of paragraph 153 (9) of the *Avena* judgment. The United States had continued to argue at that stage that no dispute existed between it and Mexico for the purposes of article 60, since it shared the position of Mexico that the paragraph in question established an obligation of result. Mexico, on the other hand, had argued that the United States did not share its view of the *Avena* judgment, namely that "the operative language [of the *Avena* judgment] establishes an obligation of result reaching all organs of the United States, including the federal and state judiciaries" [para. 24 of the 2009 judgment].

21. The Court had found that:

The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153 (9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law. In short, the question is not decided in the Court's original Judgment and thus cannot be submitted to it for interpretation under Article 60 of the Statute. [para. 44]

22. In effect, what the Court had found was that Mexico's request for interpretation dealt, not with the "meaning or scope" of the *Avena* judgment, as required by article 60, but rather with "the general question of the effects of a judgment of the Court in the domestic legal order of the States parties to the case in which the judgment was delivered" [para. 45]. The Court had concluded that "[b]y virtue of its general nature, the question underlying Mexico's Request for interpretation is outside the jurisdiction specifically conferred upon the Court by Article 60" and "[w]hether or not there is a dispute, it does not bear on the interpretation of the *Avena* Judgment, in particular of paragraph 153 (9)" [*ibid.*]. Consequently, the Court had held that it could not accede to Mexico's request for interpretation.

23. However, given that Mr. Medellín was executed on 5 August 2008, before the Court had rendered its judgment on the request for interpretation of Mexico, the Court had added that the United States had not discharged its obligation under the Court's order of 16 July 2008 indicating provisional measures in the case of Mr. José Ernesto Medellín Rojas.

24. On 3 February 2009, the Court had delivered its judgment on the merits in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. In that case, the Court had been requested to draw a single maritime boundary delimiting the continental shelf and exclusive economic zones between Romania and Ukraine in the Black Sea. Maritime delimitation, especially in respect of the continental shelf and exclusive economic zone of a given country, had been the subject of many disputes that had come before the Court, beginning with the *North Sea Continental Shelf* cases in 1969. As members of the Commission were no doubt aware, the Court's jurisprudence had evolved considerably over the years since its 1969 judgment, against the background of evolving doctrine and State practice as well as the adoption of the United Nations Convention on the Law of the Sea in 1982. A noteworthy feature of the 2009 judgment was that it presented the current state of the law on the issue of maritime delimitation in a structured manner and applied the law to the specific circumstances of the case, thus offering a specific line of delimitation, as described in the judgment. With regard to that point of the law as it currently stood, the Court had stated that:

In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court's approach is to establish the provisional equidistance line. At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.

...

The course of the final line should result in an equitable solution (Articles 74 and 83 of [the United Nations Convention on the Law of the Sea]). Therefore, the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result ... The Court has also made clear that when the line to be drawn covers several zones of coincident jurisdictions, "the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result" ...

This is the second part of the delimitation exercise to which the Court will turn, having first established the provisional equidistance line.

Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line ... A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

This is not to suggest that these respective areas should be proportionate to coastal lengths—as the Court has said "the sharing out of the area is therefore the consequence of the delimitation, not vice versa". [paras. 118–122]

25. It was the first time that the Court had set out the three principles to be applied in questions of maritime delimitation, in keeping with articles 74 and 83 of the United Nations Convention on the Law of the Sea, and had applied them in an actual dispute. Two specific issues had also arisen in that case and warranted the attention of members of the Commission, given that they had been discussed by the Commission at an earlier stage of the codification exercise.

26. The first issue was the question of whether Sulina dyke—a dyke on the Romanian coast built in 1956 and enlarged several times to its current length of 7.5 kilometres—should be used as a base point in carrying out the delimitation. To answer that question, the Court had examined in great detail article 11 of the United Nations Convention on the Law of the Sea, which provided that:

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works. [para. 132]

27. In order to determine whether the Sulina dyke could be considered “harbour works” that formed “an integral part of the harbour system”, the Court had gone quite far back in its legislative history to the *travaux préparatoires* on article 8 of the 1958 Convention on the Territorial Sea and Contiguous Zone, carried out by the Commission in the early 1950s. The Court had noted the following:

In 1954, the Special Rapporteur of the ILC observed that “dykes used for the protection of the coast constituted a separate problem and did not come under either Article 9 (ports) or Article 10 (roadsteads)”¹⁹⁸. Subsequently, the concept of a “dyke” was no longer used, and reference was made to “jetties” serving to protect coasts from the sea.¹⁹⁹ The first sentence of article 11 of [the United Nations Convention on the Law of the Sea] corresponds, apart from one minor change in the wording, to that of Article 8 of the Convention on the Territorial Sea and Contiguous Zone. ... The expert at the 1958 Conference stated that “harbour works such as jetties [are regarded] as part of ... land territory”.²⁰⁰ [para. 134]

28. The Court had gone on to note that the Commission had included the following comment in its report to the General Assembly:

Where such structures are of excessive length (for instance, a jetty extending several kilometres into the sea), it may be asked whether this article [Art. 8] could still be applied ... As such cases are very rare, the Commission, while wishing to draw attention to the matter, did not deem it necessary to state an opinion.²⁰¹ [*ibid.*]

29. The Court had accordingly reasoned that “the ILC did not, at the time, intend to define precisely the limit beyond which a dyke, jetty or works would no longer form ‘an integral part of the harbour system’” [*ibid.*]. The Court had then concluded “that there are grounds for proceeding on a case-by-case basis, and that the text of article 11 of [the United Nations Convention on the Law of the Sea] and *the travaux préparatoires* do not preclude the possibility of interpreting restrictively the concept of harbour works so as to avoid or mitigate the problem of excessive length identified by the ILC” [*ibid.*]. Noting that “[t]his may be particularly true where, as here, the question is one of delimitation of areas seaward of the territorial sea” [*ibid.*], the Court had concluded, in the light of the legislative history of article 11 of the United Nations Convention on the Law of the Sea, that the landward end,

rather than the seaward end, of Sulina dyke should be used as a base point for the delimitation.

30. The second issue in relation to which the Court had had to examine the relevance of some provisions of the United Nations Convention on the Law of the Sea was that of Serpents’ Island, a small Ukrainian maritime feature directly off the coast of Romania. The issue raised by the parties in particular had been whether, for the purposes of delimitation, Serpents’ Island was an “island” under article 121, paragraph 1, of the Convention, or merely a “rock” under article 121, paragraph 3. Although both generated a territorial sea, only an island generated a continental shelf and an exclusive economic zone. After reading out article 121, paragraph 3, of the Convention, the President of the International Court of Justice pointed out that Romania had referred to the statement it had made upon signature and ratification of the Convention to the effect that “uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States” [para. 35]. Romania had argued, based on the Commission’s work on reservations to treaties, that its statement constituted a declaration interpreting article 121, paragraph 3, of the Convention, which was permitted under article 310 of the Convention, and not a reservation to that article, which was not permitted under article 309 of the Convention. Upon examining the issue, the Court had observed that:

[U]nder Article 310 of [the United Nations Convention on the Law of the Sea], a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of [the Convention] in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of [the Convention] as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania’s declaration as such has no bearing on the Court’s interpretation. [para. 42]

31. Thus, the Court had considered the statement of Romania to be a declaration rather than a reservation. It had not explicitly set out its views on the role, if any, of the silence of Ukraine in relation to that declaration, but had concluded that the declaration had no bearing on its own interpretation of article 121, paragraph 3.

32. In any case, the Court had held that the issue of whether Serpents’ Island was an island under article 121, paragraph 1, or a mere rock under article 121, paragraph 3, was irrelevant to the case. It had stated the following:

Given this geographical configuration and in the context of the delimitation with Romania, any continental shelf and exclusive economic zone entitlements possibly generated by Serpents’ Island could not project further than the entitlements generated by Ukraine’s mainland coast because of the southern limit of the delimitation area as identified by the Court ... Further, any possible entitlements generated by Serpents’ Island in an eastward direction are fully subsumed by the entitlements generated by the western and eastern mainland coasts of Ukraine itself. The Court also notes that Ukraine itself, even though it considered Serpents’ Island to fall under Article 121, paragraph 2, of [the United Nations Convention on the Law of the Sea], did not extend the relevant area beyond the limit generated by its mainland coast, as a consequence of the presence of Serpents’ Island in the area of delimitation. [para. 187]

33. Lastly, on 28 May 2009, the Court had issued an order on the request for the indication of provisional

¹⁹⁸ *Yearbook ... 1954*, vol. I, 259th meeting, p. 88, para. 23.

¹⁹⁹ See *Yearbook ... 1956*, vol. II, document A/3159, chap. II, commentary to draft article 8, para. (2), p. 270.

²⁰⁰ *Official records of the United Nations Conference on the Law of the Sea, Volume III: First Committee (Territorial Sea and Contiguous Zone), Summary records of meetings and Annexes*, 46th meeting, p. 142, para. 11 (document A/CONF.13/39, United Nations publication, Sales No. 58.V.4, Vol. III).

²⁰¹ *Yearbook ... 1956*, vol. II, document A/3159, chap. II, commentary to draft article 8, para. (3), p. 270.

measures in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*. The application of Belgium of 19 February 2009 concerned Mr. Hissène Habré, the former President of Chad, who had resided on Senegalese territory since 1990. Belgium had submitted that by failing to prosecute or extradite Mr. Habré for certain acts he was alleged to have committed during his presidency, including crimes of torture and crimes against humanity, Senegal had violated the obligation *aut dedere aut judicare* laid down in article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and established in customary international law.

34. On the same day, Belgium had filed a request for the indication of provisional measures, asking the Court to require Senegal to take “all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied” [para. 15 of the order]. Belgium had justified its request by referring to statements made by Mr. Abdoulaye Wade, President of the Republic of Senegal, which, according to Belgium, indicated that if Senegal could not secure the necessary funding to try Mr. Habré, it could “cease monitoring him or transfer him to another State” [para. 24].

35. Senegal had asserted that, since 2005, it had been willing to try Mr. Habré in the Senegalese courts and thus to comply with its obligations under international law. Although it had not begun to try Mr. Habré, it had taken a number of steps towards that end, “in particular the introduction of offences linked to international crimes into its criminal legislation, the broadening of the jurisdiction of the Senegalese courts and the search for the financial resources needed for the organization of such a trial” [para. 27]. Senegal had argued that no urgency existed that might justify the indication of provisional measures and that Belgium had not identified the rights that it wished to see protected or the irreparable prejudice that might be caused to those rights without the indication of provisional measures. Moreover, in response to a question put by a member of the Court at the hearings, Senegal had made a formal declaration that it would not allow Mr. Habré to leave its territory while the case was pending before the Court.

36. Given those circumstances, the Court had held that there was no risk of irreparable prejudice to the rights claimed by Belgium that warranted the indication of provisional measures. On those grounds, the Court had declined to exercise its power under article 41 to indicate provisional measures.

37. In terms of pending cases, he said the Court had concluded hearings in the case concerning the *Dispute regarding Navigational and Related Rights* and would deliver its judgment at a public sitting on 13 July 2009. After the summer, it would begin hearing arguments on the merits by the parties in the case concerning *Pulp Mills on the River Uruguay*.

38. Four new contentious cases had been filed with the Court in the past year. First, as mentioned previously in

connection with the request of Georgia for the indication of provisional measures, in August 2008, Georgia had instituted proceedings against the Russian Federation. Having disposed of the request of Georgia, for the indication of provisional measures, the Court would now turn its attention to the application itself. Secondly, in November 2008, the former Yugoslav Republic of Macedonia had instituted proceedings against Greece (*Application of the Interim Accord of 13 September 1995*), contending that the latter had violated its rights under an interim accord between the two States by objecting to its application to join NATO. Thirdly, in December 2008, Germany had instituted proceedings against Italy (*Jurisdictional Immunities of the State*), contending that Italy had violated its sovereign immunity by allowing several civil claims in its courts concerning violations of international humanitarian law by the German Reich during the Second World War. Fourthly, as mentioned previously, Belgium had instituted proceedings against Senegal in February 2009 in connection with the obligation to extradite or prosecute the former President of Chad, Mr. Hissène Habré.

39. In addition to those new contentious cases, in October 2008 the Court had received a request from the General Assembly of the United Nations for an advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*. In its resolution 63/3 of 8 October 2008, the General Assembly had decided, in accordance with Article 96 of the Charter of the United Nations, to request the Court to render an advisory opinion on the following question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” Thirty-six States Members of the United Nations had filed written statements on the question. In addition, the authors of the declaration had filed a written contribution. The Court had set 17 July 2009 as the time limit for the submission of written comments on the written statements by States and for a written contribution by the authors of the declaration.

40. With the inclusion of those new cases, the current docket of the Court stood at 15 cases raising a wide variety of issues of public international law. The work of the Court, much like the work of the International Law Commission, genuinely reflected the broad substantive scope of contemporary international law. As was evident from his presentation on the Court’s recent activities, the Commission’s work continued to be very useful to the Court as it took on those new challenges.

41. He wished to speak briefly about a few issues that the Court would face in the future and on the relationship between the Court and the Commission.

42. First of all, owing to the increase in the number of cases brought before the Court, each judge was increasingly in need of his or her own research assistant. That would help to speed up the work of the Court, since judges currently had to conduct all the necessary research themselves, compile the literature and analyse the case law, which took up a considerable amount of their time.

43. Given its growing caseload, the Court had been looking into ways of expediting its work, something that would require the cooperation of others as well as efforts by the Court itself. A trend towards an increase in the number of preliminary objections had emerged: of the 100 or so judgments issued since the establishment of the Court, nearly half had been preceded by preliminary objections to admissibility and to jurisdiction. Although it was legitimate for parties to formulate preliminary objections, doing so did add to the Court's caseload. Likewise, there had been growing recourse to the Court for the indication of provisional measures. In the past decade, 22 such requests had been made, as compared with 7 from 1988 to 1998. Once again, it was not simply a matter of procedural tactics, since most often the parties had justifiable reasons for requesting such measures. It had sometimes been suggested that requests for the indication of provisional measures were used for extraneous purposes, such as to draw attention to a dispute, largely because such requests were given priority under the Statute of the Court. He did not believe that this was true, but there had certainly been an increase in the number of such requests.

44. In order to expedite proceedings and to deal with the increase in its caseload, the Court had recently revised Practice Direction III, concerning the length of written pleadings; Practice Direction VI, concerning the length of oral proceedings, particularly with regard to the length of pleadings of the parties; and Practice Direction XIII, concerning the views of the parties relating to questions of procedure.

45. Another matter that deserved attention was the jurisdictional basis of the cases on the Court's docket. In the past six years, of the 27 cases brought before the Court, 2 had been brought by special agreement, 5 on the basis of the optional clause, 15 cases through a compromissory clause in a treaty, 2 through *forum prorogatum* and 5 based on the provisions of the Court's Statute concerning advisory procedures or the interpretation of judgments. One could see from those figures that there had been a fairly large increase in the use of the compromissory clause. In order to extend the compulsory jurisdiction of the Court, consideration might be given to encouraging States to make the declaration under article 36, paragraph 2, of its Statute, but also to insert a compromissory clause in the bilateral or multilateral treaties that they concluded, making it obligatory to refer to the Court disputes concerning the interpretation or application of a treaty.

46. The third question, which could be dealt with only in a cursory fashion, concerned the proliferation of international judicial institutions and the fragmentation of jurisprudence. He felt that the fears expressed on that subject were exaggerated and were not borne out by experience. His impression was that the various international courts and tribunals were carefully examining each other's decisions and coming to a largely common understanding of the law in such fields as human rights law and the law of the sea. The International Court of Justice, as the principal judicial organ of the United Nations, occupied a special place, as it was representative of the international community at large. The fact that it was the only universal international judiciary with general jurisdiction over

issues of international law was noteworthy. The Court thus addressed the issue of human rights, for example, within the general framework of the international responsibility of States, rather than in the context of the specific civil or criminal responsibility of the individuals involved. The Court's authority gave its jurisprudence a special measure of respect. That said, he did not think that it was either necessary or desirable to establish a hierarchical order among the various international courts and tribunals.

47. Lastly, with regard to cooperation between the International Court of Justice and the International Law Commission, he said that the Commission's work was extremely useful to the Court in its judicial activities. In fact, in 8 of the 23 cases adjudicated by the Court in the past six years, it had cited positions taken by the Commission in its annual report or codification efforts, such as the draft articles on the responsibility of States for internationally wrongful acts.²⁰² Similarly, the Commission frequently made use of or referred to the Court's judgments. It was to be hoped that the two bodies would not only continue, but also strengthen, their cooperation in the future.

48. The CHAIRPERSON, after thanking the President of the International Court of Justice for his statement, announced that he had agreed to reply to questions from members of the Commission.

49. Ms. ESCARAMEIA said that she had three points to raise. First, with regard to interpretative declarations, she said that many people had been surprised at the radical position adopted by the Court in the case concerning *Maritime Delimitation in the Black Sea*, with its finding that the interpretative declaration by Romania had no effect *vis-à-vis* Ukraine. The Commission was studying interpretative declarations and their effects—after all, States would hardly make them if they had no effect—and she would therefore welcome an explanation by Judge Owada of the Court's position.

50. Secondly, was there any topic that the Commission could take up that might help the Court in its activities?

51. Thirdly, the Court had tended to adopt its judgments with a greater degree of consensus recently and with fewer disagreements among judges, which might lead outside observers to think that its decisions were negotiated. In order to speed up its work, might the Court not consider reverting to its previous practice of putting decisions to the vote?

52. Judge OWADA (President of the International Court of Justice), responding to Ms. Escarameia's first question, explained that he had said, not that interpretative declarations in general had no legal effect, but simply that the declaration by Romania had had no bearing on the Court's interpretation of article 121, paragraph 3, of the United Nations Convention on the Law of the Sea [para. 42]. Speaking in his personal capacity, he noted that during the proceedings, Romania had argued that its declaration was not a reservation and was therefore not contrary to article 310 of the Convention, while at the same time asserting that by its declaration it had reserved its

²⁰² See footnote 10 above.

position and that the failure of Ukraine to object meant that Ukraine had implicitly accepted that position. The Court had thought otherwise: it had ruled that the declaration by Romania was not a reservation and therefore could not have the same legal effect as a reservation in the absence of an objection.

53. In response to Ms. Escarameia's second question, he said that during the seminar to commemorate the sixtieth anniversary of the International Law Commission, many topics had been proposed, but it would be presumptuous of him to tell the Commission which of them it should study.

54. With regard to Ms. Escarameia's third question, he said that, at least since he had been a member of the Court, judges had increasingly been attempting to achieve agreement on cases through persuasion, and there was some convergence of views—not through any political compromise, however. That approach helped them to see the issues more clearly and perhaps to produce better judgments.

55. Mr. MELESCANU applauded the landmark decision of the ICJ on the handling of maritime delimitation cases, a key component of the Court's activities. The judgment in the case concerning *Maritime Delimitation in the Black Sea* was a turning point: it provided a logical, clear and equitable method of resolving such disputes. The comments by the President of the Court on the subject and the judgment itself had dealt a serious blow to the Commission's work on reservations to treaties, however, and in particular, to its efforts to narrow the gap between reservations and interpretative declarations. The Commission would accordingly have to re-examine the issue. Judge Owada had also mentioned an issue that was important for the Court: the use of compromissory clauses as a means of expanding its compulsory jurisdiction. He asked whether, in Judge Owada's opinion, the Commission should contribute in some way to pursuing that objective.

56. Judge OWADA (President of the International Court of Justice) said that in his view, the Court's judgment in the *Maritime Delimitation in the Black Sea* case was not at odds with the Commission's work on reservations to treaties. The Court had simply stated that, irrespective of its legal effects, the interpretative declaration by Romania in no way affected the Court's interpretation of article 121, paragraph 3, of the United Nations Convention on the Law of the Sea. As to the basis for the compulsory jurisdiction of the Court, it would be interesting for the Commission to take up that issue, but it was difficult to say whether that was a task best left to the Commission or to a political organ such as the Sixth Committee of the General Assembly. In any case, it would be interesting for the international legal community to reflect on what means might be used to enhance the Court's effectiveness through the expansion of its compulsory jurisdiction. The subject deserved serious consideration, particularly in view of its relationship with international public order, in which there was currently growing public interest.

57. Sir Michael WOOD said that he fully agreed that the Court's oral proceedings should be shorter and more focused. The Court could move in that direction by clearly indicating to the parties, at least in some cases,

the subjects on which it would be helpful to hear in-depth argument. It could even put questions to the parties, as the European Court of Human Rights routinely did.

58. Judge OWADA (President of the International Court of Justice) said that the issue of the hearings was regularly addressed by the Court through the Rules Committee, whose report was discussed in plenary. Generally speaking, the Court tried to encourage the parties to confine their oral arguments to specific points. The revised version of Practice Direction VI read, in part:

[T]he Court will find it very helpful if the parties focus in the first round of the oral proceedings on those points which have been raised by one party at the stage of written proceedings but which have not so far been adequately addressed by the other, as well as on those which each party wishes to emphasize by way of winding up its arguments.²⁰³

59. One might think that this recommendation was not phrased directly enough, but it should be recalled that the Court always had to take into account the fact that the parties to the proceedings were sovereign States and that the cases with which the Court was dealing were purely international in nature. The Court was continually attempting to strike a balance between the need for rigour in its proceedings and respect for the sovereign character of the parties involved. It should also be recalled that asking the parties questions in order to get them to concentrate on certain points would require some preliminary discussion among judges. That would be a change from the procedures currently followed by the Court, which were based on the principle that judges did not consult with one another before drafting their notes in order not to prejudge the case. There was nothing to prevent the Court from looking into the idea, and it had, in fact, already done so, but certain judges insisted on maintaining their independence until they had drafted their notes.

60. Mr. WISNUMURTI said that the Court's judgment of 3 February 2009 had settled the *Maritime Delimitation in the Black Sea* case very well. As Judge Owada had explained, the Court had proceeded through several stages in order to arrive at an equitable solution: the first stage had consisted of establishing the provisional equidistance line in the areas to be delimited; the second, of taking into account any special circumstances; and the third, of considering coastal lengths. It was his impression, however, that in the past, coastal lengths had never been taken into account in delimiting maritime boundaries, including in the respect of equidistance. He wished to know the grounds on which the Court had decided to adopt the criterion of coastal lengths, whether that had been a main factor in the Court's judgment and whether in relying on coastal lengths, the Court had wished to set a precedent in maritime delimitation.

61. Judge OWADA (President of the International Court of Justice) said that the Court had tried to develop an approach to maritime delimitation based on its evolving jurisprudence and on articles 74 and 83 of the United Nations Convention on the Law of the Sea. As members of the Commission no doubt recalled, after 1969—in other words, after the *North Sea Continental*

²⁰³ Report of the International Court of Justice, 1 August 2008–31 July 2009, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 4 (A/64/4)*, para. 234.

Shelf cases that the Court had examined—the Court had dealt with many cases of maritime delimitation. The law of the sea had given rise to heated debate, swelling into controversy, when the Convention was adopted in 1982. Since then, the law of the sea had gradually evolved and been consolidated through the jurisprudence of the Court and international arbitral awards. Generally speaking, a great deal of progress had been made on the basis of a growing consensus within the international legal community. In the case concerning *Maritime Delimitation in the Black Sea*, the Court had tried to bring together in a clearly intelligible manner the various points articulated by its jurisprudence and the relevant international arbitral awards without departing from the general trend in the development of the law of the sea. The Court had established three stages for the settlement of maritime delimitation cases, the first stage being to draw a provisional delimitation line based on the equidistance line principle. As the judgment explained, “[a]t this ... stage ... the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data” [para. 118]. Thus, the issue of coastal length did not arise at that stage. At the second stage, special circumstances could be taken into account in order to modify the provisional equidistance line in such a way as to produce an equitable solution. Other factors could also be taken into consideration, but in the case in question, the length of the coastline had figured prominently. The Court had therefore taken it into account and, at the second stage, had come to the conclusion that given the specific circumstances of the case, there was no need to change the equidistance line. Lastly, at the third stage, the Court was required to:

verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths. [para. 122]

62. The third stage thus introduced a negative, rather than positive, criterion for adjusting the equidistance line: finding out whether the difference in coastal lengths was such that the provisional equidistance line established at the first and second stages led to an inequitable result by reason of a marked disproportion between the respective coastal lengths. In the case in question, no such inequitable result had been produced.

63. Mr. FOMBA said that he would like to comment on the proliferation of international judicial institutions and the fragmentation of international law. The year 2009 had been a particularly prosperous one for Africa, since the African Union had just established two extremely important institutions: the African Court of Justice and Human Rights—a merger between the African Court on Human and Peoples’ Rights and the African Court of Justice—and the African Union Commission on International Law, to which 11 members had recently been elected. It would be interesting to hear Judge Owada’s views on those developments, and particularly on the competence of the new Commission to codify and progressively develop international law at the African level.

64. Judge OWADA (President of the International Court of Justice) said that the proliferation of international courts and tribunals and the corresponding risk of fragmentation had been discussed on a great many occasions by the international legal community, including by international judges themselves, and no unanimous opinion had been formed. Personally, he was fairly optimistic about the prospect of developing a more or less consistent practice, for the reasons he had stated previously. The idea of creating a hierarchy among the various tribunals, even on the basis of resolutions by the General Assembly or other United Nations bodies, was unrealistic. The objective must instead be to achieve the overall application of universal principles throughout the global community. That was why the efforts of bodies such as the International Law Commission in the codification of substantive rules were of such great importance. The task of tribunals was to interpret and apply the law, and by so doing, they inevitably clarified the rules of law. However, they could not engage in a full-fledged legislative process, which had to be left to a codification body such as the International Law Commission or to deliberative bodies such as the plenipotentiary conferences convened on particular topics. There were encouraging signs of a convergence in practice; for example, the International Tribunal for the Former Yugoslavia invoked the jurisprudence of the ICJ and, conversely, the ICJ had certainly relied on the judgements of the International Tribunal for the Former Yugoslavia in its own cases concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. There was thus a productive interplay between the two institutions, which reinforced one another. Human rights was an area that was potentially controversial, owing to cultural diversity and the impact on substantive law. A body like the ICJ could not do much about that because it was primarily a judicial organ, and the bulk of the responsibility lay with the institutions that the international community had vested with legislative functions.

65. Mr. VALENCIA-OSPINA said that, in his statement, Judge Owada had pointed to the increasing use of compromissory clauses in bilateral and multilateral treaties and had expressed the opinion that such clauses were the most effective way to expand the compulsory jurisdiction of the Court. In that connection, and against the background of the relationship between the Commission and the Court, he wondered whether, in the final versions of the draft articles that it recommended to the General Assembly for adoption, the Commission should incorporate final clauses providing for the compulsory jurisdiction of the Court. With regard to its methods of work, the Court could take pride in the fact that it had succeeded in holding or scheduling oral proceedings in all cases in which the written proceedings had been completed, and was therefore up to date in its work. Since that was the case, one might ask whether continued priority needed to be given to changes in the Court’s methods of work, even if such changes were considered on a regular basis. The Court had shortened the time allowed for its deliberations and for handing down its judgments: delays were thus attributable exclusively to the time that the parties took to prepare their written pleadings. Was there any reason to reduce the time the parties were allotted, or as some judges had suggested, to do away with oral proceedings

altogether, now that the Court's existing methods of work had proved to keep it up to date with its caseload? As to the significant increase in the past decade in the number of requests for the indication of provisional measures, perhaps there was a causal relationship between that increase and the fact that the Court had now decided to make provisional measures binding, contrary to its past jurisprudence. It was understandable that States might wish to obtain orders for the indication of provisional measures at a very early stage in the proceedings, since in the past they had had to wait many years for a judgment on the merits before a binding decision was handed down.

66. Judge OWADA (President of the International Court of Justice) said that Mr. Valencia-Ospina's proposal to incorporate compromissory clauses into the final form of draft articles was an interesting idea. Without wishing to suggest that the Commission should take any such action, he said it would be useful for it to consider the matter. In that connection, he wished to draw the Commission's attention to the Court's interesting but also somewhat troubling advisory opinion of 28 May 1951 on *Reservations to the Convention on Genocide*. In it, the Court had concluded that reservations to article IX of the Convention did not affect the object and purpose of the Convention and were therefore permissible. As far as procedural matters were concerned, that was acceptable. However, if a reservation to a compromissory clause set aside an obligation arising from the Court's compulsory jurisdiction over substantive issues in the Convention itself, one might then say that it could indeed affect the object and purpose of a treaty. That was one possible argument, and although he did not necessarily espouse it, he thought the Commission might wish to look into the matter.

67. With regard to the Court's methods of work, he pointed out that it organized a strategic planning meeting each year that had proved to be particularly useful, even though requests for the indication of provisional measures sometimes caused the programme of work to be adjusted. The fact that the Court had decided to operate in parallel on two different cases had also helped to expedite the work and to deal with the considerable increase in the number of cases on the docket. The basic problem, as Mr. Valencia-Ospina had correctly pointed out, was the length of time given to the parties for the preparation of their memorials and counter-memorials. The Court had been trying to curtail it as much as possible, but experience had shown that it was not easy to negotiate on that with States and to dictate changes against their wishes. As to whether there was a causal link between, on the one hand, the Court's position, adopted in the *LaGrand* case, that orders on provisional measures had binding effect, and, on the other, the increase in the number of requests for the indication of provisional measures, he could not say for sure. The increase in the number of requests was not necessarily a bad thing, and his intention had simply been to point out that it had placed an additional burden on the Court, which it must take into account in drawing up its programme of work.

68. Mr. VASCIANNIE, referring to the case concerning *Maritime Delimitation in the Black Sea*, asked whether the Court had not returned, 40 years after the *North Sea Continental Shelf* cases, to the pre-1969 legal situation,

namely, to the approach of establishing an equidistance line and then taking special circumstances into account. How did that method compare with the "equitable solution" approach that had subsequently emerged? With regard to the *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)* (*Mexico v. United States of America*), he asked whether Judge Owada considered the result to be satisfactory, given the fact that the Mexican nationals had been executed.

69. Judge OWADA (President of the International Court of Justice) said that he would not go so far as to say that the Court had gone back to the pre-1969 situation. The clear difference was that, because of the way the law had evolved and the adoption of articles 74 and 83 of United Nations Convention on the Law of the Sea, the main objective of delimitation had now become that of achieving an equitable result. The problem of whether such a result had to be obtained by taking a special circumstance into account had to be resolved on a case-by-case basis. In certain cases, the Court might conclude that a given factor would not affect the line it had drawn, but even so, that factor was not necessarily irrelevant. The judgment reflected the Court's determination to conform to the provisions of articles 74 and 83 of the Convention, the Court had also followed the current method of delimitation, with its three stages. As to the *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)*, the request by Mexico concerned only paragraph 153 (9) of the judgment. The Court had concluded that, under article 60 of its Statute, it was not able to provide such an interpretation. It had recognized that there was a problem, but that conclusion did not hinge on paragraph 153 (9). The Court's conclusion might well seem unsatisfactory, in that Mr. Medellín Rojas had been executed, but there had been nothing that the Court could do about that.

70. The CHAIRPERSON thanked Judge Owada for having joined in a dialogue with the members of the Commission.

Protection of persons in the event of disasters (*continued*) (A/CN.4/606 and Add.1, sect. F, A/CN.4/615, A/CN.4/L.758)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

71. The CHAIRPERSON invited members of the Commission to resume their consideration of the second report on protection of persons in the event of disasters (A/CN.4/615).

72. Ms. ESCARAMEIA said that, first of all, she agreed with the rights-based approach adopted by the Special Rapporteur, since the point of departure of the draft articles was victims of disasters and its purpose was to alleviate their suffering. Secondly, she agreed with the idea that disasters could not be defined strictly as natural or man-made. That was why she disagreed with the delegations

in the Sixth Committee of the General Assembly that had suggested that the Commission should begin by dealing with the first category and subsequently proceed to the second. Thirdly, she only partially agreed with the road map that the Special Rapporteur had outlined in his introduction of the chapter of his second report devoted to future work on the topic (para. 71). In her point of view, after draft article 3 on the duty to cooperate, it would be preferable to include a reference to the main principles on which the draft articles were based, to then refer to the specific rights and duties of States and other entities involved and lastly to deal with operational issues.

73. On the scope of the topic, the Special Rapporteur had examined from specific angles, namely *ratione materiae*, *ratione personae* and *ratione temporis*, the rights and needs of persons in need of protection, which were not distinct elements but rather the same elements seen from a different angle. With reference to the dual nature of the protection of persons in the event of disasters, the Special Rapporteur had referred to two axes, the first being relations between States, and the second, relations between States and persons in need of protection. That view was somewhat restrictive, however, since it failed to take into account relations between the affected States and humanitarian organizations, between other States and humanitarian organizations, or between affected persons and humanitarian organizations, all of which constituted additional axes. It was important for the draft articles to reflect the complexity of those interactions. Also, in emphasizing the importance of the States/persons axis, the Special Rapporteur referred extensively to the jurisprudence of the ICJ, but he could have included many other examples. In fact, there were entire bodies of international law—international human rights law, and, to a certain extent, international humanitarian law and international environmental law—that were based on the relationship between States and persons.

74. With regard to the scope of the topic *ratione personae*, the Special Rapporteur had rightly referred to non-State actors, but given the importance he had attributed to the State/State axis, the role of non-State actors risked not receiving sufficient attention.

75. As to the *ratione temporis* aspect, it was difficult to understand why the pre-disaster phase had been left aside for the time being. Perhaps that had something to do with the argument advanced in paragraph 18 of the second report that, at the present stage, duplication of efforts was to be avoided in view of the work being done in the same area by the ISDR. Yet the focus of that work appeared to be more operational than normative, and she would therefore appreciate an explanation from the Special Rapporteur on that subject. The importance of the pre-disaster phase had been highlighted, *inter alia*, in General Assembly resolution 63/141 (International cooperation on humanitarian assistance in the field of natural disasters, from relief to development), in which the General Assembly had emphasized the responsibility of all States to undertake disaster preparedness. Moreover, in the topical summary of the discussion held in the Sixth Committee of the General Assembly at its sixty-third session, several delegations had spoken in favour of focusing on the three

phases of a disaster, namely, prevention, response and rehabilitation (A/CN.4/606, para. 80).

76. She agreed for the most part with the wording of draft article 1 (Scope), but the expression “adequate and effective” seemed redundant and she would prefer to retain only the adjective “adequate”. More importantly, the phrase “all phases of a disaster” should be replaced by “in all phases related to a disaster”, in order to avoid giving the impression that the pre-disaster phase had been excluded. Alternatively, something to that effect could be included in the commentary.

77. Regarding draft article 2 (Definition of disaster), she said she agreed with Mr. Murase on the need to define some of the adjectives, such as “serious”, “significant” and “widespread”, or at least to clarify their meaning in the commentary. As Mr. Saboia had noted, the threshold conveyed by the phrase “a serious disruption” seemed to be too high.

78. Although her position might not be shared by the majority of members of the Commission, she had a problem with the Special Rapporteur’s reasoning and conclusion that armed conflicts should be excluded from the definition, since the many documents he cited in support of that conclusion were unconvincing. In her view, armed conflicts should be excluded only if they were the sole reason for the disaster and only to the extent that the relevant principles, remedies, rights and duties had not already been covered in another field of international law, namely international humanitarian law. Disasters that had as one of their components an armed conflict, particularly a non-international one, were a very frequent occurrence and should definitely be covered. In its 2003 resolution on humanitarian assistance, the Institute of International Law had explicitly included disasters “caused by armed conflicts or violence”,²⁰⁴ which was a clear indication that other bodies of international law failed to sufficiently cover those situations. Moreover, although the Special Rapporteur had stated that “[t]he exclusion of armed conflict from the subject matter to be studied was supported by all delegations” in the Sixth Committee (para. 6 of the second report), according to the topical summary of the discussion, “[i]t was generally agreed that legal issues already covered by other areas of international law, including international humanitarian law and international environmental law, should be excluded from the purview of the topic” (A/CN.4/606, para. 79)—something which was not quite the same thing.

79. For those reasons, she would prefer the definition in the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, but she understood why the Special Rapporteur had wished to avoid the difficulty entailed in a reference to causation. She could therefore accept the wording of draft article 2, provided that the words “excluding armed conflict” were deleted and that a clause was added further on in the draft articles indicating that the Commission’s work was without prejudice to the relevant provisions of international humanitarian law or to those of other areas of international law.

²⁰⁴ Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), pp. 263 *et seq.*, especially p. 267, para. 2.

80. The Special Rapporteur had stated that solidarity and cooperation were the principles underlying the protection of persons in the event of disasters. It therefore was unclear why he should propose a draft article on the latter but not on the former. Apart from solidarity, there were other principles that should be included in the draft articles, such as the dignity and human rights of persons in need of protection and non-discrimination in the protection of individuals.

81. As to draft article 3 (Duty to cooperate), the expression “as appropriate” should not apply to all of subparagraph (a), given that States always had the obligation to cooperate with the United Nations pursuant to Article 56 of the Charter of the United Nations, to which the Special Rapporteur frequently referred. It was regrettable that the expression “non-governmental organizations” had been omitted, replaced by the euphemism “civil society”, in subparagraph (c). She therefore proposed that an additional subparagraph should be inserted between current subparagraphs (b) and (c) in order to designate, not NGOs in general, but rather “relevant humanitarian non-governmental organizations”—an expression used in numerous documents in the field, including General Assembly resolution 63/139 of 11 December 2008 (Strengthening of the coordination of emergency humanitarian assistance of the United Nations). It would also be good to mention cooperation with the least developed countries, as suggested by Mr. Saboia.

82. With regard to terminology, the draft article should refer to States “or other territorial entities”, as the Institute of International Law had in its 2003 resolution. As to the future work of the Commission on the topic, it was useful to keep in mind that, according to the topical summary of the discussion in the Sixth Committee, “[s]everal delegations were of the view that the concept of responsibility to protect was relevant to the topic” (A/CN.4/606, para. 87).

83. Lastly, she was in favour of referring articles 1 to 3 to the Drafting Committee after due account had been taken of the suggestions made.

The meeting rose at 1 p.m.

3017th MEETING

Wednesday, 8 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Protection of persons in the event of disasters (*continued*) (A/CN.4/606 and Add.1, sect. F, A/CN.4/615, A/CN.4/L.758)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON warmly welcomed Ms. Margareta Wahlström, Assistant Secretary-General for Disaster Risk Reduction and Special Representative of the Secretary-General for the Implementation of the Hyogo Framework for Action, who was attending the meeting as an observer. He then invited the Commission to resume its consideration of the second report on the protection of persons in the event of disasters (A/CN.4/615).

2. Mr. GAJA commended the Special Rapporteur on his second report on the protection of persons in the event of disasters and said that his ability to elicit responses from the main institutional actors had provided the Commission with a wealth of material for consideration. As it was not yet clear what kind of principles and rules the Commission intended to formulate on the subject, it was difficult to express more than tentative views on the matters dealt with in the report.

3. The rights-based approach, which had been advocated by several members of the Commission in 2008 and supported by some States in the Sixth Committee, would seem to necessitate the formulation of a number of obligations for States and other entities, in particular for the State on whose territory the disaster occurred, i.e. the affected State, because rights had their counterpart in obligations. The resolution on humanitarian assistance adopted in 2003 by the Institute of International Law²⁰⁵ could to some extent be used as a model.

4. While there was certainly consensus within the Commission that States and other entities should cooperate in disaster relief, it was unclear what specific international obligations cooperation would entail (cooperation about what, to what extent and with whom), and it was far from obvious what consequences would flow from a failure by States, especially the affected State, to comply with their obligation to protect.

5. It would be difficult for the Commission to outline precise obligations under international law for States other than the affected State and for entities other than States. A number of States and NGOs might be willing to provide assistance, but they could well be reluctant to accept that they were under an obligation to do so. In fact, willing helpers were not usually lacking; what was often needed was the efficient coordination of the disaster response. The role of the affected State was crucial at that juncture. After a disaster, although assistance was available, it was sometimes the affected State that hindered protected persons from exercising their right to receive assistance. The affected State was certainly entitled to ensure the coordination of relief efforts and it might have very good reasons to refuse certain forms of assistance, but according to the Bruges resolution, “[a]ffected States are under the

²⁰⁵ *Ibid.*, pp. 265 *et seq.*

obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance or to refuse access to the victims”.²⁰⁶ For that reason, the affected State would not be entirely free to create obstacles to the flow of international assistance. If the Commission agreed with that statement, at least in principle, the key question then would be what would happen if the affected State failed to comply with that obligation. The above-mentioned resolution had been adopted in 2003 and, since then, events had proved that such non-compliance was a major concern. Although a right of protected persons to humanitarian assistance seemed to imply some form of intervention on the part of States other than the affected State, a consensus within the Commission or elsewhere on that concept of humanitarian assistance was improbable. In that connection, he recalled the impassioned plea made by Mr. Vasciannie in 2008.²⁰⁷

6. The Commission was unlikely to enhance the protection of persons in the event of disasters by setting forth rights and obligations, unless it addressed the important question of how to facilitate the flow of international assistance with the consent of the affected State. Therefore, the Commission would have to investigate some of the causes of affected States’ unwillingness to accept international assistance. In some cases, that unwillingness was exacerbated by the worry that foreign States would interfere unduly in the conduct of internal affairs and that NGOs might pursue policies inconsistent with those of the affected State.

7. One option for the Commission would be to look for more efficient and neutral ways of coordinating international assistance. Although it was an unusual approach for the Commission, any consideration of that question should include institutional aspects. The Commission could, for instance, suggest a stronger role for the United Nations, or a United Nations agency, in promoting and coordinating all international assistance, whether from public or private sources, and in facilitating the flow of assistance that would be acceptable to the affected State. The idea would be to promote a dialogue between the affected State and the United Nations, or one of its specialized agencies, thus obviating the need for that State to deal with a multiplicity of entities or States. Despite all the work already being done within the Organization, as described in the informal paper containing the observations of OCHA,²⁰⁸ assistance to an affected State would be facilitated if a single international organization were to collect data, list needs and negotiate the means of delivering assistance acceptable to the affected State. If the issue of an affected State’s reluctance to accept assistance were ignored, there was a risk that the Commission would merely make a series of statements, like those expressed by the Institute of International Law, which would probably have no positive impact.

8. He would be reluctant to start drafting principles relating to the protection of persons before more specific

obligations and their implementation had been discussed in depth. The Special Rapporteur had been wise not to go too far in his analysis in the current year. There was no need to rush to the Drafting Committee. It would be better to see what other principles and rules needed to be stated, before defining the principle of cooperation.

9. Hence it would be preferable to refer to the Drafting Committee only the provisions relating to the scope of the draft articles, in other words draft articles 1 and 2, since the definition of “disaster” necessarily affected the scope of the topic.

10. The Special Rapporteur had made a wide survey of existing definitions, and his second report contained two proposals which might offer a useful basis for discussion in the Drafting Committee. He personally would prefer a short version of draft article 1, for example: “The present draft articles apply to the protection of persons in the event of disasters.” The related definition of disasters could indeed encompass material and environmental loss affecting persons, irrespective of the cause. In that respect, he agreed with Ms. Escarameia that it was important not to dwell on causes, because they were often hard to define and might complicate the decision as to whether the draft articles were applicable. He was unable to suggest a more succinct version of draft article 2 and would even add the words “an event or chain of events” at the beginning of the definition, because the significant or widespread loss and the disruption of the functioning of society were the consequences of the disaster rather than elements of it. He tended to agree with the suggestion made by Mr. Murase with regard to the characterization of the loss, and with the comments of Mr. Saboia to the effect that imminent harm should be sufficient and that reference to the disruption of society might be unnecessary.

11. Mr. McRAE thanked the Special Rapporteur for his comprehensive introduction of his second report and for his explanation of the rights-based approach that he had adopted. He agreed with the Special Rapporteur that the most practical manner of proceeding would be to deal first with disaster and post-disaster situations and State actors and to leave prevention and non-State actors until a later stage.

12. As the Special Rapporteur had recognized, it was also important to focus on needs. In his own informal discussions in Canada with disaster-relief providers, the general view had been that the needs, rather than the rights, of individuals should be the starting point of any consideration of the topic, although they did not see needs and rights as mutually exclusive.

13. The comments on the rights-based approach in the second report were helpful, and the two-track method of identifying State-to-State obligations and of looking at the relationship between the State and the real beneficiary of those obligations, the individuals who were the victims of the disaster, was a useful analytical approach. He was, however, unsure that the jurisprudence cited supported the Special Rapporteur’s view of that distinction. In the *LaGrand* case, the ICJ had distinguished between the rights and obligations of States in relation to one another and the rights of the detained person. The Special

²⁰⁶ *Ibid.*, p. 275.

²⁰⁷ *Yearbook ... 2008*, vol. I, 2980th meeting, pp. 148–149, paras. 26–31.

²⁰⁸ ILC(LXI)POPD/INFORMAL/1(distribution limited to the members of the Commission).

Rapporteur had construed that as, on the one hand, a distinction between the rights and obligations of States in relation to one another and, on the other hand, the obligations owed by a State to the individual concerned; in paragraph 23 of his report, he said that this was the approach that he was going to follow.

14. However, he had also referred to the practice of the Dispute Settlement Body of the WTO in the case of *United States—Sections 301–310 of the Trade Act of 1974*, in which the panel had reasoned that the obligations owed by States to each other under WTO agreements were designed to facilitate the economic activity of individual economic operators and that the rules therefore functioned for the benefit of individuals. In paragraph 27 of his report, the Special Rapporteur said that that was the approach that he was going to adopt.

15. However, there was a significant difference between those two cases. In the *LaGrand* case, the Court had taken the view that the individual had rights and that the State had obligations to the individual in respect of those rights. In *United States—Sections 301–310 of the Trade Act of 1974*, the individual economic operators derived no rights from State-to-State rights under WTO agreements. Although they benefited from the opportunity of gaining access to the market through the rules of WTO agreements, they had no rights in the sense that a detained person had the rights referred to in the *LaGrand* case.

16. He therefore wondered which of the two models the Special Rapporteur was really following. When the Special Rapporteur referred in draft article 1 to the “rights of persons”, he was clearly following the *LaGrand* model, which postulated that States’ obligations did not just benefit individuals in practice but bestowed rights on them. However, an instrument setting out the rights of persons affected by disasters might not provide the pragmatic approach required by the topic. On the other hand, draft articles setting out what States could, should or must do in the event of disasters, which were predicated on State practice in that area, would be a very useful outcome. The primary focus of the topic should therefore be the rights and obligations of States; articulating the rights of individuals would complicate matters.

17. The Special Rapporteur’s discussion in his second report of the two axes—State-to-State and State-to-individual—might perhaps be a way of focusing primarily on State-to-State obligations. But, in that case, the inclusion of the reference to the rights of persons in draft article 1 was a problem, because if any mention were made of the rights of persons and of the obligations of States towards individuals, which was the reverse side of the coin of the rights of individuals, it would be necessary to articulate what those rights were. Therefore, there was still a need to discuss the full implications of a rights-based approach and whether it should be applied.

18. However, it might not be necessary to touch on the question of rights in draft article 1. Its wording indicated, first, that the draft articles applied to the protection of persons in the event of disasters; second, that the objective was to ensure the realization of the rights of persons in such an event; and, third, that the aim was to provide an

adequate and effective response. As it stood, it was concerned not only with scope—the protection of persons in the event of disasters—but also with objectives—realizing rights and providing an adequate and effective response. For that reason, draft article 1 mixed together preambular language, or language that belonged in an article about objectives, and wording about the scope of the draft articles. The result was confusing.

19. Mr. McRae would suggest splitting draft article 1 into two articles. One would refer to scope, and he would be in favour of the succinct wording proposed by Mr. Gaja. A separate article would deal with objectives, namely providing a framework to ensure an adequate and objective response in the event of disasters. Some rethinking of the wording of draft article 1 was therefore needed in order to separate the two distinct issues.

20. He agreed that a definition of “disaster” was important. The Special Rapporteur’s analysis of the different approaches to such a definition was instructive. While he concurred with Ms. Escarameia that, in principle, an effort should be made to ensure that the draft articles did not overlap with the provisions of international humanitarian law, it might not be possible to do so simply by excluding armed conflict from the definition of disasters. One question that arose was whether the exclusion as worded applied only to armed conflict while it was occurring, or also applied to the consequences of armed conflict or the disruption that existed in a society after the conflict had ended. Moreover, wording that excluded armed conflict was better placed in an article on scope than in an article on definition, although Mr. Gaja had contended that both articles 1 and 2 related to scope. Like Mr. Saboia, he thought that the lack of any reference to causation in draft article 2 made it so broad that it could be taken to refer to a political or economic crisis. As that was clearly not what the Special Rapporteur had in mind, some kind of limiting factor, such as causation, ought to be introduced.

21. The Special Rapporteur’s analysis of cooperation was very helpful, but there was a disconnect between the analysis and draft article 3. Of course, a duty to cooperate existed in a number of areas, but more evidence of the nature of a duty to cooperate was required when it came to the protection of persons in the event of disasters. If States had a duty to cooperate, he wondered if the same could be said of international organizations or NGOs, even if the qualifying phrase “as appropriate” was added. The question was whether the draft article should be worded “shall cooperate”, which suggested that such an obligation existed, or whether some sort of differentiation should be made between circumstances where quite clearly there ought to be cooperation, for example, between States and the affected State, and circumstances where a recommendation would be more appropriate, as in the case of cooperation with international organizations and NGOs, where the word “should” and not “shall” would be more apposite.

22. It was also unclear why draft article 3 began with the phrase “[f]or the purposes of these draft articles”. Since the obligation to cooperate would arise in the event of a disaster, the opening phrase should be “In the event of a disaster, States shall or should cooperate”. Furthermore

he was not sure that the term “civil society” had acquired a meaning so widely accepted that it should be used in the draft articles. As, in that context, the term actually referred to local or international NGOs, it might be wiser to employ the adjective suggested by Ms. Escarameia, and refer to “relevant non-governmental organizations”. But a reference to NGOs raised the question of the relationship with non-State actors, the consideration of which was to be postponed until a later stage. If Mr. Murase’s suggestion that the Commission should advocate drawing up an acceptable list of NGOs were followed, the Commission would then face the whole question of how the draft articles should deal with non-State actors. For that reason, a provision stating that States should cooperate with relevant NGOs was perhaps as far as the Commission could go at the current stage.

23. In his opinion, the draft articles should be sent to the Drafting Committee only after some revision. The Special Rapporteur should reflect further on the distinction between scope and objectives in draft article 1, on a limiting factor in draft article 2, on the scope of the terms “serious”, “significant” and “widespread”, on the scope of the duty to cooperate and on whether such cooperation could merely be recommended. Those were matters which should not be left to the Drafting Committee.

24. The protection of persons in the event of disasters was a very difficult topic and new terrain for the Commission. He congratulated the Special Rapporteur on making the Commission think about the complicated issues it raised and on the excellent job he had done in engaging bodies directly involved in disaster relief and response, such as the ICRC and OCHA. In an area of such great complexity, it might be helpful for the Commission to get a clearer picture of what actions States took in response to a disaster. On reading the observations of OCHA, he had begun to think that the Commission required diagrams and flow charts to understand the whole process.

25. Ms. Xue thanked the Special Rapporteur for his second report on the protection of persons in the event of disasters and welcomed his commendable efforts in reaching out to the relevant international organizations to hear about their experiences in disaster relief activities.

26. She noted that the Special Rapporteur had chosen a rights-based approach as the basis of the draft articles, an approach on which the Commission had held a heated debate at its previous session.²⁰⁹ When the Commission had decided to embark on the topic, the purpose had been to ensure optimal protection of individual victims of a disaster: in other words, the “*raison d’être*” of the legal exercise was to provide international legal guarantees for the protection of persons. If the rights-based approach was to serve as the legal basis of the draft articles, however, three basic questions must be answered: which individual rights were to be protected in the event of a disaster, who should be obliged to guarantee such protection and how protection of the rights could be ensured at the international level.

²⁰⁹ The topic was included in the long-term programme of work of the Commission at its fifty-eighth session (*Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 257), based on a proposal by the Secretariat reproduced in annex III of the report of the Commission.

27. The first question was the most crucial. Although armed conflicts had been excluded from the scope of the topic, they presented problems similar to those raised by disasters in terms of the continuous normal functioning of law and order. A disaster was a sudden occurrence that plunged normal social life into chaos. Under such special circumstances, individual rights and freedoms were bound to be affected. If protecting individual rights was the purpose of the draft articles, then it must be made clear precisely which rights were to be protected. It could not be assumed that human rights law and humanitarian law would continue to apply across the board in the event of a disaster, and any sweeping claims about rights would render the whole project pointless.

28. Under human rights law, derogations from certain individual rights were permitted in emergency situations. While such derogations were not necessarily applicable in all respects to disaster situations, it was unquestionable that certain individual human rights and freedoms could not be fully realized in the event of a disaster. The Special Rapporteur suggested in paragraph 17 of his report that rights and needs were to enter the equation, complementing each other when appropriate. In practice, however, that approach would tend to give rise to disputes, either between the Government and individuals or between the disaster-stricken country and outside actors.

29. If the intent of a rights-based approach was to give individuals legal standing (*locus standi*) to claim protection from their Government or to request international assistance, in opposition to the principle of non-interference, that was unlikely to meet the individual needs of persons and would complicate disaster relief operations. In a disaster, individual interests, collective interests and public order concerns were frequently interwoven. With limited resources available at both the domestic and international levels, those interests often had to be weighed and balanced. The rights-based approach did not seem to provide a solution to those important problems.

30. In paragraphs 20 to 25 of his second report, the Special Rapporteur referred to a series of cases of the ICJ to illustrate the Court’s jurisprudence on the protection of human rights in international law. She fully endorsed the points made but did not quite grasp the notion of the two axes as explained in paragraphs 19 to 27. Actual experience in dealing with natural disasters had shown that it was the State first and foremost that had the right and obligation to protect persons under its jurisdiction and control. The principle of sovereignty was the essential principle, and it was the affected State whose responsibility to protect was of prime importance. The guidelines and manuals on disaster relief developed by international organizations or NGOs had a direct bearing on State action. The notion of two axes should therefore be intrinsically linked with the rights and obligations of the State.

31. In short, the realization of the individual rights of persons in the event of disasters primarily depended on the implementation of the obligations of States. When a disaster reached such a scale that the affected State, with all the capacity and resources it had available, could not cope by itself, international solidarity should come into play. Solidarity was not compulsory in nature, either for

the recipient State or for the assisting actors. However, the rights-based approach implied that the recipient State must accept international assistance with a view to meeting the needs of persons. If the protection of rights was held to be an absolute duty, the corollary was that international aid must be provided whenever requested. That position was obviously not based on State practice.

32. Turning to the three draft articles, she noted that draft article 1 comprised three elements: the purpose of the draft articles was to ensure the realization of the rights of persons in a disaster; States must provide an adequate and effective response; and States must meet the needs of persons in all phases of a disaster. Unless the kinds of “rights” that it was essential to protect in the event of a disaster and the “needs” that deserved particular attention during disaster relief operations were specified, those terms could be given a fairly broad interpretation and be rendered impossible to implement by States, small or big, weak or strong. In the 2008 earthquake in Wenchuan, Sichuan Province, despite all the efforts to mobilize rescue forces to save people’s lives, provide food, clean water and medical care, arrange temporary shelter and quickly resume the operation of schools, there were still certain individual rights and freedoms that had had to be restricted for the sake of safety or the maintenance of public order and the prevention of epidemics. Draft article 1 failed to state the conditions under which the objective of protection was envisaged, whether that was the sole primary objective in the event of a disaster and how it was linked with the whole range of disaster relief operations.

33. Regarding draft article 2, concerning the definition of disaster, she agreed with the position that a strict separation between natural and man-made disasters was not necessary, since scientific studies had shown that human activities had contributed to varying degrees to the causes of some natural disasters. While causality was certainly a matter of concern, as Mr. Saboia had pointed out, the Special Rapporteur was wise not to touch on that issue at the current stage.

34. Draft article 2 identified two elements of a definition but overlooked many other factors that might come into play. The first element was “a serious disruption of the functioning of society”; the second was “significant, widespread ... loss”. If the protection of persons and international assistance were contemplated solely under such circumstances, however, that would imply that the draft articles were designed to address only certain types of disasters rather than disasters in general. When a disaster occurred, the functioning of society might not necessarily break down, but human casualties might still result. Sometimes harmful effects might be widespread, but at other times they might be limited to one geographical area. The two elements had been set out without indicating their rationale and their logical link to the rights-based approach.

35. She was puzzled to see that in draft article 3 the Special Rapporteur had immediately addressed the issue of international solidarity and cooperation. In obliging States to cooperate with other States, international organizations and civil society, the draft article implied that a State must favourably consider accepting international

assistance. If the topic was to be approached from a human rights perspective, however, the question of the sovereign rights and obligations of a State in the protection of persons must be addressed, together with the issue of what international principles a State should observe in exercising such rights and obligations. In his preliminary report,²¹⁰ the Special Rapporteur had mentioned the principles of humanity, impartiality, non-discrimination, sovereignty and non-interference, which should be appropriately reflected in the draft articles. International assistance, valuable and important as it was in the event of a disaster, should serve as a supplement to, rather than a substitute for, the affected State’s own efforts. In that respect, the special needs and interests of developing countries affected by disaster deserved attention in the draft articles. The improper imposition of international assistance might constitute a form of interference under certain circumstances.

36. In conclusion, since she still had serious reservations about the main content of the draft articles, she thought that it was premature to refer them to the Drafting Committee.

37. Mr. MELESCANU congratulated the Special Rapporteur on the quality of his report and the draft articles it contained and his helpful introductory statement. He noted that a number of questions had to be answered when beginning work on a topic: the need for regulation in that field; the level—national, regional or international—at which regulation should occur; the basic principles on which any new rules were to be based; and the role of United Nations and other international institutions in the field in question.

38. In answer to the first question, there was, in fact, a real need for regulation in the field. A formal argument was that the Commission had decided to include the topic in its programme of work, meaning that it considered it to be a subject that needed to be addressed. A substantive argument was that the world had of late been increasingly affected by serious and even dramatic disasters, and there was a need to define the regime of the affected State regarding the extent of its rights and obligations towards its citizens and its duty to cooperate with other States.

39. Referring to Ms. Xue’s comments about the rights-based approach, he saw it as a kind of stratagem on the part of the Special Rapporteur to provide a basis for the duty of the affected State to cooperate. The key problem was that it was almost impossible to codify an obligation on the part of States to accept assistance offered in the event of a disaster. The rights-based approach was an instrument for circumventing such difficulties, a clever solution to the insoluble problem of the rights and obligations of the affected State, and one to which he was not categorically opposed. Ms. Xue’s questions about which individual rights were involved, who guaranteed them, and so forth, were valid ones, but the Commission could not abandon the rights-based approach, since it must find a solution to that key problem of regulation, or the exercise would have little merit.

²¹⁰ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, p. 153, para. 52.

40. As to the level at which the problem should be addressed, he agreed with Ms. Xue and others that the primary responsibility in the event of a disaster rested with the affected State. The State was obliged to take all necessary measures to protect its citizens: to adopt legislation, create institutions and offer the necessary funding for relief organizations or national structures. At the European level, there were special agencies for handling natural disasters; they had a legal basis and the instruments and funding necessary for doing so. Perhaps the possibility could be envisaged at a later stage of elaborating guidelines for States on how to deal with disasters. Disasters could also usefully be addressed at the regional level. Natural disasters had a specific impact depending on whether they struck developing countries or least developed countries, and a mechanism at the regional level could therefore be a good solution.

41. He agreed that the Commission had to decide on the basic principles on which the new rules were to be elaborated. Draft article 3 would not be ready to be referred to the Drafting Committee until a clear picture had been gained of all the principles to be included. At present, there was only one, and that left the draft unbalanced. Draft articles 1 and 2, however, could be referred to the Drafting Committee, on the understanding that it would have to address not only drafting changes but also substantive matters.

42. The approach adopted in draft article 1, with the phrase “in all phases of a disaster”, was a good one. Although delegations in the Sixth Committee had insisted that the Commission should concentrate on the disaster proper and the post-disaster phase, he did not think it should expressly exclude the pre-disaster phase, which in some instances could be crucial. With earthquakes, for example, any prior information about the measures that were to be taken could be of great value to the countries concerned. It was therefore safe to use a general formula, referring to all phases of the disaster, on the understanding that it would be refined later, taking into account the positions expressed.

43. Regarding draft article 2, the Commission had been careful not to limit the definition of a disaster to natural disasters. It was agreed that some causes of disaster were natural, others were man-made, and in most cases a combination of the two provoked a disaster. Armed conflicts, especially internal ones, produced disasters that were a clear combination of man-made activities and natural conditions. Hence he supported Ms. Escameia’s proposal to delete the phrase “excluding armed conflict” and to add a “without prejudice” clause with respect to the application of international humanitarian law in armed conflict.

44. Regarding draft article 3, he welcomed the reference to the duty to cooperate and to the competent international organizations, in particular the United Nations and the IFRC. The Commission had a duty to state very clearly that there were specialized, competent institutions that were not only capable of channelling support in disaster situations, but sometimes also more acceptable than States in that regard. Accordingly, the words “as appropriate” should be deleted, and the duty to cooperate, bilaterally or through competent international organizations, should

be unqualified. The reference to civil society was ambiguous; it was not clear whether international or national civil society was meant. He also opposed the idea of naming NGOs, listing the “good guys” and the “bad guys”. The Commission should simply elaborate on the duty to cooperate with reference to States and specialized or competent international organizations.

45. Mr. DUGARD congratulated the Special Rapporteur on his intelligent approach to a particularly complex topic that called for the appraisal of an integration of several branches of international law, namely, environmental, human rights, humanitarian and institutional law.

46. With regard to draft article 1, he agreed that the Commission should adopt a rights-based approach. For that reason, he endorsed the text proposed by the Special Rapporteur, which stressed the rights of the person.

47. However, he had serious difficulties with draft article 2, in which brevity appeared to be achieved at the expense of clarity. He preferred the definition of disaster contained in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations and would favour including in draft article 2 the final phrase of that definition, which read “whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes” [art. 1, para. 6].

48. The main difficulty with draft article 2 concerned the problem of armed conflict and the numerous questions to which it gave rise, such as whether the Commission intended to include in its set of draft articles a provision defining armed conflict in order to specify what was being excluded, and, if so, whether the Special Rapporteur intended to take into account the *Tadić* decision and the decisions of the various international criminal tribunals, which would appear necessary.

49. In order to illustrate the problem, it would be helpful to consider the question of the definition of disaster in the context of real situations, such as those in Darfur, Gaza, Sri Lanka and Zimbabwe, all of which, in his view, constituted disasters. They would certainly be considered as such under the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, but it was doubtful whether they would be included in the definition proposed in draft article 2, since it expressly excluded armed conflict and would therefore seem to exclude Gaza and Sri Lanka. On the other hand, it could be argued that those were post-conflict situations, leading to the question of whether, for the Commission’s purposes, they qualified as disasters. A further question was how the Commission would deal with the siege of a territory—as opposed to an armed conflict—such as the one that had taken place in Gaza, or with the situation in Darfur, where armed conflict was occurring in some areas but not in others. In his opinion, the Commission should address post-conflict situations in its draft articles, even if it did not address disasters caused by an ongoing conflict.

50. The situation in Zimbabwe, which had resulted not from armed conflict but certainly from human activity,

was a stark illustration of an issue the Commission would have to confront directly, namely, how to reconcile the rights of persons in a disaster with the principle of non-intervention. For all those reasons, he had difficulty with the very brief definition of the term “disaster” proposed by the Special Rapporteur.

51. With regard to draft article 3, he agreed that cooperation was an important principle that should be reaffirmed at the beginning of the draft articles, but he had doubts regarding the institutions referred to in the draft article. For instance, it was unclear under what category the Commission should place the ICRC, which was not covered by the reference in subparagraph (b) to the IFRC. That left the category of “competent international organizations”, referred to in subparagraph (a), unless that phrase meant only intergovernmental organizations and did not include such hybrid institutions as the ICRC. The reference to “civil society” in subparagraph (c) also posed a problem, since the term had no legal meaning and raised doubts as to what kind of civil society organizations were intended. For those reasons, it might be preferable simply to delete subparagraphs (b) and (c) and to indicate that States should cooperate as appropriate with competent intergovernmental and NGOs, with an emphasis on the word “competent”. In his view, the scope and content of draft article 3 required further consideration. Although he was somewhat undecided about draft articles 2 and 3, it was possible that the kinds of criticisms he had made could be remedied by the Drafting Committee. He would therefore agree to referring draft articles 2 and 3 to the Drafting Committee on the understanding that it would have the mandate to expand draft article 2, if necessary, and to reshape draft article 3.

52. The CHAIRPERSON, speaking as a member of the Commission, said that the current topic dealt with an interconnection between very sensitive issues, including sovereignty, human rights, cooperation, solidarity and intervention. As a result, the Commission’s future work on the topic would likely entail many difficult substantive issues. Its current work had got off to an ambitious start, given that the Special Rapporteur had already proposed three draft articles. Although a consensus would have to be reached on the matter, his general impression was that the draft articles were ready to be referred to the Drafting Committee.

53. Before addressing the draft articles as such, he wished to make some general remarks. First, he urged members not to lose sight of the Commission’s main point of departure, which was the protection of the victims of a disaster. Victims—not States—were to be protected, and States were actors in that endeavour, including through international cooperation and solidarity. The protection of persons in the event of disasters responded to a general need that must be met, irrespective of the country involved; he would be strongly opposed to categorizing some groups or countries as needing more assistance than others. The same applied to the post-disaster phase, although perhaps not to the pre-disaster phase, where assistance should be provided as a matter of priority to countries less organized and less capable of dealing with a disaster if it occurred.

54. Second, while there was no doubt that the affected State had the primary responsibility for responding to a disaster, the Commission should bear in mind that there were many instances in which affected States failed to do so. Whether it was due to a lack of capacity, unforeseen obstacles or concerns for sovereignty, or to mismanagement, corruption or even misuse by providers of assistance, help did not always reach those who needed it. That fact had also been one of the Commission’s original points of departure, and he urged members to continue to keep it in mind.

55. When a disaster occurred, the affected State was the main actor; it was the first to respond and had the basic duty to provide assistance to victims. That duty was a reflection of its sovereignty, which was not only a right but also an obligation. A State’s sovereignty carried with it the obligation to protect the welfare, security and survival of the people in its territory. It followed that in the event of disaster, the affected State’s role was to act, to coordinate and to guide, but cooperation was also necessary in many cases. He fully endorsed the Special Rapporteur’s conclusion that cooperation was an established principle of international law.

56. Concerning the human rights issue, he firmly supported the rights-based approach. It was true that nearly all constitutions provided that the enjoyment of human rights could be limited in special situations for reasons of public security and public order, and he considered that this was true in disaster situations. Almost all rights, except the right to life, could be derogated from, but the point of departure should be respect for human rights in general. The Commission should not in its future work on the topic attempt to determine which human rights were relevant and which were not.

57. As to responsibility to protect, he concurred with the Special Rapporteur’s decision to exclude the concept from the draft articles. The responsibility of the affected State to respond in the event of a disaster should not be confused with the notion of responsibility to protect, which implied the idea of humanitarian intervention. Mixing the two would complicate the Commission’s work and lead to insurmountable problems.

58. In terms of specific comments on the second report, he was encouraged by the Special Rapporteur’s account of the way in which the preliminary report had been received by Governments in the Sixth Committee, since he had anticipated that States would have more reservations about the sensitive topic. He welcomed the efforts of the Special Rapporteur to establish contact with representatives of the relevant agencies of the United Nations system and other intergovernmental and non-governmental organizations. The analysis of human rights as a key aspect of disaster response, contained in the manual on *International Law and Standards Applicable in Natural Disaster Situations*,²¹¹ to which reference was made in paragraph 14 of the report, could serve as a useful guide for the Commission’s discussion concerning the human rights to be protected in the draft articles.

²¹¹ *International Law and Standards Applicable in Natural Disaster Situations*, Rome, International Development Law Organization, 2009.

59. He supported the Special Rapporteur's rights-based approach to the topic's scope *ratione materiae*, finding it to be the best possible solution, and the holistic approach to rights and needs, since rights were legal concepts that reflected needs. Accordingly, he supported the points made in paragraphs 17 and 18 of the report, in particular, that the Commission should leave a risk-informed paradigm for later debates.

60. He endorsed the dual approach to the nature of the protection of persons in the event of disasters, which was expressed in terms of two main axes, noting that the most important of the two concerned States in relation to one another. The second axis, that of States in relation to persons in need of protection, should be addressed only after the Commission had clarified the former. The participation of civil society in protecting persons in the event of a disaster was also part of the topic, but the main issue before the Commission was to determine the responsibilities of States in the event of a disaster: first those of the affected State and subsequently those of other States.

61. He shared the Special Rapporteur's view that the Commission should initially limit itself to the disaster proper and the post-disaster phases, and deal with the pre-disaster phase at a later stage, bearing in mind the need to help all States strengthen their disaster preparedness.

62. With regard to draft article 1, he had a problem with the reference to "all phases of a disaster" and with the unspecified nature of "the rights of persons", but felt that those matters could be resolved in the Drafting Committee.

63. As to draft article 2, he wished to emphasize that the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, on which the proposed definition had been based, had been adopted in the specific context of telecommunications. For the Commission's purposes, a more general definition of disaster was needed. He agreed that the definition should not refer to causation and should exclude armed conflicts. He favoured the approach of placing the protection of persons at the centre of the Commission's efforts on the topic, at least at the current stage, without prejudice to later stages. Initially, property and environmental losses should be dealt with only in the context of the protection of persons. He would even go so far as to say that, *prima facie*, there was no reason to make specific mention in the draft of the need to protect property *per se* in the event of a disaster.

64. While he could generally agree with the proposed text of draft article 2, it seemed somewhat illogical to state that disaster was a disruption of functioning, when it was the other way around: first came the disaster and then the disruption. Furthermore, the degree of dysfunction of society should be understood as a profound dysfunction, involving more than mere economic or political difficulty.

65. The Special Rapporteur's rationale for affirming that cooperation was a legal principle was persuasive, and he had nothing to add to it except to reiterate that if States were legally bound to cooperate in the event of a disaster, then they were all the more firmly bound to act when they

were affected by a disaster. In such circumstances, to act also meant, if necessary, to open their borders and accept aid from other countries, in keeping with certain regulations that remained under their control. On the other hand, he had doubts about whether one could speak of solidarity as a legal principle, as was indicated in paragraph 57 of the report.

66. With regard to the text of draft article 3, while he had no objection to States cooperating with civil society, it was going too far to imply that they were required to do so, even if qualified by the phrase "as appropriate". It was correct phrasing to say that States "shall" cooperate among themselves and with international organizations, and perhaps they "should" also cooperate with the IFRC. But to make it a principle that they must cooperate with NGOs was to go too far.

The meeting rose at 11.45 a.m.

3018th MEETING

Thursday, 9 July 2009, at 10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Protection of persons in the event of disasters (*continued*) (A/CN.4/606 and Add.1, sect. F, A/CN.4/615, A/CN.4/L.758)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The Chairperson invited the members of the Commission to continue their consideration of the Special Rapporteur's second report on the protection of persons in the event of disasters (A/CN.615).

2. Mr. Wisnumurti thanked the Special Rapporteur for his analytical review of States' positions and for summarizing the understanding which had emerged on some limitations of the scope *ratione materiae* and *ratione temporis*, as mentioned in paragraphs 6 and 7 of his report.

3. In the chapter of his report on defining the scope of the topic, the Special Rapporteur addressed three aspects of the topic's scope, namely *ratione materiae*, *ratione personae* and *ratione temporis*. With regard to its scope *ratione materiae*, he understood why the Special Rapporteur had adopted the proposal of the IFRC that the rights-based approach should be complemented by a

consideration of needs. That holistic approach to the topic was not only necessary but also logical; after all, when a disaster occurred, the ultimate objective of the right of persons to protection was to meet their needs.

4. In paragraph 19 of his report, the Special Rapporteur referred to the dual nature of the protection of persons in the event of a disaster, namely the rights and obligations of States in relation to one another and the rights and obligations of States in relation to persons in need of protection. It was indeed essential to understand the dual nature of protection when apportioning the rights and obligations of the parties concerned. But ultimately, as he had indicated in his own statement the previous year, the affected State bore primary responsibility for the protection of persons in its territory, or under its jurisdiction or control, during a disaster. Consequently, as prescribed, for example, in General Assembly resolution 46/182 of 19 December 1991, entitled “Strengthening the coordination of humanitarian emergency assistance of the United Nations”, humanitarian assistance must be provided “with the consent of the affected country and in principle on the basis of an appeal by the affected country” (Annex, para. 3). The principles of sovereignty and non-interference should not, however, be invoked unreasonably or illegitimately at the expense of international cooperation aimed at protecting persons in real need of urgent relief. Those factors must guide the Commission’s understanding of the rights-based approach and thus of the rights of the affected persons. That was why he begged to differ with the opinion expressed by the Special Rapporteur in paragraph 27 of his report; on the contrary, it was necessary to define the rights and obligations of States in relation to persons in need before determining the rights and obligations of States in relation to one another.

5. With regard to limitations *ratione personae*, the Special Rapporteur observed in paragraph 28 of his report that it was common for numerous State and non-State actors to participate in post-disaster relief. Since the IFRC had already made a substantial contribution to the domestic legal regime applicable to several of those actors, the Special Rapporteur was right to propose that the Commission should consider the role of non-State actors at a later stage. He could follow the Special Rapporteur’s logic of limiting the scope *ratione temporis* to the disaster proper and the post-disaster phase for the time being and to consider pre-disaster preparedness at a later stage, but that did not mean that it was less important. Pre-disaster preparedness encompassed a wide range of issues and activities which the Commission could not contemplate at the current stage of its deliberations.

6. He found it difficult to approve draft article 1 as proposed by the Special Rapporteur in paragraph 30 of his report, since it covered three different issues, namely, the protection of persons in the event of disasters, the scope proper; the obligation of States to ensure the realization of the rights of persons; and the obligation of States to provide an adequate and effective response to their needs in all phases of a disaster. Lumping the three elements together in one draft article might make it cumbersome. Another, perhaps more substantive difficulty was that the draft article addressed only the obligations of States *vis-à-vis* persons affected by a disaster and not the rights of the

affected States. To overcome that problem, the Commission could adopt Mr. Gaja’s suggestion that draft article 1 should retain only the first part of the existing text, which read “The present draft articles apply to the protection of persons in the event of disasters”. Separate provisions would then be required on the rights and obligations of the affected States in relation to persons in need of protection, as envisaged in the second and third elements of the existing text of draft article 1. In order to define “disaster”, the Special Rapporteur had reviewed various possible wording contained in international instruments before concluding that an article of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations was a good point of departure. In that connection, he was grateful that the Special Rapporteur had excluded the causes of a disaster from the definition. The previous year, he himself had mentioned the example of a disaster which had struck the region of Sidoarjo, in East Java, Indonesia. The Indonesian and foreign scientists and experts studying the mudflow still disagreed as to its probable cause and whether it was a natural phenomenon connected with the earthquakes that had occurred in different parts of Java, or whether it was a man-made disaster resulting from faulty drilling activities for which a private company was responsible.

7. After a thorough review and analysis of definitions from various sources, the Special Rapporteur had proposed draft article 2 in paragraph 45 of his report. While he concurred with the Special Rapporteur that the threshold for determining the existence of a disaster should be the degree of dysfunction of the society in which it occurred, the phrase “a serious disruption of the functioning of society” in the Special Rapporteur’s definition referred only to the impact of a disaster; the disaster was the event which had caused that disruption. The draft article should therefore establish a causal link between the event and the harm resulting from it. He proposed that draft article 2 should be amended to read: “‘Disaster’ means an event [or a situation of great distress], excluding armed conflict, causing a serious disruption of the functioning of society and inflicting significant, widespread human, material or environmental loss.”

8. He appreciated the Special Rapporteur’s reference to paragraph 10 (b) of the report of the Secretary-General on implementing the responsibility to protect²¹², which reaffirmed that responsibility to protect applied only to the four crimes specified in the 2005 World Summit Outcome document,²¹³ namely genocide, war crimes, ethnic cleansing and crimes against humanity. Responsibility to protect should not be extended to disasters and therefore should not be included in the topic.

9. With regard to solidarity and cooperation, although the duty to cooperate was a well-established principle of international law, like other members of the Commission he wondered whether the same could be said of solidarity. That said, paragraph 63 of the report was extremely important because it made it clear that cooperation in no way diminished a sovereign State’s prerogatives within the limits of international law.

²¹² A/63/677.

²¹³ See footnote 180 above.

10. Having completed his review of the principle of cooperation, the Special Rapporteur had proposed a draft article 3. The text, including the phrase “as appropriate”, was acceptable, except for the reference to “civil society” in subparagraph (c). The term “civil society” was a political notion which had different meanings for different people. It would be preferable to replace it with “competent non-governmental organizations”, as had been suggested by some members, including Mr. Dugard. Mr. Murase’s proposal, that a list of competent and credible NGOs should be compiled, also deserved support.

11. In conclusion, he thought that the draft articles were not ripe for referral to the Drafting Committee and that the Special Rapporteur should revise them in the light of the comments and suggestions of Commission members.

12. Ms. JACOBSSON said that her comments would focus on the three draft articles proposed by the Special Rapporteur. The definition of the scope in draft article 1 was directly related to the discussion of a rights-based versus a needs-based approach. The Special Rapporteur had opened the door to a combination of both. She regretted that she did not have a wide enough knowledge in that field to fully comprehend the concept of a needs-based approach. It was therefore difficult to accept or reject it, particularly since the IFRC considered it relevant. In her opinion, however, the Commission should start from a rights-based approach, and she agreed with Mr. Petrič’s statement the previous day that rights should not be qualified. That meant that human rights must form the framework of the Commission’s work, including any provisions on derogations. In that respect the debate, which concerned a matter or principle, was very similar to the Commission’s deliberations on “fundamental rights” (see the 3002nd to 3006th meetings above) in the context of Mr. Kamto’s fifth report (A/CN.4/611). For the sake of consistency, it would be advisable to adopt the same solution in both cases.

13. As far as draft article 2 was concerned, it was difficult to decide on a final definition of the term “disaster” at such an early stage, although a provisional working definition might be useful. The debate so far could be summarized by saying that some thought the definition too broad, while others thought it too narrow. The previous year, she had agreed in principle with the Special Rapporteur that armed conflicts should be excluded, but she strongly suspected that it might prove difficult to define a threshold between an armed conflict and a peacetime situation and to determine, let alone agree on, whether an armed conflict existed, especially if the conflict was confined to certain parts of a State’s territory. She concluded that the aim should be not to cover situations of armed conflict *per se*; at the same time, the Commission should not rule out altogether the examination of specific situations. For that reason, Ms. Escameia’s idea of a “without prejudice” clause was excellent.

14. As for the working method, although consideration could first be given to the problems that arose in the acute phase of the disaster—the “disaster proper”—thought must likewise be given to the pre- and post-disaster phases. For the time being, the Commission could opt for a tentative definition. It was important to establish some kind of flow chart to identify the issues that needed to be

addressed and to define the temporal scope of the topic. The examples provided by Mr. Petrič the previous day had been illustrative. In fact, it was not easy to say when one phase ended and another began, as was very clear from General Assembly resolution 63/141 of 11 December 2008, entitled “International cooperation on humanitarian assistance in the field of natural disasters, from relief to development”.

15. Draft article 3 was perhaps the most intellectually challenging, partly because it spelled out the legal basis for the draft articles and partly because it attempted to identify the actors. In his report, the Special Rapporteur maintained that there was a general duty to cooperate under international law. That duty had certainly become stronger and clearer over the years, but if it was as clear-cut as some members had asserted, she wondered why it was necessary to specify, as the Special Rapporteur had done in draft article 3, that States must cooperate “[f]or the purposes of the present draft articles”. The unfortunate fact was that the duty to cooperate, as reflected in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 2007), had to be developed, made explicit and fleshed out. It was the task of the Commission to help promote and strengthen international cooperation, even if it was the primary responsibility of the affected State to deal with a disaster situation. Thought should therefore be given to the kind of cooperation envisaged in the context of the protection of persons. Draft article 3 provided for three levels of cooperation, which should be spelled out in a more transparent manner. The first, that of inter-State cooperation, was obvious, and it was the Commission’s task to say what that obligation would imply in the event of a disaster. At the second level, an obligation to cooperate with the IFRC and the ICRC already existed, and she was curious to know why the latter organization had not been mentioned in draft article 3. It must be emphasized that States’ obligation to cooperate with the ICRC encompassed post-conflict situations and might also apply to disasters. That showed how difficult it was to distinguish clearly between the various phases of a disaster. The third level was that of cooperation with NGOs.

16. She therefore proposed that draft article 3 should be recast to read:

“In order to achieve the fullest possible protection of persons in the event of disasters, States shall cooperate among themselves.

“1. States have a duty to cooperate with:

“(a) competent international organizations, in particular the United Nations; and

“(b) the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross.

“2. Furthermore States shall, as appropriate, cooperate and facilitate the work of relevant humanitarian non-governmental organizations.”

17. In conclusion, she thought that draft articles 1 and 3, but not draft article 2, could be referred to the Drafting Committee.

18. Mr. NOLTE said that he had one general remark and a few specific comments to make. The general remark concerned the definition of the topic. The Special Rapporteur thought that an explicit reference to the spirit, or philosophy, underlying the whole project should be incorporated in the draft article defining the scope of the topic. Like Mr. Gaja and Mr. McRae, he doubted the advisability of addressing the question of whether the project rested on a rights-based or a needs-based approach in the definition of scope. Admittedly, the intention of clearly indicating the spirit informing the project was a good one, but it made the definition of scope less precise and open to conflicting interpretations. He therefore endorsed Mr. Gaja's proposal to limit the definition of scope in draft article 1 to the first part of the sentence, in other words: "The present draft articles apply to the protection of persons in the event of disasters." Like Mr. McRae, he thought that the spirit or purpose of the draft articles should be dealt with elsewhere, either in a preamble or in a separate article.

19. That proposal was, of course, of a rather technical nature. The main substantive issue was the terms in which the spirit or purpose of the draft articles should be formulated. All the previous speakers had considered that attention should focus on the persons affected by a disaster and that their well-being was the main purpose of the undertaking. Some members seemed to take it for granted that a rights-based approach was the best way of achieving that purpose, but he was among those who urged caution. The Special Rapporteur had explained in paragraph 16 of his report that he had decided to propose a rights-based approach in the same spirit as that which had prevailed in the 1980s, when a similar approach had emerged with regard to development policy. However, the analogy was not obvious. In the 1980s it might have been necessary to emphasize that the ultimate purpose of development was the realization of the human rights of individuals and not merely the development of the State as an abstract entity. Hence, the purpose of a rights-based approach to development had been to focus on the individual as the ultimate beneficiary of development policy. In the field of disaster relief, however, there was no doubt that the focus of all efforts was the individual. The question was rather that of identifying the best legal technique for achieving that purpose. A rights-based approach indeed strengthened the focus on the individual and had the advantage of setting aside the notion that disaster relief was a matter of charity. But such an approach entailed a serious disadvantage in that it was limited by the extent of the rights themselves and was therefore open to challenges as to the extent of rights protection. Human rights could be severely curtailed in emergencies, and human rights obligations essentially bound only the affected State rather than all States. He was not suggesting that human rights were irrelevant in the context. They were important as a means of strengthening the position of individual disaster victims and of identifying their needs, but the project should have a broader basis, namely the needs of the persons concerned. Those needs might go well beyond their rights, and disaster relief should not be hampered by disputes about the extent of rights. Even in disasters which did not acquire

an international dimension because the affected State had the means to cope with the situation, one did not generally speak of rights but of needs. For that and other reasons, he proposed that the emphasis of the second part of draft article 1 should be reversed, so that it would then read, either as part of a preamble or as a separate article: "In order for States to provide an adequate and effective response to the needs of persons in a disaster, including to ensure the realization of the rights of persons in such an event". That wording would not discard human rights as a key element of disaster relief, but it would place them in the wider context of the needs of individuals. Such an approach, based on two pillars but with a stress on meeting needs, would strengthen rather than weaken the spirit or purpose of disaster relief efforts.

20. Caution was needed when defining the term "disaster". While it was indisputable and obvious that it was often impossible to distinguish clearly between a natural and a man-made disaster, it was equally true that such a distinction was immaterial from the perspective of individuals and their rights. But that should not lead the Commission to sweeping conclusions. Not every grave crisis was a disaster. As Mr. McRae had said, the current world economic crisis was not a disaster, even though it might produce catastrophic effects in some regions. He was less certain than Mr. Dugard that the situation in Zimbabwe was a disaster in the technical sense that the Commission was trying to define. While he was less familiar than Mr. Dugard with the situation in that country and although he had the impression that the Zimbabwean population was in need of relief, to characterize that situation as a disaster was tantamount to saying that political mismanagement and human rights violations constituted a disaster. He was not persuaded that this would be of any benefit to the victims of certain human rights violations and was therefore in favour of setting a threshold like that proposed by the Special Rapporteur, in other words a "serious disruption" of the functioning of society. Such a threshold was particularly important if it was impossible to exclude disasters by reference to their cause.

21. Regardless of whether the Commission adopted a rights-based, needs-based or combined approach, it was of course most important to determine the obligations and competences of the affected State. That was a matter which would have to be examined in future reports and at future sessions, although, as Mr. Gaja had proposed, it might already be possible to address possible causes of States' unwillingness to cooperate and to stress institutional aspects, especially the role of the United Nations and the duty of States to give it "every assistance" (Article 2, paragraph 5, of the Charter of the United Nations). Ms. Escameia was therefore right to postulate a duty on the part of Member States to assist the United Nations. On the other hand, given the very clear statement by the Secretary-General, it might be unwise to rely on the responsibility to protect as a possible source of obligations for Member States. That did not, however, mean that there were no other sources of rights and obligations for third States in the event of a disaster. For example, if a State simply disregarded a famine which led to the death of many people in part of its territory, such disregard might not amount to genocide in the technical sense, but it might well be a violation of a *jus cogens* human

rights norm, which in turn would allow and oblige third States to hold the State concerned responsible, or would at least make it a duty of that State to accept help. He agreed with Ms. Escameia that the Commission should not exclude armed conflicts from the scope of the topic, but that it should formulate a “without prejudice” clause with respect to the rules relating to armed conflict. He supported the Special Rapporteur’s idea of identifying two main axes — although there might be more — namely the relationship between States, on the one hand, and, on the other, the relationship between States and other subjects of international law, in particular persons and NGOs, and of clarifying the framework for them in the course of the Commission’s work on the topic. As for the duty to cooperate, he agreed with Mr. Gaja that the principle should be dealt with in conjunction with the other substantive principles with which it was connected. He did not deny the existence of States’ duty to cooperate, but it was just one of their fundamental duties. It was too early to refer draft article 3, but not draft articles 1 and 2, to the Drafting Committee.

22. The CHAIRPERSON, speaking as a member of the Commission, noted that Mr. Nolte had raised the issue of a famine which was ignored by the State in whose territory it raged. Since failure to assist the afflicted was an offence under many constitutions and criminal codes around the world, the Commission could take that practice as its basis for formulating a general principle of law.

23. Mr. OJO said that the adoption of a rights-based approach to the topic of the protection of persons in the event of disasters, with a view to its codification, was problematic. In his report, the Special Rapporteur discussed the dual axes of the topic, namely, the rights and obligations of States in relation to one another, and the rights and obligations of States in relation to persons in need of protection. He also gave an extensive review of treaty practice and the practice of judicial authorities with regard to the dual protection of States and persons under international law, looking at a range of subjects as diverse as genocide, consular relations and the WTO General Agreement on Tariffs and Trade (GATT) (paras. 19–27 of the report). Furthermore, he carefully analysed the sources of international law on the protection of persons in the event of disasters, notably international humanitarian law, human rights law and international legal rules concerning refugees, displaced persons and disasters. His findings therefore amply justified his preference for including dual protection within the scope of the topic.

24. With regard to the definition of the term “disaster”, the Special Rapporteur should be congratulated on his thorough examination of international instruments and judicial practice in that area. In the initial and concluding paragraphs of the section of the report on that matter, the Special Rapporteur paid glowing tribute to the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations which, he said, provided the “best guidance” in defining the term (para. 44 of the report). He nonetheless pointed out that the Convention had certain limitations in that it regarded a disaster to pose a “widespread threat to human life, health, property or the environment” (art. 1, para. 6). The Special Rapporteur rightly observed that “[a] possible

alternative would be to consider language that requires the existence of actual losses in the definition of disaster” (para. 34 of the report). That statement highlighted the main indicia of the topic under consideration, whose very title assumed the actual existence of a disaster by referring to the protection of persons “in the event of” disasters.

25. The Special Rapporteur then distanced himself from other aspects of the definition set forth in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations by avoiding any reference to causal elements of disasters such as accident, nature or human activity, arguing that, on the one hand, it was singularly difficult to establish a clear causal relation and, on the other, such a test would not imply a substantive contribution to the definition of the term. He therefore drew heavily on other instruments and judicial decisions, but in doing so, failed to include in draft article 2 some key elements of the notion of a disaster. It was necessary to protect victims of disaster under international law when such an event assumed an international dimension because local capacity and resources were overwhelmed. That crucial element was to be found in at least three of the instruments examined by the Special Rapporteur. A disaster should be the business of the international community if it was of such magnitude that it was beyond the human, material, technical and other resources of local State or non-State actors. The affected State would then have a duty to request an international response. As the Secretariat had indicated in its memorandum on protection of persons in the event of disasters, there was “greater recognition of a positive duty on affected States to request assistance, at least where the domestic response capacity is overwhelmed by a disaster”.²¹⁴

26. Draft article 2 should be amended either by making the qualifying phrase “excluding armed conflict” the subject of another paragraph, or by placing it at the end of the definition proper. Draft article 2 could then read: “Disaster means a serious disruption of the functioning of a community or society causing significant, widespread human, material or environmental loss which overwhelms local response capacity but excluding the effect of armed conflict.” Lastly, he commended the Special Rapporteur for his detailed elucidation of the fundamental principles of cooperation and solidarity in international relations, twin principles which formed irreducible requirements in an increasingly interdependent world, especially in the area of disaster response and management. He therefore supported draft article 3 as ably crafted by the Special Rapporteur.

27. Mr. FOMBA said that the Special Rapporteur had clearly laid the groundwork for the debate with his thorough research and detailed analysis of the issues at stake. The three draft articles he proposed constituted an excellent working basis. With regard to the general approach to the subject, it was first necessary to examine the right to humanitarian assistance and its implications from both the legal and the practical perspective. Secondly, it was necessary to consider the primary responsibility of the affected State and, in doing so, to spell out the State’s duties, especially when it could not or would not take

²¹⁴ A/CN.4/590 and Add.1–3 (see footnote 181 above), para. 57.

action itself. Thirdly, it was vital to tackle the right of third parties to assist the affected State with emphasis on the conditions making external action lawful and the limits of such action. Fourthly, the general duty to cooperate with the affected State at various operational phases should be investigated, in particular from the perspective of furnishing assistance to developing States. Fifthly, it was crucial to ponder the issue of a State's duty to take what measures were needed to facilitate assistance. Lastly, an affected State's obligation not to refuse assistance in certain cases and the appropriate ways and means of ensuring that States honoured that obligation should also be discussed.

28. With regard to the proposed draft articles, he agreed that the current wording of draft article 1 (Scope) dealt with two linked but different elements, namely scope on the one hand and the aim or purpose of operations on the other. It therefore seemed wiser and more logical to separate the two aspects, which was why he agreed with Mr. Gaja's proposed reformulation. Alternatively, the draft article could be worded: "These draft articles apply to the protection of fundamental human rights and the meeting of basic human needs in the event of disasters." That language would be more coherent. With regard to draft article 2 (Definition of disaster), it was illusory to aspire to a perfect and universally acceptable definition. Some attempts had, however, been made and the Special Rapporteur had decided to pick the least bad among them. As for the current wording, he personally agreed with Mr. Gaja that since disruption was not in itself an intrinsic element of a disaster but rather the consequence of it, the wording of the definition should be revised. While armed conflicts were indisputably among the causes of situations of emergency and disaster, it was also true that specific provisions of international humanitarian law applied to armed conflicts. A number of Commission members seemed to support the idea of following the example of the 2003 resolution on humanitarian assistance of the Institute of International Law²¹⁵ and replacing the phrase "excluding armed conflict" by a "without prejudice" clause. Draft article 3 (Duty to cooperate) was an essential provision, but its wording still seemed to give rise to some questions. A proposal had been made to replace the expression "[f]or the purposes of the present draft articles" with "in the event of disasters"; the latter phrase was acceptable because it was clearer and more direct. In the view of some Commission members, such as Ms. Escarameia, the expression "as appropriate" obscured or contradicted the clearly established "automatic" competence of the United Nations. He did not agree with that view, at least at first glance. Moreover, there did not appear to be agreement on the categories of actors to be mentioned in subparagraphs (a) and (b) of draft article 3. That was perhaps a matter of principle which should be decided at the outset. In conclusion, he was in favour of sending draft articles 1 and 2 to the Drafting Committee. It was perhaps premature to send draft article 3 to the Drafting Committee for at least two reasons: the current level of disagreement about its contents and the need to know if other complementary provisions were planned, especially on procedures for implementing the current version of draft article 3, like those included in the 2003 resolution of the Institute of International Law.

²¹⁵ See footnote 204 above.

29. Mr. CAFLISCH said that Switzerland, like other countries, had a standing civil protection corps, which was frequently asked to step in when disasters—often natural disasters—happened abroad. Obviously, Switzerland acted only with the agreement of the State concerned in order to help it and above all its population, but despite the agreement and solidarity underpinning such relief operations, difficulties did sometimes arise and hamper the smooth handling of operations. One of the main purposes of the Commission's work should be to determine the conditions for providing international humanitarian assistance in the event of disasters, especially the conditions governing international humanitarian action at the inter-State level. He looked forward to seeing what those specific conditions would be.

30. Although the Special Rapporteur was probably right to invite the Commission to concentrate, at least initially, on the disaster proper and the post-disaster phase, the preventive aspect should not be forgotten. As recent events had shown, some disasters could have been avoided and their consequences mitigated by adequate precautions, which were not always taken and could not always be taken. That was also an area where solidarity should come into play to enable those countries which so wished to set up the requisite early warning systems. It would certainly be advisable for the Commission to keep that question on its agenda, even if, as the Special Rapporteur pointed out in paragraph 18 of his report, the United Nations, through the ISDR, was working to increase awareness of the importance of disaster reduction.

31. He had no particular comments to make about the scope of the draft articles as defined in draft article 1, except to note that the text seemed somewhat complicated—but the Drafting Committee would probably simplify it. As for draft article 2 (Definition of disaster) that term had to cover two elements: first, a sudden unforeseen (but not necessarily unforeseeable) natural or man-made event and, secondly, an event which had a substantial adverse impact on the life, well-being and property of the population, or a large segment of it. Those elements excluded armed conflict, as did the proposed text of draft article 2, and rightly so. That article also suggested another element, that of a "serious disruption of the functioning of society", but it was questionable whether that was the case in every disaster; in any event, it appeared that the idea was expressed in very general terms. He therefore preferred the language quoted in paragraphs 39 to 41 of the report. As Ms. Jacobsson had suggested, the ICRC should perhaps be included in draft article 3 (Duty to cooperate). While the ICRC acted mainly in the context of armed conflicts, that did not mean that it offered no assistance in the event of disasters or "mixed" situations. As other members of the Commission had said, that provision should not refer to "civil society" without further clarification.

32. Sir Michael WOOD drew attention to the complexity of the topic and said that he did not yet see clearly what direction the Commission was taking. That should not be understood in any way as criticism of the Special Rapporteur or of the Secretariat, who had made a considerable and admirable effort to clarify matters. There was a wealth of existing materials and a great deal of experience

and expertise in the area of disaster relief. Since the subject was an eminently practical one, the Special Rapporteur should be congratulated for collaborating closely with those working in the field. Since that was a crucial means of ensuring that the Commission's work was useful, he should be encouraged to pursue that avenue. The central challenge was that of ascertaining if it would be helpful to draw up legal principles at the level of generality appropriate for work by the Commission; that was still an open question. However, since the topic had been placed on the Commission's agenda with the approval of the Sixth Committee, the Commission had to do its best to produce something useful.

33. One of the central points was what could be said about the obligations of the affected State. He wondered how far, and in what circumstances, the affected State had a duty to cooperate with those offering aid. Was the affected State, under extreme circumstances, legally obliged to accept the assistance offered by others and, if so, in what sense was that a legal obligation? It was not certain that the Commission should try to answer those questions directly, or that they should be put in such blunt terms. In any event, for the reasons given by the Secretary-General, by the Special Rapporteur in his second report and by many Commission members, it was inadvisable to invoke the notion of responsibility to protect. That was still a fragile notion with a limited field of potential application. It would not help future debates on the responsibility to protect, or the Commission's work, if an attempt were made to extend the notion to disasters across the board.

34. The expression "rights-based approach" was not a legal term. The Special Rapporteur explained in his preliminary report that the rights-based approach "deals with situations not simply in terms of human needs, but in terms of society's obligation to respond to the inalienable rights of individuals, empowers them to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed".²¹⁶ That suggested a philosophical or moral approach. It might be a shorthand way of suggesting that the topic should be approached from the point of view of the rights of individual victims of a disaster, rather than from the perspective of the rights and obligations of the concerned States. The Special Rapporteur elaborated on the implications of a rights-based approach in his second report, where he stated that it was a "useful departing position that carries the all-important baggage of rights-based language" (para. 17). He would welcome further explanation from the Special Rapporteur as to what, in concrete terms, would be the consequences, for that project, of such an approach.

35. Pending such clarifications, his own tentative answer to the question was that, at least initially, the focus should be on the rights and obligations of States—the affected State and other States—in the event of disasters. Rather than starting from some abstract position, it would be preferable to encourage and facilitate the practical actions that States, particularly affected States, needed to take in

the face of disasters in order to provide "an adequate and effective response" to the needs of persons, to quote draft article 1. To turn the exercise into another restatement of the individual human rights of a particular class of persons—in that case the victims—might distract the Commission from its real objective of ensuring that the needs of the victims were met to the greatest extent possible. For those reasons, the phrase "the realization of the rights of persons in such an event" should be omitted from draft article 1. Moreover, since, as other members had pointed out, draft article 1 combined two separate thoughts, the scope of the draft articles and the purpose of the exercise, it would be preferable to reformulate draft article 1 so that it focused on scope, as Mr. Gaja had suggested. It could simply state that the articles applied to the protection of persons in the event of disasters.

36. He agreed with most of the comments which had been made about draft article 2 (Definition of disaster). He did not see how it would be possible to avoid a rather more elaborate text. There were many precedents on which the Commission could draw. It was necessary and important to exclude armed conflicts, but the wording required further study. A "without prejudice" clause would not necessarily be sufficient, but it would be difficult to be more precise without a better idea of the substance of the draft articles. Perhaps it merited a separate article. Depending on the substance of the project, the Commission might wish to say that the provisions of the draft articles did not apply to the extent that matters were governed by international humanitarian law.

37. As for draft article 3 (Duty to cooperate), he agreed that the duty to cooperate did not mean a great deal when stated in an abstract way, as it was in the draft article.

38. The first comment he might make in that regard was that in the section of the second report on solidarity and cooperation (paras. 50–70), reference was made to solidarity as if it were a separate principle and different from the principle of cooperation. It was even called an "international legal principle". Elsewhere in the report the terms "solidarity" and "cooperation" seemed to be used interchangeably. Yet the term "solidarity" did not appear in the draft article itself, which was right, because it was not a concept of international law, but one of morality or ethics. It was difficult to see what a notion or a "principle" of solidarity could, as a matter of law, add to cooperation, at least in the context of the current topic. In the passage from the 1990 report of the Secretary-General on humanitarian assistance to victims of natural disasters and similar emergency situations cited in the Special Rapporteur's second report, it was said that "[t]he concept of international solidarity ... understood as a feeling of responsibility ... has its roots in the ethical principles of the Charter [of the United Nations]".²¹⁷ That did not suggest a legal principle.

39. Secondly, the Special Rapporteur's second report stated that the principle of cooperation applied "both among nations and among individual human beings" (para. 50). The duty to cooperate might indeed be "well established as a principle of international law" as was

²¹⁶ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, p. 146, para. 12.

²¹⁷ A/45/587, para. 5.

stated further on (para. 52). What was not clear, however, in the current state of international law or in the context of the topic under consideration, was what particular action, if any, was required of any particular State. The manner in which the duty to cooperate was stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations²¹⁸, which was cited in the second report, was so general that it was difficult to determine its content. The picture might be different with regard to specific obligations to cooperate that States might agree to under particular instruments, such as those mentioned in paragraph 55 of the second report. But even in the case of those specific instruments, it would be interesting to know what effect a general duty to cooperate had had in practice. The reference to the instruments relating to a new international economic order (para. 57) hardly suggested practical outcomes. Not every statement in a General Assembly resolution constituted an “international legal principle” (*ibid.*).

40. Of course, international cooperation was very important in the field of disaster relief. There was probably no field in which it was more evident or where it more reflected the demands of public opinion. It was undoubtedly necessary to do everything possible to encourage and facilitate such cooperation. But the fact that something was important and should be encouraged did not mean that it was a legal obligation at the international level.

41. Some points required clarification before draft article 3 was referred to the Drafting Committee. Was the Commission proposing a text containing a duty *de lege ferenda*, or was it reformulating a duty to cooperate which already existed as a matter of law in the field of disaster relief? In either case, the content of the duty had to be clear. Was it to be a general principle rather than a rule, or did it have concrete application in particular circumstances? If it was a duty, whether general or more specific, who were the beneficiaries of the duty? Was it to be enforceable and, if so, at whose instigation?

42. He agreed with other members of the Commission that it was premature to refer the three draft articles to the Drafting Committee without further consideration. To do so would risk introducing an element of inflexibility into future work. Draft articles 1 and 2 could be referred to the Drafting Committee if general agreement could be reached on the changes that should be made to them, but the position was different with regard to draft article 3, which went to the heart of the topic. It was too early to go down a particular route without a clear idea of the eventual destination.

43. Mr. VASCIANNIE said that he was not sure what was meant by a rights-based approach. Perhaps it was a way of saying that, from a philosophical viewpoint, in disaster situations, particular attention must be paid to the needs and concerns of the affected persons. On that reading, rights and needs were essentially synonymous and it was a matter of placing the individual at the centre of

the analysis. If that was what was intended, that approach was broadly acceptable, but it provided only an overall orientation and did not say how, in the context of an actual disaster, that emphasis on the individual was to be translated into reality. It was still necessary to examine the interplay of specific agreed rules to ascertain what actions were acceptable or unacceptable, having regard to various other considerations such as available resources, States' views, conflicting individual interests and the role of public and private entities.

44. If a rights-based approach was essentially a reminder that individuals had legal rights even when disaster struck, that, too, might be acceptable. In the context of a disaster, international law required respect for the principles of humanity, neutrality and impartiality in the treatment of victims. It also insisted on the continued recognition of some basic human rights, such as the right to life, even if derogations from some human rights were allowed in times of disaster.

45. But the issue of a rights-based approach did not end there. The emphasis on legal rights of individuals in the context of a disaster made it necessary to locate where the corollary legal duties must lie, and to determine whether they rested with individuals, the affected State or other States. If the rights of individuals faced with a disaster were not respected, what did international law then require or allow? He, too, sought an answer to those points which had been perceptively raised by Mr. Gaja.

46. More generally, it was to be feared that without a clear conception of the meaning and implications of the rights-based approach, it would very quickly become apparent that it meant that in cases where an affected State could not satisfy the needs of individuals affected by a disaster, other States would claim the right or duty to intervene on behalf of the victims. That question had been considered, but not resolved, at the previous session. Mr. Nolte and the Chairperson, speaking as a member of the Commission, had seemed to support the idea that other States had the right to supply humanitarian assistance. It therefore seemed an opportune moment to briefly repeat some of the objections to the notion of “forcible” humanitarian assistance (when the affected State refused that assistance). First of all, forcing an affected State to accept assistance was contrary to the principles of sovereignty and non-intervention, which were core values of the Charter of the United Nations and of international law in general. Secondly, General Assembly resolution 46/182 (Strengthening of the coordination of humanitarian emergency assistance of the United Nations) stated that humanitarian assistance should be provided with the consent of the affected country and, in principle, on the basis of an appeal by the affected country. Thirdly, the position of the majority of States was unequivocal: most rejected the idea of humanitarian intervention in the event of disasters, as could be seen from the 2008 memorandum of the Secretariat on protection of persons in the event of disasters.²¹⁹ Fourthly, as noted in paragraph 8 of the Special Rapporteur's second report, some delegations in the Sixth Committee, including China, India and Japan, had expressed

²¹⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

²¹⁹ A/CN.4/590 and Add.1-3 (see footnote 181 above), paras. 20-23.

doubts about the relevance of a responsibility to protect in that area of the law. It would not be easy to argue that a putative right to use military force to protect victims of gross human rights violations was transferable to a right to use military force to require a State to accept help in a cholera epidemic or other disaster. Fifthly, there were other policy reasons why forcible humanitarian intervention should be viewed with scepticism: the risk of abuse, the risk that double standards would be applied and the problem of identifying the appropriate intervention threshold for giving help to States that did not want it. Hence there was no basis in *opinio juris*, or State practice, and it was not a good idea *de lege ferenda*.

47. He therefore encouraged the Special Rapporteur to look again at the concept of a rights-based approach and to clarify the meaning and implications of that approach in the context of disaster relief. Generally speaking, the Special Rapporteur wished to give support to individuals and to give effect to the ideas of solidarity and cooperation, ideas which played a prominent, albeit somewhat uncertain, role in the second report. He personally shared the view that one way of giving effect to those ideas was to channel disaster relief through the United Nations system, on the basis of the affected State's consent, a point already made by Mr. Gaja.

48. With regard to the scope of the topic *ratione temporis*, the Special Rapporteur's proposal that it should be limited to the disaster proper and the post-disaster phase, without prejudice to the possibility of examining the pre-disaster phase at a later stage, was acceptable.

49. As Mr. Gaja, Mr. Wisnumurti and Mr. Nolte had pointed out, it might be sufficient for draft article 1 (Scope) to state that the draft articles applied to the protection of persons in the event of disasters. The rest of the phrase ("to ensure the realization of the rights of persons in such an event") would be more suitably placed in a preamble, as it stated the *raison d'être* of the future instrument and the means by which its basic objectives could be met.

50. With respect to draft article 2 (Definition of disaster), the Special Rapporteur, having perceptively raised a number of important questions, had expressed his preference for the definition in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, of which he recapitulated the main elements. He personally approved of that approach, in particular the idea that the disasters in question did not need to be confined to natural events. He also agreed with the idea that armed conflicts should be excluded from the definition and hoped that Ms. Escarameia's suggestion regarding a "without prejudice" clause would be examined in greater detail. But he had a number of queries. First, he was not entirely sure that a disaster was in itself a serious disruption of the functioning of society; it was rather the cause of such a disruption. Secondly, he wondered whether, as it was worded, the definition was not over-inclusive: there could be a serious disruption of the functioning of society not caused by a disaster. More importantly, in view of the significant implications that could stem from the classification, or otherwise, of an event as a disaster, it might be wise to explore those implications before establishing a final definition.

51. Draft article 3 (Duty to cooperate) indicated that States must cooperate among themselves and, as appropriate, with the IFRC (but not the ICRC) and with civil society. That was too vague. Furthermore, as Mr. McRae and other members had pointed out, if the affected State did not cooperate with other States, it would be in breach of draft article 3. But what was stated was a duty to cooperate with an undefined category of States ("among themselves"), with no discretion allowed to the affected State, even through an "as appropriate" escape clause. As another member had said, the problem with the expression "civil society" was that it could mean just about anything.

52. He encouraged the Special Rapporteur to consider referring draft articles 1 to 3 to the Drafting Committee later, following his next report. Failing that, he himself could support referral of draft articles 1 and 2 to the Drafting Committee and would ask the Special Rapporteur to tease out the implications of a rights-based approach, particularly in respect of the question of whether there was a right of intervention to ensure the acceptance of assistance in times of disaster.

53. Mr. NOLTE said that he wished to dispel a misunderstanding with regard to an opinion which Mr. Vasciannie had attributed to him. In one of his statements on the topic at the previous session, he had said that, in principle, he had no problem regarding the right to humanitarian assistance as implicit in international human rights law, and that he regarded it as an individual right that was exercised collectively.²²⁰ That said, that right should be enforceable in the same manner as other human rights, in other words, without 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.

54. Mr. VASCIANNIE said that if that meant that Mr. Nolte did not approve of using force to supply humanitarian assistance, he would be pleased to note that he was not among the group of members whom he had mentioned.

55. The CHAIRPERSON, speaking as a member of the Commission, said that he had never supported the idea of military intervention in the event of a humanitarian disaster. Essentially he had made two points in that connection. First, the purpose of the project was to protect victims of a disaster and the leading actor bearing primary responsibility for that protection was the affected State. Secondly, if the affected State did not, or could not, protect persons, international assistance was useful and welcome, but, when formulating the draft articles, care would have to be taken to define the rules and limits of that cooperation.

56. Ms. Xue said that an extremely interesting point of the debate had been reached, where a clear distinction would have to be drawn between humanitarian assistance and humanitarian intervention, because it was the latter which posed a problem.

²²⁰ *Yearbook ... 2008*, vol. I, 2980th meeting, p. 147, para. 18.

57. Mr. VASCIANNIE, noting that the Chairperson had mentioned the primary responsibility of the affected State, said that to him that expression often connoted exclusive responsibility. It was therefore necessary to emphasize that other States also had a responsibility to determine what was to be done if the affected State did not accept humanitarian assistance. Since the latter could not be imposed by force, the notion of consent was essential.

58. Mr. NOLTE said that, once recourse to unilateral armed force had been ruled out—a matter on which most, if not all, Commission members agreed—there were still other possibilities, which the Commission had dealt with in its articles on State responsibility for internationally wrongful acts.²²¹

59. Mr. OJO said that he wished to revert to a point he had made at the previous session and to which Mr. Vasciannie had referred. The problem was one of knowing where to draw the line between a State's capacity to cope with a disaster and the moment when it really needed help. If a State did not need assistance, no third State could intervene. But should nothing be done if a State decided, in the name of its sovereignty and the principle of non-intervention, to refuse all assistance even though the disaster was so great that its people were dying? It was plainly vital to determine at what point the State required assistance.

60. Mr. HMOUD said that it was up to the State to decide whether or not it required assistance, but its international responsibility might be incurred, a factor which might encourage it to accept the assistance offered without there being any question of military intervention.

61. Mr. SABOIA said that the issue was very difficult because it involved the very fine dividing line between the legal and the political spheres, as Mr. Ojo had noted. He agreed with Mr. Vasciannie and several other members about the need to respect the sovereignty of States and prohibit the use of force. He was opposed to the application in disaster situations of the emergent principle of the responsibility to protect and to a broad interpretation of humanitarian assistance without the consent of the affected State. There were, however, borderline situations to which the international community could not remain indifferent and where, as had been seen recently, political and diplomatic pressure could be exerted to persuade a State to take account of its population's needs, although there had never been any question of calling upon the Security Council to intervene in order to oblige that State to accept assistance. The fact that State responsibility could be incurred was not sufficient when people were dying and the situation posed a threat to international peace. It was then a question of what action to take, because even if the use of force should be avoided at all costs and authorized only as a last resort, doing nothing would be unacceptable.

62. Mr. WISNUMURTI feared that the Commission was venturing into troubled waters and that the debate was becoming unproductive. He considered that humanitarian intervention must not be imposed and that, basically, it

was just a synonym for the responsibility to protect, for which guidelines already existed. The debate on that point should therefore be ended, and attention should be directed to the question of humanitarian assistance, which was a matter where, in his opinion, the decision lay with the affected State.

63. Ms. ESCARAMEIA said that she was extremely surprised by the turn taken by the debate, because certainly no one had ever said that military intervention could be justified in any circumstances. It was very interesting to note that those who did not want States to have any obligation to accept humanitarian assistance always claimed that the others had said that such a duty would mean that military intervention would be authorized. But once again, no one had ever contended that the obligation for a State to accept humanitarian assistance was tantamount to authorizing another State to take military action to impose that humanitarian assistance. What had been said was that a State had a duty to accept the assistance that it could not provide itself and, if it refused, its responsibility and that of its leaders might be incurred. The fact that a State might be held responsible clearly did not mean that it was going to be subjected to military intervention. There were various degrees of responsibility and there were courts to decide such matters. Even in the absence of the requisite courts, the State was, at least in theory, responsible and that was also true when the means of implementing that responsibility were lacking. Furthermore, States could not intervene militarily in other States; the Security Council alone was empowered to do so if it deemed the situation to be a threat to peace and security. The same argument held good for the responsibility to protect, which did not necessarily imply military intervention. If the responsibility to protect merited more careful analysis, it was because it was an area that was rapidly evolving and because, in some disaster situations, breaches of the responsibility to protect might amount to crimes.

64. Mr. NIEHAUS congratulated the Special Rapporteur on his excellent report and said that there was every justification for adopting a rights-based approach to the topic. As the Special Rapporteur had noted in his preliminary report, the Secretary-General had indicated that "the rights-based approach ... describes situations not simply in terms of human needs, ... but in terms of society's obligation to respond to the inalienable rights of individuals. It empowers people to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance where needed". He had highlighted the affected State's obligation to protect persons and the need for international cooperation in disaster situations. Another important point with regard to the protection that the Commission was seeking to give to persons in those situations was that the same rules applied irrespective of whether the disaster was natural or man-made. The Special Rapporteur had rightly refrained from drawing futile distinctions in that regard.

65. The three aspects of scope which he had examined—*ratione materiae*, *ratione personae* and *ratione temporis*—would facilitate the study, treatment and understanding of the subject. With regard to scope *ratione temporis*, paragraph 29 of the report explained that, during the debate in the Sixth Committee, a number of delegates

²²¹ See footnote 10 above.

had suggested that work on the topic should be limited to the disaster proper and the post-disaster phase. That did not seem logical because all three phases—before, during and after the disaster—formed a whole and were all very important.

66. The three proposed draft articles were clear and could be referred to the Drafting Committee although, like many other members of the Commission, he had qualms about the reference to “civil society” in draft article 3, paragraph (c). For the sake of clarity, it would be wiser to replace that term with another more appropriate expression. The Drafting Committee could take care of the matter. Some of the comments or criticisms concerning the draft articles seemed in fact to relate more to a question of method, more precisely the presentation of reports to the Commission. In general, because of the complexity of the topics examined, reports contained only a few draft articles, which obviously could not cover all issues. If they were perused too rapidly, there might seem to be some gaps, whereas in reality, one could discern a methodical exposition by the Special Rapporteur, who obviously intended to deal with those points in subsequent draft articles devoted to the various aspects in question. That said, pinpointing those omissions might have a beneficial effect on the final product, provided that one did not lose sight of the overall picture and allowed the Special Rapporteur to present the fruit of his analyses in subsequent articles.

67. Mr. HMOUD thanked the Special Rapporteur for his second report, which contained three draft articles on scope, the definition of disaster and the duty to cooperate. The Special Rapporteur presented solid legal arguments in support of his approach to the topic and the choices he had made in the first three draft articles. In doing so, he had made sure that the legal premise underlying the draft articles existed in international law and had refrained from putting forward certain principles that would not secure the general acceptance needed to make the draft articles an effective instrument for dealing with natural disasters.

68. There were, however, other issues that needed to be examined in the context of the Commission’s current or future work on the topic. The rights-based approach and the dual nature of that approach were matters not yet settled within the Commission and would be extensively debated by States and stakeholders in disaster-relief efforts.

69. With regard to the definition of “disaster” in draft article 2, he wondered whether that would be the only term included in that draft article or whether other definitions would be added. Draft articles formulated by the Commission usually incorporated an article on definitions, and draft article 2 presumably fell into that category. If that were the case, it should be revisited at a later date in order to include some further terms, because it was also necessary to define “protection”. As he had said the previous year in his statement on the preliminary report, the meaning of that concept in the regime related to disasters was unclear and the term could not be applied by analogy with human rights law, international humanitarian law or refugee law because it was understood differently in those legal regimes and had a particular meaning in disaster situations.

70. The responsibility to protect and its relationship with the topic had been debated in 2008 by the Commission and by the Sixth Committee during the sixty-third session of the General Assembly. It seemed counter-productive to dwell on the question of whether it was necessary to extend the concept to disaster situations, given the difference between the legal premise underpinning intervention in the event of international crimes and that underlying rights and obligations with respect to disaster relief. In that connection, the Secretary-General in his report to the General Assembly²²² had rightly pointed out that the application of the responsibility to protect to situations other than international crimes would “stretch the concept beyond recognition or operational utility”.

71. As for the outcome of the Commission’s work on the topic and its legal value, there had plainly been differences of opinion in the Sixth Committee on the legal force of the final draft articles (see paragraph 5 of the report). It would therefore be advisable, as the Special Rapporteur suggested, to defer the decision on that matter to a later stage when the framework of the draft articles, their content and their goals had been set. The Special Rapporteur stressed that the Commission’s work should complement existing legal regimes for disasters. That was a welcome suggestion. But it should be remembered that the Commission was engaged in drawing up general principles of law that would apply to all disaster situations. Consequently, that work would be legally binding and certain aspects of it would not complement, but rather overlap, existing legal regimes or instruments. It would therefore be essential to ensure that it did not conflict with them.

72. With regard to the scope *ratione materiae* of the draft articles, the Special Rapporteur stated in his report that he would adopt a rights-based approach to the topic. That approach had legal merit as the draft articles concerned the rights and obligations of various actors in disaster situations. The bottom line was whether it would be advisable to adopt a practical approach that identified the problems facing relief and assistance efforts on the ground and established norms to cope with those problems, an approach that he himself had supported the previous year. In that regard, the Special Rapporteur was right to accept the suggestion of the IFRC that the rights-based approach should be complemented by considering the relevance of needs in the protection of persons. The emphasis would therefore be placed on strengthening the means of coping with disasters, rather than on considering a conceptual premise. A practical approach would also ensure that risk management in disaster situations would ultimately be examined in the context of the topic; that was a matter that could be left for the moment to other bodies, but should be taken into consideration in the Commission’s work.

73. As far as the dual nature of protection was concerned, there was no reason not to include in the draft articles a set of rights of direct benefit to the protected individual. Although the Special Rapporteur provided a lengthy exposition of the legal basis for that approach and analysed judicial decisions relating in particular to consular protection, it would be counterproductive and futile

²²² A/63/677, para. 10 (b).

to dwell on controversial issues such as whether an individual could be a subject of international law, since at the current stage the Commission was considering only the rights and obligations of States *inter se*. At a later stage, it would be possible to ascertain whether direct benefits to the protected individual would stem from the individual rights regime, from the duties of the State where the disaster occurred (the State which was primarily responsible for the protection of its citizens), or from the duties of other States. The inter-State regime of legal rights and obligations might form the basis of benefits for the protected person, if a list of such rights and obligations were exhaustive. In the section on scope *ratione materiae*, the Special Rapporteur had not specified the rights that States and non-State actors had with regard to one another. In the section on scope *ratione personae*, he stated that he would focus on the relationship between States without prejudice to specific provisions applicable to non-State actors which might be introduced at a later stage. Yet in draft article 3 he referred to cooperation between States and non-State actors. Hence the relationship with non-State actors, which was already covered in the draft articles, should be mentioned as part of the scope *ratione materiae* and *ratione personae*.

74. With regard to scope *ratione temporis*, for the reasons set out in the second report, it was preferable to concentrate at the current stage on the disaster proper and post-disaster phase and possibly to consider prevention and preparedness later on. It was important to have a set of rules that could be readily implemented, bearing in mind that, especially in natural or complex disasters, a rule on prevention might be hard to apply.

75. It was troubling that draft article 1 on scope sought to ensure the realization of the rights of persons in the event of disasters. First, the realization of individual rights could never be ensured; a State could aim or intend to protect such rights, but it could not ensure them. Secondly, since the Commission was not yet dealing with the rights of individuals in the event of a disaster, it was premature to define the scope in terms of individual rights. Thirdly, since the aim of investigating the rights and obligations of various actors should result in the individual receiving better protection in disaster situations, it was illogical to limit the purpose of the draft articles to the rights of the individuals. He therefore proposed that the draft article should be amended to read: "The draft articles apply to the protection of persons in the event of disasters, by providing adequate and effective response to the needs arising in all phases of the disaster."

76. With regard to the definition of the term "disaster", his first comment was that the exclusion of armed conflict seemed appropriate, since international humanitarian law was the *lex specialis* governing such situations. The definition proposed in draft article 2 left room for the application of the regime of the draft articles if a disaster other than an armed conflict occurred during such a conflict. Final draft articles concerning the relationship with other principles of law could cover the relationship with international humanitarian law where it did not cover other disasters occurring during armed conflicts. Secondly, the Special Rapporteur defined disaster in terms not of causes but of consequences, namely the serious disruption of the

functioning of society. In order to avoid too broad a definition, a list could be drawn up of events that would not be regarded as disasters for the purposes of the draft articles. In addition, for the sake of precision, a reference should be made to the causes of the disaster, at least in the commentary, if not in the draft article itself. In any case, the causal relationship between the origin of the disaster and the ensuing harm should also be brought out in the commentary and it should be made clear that the causation could be direct or indirect. Thirdly, the element of environmental harm should appear in the definition of a disaster, but that did not mean that the text under consideration should deal with environmental protection, as that matter was subject to other rules of international law. Lastly, it seemed warranted to define disasters in terms of the harm incurred rather than the threat of harm. Unless it could be demonstrated that a threat to human life, property and the environment existed independently of the actual loss, the definition should cover only actual loss.

77. On the subject of solidarity and cooperation, he fully supported the inclusion of the principle of cooperation in the draft articles. The Special Rapporteur had shown that the notion of cooperation was firmly rooted in international law. However, emphasizing the principle of solidarity as underlying the duty of cooperation would be controversial and might lead to the rejection of the notion of cooperation by those who did not accept the idea of solidarity or third generation human rights. Reference to the provisions of various international instruments such as Article 1, paragraph 3, of the Charter of the United Nations and General Assembly resolutions that were generally accepted would suffice as the legal basis for cooperation. But it was still necessary to specify who would be subject to that duty. There were good reasons to require a State where a disaster occurred to cooperate with other States, subject to certain conditions, including respect for the principle of non-intervention, or with intergovernmental organizations whose role in international disasters had been recognized by the international community. Once again, certain conditions had to be met in order to ensure that the affected State would not be subjected to interference in its essential functions as a State. Cooperation with other States and intergovernmental organizations should not, however, be seen only from one perspective. A State where a disaster happened was entitled to receive cooperation from other States and intergovernmental organizations on certain conditions, including the ability of those entities to cooperate and furnish assistance. With regard to cooperation with civil society, the essential role played by Red Cross and Red Crescent Societies in disasters should be recognized. But it was one thing to recognize that role and another to oblige a State to cooperate with its national Red Cross and Red Crescent Societies, an obligation that did not exist in international law and had not garnered enough general support to become a rule. The same applied to humanitarian NGOs. For various legal and other reasons, some States would object to being placed under an obligation to cooperate with NGOs. Any reference to cooperation with NGOs should therefore be couched in non-binding language.

78. In conclusion, he was in favour of referring the draft articles to the Drafting Committee with the amendments

he had proposed, especially those concerning scope and cooperation. As for the definition of “disaster”, he hoped that the Special Rapporteur would respond on the matter of causation and the suggestion of an exclusion list. He hoped that the Drafting Committee would accept his proposal to add a definition of the term “protection” in draft article 2.

The meeting rose at 1.05 p.m.

3019th MEETING

Friday, 10 July 2009 at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Protection of persons in the event of disasters (*continued*) (A/CN.4/606 and Add.1, sect. F, A/CN.4/615, A/CN.4/L.758)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report on the topic of the protection of persons in the event of disasters (A/CN.4/615).

2. Mr. VARGAS-CARREÑO said that being one of the last to speak on a topic made it easier to identify the main issues of debate, as well as the points on which there were differences and the possible ways of overcoming them, especially in the case of the current topic, on which there had been a lively exchange and numerous substantive and persuasive interventions. There had been general agreement on a number of points, one of which was that everyone appreciated the excellent quality of the Special Rapporteur’s second report, especially given the difficulty and complexity of the subject matter involved. There was also general agreement that, despite the complexity of the topic, it was important, timely and appropriate for it to be taken up by the Commission. Personally, he would like to see the General Assembly, through a resolution, formally adopt a declaration on the principles on the topic, which would represent a major contribution by the Commission to the current body of international law.

3. Both the preliminary²²³ and second reports of the Special Rapporteur had helped to define the task before the

Commission in terms of what it should and should not address in its current set of draft articles. With regard to what it should address, there was certainly still much to be done and the Commission would gradually narrow the scope of its work. As to what not to address, on the basis of the two reports presented by the Special Rapporteur and the subsequent debates, the Commission could begin trimming down or eliminating certain issues. For example, it had become clear that the responsibility to protect without the consent of the affected State did not constitute an accepted principle under current international law.

4. Despite divergent views on certain points, most Commission members seemed to agree that the first three draft articles should address the scope of the topic, the definition of disaster and the duty to cooperate, respectively.

5. With regard to draft article 1, he could accept Mr. Gaja’s proposed wording, which simply stated that the draft articles applied to the protection of persons in the event of disasters. However, either as a continuation of that article or in a subsequent article, there should be an indication to the effect that in order to provide protection, States must ensure the realization of the rights of persons and provide an adequate and effective response in the event of a disaster. It was also important to include, either in draft article 1 or in a subsequent article, a provision stating that protection of persons must be provided at all phases of a disaster, including the pre-disaster, disaster proper and post-disaster phases, the latter being, generally speaking, the most important.

6. With regard to draft article 2, he could accept the Special Rapporteur’s proposed definition of disaster, provided that the phrase “excluding armed conflict” was deleted. In that connection, he considered reasonable the arguments put forward by Ms. Escarameia and other members favouring the inclusion of armed conflicts in some cases. Certainly the armed conflicts cited as examples by Mr. Dugard had left tremendous disasters in their wake. Nor was there any doubt that situations such as those that had occurred in Central America during the 1980s or those currently occurring in Darfur and Gaza constituted disasters that were the result of armed conflict. While there was no question that it was primarily the rules of international humanitarian law, in particular the 1949 Geneva Conventions and their Additional Protocols, that applied in situations of armed conflict, it was also true that those rules did not cover other aspects of disasters, which were precisely the ones that would be covered by the Commission’s draft articles. That was especially true in the post-disaster phase, where the rules of international humanitarian law were clearly inadequate.

7. Lastly, with regard to draft article 3, it would be useful to include a general introductory provision reiterating the obligation of States to cooperate among themselves, without prejudice to subsequent articles that might further specify and develop that obligation. Among the proposals made with regard to draft article 3 that related to the other bodies with which the State must cooperate, he favoured the proposal of Ms. Jacobsson to add a specific reference to the ICRC in subparagraph (b) and to replace the term “civil society” with a reference to competent NGOs in subparagraph (c).

²²³ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.

8. Overall, there appeared to be more areas of agreement than disagreement. Consequently, he wished to join with others who favoured referring the three draft articles to the Drafting Committee. If agreement could not be reached in the Drafting Committee, the draft articles should be resubmitted for consideration to the plenary Commission so that it could issue new instructions to the Special Rapporteur or establish a working group that would be given the task of preparing a new text.

9. Mr. SINGH said that he wished to join other members in expressing his appreciation to the Special Rapporteur for his second report and for his detailed introduction highlighting recent developments. The report had provided an excellent basis for the Commission's discussions.

10. As had been pointed out by several members, a rights-based approach that focused on the rights of persons affected by a disaster could give rise to difficulties. For example, individual human rights might be suspended and become unenforceable during an emergency or in the immediate aftermath of a disaster, and emphasis on the rights of individuals could detract from the objectives of saving the lives of affected persons, rescuing those in danger and caring for the injured. In such situations, the rights of individuals should be subordinated to larger community interests. Accordingly, it might be preferable to refer to the rights and obligations of States and to emphasize the need to provide an adequate and effective response.

11. As to the relevance of the responsibility to protect in the context of disasters, it might be recalled that divergent views were expressed in the Commission at the previous session, as well as in the Sixth Committee. In paragraph 14 of his report, the Special Rapporteur had drawn attention to the Secretary-General's clarification that the concept applied only to genocide, war crimes, ethnic cleansing and crimes against humanity,²²⁴ and that extending it to cover other calamities, such as climate change or natural disasters, would stretch the concept beyond recognition or operational utility. In that light, it was clear that the responsibility to protect was not relevant to the Commission's topic.

12. With regard to draft article 1, which included both the scope and the objective of the draft articles, he agreed with members who had suggested that only the first part of the text of the article, which related to scope, should be retained.

13. In draft article 2, the Special Rapporteur had defined the term "disaster" on the basis of the definition in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations. In his view, the requirements of "serious disruption of the functioning of society" and "widespread" loss raised the threshold too high and should be deleted. He agreed with Mr. Caffisch that some of the phrases quoted in paragraphs 39–41 of the report would be more suitable for expressing essential elements of the definition of disaster, namely: "a situation of great distress involving loss of human life or large-scale damage to property", "an exceptional situation in which life, property or the environment

may be at risk", or "a calamitous event resulting in loss of life, great human suffering and distress, and large scale material damage".

14. Draft article 3 required States to cooperate among themselves and, as appropriate, with competent international organizations, in particular the United Nations, the IFRC and civil society. In paragraph 64 of his second report, the Special Rapporteur recalled General Assembly resolution 46/182, which recognized that it was the primary duty of the affected State to provide for the needs of the victims of natural disasters occurring in its territory. It should be recalled that the General Assembly, reaffirming the sovereignty of States, had also recognized that the affected State had the primary role in the initiation, organization, coordination and implementation of humanitarian assistance within its territory. Draft article 3 should also attribute that primary role to the affected State.

15. The term "civil society" merited further examination. As had been suggested by some members, reference could be made to "other relevant organizations", which would include NGOs with the required expertise and capability. It would not be advisable to include a list of such organizations, since no list could be exhaustive and differences might exist between States with regard to the competence or acceptability of specific organizations. Moreover, it was up to the affected State to decide whether it needed outside assistance, and if so, which States or organizations it wished to approach to request such assistance.

16. In conclusion, he would support sending all three draft articles to the Drafting Committee.

17. Mr. VALENCIA-OSPINA (Special Rapporteur), summing up the discussion, said that he thanked all those who had taken part in the debate on the second report for their constructive approach and for the many substantive contributions that had enriched the debate. The report, which had been intended to delimit the topic and guide the Commission's future work, had provoked a discussion that had gone far beyond an analysis of the three proposed draft articles and had touched on questions that would be dealt with in future reports. In that regard, he agreed with the observation that the Commission's work of codification and progressive development of a topic of international law could not be undertaken as if it were an instant process, requiring *ab initio* a detailed exposition of the ultimate consequences of the basic tenets informing the set of draft articles to be elaborated. Rather, it was a painstaking and time-consuming exercise in which the ultimate consequences, by definition, could not be the premise but rather the result. Seen in that light, the debate would serve as an invaluable guide for further inquiries on his part into what had been generally recognized in the Commission as a highly complex and difficult topic.

18. He was gratified that the combined effect of the two reports on the topic had resulted in a considerable degree of common understanding of some of the basic premises on which the Commission might proceed. While certain aspects would become clearer in the light of future reports, that fact did not, of itself, justify halting progress at the current stage pending his submission of future proposals,

²²⁴ A/63/677, para. 10 (b).

without the benefit of a clear indication from the Commission as to the direction it wished to take. That direction could, to a large extent, be indicated by means of the formulation in the Drafting Committee of draft articles based on the three draft articles proposed in the second report.

19. Referral of the three draft articles to the Drafting Committee had been supported by many members, with whom he firmly associated himself. With flexibility, all the specific points raised in the debate appeared amenable to solutions entailing nothing more than drafting changes. Apart from cautious admonitions regarding further elaboration in subsequent draft articles, nothing in the debate had suggested that there was any fundamental opposition to the substance of the proposed draft articles, which could and should be submitted for scrutiny to the Drafting Committee.

20. That point was strikingly illustrated by the views expressed on the rights-based approach, mainly in connection with draft article 1. Although he would address in some detail and on an article-by-article basis the observations that had been made, since the rights-based approach was central to the topic as formulated by the Commission, it deserved to be highlighted at the very outset. The rights-based approach had received wide support. Keeping in mind the main objective of the topic, which was to assist victims in a disaster, it was believed that a focus on the rights of individuals provided the most solid, if not the only, legal basis for the work of the codification and progressive development of the law pertaining to the topic. The protection of victims being the central objective of the topic, respect for human rights represented the best starting point for further legal inquiry. Of particular significance was the view expressed by an initially sceptical Commission member (see the 3018th meeting above, Mr. Vasciannie, paras. 43–52) that such an approach would be broadly acceptable if it was understood to mean, first, that the approach demanded paying particular attention to the needs and concerns of individuals who were suffering; and, second, that the approach was essentially a reminder that, when disaster struck, individuals had legal rights, thereby reaffirming the place of international law in the context of disaster.

21. Nevertheless, some members remained sceptical of such an approach to the protection of persons and had expressed doubts that it would facilitate the pragmatic response that the topic should provide. It had also been suggested that a restatement of the rights and obligations of States was unlikely to enhance the protection of individuals, particularly if the Commission did not address the causes of an affected State's unwillingness to accept humanitarian assistance, such as the fear that an assisting State would interfere in its internal affairs. It was unclear to some members which rights would underpin the rights-based approach. While some thought that particular emphasis should be placed on economic, social and collective rights, others had noted that the Commission should be mindful of the limited ability of some affected States to guarantee certain rights.

22. Leaving aside for the moment the question of a contradiction more apparent than real between a rights-based and a needs-based approach, making rights language

central to the discussion would not mean that the Commission was endorsing the position of those human rights advocates who held that any human rights violation justified forcible humanitarian intervention. There were some serious questions to be addressed regarding what measures would be allowed under international law if the affected State failed to satisfy the rights of individuals, but not all of those questions could be answered in the Commission's work on the topic. However, it was clear that forcible intervention was illegal under international law, absent a justifiable claim of self-defence or action by the Security Council, even invoking the responsibility to protect—a doctrine that, in any event, most Commission members had set aside as irrelevant to the current undertaking.

23. Regarding the question of which rights would underpin the rights-based approach, the Commission had been reminded of the debate held during the first part of the current session in connection with the topic of the expulsion of aliens. Before venturing onto similar terrain, he thought it more prudent and efficient to await the Commission's reaction to the revised proposals to be submitted by the Special Rapporteur on expulsion of aliens.

24. Contrary to the views of some members, the rights-based approach did not purport to offer any definitive answers to the question of a State's duty to accept humanitarian aid. It merely created a space in which to assess that question, in the light of both the State's rights as a sovereign subject of international law and its duty to ensure the rights of individuals in its territory. At the same time, it also allowed for consideration of the questions of non-interference and the State's right to control foreign activity within its borders, which would enable the Commission, if it found it appropriate, to address such questions as the reasons for States' unwillingness to accept humanitarian aid.

25. The second report had also elicited a fruitful debate on the concept of the dual nature of the protection of persons. Many members had supported the understanding of that concept presented in the report and had agreed that the Commission should begin by establishing the rights and duties of States *vis-à-vis* each other before focusing on the rights of States *vis-à-vis* persons in need of protection. Members had stressed that the primary responsibility for the protection of persons under international law lay with the affected State, while at the same time, the Commission had been encouraged to remain mindful of other lines of responsibility, such as the one between the affected State and international organizations or between humanitarian organizations and affected persons.

26. The debate had also revealed broad agreement on other aspects of the scope of the topic. Members had generally supported the proposal to focus first on the disaster proper and immediate post-disaster phases, without prejudice to subsequent work on the issues of preparedness and mitigation in the pre-disaster phase. Some members, however, thought that the pre-disaster phase was crucial for providing effective protection to disaster victims. In addition, there was general agreement that work should focus on the rights and obligations of States, without prejudice to provisions relating to the conduct of non-State actors.

27. As could be seen from the foregoing overview, there was broad agreement in the Commission on the most salient questions regarding the substance of the topic, as presented in the second report. That significant achievement amply justified referring the draft articles embodying such substantive common ground to the Drafting Committee for textual refinement.

28. Before turning to the examination, on an article-by-article basis, of concrete suggestions for improving the layout or text of the three proposed draft articles, he wished to emphasize once more that the three draft articles were interrelated. Read jointly, they were intended to set the limits of the topic in its three dimensions: *ratione materiae*, *ratione temporis* and *ratione personae*. In particular, draft article 3 served to identify the actors to which the draft articles would apply *ratione personae*. Moreover, the three draft articles had been drafted in such a way as to avoid prejudicing any decision that the Commission might later find it necessary or appropriate to take as a result of further inquiries into the topic, such as the coverage to be given to prevention in the pre-disaster phase.

29. Lastly, the draft articles had been formulated in such a way as to bring together positions firmly held by the most relevant non-State actors concerned with humanitarian assistance: the United Nations, acting through a variety of its organs and bodies, and the International Red Cross and Red Crescent Movement, comprising the IFRC, the national societies and the ICRC. Those positions, which at first glance seemed to exemplify the rather artificial dichotomy between a rights-based approach and a needs-based approach, were not irreconcilable, but represented differences of emphasis or degree that could usefully complement each other. In his view, and that of several other Commission members, a rights-based approach, complemented by a consideration of the needs of the affected individuals, was fundamental as a guide for further work on the topic. Some members and some humanitarian actors believed that an approach based on needs would be better suited to the present undertaking, but as had been observed in the debate, individual rights could be understood as a conceptual solution to individual needs without implying that they were on the same legal plane. Working on that conceptual level to identify the relevant rights and obligations was the task to which the Commission's expertise was best suited in the light of its statutory mandate, although it should take needs into account when conducting such an inquiry.

30. With regard to draft article 1 (Scope), several members had made useful suggestions—some of which he could embrace. Some members had sought to reduce the language to a more basic statement that would essentially echo the title of the set of draft articles to be elaborated. As had been noted in the debate and as he had already stressed in his introductory statement, draft article 1 linked the scope proper of the draft articles, covered by the first part of the article, to their purpose or objectives, reflected in the second. Many members believed, however, that the reference to the rights and needs of persons related not to scope but to objectives and therefore belonged in a separate draft article or even in the preamble. A suggestion had also been made to invert the word order in the second

phrase so that “needs” would precede “rights”, which would stress that the broader basis should be needs, which might extend well beyond rights. An alternative formulation for a separate article on objectives, maintaining the original sequence, was also put forward. He could ally himself to the widely held view that the article on scope should be divided into two draft articles, one addressing scope *per se* and the other addressing objectives.

31. Also with regard to draft article 1, it had been suggested that the terms “all phases of a disaster” and “rights of persons” should be clarified, possibly in the commentary. A suggestion had also been made, and he was inclined to favour it, that in draft article 1 or 3 or elsewhere in the draft, special account should be taken of the needs of developing countries. All of those suggestions could be examined in greater detail by the Drafting Committee.

32. All those who had spoken on draft article 2 had agreed that a definition of disaster must be included in the draft articles and that it was impractical to make a distinction between natural and man-made disasters. There had also been a large measure of agreement that the definition might encompass material and environmental loss, to the extent that it affected persons, and that there must be actual harm, although for some speakers, imminent harm should be considered sufficient.

33. The debate on the draft article had clustered around three main points: the elements of the definition, such as widespread loss and serious disruption; the question of causation; and the exclusion of armed conflict. Some members had argued that the elements given were not in fact elements of a disaster but rather the consequences of one, so that the definition should include a reference to an event or a chain of events. Several members had felt that the terms “serious disruption” and “significant, widespread ... loss” warranted elaboration and that it had to be clarified whether the words “significant” and “widespread” were both necessary or whether one would suffice. Some members thought that a limiting factor should be introduced so that the definition would not be overly broad. One such factor, it had been suggested, could be a limited inquiry into causation, although many members would prefer to avoid that. A solution might be to include language like that in the last part of the Tampere definition. Lastly, many members had supported the exclusion of armed conflict from the definition, although it had generally been felt that some alternative formulation would be necessary to avoid overlap with international humanitarian law while capturing all situations that could be properly called disasters. It had been suggested that the phrase “excluding armed conflict” should be replaced by a “without prejudice” clause dealing with humanitarian law.

34. In response to these suggestions, he wished to point out that the text he had proposed for draft article 2 employed the terminology found in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, albeit in a shortened version, for the reasons explained in his report. The same terms had been used in the definition of disaster adopted only two years ago in the Guidelines for the Domestic Facilitation and Regulation of International

Disaster Relief and Initial Recovery Assistance²²⁵ by the IFRC, which incorporated the exclusion of armed conflict. These terms could also be found in the definition of disaster developed in 1992 by the Department of Humanitarian Affairs in its “Internationally agreed glossary of basic terms related to Disaster Management”.²²⁶

35. With respect to the suggestion that a reference to an event or chain of events should be included, he noted that in the context of protection of persons, it was the disruption, and not the discrete event, that constituted the disaster that called for protection, and the risk of disruption that called for prevention and preparedness. As to the use of the words “serious” or “significant”, in its commentary to principle 2 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities²²⁷ adopted in 2006, the Commission had referred to the use of the word “serious” in both the *Trail Smelter* and *Lake Lanoux* awards and had listed a number of international conventions and other legal instruments and domestic law where the term “significant” was employed.

36. He found merit in the suggestion that the reference to exclusion of armed conflict should be replaced by a separate provision that might find its proper place among the draft’s final provisions and be modelled on article X, entitled “Relationship with other rules of international law”, of the resolution on humanitarian assistance adopted by the Institute of International Law²²⁸ in 2003 and on article 1, paragraph 4, of the IFRC Guidelines, among others. Other suggestions of a drafting nature could be usefully examined with an open mind and in greater detail in the Drafting Committee. The adoption of a definition of disaster, indispensable to a determination of the scope of the topic, was without prejudice to the possibility of elaborating, at a later stage, a separate provision on the use of terms, as was customary in most drafts adopted by the Commission.

37. Concerning draft article 3, all those who had spoken had recognized that the duty to cooperate was well established in international law as an expression of the principle of cooperation enshrined in the Charter of the United Nations. His second report had drawn attention to the characterization of the principle of solidarity as a legal principle in a number of international instruments. Nevertheless, for a number of members, the concept’s legal status was open to question. He deemed it unnecessary to pursue an inquiry into solidarity at the current stage, since no reference to it appeared in the text proposed for draft article 3.

38. There had been general agreement that the principle of cooperation, formulated as a duty of States, was at the very core of the topic. Paragraph 18 of the Secretariat memorandum²²⁹ described the principle as a *sine qua non* for disaster relief, a fact duly reflected in the Bruges

resolution. The view had been expressed, however, that before a decision could be taken to refer the proposed text to the Drafting Committee, the Commission must learn what other principles were to be included and examine the corresponding formulations. It had been suggested that the Special Rapporteur’s next report should be devoted to the treatment of additional principles. He wished to recall his earlier remark about methodology, echoing the opinion of another member of the Commission that the codification and progressive development of a topic was not an instant process. Other principles would be the subject of draft articles in subsequent reports, particularly in connection with assistance and access in the event of disasters. In paragraph 52 of his preliminary report,²³⁰ those principles were identified as humanity, impartiality, neutrality and non-discrimination, as well as sovereignty and non-intervention. The principle of sovereignty and its corollary, non-intervention, would be reflected in a provision concerning the primary responsibility of the affected State.

39. In his second report, he had recourse to the image of two axes to illustrate his approach to the dual nature of protection of persons in the event of disasters. He could employ a similar image, that of two planes, one vertical and one horizontal, to illustrate his approach to the various principles involved. The principle of cooperation, the core principle that formed the legal basis of the whole undertaking, operated on the vertical plane. Other principles, insofar as they informed the stage of assistance and access when the disaster had occurred, operated on the horizontal plane. That distinction explained why the principle of cooperation must be the subject of autonomous treatment at the very outset of the work on the topic, whereas the other principles would find their proper place in the work when the three distinct phases of the disaster cycle were addressed. If that analysis was correct, then there was no justification for postponing the formulation of a draft article on the duty to cooperate, pending further work on other principles.

40. It had also been suggested that work should be suspended pending the formulation of proposals concerning the practical consequences, in the event of a disaster, of the implementation of the principle of cooperation. He referred again to his earlier comments about methodology, which were even more pertinent to the latter suggestion, since most of the draft articles that were to constitute the bulk of the text would be devoted to the operational aspects of assistance. Those were nothing other than the practical manifestations of the implementation of the legal duty to cooperate. To use a well-known simile, it would amount to putting the cart before the horse, were the Commission to follow the suggestion to which he had just referred.

41. Specific suggestions had been made to improve the wording of draft article 3 in respect of cooperation between States and non-State actors. Many members had been opposed to the reference to civil society in subparagraph (c). He deferred to the majority view and could agree to its replacement, at an appropriate place, with a specific reference to NGOs. Some members had

²²⁵ See footnote 176 above.

²²⁶ United Nations, Department of Humanitarian Affairs (DHA/93/36).

²²⁷ *Yearbook ... 2006*, vol. II (Part Two), p. 64, para. 67.

²²⁸ See footnote 204 above.

²²⁹ A/CN.4/590 and Add. 1–3 (see footnote 181 above).

²³⁰ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.

questioned the absence of a reference in subparagraph (b) to the ICRC. Although that omission had been intentional, to take account of the position expressed by both the ICRC and the IFRC concerning their respective mandates in the event of disasters, he would have no difficulty with including a reference to the ICRC, either as such, or under the accepted denomination of the International Red Cross and Red Crescent Movement, which encompassed both the IFRC and the ICRC as well as national Red Cross and Red Crescent societies. A specific reference to the Red Cross and Red Crescent institutions was warranted in recognition of their *sui generis* status as neither intergovernmental nor non-governmental organizations. The inclusion of a “without prejudice” clause to cover humanitarian law would place in its proper perspective the question of the applicable law—humanitarian or international disaster relief law—in the event of mixed situations involving armed conflict and disasters.

42. It had also been suggested that cooperation with the United Nations should be differentiated from cooperation with other competent international organizations in the light of the duty to cooperate enshrined in the Charter of the United Nations. To make that distinction clear, it had been suggested that the word “shall” should be reserved for the duty of States to cooperate among themselves and with the United Nations, whereas the word “should” should replace “as appropriate” and be used with respect to other competent or humanitarian intergovernmental and non-governmental organizations. He had no difficulty in agreeing to that suggestion, even though, in his opinion, the expression “as appropriate” led to the same result as the word “should”. In his view, the nature and degree of involvement of the United Nations in a given disaster situation was to be determined under a general regime put in place by the Organization with the agreement of its Member States, in conformity with its rules or pursuant to bilateral accords between the United Nations and the affected State and other States concerned. Such a general regime or bilateral accords could well envisage the channelling through the United Nations, alone or mainly, of the assistance to be provided in the event of a disaster.

43. It had also been suggested that the opening phrase, “For the purposes of the present draft articles”, should be replaced by words such as “In the event of a disaster”. The change would seem to make the provision more restrictive, as it would limit the duty to cooperate to the various phases of the disaster, whereas the current wording was intended to refer to all the protection objectives of the set of draft articles and was thus more comprehensive and more in keeping with the *raison d'être* of the topic. Once it had been agreed that a draft article on the principle of cooperation was central to the topic and merited autonomous treatment, changes of a drafting nature could properly be entrusted to the Drafting Committee in the light of the debate, including his summing up.

44. If he had referred to the salient drafting points made during the debate, his purpose had been not to transform the plenary into the Drafting Committee, but to show the flexibility incumbent upon him in the pursuit of the common goal and to demonstrate that the various views expressed were capable of rapprochement by means of drafting techniques. He could therefore conclude his

summing up by proposing that the Commission refer the three draft articles in his second report to the Drafting Committee for improvement and adoption in the light of the debate.

45. Mr. NOLTE said he had been impressed by the Special Rapporteur’s mix of stability and flexibility: he had stood his ground on certain points yet on others had taken into account the suggestions made by members of the Commission. He himself had been among those who had had reservations about whether draft article 3 should be referred to the Drafting Committee. To accommodate these concerns, he wished to make a suggestion. The Special Rapporteur had accepted the idea of dissociating the question of the scope from that of the purpose of the draft as stated in draft article 1. The problem that some members had with draft article 3 was its relative lack of substance: it proclaimed the duty to cooperate but did not indicate for what purpose. If the element of purpose now covered in draft article 1 was incorporated in draft article 3—if it was stated that the purpose of cooperation was to satisfy the needs and rights of victims of disasters—then draft article 3 might be given the content some members thought it now lacked. It would be a general statement of purpose which could be made more specific by the inclusion of additional principles. If that approach was taken, he for one would have less difficulty about referring all three draft articles to the Drafting Committee.

46. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the opening phrase of draft article 3, “For the purposes of the present draft articles”, had been intended to introduce the element of purpose. If the Commission wished to have a separate provision on the purposes or objectives of the draft articles, as distinct from the scope, and if the draft articles 1 to 3 were deemed to be closely related and to be read together, then the opening phrase of draft article 3 could be construed as referring to the purpose of the topic, namely the protection of persons, from the dual perspective of rights and needs. If, instead of drafting a separate provision, the reference to purpose were placed in draft article 3, that would not alter the substance of the draft and would simply be a question of presenting the material in the most effective manner. He was thus not at all disinclined to accept Mr. Nolte’s suggestion.

47. Sir Michael WOOD said the Special Rapporteur seemed to have overstated the degree of consensus within the Commission, both on substance and on procedure. On substance, the view had clearly been expressed that the rights-based approach was not a helpful one, and there was no agreement as to whether emphasis should be given in draft article 1 to the realization of the rights of persons, as opposed to the provision of an adequate and effective response in disaster situations. If the Commission decided to send draft articles 1 and 2 to the Drafting Committee, it should be on the understanding that the Committee’s task went far beyond textual refinement. It would be delving into the substance and fundamentals of the project, and it might conceivably fail to reach agreement and be obliged to refer the texts back to the plenary Commission. He remained of the view that it would be premature to send to the Drafting Committee any of the draft

articles, especially draft article 3, which went to the very substance of the topic. He would prefer for the Commission to continue its consideration of the texts in plenary after seeing further reports from the Special Rapporteur.

48. Mr. McRAE asked which version of the draft articles the Commission was going to refer to the Drafting Committee: the original, or the one described by the Special Rapporteur in his summing up, which would incorporate significant changes. Once he himself saw a revised version of the draft, his opposition to referring it to the Drafting Committee might dissolve. It would certainly be better for the Drafting Committee to work with the draft articles, not in their original form, but as revised by the Special Rapporteur in the light of the Commission's discussion.

49. Mr. VALENCIA-OSPINA (Special Rapporteur) said he proceeded from the premise that drafting work was done in the Drafting Committee, not in the plenary Commission. He had already accepted some of the suggestions made during the plenary debate—for example, to divide draft article 1 into two separate articles—but the precise terminology would be for the Drafting Committee to determine. The Secretariat, as was customary, had prepared a list of the drafting suggestions for distribution to the members of the Drafting Committee, and he would be glad to indicate which of those changes he could agree to. He was also willing to prepare a paper incorporating those elements for the benefit of the Drafting Committee. On that basis, at the Committee's first meeting, he could foresee, for example, quick acceptance of an article on scope, limited as suggested by Mr. Gaja.

50. Sir Michael's remarks seemed to suggest that the Special Rapporteur should continue producing reports and proposing draft articles without a firm indication of the legal basis for those texts. If neither a rights-based approach nor the principle of cooperation were to be regarded as the basis for the Commission's work on the topic, then he needed to hear what alternative bases there might be. To assert that the Commission could not accept the idea that cooperation and a rights-based approach were at the centre of the undertaking implied that it might simply have to halt its consideration of the topic.

51. Ms. XUE commended the Special Rapporteur for his summing up of the debate and for the flexibility he had shown. She observed that no Commission member had called into question the purpose of the topic, namely, the protection of the victims of disasters. The question before the Commission was how to proceed, and what international law should underpin the Commission's work, in order to provide optimum protection to persons in need.

52. She had welcomed the Special Rapporteur's clarification as to why he had immediately addressed the issues of solidarity and cooperation in draft article 3. However, if the point of departure of the Commission's work was to be that of solidarity under international law, then the title of the topic would have to be changed, from "protection of persons in the event of disasters" to, for example, "solidarity, international solidarity and cooperation in the event of disasters, for the protection of persons" or "international humanitarian intervention in the event of

disasters, for the protection of persons". The Commission should not be overly ambitious, in seeking to cover all situations that generated cases of human need.

53. Effective protection of human rights of every individual could become a vast topic that went far beyond disaster relief. While there was nothing wrong with a "rights culture", the Commission—as a body of international lawyers—needed to be clear about what it was doing: the Commission wanted States to be more responsible in the event of disasters, especially tremendous natural disasters, whether the causes were man-made or not. To that end, she agreed with the Special Rapporteur on the need to stress the aspect of international solidarity and cooperation. However, to start with international solidarity and cooperation instead of starting with the rights and obligations of the affected State resulted in a different focus. In her view, the Commission should continue discussion on that fundamental substantive issue and decide what its focus should be before sending any draft articles to the Drafting Committee.

54. Mr. Gaja had suggested retaining only the first sentence of draft article 1. If she had understood him correctly, he had referred to both aspects: the rights and obligations of affected States and international cooperation and solidarity. However, the special emphasis on solidarity and international organizations immediately introduced by the Special Rapporteur in draft article 3 reflected a different approach, and had shifted the focus from the affected State to the international community. That was a decision that needed to be debated in the plenary Commission.

55. Whether a rights-based approach or needs-based approach was adopted, the aim was to ensure the protection of individuals. International humanitarian assistance in the event of a disaster was of great importance for any State, whether small or large, weak or strong, and that was where solidarity should be strengthened. States were still the main actors in the whole process, however, and should be held primarily responsible for organizing disaster relief operations. It was therefore necessary to keep States at the centre of the Commission's work on the topic.

56. The CHAIRPERSON observed that there appeared to be a broad degree of consensus with regard to the purpose of the topic.

57. Mr. OJO said that he was in favour of sending the draft articles to the Drafting Committee and recalled that the Special Rapporteur had adequately reflected the views of all speakers in his summing up and had offered to provide additional input for the Drafting Committee. Moreover, the draft nature of the articles meant that they could be changed subsequently, when the Drafting Committee referred its work back to the plenary Commission.

58. Mr. WISNUMURTI said that he was not in favour of referring the draft articles immediately to the Drafting Committee, as it was necessary first to reach a consensus on the outstanding fundamental issues. Although there was general agreement regarding the aim of the topic, namely the protection of persons, there were differing views as to how to reach that objective. In his view, the difficulty

stemmed from the rights-based approach adopted. He had accepted that approach on the understanding that the issues of protection *vis-à-vis* the rights of the States concerned would be reflected in the text in a balanced manner. Further clarification of what was actually meant by a rights-based approach would be helpful. Did that concept encompass, for example, the whole range of human rights of victims of disaster, or only certain rights? In his view, the most important aspect of a rights-based approach was that it should focus solely on the right to protection and relief. He would welcome reflection of that limited approach in the drafting of the text.

59. Following some further debate in the plenary, it would be very helpful if the Special Rapporteur himself, rather than the Secretariat, could draw up a revised version of the three draft articles, reflecting his view of the debate so far, for the benefit of the Drafting Committee.

60. Ms. ESCARAMEIA recalled that the decision that the topic was suitable had been taken long ago. The question at hand was whether to refer the draft articles to the Drafting Committee. Of the many Commission members who had spoken during the substantive debate, only a very small minority had said that they were not in favour of referring the draft articles to the Drafting Committee, or that they were only in favour of referring draft articles 1 and 2. In her view, substantive debate on the item should not be reopened. In keeping with the majority view, all three draft articles should be referred to the Drafting Committee, which would consider them in the light of the debate and the Special Rapporteur's summing up. That was normal practice. The Drafting Committee was much more than an editorial body and had often considered substantive issues. It had never been standard practice for the Commission to have to reach agreement on all outstanding issues beforehand.

61. Mr. GAJA said that it was necessary to reach a consensus and proposed that, as a compromise, the first part of draft article 1, relating to scope in the narrow sense, should be referred immediately to the Drafting Committee, together with draft article 2, and that a working group should be established for informal discussion of draft article 3 on cooperation and the second part of draft article 1 on objectives. The working group could be chaired by the Special Rapporteur, or by another member if the Special Rapporteur preferred. When the working group had reached agreement, it would report to the plenary Commission with the recommendation that the revised articles should be referred to the Drafting Committee.

62. Mr. NOLTE said, in response to the remarks by Sir Michael, that the degree of precision required of a draft article before it could be referred to the Drafting Committee depended on the nature of the topic. Draft articles referred recently to the Drafting Committee concerning reservations to treaties had been much more precise, for example, than those concerning the expulsion of aliens, which had given rise to fairly substantive discussions in the Committee.

63. He recognized the concern expressed by Ms. Xue regarding the apparent imbalance caused by reference, in draft article 3, to a duty of cooperation, with no

mention of the role of the affected State. Other members had shared that concern, which had accounted for their reluctance to refer the draft article to the Drafting Committee. As to the way forward, it should be left to the discretion of the Special Rapporteur whether to send the draft article on cooperation to the Drafting Committee first, establishing a working group only in the event of problems with formulation, or whether to establish a working group first, and discuss the role of the affected State contemporaneously.

64. While recognizing the merit of Mr. Gaja's proposal in addressing the reservations of fellow members, in his view it would do no harm to refer all three draft articles to the Drafting Committee, on the understanding that the article on cooperation should be adopted on a provisional basis only, pending the drafting of a subsequent article on the role of the affected State.

65. Sir Michael WOOD clarified that he had not been suggesting that consideration of the topic in question should be halted, merely making the point that it was not helpful to approach the issue from a particular theoretical perspective, whether "rights-based" or otherwise. In his view, the Commission should try to come up with provisions that were realistic and practical and that would assist in providing an adequate and effective response to disasters. In other words, he was proposing a practical approach with no particular theoretical basis.

66. He agreed with the distinction made by Mr. Gaja concerning questions of scope, as covered in the first part of draft article 1, together with draft article 2, and would have no problem referring the corresponding text for consideration by the Drafting Committee, as proposed by Mr. Gaja. The second part of draft article 1 and draft article 3, however, went to the very heart and direction of the project, and he endorsed Mr. Gaja's proposal for further discussion on those issues.

67. Ms. JACOBSSON thanked the Special Rapporteur for his excellent summing up and for the flexibility he had shown. She had welcomed the acknowledgement, for example, that the definition contained in draft article 2 was not final, but would evolve over time. In her view, that applied to any draft article. She concurred with the Chairperson that there was an area of consensus within the Commission. She also agreed with the comments made regarding the possibility of substantive discussions in the Drafting Committee, depending on the nature of the topic in question. She therefore favoured referring all three draft articles to the Drafting Committee, in the light of the Special Rapporteur's summing up. She would be interested to hear the Special Rapporteur's views concerning Mr. Gaja's proposal, to which, of course, she could have no objection; having already endorsed referral of all three draft articles to the Drafting Committee, she could not object to partial referral.

68. She observed that there had been nothing in the Commission's report on the work of its sixtieth session²³¹ to indicate that the Commission would still be having problems dealing with matters of principle at the current

²³¹ *Yearbook ... 2008*, vol. II (Part Two), chap. IX, pp. 129–135.

session. She had been under the impression that it had been agreed that referring draft articles to the Drafting Committee would be the way to proceed. There was an interesting reference in the Commission's report to seeking information from international organizations on real needs.²³² In line with the practical approach advocated by Sir Michael, perhaps the Commission should give renewed consideration to the idea of inviting the views of the international organizations concerned; that might help it to decide what it really wished to achieve.

69. The CHAIRPERSON, speaking as a member of the Commission, said he thought that Mr. Gaja's proposal as modified by Mr. Nolte could provide an acceptable way out of the dilemma. Referring the draft articles to the Drafting Committee would not mean that they were lost forever to the plenary; the Commission would still have the flexibility to refer matters of substance to a working group and subsequently to debate them in the plenary, as it had done on occasion in the past. There was agreement that the basic aim was to find the best way to help victims of disaster and to help both the affected State and other States willing to provide assistance to do just that, with due respect for State sovereignty. He was committed to the topic and optimistic that the Commission could make a contribution.

70. Speaking as Chairperson, he would by all means try to avoid a vote, which he did not believe would further the Commission's work.

71. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he was receptive to suggestions that would take the work forward. Bearing in mind that the task of the Commission was to codify and develop the law, his concern had been to find the legal foundation on which the Commission could build a set of draft articles on the topic. Unlike most of the topics the Commission had dealt with, protection of persons in the event of disasters was a novel topic, and there was no wealth of doctrine, practice and jurisprudence to draw on, merely a mixture of hard law, soft law, wishful thinking and practical considerations. The Commission had had the same debate at its previous session, and he recalled Mr. Pellet saying then that in his view the rights-based approach was the only possible legal basis on which the Commission could proceed. He himself had come to the "rights culture" rather late in his career, but the concept of a rights-based approach was widespread, and the Commission must be sensitive to current thinking. However, the approach would constitute only a background; nowhere in the draft articles would there be an explicit reference to a rights-based approach or to solidarity. He had sought, not just a moral or philosophical, but a legal, underpinning for the draft articles. In future reports, he would be dealing with the principles of sovereignty and non-intervention, either by themselves or in the context of the primacy of the affected State.

72. He still believed that the best way to advance was to refer all three draft articles to the Drafting Committee, and he endorsed the view of the Drafting Committee's function expressed by other members. Like the Chairperson,

he did not believe that a vote would help matters. However, the compromise plan proposed by Mr. Gaja might be more acceptable to the Commission. If the Commission wished, he could quickly reformulate all three draft articles in the light of the discussion. The reformulation might clarify the discussions held in the plenary.

73. The CHAIRPERSON asked whether, bearing in mind the discussion and the readiness of the Special Rapporteur to rework the draft articles in the light of it, the members could reach consensus on the proposal to send all three draft articles to the Drafting Committee, on the understanding that there were some difficulties with draft article 3 that could subsequently be referred, if necessary, to a working group.

74. Mr. GAJA said that the purpose of a working group was to reach consensus before referring draft articles to the Drafting Committee. It would be helpful if a working group, taking into account the points raised in the debate, could arrive at some kind of general compromise and report it to the plenary Commission.

75. Mr. SABOIA said that, in the light of the Special Rapporteur's flexibility and his willingness to rework the draft articles to reflect the discussion, he thought that the procedure outlined by the Chairperson would be the best solution. It would not preclude the possibility of creating a working group if problems persisted, but the draft articles reformulated by the Special Rapporteur might present fewer problems than anticipated.

76. Mr. WISNUMURTI said that he was grateful for the Special Rapporteur's willingness to produce an informal text reflecting the discussion. On that basis, he could agree to either plan: forming a working group before referring the draft articles to the Drafting Committee, or referring them and forming a working group afterwards if it proved necessary.

77. Sir Michael WOOD said that he, too, was grateful to the Special Rapporteur for his flexibility. His preference would be for the formation of a working group first, as Mr. Gaja had proposed, although in the end, following that procedure or the procedure suggested by the Chairperson might come to the same thing.

78. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, of course, his preference was to refer all three draft articles to the Drafting Committee, but in the interests of consensus he was willing to submit to the Commission's decision. The procedure the Chairperson had outlined based on Mr. Nolte's proposal was closer to his own position than the proposal of Mr. Gaja, but if a working group was to be set up beforehand he would request the privilege of chairing it.

79. Ms. JACOBSSON said that she favoured the procedure outlined by the Chairperson, because it meant that the Commission could set up a working group when it was needed and not before, so that the work was not unnecessarily delayed.

80. Mr. HASSOUNA said that the reformulated draft articles that the Special Rapporteur would prepare might

²³² *Ibid.*, pp. 130–131, para. 225.

help to move the work forward, possibly without the need for a working group. He was in favour of referring all three draft articles in that form to the Drafting Committee and forming a working group if it proved necessary.

81. Ms. ESCARAMEIA said she shared the Special Rapporteur's view that all three draft articles should simply be referred to the Drafting Committee, but, that not being possible, and in the light of the Special Rapporteur's commendable flexibility, she supported the Chairperson's suggestion.

82. The CHAIRPERSON asked whether all members could agree to the proposal to refer to the Drafting Committee all three draft articles, as reformulated by the Special Rapporteur to reflect the discussion, and, if it proved necessary, to establish a working group chaired by the Special Rapporteur to study draft article 3.

83. Sir Michael WOOD said that, if he could make a slight alteration, his proposal was that the second half of draft article 1 relating to purpose should also, if it proved necessary, be referred to a working group along with draft article 3.

84. The CHAIRPERSON, speaking as a member of the Commission, said that he supported that proposal.

85. Speaking as Chairperson, he took it the Commission wished to proceed in that manner.

It was so decided.

86. Mr. VÁSQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic "Protection of persons in the event of disaster" was composed of Ms. Escarameia, Mr. Fomba, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood and Ms. Xue, together with Mr. Valencia-Ospina (Special Rapporteur) and Ms. Jacobsson (Rapporteur) (*ex officio*).

The meeting rose at 1.05 p.m.

3020th MEETING

Tuesday, 14 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Shared natural resources²³³ (A/CN.4/606 and Add.1, sect. A, A/CN.4/607 and Add.1,²³⁴ A/CN.4/608²³⁵)

[Agenda item 5]

REPORT OF THE WORKING GROUP

1. The CHAIRPERSON invited Mr. Candiotti, the Chairperson of the Working Group on shared natural resources, to present the Working Group's report.

2. Mr. CANDIOTTI (Chairperson of the Working Group on shared natural resources) said that, at its 3013th meeting on 2 June 2009, the Commission had decided to establish a Working Group on shared natural resources. The Working Group had held one meeting on 3 June 2009, at which its members had exchanged views as to whether it might be feasible for the Commission to consider the issue of transboundary oil and gas resources in the future. The Working Group had had before it the following documents: the questionnaire on oil and gas which had been circulated to Governments;²³⁶ a document on oil and gas prepared by Mr. Yamada, the former Special Rapporteur on shared natural resources (A/CN.4/608); the fourth report on shared natural resources presented by Mr. Yamada;²³⁷ the relevant portions of Mr. Yamada's fifth report on shared natural resources;²³⁸ the comments and observations received from Governments on the questionnaire on oil and gas (A/CN.4/607 and Corr.1 and Add.1); the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat (A/CN.4/606 and Add.1) summarizing, *inter alia*, the views expressed by delegations in the Sixth Committee in 2008 on the issue of oil and gas; and two working papers prepared by Mr. Yamada, containing excerpts from summary records of the Sixth Committee's debates on the topic of oil and gas in 2007 and 2008.

3. During its discussions, the Working Group had addressed a number of questions, including that of whether it was really necessary to examine the feasibility of any future work by the Commission on oil and gas resources and whether such work would meet a practical need; the sensitivity of the issues in question; the relationship between the issue of transboundary oil and gas resources and boundary delimitation, especially maritime boundaries; and, lastly, the difficulty of collecting information on the relevant practice. While the Working Group

²³³ In 2007, the Commission considered the Special Rapporteur's fourth report on shared natural resources, which dealt with oil and natural gas (*Yearbook ... 2007*, vol. II (Part One), document A/CN.4/580) and requested a Working Group, chaired by Mr. Enrique Candiotti, to examine the questions raised in the report. At the same session, the Commission decided to proceed with the second reading of the draft articles on transboundary aquifers, independently from its future work on oil and natural gas; these two resources would be examined together (*ibid.*, vol. II (Part Two), p. 56, paras. 158–159 and pp. 59–60, paras. 178–183). At its sixtieth session in 2008, the Commission adopted on second reading a preamble and 19 draft articles on the law of transboundary aquifers (*Yearbook ... 2008*, vol. II (Part Two), chap. IV, sect. E), which it transmitted to the General Assembly.

²³⁴ Reproduced in *Yearbook ... 2009*, vol. II (Part One).

²³⁵ *Idem*.

²³⁶ *Yearbook ... 2007*, vol. II (Part Two), p. 56, para. 159.

²³⁷ *Ibid.*, vol. II (Part One), document A/CN.4/580.

²³⁸ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/591.

recognized that no two situations were alike when it came to the exploration or exploitation of oil and gas resources, some members had been of the opinion that it might be necessary to clarify certain legal aspects, especially those touching on cooperation.

4. Several members had emphasized the need for the Commission to proceed cautiously with regard to oil and gas and to be responsive to States' views. Some members had pointed to the fact that the majority of Governments which had expressed an opinion on the matter had not been in favour of, or had had reservations about, the Commission studying the subject of oil and gas in the future. Some members had, however, drawn attention to the fact that the number of written responses received until then, although substantial, was insufficient for the Commission to decide whether it should undertake any work on the subject.

5. In order to help the Commission to assess the feasibility of any future work on oil and gas, the Working Group had asked Mr. Murase to prepare a study for submission to a Working Group on shared natural resources which might be set up at the Commission's sixty-second session, in 2010. The study, which would be prepared with the assistance of the Secretariat, would analyse Governments' written replies on the subject of oil and gas, their comments and observations in the Sixth Committee and any other relevant information.

6. On the basis of these discussions, the Working Group had decided to make the following recommendations to the Commission: (a) to postpone a decision on any future work on oil and gas until the Commission's sixty-second session; (b) in the meantime, once again to distribute the questionnaire on oil and gas to Governments, while encouraging them to provide comments and information on any other matter concerning the issue of oil and gas and especially on whether the Commission should address that topic. The Commission was invited to take note of the Working Group's report and recommendations.

7. The CHAIRPERSON said that, if he heard no objections, he would take it that the Commission, having taken note of the report of the Working Group on shared natural resources, wished to approve the recommendations contained therein.

It was so decided.

Reservations to treaties (*continued*)* (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Corr.1 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL
RAPPORTEUR (*continued*)**

8. The Chairperson invited Mr. Pellet, the Special Rapporteur, to resume the presentation of his fourteenth report on reservations to treaties (A/CN.4/614 and Add.1–2).

9. Mr. PELLET (Special Rapporteur) announced that his statement would refer to paragraphs 80 to 127 of his fourteenth report, which were devoted to the validity of reservations and interpretative declarations. That report constituted a follow-up to his tenth report,²³⁹ which he had presented to the Commission in 2005 and which had been concerned with the validity of reservations themselves. If the draft guidelines contained in the fourteenth report were referred to the Drafting Committee, that would make it possible to complete the third part of the Guide to Practice on the validity of reservations and similar unilateral statements.

10. On reflection, he thought that draft guidelines 3.3 on the consequences of the non-validity of reservations and 3.3.1 on the non-validity of reservations and responsibility presented in his tenth report (A/CN.4/588/Add.2), which had been adopted by the Drafting Committee, ought to be placed in chapter IV of the Guide to Practice on the effects of reservations. Moreover, draft guidelines 3.3.2 to 3.3.4 on the nullity of invalid reservations, the effect of unilateral acceptance of an invalid reservation and the effect of collective acceptance of an invalid reservation would be examined at the next session at the same time as the part of the fourteenth report on the effects of reservations and interpretative declarations (paras. 179–290).

11. This part of the fourteenth report on reservations to treaties centred on the validity of reactions to reservations (paras. 94–127), in other words, objections on the one hand and acceptances on the other. He had chosen that order because it seemed easier to understand the position with regard to the validity of acceptances once some thought had been given to the validity of objections. The term "validity" as used in that context had a slightly different meaning to that which it had in the expression "validity of reservations". The crux of the matter was whether objections and acceptances could produce legal effects, or at least the effects which their authors expected them to have. He urged the Commission members not to reopen the somewhat academic and futile discussion of terminology. The Commission had clearly opted for the term "validity" and it would be quite inappropriate to reopen the debate. Moreover, the members of the Commission would not get anywhere with the argument that the validity of objections and acceptances should not be discussed before the Commission had debated the effect of reservations. He had begun with the question of validity because that followed the logical sequence of the Guide to Practice. In any event, the effects of reservations would be considered at the next session.

12. In view of the very close links between validity and effects, however, he would be pleased to hear members' opinions about the related questions of the effect of objections and the effect of acceptances.

13. Turning to the validity of objections to reservations, he drew attention to the definition of an objection contained in draft guideline 2.6.1 adopted by the Commission at its sixtieth session, which read: " 'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization in response to

* Resumed from the 3014th meeting.

** Resumed from the 3012th meeting.

²³⁹ See footnote 134 above.

a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.”²⁴⁰ First the ICJ in 1951 in its advisory opinion on *Reservations to the Convention on Genocide*, then the Commission itself had indicated that the rules applying to the validity of objections should be brought into line with those on the validity of reservations. In other words, the ICJ and the Commission had taken the view that the criterion for deciding whether an objection was invalid was the compatibility of the reservation with the object and purpose of the treaty. If one had a reasonable idea of the object and purpose of the treaty, that position considerably restricted the ability to object to a reservation. Nevertheless, it had become clear that that position was at odds with the principle of consensualism since, if a reservation was not incompatible with the object and purpose of a treaty, it was impossible to object to it. In the 1966 draft text on the law of treaties²⁴¹ which had resulted in the 1969 and 1986 Vienna Conventions, the Commission had dissociated the conditions for the validity of objections from the conditions for the validity of reservations. In short, it had simply refrained from laying down conditions for the validity of objections.

14. That raised the question of whether it was sufficient to hold that, in accordance with the fundamental principle of consensualism, no State could have a reservation foisted upon it unless, vice versa, it were accepted that an objection thereto would always be valid. After all, an objection merely gave practical effect to the principle that a State could in no way be forced to accept, by means of a treaty, provisions which it did not want. That statement was true of simple objections, which formed the subject of article 21, paragraph 3, of the 1969 Vienna Convention, and of objections with a maximum effect, as was clear from article 20, paragraph 4 (b) of that Convention. He therefore thought that a simple objection and an objection with a maximum effect could never be invalid.

15. The problem arose more with regard to what were generally called objections with an intermediate effect, in other words, objections which purported to exclude, in relations between the two States concerned, not only the provision to which the reservation related, but also other provisions of the treaty. In his opinion, such objections must always be deemed valid, even when their purpose was to deprive the treaty of its object and purpose in relations between the two States in question. Hence, even in that context, the objection could not be called invalid for two reasons. First, because he who could do more could do less, in other words, if a State could, by means of an objection, completely exclude the application of a treaty, it could also exclude that of some provisions of the treaty, while maintaining treaty relations with the reserving State. Secondly, an objection with an intermediate effect allowed a treaty to apply, albeit while adding certain restrictions to those intended by the author of the reservation.

²⁴⁰ For the commentary to this draft guideline, see *Yearbook ... 2005*, vol. II (Part Two), pp. 77–82.

²⁴¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 177.

16. It had been suggested that such an objection was a “counter-reservation”. That proposal was attractive, but not completely convincing. A reservation was a unilateral declaration to which an objection could be made, but there was nothing to say that it was possible to object to an objection with an intermediate effect, even if it were to be termed a “counter-reservation”. In any event, an objection to such a “counter-reservation” would be out of time in the light of the actual definition of reservations in article 2, paragraph 1 (d), of the Vienna Conventions, as reproduced in draft guideline 1.1 of the Guide to Practice. Admittedly, late objections were not completely excluded by the Guide to Practice, but they could produce an effect only if no State was opposed to them. It would be preferable to discard that attractive, but risky intellectual construct which, in practice, led nowhere, and to take objections with an intermediate effect for what they were, in other words, objections and objections which were in principle valid insofar as they complied with provisions of article 20 of the Vienna Conventions. With a view to the progressive development of international law, he considered that it would be wise to investigate the effects that such objections with an intermediate effect could produce.

17. In that connection, he drew attention to practice in the matter, which was described in paragraphs 108 and 109 and also in paragraphs 117 and 118 of the fourteenth report. The only practice which he had found related to objections to reservations to article 66 of the Vienna Conventions themselves. Basically, that practice was extremely reasonable in that the objecting States had never in that context acted arbitrarily, but had taken care to restrict the exclusion of the application of certain provisions to those connected with the article to which the reservation had been made, in that case articles 53 and 64 of the Vienna Conventions. A provision on that practice would have to be embodied in the draft guidelines *de lege ferenda*, but it would be more logical to put it in the fourth part of the Guide to Practice on the effects of reservations and objections, than in the section on validity. Rather than challenging the validity of objections with an intermediate effect, it was a question of restricting the effects that they could produce.

18. The same considerations seemed to apply to “super-maximum” intentions, in other words, objections by which their author intended to require the reserving State to apply the treaty in its entirety, without the reservations. At first, he had been tempted to consider that such objections were not valid, since wishing to impose a “super-maximum” effect on an objection was a way of distorting the intentions of the State which had formulated the reservation, something which undermined the very principle of consensualism, of which he was particularly fond. However, after a discussion with members of the Commission and United Nations human rights bodies and in order to take account of the case law of the European Court of Human Rights, he had become convinced, or had allowed himself to be convinced, that that position was immoderate and too inflexible and that there, once again, the crux of the matter was not the validity of objections with a “super-maximum” effect, but of knowing if, and on what conditions, such objections could produce their effects.

19. In the end, even if it was true that the distinction between invalidity and absence of effects was tenuous, it seemed to be of theoretical relevance and was consistent with the system of the Vienna Conventions. He had not therefore proposed any draft guideline on the validity of objections because any problems arose in the context of effect and not that of validity. It would be up to the Commission to revisit that issue when it examined the part of the fourteenth report on the effects of reservations and interpretative declarations.

20. At the most, it could be held that an objection made after there had been acceptance would not be valid, but draft guideline 2.8.12, which the Commission had adopted during the first part of the current session (3007th meeting above, para. 1), took a different standpoint and there was no point in going back on it.

21. As for the validity of acceptances, according to some legal writers, including Frank Horn,²⁴² one of the top specialists in the matter, the acceptance of an invalid reservation would itself be invalid. Nevertheless, as he had already pointed out in paragraph 203 of his tenth report,²⁴³ the question was not one of validity, but of effect and it was not clear that acceptance, even express acceptance, of an invalid reservation produced no effect.

22. Of course, such acceptance did not make the reservation valid, but the possibility could not be ruled out that it permitted the reserving State to be bound by the treaty. In any event, it seemed fairly obvious that an invalid reservation could be unanimously accepted by the other parties to a treaty. Moreover, considering the tacit acceptance of a reservation—the form which it took in the vast majority of cases—to be invalid was completely unreasonable.

23. For all those reasons, he had decided to present just one draft guideline on the substantive validity of acceptances and objections, draft guideline 3.4, which read: “Acceptances of reservations and objections to reservations are not subject to any condition of substantive validity.” But it was understood that the freezing, or restriction, of the effects of certain objections would form the subject of draft guidelines in the third part of the fourteenth report on the effects of reservations, acceptances and objections.

24. The CHAIRPERSON thanked the Special Rapporteur and asked the members of the Commission for their comments.

25. Mr. GAJA said that there was no question of the quality of the Special Rapporteur’s fourteenth report and that he would confine his comments to doubts or criticisms regarding some specific issues. First, the definition of objections to reservations, presented by the Special Rapporteur in 2005 in draft guideline 2.6.1, referred to a statement whereby a State or international organization purported to modify the legal effects of a reservation and whose purpose was therefore the partial rejection of a reservation, although that kind of objection was rare.

²⁴² *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5 (1988), p. 121.

²⁴³ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add. 1–2, p. 188.

By entering a partial objection, the objecting State could introduce elements which made the combination of reservation and objection invalid, for reasons connected with the objection rather than the reservation. The reservation could, in fact, be valid but if, for example, the objecting State accepted it while at the same time introducing into that acceptance conditions relating, for example, to non-discrimination, the combination of reservation and objection might conceivably be invalid. It therefore seemed necessary to soften the categorical statement contained in draft guideline 3.4 (Substantive validity of acceptances and objections). A partial objection to a valid reservation could well pose problems of validity.

26. Secondly, the Special Rapporteur wrote that “the validity (or non-validity) of a reservation must be evaluated independently of the acceptances or objections to which it gave rise” (para. 94) and then that “acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation” (para. 124). At the same time, the Special Rapporteur considered that “in light of the presumption contained in article 20, paragraph 5, of the Vienna Conventions, States or international organizations which have remained silent on a reservation, whether valid or not, are deemed to have ‘accepted’ the reservation” (para. 126). What was a matter of concern was that, in saying that there was tacit acceptance also of a reservation that might be invalid, no account was being taken of a fairly widespread practice which consisted in challenging the validity of reservations after the 12-month period stipulated in article 20, paragraph 5, had elapsed. That practice suggested that there was tacit acceptance only of reservations which were deemed valid, because otherwise States could not go back on the acceptance of reservations once they had given it.

27. Moreover, maintaining that contracting States accepted invalid reservations through their silence was likely to make the rules on the validity of reservations worthless, even if acceptance was not considered to have any bearing on validity; the reservation was still invalid, but States could no longer raise the issue of invalidity. The reservation would thus have produced a result even if it was not valid. While parties to a treaty could unanimously agree to amend the reservation regime provided for in the treaty, it appeared difficult to infer that an agreement existed simply because the other parties had remained silent in the 12 months following ratification of the treaty, or until the expiry of any other period of time established in accordance with article 20, paragraph 5, of the Vienna Conventions.

28. Thirdly, with regard to what the Special Rapporteur called objections with an intermediate effect, the example he quoted, which was the most noteworthy, was that of certain States which had made reservations to article 66 of the 1986 Vienna Convention, concerning dispute settlement procedures. Those States had stated that they did not consider that section 5 of the Convention applied to reserving States. He did not recall that he had ever coined the term “counter-reservation” which the Special Rapporteur had attributed to him, but in any event it referred, not to a reservation in the technical sense, but to a reaction going beyond the reservation. It entailed a rewriting of contractual relations between the reserving and the

objecting State. As the Special Rapporteur had pointed out, it remained to be seen whether an objection with an intermediate effect could produce the effect intended by its author. That question would be tackled in the future and the Special Rapporteur would then give his opinion on whether the objecting State might unilaterally exclude the application of a whole section of a treaty to a reserving State, or whether there had to be at least tacit acceptance by the reserving State before an objection with an intermediate effect could produce its intended effect.

29. Mr. PELLET said that he had understood the first and second, but not the third objection of Mr. Gaja, who appeared to be saying that, while one could not rule out the possibility of the reservations regime being amended in the course of time, one could certainly not infer from unanimous tacit acceptance that a reservation had been accepted. He was fully in agreement with that statement and did not think that he had said anything to the contrary.

30. Mr. GAJA said that he was delighted to hear that. His impression on hearing the Special Rapporteur's presentation at the beginning of the meeting had been that the absence of a reaction from any State could have been taken to mean that the reservations regime had been amended, or that an otherwise invalid reservation had been accepted. His substantive objection mainly concerned the application of article 20, paragraph 5, of the Vienna Conventions.

The meeting rose at 11.05 a.m.

3021st MEETING

Wednesday, 15 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Reservations to treaties (*continued*) (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Corr.1 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL
RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Special Rapporteur to resume his introduction of the second part of his fourteenth report on reservations to treaties (A/CN.4/614/Add.1).

2. Mr. PELLET (Special Rapporteur) said that the question of the validity of interpretative declarations had to be approached somewhat differently from that of reservations. For one thing, the 1969 and 1986 Vienna Conventions were silent on interpretative declarations; indeed, that was one of the major lacunae in the Conventions. For another, the question of the validity of interpretative declarations was bound up with their definition, in other words, with the distinction between a reservation and an interpretative declaration. As recalled in paragraph 129 of his report, the definition of interpretative declarations in no way prejudged the validity or the effect of such declarations. Moreover, reclassifying an interpretative declaration as a reservation, using the method set out in draft guidelines 1.3 and 1.3.1, on the grounds that the declaration purported to exclude or modify the legal effect of certain provisions of the treaty, did not mean that the unilateral statement was invalid, merely that its validity must be assessed on the basis of the criteria for the validity of reservations, which were contained in draft guidelines 3.1 to 3.1.13. That requirement was covered by draft guideline 3.5.1, which read as follows:

“3.5.1 Conditions of validity applicable to unilateral statements which constitute reservations

“The validity of a unilateral statement which purports to be an interpretative declaration but which constitutes a reservation must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.15.”

3. While it might seem obvious that, when a statement constituted a reservation, the criteria to be applied were those for the validity of reservations, he believed that it would be useful to state that point explicitly, since the Commission was drafting a Guide to Practice, not a treatise for scholars. Indeed, the problem often arose in practice. For example, in the *English Channel* case referred to in paragraph 135 of the report, the United Kingdom had claimed that a reservation by France was actually an interpretative declaration. In concluding that it was in fact a reservation, the Court of Arbitration had considered its purported effects without questioning the validity of the reservation as such. On the other hand, in the case of *Belilos* referred to in paragraph 137 of the report, the European Court of Human Rights, after having reclassified the declaration of Switzerland as a reservation, found it to be invalid. In paragraph 136 of the report, and in the footnote thereto, other examples were given, outside of the content of disputes, of “false” interpretative declarations being reclassified as reservations, the validity of which had then been challenged.

4. The central issue was whether it was possible for true interpretative declarations, in other words, those that matched the definition given in draft guideline 1.2, to be invalid. It was important to bear in mind that, just because a declaration was valid, it did not necessarily mean that it was “right”; similarly, just because it was invalid, it did not mean that it was “wrong”. The interpretation of treaties was not an exact science: one person's truth was not necessarily another's. Even Kelsen had acknowledged that there might be several correct interpretations of a statute, which were all

of equal value.²⁴⁴ An interpretative declaration was a point of view concerning the interpretation of the meaning of a treaty, and was only authentic if given and understood by all parties. Whether interpretative declarations were wrong, however, was a completely subjective matter.

5. In the absence of an authentic interpretation, the interpretative declarations of parties might not coincide, and might be opposed by other parties. However, one could not say that one was valid and another was not. All that could be deduced was that two States did not agree on their interpretation. It was difficult to see how the principle of article 19 (c) of the Vienna Conventions, relating to the invalidity of reservations incompatible with the object and purpose of the treaty, could be transposed to that situation. The process of interpretation itself was governed by the object and purpose of the treaty, as was clear from article 31, paragraph 1, of the Vienna Conventions. Moreover, differences of interpretation often concerned the very definition of the object and purpose of the treaty, and there was therefore no way to decide between the parties until a competent body had ruled on the interpretation of the treaty. If an interpretative declaration was objectively incompatible with the object and purpose of a treaty, it was no longer a true interpretative declaration, but a reservation; a State making a declaration potentially calling into question the object and purpose of a treaty was in reality seeking to modify the application of the treaty with respect to itself.

6. On the other hand, it could happen that a treaty contained provisions prohibiting or restricting the possibility of formulating interpretative declarations. Only when such provisions existed could an interpretative declaration be considered to be invalid, if it was formulated despite the prohibition or restriction provided for in the treaty. That would be in line with article 19, paragraphs (a) and (b), of the Vienna Conventions, relating to the invalidity of reservations that were expressly or implicitly prohibited by the treaty itself. If a treaty prohibited the formulation of interpretative declarations, or permitted interpretative declarations only to some of its provisions, the situation was clearly analogous to that covered by article 19, paragraphs (a) and (b), of the Vienna Conventions. There was a slight nuance to be borne in mind, however, as discussed in paragraph 148 of the report: the concept of specified reservations should not be transposed to interpretative declarations, since it would complicate matters unnecessarily. In any event, it was difficult to imagine what a “specified” interpretative declaration might be, and he did not think that it would be useful to include the concept in a draft guideline on the validity of interpretative declarations. In addition, since an interpretative declaration could be formulated at any time, a temporal limitation like that contained in article 19 of the Vienna Conventions was not appropriate. Therefore draft guideline 3.5 read as follows:

“3.5 *Substantive validity of interpretative declarations*

“A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is expressly or implicitly prohibited by the treaty.”

²⁴⁴ H. Kelsen, *Pure Theory of Law*, translation from the second (revised and enlarged) version by Max Knight, Clark (New Jersey), The Lawbook Exchange, 2005, p. 351.

As could be seen, the draft guideline was a simplified version of article 19, paragraphs (a) and (b), of the Vienna Conventions, transposed to interpretative declarations.

7. As the Commission had seen during its consideration of the thirteenth report on reservations to treaties,²⁴⁵ interpretative declarations could generate three types of reactions: approval (covered in draft guideline 2.9.1); opposition (covered in draft guideline 2.9.2), or reclassification (covered in draft guideline 2.9.3). The question arose whether those different unilateral statements were subject to substantive conditions for validity. Since the problem was more theoretical than practical, he had not addressed the matter in detail in the report under consideration.

8. In brief, however, approvals would follow the same rules as the interpretative declarations they were approving; if a State approved an invalid interpretative declaration, its declaration could in turn be considered to be invalid. However, because that situation involved two concordant interpretative declarations, he did not believe that a specific draft guideline on the matter was necessary. In practice, the conclusion was that approval of an interpretative declaration was not subject to any conditions for validity. Opposition to an interpretative declaration simply constituted a different point of view; there was no issue of validity involved. When it came to reclassification, though, a State was not calling into question the content of the declaration itself but invoking the rules of validity applicable to reservations. Whether the reclassification was justified or not, the issue was not one of validity but of applicable law. Draft guideline 3.6 therefore read as follows:

“3.6 *Substantive validity of an approval, opposition or reclassification*

“Approval of an interpretative declaration, opposition to an interpretative declaration and reclassification of an interpretative declaration shall not be subject to any conditions for substantive validity.”

Draft guideline 3.6 was based on draft guideline 3.4, presented earlier, on the substantive validity of acceptance of reservations and objections to reservations. He acknowledged that the inclusion of “negative” draft guidelines 3.6 and 3.4, which simply stated that the validity of certain reactions to reservations or to interpretative declarations was not an issue, might seem odd. He recalled, however, that the Commission was drafting, not a convention, but a Guide to Practice. Practitioners might well wonder whether such reactions to reservations or to interpretative declarations were valid or not. In his view, it would be helpful for them to be shown that the issue was not one of validity at all, but rather one of effects. In addition, inclusion of draft guidelines 3.6 and 3.4 in the Guide to Practice was the only way to enable the Commission’s thinking on the important and intriguing matter of the validity of such unilateral reactions to reservations and interpretative declarations to be reflected in the Guide to Practice. While the Commission was not preparing a draft convention, neither was it producing a technical treatise, which meant that all commentary must be based on the draft guidelines themselves.

²⁴⁵ See footnote 137 above.

9. With regard to conditional interpretative declarations, the Commission's position was that the rules applying to such declarations would most probably be aligned with those applying to reservations, it being understood that if the effects of conditional interpretative declarations were found to be exactly the same as the effects of reservations, all specific provisions on conditional interpretative declarations would be deleted at the close of the first reading and replaced by a general draft guideline indicating that the legal regime was identical to that for reservations.

10. While drafting the relevant part of the fourteenth report, however, he had wondered, together with Daniel Müller, to whom he again paid tribute, whether the regime applying to conditional interpretative declarations, as defined in draft guideline 1.2.1, did not in fact differ from that of reservations precisely when it came to the issue of validity. By definition, conditional interpretative declarations were purely aimed at interpreting the treaty, not at modifying the treaty's provisions. Even if conditional interpretative declarations were considered to be "androgynous" instruments, neither one thing nor the other, their indeterminate nature would ultimately have no effect on their validity. If the interpretation given in a conditional interpretative declaration was not contested, or was found to be correct by a competent body ruling on the interpretation, the State was bound by its interpretation, all States were bound to accept it and there was no issue of validity at all. On the other hand, if the interpretation given in the conditional interpretative declaration was contested, and the intended effects of the declaration were the same as those of a reservation, then the rules on the validity of reservations must apply. The only difference was that the applicability of those rules was subject to the declaration's being contested.

11. The interchangeability of the rules applying to both reservations and conditional interpretative declarations were illustrated by an interesting example, given in paragraph 171 of the report, concerning the reservations of the Netherlands to the International Covenant on Civil and Political Rights. The Netherlands had stated that it preferred to formulate reservations rather than interpretative declarations in all cases, since if the latter form were used doubt might arise concerning whether the text of the Covenant allowed for the interpretation put upon it. By using the reservation form, the Netherlands wished to ensure in all cases that the relevant obligations arising out of the Covenant would not apply to it, or would apply only in the way indicated.²⁴⁶

12. In his view, that was a remarkable example of the way in which reservations and interpretative declarations could be interchanged. The Netherlands knew that it had not always formulated true reservations, but since the applicable rules were the same, it had considered it safer to call its statements reservations, not interpretative declarations. It would clearly be incongruous, therefore, to dissociate the regimes, including in terms of validity. In view of the Commission's position described above, he believed that it would be judicious to adopt draft

guidelines 3.5.2 and 3.5.3 which, *mutatis mutandis*, aligned the applicable rules for conditional interpretative declarations with those relating to reservations, on the understanding that they would be in square brackets and would probably be deleted from the final text. Those draft guidelines read as follows:

"3.5.2 *Conditions for the substantive validity of a conditional interpretative declaration*

"The validity of a conditional interpretative declaration must be assessed in accordance with the provisions of draft guidelines 3.1 and 3.1.1 to 3.1.15.

"3.5.3 *Competence to assess the validity of conditional interpretative declarations*

"Guidelines 3.2, 3.2.1, 3.2.2, 3.2.3 and 3.2.4 apply, *mutatis mutandis*, to conditional interpretative declarations."

13. He hoped that the Commission would agree to refer draft guidelines 3.4, 3.5, 3.5.1, 3.5.2, 3.5.3 and 3.6 to the Drafting Committee. The third part of the report, which would deal with all the effects of reservations and related declarations, should be ready by the end of the session, or in any event by the end of 2009. He awaited with interest questions from other members.

14. Mr. GAJA said that the Special Rapporteur, in paragraph 152 of his report, had stated that it was difficult to see how approval of simple interpretative declarations could be subject to conditions for validity that were different from those applicable to the initial act. Simple interpretative declarations were generally not subject to conditions for validity, and the same should therefore apply to the approval of such declarations. There were, however, according to the Special Rapporteur, treaty provisions that prohibited contracting States, wholly or in part, from making even simple interpretative declarations, although in his own view such clauses could be understood differently. But assuming that to be the case, such treaty-based prohibitions should apply also to approvals of interpretative declarations, where the latter were made in spite of the prohibition, as well as to objections to interpretative declarations, where such objections were expressed in the form of an alternative interpretation, since that would amount to making an interpretative declaration. Naturally, a statement of objection that simply pointed out that interpretative declarations were prohibited should not be deemed invalid.

15. Draft guideline 3.5 (Substantive validity of interpretative declarations) provided that a State or an international organization could formulate an interpretative declaration unless the interpretative declaration was expressly or implicitly prohibited by the treaty. The proviso of that formulation should also appear in draft guideline 3.6 (Substantive validity of an approval, opposition or reclassification). Accordingly, draft guideline 3.6 should be amended by adding the words "unless the interpretative declaration is expressly or implicitly prohibited by the treaty" with reference to approval of or objection to an interpretative declaration.

²⁴⁶ *Multilateral Treaties Deposited with the Secretary-General* (available from <http://treaties.un.org>), chap. IV.4.

16. The other point he wished to make related to paragraphs 167 and 168 of the report, which said, if he had understood them correctly, that the question of the validity of conditional interpretative declarations depended on whether the proposed interpretation corresponded to the interpretation of the treaty established by agreement between the parties. Thus, an interpretation that had been determined to be correct because it had not been contested or because a dispute settlement body had found it to be accurate constituted a valid interpretation, even where interpretative declarations were prohibited, because what the State was in effect proposing was a correct interpretation, and it could just as easily have not made any declaration at all. True, it would not be known for some time whether the interpretation was correct and whether the conditional interpretative declaration was therefore valid. However, that was not the point with which he took issue.

17. What he found to be unconvincing in the report was the suggestion that when a conditional interpretative declaration proposed an interpretation that was ultimately determined to be correct, it was possible for such a declaration not to be regarded as equivalent to a reservation. The fact was that States making a conditional interpretative declaration made their acceptance of a treaty conditional upon a certain interpretation of one or more treaty provisions, thereby excluding all other interpretations, whether correct or incorrect, and not allowing a dispute settlement body to define the scope of the provision in question in another manner insofar as it applied to them. The issue of the actual meaning of the treaty did not arise, since the declaring State was bound by the treaty only to the extent that the conditional interpretative declaration imparted a certain meaning to a particular provision of the treaty. The validity of conditional interpretative declarations should be assessed using the same criteria as those applicable to the validity of reservations. Whether or not a conditional interpretative declaration was contested or approved, even if by a majority of other States parties, did not appear to alter its nature.

18. When, for example, the United Nations Convention on the Law of the Sea, in article 309, prohibited reservations, it also prohibited conditional interpretative declarations, irrespective of the correctness of the proposed interpretation. If, upon ratifying the Convention, a State wished, for instance, to specify that one island was, in its view, actually a rock, it could do so by means of a simple interpretative declaration, but it could not subject its consent to be bound by the Convention to such an interpretation.

19. Thanking the Special Rapporteur for the work he had completed so far, he said that he looked forward to further developments of this. While he agreed that the Commission was not producing a technical treatise, the Special Rapporteur's work had delved more deeply into the subject of reservations and interpretative declarations than the relevant literature and had even injected some passion into the consideration of a theoretical issue not normally associated with that sentiment.

20. Mr. NOLTE said that it appeared from the summary of the discussions in the Commission and in the Sixth Committee on the role of silence as a reaction to

interpretative declarations, which appeared in paragraphs 37 and 41 to 43 of the fourteenth report, that States, while accepting the general approach of the Commission, were open to the possibility that silence could constitute approbation or acquiescence in certain circumstances. In his view, the legal consequences of silence in response to an interpretative declaration could not be assessed solely in the light of the general rule stated in article 31, paragraph 3 (a), of the 1969 Vienna Convention, since the declarations in question were unilateral in nature and were framed in a specific formalized context in which the expectations of the parties to a multilateral treaty were typically such that, in order to preserve the meaning given to the terms of the treaty, States could not actively insist on a different position. The judgment of the ICJ in the case concerning *Maritime Delimitation in the Black Sea* supported that point of view.

21. He wished to make two observations concerning the recommendations contained in the latest report of the Working Group on reservations to the sixth inter-committee meeting of human rights treaty bodies²⁴⁷ and reproduced in paragraph 53 of the Special Rapporteur's report. First, in recommendation 3, the working group's recognition of the applicability of the Vienna Convention regime to reservations to human rights treaties was rather limited, since, in two different places in the same recommendation, it stressed the specificity of the human rights regimes.

22. Second, in recommendation 7, the working group asserted that a State could not rely on an invalid reservation, and unless its contrary intention had been "incontrovertibly established", it remained a party to the treaty without the benefit of the reservation. The Special Rapporteur had no doubt carefully weighed his words when mildly characterizing that expression as perhaps going a bit too far, but in his own view that remarkable sentence clearly went too far. It could require human rights treaty bodies to compel a reserving State to remain bound by a human rights treaty in cases where that might not be appropriate. In addressing the question of the consequences of invalid reservations to human rights treaties, it might be helpful to postulate presumptions; however, such presumptions should be more balanced and allow greater margin for the will of the State concerned, the nature of the particular treaty and the related circumstances.

23. On a point relating to a decision by the Inter-American Court of Human Rights in the case of *Boyce et al. v. Barbados*, described in paragraphs 56 to 60 of the report, he agreed with the Special Rapporteur that the Commission should address the question of the interpretation of reservations. In his view, the decision in *Boyce et al. v. Barbados* suggested that the Commission should remind States, courts and treaty monitoring bodies that the interpretation of a reservation was not limited to a strictly textual analysis, since reserving States might otherwise feel compelled in the future to formulate longer and more extensive reservations in order to avoid the risk that their intentions were not adequately taken into account.

24. Turning to the second part of the Special Rapporteur's fourteenth report, he wished to state at the outset

²⁴⁷ HRI/MC/2007/5 and Add.1, para. 18.

that he agreed with nearly all of the proposed draft guidelines, as well as with the Special Rapporteur's conclusions concerning the validity of acceptances, the validity of interpretative declarations and the validity of reactions to interpretative declarations. His main concern had to do with the question of the validity of objections. In that regard, he agreed with the Special Rapporteur's point of departure, which was that the validity of an objection must be assessed independently of that of the validity of a reservation. He also agreed that, as a general rule, objections could be formulated for any reason whatsoever, since the principle of consent in treaty relations held that no State could impose a particular treaty arrangement on another party against its will. That meant that it was indeed difficult to conceive of a situation in which an objection that had the usual effects ascribed to it by the Vienna Conventions—minimum effect or maximum effect—could ever be invalid. He also agreed that the question of whether an objection could have super-maximum effect did not concern the validity of such objections but rather their potential effects.

25. Like Mr. Gaja, however, he had doubts as to whether the same was true for objections that were intended to have intermediate effect. In paragraph 105 of his report, the Special Rapporteur stated that "[i]t is quite clear that if the effect of an objection is to modify the bilateral treaty relations between its author and the author of the reservation in a manner that proves to be contrary to a peremptory norm of international law (*jus cogens*), this result would be unacceptable. Such an eventuality would, however, seem to be impossible". In the same paragraph the Special Rapporteur noted that "[i]t is extremely difficult—and, in fact, impossible under these circumstances—to imagine an 'objection' that would violate a peremptory norm".

26. Such statements represented a challenge to lawyers, and in particular to law professors. He would therefore describe a hypothetical situation in an attempt to demonstrate that it was indeed conceivable for an objection with intermediate effect to create treaty relations that could lead to the violation of a peremptory norm of international law. For the sake of argument, one might assume that a group of States had concluded a convention aimed at eliminating terrorism and that the convention was based on three understandings: first, that any State party would extradite a terrorist suspect at the request of another State party that had issued an arrest warrant; second, that States parties would exchange any information they had concerning persons designated as terrorist suspects by another State party; and third, that the convention would contain a clause stipulating that the obligation to extradite did not apply in cases in which there were reasonable grounds for believing that the person to be extradited risked being subjected to torture.

27. It might further be assumed that State A, upon acceding to the convention, had formulated a reservation, according to which it would not provide information that it considered might threaten its national security; and that State B had formulated an objection to that reservation, according to which it did not consider itself bound by the provision that limited the duty to extradite in the case where the person to be extradited risked being subjected to torture.

28. A determination establishing the validity of that objection could lead to the following situation: if State B had subsequently requested the extradition of a person from State A, and it was well known that terrorist suspects were tortured on a regular basis in State B, State A would be obliged under the terms of the treaty to extradite the person, without being able to invoke the torture exception. That was because the provision containing it had been excluded by the objection with intermediate effect formulated by State B. Yet an obligation to cooperate in the commission of torture violated a norm of *jus cogens*. Such an absolute duty to extradite was partially invalid insofar as it applied to cases in which the extradited person risked being subjected to torture.

29. That hypothetical situation demonstrated several points. First, it was too simplistic to invoke the maxim cited by the Special Rapporteur in paragraph 103: "He who can do more, can do less." While it was true that State B could have formulated its objection in such a way as to exclude all treaty relations, it should not be able to exclude certain provisions of the treaty if doing so would have the effect of enlarging the scope of the treaty obligations and leading to a *jus cogens* violation. Perhaps the Special Rapporteur might object, arguing that objections with intermediate effect could never have the effect of enlarging the scope of treaty obligations, but such a statement would pose difficulties of its own. Treaty obligations were typically an interrelated mix, so that taking one out did not necessarily imply that fewer obligations remained.

30. Second, the issue was not about the possible effects of an objection. In paragraphs 117 and 118 of his report, the Special Rapporteur assumed that objections could have an intermediate effect if they were aimed at safeguarding the package deal on which the treaty was based or if there was an intrinsic link between the provision that gave rise to the reservation and the provisions whose legal effect was affected by the objection. In his own example, the obligation to extradite could well be considered an element of a package deal between one group of States that typically had an interest in receiving terrorist suspects and another group of States whose interests lay more in receiving information. The link between the two kinds of obligations in his example was admittedly not as close as in the case of an objection to a reservation concerning the dispute settlement procedures of the *jus cogens* regime under the 1969 Vienna Convention, to which the Special Rapporteur referred in paragraphs 116 to 118 of his report. But despite the relatively more remote nature of that link, it nevertheless existed and, arguably, was sufficiently strong. Even if the Special Rapporteur could demonstrate that the link was not sufficiently strong, the mere fact that it could exist must be taken seriously, and one could not simply redefine the issue solely in terms of the effects that an objection with intermediate effect could produce.

31. For those reasons, he was not yet convinced that objections with intermediate effect could never be invalid. Consequently, it was necessary to formulate a draft guideline that either specified the grounds for establishing the non-validity of an objection with intermediate effect or excluded objections with intermediate effect.

32. Irrespective of whether it was possible for an objection to a reservation to violate a *jus cogens* norm, he tended to agree with Mr. Gaja that any partial objection that modified the content of a treaty in relation to a reserving State to an extent that exceeded the intended effect of the reservation, in other words, any objection with intermediate effect in the sense understood by the Special Rapporteur, required the acceptance or acquiescence of the reserving State. That followed from the very same principle that the Special Rapporteur had invoked, namely, the principle of consent, according to which no treaty obligation could be imposed on a State against its will. It was true that exposing States to the risk that they might encounter objections that had the effect of creating a different set of treaty obligations than that contemplated in both the treaty and the reservation might deter a State from formulating a reservation. However, such an advantage did not justify the sacrifice of the principle of consent, on which the Special Rapporteur himself had placed so much emphasis.

33. Moreover, he was not persuaded that the Commission should attribute to the mere formulation of a reservation the unsatisfactory result whereby an objection was capable of excluding the application of an essential provision of a treaty. It turned the system on its head to use an objection that excluded an essential provision or that led to a violation of *jus cogens* as an inducement for a State to withdraw a reservation.

34. In his opinion, Mr. Gaja's approach, as described in paragraph 110 and during his intervention at the previous meeting (para. 28), did not raise the uncertainties that characterized the regime of late reservations, as stated in paragraph 112. Rather, it was the fact that a reservation had been formulated and that objections with intermediate effect were considered acceptable that required a limited reopening of the possibility for an objecting State to formulate what amounted, in effect, to a reservation.

35. Apart from that particular point, he subscribed to the Special Rapporteur's suggestion that draft guidelines on the validity of reactions to reservations were unnecessary, except in respect of the question of the validity of objections to reservations. He also subscribed to the proposal that the draft guidelines should be referred to the Drafting Committee, due account being taken of Mr. Gaja's comments.

36. Mr. PELLET (Special Rapporteur) said that he was perplexed as to whether, apart from an academic perspective, it was reasonable to consider that a reservation with intermediate effect could lead to acts contrary to *jus cogens* norms. In his view, Mr. Nolte took too narrow a view of *jus cogens* and considered it as a sort of a trump card that could be played only in treaty relations, which was incorrect. According to the example he had provided, acceptance of the intermediate-effect objection by State A meant that it was compelled to allow the extradited person to be tortured in State B, which was an unacceptable result. In his view, the exclusion of the application of a treaty provision by State B did not change the fact that State A remained under an obligation not to extradite the person in question to State B, since that would contravene the *jus cogens* norm assumed to exist in the example. He was absolutely convinced that a State could make a reservation to a provision

related to *jus cogens*; however, the only thing that happened when it did so was that it deregulated that provision, but still remained bound by the *jus cogens* norm in question, which existed independently of the provision. Therefore the example provided by Mr. Nolte was inaccurate insofar as it assumed that, merely on the basis of the regime of reservations to treaties, State A could violate a norm of *jus cogens*, whereas the *jus cogens* norm continued to exist independently of the treaty. He therefore did not see where the problem of validity lay and was not convinced by Mr. Nolte's example.

37. Mr. NOLTE said that he did not deny that the rule of *jus cogens* would exist independently of his hypothetical treaty. If, however, a reservation could be said to violate *jus cogens*, even though *jus cogens* existed independently, he could not see why the same should not be said of an objection that had the effect of producing a treaty regime that violated *jus cogens*. He therefore failed to understand the Special Rapporteur's objection.

38. Mr. PELLET said that it was incorrect to say that a reservation violated *jus cogens*. What a reservation did was merely to deregulate the provision and take it out of the treaty context, but of course the obligation to respect *jus cogens* rules continued to apply.

39. Mr. NOLTE said that the Commission had already provisionally adopted draft guideline 3.1.9 (Reservations contrary to a rule of *jus cogens*), which stated: "A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law." He thought that the same principle should apply to an objection with intermediate effect.

40. Mr. HMOUD said that he had not yet made up his mind concerning objections with intermediate effect. However, he recalled that the Commission had discussed the issue and, although it had concluded that a treaty regime existed separate from the peremptory norm, it had nevertheless adopted the draft guideline.

41. Ms. ESCARAMEIA, after thanking the Special Rapporteur for his fourteenth report and his introductory statements, which had clarified a number of difficulties in the report, said that she was still puzzled by the sharp distinction drawn in the report between validity and the production of effects, a distinction that had formed the basis of several of the Special Rapporteur's proposals. It seemed to contradict the idea of validity on which the Commission had originally agreed, namely the capacity to produce effects. She recalled that the report of the Commission on the work of its fifty-eighth session stated, in paragraph (2) of the general commentary on the validity of reservations and interpretative declarations, contained in paragraph 159:

After extensive debate, the Commission decided, ... to retain the term 'validity of reservations' to describe the intellectual operation consisting in determining whether a unilateral statement made by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation.²⁴⁸

²⁴⁸ *Yearbook ... 2006*, vol. II (Part Two), p. 143.

Meanwhile, paragraph (7) of the same commentary stated:

However, the term ‘permissibility’ was retained to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions, since, according to the English speakers, the term did not imply taking a position as to the consequences of non-fulfilment of those conditions. That term was rendered in French by the expression “*validité substantielle*”.²⁴⁹

42. She wondered whether the Commission should use a term for interpretative declarations that it had decided not to use for reservations. For the sake of consistency, perhaps the Commission should use the word “permissibility” wherever the term “*validité substantielle*” was used in French even when referring to interpretative declarations, although she noted that, in his oral introduction, the Special Rapporteur had said that the issue of validity was approached differently in the context of interpretative declarations than in the context of reservations.

43. Secondly, the Special Rapporteur had said that the principle of consent could not violate *jus cogens*. He had also said that reactions to reservations, interpretative declarations and reactions to interpretative declarations, by their very nature, could not violate *jus cogens*. In her view, however, such reactions could be contrary to *jus cogens*; she would give her reasons later. If her view was correct, however, she wondered what consequences that would entail. It might well be that conditions for substantive validity—if she might use the term—could apply to reactions to reservations, interpretative declarations and reactions to them.

44. More radically, if effects, on the one hand, and substantive validity, on the other, seemed, at least in a number of cases, to be separate issues, she wondered of what practical use for a user of the Guide to Practice it was to have an analysis of validity and not simply one of effects. The Special Rapporteur had said that the Commission should take the opportunity to explain the issue, but, in her view, it was controversial and might be confusing to practitioners. The question of validity was not important from the practical point of view. The only question was whether substantive validity or invalidity had consequences beyond that of the production or non-production of effects, and, if not, whether it was not better just to address the effects in the Guide to Practice.

45. Turning to specific points raised in the report, she endorsed the view expressed in paragraph 94 of the report that objections and acceptances were not the criteria for the validity of a reservation, the corollary being that general acceptance did not make a reservation valid.

46. With regard to the validity of objections, in his report the Special Rapporteur said that a State might object to both invalid and valid reservations, since no State could be bound against its will. He based his argument on the 1951 advisory opinion of the ICJ concerning *Reservations to the Convention on Genocide*. That opinion was, however, highly ambiguous, and could be used to argue the exact opposite. The Special Rapporteur went on to argue that, although an objection contrary to *jus cogens* would be unacceptable, such an eventuality was impossible. It was, however, possible to envisage cases in which objections

could be contrary to *jus cogens*. Mr. Nolte had provided a quite complex example, Mr. Gaja a simple one. It was not uncommon for reservations to exclude a particular region; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Prevention and Punishment of the Crime of Genocide offered some examples. Objections to such reservations might state, for example, that the objecting State agreed to the regional exclusion but not with respect to a certain group or population. In that case, the objection itself introduced a discriminatory element: it was not acceptable to say that some populations could not be subject to torture or genocide, while others could. Such an objection was contrary to *jus cogens* and should therefore not be accepted. She did not see why a provision similar to draft guideline 3.1.9 could not be drafted for objections.

47. She had difficulty in understanding the Special Rapporteur’s view that acceptances could not be characterized as valid or invalid. They produced effects, in the sense that they could reinforce an invalid reservation and thus be contrary to *jus cogens*. She could therefore not endorse draft guideline 3.4, according to which acceptances of reservations and objections to reservations were not subject to any conditions for substantive validity.

48. With regard to the validity of interpretative declarations, she concurred with the view that the question of validity was different from the question of whether a statement was a reservation or an interpretative declaration. She also agreed in part that, if a statement was incompatible with the object and purpose of the treaty, it constituted a reservation and not an interpretative declaration, a case in point being that of *Belilos*. She thus endorsed draft guideline 3.5.1, which stated that an interpretative declaration that was actually a reservation should be treated as such. She considered, however, that the draft guideline should spell out that a statement purporting to exclude or modify the application of certain provisions should be treated as a reservation, regardless of the name given to it.

49. As far as genuine interpretative declarations were concerned, she concurred with the view that the value of an interpretation was based not on content but on authority, either the agreement of all parties to the treaty or the ruling of a competent body. Having the right to interpret a provision did not entitle a party to adopt whatever interpretation it wished, however. She therefore found it difficult to accept draft guideline 3.5, which stated that all interpretations were valid unless expressly or implicitly prohibited by the treaty, by analogy with article 19, subparagraphs (a) and (b) of the Vienna Conventions. That formulation could leave room for interpretative declarations incompatible with the object and purpose of the treaty, which was clearly not the Special Rapporteur’s intention. There should therefore be a guideline making it clear that a statement that purported to be an interpretative declaration but was incompatible with the object and purpose of the treaty should be treated as a reservation, perhaps not with regard to the entire regime of reservations, but as far as validity was concerned.

50. With regard to the validity of approval, opposition or reclassification, she noted that the Special Rapporteur had concluded that such reactions to interpretative declarations

²⁴⁹ *Ibid.*, p. 144.

could be “correct” or “incorrect” but not “valid” or “invalid”. Draft guideline 3.6 was based on that understanding. In her view, however, since interpretative declarations could be valid or invalid, reactions of approval or opposition could also be valid or invalid. She could not understand why the criteria of substantive validity that applied to the other unilateral acts should also not apply to reactions.

51. As for the validity of conditional interpretative declarations, she endorsed the view that the conditions for the validity of reservations applied (as expressed in draft guideline 3.5.2), as did the competence to assess such validity (draft guideline 3.5.3). However, if conditional interpretative declarations were substantially the same as reservations, the time of formulation might be an issue. Under the Vienna Conventions, the time element was part of the definition of a reservation, and reservations were subject to a number of formal requirements and the subsequent procedure of objections or acceptances. She wondered what the effect would be if a conditional interpretative declaration was made later than the time limit set for reservations and what regime of reactions would apply. Since articles 19 and 20 of the Vienna Conventions did not apply directly to conditional interpretative declarations, further elaboration might be required.

52. It was possible that the wealth of technical detail presented by the Special Rapporteur had caused her to misunderstand some points, and she would appreciate his clarification on the questions she had raised.

The meeting rose at 11.25 a.m.

3022nd MEETING

Thursday, 16 July 2009, at 10.20 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Cafilisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood.

Reservations to treaties (continued) (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Corr.1 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL
RAPPORTEUR (continued)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the fourteenth report on reservations to treaties (A/CN.4/614 and Add.1–2).

2. Mr. FOMBA said that he would begin by making some general comments before giving his opinion on the draft guidelines proposed by the Special Rapporteur.

3. The goal set by the Special Rapporteur in paragraph 80 of his fourteenth report was legitimate. The opinions expressed in paragraph 81 were justified and should be endorsed. The approach recommended in paragraph 82 was acceptable, as were the viewpoints set out in paragraphs 83 and 84. The recapitulation of the position with regard to the validity of reservations in paragraph 85 was extremely useful, as the topic was highly technical and had been under consideration for many years. What counted in the Commission was the intellectual process comprising the understanding, definition, logical grounding and nexus of issues covered in the first, second and third parts of the Guide to Practice, as well as the exposition of the role and function of the various draft guidelines.

4. In the section on the validity of reactions to reservations (paras. 94–127), the Special Rapporteur, having first drawn attention to the lacunae in the 1969 and 1986 Vienna Conventions, was then at pains to clarify the nature, role and function of reactions. That clarification was very important and useful. In paragraph 95 he said that, while it might be appropriate to refer to the substantive validity of an objection to, or acceptance of, a reservation, although the term had a slightly different connotation, the main issue was whether the objection or acceptance could produce its full effects. He was personally unsure whether he had fully understood that statement, especially as *prima facie* there was a tendency to mix up substantive validity and effects.

5. Turning to the validity of objections, he approved of the idea that the fate of draft guideline 2.6.3 and, more precisely, the question of whether objections were a “freedom” or a “genuine right”, should be settled by the Drafting Committee. Without prejudice to any consensus which might emerge, at first sight he agreed that a right did exist and that it was rooted primarily in State sovereignty. He supported the idea put forward in paragraph 98 that the compatibility of a reservation with the object and purpose of the treaty must furnish the criterion for the attitude of a State, as the ICJ had found in its 1951 advisory opinion on *Reservations to the Convention on Genocide*. In paragraph 100, he endorsed the Court’s unambiguous position that “in its trade relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto” [p. 21 of the opinion]. He also supported the way in which the Special Rapporteur had construed the Court’s position when he wrote in the same paragraph that “a State may make an objection to any reservation, whether valid or invalid”.

6. The Special Rapporteur correctly interpreted the purpose and possible effect of objections in paragraph 102. In paragraph 103, he put forward a number of interesting ideas, but it was not always clear what he meant and there appeared to be a certain amount of contradiction in his reasoning when he wrote, on the one hand, that the purpose or possible effect of any objection did not necessarily render the objection invalid and, on the other, that an objection could undermine the object and purpose of

the treaty, for example by excluding the application of an essential provision of the treaty.

7. In paragraph 104, although the idea that the objections of France and Italy to the “declaration” of the United States²⁵⁰ regarding the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP) were only unwarranted and regrettable would dispose of the argument that they were invalid and was correct from the point of view of a textually rigorous interpretation, it might nonetheless imply a possible link with the issue of invalidity, if viewed from standpoint of the reasons for and unwarranted nature of the objections. Moreover, the Special Rapporteur had placed the word “only” in inverted commas, which might reflect some hesitation or caution on his part. He personally endorsed the idea expressed in paragraph 105 that an objection that conflicted with a *jus cogens* norm would be unacceptable. Furthermore, the mini debate between Mr. Pellet and Mr. Nolte at the previous meeting had been most enlightening in that respect. The explanation of why such an eventuality was impossible was very interesting, but rather difficult to grasp. Perhaps that was on account of the Special Rapporteur’s tremendous analytical skills and keen intellect, which not everyone shared.

8. Moving on to paragraph 106 of the fourteenth report, he said that there were good reasons to doubt the consequences of objections with a “super-maximum” effect and hence their validity. The Special Rapporteur, who himself remained sceptical, put forward some good arguments, but the Commission had been right to include objections with a super-maximum effect in the definition of the term “objection” in order to adopt a neutral position with regard to the intention of the author of an objection.

9. The idea in paragraph 113 that it was difficult for States to anticipate all possible reservations and to evaluate their potential effects had merit. In paragraph 115, the conclusion that, although the Vienna Conventions did not expressly authorize objections with intermediate effect, they did not prohibit them, was correct and acceptable. In paragraph 116, the Special Rapporteur rightly denounced the risk of abuse inherent in that type of objection. The review of the origins of the practice of objections with an intermediate effect, which was to be found in paragraph 117, was very helpful. He fully agreed with the Special Rapporteur’s analysis in paragraphs 118 to 120.

10. As far as the validity of acceptances was concerned, the Special Rapporteur was right in paragraph 122 to distinguish between cases in which a reservation was valid and those in which it was not. Referring to the latter, he used the expression “at least on the face of it”, which suggested that he was not, perhaps, entirely convinced, at least at that stage. In paragraph 123, with regard to the question of whether acceptance could determine the validity of a reservation, he could accept the theoretical position defended by the Special Rapporteur, which was, in fact, a negative answer. He agreed with the analysis of the doctrinal position because it contained some ideas of

significance for the legal certainty of treaty relations. The notion that the acceptance of an invalid reservation was not *ipso facto* invalid and the supporting arguments were acceptable.

11. In the conclusions regarding reactions to reservations, the Special Rapporteur, after emphasizing the silence of the Vienna Conventions, wrote that it would be unwise to speak of the substantive validity of those reactions. That conclusion was apt and acceptable. It was indeed necessary to stress the principle of consensualism among the various arguments, even if it might appear to be self-evident. It was true that a specific draft guideline on the subject was not indispensable. The Special Rapporteur did, however, raise the question of whether the Commission might wish to decide differently. It had two options: to say nothing and maintain the silence of the Vienna regime, or to break the silence and to speak out clearly, even if that meant stating the obvious. The Special Rapporteur had been well-advised to choose the second option.

12. The reference to the fact that the Vienna Conventions did not contain any rules on the validity of interpretative declarations was very useful. He subscribed to the idea expressed in paragraph 128 that interpretative declarations could not simply be equated with reservations. The cautiously positive approach adopted in draft guideline 1.2 (Definition of interpretative declarations), as quoted in paragraph 129, had been wise and justified. The Commission should maintain its position that the term “permissibility” should be understood to mean “validity”. The distinction drawn in paragraph 130 between the question of validity and that of the classification of a unilateral declaration was crucial and the examples quoted in paragraph 131 were apposite. In paragraph 133, he could accept the conclusion that, with the exception of treaty-based prohibitions of unilateral interpretative declarations, it would seem impossible to identify any other criterion for the substantive validity of an interpretative declaration. The arguments set out in paragraphs 140 to 146 concerning the validity or otherwise of genuine interpretative declarations when the treaty contained no rules on the matter were sound, relevant and enlightening. In paragraph 149, the use of temporal limitations on the formulation of reservations and interpretative declarations as a distinguishing feature was also appropriate. The Special Rapporteur concluded that a guideline specifying the rules for determining the validity of interpretative declarations was unnecessary, since it was a less complex question than that of reservations and should not raise major assessment issues. In view of the very nature, role and function of interpretative declarations, he could, at first sight, endorse that position.

13. With regard to the validity of reactions to interpretative declarations, the method of first examining the validity of the declarations themselves was the most logical one. The Special Rapporteur wrote that the common basis for analysing both was the sovereign right of any State to interpret the treaties to which it was a party. There was no disputing that fact. The argument that, in principle, the exercise of the right to react to an interpretative declaration was not subject to an assessment of the validity of those reactions could also be supported.

²⁵⁰ *Multilateral Treaties Deposited with the Secretary-General* (available from <http://treaties.un.org>), chap. XI.B.22.

14. As far as the validity of approvals was concerned, it was true that the author of the approval did the same thing as the author of the interpretative declaration. Furthermore, the cause and effect relationship justified symmetry in any conditions governing validity in both cases. In paragraphs 153 and 154, the review of the position under the Vienna Conventions was once again very useful. The analysis of cases in which an interpretative declaration would not be valid and the interpretation of the consequences thereof were acceptable. Paragraph 154 dealt with individual interpretations by States. He wished to know what would happen in the opposite case. He agreed with the opinion expressed in paragraph 155 that the question of the “right” interpretation could not be resolved until the effects of interpretative declarations had been considered.

15. He subscribed to the idea that it was unnecessary to predicate the validity of an opposition upon respect for any specific criteria. In the event of a conflict between two interpretations, the solution proposed in paragraph 157 seemed to be logical and acceptable. It was appropriate to distinguish between the validity of opposition and its possible effects, as had been done at the end of paragraph 158.

16. As for the validity of reclassifications, the idea expressed in paragraph 159 that it was the legal nature of the initial declaration and the regime applicable to it which were at stake was enlightening and had merit. A reminder of the way in which classification operated was very useful. At the end of paragraph 161, the Special Rapporteur was right to differentiate between the question of a justified or an unjustified opinion and that of the validity of reclassification. He went along with the position set out in paragraph 163 that, as a matter of principle, reclassifications, whether justified or unjustified, were not subject to criteria for substantive validity.

17. The conclusions regarding reactions to interpretative declarations which the Special Rapporteur drew in paragraphs 164 and 165 were perfectly defensible.

18. In the section on the validity of conditional interpretative declarations, the recapitulation in paragraph 166 of the definition of such declarations was very useful. In paragraph 167, the Special Rapporteur seemed, however, *a priori* to establish a parallel with “simple” interpretative declarations, which appeared logical given that the argument was actually drawn from the definition of conditional interpretative declarations. In paragraph 169, the conclusion that any conditional interpretative declaration potentially constituted a reservation was appropriate and the telling example quoted in support of that statement was interesting. There seemed to be a mistake in paragraph 168: “condition formulated by the author of the declaration” should read “condition formulated by the author of the conditional interpretative declaration”. In paragraph 172, the parallel established between the conditions for the substantive and formal validity of conditional interpretative declarations and reservations appeared logical and the analysis of the classification and consequences of the hypothetical cases presented in that paragraph had merit. In paragraph 177, the Special Rapporteur concluded that there was no reason to think that conditional interpretative declarations were subject to the same conditions for their validity as “simple” interpretative declarations and

that, instead, they were subject to the conditions for the validity of reservations. But that conclusion contradicted the position expressed in paragraph 167 and it would be helpful if the Special Rapporteur were to supply an explanation in that respect.

19. Turning to the draft guidelines proposed by the Special Rapporteur, Mr. Fomba said that even if draft guideline 3.4 (Substantive validity of acceptances and objections) was not really indispensable, it was worth retaining for practical reasons and in order to reflect the purpose of the Guide to Practice, which was to act as a useful tool.

20. Draft guideline 3.5 (Substantive validity of interpretative declarations) was fully justified by the arguments put forward in paragraphs 147 and 148 of the report. As for form, in order to avoid repetition, it might be possible to say “unless the latter is expressly or implicitly prohibited”.

21. Draft guideline 3.5.1 (Conditions of validity applicable to unilateral statements which constitute reservations) was concerned with a particularly important aspect of State practice and was therefore necessary and useful.

22. He approved of draft guideline 3.5.2 (Conditions for the substantive validity of a conditional interpretative declaration), provided that he received an answer to the point he had raised in connection with paragraph 177.

23. Since the Commission had not reached a final decision on how to handle conditional interpretative declarations, the Special Rapporteur had been wise to propose that draft guideline 3.5.3 (Competence to assess the validity of conditional interpretative declarations) should be included on a provisional basis only.

24. The Special Rapporteur offered the Commission two options for draft guideline 3.6 (Substantive validity of an approval, opposition or reclassification): the first would be to make a detailed presentation of draft guideline 2.9.4 in the commentary—the solution which the Special Rapporteur appeared to prefer; the second would be to provide a specific guideline, the solution which Mr. Fomba personally preferred.

25. In conclusion, he was in favour of referring the draft guidelines proposed by the Special Rapporteur to the Drafting Committee.

26. Mr. HMOUD congratulated the Special Rapporteur on the part of his fourteenth report in which he thoroughly analysed questions connected with the validity of reservations, interpretative declarations and reactions to those reservations and declarations. In the light of the choices offered by the Special Rapporteur, the Commission must decide on the way forward with regard to those matters. Having debated the tenth report²⁵¹ and adopted draft guidelines on the validity of reservations²⁵² and some terminology, the Commission had decided to separate the issues of validity and legal effects. Consideration of the

²⁵¹ See footnote 134 above.

²⁵² *Yearbook ... 2006*, vol. II (Part Two), paras. 158–159.

latter should therefore be postponed until the Special Rapporteur presented his report on that subject at the following session.

27. The crucial question raised by the Special Rapporteur with regard to the validity of reactions to reservations was whether they themselves were subject to conditions governing their substantive validity. The Special Rapporteur had noted that the Vienna Conventions did not set forth any conditions for their substantive validity and that a reaction was a statement formulated by a State which would have refrained from doing so, if another State had not formulated a reservation before that. While reactions did not exist independently of reservations, the freedom to formulate them meant that they were not subject to any substantive validity conditions. That premise regarding the validity of reactions could be accepted, as long as it was understood that reactions might, or might not, have all or some of the legal effects intended by their author, even if they were not subject to substantive validity conditions.

28. The Special Rapporteur made an important point about objections in paragraph 103 of his report, namely that, even if an objection could have the effect of undermining the object and purpose of the treaty, the author had the right to exclude all treaty relations with the author of the reservation and that he who could do more could do less. While that made sense, it had to be borne in mind that the author of the reservation would, in that case, be forced to apply a treaty deprived of its object and purpose *vis-à-vis* the objecting entity—either a State or an international organization. The author of the reservation had little choice, especially if the period of time for making another reservation aimed at ruling out any treaty relationship with the objecting State had expired. In that case, the principle of consent would be greatly weakened as far as the author of the reservation was concerned. The Commission should therefore consider that matter when investigating the legal effects of objections.

29. The issue became more complex if the effect of the objection was to exclude a peremptory norm of international law from the application of the treaty relationship with the reserving entity. That matter had been debated at the previous meeting on the basis of the example quoted by Mr. Nolte. Nobody disputed the fact that *jus cogens* obligations and rules were binding regardless of treaty relations. But in the example in question, if State A (the reserving State) insisted that before surrendering a person to State B (the objecting State), the latter had to guarantee that it would not torture that person, could State A oblige State B to submit to that demand on the basis of the *jus cogens* rules existing separately in international law outside the treaty relationship? The answer was “no”. The *jus cogens* rules prohibited State B from committing acts of torture, but because State B had excluded the relevant article in the treaty from its relations with State A, the latter could not oblige State B to furnish such a guarantee. Such a situation was not inconceivable and if it was not dealt with in the section on validity, the Guide to Practice should make it clear that such an objection had no legal effect because it violated *jus cogens* rules of international law.

30. The example given was that of an objection with an intermediate effect. It could be assumed that that kind of

objection, like all the others, was not subject to validity conditions. It was, however, necessary to remember that it modified a treaty relationship with the reserving State in that it limited its consent—for the objecting State, that was a means of “putting a foot in the door”, because it knew that the objection could not be treated as a reservation and that, as stated in paragraph 114 of the report, the reserving State was not in a position to respond effectively to such objections. That might suggest that the Commission was concerned solely with the right of consent of the objecting State, but not of the reserving State. That imbalance should therefore be corrected either in the part on validity, or in the part on the legal effects of objections, but not just ignored on the grounds that the reserving State could always withdraw its reservation. The Special Rapporteur seemed inclined to deal with objections with intermediate effects in the part on legal effects. When it came to the acceptance of an invalid reservation, the distinction between the validity of the acceptance and its legal effects was more theoretical and involved no real practical issues. Whether it was invalid or devoid of legal effects amounted to the same thing in practice. Acceptance of invalid reservations could therefore be covered in the part on legal effects.

31. With regard to the validity of interpretative declarations, it could not be argued that treaty-based prohibitions of certain interpretative declarations were invalid. Indeed, the report provided some good examples of specific and general prohibitions on interpreting treaties. A guideline on the invalidity of declarations prohibited by a treaty was therefore warranted. The next question was whether an interpretative declaration not falling within the ambit of the treaty-based prohibition could be invalid. According to the Special Rapporteur, that was not the case, even when a tribunal or a judicial body issued the “right” interpretation of a treaty provision forming the subject of conflicting interpretations by States parties. The Special Rapporteur suggested that every State party had the right to interpret the treaty in a certain manner, provided that the interpretation was not prohibited by the treaty, even if it was the “wrong” interpretation. According to that line of reasoning, the interpretation in question could never be invalid because, unlike interpretations which were prohibited by the treaty, there was nothing in international law that prohibited a State party from interpreting a treaty in a certain manner. Paragraph 143 of the report described articles 31 to 33 of the Vienna Conventions as “guidelines as to the ways of finding the ‘right’ interpretation”. Although article 32 on supplementary means of interpretation was couched in non-binding terms, that was not true of articles 31 and 33, which laid down the methods of interpretation to be employed in the absence of any special agreed rules in the treaty. If a State interpreted a treaty in bad faith, that would therefore be incompatible with article 31, paragraph 1, and it could be held that its “interpretative declaration” violated international law. If the logic of the report were followed, that declaration should be invalid because it violated a State’s obligations under international law (namely those arising out of the provisions of common article 31 of the Vienna Conventions, provided that those provisions were binding on it).

32. Apart from any doctrinal considerations, what would be the consequences of a tribunal’s ruling that the

interpretative declaration of a State was incorrect? If it were accepted that such a declaration would be invalid by virtue of the tribunal's decision, it would be invalid from the moment it was formulated. But if the issue was not that of invalidity, but of the legal effects of the wrong interpretation by that State, it would be necessary to ascertain whether that interpretation had had any legal effect between the time it had been formulated and the time it had been declared wrong. That was a practical question, the answer to which would guide tribunals and judicial bodies on how to deal with the legal effects of an interpretative declaration deemed to be wrong, i.e. containing a valid but wrong interpretation.

33. The second issue in relation to interpretative declarations arose when a declaration made by a State specified the scope attributed by that State to a treaty. That kind of declaration had been extensively debated, especially in cases where the State making the declaration had intended to define the scope of a human rights or counter-terrorism instrument in a certain manner. States parties which disagreed with that interpretation had generally argued that the declaration was a reservation which was incompatible with the object of the treaty and therefore invalid. The problem was that, according to the definition in draft guideline 1.2, declarations specifying the scope of a treaty were interpretative and therefore valid under new draft guideline 3.5. But they could also be regarded as “disguised” reservations limiting the scope of the treaty and therefore invalid under new draft guideline 3.5.1. That inconsistency had to be resolved and that could be done by saying that, as a matter of principle, an interpretative declaration was invalid when it was incompatible with the object and purpose of the treaty.

34. As far as the validity of reactions to interpretative declarations was concerned, it was essential to examine two points in connection with opposition to an interpretative declaration. First, there was no reason to treat opposition containing an interpretation prohibited by a treaty any differently from interpretative declarations that were prohibited by a treaty. Hence, if a State opposed an interpretative declaration by giving a prohibited interpretation, that opposition should also be invalid and the new draft guideline 3.6 should say so. Secondly, he wondered whether oppositions containing an interpretation that were contrary to articles 31 and 33 of the Vienna Conventions should be deemed invalid. If their legal effects were the only aspect to be considered, would they produce effects between the time of their formulation and the time that an authorized body declared that they contained a wrong interpretation?

35. Lastly, with regard to conditional interpretative declarations, the fact that their author's consent to be bound by a treaty was subject to some interpretation made it more akin to a reservation. Did that mean, however, that it should be treated as a reservation for the purpose of determining whether it was invalid? If the other parties or an authorized body accepted the author's interpretation, it should be treated in the same manner as any other interpretative declaration. But if that declaration was opposed by one or more parties, or by an authorized body, it was legitimate to treat it as a reservation for the purpose of determining whether it was invalid. That was why he

wondered whether it would be sufficient to apply draft guideline 3.5.1 to a conditional interpretative declaration without determining that such a declaration always had to be regarded as a reservation for the purpose of determining its validity. Thus, if the validity of a conditional interpretative declaration which was actually a reservation was opposed by one or more States parties, or declared wrong by an authorized body, it would be assessed as if the declaration were a reservation in accordance with draft guidelines 3.1 and 3.1.1 to 3.1.15. Otherwise, that declaration should be treated like any other interpretative declaration.

36. In conclusion, Mr. Hmoud recommended that the draft guidelines should be referred to the Drafting Committee once the Special Rapporteur had provided further explanations on the points he had raised in his statement.

37. Mr. PELLET (Special Rapporteur) said that he was still unconvinced by the example given by Mr. Nolte and did not see what was to be done about the *jus cogens* issue. The only thing worth saying was that the *jus cogens* obligation still existed. In other words, if the objection might entail conduct contrary to a peremptory norm of general international law, it would not have any effect, but he failed to see what that had to do with validity. If an objection might entail the violation of a *jus cogens* obligation, it could not be accepted, but in his opinion the problem did not arise in the context of validity.

38. Mr. MELESCANU said that the most important issue was that of the legal effects of reservations and declarations, but first it was absolutely vital to consider the question of validity. The Special Rapporteur had proceeded methodically and his logical arguments rested on State practice in the matter. He had first examined the conditions for the validity of reservations and declarations and then he had looked at the validity of objections to reservations and declarations, which was wise, because the conditions for the validity of reservations and objections should to some extent mirror the conditions for the validity of declarations and objections to declarations.

39. The situation was fairly plain in respect of draft guideline 3.4 (Substantive validity of acceptances and objections). The Special Rapporteur referred to the Vienna Conventions, which did not determine the conditions for the substantive validity of acceptances, and he thought that it would be unwise to speak of the substantive validity of reactions to reservations. He personally shared that point of view and proposed that the draft guideline should be referred to the Drafting Committee.

40. He broadly endorsed the comments made by Mr. Fomba and Mr. Hmoud with regard to interpretative declarations. He recommended referral of draft guideline 3.5 (Substantive validity of interpretative declarations) to the Drafting Committee, but with one reservation in respect of the phrase “unless the interpretative declaration is expressly or implicitly prohibited by the treaty”. The question of a treaty-based prohibition on a conditional interpretative declaration did not, in fact, seem to have been settled. Although the Commission was supposed to be drawing up a guide, in other words, guidelines based on State practice, the report provided only two examples of State practice in the matter, one concerning a bilateral treaty between

Canada and Costa Rica, and the other a multilateral treaty which was still no more than a draft. There was therefore not enough practice to posit the existence of legal instruments expressly or implicitly prohibiting the formulation of a declaration. From a practical viewpoint, all the members agreed that declarations were more appealing than reservations because they were not subject to time restrictions and because they could be made even when a treaty prohibited the formulation of reservations. For that reason, if the issue were dealt with in a very rigid manner, as it was in draft guideline 3.5, the Commission was likely not only to give States ideas, something which would limit the importance and practical utility of declarations, but also to kill the goose that laid the golden eggs, for if interpretative declarations, even conditional ones, were subject to the same legal regime as reservations, States might as well opt for the latter, as the Government of the Netherlands had pointed out (see the 3021st meeting above, paragraph 11).²⁵³ That question should therefore be handled in the section on legal effects, as Mr. Fomba and Mr. Hmoud had recommended. The draft guidelines should not contain inflexible provisions which might prejudice the Commission's decision when it considered legal effects, or, above all, the reservations dialogue.

41. As far as the validity of interpretative declarations was concerned, he thought that it would be harmful to rigidly align draft guidelines 3.5.2 and 3.5.3 on the reservations regime, even if draft directive 3.5.3 might seem to have some justification. If the phrase "unless the interpretative declaration is expressly or implicitly prohibited by the treaty" was retained in draft guideline 3.5, it should also be added to the provision concerning objections to interpretative declarations, although that might be taking matters too far, since there was no convincing practice in that respect.

42. Mr. NOLTE, replying to the Special Rapporteur's comments, said that an objection creating a treaty-based obligation that would violate *jus cogens* could already be deemed to violate the latter and would therefore be invalid. It was a matter of choice and consistency; if a reservation which created a treaty-based obligation that would violate *jus cogens* had to be deemed invalid, the same must be true of an objection having the same effect. He preferred that solution and thought that the Guide to Practice should stipulate that objections or other unilateral declarations which would create a treaty-based obligation contrary to *jus cogens* were themselves deemed invalid and did not produce any effect.

43. Mr. PELLET (Special Rapporteur) said that he would reply to Mr. Nolte's comments after he had given the matter some thought. Mr. Melescanu's statement called for two immediate remarks.

44. First, there seemed to be some misunderstanding, the Guide to Practice was not supposed to reflect existing practice but to guide future practice; in fact it was a guide "for" practice. It was not therefore crucial to find specific examples of a given point and he had used bilateral treaties, or treaties which had not yet been adopted, as

examples simply in order to show that the issue in question could arise and should therefore be dealt with in the Guide.

45. Secondly, he could not but be worried by the comments made by Mr. Hmoud and Mr. Melescanu about conditional interpretative declarations. If those declarations really formed a separate category, if only when it came to evaluating validity—and Mr. Hmoud and Mr. Melescanu had put forward some disturbing arguments in that connection—they could not be merely treated like reservations. In point of fact, that was very important for the Guide to Practice, because the Commission would have to retain all the provisions on conditional interpretative declarations that were currently in square brackets. He would therefore be grateful if the members of the Commission were to give their opinion on that issue.

46. Mr. DUGARD welcomed the draft guidelines contained in the Special Rapporteur's fourteenth report and, unlike some members, did not think that they were of little practical effect and therefore useless. The debate on reservations and interpretative declarations had turned on admissibility, validity and effects, and draft guidelines on those subjects were particularly welcome.

47. The section of the report under consideration, which was concerned with interpretative declarations, raised some interesting legal questions. The Special Rapporteur examined the rules relating to interpretation and rightly commented that there was rarely a "correct" interpretation of treaties. In national legal systems, it was up to the courts to interpret laws and it was inconceivable that the parties to a contract, or individuals affected by a law, would have the right to interpret them. The complexity of international law in that respect was due to the fact that it allowed each State, in the exercise of its sovereignty, to put forward one interpretation or another. But that did not mean that the Commission must refrain from any attempt to restrict the exercise of that power of interpretation. The Special Rapporteur said that when a treaty established a restriction with regard to a particular interpretation, its provisions must prevail; he then referred to the provisions of the 1969 Vienna Convention regarding interpretation, but in his own opinion, those rules were so flexible that they were not really much help in finding the right solution.

48. The Special Rapporteur then said that an interpretative declaration which was incompatible with the object and purpose of a treaty was in fact a reservation and could not be valid as an interpretative declaration. In that connection, he referred to the objections of Spain to the declaration of Pakistan²⁵⁴ regarding the International Covenant on Economic, Social and Cultural Rights. He endorsed the Special Rapporteur's conclusions on that point and approved of draft guideline 3.5.1.

49. Lastly, in respect of *jus cogens*, it was clear that an interpretative declaration might violate a peremptory norm of international law. Mr. Nolte had given one example, and another might be that of a declaration in which a State accepted the provisions of the Convention

²⁵³ *Multilateral Treaties Deposited with the Secretary-General* (available from <http://treaties.un.org>), chap. IV.4.

²⁵⁴ *Ibid.*, chap. IV.3.

against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, but pronounced that it did not consider certain, very harsh interrogation techniques in an isolation cell to be torture. It might be said that such a declaration conflicted with a *jus cogens* norm. He therefore thought that the Special Rapporteur should seriously consider mentioning *jus cogens* in draft guideline 3.5, for example by adding the words “or is incompatible with a peremptory norm of international law”. The draft guidelines contained in the report under consideration should be sent to the Drafting Committee.

50. Mr. McRAE said that when the Special Rapporteur had introduced the report under consideration, he had clearly laid out the parameters of the debate; no attempt should be made to go back on draft guidelines that had already been sent to the Drafting Committee, even if they were quoted in the report, and the Commission should not ask whether it could deal with validity before knowing what the Special Rapporteur was going to say about effects, although he had stated that responses to reservations raised issues relating to effects, but not to validity. At an earlier meeting, Mr. Gaja, supported by Mr. Nolte and Ms. Escarameia (3021st meeting, paras. 25 and 44–46, respectively), had, however, contended that issues of validity did arise, at least in respect of objections to reservations with an intermediate effect (3020th meeting, para. 25). At least in the abstract they seemed to be right; if an objection to a reservation with an intermediate effect had an impact on the treaty relationship between the reserving and the objecting parties, it could, at least in principle, be characterized as a valid or invalid objection.

51. He wondered, however, if there was any substance to that debate. If the Special Rapporteur said that there was no point in characterizing the objection as valid or invalid and that the real issue was that of the effect of the objection, then what Mr. Gaja, Mr. Nolte and Ms. Escarameia called “invalidity” might in practice be no different from what the Special Rapporteur meant by “effects”. But of course it was impossible to know that for certain, because the Special Rapporteur had not yet spelled out those effects. The debate had therefore taken on a somewhat surreal quality. Hence, he was inclined to agree with Ms. Escarameia that the Commission should not be talking about validity at all, but just about effects. Mr. Hmoud had made some pertinent comments in that respect. Perhaps it was necessary to wait until the following year and to hear what the Special Rapporteur had to say about effects, before reaching a decision.

52. Even though reactions to reservations and interpretative declarations supposedly involved no validity issues, the Special Rapporteur asked whether there should be a draft guideline on the matter. There were already a large number of draft guidelines, but if the Special Rapporteur had needed several pages of closely reasoned argument to convince the Commission that there was no issue of validity, perhaps the readers of the Guide to Practice might need some guidance in order to reach the same conclusion. A draft guideline on the subject, accompanied by a commentary, therefore seemed necessary, assuming that the Commission did not decide, after the debate on effects the following year, to abandon any reference to validity. Those comments obviously applied to draft guideline 3.4

on the substantive validity of acceptances and objections, but they were equally applicable to draft guideline 3.6 on the substantive validity of an approval, opposition or reclassification, except for the points made by Mr. Gaja the previous day and Mr. Hmoud at the current meeting. If the validity of an interpretative declaration depended on the terms of a treaty, that must also be true of the validity of any approval of an interpretative declaration. That meant that the phrase “subject to the terms of the treaty”, or words to that effect, should be added at the end of draft guideline 3.6.

53. Lastly, the Special Rapporteur requested the opinion of the Commission members with regard to conditional interpretative declarations and noted in paragraph 167 of his fourteenth report that “[i]t is clear from the definition of a conditional interpretative declaration that it does not purport to modify the treaty, but merely to interpret one or more of its provisions in a certain manner”. With all due respect to the Special Rapporteur, that was a distinction without a difference. If a State made its acceptance of a treaty conditional on a particular interpretation of it, it was seeking to modify what would be its meaning if the interpretation were not adopted, and that was a reservation. Of course, if the interpretation proved to be correct, there was no problem; the situation was comparable to that of a reservation accepted by all the other parties to a treaty. Perhaps there was a difference in the way a conditional interpretative declaration and a reservation were formulated, but in substance there was no distinction between them. For that reason, the content of draft guideline 3.5.2 was already encompassed in draft guideline 3.5.1. He therefore urged the Special Rapporteur to do as he had suggested and to explain at the following session that the effects of conditional interpretative declarations were the same as those of reservations, so that conditional interpretative declarations no longer led a twilight existence between simple interpretative declarations and reservations.

54. He was in favour of sending the draft guidelines contained in the Special Rapporteur’s fourteenth report to the Drafting Committee.

The meeting rose at 12.25 p.m.

3023rd MEETING

Friday, 17 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Cafilisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnurmurti, Sir Michael Wood.

Reservations to treaties (*continued*) (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Corr.1 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL
RAPPORTEUR (*continued*)

1. Sir Michael WOOD welcomed the submission of the part of the fourteenth report on validity of reservations and interpretative declarations (A/CN.4/614 and Add.1–2, paras. 80–178) and said that he awaited with great interest the third part of the report, dealing with what promised to be the centrepiece of the whole project, the effects of reservations and interpretative declarations and reactions thereto (paras. 179–290). He hoped the Commission would receive that part early enough in advance of its next session to be able to give it the full consideration that it would deserve. Perhaps, once the full picture was visible, the relationship between the various parts of the Guide to Practice would become clearer, enabling its structure to be somewhat simplified and its length reduced. If it was to be a practical tool, read and understood by busy—and unimaginative—government officials, and by busy practitioners, judges and arbitrators, then it needed to be user-friendly. Perhaps at some stage, the number of guidelines might be reduced and those that were central highlighted.

2. The second part of the fourteenth report provided an indication of how the draft guidelines might be shortened. If the Special Rapporteur was correct and the question of the substantive validity (or permissibility) of reactions to reservations, of interpretative declarations (except in the case of treaty-based restrictions or conditional interpretative declarations) and of reactions to interpretative declarations did not arise, and solely the effects of those acts had to be dealt with, then to refer to the question of substantive validity would be to include something simply for the sake of completeness rather than for the practical implications.

3. The commentaries would be an essential part of the project, as they were with almost all of the Commission's work. The Special Rapporteur might wish to consider whether they should be comprehensive, picking up much or most of the very interesting material from his 14 reports, or whether they should be selective and only highlight the most important issues.

4. On the substance of the second part of the fourteenth report, he said that if the distinction between substantive validity and effects was accepted, he basically agreed with the Special Rapporteur's analysis and conclusions and would be happy to see the draft guidelines referred to the Drafting Committee. Specifically, he agreed with the Special Rapporteur's analysis in paragraph 105 of the report of whether an objection to a reservation could be invalid because it produced a result that was contrary to *ius cogens*. He also agreed that one could not simply equate objections with intermediate effect to reservations, as explained in paragraph 114. The example of the reservations and objections to part V of the 1969 Vienna Convention was a rather special case. It raised the question of

whether the Guide to Practice should acknowledge, perhaps in the commentary, that the practice described was without prejudice to the application of different practice in special cases. On the other hand, like other objections with intermediate effect, the example given might simply raise the question of the meaning of the expression “the provisions of the treaty to which the reservation relates” in article 21, paragraph 1 (a), of the 1969 Vienna Convention—perhaps a matter worth consideration in the next part of the fourteenth report.

5. The Special Rapporteur had asked for views on the treatment of conditional interpretative declarations. That was an important matter on which he hoped the Special Rapporteur would accept a conditional response. Although the approach suggested, namely to treat such acts as conditional reservations, was logical, he would prefer to reserve his final position until the third part of the fourteenth report was available.

6. Lastly, he would find it helpful if the Special Rapporteur could indicate what he saw as the timetable for concluding the Commission's work on the topic, both on first reading and on second reading.

7. Mr. HASSOUNA said that the Special Rapporteur had once again presented the Commission with a document based on thoughtful legal analysis coupled with concrete suggestions, but had also raised unanswered questions. He had reminded the Commission that the question of validity of reservations and interpretative declarations was merely a prelude to the real core of the subject, namely the legal effects of reservations and interpretative declarations, to be discussed at the Commission's next session. The Commission was thereby forewarned that the next session would be heavily burdened with work on the final section of the Guide to Practice, as a prelude to the completion of a valuable tool on the technical and complex subject of reservations to treaties. At last, there was light at the end of the tunnel.

8. He would like to comment on the first part of the fourteenth report (paras. 1–79), something he had not yet had an opportunity to do. With regard to the draft guidelines on competence to assess the validity of reservations, he subscribed to the view that human rights monitoring bodies had such competence. Since their task was to ensure that States implemented human rights treaties, they should also deal with reservations, especially those which severely undermined the effectiveness of human rights conventions. In that regard, questions to be examined further were the extent to which the views on reservations of human rights monitoring bodies were authoritative, whether States should comply with those views and whether invalid reservations were severable.

9. Another issue raised in the first part of the report was that of silence in response to an interpretative declaration. He shared the view that the Commission should specify the circumstances in which silence could be interpreted as consent to an interpretative declaration. The point could be made either in the commentary or by rephrasing draft guideline 2.9.9. Specificity was required in order to ensure coherence between draft guideline 2.9.9, paragraphs 1 and 2, and between draft guidelines 2.9.9 and 2.9.8.

10. He supported the inclusion of the draft guidelines contained in the second part of the report, which represented an important step in the sequence leading to the examination of the legal effects of reservations and interpretative declarations. Regarding the validity of objections to reservations, he considered that States had the right, not merely the freedom, to object to reservations. The power to make treaties was one of the most important prerogatives that States enjoyed under international law, and objecting to a reservation was a corollary of the right to make treaties. He basically agreed with the analysis of the validity of objections and with the conclusion that the Commission should not deal with the substantive validity of objections. He had some doubts, however, about objections contrary to the object and purpose or to a fundamental provision of a treaty. How did such objections differ from invalid reservations under article 19, subparagraph (c), of the Vienna Convention and should they be admissible?

11. With regard to the validity of acceptances of reservations, the Special Rapporteur had stressed two basic points: acceptance of an invalid reservation did not make the acceptance itself *ipso facto* invalid, but the legal effects of acceptance of an invalid reservation were curtailed by the invalidity of the reservation concerned. Draft guideline 3.4 reflected only the first point, however, and a second paragraph should perhaps be added to state that acceptance of an invalid reservation would have no legal effects. That clarification could also be made in the commentary to draft guideline 3.4. It would remind States that accepting invalid reservations had legal consequences and induce them to give more serious consideration to reservations.

12. In connection with the validity of interpretative declarations, the question arose whether interpretative declarations were permissible when the treaty was silent on the matter. Clarification on that point was important, since the Vienna Convention overlooked the issue of interpretative declarations. A draft guideline on the question might be necessary, but the commentary to draft guideline 3.5 could also analyse that point of law in detail and, he would suggest, provide several concrete examples of treaties that implicitly prohibited interpretative declarations.

13. Lastly, on the validity of approval, opposition and reclassification of interpretative declarations, he supported the inclusion of draft guideline 3.6 in the Guide to Practice. Since the legal regime of declarations currently lacked clarity and precision, it was important for the Commission's work to be thorough and comprehensive, tackling all the issues pertaining to interpretative declarations. In the commentary to the draft guideline, all the points made by the Special Rapporteur in that context could be restated. Particular mention could be made of the fact that international law did not establish criteria for assessing the validity of approval, opposition and reclassification of interpretative declarations, but merely created methods for their interpretation.

14. He agreed with other members of the Commission that the draft guidelines should be referred to the Drafting Committee, in anticipation of the submission of the final draft articles at the Commission's next session.

The meeting rose at 10.30 a.m.

3024th MEETING

Tuesday, 21 July 2009, at 10.10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood.

Reservations to treaties (*continued*) (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Corr.1 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Special Rapporteur on reservations to treaties to present a summary of the debate on the topic.

2. Mr. PELLET (Special Rapporteur) said that the members of the Commission who had spoken on the subject had managed to convince him that some of their criticisms were well founded. He would take those criticisms into consideration in the Guide to Practice, which would undoubtedly be improved thereby. Before analysing the various criticisms and proposals, he would take up two points of procedure, one more important than the other. First, he would not comment on the points raised by Mr. Hassouna at the previous meeting on the first part of the fourteenth report, because it seemed inappropriate to discuss a draft that had already been discussed by the Commission, referred to the Drafting Committee and formally adopted by the Commission. Secondly, a number of speakers had emphasized the importance of the chapter on the effects of reservations and interpretative declarations (paras. 179–290), and had asked the Special Rapporteur to inform them of the timetable of future debates. He was not sure that he would finish the third part of the fourteenth report before the end of the sixty-first session, but he anticipated completing over the summer the preliminary version of the part relating to effects of a valid reservation, which the Secretariat could then distribute. In that connection, he wished to congratulate the Secretariat on the excellent study that it had published on the question of reservations to treaties in the context of the succession of States (A/CN.4/616), on which he would draw in preparing the draft guidelines and commentaries thereto that would make up the first part of the fifteenth report, which he intended to submit well before the deadline of March 2010. Thirdly, he would in due course submit the two annexes on the reservations dialogue and dispute settlement, respectively, which he had over-optimistically

expected to have completed for the current session. He might also, although he had not yet taken a definitive decision, put forward proposals for a formal revision of the Commission's preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.²⁵⁵

3. If the Commission and the Drafting Committee adhered to that timetable, the Guide to Practice could be adopted on first reading at the sixty-second session. Theoretically, two years should pass between the first and second readings, but given the particular nature of the Guide to Practice, it might be possible to adopt a two-stage procedure and request States to begin commenting on the first two parts of the Guide at once and then, between the sixty-second and sixty-third sessions, on the three following parts, relating to validity, effects and succession. The Commission could thus move on to the second reading in 2011, which would coincide with the end of his mandate. By extending the normal procedure in that way, the Commission could avoid appointing a new special rapporteur to work on the topic. In any case, he had finished the draft commentary to the second part of the Guide to Practice, and the Commission would need to adopt it in its report on the current session, together with draft guidelines 3.1, 3.2 and, perhaps, 3.3.

4. With regard to the substantive questions relating to the six draft guidelines contained in document paragraphs 80 to 178, draft guideline 2.6.3 (Freedom to make objections), set out in paragraph 96 of the report, had already been discussed in plenary meeting and referred to the Drafting Committee, so it should not be debated again. The Drafting Committee had decided, for reasons that he found unconvincing, to defer consideration of draft guidelines 2.6.3 and 2.6.4 (Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation), which meant that the texts had not come before the plenary Commission, making it impossible to complete the second part of the Guide to Practice. He considered that, since the question of the validity of objections had been debated, there was no longer any reason why the Drafting Committee should not address the two draft guidelines again.

5. With regard to the "semi-guideline" 3.4 (Substantive validity of acceptances and objections), it seemed to have been generally accepted that a simple objection or a maximum-effect objection did not give rise to any issues of validity. All speakers agreed that it was impossible to lay down a hard and fast rule that an objection aimed at producing a "super-maximum" effect was *ipso facto* not valid and that the problems posed by such an objection were problems not of validity but of effect. The criticisms and suggestions focused on the extremely sensitive question of the validity of objections with intermediate effect, namely those whereby the objecting State agreed to be associated through the treaty with the author of the reservation while excluding from their treaty relations the application of certain provisions of the treaty not covered by the reservation. It had been suggested that, with regard to such objections with intermediate effect, the author of an objection could at the same time introduce conditions

to be associated with the author of the reservation that would not be valid under international law. One speaker had given the example of an objecting State that could introduce a discriminatory clause by such means. Another had put forward the example of a person being expelled to a State where that person risked being tortured. A third had considered that, by means of an objection restricting the territorial application of the treaty, a State could establish a form of discrimination that ran counter to *jus cogens*. While he shared the righteous indignation that prompted such comments, he remained doubtful as to whether they were well founded in law. Such problems might arise in the case of reservations themselves but not in the case of objections. The example that had been cited most often was that of a State that refused to include in its relations with the reserving State the principle that expulsion was prohibited where there was a risk of torture. Regardless of whatever might have been said, such a course of action could never legitimize or render lawful an act contrary to *jus cogens*, since its only effect was to exclude the clause in question from the treaty relations between the two States concerned. The peremptory norm enshrined in the treaty was once again excluded from the treaty, but it remained totally and absolutely applicable between the two States. Contrary to what had been said, it was not the case that their treaty relations could be isolated from the totality of the legal relations between the States in question. Indeed, such reasoning diminished *jus cogens*, because it amounted to claiming that, simply by objecting to a reservation, the objecting State could avoid its obligations under *jus cogens*. It had been pointed out that, according to draft guideline 3.1.9, "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law"²⁵⁶ and that there was no reason to treat objections any differently. Apart from the fact that the draft guideline had been the result of a laborious compromise, he was far from persuaded that the question applied in the same way to reservations and objections. A reservation excluded the application of certain provisions of the treaty, while an objection excluded the full application of the reservation in the relations between the two States. As indicated in paragraphs 110 to 114 of the report, objections were not in fact "counter-reservations". He still failed to see—and some other members of the Commission seemed to share his bewilderment—how a State could, by making an objection, exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law. The mere act of making an objection with intermediate effect in order to exclude a provision prohibiting expulsion to a State that practised torture would not have the effect of authorizing such expulsion if the expulsion was considered prohibited by a peremptory norm of general international law. Similarly, a State that included, in an objection with intermediate effect, a provision prohibiting a given form of discrimination, would not be in a stronger position to engage in such discrimination itself and would therefore not alter the legal effects of the treaty in a manner contrary to a peremptory norm of general international law. None of the examples given justified transposing draft guideline 3.1.9 to the case of objections.

²⁵⁵ See footnote 140 above.

²⁵⁶ For the commentary to this guideline, see *Yearbook ... 2007*, vol. II (Part Two), pp. 46–48.

6. Several speakers had taken a different position, however, holding that unconditionally accepting the validity of such objections undermined the very principle of consensualism. One speaker had said that such objections would be valid only if they were accepted by the reserving State. The idea that an objection with intermediate effect was conditional upon acceptance by the reserving State would create a vicious circle: if State A made a reservation excluding the application of article 3 of a treaty and if State B reacted by making an objection with intermediate effect whereby it added the exclusion of article 5, State A could, in turn, respond to State B's exclusion by excluding article 8, and so forth. That position was intellectually untenable for several reasons. First, the two States were not in the same situation, since it was State A that had taken the initiative in refusing to apply the treaty in full, and not State B. Secondly, although the reservations dialogue could be protracted indefinitely, the law of the interplay between reservations and objections was, under the 1969 and 1986 Vienna Conventions, subject to precise time limits, which could not be met in the case referred to above. Thirdly, even if there was a problem of validity—and he did not believe there was—it would in any case not be a question of substantive invalidity, but of adding a procedural condition to the applicability of the objection. Fourthly, the suggestion that the reserving State should accept an objection with intermediate effect was inadmissible, since it was, after all, up to the author of the reservation to withdraw the reservation, thereby resulting in the withdrawal of the objection, as provided for in draft guideline 2.5.7 (Effect of withdrawal of a reservation). That final point had been duly noted by one speaker, who had been concerned at the respect shown for the will of the reserving State and not only of the objecting State and had therefore considered the Special Rapporteur's proposals unbalanced in that respect, although the speaker had admitted that the matter could be dealt with in the fourth part of the Guide to Practice relating to the effects of objections with intermediate effect. He himself shared that view, although he admitted that he could have easily held the opposite view, since, as a number of speakers had noted, the borderline between validity and effect was often unclear. At the same time, the author of an objection did not have unlimited freedom to give that objection an intermediate effect. As he had shown in paragraphs 116 to 118 of the report, and as he had attempted to explain during his presentation, limited practice—perhaps restricted to the 1969 Vienna Convention—showed that there were limits that did not affect the validity of an objection but merely allowed it to have an effect.

7. He had, however, taken on board a comment made by a number of speakers, which had led him to change his mind. He was not sure, upon reflection, that paragraph 103 of the report was altogether convincing. Although he still believed that an objection had no potential effect other than to suspend the treaty in the bilateral relations between the author of a reservation and the author of an objection, and that the author of the objection, in formulating the objection, exercised a right and not simply a freedom to do so, he recognized that he had perhaps been mistaken in claiming that, by means of an objection with intermediate effect, a State could undermine the object and purpose of the treaty in its relations with the reserving State. The provisions whose application could be excluded by means

of an objection with intermediate effect should be related to the reservation itself. Since a reservation was not valid if it was incompatible with the object and purpose of the treaty, it was mistaken to consider that a State could deprive the treaty of its object and purpose by means of an objection with intermediate effect, because the necessary link between the exclusion of certain provisions by the reservation and that of other provisions by the objection with intermediate effect undermined the validity of that argument. Moreover, as had been suggested, it should be recognized that the phrase “the provisions to which the reservation relates”, used twice in article 21 of the Vienna Conventions, could be helpful in restricting the acceptable scope of objections with intermediate effect.

8. He thus found himself in a difficult position, since, according to his own logic, that final point related more to the validity than to the effects of an objection. Indeed, an objection was in the same situation as a reservation prohibited under article 19, subparagraph (c), of the Vienna Conventions and it would undoubtedly be logical if the foregoing appeared in the third rather than the fourth part of the Guide to Practice. He was still not sure how he should improve his text, but he intended to make some specific proposals at the end of his statement. In any case, he had concluded from the debate that an objection with intermediate effect could produce such effect only if the provisions to which it related were linked to the provisions to which the reservation itself related—which meant that it did not matter whether the topic was covered in the third or the fourth part of the Guide to Practice—but also that the objection could not have the effect of depriving the treaty of its object and purpose in the relations between the two States concerned, which was purely a problem of validity. Thus, even if he proposed a text for a draft guideline 3.4.1 along those lines, it would also be necessary to amend draft guideline 3.4 accordingly in order to take account of the limits to the validity of an objection, and that would raise a problem of internal procedure for the Commission, to which he would ultimately return.

9. As for acceptances, he said that the debate held the previous week had led him to change his mind on a point that was of limited importance, but that had editorial and procedural consequences. According to draft guideline 3.4, acceptance was not subject to any condition of substantive validity. He still believed that such was the case, for the reasons given in paragraphs 121 to 126 of the report. Those reasons had been generally accepted, but he had come to think that he ought to draw a distinction between tacit acceptances and express acceptances. Everything that he had written seemed correct insofar as tacit acceptances were concerned, but a number of doubts regarding express acceptances had been raised in his mind by some speakers. Certainly, as he had already said, he by no means considered that the parties' agreement as to the validity of a reservation could be assumed from their unanimous silence concerning a reservation during a period of twelve months or that the general acceptance of a reservation was sufficient to make it valid. When it came specifically to express acceptances, however, he had been convinced by the arguments put forward the previous week that it was not correct to say that such acceptances produced no effect on the validity or invalidity of a reservation, in that they would at least have to be taken

into consideration by the interpreter in order to assess their validity or invalidity. He had also been persuaded that an express acceptance, which was a voluntary act, could not be deprived of certain effects—which would make it relevant to the fourth part of the Guide to Practice, dealing with effects—but that it could produce no effect, which was the case with invalidity. If the Commission agreed, draft guideline 3.4 should also be reviewed from that point of view to reflect the potential invalidity of express acceptances.

10. As for interpretative declarations, the “peremptory norms brigade” had once again expressed their view that interpretative declarations contrary to *jus cogens* were not valid. He had changed his mind on that point, too, or at least partially, having been convinced by an example given by one speaker of a hypothetical interpretation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that might, on the pretext of interpretation, seek to legitimize certain forms of torture. It would certainly be a case of interpretation and not a reservation, in the sense that the author of the declaration would not be aiming to exclude the application of certain provisions of the treaty but rather—to use the wording of draft guideline 1.2—“to specify ... the meaning ... attributed by the declarant to a treaty or to certain of its provisions”. He thought that, for that reason alone, he ought to add a clarification along those lines at the end of draft guideline 3.5, the nature of which would be substantially changed thereby.

11. He was not, however, convinced by the other criticisms of draft guideline 3.5. For example, it really did not seem possible to claim that a mistaken interpretation “violated” article 31 of the Vienna Conventions, as that would have the effect of reinventing a sort of law of responsibility exclusive to reservations to treaties. True, if an impartial third party with the power to decide ruled that an interpretation advanced by a State was false, that falseness would be duly established; but the fact remained that the State in question could formulate such an interpretation and, in the vast majority of cases, the interpretation would produce all its effects indefinitely, for the good reason that, as another member of the Commission had pointed out when commenting on paragraphs 139 and 140 of the report, international law and society were essentially decentralized and were so constituted that they relied on self-interpretation. A State could be mistaken in advancing a given interpretation, but it did not follow that its erroneous interpretation was not valid. He could not quite understand how draft guidelines 3.5 and 3.5.1 could be said in that regard to leave a void that could be rectified only if one held that an interpretative declaration could be invalid because it was contrary to the object and purpose of the treaty. That approach confused cause and effect: an interpretation must be made in the light of the object and purpose of the treaty and, if it was based on a misapprehension of that object and purpose, it was erroneous, incorrect or false, but not invalid. Indeed, it was a repetition of the previous problem.

12. During the debate, two members of the Commission had complained that he had not given concrete examples of a treaty-based prohibition against formulating interpretative declarations and had asked him to provide some

in the commentary. While he had no examples of such provisions, he considered that the examples that he had given of bilateral treaties and an abortive multilateral convention showed that the problem could arise, which justified its treatment in the Guide to Practice. He had also taken note of the proposed simplification of the text of draft guideline 3.5 and was in favour; he would leave it to the Drafting Committee and the Secretariat to produce a suitable text.

13. With regard to draft guideline 3.5.1, the title of which, at least, would need to be reviewed by the Drafting Committee, it had been proposed that greater emphasis should be placed on the idea that interpretative declarations that were “reclassified” as reservations must be treated as such. In his view, the problem was purely one of drafting, and the Drafting Committee could deal with it, although he was not convinced that it was necessary, since the reference to draft guidelines 3.1 to 3.1.15 meant precisely that such alleged interpretative declarations should be treated as reservations.

14. As for conditional interpretative declarations, no speaker had been opposed in principle to referring draft guidelines 3.5.2 and 3.5.3 to the Drafting Committee as a precautionary measure, even though they might subsequently be deleted if the Commission decided that conditional interpretative declarations were subject to the same regime as reservations. According to one point of view, however, a distinction should be drawn between a case in which a conditional interpretation was deemed correct and one in which it turned out to be incorrect, if, for example, a competent, impartial third party so ruled. He had difficulty accepting that view.

15. He invited the Commission to consider the example given of a hypothetical interpretative declaration by Romania at the time it ratified the United Nations Convention on the Law of the Sea, under the terms of which Romania agreed to be bound by the Convention on condition that article 121 was interpreted as including Serpents’ Island among the “rocks” referred to in paragraph 3. There could be one of two consequences: the ICJ, in hearing a subsequent dispute with Ukraine, for example, either accepted that interpretation or it rejected it. In either case, the Court would have ruled on whether or not the declaration was well founded; however, if conditional interpretative declarations were to be equated with reservations, it was not because they were reservations but because, owing to their conditionality, they behaved like reservations and the same rules could be applied to them. As another member of the Commission had said, if the interpretation proved correct, the problem of the validity of the conditional interpretative declaration did not arise. If it proved incorrect, the question of its validity arose, but it did so by virtue of the fact that it was conditional and, in his view, that was what draft guidelines 3.5.2 and 3.5.3 stated.

16. He had, however, reached that conclusion only with considerable hesitation and, if it turned out that a majority of the Commission held the opposite view—that the conditions for the validity of conditional interpretative declarations were different, even if only in one detail, from those of reservations—he would go along with them. In

that case, however, it would be necessary to delete the square brackets from all the draft guidelines relating to conditional interpretative declarations. In other words, if the Commission decided to refer draft guidelines 3.5.2 and 3.5.3 to the Drafting Committee without any further instructions, that would mean that it accepted the principle set out in them and that conditional interpretative declarations were thus subject to the same conditions of validity or invalidity as reservations. Alternatively, the full Commission would need to give the Drafting Committee precise instructions in order to sidestep the principle of assimilation that underlay the draft guidelines and that one member at least had found too rigid.

17. Two suggestions had been made about draft guideline 3.6 (Substantive validity of an approval, opposition or reclassification). The first had been to add at the end of the draft guideline the phrase that appeared at the end of draft guideline 3.5, namely “unless the interpretative declaration is expressly or implicitly prohibited by the treaty”, since such reactions might, like interpretative declarations themselves, come up against a prohibition set out in the treaty. He was in favour of that proposal, but it had consequences only for approval or opposition, since it was hard to see how a reclassification as a reservation could be affected by a prohibition. Nevertheless, he supported the proposal, which he thought the Drafting Committee could adopt. The second proposal relating to draft guideline 3.6 seemed fairly similar to the first, at least in spirit, since it was to insert the phrase “Subject to the terms of the treaty” at the beginning of the draft guideline. That seemed more ambiguous and, in his view, every guideline in the Guide to Practice should be read subject to any contrary provision in the treaty. He was not, however, opposed to the Drafting Committee considering the proposal.

18. Two members had also raised the question of the function, and indeed the very nature, of the Guide to Practice, and he felt bound to repeat what he had already had occasion to say, namely, that the term “Guide to Practice” did not mean that the text, which was a flexible legal instrument, was based on past State practice, but rather that it was intended to guide States in their future practice. Another reproach levelled at the Guide was that it was too complicated. Certainly, the draft guidelines were often complex, as was the commentary, but that was no accident, given that it had taken over 15 years to bring the enterprise to a successful conclusion, and that was simply due to the fact that the legacy of the Vienna Conventions with regard to reservations to treaties, combined with practice that was also difficult to understand, was indeed extremely complicated. The Commission was not producing an introductory handbook to the law of reservations—such a handbook already existed, in the form of articles 19 to 23 of the Vienna Conventions—but rather a treatise on reservations that attempted to give the user all the replies to questions that might arise, and that precluded any gross simplification. At the same time, he wondered whether the Commission might not ultimately consider producing some kind of digest of the law of reservations that would set out, in a form to be decided, the basic principles on which the Guide to Practice was founded or would facilitate the use of the Guide, bearing in mind the difficulties that might be involved, since users should not be led to

believe that such matters were simple when they were not. The Commission should not make a hasty decision in that regard, but it did have to decide what it wanted to do with the draft guidelines proposed in paragraphs 80 to 178 of the fourteenth report.

19. With one small exception, the members of the Commission who had spoken had said that they were in favour of referring the draft guidelines to the Drafting Committee, so the most convenient solution for him would be to support that proposal. However, he rejected that solution, which he saw as the easy way out, since on at least three points, and perhaps four, he had been convinced by the debates during the session that he had taken a wrong turn. After listening to what members had said and giving it some thought, he had come to believe that, first, an objection could neither result in the exclusion of the application of provisions of the treaty unconnected with the reservation to which the objection related, nor deprive the treaty of its object and purpose in the relations between the author of the reservation and the author of the objection. That meant that draft guideline 3.4 must be thoroughly overhauled and doubtless split up into two separate guidelines. Secondly, again in the context of draft guideline 3.4, if a reservation itself was not valid, the express acceptance of it was likewise not valid. Thirdly, the members who believed that a situation could arise in which an interpretative declaration was contrary to a peremptory norm of general international law were right and, that being the case, such a declaration should be considered invalid and draft guideline 3.5 redrafted accordingly. Fourthly, although it was a point on which he was less sure, it was worth considering whether conditional interpretative declarations could really be subject to the same conditions of validity as reservations. If they could not, draft guidelines 3.5.2 and 3.5.3 should also be redrafted.

20. As it was not up to the Drafting Committee to decide on questions of principle, and as the four questions that he had mentioned were questions of principle, he would prefer that the Commission not refer the draft guidelines contained in paragraphs 80 to 178 of his fourteenth report, as they stood, to the Drafting Committee. There were three possible solutions. The first was that the Commission could put off consideration of the draft guidelines by the Drafting Committee to the following year, although the Committee’s programme of work on reservations was already full, which was a considerable drawback. Secondly, he could prepare new draft guidelines on the basis of the principles that he had just set out and submit them to Commission members over the next few days. The third possibility was that the Commission could refer the draft guidelines to the Drafting Committee during the current session. If it did that, however, it would need to take a formal stand on the four questions of principle that he had raised, so that the Drafting Committee would know what approach to take with regard to the validity of objections with intermediate effect, the validity of express acceptances of invalid reservations, the validity of interpretative declarations that were contrary to peremptory norms of general international law and the question of aligning the conditions for the validity of conditional interpretative declarations with the reservations regime.

21. The CHAIRPERSON said that he took it that the Commission wished to adopt the second course of action suggested by the Special Rapporteur, namely to put off its decision on these draft guidelines and to wait until the Special Rapporteur had submitted new texts for draft guidelines 3.4, 3.5, 3.5.2, 3.5.3 and 3.6.

It was so decided.

Cooperation with other bodies (*continued*)*

[Agenda item 14]

STATEMENT BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

22. The CHAIRPERSON invited Mr. Manuel Lezertua, Director of Legal Advice and Public International Law (Jurisconsult), to address the Commission.

23. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Committee of Legal Advisers on Public International Law) extended greetings to the Chairperson and members of the International Law Commission and said that he would like to inform the Commission of the major developments that had taken place in the Council of Europe over the past 12 months.

24. The Chairpersonship of the Committee of Ministers had been held by Sweden from May to November 2008 and by Spain from November 2008 to May 2009. It was currently held, since May, by Slovenia. The Chairpersonship by Sweden had been marked by the conflict that had broken out the previous summer in the Caucasus between the Russian Federation and Georgia. Sweden had quickly intervened to call on the Russian and Georgian authorities to put an end to the armed confrontation. It had aligned itself with the efforts of the Secretary-General and the Council of Europe Commissioner for Human Rights to reach a peaceful settlement of the crisis, in accordance with the commitments entered into by the two countries, which were both States members of the Council of Europe, and the obligations arising out of their membership of the Council. The conflict had constituted, and continued to constitute to a certain extent, a serious challenge to the Council's credibility and the values that it upheld.

25. Sweden had also attached great importance to the potential of the Council of Europe to strengthen the rule of law. The Council secretariat had conducted a study that had been considered and welcomed by the Committee of Ministers which sought to identify the key elements characterizing the concept of the rule of law as well as the type of activities that the Council might undertake in that regard.

26. With a view to promoting international justice, the Council of Europe had organized an international conference in London in October 2008, entitled "International Courts and Tribunals—the Challenges Ahead", attended by presidents, prosecutors and clerks of international courts and tribunals, together with the legal advisers of the ministries of foreign affairs of the States members of the Council. The conference had considered the practical challenges facing such courts and tribunals.

27. In the area of relations with the United Nations, the Swedish Chairpersonship had managed to secure the adoption by consensus of a General Assembly resolution on cooperation between the United Nations and the Council of Europe.²⁵⁷ That cooperation continued to develop actively in a number of fields, including human rights, particularly children's rights, as well as abolition of the death penalty and efforts to combat terrorism.

28. The Chairpersonship by Spain (November 2008–May 2009) had then concentrated on the question of the provisional application of certain provisions of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, which was intended primarily to speed up the processing of applications pending before the European Court of Human Rights. Until the entry into force of the Protocol, which had been delayed owing to non-ratification by one member State, it had been decided to find temporary solutions so that some of the Protocol's provisions could be implemented. The Chairpersonship by Spain had also devoted considerable attention to efforts to combatting terrorism.

29. Lastly, the current Chairpersonship by Slovenia had announced its desire to continue the process of reforming the European Court of Human Rights by proactively seeking ways in which cases could be heard more efficiently and gradually eliminating the backlog of cases, to the extent possible. In addition to the question of the entry into force of the Protocol, it sought to think of solutions that would ease the work of the Court, which had over 100,000 applications pending.

30. Slovenia was also active in promoting and developing the rule of law at the national and international levels. In particular, it planned to organize a conference of experts on the decisions of international tribunals and their contribution to strengthening the rule of law at the national and international levels.

31. Turning to the high-level conferences organized by the Council of Europe over the past year, he mentioned first the session of the Committee of Ministers, attended by the Ministers for Foreign Affairs of member States, which had been held in Madrid in May 2009. In addition to adopting important decisions on the future of the European Court of Human Rights, the ministerial conference had provided an opportunity to assess the implementation of the Action Plan adopted at the Third Summit of Heads of State and Government in Warsaw in 2005. The Ministers had also adopted an important declaration, entitled "Making gender equality a reality", and considered questions relating to the election of the next Secretary General of the Council of Europe. They had, moreover, constituted themselves, for the first time, as the Conference of High Contracting Parties to the European Convention on Human Rights, with a view to addressing issues relating to the entry into force of Protocol No. 14.

32. The following conferences had been organized at ministerial level: the eighth Council of Europe Conference of Ministers responsible for Youth, held in Kyiv in

* Resumed from the 3016th meeting.

²⁵⁷ General Assembly resolution 63/14 of 3 November 2008.

October 2008; the World Conference on Constitutional Justice, with the theme “Influential Constitutional Justice—its influence on society and on developing a global jurisprudence on human rights”; the first Council of Europe Conference of Ministers responsible for Social Cohesion, held in Moscow in February 2009, with the theme “Investing in social cohesion—investing in stability and the well-being of society”; the first Council of Europe Conference of Ministers responsible for Media and New Communication Services, held in Reykjavik in May 2009; the Council of Europe Conference of Ministers responsible for Family Affairs, held in Vienna in June 2009, on the theme “Public Policies supporting the Wish to Have Children: societal, economic and personal factors”; and the twenty-ninth Conference of Ministers of Justice, held in Tromsø, Norway, in June 2009, the principal theme being “Breaking the Silence—united against domestic violence”, with particular reference to combating the silence and impunity that went hand in hand with such violence. In addition, on that occasion the Council of Europe Convention on Access to Official Documents had been opened for signature. Lastly, the fourth European Conference of Judges and Prosecutors had been held in Bordeaux, France, on 30 June and 1 July 2009, on the theme of relations between judges and prosecutors. The Conference had been organized jointly by the Consultative Council of European Judges and the Consultative Council of European Prosecutors, in cooperation with the French *École nationale de la magistrature*.

33. With regard to relations between the Council of Europe and other regional or international organizations, he said that the Council of Europe and the European Union enjoyed excellent relations, with the two engaging in numerous joint activities. Their relations had been governed since 2001 by a joint declaration on cooperation and partnership between the two organizations and since 2007 by a memorandum of understanding that established the objectives to be attained and identified the main areas for joint action. Relations between the two organizations were reinforced by quadripartite meetings made up of the Chairpersonship of the Council of Europe Committee of Ministers, the Chairpersonship of the Council of the European Union and the secretariats of the two bodies. The twenty-seventh Quadripartite meeting between the Council of Europe and the European Union, held in Brussels in November 2008, had been used to review joint activities to promote human rights, democracy and the rule of law in South-East Europe. Also on the agenda had been the implementation of the memorandum between the two organizations and follow-up to the situation in Belarus. At the twenty-eighth meeting, held in Madrid in May 2009, a major topic had been the European Neighbourhood Policy and the prospects for cooperation between the two organizations in that context.

34. Relations between the Council of Europe and the Organization for Security and Co-operation in Europe were organized on the basis of coordination meetings held since 2004. The ninth such meeting, held in Vienna in March 2009, had dealt with questions of relevance to both organizations, particularly efforts to combat terrorism, minority rights and efforts to combat trafficking in human beings.

35. Turning to legal news and the activities of the Treaty Office, he said that the Council of Europe had witnessed the adoption of three major conventions during the past year.

36. First, on 25 November 2008, the European Convention on the adoption of children (revised), an updated version of the 1967 European Convention on the adoption of children, had been opened for signature by the States members of the Council of Europe and by non-member States that had participated in its drafting. The object of the Convention was to take into account developments in society and the law, while respecting human rights and bearing in mind that the best interests of the child should always be paramount. The Convention introduced some innovations, such as the requirement of the father’s consent in all cases, even where the child was born out of wedlock.

37. On 27 November 2008, the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Genetic Testing for Health Purposes had also been opened for signature. It would enter into force after five ratifications, of which at least four had to come from States members of the Council of Europe. The new Protocol defined the principles governing such matters as the quality of genetic services, information, prior consent and genetic counselling, and established general rules for the conduct of genetic tests.

38. Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms had been opened for signature in Strasbourg on 27 May 2009 and would enter into force on 1 October 2009, since it had already been ratified by six States, while another six had signed it. The Protocol, which concerned the processing of applications to the European Court of Human Rights, introduced a number of innovations: a single judge would be able to reject applications that were manifestly inadmissible, whereas previously such a decision could be taken only by a committee of three judges; and the competence of such committees had been extended so that the judges could declare an application admissible and render a judgment on the merits in cases where well-established case law of the Court existed. States could, if they so wished, provisionally apply the provisions of Protocol No. 14 *bis* prior to its entry into force.

39. The Council of Europe Convention on Access to Official Documents had been opened for signature on 18 June 2009, during the twenty-ninth Conference of Ministers of Justice. It had already been signed by 12 States. The Convention was the first binding international legal instrument that recognized a general right of access to official documents held by public authorities. Restrictions on such right of access were permitted only where they were intended to protect certain interests, such as national security, defence or privacy. The Convention set out the minimum standards to be applied in the processing of requests for access to official documents. A group of specialists on access to official documents would be set up once the Convention was operational.

40. The Council of Europe Convention on the avoidance of statelessness in relation to State succession, which

had been open for signature for three years, had entered into force on 1 May 2009. The Convention, which built on the European Convention on Nationality, set out more detailed rules for States to follow in order to prevent, or at least minimize, cases of statelessness resulting from State succession.

41. Lastly, he noted that the Group of Experts on Action against Trafficking in Human Beings had held its second meeting in June 2009. The Group's mandate was to monitor the Council of Europe Convention on Action against Trafficking in Human Beings of 2005, which had already been ratified by 25 member States. The Group, which was made up of 13 independent experts, would publish regular reports on compliance with the Convention.

STATEMENT BY THE REPRESENTATIVE OF THE COMMITTEE
OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

42. The CHAIRPERSON thanked Mr. Lezertua and invited the Head of the Public International Law and Anti-Terrorism Division of the Council of Europe, Secretary of the Committee of Legal Advisers on Public International Law, Mr. Alexandre Guessel, to address the Commission.

43. Mr. GUESSEL (Head of the Public International Law and Anti-Terrorism Division of the Council of Europe, Secretary of the Committee of Legal Advisers on Public International Law) said that CAHDI was a coordinating body but also a thinktank advising the Council of Europe Committee of Ministers and a body in which legislation was drafted.

44. CAHDI was made up of legal advisers of the ministries of foreign affairs of the 47 member States and a number of observer States and organizations: Australia, Canada, the Holy See, Israel, Japan, Mexico, New Zealand, the United States of America, the United Nations, the European Union, the ICRC and NATO. The strength of the Committee lay in the combination of high-level State representation and increasingly high attendance levels of delegations. CAHDI meetings enabled States' legal advisers to coordinate their approach on such sensitive topics as international jurisdictions, the implementation of United Nations sanctions, the peaceful settlement of disputes, State immunity and questions relating to humanitarian law. CAHDI, which also acted as the European observatory of reservations to international treaties, gave member States the opportunity to exchange information, to discuss the possibility of objecting to a given reservation and to provide more information on a reservation than members themselves had been able to put together. Every year, CAHDI—to which some members of the International Law Commission belonged—organized an exchange of views on the Commission's work.

45. The end of 2008 had been marked by the drafting of a report on the so-called "disconnection clause" and its impact on Council of Europe conventions containing such a clause. The report contained important recommendations on the implementation of such clauses, which would be extremely useful for bodies drawing up new conventions. At its thirty-seventh meeting, held in Strasbourg in March 2009, CAHDI had focused on drafting its advice on the provisional application of some of the procedural

provisions of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. Although the Protocol was intended to amend the Court's procedures in order to enable it to work more effectively, its entry into force continued to pose problems. The Committee of Ministers had therefore requested CAHDI to find ways of overcoming the obstacles raised by the delay in the Protocol's entry into force. Two solutions had been suggested. One had been to hold a conference of the High Contracting Parties to the European Convention on Human Rights with a view to reaching a consensus agreement on a decision to apply the two procedural elements of Protocol No. 14 on a provisional basis. The new procedures would, however, apply only to States that so wished. The other proposal had been to adopt a new legal instrument entitled "Protocol No. 14 *bis*", whereby the same two procedural elements of Protocol No. 14 could be implemented by States that wished to do so. Obviously, a State was free to choose the route that seemed to it the simplest, fastest and most appropriate, taking into account its constitutional requirements.

46. On the initiative of CAHDI, the Council of Europe Committee of Ministers had also adopted, in July 2008, Recommendation CM/Rec(2008)9 on the nomination of international arbitrators and conciliators. The recommendation encouraged States to nominate arbitrators and conciliators in accordance with major conventions, such as the 1969 Vienna Convention or the United Nations Convention on the Law of the Sea. CAHDI was responsible for following up that recommendation and, at each meeting, it reminded States of the practical benefits of keeping their lists of arbitrators and conciliators up to date. The recommendation, which promoted the rule of law at the international level, could also be seen as contributing to the implementation of the 2005 World Summit Outcome.

47. Lastly, he informed the Commission that, on 1 January 2009, Mr. Rolf Einar Fife, Legal Adviser to the Ministry of Foreign Affairs of Norway, had taken over the Chair of CAHDI, the Vice-Chairperson being Ms. Edwige Belliard, of the Ministry of Foreign Affairs of France.

48. The CHAIRPERSON thanked Mr. Guessel for his statement and invited the members of the Commission to put questions to the two speakers.

49. Mr. GAJA said that the difficulties facing the European Court of Human Rights, which was submerged by a large number of applications, were well known. In order to remedy the situation, two rather complicated procedures had been adopted. Protocol No. 14, which had not entered into force because one State had not ratified it, could nonetheless be provisionally applied with respect to States that made a declaration to that effect. Meanwhile, Protocol No. 14 *bis* could enter into force without the need for all member States to be party to it. The provision had, however, involved a major innovation in that, whereas previously there had been only one procedure that could be used, there were currently two. For some States, applications were still dealt with by a committee of three judges, while for others they were dealt with by a single judge. It was worrying that a single judge could decide to reject an application.

50. The point that interested him most was the subsequent agreement of the parties. Theoretically, amendment of the European Convention on Human Rights required the unanimous ratification of a protocol. In the case of Protocol No. 14, the procedure had been circumvented by means of an informal agreement between the States parties. While not criticizing the procedure, he did wish to point out that it involved a radical change in the European human rights protection system, and he requested further information on how such an informal agreement had been used to amend the European Convention on Human Rights.

51. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) said that Mr. Gaja had put his finger on the weak point of the system. The European Court of Human Rights currently had over 100,000 cases pending, and if nothing was done, there would be 300,000 in four years' time. Since Protocol No. 14 could not enter into force owing to the fact that one State had not ratified it, it had been absolutely essential to find a solution to the problem. CAHDI had been consulted in order to establish what might be done in that regard while having due regard for international law. The solution proposed had been to apply the treaty on a provisional basis.

52. The basic idea was that, since the negotiators of the original instrument had not provided for the possibility of a provisional application, there had to be an agreement, which should not, however, be termed informal, since it had been adopted by the Conference of Contracting Parties. It had thus been decided that, for those who accepted such a provisional application, the basic elements of Protocol No. 14 should apply. As Mr. Gaja had noted, there were thus currently two different procedures: applications lodged against States that had not made a declaration would continue to be dealt with in accordance with the former procedure under Protocol No. 11, while Protocol No. 14 *bis* would apply to all others. The situation was, of course, unfortunate, but the President of the Court, Mr. Costa, had recently informed the Council of Europe Committee of Ministers that the situation was so desperate that he was inclined to take the risk, in the knowledge that the vast majority of contracting parties would shortly be bound by the new procedure. Moreover, the fact that the solution had been approved by CAHDI meant that it was in conformity with international law. By the end of 2009, when most of the contracting parties would be bound by the procedures under Protocol No. 14, the two solutions proposed by CAHDI—namely, the provisional application of one part of Protocol No. 14 or else the provisional application of Protocol No. 14 *bis*, since, from the legal point of view, the two were separate instruments—would end up merging, since their consequences would be identical. All contracting parties would thus be subject to the same procedure, with the exception of those that had rejected both solutions.

53. CAHDI, the Committee of Ministers and the Steering Committee for Human Rights of the Council of Europe had all emphasized that the measure was valid only until the entry into force of Protocol No. 14, which remained the priority. When the Protocol received the ratification that it needed to enter into force, the two procedures he

had described would disappear and the situation would return to normal. In a few months' time, it would be little more than a footnote in the Court's history.

54. Mr. NOLTE said that the extremely important precedent that had been set was of particular interest to the International Law Commission, which had started considering the evolution of treaties over time. He fully understood the pragmatic considerations that had led the Council of Europe to make its decision but noted that CAHDI and Governments had acted on the assumption that the current European Convention on Human Rights could be interpreted as being divisible on the procedural level and perhaps even on the level of substantive rights, although it was to be hoped that such a precedent would never arise. The fact was that it was a case involving a subsequent agreement on the interpretation of the Convention, and the Court, which, in theory, should be the body determining the validity of the premise, found itself in the awkward position of being both judge and party.

55. It should also be borne in mind that, even if all member Governments accepted such an agreement, some parliaments might feel that they had been overridden, since, when they had ratified the original Convention, they had perhaps counted on there being a uniform procedure for all claimants. It was thus theoretically possible that, on the application of a national parliament, a national constitutional court could verify whether the new procedure conformed to the original legislation. There might then be new developments, but in any case, it was a fascinating example of the evolution of a treaty over time.

56. Mr. HASSOUNA asked Mr. Lezertua whether he thought that such a "creative" legal solution, whereby the unanimity rule set out in other instruments, including political documents, could be bypassed, was a one-off solution or whether it could be applied in other contexts. As for cooperation between the Council of Europe and regional organizations, such as the Organization of American States (OAS) or the European Union, he thought that it would be good to extend such cooperation to other organizations, such as the Asian–African Legal Consultative Organization. Meetings or other joint activities would undoubtedly be useful both for the organizations and the member States concerned.

57. Ms. ESCARAMEIA asked whether States that had ratified Protocol No. 14 *bis* had treated it as a new instrument and gone through all the stages of the usual ratification procedure laid down by their domestic law, such as parliamentary approval. If they had, it could be assumed that it would be much easier for them to choose the first option, namely the provisional application of the two procedural elements of Protocol No. 14. She would also like to know whether the monitoring mechanism provided for under the Council of Europe Convention on Access to Official Documents was similar to the mechanisms available to the United Nations human rights bodies. She asked what powers the mechanism had and what relationship it had with the European Court of Human Rights.

58. Mr. GALICKI was surprised that no information had been given on Council of Europe activities to combat terrorism.

59. Sir Michael WOOD asked whether Recommendation CM/Rec(2008)9 of the Committee of Ministers to member states on the nomination of international arbitrators and conciliators, adopted by the Council of Europe Committee of Ministers in July 2008, had been transmitted to the United Nations—through the Sixth Committee, for example—in the context of the current debate on the rule of law.

60. Mr. PELLET asked, with relation to Protocol No. 14, whether anyone had thought of a very simple solution, which would be to allow the Russian Federation—which, as everybody knew, was the only State member of the Council of Europe that had declined to ratify the Protocol—to make reservations. He did not believe that such reservations would be inadmissible under the law of reservations or the European Convention on Human Rights.

61. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI), replying to Mr. Nolte, said that to his knowledge there had been no decision by a national parliament or a national constitutional court declaring the solution adopted by the Council of Europe unconstitutional. The Council endeavoured to comply with international law. The principle of provisional application did not appear in the text of the Convention because no one had thought that a State would avoid ratification, but it did feature in the 1969 and 1986 Vienna Conventions. Meanwhile, the ratification of the new instrument—Protocol No. 14 *bis*—had taken place according to the normal procedures, with parliamentary approval, but that had presented few problems, since all the States concerned had already ratified Protocol No. 14, and Protocol No. 14 *bis* repeated only about one third of its provisions.

62. The solution adopted by the Council of Europe was indeed a one-off solution. It was not directly applicable to other organizations, such as the Inter-American Court of Human Rights or the African Court on Human and Peoples' Rights, which had their own procedures.

63. The solution suggested by Mr. Pellet had indeed been considered. CAHDI had expressly stated that the ratification of Protocol No. 14 by the Russian Federation—together with the formulation of reservations or interpretative declarations compatible with international law and the Convention, if necessary—remained a priority, but the Russian Federation was obviously free to decide for itself.

64. Mr. GUESSEL (Head of the Public International Law and Anti-Terrorism Division of the Council of Europe, Secretary of CAHDI) said that it was not the first time that the European Court of Human Rights had used two different procedures. The same thing had happened, for example, when some countries had refused to recognize the right of individual petition. With regard to efforts to combat terrorism, he noted that the ratification of the three most important Council of Europe conventions in that field—the Council of Europe Convention on the Prevention of Terrorism, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism and the Convention on cybercrime—was moving

forward. Consultations between the parties to the first two of those conventions had begun recently, and reports relating thereto would shortly be published. The Committee of Ministers had reaffirmed that counter-terrorism efforts that respected human rights remained a priority for the Council of Europe.

65. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) confirmed that the First Consultation of the Parties to the Council of Europe Convention on the Prevention of Terrorism had been held in Madrid as part of the 119th session of the Committee of Ministers. In the declaration they had adopted, they had asked the Committee of Experts on Terrorism (CODEXTER) to monitor the implementation of the Convention.

66. Replying to Sir Michael Wood, he said that he had himself transmitted Recommendation CM/REC(2008)9 of the Committee of Ministers to member states on the nomination of international arbitrators and conciliators to the Ambassador of Sweden in New York, who had chaired the Committee of Ministers at that time, and had requested him to transmit it to the United Nations. Meanwhile, the follow-up mechanism provided for by the Council of Europe Convention on Access to Official Documents was not yet operational, but he emphasized that every mechanism under a convention was independent of other mechanisms and of the Court itself. However, that by no means precluded any application to the Court for an opinion on a human rights question, in the field of bioethics, for example.

The meeting rose at 1.15 p.m.

3025th MEETING

Wednesday, 22 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Cooperation with other bodies (*continued*)

[Agenda item 14]

STATEMENT BY THE REPRESENTATIVE OF THE
INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON welcomed Mr. Aparicio, of the Inter-American Juridical Committee (IAJC), and invited him to address the Commission.

2. Mr. APARICIO (Inter-American Juridical Committee) thanked the Commission for giving him the opportunity to exchange ideas about the topics on the agenda of the IAJC, of which he was Chairperson. The IAJC, in its different forms, was the oldest inter-American organization and had been active for some 100 years. It predated the OAS and had long served as the impetus behind the development of law in the region. For example, it had been responsible for the establishment of such pillars of inter-American law as the Bustamante Code annexed to the Convention on Private International Law and the principles concerning the right to asylum, of which great use had been and was still being made in the Latin American region.

3. The IAJC held two regular sessions every year. It generally met in August at its seat in Rio de Janeiro and in March at a venue in a member State other than Brazil. In 2009, the seventy-fourth regular session had been held in Bogota and in the following year the IAJC would possibly meet in Haiti, a country where it was engaged in a juridical–institutional cooperation project.

4. One of the most important of the global topics on the agenda of the IAJC was international humanitarian law. In that context, it worked closely with the ICRC, and it offered advice to all OAS member States on how to implement international humanitarian law and on how to make the provisions of domestic law on armed conflicts, firearms and the characterization of war crimes compatible with the 1949 Geneva Conventions and the Rome Statute of the International Criminal Court. It was also conducting a survey of member States' views on what the priority issues were in the field of international humanitarian law.

5. Another global issue which was the focus of the attention of the IAJC was the promotion of the ICC. A former member of the International Law Commission, Mr. Herdocia Sacasa, had been entrusted with the work on that topic. The IAJC had recently sent Governments a letter detailing its activities in that respect and was offering its assistance in the training of officials in the executive and legislative branches with a view to facilitating the implementation of the Rome Statute of the International Criminal Court in member States. It was also collaborating with organizations such as the Due Process of Law Foundation and was planning to launch a capacity-building exercise for officials who were responsible for drafting legislation.

6. On regional topics, the IAJC was actively participating in the ongoing task of elaborating a draft inter-American convention against racism and all forms of discrimination and intolerance²⁵⁸ as a member of the working group set up to prepare a text based on the first original draft presented by Brazil. Basically, the IAJC believed that the inter-American instrument should not merely reiterate the provisions of other conventions, but should place emphasis on new issues in human rights protection and in combating discrimination, racism and intolerance.

7. The IAJC was likewise collaborating with Haiti, which Mr. Aparicio had visited the previous month in order to meet with the Minister of Justice, a former

member of the Inter-American Commission on Human Rights, prior to the launching of a cooperation project centred on prisons, preventive detention and access to justice in that country.

8. The protection of migrants was another area of interest to the IAJC. The “Primer or manual on the rights of migrant workers and their families”²⁵⁹ adopted by the Committee had been distributed to all the consulates of States where there was a substantial community of migrants from the Latin American and Caribbean region. The IAJC and the Inter-American Commission on Human Rights were pursuing their joint examination of ways of protecting migrants' rights. In addition, the Committee had adopted a resolution²⁶⁰ manifesting its concerns about the directive of the European Parliament and of the Council on common standards and procedures in member States for returning illegally staying third-country nationals,²⁶¹ since it considered that the directive violated various human rights and principles enshrined in international instruments. It noted that in Italy, for example, the directive had been used to criminalize undocumented migrants, a move which the IAJC specifically condemned.

9. The topic on which the IAJC had done the most work and encountered the greatest difficulties was that of democracy and the rule of law. It was a hotly debated subject in the region, and its consideration by the IAJC entailed certain risks, because it had not only legal but also political implications. The IAJC had been able to deal with the subject of democracy and the Inter-American Democratic Charter (Lima, 11 September 2001)²⁶² because, like the Inter-American Commission on Human Rights, it was an independent body. That meant that it could take up a subject even if some member States did not wish it to do so. Indeed, it was that right of initiative which made the IAJC so important.

10. In that context, the prime concern of the IAJC was that the Charter was not binding on member States, although it had helped to forge a link between democracy and the rule of law, a matter of great importance in the Latin American and Caribbean region. Further efforts would be necessary to strengthen that link.

11. The main problem encountered with the Charter, and one which hampered the defence and promotion of democracy in the Americas, was that the political organs of OAS had limited the scope of the Charter by defining democracy solely in terms of the legitimacy of the origin of a Government and whether the electorate could exercise its right to vote. As Juan Méndez, a former member of the Inter-American Commission on Human Rights, had pointed out, that restrictive approach entailed two

²⁵⁹ Annual Report of the Inter-American Juridical Committee to the General Assembly 2008 (OEA/Ser.Q/VIII.39-CJI/doc.316/08), p. 165, document CJI/doc.292/08; see also resolution CJI/RES. 139 (LXXII-O/08), p. 137.

²⁶⁰ *Ibid.*, resolution CJI/RES. 150 (LXXIII-O/08) “Opinion of the Inter-American Juridical Committee on the Directive on Return adopted by the Parliament of the European Union”, p. 187.

²⁶¹ Directive 2008/115/EC of 16 December 2008, *Official Journal of the European Union*, No. L 348, 24 December 2008, p. 98.

²⁶² OEA, *Official Documents*, OEA/Ser.G/CP-1. See also ILM, vol. 40, No. 5 (September 2001), p. 1289.

²⁵⁸ See <http://www.oas.org/consejo/CAJP/RACISM.asp> (accessed 11 May 2015).

dangers. The first was that it conferred international legitimacy on authoritarian Governments which complied with *pro forma* democratic requirements as far as elections were concerned. The second was that it prevented the Charter from being interpreted as the fundamental means of safeguarding the rule of law and other essential elements of democracy, such as a balance between branches of government, an independent judiciary, respect for legal procedures in adopting laws, guarantees of freedom of speech and respect for a free press. Since those were matters of inherent importance to democracy, the IAJC wished to examine them in greater depth in order to avoid the types of problems that had emerged in Honduras, where a conflict had arisen between branches of government. Since the Charter was currently interpreted as something to be applied solely by the executive, other branches of government were unable to invoke it and thereby restore a balance between the executive, legislative and judicial branches.

12. Another subject of fundamental importance was the public's access to information. He had been appointed rapporteur for the topic. The IAJC had approved and forwarded to Governments a set of 10 principles on the right of access to information which should be embodied in domestic law in Latin America, the Caribbean and North America. However, in that regard, the greatest contribution of the IAJC had been the introduction of the notion that access to information was a fundamental human right, a view that had been upheld by the Inter-American Court of Human Rights in its ruling in *Claude Reyes et al. v. Chile*. Hence, if that right were violated, it would be possible to seek redress through the mechanisms for defending human rights, namely, the Inter-American Commission on Human Rights and the Court itself.

13. The remaining principles sought to remove obstacles impeding citizens' access to information, such as costs, lack of means, failure to use technology to supply information or arguments related to national security. In the opinion of the IAJC, the overarching principle should be that access should be granted to information, very few exceptions should be allowed and specific reasons must be given for refusing to supply information. Fortunately, headway was being made in the region. Mexico had adopted one of the most progressive laws on the subject. The United States and Canada had such legislation; Peru was in the process of drafting legislation; Chile had accepted the ruling of the Inter-American Court of Human Rights in *Claude Reyes et al. v. Chile* and, as a result, had passed a law on access to information. It was therefore to be hoped that a start could soon be made on the drafting of an inter-American convention on access to information.

14. In conclusion, he said that the IAJC was facing many challenges in the development of inter-American law and the incorporation in it of new facets of protection of citizens' rights in the Americas. The Committee would be working more closely with the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights to achieve that goal. Those three bodies would be holding their first joint meeting in Rio de Janeiro in August 2009, on the occasion of the fiftieth anniversary of the American Convention on Human Rights: "Pact of San José, Costa Rica", in order to coordinate their

activities in an effort to make progress on a number of the above-mentioned topics. The IAJC hoped to provide support to the Inter-American Commission on Human Rights in warding off any attempt to violate individual freedoms and the rule of law in the Americas.

15. Mr. OJO said that the United States and a number of other countries were reportedly about to withdraw their aid to Honduras owing to the political imbroglio there. Such a step would cause immense suffering among the citizens of that country. He therefore wished to know what action the IAJC intended to take to hold the leaders of the military coup accountable for any disasters caused by their intransigence.

16. Mr. APARICIO (Inter-American Juridical Committee) explained that the IAJC had an advisory role and could provide advice if it was requested to do so by the Governments of the region. For example, OAS had asked it to examine whether the Helms-Burton Act²⁶³ passed by the United States violated principles of international law. In the case of Honduras, its advice had not been sought, and consideration of the problems of that country fell under the jurisdiction of the Permanent Council, the political organ of the OAS. The Council had issued a clear, unanimous condemnation of the *de facto* Government in Honduras and had expressed its support for President Zelaya. President Arias of Costa Rica, who was moderating the endeavours of the OAS to mediate in the political conflict, was in permanent contact with the Chair of the Permanent Council and with the Secretary General of OAS. It was to be hoped that the democratic order would soon be restored peacefully in Honduras.

17. Mr. VARGAS CARREÑO said that he was fully in agreement with Mr. Aparicio's analysis of the situation with regard to the Inter-American Democratic Charter. Democracy was not just a matter of free elections, but included many other elements. For democracy to prevail, especially in crises like that which had arisen in Honduras, it was essential to fully implement the Charter.

18. His specific question was related to the draft inter-American convention against racism and all forms of discrimination and intolerance which, according to Mr. Aparicio, would not reiterate the contents of universal conventions. He personally disagreed with that approach, because no harm had been done by the fact that some OAS conventions, for example, those on torture and forced disappearances, contained provisions similar or complementary to conventions on the same subjects that had been adopted by the United Nations. What was important was that there should be no backsliding. Just before the Inter-American Convention to Prevent and Punish Torture had been signed, one well-meaning delegation had stated that the convention could under no circumstances be deemed to affect the right of asylum. That had been a huge mistake, because it meant that torturers could seek asylum on the pretext that they were in danger of persecution. For that reason, it was vital to take account

²⁶³ Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114 (1996), available from www.treasury.gov/resource-center/sanctions/Documents/libertad.pdf (accessed 15 February 2016).

of universal conventions. He was not afraid of repeating the contents of human rights instruments. On the contrary, that would be a wise course of action, because an omission could be interpreted in an unfortunate manner. He therefore wished to know why universally accepted norms could not be included in the draft convention.

19. Mr. APARICIO (Inter-American Juridical Committee) replied that, in fact, what he had meant was that there would be no point in reinventing anything and that use would be made of the contents of all existing instruments but that, at the same time, attention would be paid to aspects requiring greater emphasis because they had not been covered in other conventions. In that context, he was thinking of the rights of Afro-descendants, gender issues and new situations that had arisen in the Americas. The new convention should complement existing instruments, represent progress on certain issues and not undermine the fight against discrimination and racism.

20. The CHAIRPERSON, speaking as a member of the Commission, said that from his experiences in Colombia in 1972, it seemed that the process of integrating indigenous peoples into the larger society was producing a form of discrimination, because those peoples were losing their cultural identity. Such a loss was a tragedy, since it made society less pluralistic. He therefore wondered if the IAJC and the forthcoming convention paid attention to that specific kind of discrimination in Latin America.

21. Mr. APARICIO (Inter-American Juridical Committee) responded that the issue was being addressed in the context of the draft American declaration on the rights of indigenous peoples,²⁶⁴ but little progress had been made on the subject in the past eight years, and results had fallen short of expectations because of the complexity of the subject matter. It was likely that there would be consensus on maintaining only what had already been accepted in the United Nations Declaration on the Rights of Indigenous Peoples.²⁶⁵ Discussions on the draft inter-American convention against racism and all forms of discrimination and intolerance were still at a preliminary stage. The topic of racism, for example, was a subject of much debate and there were solid arguments both for and against employing the term, which could prove to be a double-edged sword. He therefore thought that the debate concerning indigenous peoples would continue within the framework on the draft American declaration and that the working group on the draft convention in the coming months would be examining which aspects of discrimination should be addressed by the Convention.

22. Mr. VASCIANNIE noted that the IAJC had expressed a willingness to help with training to facilitate the implementation of the Rome Statute of the International Criminal Court. He wondered if the IAJC had encountered difficulties with the bilateral agreements that the United States had been encouraging other OAS members to enter into with respect to article 98 of the Statute. In its work on the elaboration of a draft inter-American convention against racism and all forms of discrimination and

intolerance, the Committee was considering the inclusion of gender issues and issues related to Afro-descendants, and he wondered if any thought was being given to provisions on affirmative action to rectify past discrimination. Lastly, he recalled that there was a long-standing issue on how to integrate Caribbean States into the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Since the Committee was planning to work closely with those bodies, he would like to know the Committee's current thinking on how to integrate the Caribbean States into its own structure.

23. Mr. APARICIO (Inter-American Juridical Committee), replying to the first question, said that with the election of the Obama administration in the United States of America, the conflict with other countries over the waiver of immunity under article 98 of the Rome Statute of the International Criminal Court had subsided; the United States now had a much more favourable attitude towards the ICC. The IAJC was working to overcome the lack of information in Latin America and the Caribbean about the Statute and the work of the ICC. It was also training officials in preparation for the task of incorporating the Statute into domestic legislation and applying it. Because of its budgetary constraints, the Committee was negotiating with donor organizations for help in carrying out those tasks. With regard to the second question, the work on the draft inter-American convention against racism was still at a very early stage and there had not yet been any in-depth discussion of the specific issues of Afro-descendants, gender and affirmative action.

24. On the third question, he said that cooperation between the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights was essential to the protection of human rights in the region. The greatest successes had been achieved through the Court's adjudication of contentious cases following referral by the Commission. The IAJC aimed to support that cooperation. In the past, the use of the death penalty in Caribbean countries had obstructed their integration into the inter-American system. A *rapprochement* was now taking place, however, and their stronger representation on the Commission, the IAJC and the Court was being sought to ensure that attention was given to issues of concern to Caribbean countries. Haiti, which desperately needed help with its daunting problems of prison and pretrial detention conditions and access to justice, exemplified the need for greater sensitivity to the problems of Caribbean countries.

25. Mr. NIEHAUS said that he welcomed the valuable efforts of the IAJC to promote access to information as a fundamental human right. Unfortunately, in many countries of Latin America, the principle of access to information was now under severe threat. Perhaps the IAJC might undertake initiatives to induce States not only to promote access to information but also to work against the retrograde trends in that regard that were now being witnessed.

26. Mr. APARICIO (Inter-American Juridical Committee) said that there were indeed contradictory trends in the region. Mexico, for example, had adopted legislation on access to information that was among the most advanced in the world, breaking with its long tradition of centralized

²⁶⁴ AG/RES.1022 (XIX-O/89) (www.cidh.oas.org/ProjetDeclaration.htm, accessed 15 February 2016).

²⁶⁵ General Assembly 61/295 of 13 September 2007, annex.

control of power, and Chile and Costa Rica had also made major steps forward, but there were instances of serious backsliding on freedom of expression and information. The IAJC was working to ensure that legislation was not only adopted but actually applied. Nicaragua, for example, had a law on access to information, but there had been setbacks in its application. Freedom of information was contrary to the whole tradition of *caudillismo*, or autocratic government, in Latin America. His organization was working with OAS on a model law on access to information and trying to induce States to take the subject seriously. It was also working with civil society to promote freedom of information.

27. Mr. SABOIA said he agreed with earlier comments that while much progress had been made in combating racism, there was a need to avoid backsliding. At a very productive regional meeting held in December 2000, in Santiago, preparatory to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, a draft declaration offering a broad and balanced approach to the issues of racism, racial intolerance, gender, Afro-descendants and indigenous populations had been adopted.²⁶⁶ It might be of use to the IAJC in its efforts.

28. He noted that the IAJC had adopted a “Primer or manual on the rights of migrant workers and their families” and a resolution opposing the European Parliament’s directive on return of illegal immigrants. One of the topics on the Commission’s agenda was expulsion of aliens. It would be useful for the Special Rapporteur on that topic to learn more about the approach taken by the IAJC in its work on migrants’ rights and to have more detailed information on the Primer and on the resolution.

29. Mr. APARICIO (Inter-American Juridical Committee) said such an exchange would indeed be useful and he would certainly support it. The IAJC had concluded that the European directive did not sufficiently protect the due process rights of migrants subject to expulsion, and that was a subject on which the Commission and the IAJC might well work together.

30. Mr. NOLTE, reverting to the situation in Honduras, said that it raised two issues from a legal point of view. The first was whether a democratically-elected president could call a referendum to change the constitutional set-up, and the second was whether such a president could be ousted. The focus of the international community had been on the second aspect, while the attention of legal committees should be trained on the first and particularly on preventing the problem from arising in other countries. The European Commission for Democracy through Law, or Venice Commission, an advisory body on constitutional matters of the Council of Europe, which encompassed not just European countries but also Brazil, Chile and Peru, with observers from Argentina and Mexico, had dealt with a case that in some respects was reminiscent of the situation in Honduras. It had concerned an initiative by the Principality of Liechtenstein to submit the question of expanding the House’s powers to a referendum, raising

the issue of whether it was compatible with the principle of democracy to hold a referendum on the expansion of the powers of a monarch. True, a monarch was not democratically elected, so that the parallel with Honduras was not perfect, but from a substantive point of view, the question was the same: to what extent might a constituted power, such as a president, appeal to a constituent power to circumvent constitutional rules. He would like to know how the IAJC viewed that issue, in particular with a view to preventing the possible regression of Latin American countries from established democracies to what might be called “Bonapartist” tendencies.

31. Mr. APARICIO (Inter-American Juridical Committee) said that he was personally convinced of the urgency of addressing that problem. At the most recent session of the OAS General Assembly, held in Honduras, he had made a statement on precisely that subject. It had not been very well received, and was perhaps in the nature of a premonition, since within three weeks of his statement, the fears he had expressed about the trend in the region towards legitimizing unconstitutional acts through popular referendums had been borne out by the events in Honduras. Constitutional crises of that sort were not confined to Honduras: in his own country, a constitution had been adopted without following constitutional procedures and had been legitimized through popular referendum. A series of flawed democracies was emerging, democracies based on popular elections carried out with no respect for proper legal procedures. It had even been argued that such procedures had been imposed by “Western” countries and were aimed at dominating and controlling certain segments of society. It was a dangerous situation. Certainly the Inter-American Democratic Charter established the duty to support democratically-elected presidents. But it was crucially important to strengthen the other elements of democracy and the rule of law—freedom of expression, the balance of power between branches of government and the independence of the judiciary—and above all to prevent the legal system from being used for political purposes.

32. Ms. JACOBSSON welcomed the prospect of better cooperation between the Commission and the IAJC in their respective work on protection of migrants and asked for more information on the approach of the IAJC, for example, whether it worked in liaison with European and other institutions, such as CAHDI of the Council of Europe. She was very glad to hear about the work being done on international humanitarian law, the rule of law and access to information and would like more information on those efforts.

33. Mr. APARICIO said that, in respect of protection of migrants, the main concern of the IAJC was to disseminate information on migrants’ rights, including through the Primer that was already being distributed, and to avert the criminalization of undocumented workers. With regard to cooperation with European institutions, meetings had been held with representatives of the European Union to convey OAS concerns about the directive on return of illegal immigrants. Work on humanitarian law had been undertaken in concert with the ICRC and aimed ultimately at the adoption of an inter-American declaration on humanitarian law. Efforts focused on training,

²⁶⁶ Report of the Regional Conference of the Americas, Santiago, Chile, 5–7 December 2000 (A/CONF.189/PC.2/7), chap. I.

harmonization of domestic laws with the 1949 Geneva Conventions and the Rome Statute of the International Criminal Court, and internal armed conflicts. The work of the IAJC on access to information was related to “quality control” of democracies and combating corruption.

34. Mr. CANDIOTI agreed that quality control of democracies in Latin America was indeed of the greatest importance; developments in that area had to be closely followed and guidance provided on the basis of such important instruments as the Inter-American Democratic Charter. The Commission welcomed its yearly dialogue with a representative of the IAJC. It would be useful to know whether the IAJC had sufficient access to the Commission’s documentation, whether it used it in its own work and whether it might be prepared to comment occasionally on the Commission’s efforts, as did the Asian–African Legal Consultative Organization (AALCO). IAJC input on expulsion of aliens, for example, would offer a valuable and different perspective on that complex issue. The rational management and protection of transboundary aquifers was another subject on which it would be useful to have IAJC input, especially since many of those aquifers were situated in Latin America. He would also like to know what other topics the IAJC was addressing in the environmental field. Lastly, he wondered if the IAJC could suggest any topics that the Commission might take up in the future.

35. Mr. APARICIO (Inter-American Juridical Committee) said that the IAJC remained abreast of the activities of the Commission—but only to a limited extent—and should have a much broader relationship with the Commission. The IAJC struggled under a very heavy agenda, given that it met for only four weeks each year. Nevertheless, the IAJC had received the visit of Mr. Vasciannie, which had been very positive, and the former Chairperson of the IAJC, Mr. Hubert, in turn, had visited the Commission the previous year. He agreed that the IAJC should receive more visits from representatives of the Commission and that consideration should be given to organizing a joint meeting between the two bodies, including all or some of their members, in order to foster an exchange of information, which, in his view, was very important. On his return, he would propose to the IAJC that at each of its sessions time should be allotted for an analysis of the Commission’s activities, with a view to contributing to the Commission’s work and, especially, with a view to receiving the Commission’s input on issues the IAJC wished to address, such as migration, access to information, environmental law and consumer protection. He would also propose that, at each session, the IAJC should consider which of its reports were worth sending to the Commission, as well as take stock of any requests it wished to transmit to the Commission. The Commission might perhaps consider adopting a similar approach.

36. Mr. VALENCIA-OSPINA said that during Mr. Aparicio’s informative briefing, he had been reminded of the concerns expressed in the Commission and the Sixth Committee about the future role of the Commission as a body dedicated to the codification and progressive development of international law. Although the main function of the IAJC was also the

codification and progressive development of international law, albeit at the inter-American level, the IAJC was apparently developing a series of other activities, such as training and the dissemination of information, which could almost be considered technical cooperation in respect of certain countries. Although he was not suggesting that the International Law Commission should follow the same path, he nevertheless wondered to what extent such an expansion in the role of the IAJC was compatible with its primary function of codification and progressive development of international law. Since the meetings of the IAJC were limited to four weeks a year, he also wondered whether that meant that it had a permanently staffed office to enable it to carry out its additional activities outside of that four-week period.

37. Mr. APARICIO (Inter-American Juridical Committee) said that the work of the IAJC did in fact suffer from time constraints. For the time being, OAS was experiencing major financial difficulties, which was why the IAJC sessions had been reduced to a little less than four weeks a year and which had prevented the Committee from carrying out a series of other activities. As the IAJC was subject to the decisions of the OAS Permanent Council and General Assembly, there did not appear to be any real possibility in the short term of expanding the codification activities of the IAJC. One of the major areas where codification was needed was private international law; however, OAS member States had not yet agreed on when to hold the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), which was to codify new standards, taking into account new issues, such as regional trade law, the protection of personal data and consumer protection. While progress in that area had come to a standstill, he hoped that the situation would gradually begin to improve.

38. The CHAIRPERSON thanked the representative of the Inter-American Juridical Committee for his valuable contribution to the work of the Commission.

Reservations to treaties (concluded) (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Corr.1 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL
RAPPOREUR (*concluded*)

39. Mr. PELLET (Special Rapporteur) introduced new proposals for draft guidelines 3.4 to 3.6, revised in the light of the plenary debate, which read as follows:

“3.4 *Substantive validity of reactions to reservations*

“3.4.1 *Substantive validity of the acceptance of a reservation*

“The explicit acceptance of a non-valid reservation is not valid either.”

“3.4.2 Substantive validity of an objection to a reservation

“An objection to a reservation by which the objecting State or international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty not affected by the reservation is not valid unless:

“(a) the additional provisions thus excluded have a sufficient link with the provisions in respect of which the reservation was formulated [affected by the reservation];

“(b) the objection does not result in depriving the treaty of its object and purpose in the relations between the author of the reservation and the author of the objection.”

“3.5 Substantive validity of interpretative declarations

“A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is expressly or implicitly prohibited by the treaty or is incompatible with a peremptory norm of general international law.”

“3.5.1 Conditions of validity applicable to interpretative declarations recharacterized as reservations

“The validity of a unilateral statement which purports to be an interpretative declaration but which constitutes a reservation must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.15.”

“3.6 Substantive validity of an approval, opposition or recharacterization

“1. A State or an international organization may not approve an interpretative declaration which is expressly or implicitly prohibited by the treaty.

“2. The opposition to, or the recharacterization of, an interpretative declaration shall not be subject to any condition for substantive validity.”

40. After further consultation with several members who had taken a position on the matter, he had decided not to propose an amendment to draft guidelines 3.5.2 and 3.5.3 on conditional interpretative declarations. The Drafting Committee would, of course, review the wording of those drafts, but in principle, the Commission could continue to consider that conditional interpretative declarations, even on the somewhat tangential problem of validity, would be subject to the same treatment as reservations.

41. In the light of those comments, he requested the Commission, in accordance with its usual practice, to refer draft guidelines 3.4, 3.4.1, 3.4.2, 3.5, 3.5.1, 3.5.2, 3.5.3 and 3.6 to the Drafting Committee, on the understanding that it was, of course, the latter’s responsibility to improve the wording that he had proposed. However, he believed that the current wording did adequately incorporate, in substance at any rate, the conclusions to be drawn from the debate.

42. Mr. NOLTE said that he commended the Special Rapporteur for having summed up the debate on the topic in an objective and constructive manner. While he

certainly did not wish to impede the progress of work on the topic, he nevertheless wondered whether the issue of the validity of objections, on which the Special Rapporteur had commented extensively in his summing up, with reference to its as-yet undefined relationship to peremptory norms of international law, should be debated in the plenary Commission or in the Drafting Committee.

43. Mr. PELLET (Special Rapporteur) said that, since that issue concerned a matter of principle, in his view, it should be discussed in the plenary, not in the Drafting Committee.

44. Mr. MELESCANU asked whether, in the opinion of the Special Rapporteur and that of Mr. Nolte, the phrase “or is incompatible with a peremptory norm of general international law” in draft guideline 3.5, effectively addressed the points that had been raised by Ms. Escarameia, Mr. Nolte and many other members.

45. Mr. NOLTE said that draft guideline 3.5 did not address the points he had raised, since it concerned the substantive validity of interpretative declarations. His point related to draft guideline 3.4.2 concerning the substantive validity of an objection to a reservation, which was quite different.

46. In that connection, he would launch the discussion by reiterating his position, which was that he did not fully understand why the Special Rapporteur accepted the invalidity of reservations that excluded or modified the legal effect of a treaty in a manner contrary to a peremptory norm of international law, as well as the invalidity of interpretative declarations that were incompatible with a peremptory norm of international law, but did not accept the invalidity of objections to a reservation that purported to exclude the application of a provision not addressed by the reservation and as a result rendered the treaty incompatible with a peremptory norm of international law. In the practical example he had provided in the earlier debate, he had tried to demonstrate that whenever an objection excluded the application of an exception to a general rule, it enlarged the general rule and thereby opened up the possibility for the treaty to give rise to a violation of a peremptory norm of international law.

47. In order to remedy that problem, he proposed that draft guideline 3.4.2 should be amended to include a subparagraph (c), which would read: “the objection does not result in rendering the treaty incompatible with a peremptory norm of international law.” That subparagraph would be cumulative with subparagraphs (a) and (b) and was modelled on the wording used in draft guideline 3.5 to refer to the incompatibility of an interpretative declaration with a peremptory norm of international law. In his view, it was in the interest of the Commission to take a decision on the matter, irrespective of the outcome, given its relative importance to the Commission’s debates.

48. Mr. HMOUD said that, if the Commission did not wish to address the situation whereby an objection excluded the application of a provision of a treaty that led to the violation of a peremptory norm of international law under the heading of the substantive validity of reactions to reservations, it should do so under the heading

of their legal effects. Having said that, he could support Mr. Nolte's proposed addition to draft guideline 3.4.2, but pointed out that it did not constitute a third choice but an alternative criterion to subparagraph (b), which could be divided into two parts, (i) or (ii), either alternative to be considered cumulative with subparagraph (a).

49. The CHAIRPERSON said that the Commission should refrain from making too many detailed drafting suggestions at the current stage. Instead, it should establish the general orientation to be followed by the Drafting Committee.

50. Ms. ESCARAMEIA said that she endorsed Mr. Nolte's proposal and agreed that it should be added to subparagraph (b). While her own position had been much more ambitious, she would be content with the inclusion of Mr. Nolte's formulation in draft guideline 3.4.2. The matter of validity was distinct from that of effects; that was how the Commission had constructed the Guide to Practice. In her view, an objection was permissible or impermissible independently of its effect on the treaty. That view, however, was apparently not shared by the majority of members, and she could accept that they had a differing perspective. But at least the Commission should not consider an objection permissible that rendered a treaty incompatible with *jus cogens*, and for that reason she supported Mr. Nolte's proposal.

51. Mr. GAJA said that he wished to make two points. First, it troubled him that draft guideline 3.4.2, although ostensibly concerning only validity, seemed also implicitly to deal with effects and assumed that effects were produced. It appeared to suggest that it was sufficient to make an objection in order for the objecting State to reach its intended purpose. That was a question regarding which the Commission had said it would defer consideration, and personally he would favour that course of action.

52. Second, he had been surprised at the proposed new text in draft guideline 3.6, since what first sprang to mind when thinking of an opposition to an allegedly invalid interpretative declaration was simply a statement pointing out that this particular interpretative declaration was prohibited. It was difficult to understand why that kind of opposition should be considered invalid. There was also another kind of opposition to an invalid interpretative declaration: one in which the author considered the interpretation provided in the declaration to be incorrect and proposed another interpretation. If the original interpretative declaration was prohibited, an opposition proffering another interpretation should be considered invalid as well.

53. Since he would not be able to participate in the Drafting Committee during its next few meetings, he proposed to add the following wording to draft guideline 3.6: "When a treaty prohibits the formulation of an interpretative declaration, the prohibition also applies to the formulation of an interpretation in reaction to an interpretative declaration."

54. Mr. PELLET (Special Rapporteur) suggested that, without taking a position as to their merits, Mr. Gaja's misgivings and proposed reformulation of draft

guideline 3.6 could be referred to the Drafting Committee for its consideration.

55. As far as Mr. Nolte's comments were concerned, he thought that the Commission should settle the issue of whether to incorporate the amendment to draft guideline 3.4.2 proposed by Mr. Nolte by means of a vote, whether formal or informal. Since he had explained his position on the substantive point at length during the previous meeting, he would not do so again. He would merely reiterate that he was strongly opposed to the proposal, quite simply because it was not possible for an objection to render a treaty incompatible with a peremptory norm of general international law. The most an objection could do was to deregulate relations between the reserving State and the objecting State, automatically referring States to general international law, which, even in the case postulated, obliged States to respect the peremptory norms of general international law. Mr. Nolte's proposal would therefore have the Commission adopt a provision that was, in his opinion, objectively false. He had to say that it would trouble him greatly if the Commission were to adopt that proposal, which he considered to represent a serious question of principle. It was not even an ideological or doctrinal issue for him, as he was one of the few Frenchmen who had always been quite militantly in favour of *jus cogens*. It was simply that it was impossible and technically incorrect. He would not say anything more on the matter other than to reiterate that once everyone had had a chance to express their opinion, the Commission should proceed to a vote. It was definitely a decision to be taken by the plenary Commission, not by the Drafting Committee.

56. Sir Michael WOOD said that the Commission should not force on the Special Rapporteur a formulation that he regarded as false. Moreover, Mr. Nolte's proposal was, as he himself had admitted, very closely related to the question of effects. Draft guideline 3.4.2 already tended in that direction, but Mr. Nolte's proposal made it more explicit. Sir Michael would prefer to defer discussion of the point to the next session, when the Commission debated the issue of effects. It would then be possible to see whether there was any need for an additional provision about *jus cogens* in draft guideline 3.4.2. He doubted, however, that there would be such a need.

57. Ms. ESCARAMEIA wondered whether it was necessary to vote on Mr. Nolte's specific proposal, which was a matter more for the Drafting Committee than the plenary. The Commission should vote rather on whether the Drafting Committee should be dealing with the issue of peremptory norms of international law and the permissibility of objections. If the Commission voted in favour of such a proposition, the Drafting Committee could come up with a formulation—or fail to do so—but the issue would at least be discussed. In her view, it was not simply a matter of effects and should therefore not be left to the next session. She considered that the question of permissibility was separate from that of effects, so she would be glad if the problem of *jus cogens* could be considered in the context of permissibility. In the informal setting of the Drafting Committee, there could be a free exchange of views. She appealed to the Special Rapporteur to allow the issue to go to the Drafting Committee.

58. Mr. MELESCANU said that he strongly supported the views of the Special Rapporteur and Sir Michael. He could not accept the idea that, by objecting to a reservation, a State could make a treaty incompatible with the peremptory norms of international law. If the matter went to the Drafting Committee, the end result would be not a provision confirming the importance of *jus cogens* but a clear suggestion that, by making an objection, a State could call into question the peremptory norms of international law. That would be unacceptable to many members of the Commission. Any discussion should be deferred until the Commission came to debate the effects of a reservation.

59. Mr. NOLTE said that he and the Special Rapporteur each thought the other guilty of a logical error. He persisted in believing that the draft guidelines would be inconsistent if no provision was made for the consequences of invalidity to objections in certain circumstances. If the Commission could determine where the logical error lay, a text could be referred to the Drafting Committee. Otherwise, the authority of the Special Rapporteur should prevail. If that was the collective wisdom of the Commission, he would gladly submit.

60. Mr. McRAE said that, referring the issue to the Drafting Committee, as suggested by Ms. Escameia, would not solve the problem, for the same debate would be carried on by the same people who had shown themselves to be divided on the issue. A decision should be taken by the full Commission. He agreed with Sir Michael that the matter was one of effects and should form part of the Commission's discussion on that topic at the next session. He understood the views both of the Special Rapporteur—who believed that Mr. Nolte's proposal constituted a logical impossibility—and of Mr. Nolte, who held that without such a provision the draft guidelines would appear inconsistent. Personally, he could not see how an objection could render a treaty incompatible with peremptory norms of international law. He therefore opposed the provision proposed by Mr. Nolte.

61. Mr. PELLET (Special Rapporteur) said that he had almost been persuaded by Ms. Escameia's argument. He continued, however, to be opposed to the proposed provision, since it was an issue of principle. The full Commission should therefore take the decision. He noted that both Mr. Hmoud and Sir Michael, whether or not they agreed on the substance of the matter, both considered that Mr. Nolte's proposal related to effects and he supported the suggestion that it should be discussed at the next session. The Commission should vote on the issue, either formally or informally.

62. Mr. HMOUD said that it was quite acceptable to him to defer discussion of Mr. Nolte's proposal to the Commission's debate on effects. He wished, however, to ask the Special Rapporteur why draft guideline 3.6, as revised, posed the question of validity only with respect to approval. In his own statement on the matter, he had given an example of why opposition also formed part of the equation: if an opposition to an interpretative declaration that was prohibited by the treaty also proffered an interpretation, it should be equally invalid. He would be prepared to accept Mr. Gaja's proposal, which would restore opposition as a factor in the question of validity.

63. Mr. PELLET (Special Rapporteur) said that he had already answered the question when responding to the statement by Mr. Gaja, who had argued along similar lines. The Drafting Committee could discuss the precise wording.

64. The CHAIRPERSON said that an indicative vote should be held, but he wondered what the precise wording should be.

65. Mr. PELLET (Special Rapporteur) said that, since it was only an indicative vote, the wording could be broad. The Commission could be asked whether it was in favour of adding to draft guideline 3.4.2 a third provision dealing with *jus cogens*.

66. The CHAIRPERSON invited the Commission to take an indicative vote.

An indicative vote was taken by a show of hands.

67. The CHAIRPERSON said that, according to the indicative vote, 13 members were against a new provision and 4 were in favour, with 6 abstentions. One vote was unaccounted for. He therefore took it that the Commission wished to refer draft guidelines 3.4, 3.4.1, 3.4.2, 3.5, 3.5.1, 3.5.2, 3.5.3 and 3.6, as revised by the Special Rapporteur, to the Drafting Committee.

It was so decided.

REPORT OF THE DRAFTING COMMITTEE (*concluded*)*

68. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) introduced the text and titles of draft guidelines 3.3 and 3.3.1 provisionally adopted by the Drafting Committee on 29 May and 4 June 2009, as contained in document A/CN.4/L.744/Add.1, which read:

“3.3 Consequences of the non-validity of a reservation

“A reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is not valid, without there being any need to distinguish between the consequences of these grounds for invalidity.”

“3.3.1 Non-validity of reservations and international responsibility

“The formulation of an invalid reservation produces its consequences pursuant to the law of treaties and does not, in itself, engage the international responsibility of the State or international organization which has formulated it.”

69. With those texts, he was presenting the fourth report of the Drafting Committee relating to the non-validity of reservations, which the Commission had referred to the Committee at the 2891st meeting on 11 July 2006.²⁶⁷

* Resumed from the 3014th meeting.

²⁶⁷ *Yearbook ... 2006*, vol. I, 2891st meeting, para. 44.

70. Draft guideline 3.3 was entitled “Consequences of the non-validity of a reservation”, as originally proposed. The draft guideline, which had been referred to the Drafting Committee in 2006 following an indicative vote, had given rise to extensive debate in the Committee. Some members had agreed with the Special Rapporteur’s view that there was no distinction to be made, with regard to the consequences of invalidity, between the different grounds for invalidity listed in draft guidelines 3.1. Other members had considered that the consequences of the invalidity of a reservation might be different, depending on the grounds for such invalidity. Furthermore, some members had been of the view that it was premature to adopt the draft guideline, since the Commission had not yet examined the consequences arising out of the invalidity of a reservation.

71. The Drafting Committee had finally agreed on a text that was largely based on that originally proposed by the Special Rapporteur. However, following a suggestion made in the plenary Commission, the words “explicit or implicit”, referring to the prohibition of a reservation, had been deleted, in order to bring the text into line with that of other draft guidelines provisionally adopted by the Commission. Moreover, an explicit reference to the consequences of invalidity had been included in the text. The provision thus stated the principle that a reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and purpose of the treaty was not valid, without there being any need to distinguish between the consequences of those grounds for invalidity. He noted, however, that, according to some members, the statement contained in the draft guideline should not be interpreted as prejudging any final determination as to whether the consequences of the various grounds for invalidity were necessarily identical. Some members had also been of the view that the draft guideline might need to be revisited in the light of the outcome of the Commission’s consideration of the question of the consequences of the invalidity of a reservation.

72. Draft guideline 3.3.1, which was entitled “Non-validity of reservations and international responsibility”, enunciated the principle that the formulation of an invalid reservation produced its consequences pursuant to the law of treaties and did not, in itself, engage the international responsibility of the State or international organization that had formulated the reservation.

73. The draft guideline as adopted by the Drafting Committee was largely based on the text proposed by the Special Rapporteur, which had not given rise to many comments during the plenary debate in 2006. Some minor changes had been introduced by the Committee to the text proposed by the Special Rapporteur, namely the replacement of the word “effects” by the word “consequences”; the replacement of the expression “within the framework of” by the expression “pursuant to”; the replacement in the English text of the words “shall not” by the words “does not”; and the addition of the word “international” before the word “responsibility” in both the text and the title of the draft guideline.

74. The view had been expressed in the Committee that the formulation of a reservation incompatible with

ius cogens would engage the international responsibility of the author of the reservation. The majority of members, however, had been of the opinion that the general statement contained in the draft guideline remained accurate, as far as the formulation of the reservation was concerned. The commentary would indicate that the purpose of the words “in itself” was to clarify that the draft guideline referred only to the formulation of an invalid reservation and was without prejudice to the consequences that might be attached, in terms of international responsibility, to any conduct that could be adopted by a State or an international organization in relation to, or as a consequence of, the formulation of an invalid reservation. He hoped that the Commission would be in a position to adopt the draft guidelines.

75. The CHAIRPERSON, after noting that the Special Rapporteur had offered to write the commentaries to the draft guidelines, said that he took it that the Commission wished to adopt draft guidelines 3.3 and 3.3.1.

It was so decided.

The meeting rose at 12.45 p.m.

3026th MEETING

Thursday, 23 July 2009, at 10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermudez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Cooperation with other bodies (*concluded*)

[Agenda item 14]

STATEMENT BY THE REPRESENTATIVE OF THE ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

1. The Chairperson invited Mr. Singh, President of the forty-seventh session of the Asian–African Legal Consultative Organization (AALCO), to address the Commission.

2. Mr. Singh (Asian-African Legal Consultative Organization) said that his organization attached the greatest importance to its traditional and long-standing relationship with the International Law Commission. One of the functions of AALCO under its statute was to study the subjects under consideration by the Commission and to forward to it the views of its member States. Over the years, that had forged a closer relationship between the

two organizations. It had also become customary for the Secretary-General of AALCO to present the views expressed by member States participating in the annual session of AALCO, but the new Secretary-General, Mr. Rahmat Mohamad, had been unable to attend, as he was occupied with the preparations for the forty-eighth session of AALCO.

3. AALCO, originally known as the Asian Legal Consultative Committee (ALCC), had been constituted on 15 November 1956 as an outcome of the historic Asian–African Conference, held in Bandung, Indonesia, in April 1955. Seven Asian States—Egypt, India, Indonesia, Iraq, Japan, Myanmar and Sri Lanka – had been the founding members. In 1958, the name had been changed to Asian–African Legal Consultative Committee in order to enable African countries to become members. There were currently 47 member countries from Asia and Africa.

4. The purposes and objectives of AALCO, as provided in its statute, were to serve as an advisory body to its member States in the field of international law and as a forum for Asian–African cooperation in legal matters of common concern; consider issues related to international law that might be referred to it by its member States; exchange views, experiences and information on matters of common concern having legal implications and make recommendations thereon; communicate to the United Nations, other institutions and international organizations the views of the organization on matters of international law referred to it; consider topics being studied by the International Law Commission, forwarding the views of AALCO to the Commission, considering the Commission’s reports and, wherever necessary, making recommendations thereon; and, lastly, undertake, with the consent of or at the request of its member States, such activities as might be deemed appropriate for the fulfilment of its functions and purposes.

5. There were thus three ways in which a topic might be placed on the AALCO work programme: at the request of a member State; on the initiative of the Secretary-General; or as follow-up to the work of the International Law Commission. The AALCO secretariat prepared studies on each topic for consideration at the annual session. The annual session was the plenary organ of the organization and was held in one of the member States, by rotation, insofar as possible, between Asia and Africa. Observer delegations representing governments and international organizations from all regions of the world also participated.

6. AALCO had already examined a wide range of issues of international law that were under consideration by the United Nations, specifically by the International Law Commission and the Sixth Committee of the General Assembly. The topics currently on its agenda included matters relating to the work of the International Law Commission, the law of the sea, extraterritorial application of national legislation, international terrorism, the ICC, cooperation against trafficking in women and children, environment and sustainable development, work of UNCITRAL and other international organizations in the field of international trade law, the status and treatment of refugees, protection of migrant workers, and human rights. In 1980, in recognition of the growing relevance of the work of AALCO

to the United Nations, the General Assembly had decided to accord the organization permanent observer status. An item entitled “Cooperation between the United Nations and the Asian–African Legal Consultative Organization” had since been placed biennially on the agenda of the General Assembly and considered in plenary.

7. In the year since its forty-seventh annual session, AALCO had engaged in various activities. On 18 March 2009, with the assistance of the Government of Japan, it had organized a seminar on “The International Criminal Court: emerging issues and future challenges”, which had examined various aspects of the Rome Statute of the International Criminal Court, the contemporary relevance of the Statute to AALCO member States, the progress made on defining the crime of “aggression” and matters relating to the forthcoming Review Conference of the Rome Statute. On 24 October 2008, a joint meeting of AALCO and the International Law Commission had been held in New York. Mr. Yamada had briefed the meeting on the Commission’s work on shared natural resources and Mr. Perera had given a detailed description of the key issues on the Commission’s agenda of special interest to AALCO member States, such as effects of armed conflicts on treaties, responsibility of international organizations, protection of persons in the event of disasters and immunity of State officials from foreign criminal jurisdiction. The meeting of legal advisers of AALCO member States, also held on 24 October 2008 in New York, had provided an opportunity for an exchange of views on issues under consideration by the Sixth Committee. The President of the International Court of Justice, the Legal Counsel of the United Nations and the Vice-Chairperson of the Sixth Committee had addressed the meeting. In addition to AALCO member States, several non-member States had participated in the meeting.

8. The Commission might recall that the General Assembly, in its resolution 62/66 of 6 December 2007, had invited Member States, in association with regional organizations, professional associations, academic institutions and members of the International Law Commission, to convene national or regional meetings to be devoted to the work of the Commission on the occasion of its sixtieth anniversary. Accordingly, on 2 December 2008, AALCO had organized a seminar to celebrate the Commission’s sixtieth anniversary, focusing on the role of the Commission in the twenty-first century, interlinkages between the work of the Commission and AALCO and the question of how to ensure adequate reflection of Asian–African concerns in the Commission’s work. In addition to Mr. Perera and himself, Mr. Momtaz, a former Chairperson of the Commission, had participated in the seminar, which had highlighted the importance of member States participating in the Commission’s work and contributing to it by responding in a timely manner to questionnaires sent to them. At the meeting, a message had been addressed to the Commission by AALCO on behalf of its member States, commending it for its contributions to the codification and progressive development of international law. He had presented a copy of that message to the Chairperson of the Commission. Lastly, AALCO looked forward to continuing to work in close cooperation with the Commission, and he invited members of the Commission to participate in the forty-eighth annual session, which would be held in

Putrajaya, the administrative capital of Malaysia, from 17 to 20 August 2009.

9. The CHAIRPERSON thanked Mr. Singh for his account of the activities of AALCO and invited any member of the Commission who so wished to ask questions. The message from AALCO to the Commission would be distributed to members.

10. Mr. DUGARD said that he had heard that the African Union Commission on International Law had been established and asked whether AALCO had already had any contact with that body.

11. Mr. HASSOUNA asked what the priorities of the newly elected Secretary-General of AALCO were and whether he envisaged a more active role for the organization that he headed.

12. Ms. ESCARAMEIA enquired whether there were summary records of the work of AALCO and, if so, whether they could be made available to the Commission.

13. With regard to the seminar organized in Japan on the ICC, she said she would like to know what the conclusions of the seminar had been, particularly in view of the fact that hardly any Asian States were party to the Rome Statute of the International Criminal Court, and whether technical or legal assistance in relation to the Statute had been envisaged.

14. Mr. PERERA suggested that consideration be given to how relations between AALCO and both the Commission and the Sixth Committee could be improved still further. The timing of the annual session of AALCO in relation to the Commission's was very important in that respect. Recalling the significant role that working groups had played in the past in respect of the law of the sea, he enquired whether there was any intention of reconstituting such groups, which could work on important topics between the annual sessions.

15. Sir Michael WOOD asked what topics AALCO would like to see studied by the Commission and which aspects of the topics it now studied had aroused the most interest at the annual session of AALCO.

16. Mr. VASCIANNIE enquired, first, how AALCO was structured and whether that structure enhanced its contributions to the Commission's work and, secondly, what the reactions of its member States were when AALCO asked them to make a timely response to questionnaires sent out by the Commission.

17. Ms. XUE said it would be interesting to hear what links had been created between AALCO and the newly established African Union Commission on International Law. Noting that in recent years, a growing number of bodies had been set up to promote international law at both the national and international level, such as the European Society of International Law and the Asian Society of International Law, she said she wondered, in general, what role AALCO intended to play to encourage the development of international law in that new environment. She also wished to know what topics under

consideration by AALCO might be of interest to the international community as a whole. Lastly, she asked how the AALCO member States saw the current situation of international criminal law.

18. Mr. FOMBA asked about the level of participation in AALCO by French-speaking countries, including those in Africa, and what the outlook was for cooperation between AALCO and the African Union Commission on International Law and other organizations or bodies, including the International Law Commission.

19. Mr. HMOUD said that AALCO had recently been seen to organize conferences, meetings and seminars without really tackling substantive issues. In his view, an issues-oriented approach would be desirable. He asked whether AALCO had rectified that tendency and decided to concentrate more on truly legal topics.

20. Mr. WISNUMURTI commended AALCO for its contribution to the development of international law, particularly the law of the sea. He asked what AALCO was now doing to contribute in various forums to the development of international law, and what the outcomes had been.

21. Mr. SINGH (Asian–African Legal Consultative Organization) thanked members of the Commission for their questions. With regard to cooperation between the African Union Commission on International Law and AALCO, he said that as far as he knew there had been no contact between the two organizations. He would, however, raise the question with the Secretary-General of AALCO on his return, and he hoped that such contacts would be established between the two organizations during the forthcoming annual session of AALCO.

22. Summary records of the annual sessions of AALCO were published periodically, and he would ensure that they were made available to members of the Commission. As for the priorities of the new Secretary-General, his primary intention was to put the organization on a sounder financial footing by encouraging member States to pay their dues in a timely fashion. When AALCO had more resources, it would be able to expand its activities. The new AALCO headquarters in New Delhi had been provided by the Government of India. The secretariat had moved there in 2008 and it was to be hoped that the move would help to scale up the organization's activities and make them more useful to member States. A number of members of the Commission had referred to the contributions of AALCO to work on the law of the sea, the law of treaties and other branches of international law, but had expressed concern that the organization's current work programme no longer reflected the same degree of interest in the work of the United Nations and other international organizations. He was confident, however, that, when AALCO had finally settled into its new headquarters, it would be able to focus more on substantive work.

23. Concerning the organization's next annual session, he said that, in addition to the usual agenda items, it would focus on migration, trafficking in persons and smuggling of migrants. In the area of the law of the sea, it would consider maritime security and piracy.

24. As to the structure of AALCO, he said that the organization was made up of member States represented at intersessional meetings by governmental delegations which, at annual sessions, might be headed by ministers or attorneys general, thus ensuring a high level of representation. AALCO also maintained cooperative relations with various associations of international law, including the Indian Society of International Law and other bodies based in New Delhi such as the regional delegation of the ICRC, the Office of the United Nations High Commissioner for Refugees and other United Nations institutions. When the organization's financial situation improved, contacts would be developed with other international law associations, including CAHDI and the IAJC. With regard to the question by Mr. Fomba, he said that Cameroon had recently joined AALCO and other French-speaking countries would probably follow suit. Lastly, referring to the question about issues-oriented approaches to international law raised by Mr. Hmoud, he said that the idea would certainly be given consideration in years to come.

The meeting rose at 10.45 a.m.

3027th MEETING

Friday, 24 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Expulsion of aliens (*continued*)* (A/CN.4/604, A/CN.4/606 and Add.1, sect. E, A/CN.4/611, A/CN.4/617, A/CN.4/618)

[Agenda item 6]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee), presenting a short progress report on the topic "Expulsion of aliens", recalled that, in 2007, the Commission had referred draft articles 1 and 2—proposed by the Special Rapporteur in his second report²⁶⁸ and subsequently revised in the light of debate at the plenary meeting²⁶⁹—and also draft articles 3 to 7 (contained in the third report²⁷⁰) to the Drafting Committee.

* Resumed from the 3006th meeting.

²⁶⁸ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

²⁶⁹ *Yearbook ... 2007*, vol. II (Part Two), p. 61, para. 188 and p. 68, para. 258.

²⁷⁰ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

2. At that time, the Drafting Committee had provisionally adopted draft articles 1 (Scope) and 2 (Use of terms), while recognizing the need to revisit certain questions at a later stage. In 2008, it had decided to add a new paragraph 2 to draft article 1²⁷¹ in order to exclude from the scope of the draft articles aliens whose departure from the territory of a State might be governed by special rules of international law, namely diplomats or consular or other officials of a foreign State and agents of an international organization. The Committee had also been able provisionally to adopt draft article 3 (Right of expulsion), which was largely based on the text proposed by the Special Rapporteur.

3. During the current session, the Drafting Committee had held eight meetings on the topic, from 6 to 8 and from 11 to 14 May 2009. As in previous years, it had decided that the draft articles provisionally adopted would remain in the Committee until more draft articles had been completed.

4. The Drafting Committee had considered draft articles 4 to 7. Thus far it had not been able to reach agreement on the text of draft article 4 (Non-expulsion by a State of its nationals), owing to divergent views among the members on whether exceptions to the prohibition of the expulsion of nationals should or could be envisaged. It had been able provisionally to adopt draft article 5 (Non-expulsion of refugees), draft article 6 (Non-expulsion of stateless persons) and draft article 7 (Prohibition of collective expulsions). Draft articles 5 and 6, as provisionally adopted by the Committee, were largely based on the relevant provisions of, respectively, the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. Paragraph 2 of draft article 5, however, extended protection to a refugee who, although unlawfully present in the territory of the receiving State, had applied for recognition of refugee status.

5. Draft article 7, as provisionally adopted by the Drafting Committee, was based on the text originally proposed by the Special Rapporteur. Paragraph 4, however, which dealt with collective expulsions in times of armed conflict, was partially based on a revised text proposed by the Special Rapporteur in the light of the plenary debate in 2007 in order to narrow the possible exceptions to the prohibition of collective expulsion in times of armed conflict. The Committee had decided provisionally to adopt the paragraph, while indicating in a footnote that it was subject to review with regard to how it related to international humanitarian law.

6. The CHAIRPERSON said he took it that the Commission wished to take note of the progress report.

It was so decided.

The meeting rose at 10.15 a.m.

²⁷¹ *Yearbook ... 2008*, vol. I, 2989th meeting, p. 252, para. 27.

3028th MEETING

Tuesday, 28 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Expulsion of aliens (concluded) (A/CN.4/604, A/CN.4/606 and Add.1, sect. E, A/CN.4/611, A/CN.4/617, A/CN.4/618)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON said that, in response to the wishes expressed by the Commission during the first part of the session, the Special Rapporteur on expulsion of aliens, Mr. Kamto, had submitted both a new version of the draft articles on the protection of the human rights of persons who have been or are being expelled, revised by him in the light of the plenary debate during the first part of the sixty-first session (A/CN.4/617), and a new draft workplan with a view to structuring the draft articles (A/CN.4/618). The Special Rapporteur was unfortunately unable to attend the second part of the session but had informed him that he had no objection to the Commission's taking action on the revised draft articles in his absence. He himself therefore proposed the following courses of action: if the Commission so desired, it could refer the draft articles to the Drafting Committee without a discussion or, if any member wished to make a comment or ask a question on the revised draft articles, it could postpone the consideration of the draft articles to the next session, so that the discussion could take place in the presence of the Special Rapporteur.

2. Sir Michael WOOD, raising a procedural point, asked what was to be gained by referring the draft articles to the Drafting Committee immediately, since presumably the Drafting Committee on the topic would not meet for the rest of the session, owing to the absence of the Special Rapporteur. The normal procedure, after all, was to refer a text to the Committee in the light of a discussion held in plenary with the Special Rapporteur. He himself had a number of substantive questions to ask.

3. Mr. PELLET said he was surprised that the Special Rapporteur, having submitted his revised draft articles, was not present to defend them. To condone such a procedure would be to set an unfortunate precedent.

4. The CHAIRPERSON said that the proposal he had outlined had been suggested by the Special Rapporteur.

In his own view, it was not in line with the Commission's normal procedures.

5. Mr. VASCIANNIE requested the Secretariat's assistance in recalling what had been decided on the subject during the first part of the session. He also wished to know whether the Special Rapporteur had expressed a preference for one of the two options.

6. The CHAIRPERSON said that, as he understood it, the Special Rapporteur's preference would be to refer the draft articles to the Drafting Committee, but he was not pressing for such a course of action.

7. Mr. DUGARD, supported by Ms. ESCARAMEIA, Mr. MELESCANU and Mr. HASSOUNA, said that he did not see the point of referring the draft articles to the Drafting Committee unless there had been a debate beforehand in the presence of the Special Rapporteur. The Special Rapporteur should be informed of the concern that his absence had roused in the Commission.

8. Mr. OJO said that, like Mr. Vasciannie, he would like to be reminded of the decision taken by the Commission on the subject during the first part of the session. He also wondered whether the Special Rapporteur had concurred with that decision. If he had—as he himself thought—and if members of the Commission wished to discuss the draft articles with him, then the discussion should be postponed until the next session. In the two documents under consideration, the Special Rapporteur had explained how he had proceeded. If the Commission was satisfied with those explanations, then the question of his absence or presence should not arise and the draft articles should be referred to the Drafting Committee, even if such a procedure was not fully in line with the usual practice.

9. Ms. XUE said that on the whole, she shared the views of previous speakers. It was indeed difficult to discuss substantive issues in the absence of the Special Rapporteur, since it was his task to sum up the debate in plenary. She did wish to point out, however, that the draft articles contained in document A/CN.4/617 were a marked improvement over the previous text. The Special Rapporteur had thus taken into account the Commission's comments and should be commended for that. In her view, the draft articles could perfectly well be referred as they stood to the Drafting Committee.

10. At the beginning of the next session, the Commission should devote an informal meeting to its workplan, so that special rapporteurs would know the dates on which their topics were to be considered and members themselves could prepare better for the debate. To that end, if possible, special rapporteurs should be informed at the beginning of a session of the provisional date when the Commission expected to consider their report. The fact that some members had substantive issues to raise did not affect the question of whether the draft articles should be referred to the Drafting Committee. A message should be transmitted to the Special Rapporteur to inform him of the direction in which the Commission wished him to take his work on the topic.

11. Mr. CANDIOTI, speaking on a point of order, said that the consideration of the draft articles should be postponed until the next session, as had been suggested, or else the debate should continue in a closed meeting.

12. The CHAIRPERSON said that, if he heard no objection, he would take it that Mr. Candiotti's proposal to continue the debate in a closed meeting was adopted.

It was so decided.

The meeting was suspended at 10.30 a.m. and resumed at 10.55 a.m.

13. The CHAIRPERSON said that, following consultations held during the closed meeting, the Committee had decided to postpone the consideration of the draft articles contained in document A/CN.4/617 and of the workplan contained in document A/CN.4/618 until the next session, so that the discussion could take place in the presence of the Special Rapporteur.

The meeting rose at 11 a.m.

3029th MEETING

Friday, 31 July 2009, at 10.10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (concluded)* (A/CN.4/606 and Add.1, sect. F, A/CN.4/615, A/CN.4/L.758)

[Agenda item 8]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) introduced the titles and texts of draft articles 1 to 5 provisionally adopted by the Drafting Committee from 13 to 17 July 2009, as contained in document A/CN.4/L.758, which read:

“Article 1. Scope

“The present draft articles apply to the protection of persons in the event of disasters.

* Resumed from the 3019th meeting.

“Article 2. Purpose

“The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

“Article 3. Definition of disaster

“‘Disaster’ means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

“Article 4. Relationship with international humanitarian law

“The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

“Article 5.²⁷² Duty to cooperate

“In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves and with the United Nations and other competent intergovernmental organizations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.”

2. At its 3019th meeting, on 10 July 2009, the Commission had referred to the Drafting Committee draft articles 1 to 3, as proposed by the Special Rapporteur in his second report, on the understanding that if no agreement was reached on draft article 3, it could be referred back to the plenary Commission with a view to establishing a working group to discuss the draft article. In eight meetings, held from 13 to 17 July 2009, the Drafting Committee had successfully completed its consideration of all the draft articles referred to it and had provisionally adopted five draft articles.

3. The Drafting Committee had undertaken its work on the basis of a revised set of proposed draft articles prepared by the Special Rapporteur, taking into account the various drafting and structural suggestions made in the plenary. In keeping with a number of those suggestions, the Special Rapporteur had proposed dividing some of the draft articles in order to produce a total of five.

4. The current wording of draft article 1 (Scope) was based on the first part of the formulation initially proposed by the Special Rapporteur in his second report and reflected the title of the topic. The latter point had had a bearing on the debate in the Drafting Committee. While there had been general agreement that the scope of the draft articles should include the pre-disaster phase, suggestions as to how best to reflect that had ranged from replacing the phrase “in the event of” with “in relation to”

²⁷² Draft article 5 was adopted on the understanding that a provision on the primary responsibility of the affected State would be included in the set of draft articles in the future.

or “in case of”, in order to allow more room for the inclusion of pre-disaster activities, to making express reference to the various phases of a disaster. Ultimately, it had been decided to maintain the existing formulation, out of a concern that amending the text of draft article 1 might require amending the title of the topic. Moreover, the Committee had understood the phrase “in the event of disasters” to include all phases of a disaster and would provide a corresponding explanation in the commentary.

5. The subject matter of draft article 2 (Purpose) had been taken from the second half of the Special Rapporteur’s initial proposal for draft article 1 on scope; in the revised text he had presented to the Drafting Committee, the Special Rapporteur had proposed placing the provision in a separate draft article dealing with purpose. Although it was unusual for texts prepared by the Commission to include a provision outlining the objectives of the draft articles in question, it was not without precedent. Principle 3 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities²⁷³ had included a provision on the purposes of the draft principles. Hence, although the view had been expressed in the Committee that the provision would be better placed in the preamble, most of the members had supported its inclusion as a separate draft article.

6. The Special Rapporteur’s revised proposal incorporated a number of changes in response to suggestions made during the plenary debate. One such change involved inverting the references to “rights” and “needs”, so that instead of referring to “the realization of the rights of persons ... by providing an adequate and effective response to their needs”, the text of the revised proposal referred to ensuring “an adequate and effective response to ... the needs of persons ..., with full respect for their rights”. The new word order placed the emphasis on the link between a high-quality (“adequate and effective”) response and meeting the needs of the persons concerned, both of which had to be carried out with full respect for the existing rights of disaster victims. That approach had met with general agreement in the Drafting Committee. In one of the versions developed by the Committee, the phrase “in particular” had been placed before the concluding reference to respect for the rights of the persons concerned, but was eventually deleted as it implied that the rights in question were a subcategory of needs.

7. With regard to other aspects of draft article 2, it should be noted that the Special Rapporteur’s initial proposal made a reference to “States”, understood as a general statement of the obligation of States to ensure an adequate and effective response to disasters. That point had given rise to debate in the Drafting Committee. While some members had supported an express reference to the basic duty of States to provide for the needs of disaster victims, others had taken issue with the general terms in which the provision had been drafted. A general reference to the obligations of States did not, in the opinion of a number of members, sufficiently convey the specific rights and obligations of the affected State or make it clear that the affected State and assisting States had differing obligations. The matter had eventually been resolved by deleting the reference to

States, on the understanding that such a reference was not strictly necessary in a provision concerning the purpose of the draft articles and that specific provisions on the obligations of States would be taken up at a later stage.

8. As to the matter of the temporal application of the draft articles, the Drafting Committee had, as mentioned previously, approved of including the pre-disaster phase in the scope of the draft articles. The question had arisen again in relation to draft article 2. Some members had preferred including a specific reference to “all phases of the disaster”. However, the prevailing view had been that draft article 2 could be made more concise by referring to “an adequate and effective response to disasters” without having the effect of excluding the pre-disaster phase. That issue would be explained in the commentary.

9. The Special Rapporteur’s initial proposals had referred to the need “to ensure” the realization of rights by providing an adequate and effective response. After considering various options, such as the phrase “to provide for”, the Drafting Committee had opted instead for the verb “to facilitate”, since the draft articles would not themselves ensure a response, but rather, it was hoped, help to facilitate an adequate and effective response.

10. It had also been decided to introduce the qualifier “essential” before the term “needs”, in order to convey more clearly that the needs being referred to were those related to survival in the aftermath of a disaster. There had been an earlier proposal to use the adjective “basic”, but it was thought that “essential” more clearly described the context in which such needs arose. Moreover, the commentary would clarify that the term “persons concerned” meant the individuals directly affected by a disaster, as opposed to those indirectly affected.

11. The Special Rapporteur’s earlier proposal had referred to “the realization” of rights, which carried an affirmative connotation. However, since some of the applicable rights were economic and social rights that States were obliged progressively to ensure or to “take steps” towards ensuring, a more neutral formulation had been sought. The Drafting Committee had opted for the commonly used phrase “with full respect for their rights”, which left the question of how those rights were to be enforced to be determined by the relevant rules themselves; it had also considered the phrase “with due respect for their rights”, but had eventually settled on the adjective “full”, which had a more active connotation.

12. The Drafting Committee had also considered several proposals to add a further qualifier, which had included the alternative formulations “as appropriate”, “as far as possible”, “to the extent possible”, “as required by the present draft articles”, “in accordance with relevant provisions of international and domestic law” and “applicable rights”. However, none of those suggestions had ultimately met with acceptance. The concern was that the introduction of additional qualifiers risked turning what was a straightforward statement of purpose into a complicated provision and unnecessarily diluting existing legal rights. The commentary would nevertheless explain that there was an implied leeway in assessing for the applicability of rights, which was conditioned by the extent of the impact of the

²⁷³ *Yearbook ... 2006*, vol. II (Part Two), para. 66.

disaster. The extent of that conditionality, insofar as it was not covered by the draft articles being developed by the Commission, would be determined by the relevant rules recognizing or establishing the rights in question.

13. Lastly, by the term “rights”, the Commission was referring not only to general human rights, but also to rights acquired under domestic law. Some members of the Drafting Committee had expressed the view that the reference to “rights” was vague because it did not clarify whether what was being referred to was human rights—meaning pre-existing rights—or the rights to be enumerated in the draft articles. Nevertheless, the Drafting Committee had not approved a suggestion to draw up a list of applicable rights for the simple reason that it was impossible to ensure that such a list was exhaustive, and that could lead to an *a contrario* interpretation that rights not expressly mentioned were not applicable.

14. Draft article 3 (Definition of disaster) defined the term for the purposes of the draft articles. The Drafting Committee’s primary concern with regard to the provision had been to properly delimit the scope of the definition of “disaster” so as to capture the elements that fell within the scope of application of the topic without inadvertently including other serious events, such as political and economic crises, which could also undermine the functioning of society. The delimitation of the scope had been accomplished in two ways.

15. The first step had been to reorient the definition to focus on the existence of an event causing the disruption of society. The initial version of the definition, as proposed by the Special Rapporteur in his second report, had followed the approach taken in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations. In other words, the definition had focused on the consequences of an event—the serious disruption of the functioning of society caused by that event—rather than on the event itself. A preference for the opposite approach, which had been expressed by several Commission members during the plenary debate, had been reiterated in the Drafting Committee. It had been explained that the approach taken in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations represented the current thinking in the humanitarian assistance community, as confirmed by the 2005 World Conference on Disaster Reduction convened by the United Nations General Assembly in Hyogo (Japan),²⁷⁴ as well as by recent treaties and other instruments, including the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance,²⁷⁵ which had been adopted by the IFRC in 2007. Nevertheless, the prevailing view in the Drafting Committee had been that the Commission was free to shift the emphasis of the approach, especially since it was embarking on the formulation of a legal instrument, which required a tighter definition than one that was policy-oriented. Moreover, linking the definition of “disaster” to the existence of an event more clearly conveyed the logical sequence of a disaster situation.

16. The scope of the definition of “disaster” had been limited further through a series of textual refinements. Inspired by the definition adopted by the Institute of International Law at the latter’s 2003 Bruges session,²⁷⁶ which had deliberately set a higher threshold so as to exclude other acute crises, the Drafting Committee had decided to qualify the term “event” with the word “calamitous” so as to emphasize the extreme nature of the event being considered. The commentary would further clarify the kinds of events not covered by the draft articles. The Committee had also decided to approve a suggestion made in the plenary to use the phrase “event or series of events” in order to encompass the types of disasters that might not, taken separately, meet the necessary threshold, but that, taken together, would constitute a calamitous disaster for the purposes of the draft articles.

17. Three types of consequences had been anticipated in the provision: widespread loss of life, great human suffering and distress, and large-scale material or environmental damage. The “loss of life” element was a refinement that had been inspired by the 1995 Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief²⁷⁷ and had been implied in the Special Rapporteur’s initial proposal, which had referred to “widespread human ... loss”. It had been agreed that the qualifier “widespread” would be explained in the commentary. It had also been agreed that the phrase “great human suffering and distress” was a necessary element of the definition.

18. The phrase “large-scale material or environmental damage” had been included in draft article 3 on the understanding that it was not the environmental loss *per se* that would be covered by the topic, but rather the impact of such loss on individuals, which would preclude the consideration of economic loss in general. At the same time, the view had been expressed that to link the definition of disaster to actual loss might prevent the draft articles from applying to activities intended to mitigate potential future human loss arising from existing environmental damage. Those matters would be taken up in the commentary.

19. The Drafting Committee had also considered a suggestion that an express reference to the exclusion of armed conflict from the scope of the definition should be included in the draft article. It had, however, opted to solve the question in the context of draft article 4. The two draft articles would need to be read in conjunction.

20. Draft article 4 (Relationship with international humanitarian law) dealt with the extent to which the draft articles covered situations of armed conflict. In his original proposed definition of disaster, the Special Rapporteur had expressly excluded armed conflict. In the plenary debate, it had been suggested that the matter would be best dealt with in a separate “without prejudice” clause. In his revised proposal, the Special Rapporteur had adopted that approach, eliminating the reference to armed conflict from the definition and adding a provision stating that the draft articles were without prejudice to the rules applicable

²⁷⁴ See footnote 177 above.

²⁷⁵ See footnote 176 above.

²⁷⁶ See footnote 204 above.

²⁷⁷ *International Review of the Red Cross*, vol. 36, No. 310 (1996), annex VI, p. 119.

in armed conflict. Two issues had been raised during the discussion in the Drafting Committee. First, it had been proposed that the express exclusion of armed conflict in the definition should be restored. The second issue had been whether a “without prejudice” clause would be sufficient. The first matter had been resolved by the solution found for the second.

21. It had been argued that, whether or not a “without prejudice” clause was introduced, armed conflicts would, in principle, unless expressly excluded under the definition, be considered disasters for the purposes of the draft articles, if they satisfied the threshold criteria set out in draft article 3. The Drafting Committee had thus considered a proposal to include a second paragraph in draft article 3 expressly excluding armed conflict. That approach had not, however, been adopted, largely because of the concern raised by some members that a categorical exclusion would be counterproductive, particularly in complex emergencies, where a disaster, whether emanating from natural or human causes, occurred in an area of armed conflict. To exclude the applicability of the draft articles because of the simultaneous existence of an armed conflict would be detrimental to the protection of victims, especially where the onset of the disaster had pre-dated the armed conflict.

22. It had been agreed that, while the draft articles did not seek to regulate the consequences of armed conflict, they could nonetheless apply in situations of armed conflict where existing rules of international law, particularly international humanitarian law, did not apply. It had been thought that a “without prejudice” clause would not achieve that result, since it would merely preserve the applicability of both sets of rules, thereby suggesting that the draft articles applied in the context of armed conflict to the same extent as existing rules of international law. It had therefore been proposed that a new provision should be drafted to clarify the relationship between the draft articles and the rules of international humanitarian law, giving precedence to the latter in situations where they were applicable.

23. Draft article 5 (Duty to cooperate) had been the last to be adopted by the Drafting Committee at the current session. Different opinions had been expressed within the Commission as to the timeliness of referring the draft article to the Drafting Committee. Similarly, the view had been expressed in the Committee that it was premature to adopt a general provision on the obligation of States to cooperate without an exposition of other applicable principles and further consideration of the implications of such obligation, particularly for the affected State. A majority of members, however, had supported the adoption of the draft article, on the understanding that a provision on the primary responsibility of the affected State would be included in the draft articles at a later stage. A footnote to that effect had been appended to the draft article.

24. One change was that the draft article was presented as a single sentence rather than as a series of clauses. The Special Rapporteur’s initial proposal had been to distinguish cooperation between States from that between States and international organizations (particularly the United Nations), between States and the IFRC, and

between States and civil society. In response to suggestions by the plenary Commission, the Special Rapporteur had presented a revised proposal that had sought to distinguish further between different levels of cooperation: mandatory with some entities but recommendatory with others. The Drafting Committee had, however, been unable to agree on how best to capture the exact legal relationship between States and the various entities listed. There had also been a concern that the provision was becoming unnecessarily complex. The Committee had felt that it was unnecessary to spell out the exact nature of the legal obligation to cooperate (whether “shall” or “should”) in the general provision on cooperation and had decided to deal with that question in specific provisions to be adopted in the future.

25. The Drafting Committee had therefore returned to a position closer to the original wording, in which the key phrase was “as appropriate”. The phrase, which qualified the entire draft article, served both as a reference to existing specific rules on cooperation between the various entities mentioned in the draft article (including any such rules added to the draft articles in the future) and as an indication that, in a given situation, there was some leeway for determining whether cooperation was “appropriate”.

26. The Drafting Committee had decided to insert the word “competent” before “intergovernmental organizations” as an indication that, for the purposes of the draft articles, cooperation would be necessary only with entities that were involved in the provision of humanitarian assistance. Following a suggestion made in the plenary debate, a reference to the ICRC had been added, since the draft articles might also apply in complex emergencies involving armed conflict. The Committee had also standardized the earlier reference to “civil society” by changing the phrase to “relevant non-governmental organizations”. The commentary would make it clear that cooperation was inherently reciprocal in nature, so that a duty for a State to cooperate with an international organization implied the same duty on the part of the organization.

27. Mr. NOLTE said that there was just one point on which he wondered whether the Chairperson of the Drafting Committee fully reflected the discussions within the Committee. He had reported that the Committee had referred to “essential needs” to indicate those related to survival. It had not been his impression that the Committee had meant the term to be understood so narrowly, especially in the light of the definition of disaster in draft article 3, which referred not only to loss of life but also to great human suffering and distress and large-scale material or environmental damage.

28. Mr. MELESCANU said that the report of the Chairperson of the Drafting Committee reflected the long and exhaustive debate held in the Committee. He commended the Special Rapporteur not only for the speed with which he had drafted new texts when requested but also for his deep knowledge of the subject. The Special Rapporteur had the ability to be flexible while remaining firm about the general approach that he had established.

29. Along with Ms. Escameia and others, he attached particular importance to the inclusion in draft article 2

of provisions that could cover the pre-disaster phase as well as the disaster *per se* and the reconstruction stage, although he had doubts as to whether “an adequate and effective response” could be made in the pre-disaster phase. Although the Drafting Committee had accepted that wording of draft article 2, the Special Rapporteur had promised to reflect in the commentary the concerns expressed in that regard. A broader approach to protection could thus be extended to future draft articles.

30. The definition of disaster in draft article 3 was crucial and, thanks to the Special Rapporteur, it covered every aspect of the topic. The definition would enable the Drafting Committee to make faster progress at the next session.

31. Lastly, although neither French nor English was his first language, he felt that, in draft article 5, the English word “relevant” and the French word “*pertinentes*” did not have precisely the same meaning. He would prefer the word “*compétentes*” in the French text. The matter could be dealt with by the Drafting Committee at the next session.

32. Mr. KOLODKIN said that he too had a query about the text of draft article 5 in the various languages, which could be discussed at the next session.

33. The CHAIRPERSON said that he took it that the Commission wished to take note of the report of the Chairperson of the Drafting Committee.

It was so decided.

The most-favoured-nation clause²⁷⁸

[Agenda item 11]

REPORT OF THE STUDY GROUP

34. Mr. PERERA (Co-Chairperson of the Study Group on the most-favoured nation clause) recalled that, at its 3012th meeting on 29 May 2009, the Commission had decided to establish a Study Group on the most-favoured-nation clause, to be chaired by Mr. McRae and himself. The Study Group had held two meetings on 3 June and 20 July 2009, at which it had considered a road map for future work and had made a preliminary assessment of the draft articles adopted by the Commission in 1978, with a view to identifying subsequent developments.

²⁷⁸ In 1978, at its thirtieth session, the Commission adopted draft articles on the most-favoured-nation clause and commentaries thereto, which it transmitted to the General Assembly (*Yearbook ... 1978*, vol. II (Part Two), para. 74). In 2006, at its fifty-eighth session, the Commission discussed whether the topic of the most-favoured-nation clause should be included in its long-term programme of work and then invited the views of Governments (*Yearbook ... 2006*, vol. II (Part Two), p. 186, para. 259). In 2007, at its fifty-ninth session, the Commission established an open-ended Working Group that, after consideration of a working paper prepared by Mr. McRae and Mr. Perera, recommended that the topic be included in the long-term programme of work of the Commission (*Yearbook ... 2007*, vol. II (Part Two), pp. 98–99, para. 377). In 2008, at its sixtieth session, the Commission decided to include the topic in its programme of work and to create a Study Group therefor at its sixty-first session (*Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 354). The Commission also considered a document examining what had been decided in 1978, why it had not been taken any further and what had changed since 1978 (*ibid.*, annex II).

35. The Study Group had first examined the nature, origins and development of most-favoured-nation clauses, the earlier work of the Commission on the topic, the Sixth Committee’s reaction to the 1978 draft articles, subsequent developments, current challenges posed by the clause and the Commission’s possible contribution in the light of the substantial changes which had occurred since 1978. Those changes included the context in which most-favoured-nation clauses were employed, the body of available practice and jurisprudence and emergent problems, connected in particular with the application of such clauses in investment agreements.²⁷⁹ As a result of that discussion, the Study Group had agreed on a work schedule for the preparation of papers which, it hoped, would shed additional light on the scope of most-favoured-nation clauses and their interpretation and application.

36. Eight topics had been identified along with the members of the Study Group who would assume primary responsibility for researching them and preparing specific papers on them:

(i) catalogue of most-favoured-nation provisions—Mr. McRae and Mr. Perera;

(ii) the 1978 draft articles of the International Law Commission—Mr. Murase;

(iii) the relationship between most-favoured-nation and national treatment—Mr. McRae;

(iv) most-favoured-nation in the General Agreement on Tariffs and Trade (GATT) and the WTO—Mr. McRae;

(v) the work of the United Nations Conference on Trade and Development on most-favoured-nation—Mr. Vasciannie;

(vi) the work of the Organisation for Economic Co-operation and Development on most-favoured-nation—Mr. Hmoud;

(vii) the *Maffezini* problem in investment treaties—Mr. Perera; and

(viii) regional economic integration agreements and free trade agreements (to be decided)—Mr. McRae.

37. Pending the fuller analysis of the 1978 draft articles to be undertaken by Mr. Murase, Mr. McRae, Co-Chairperson of the Study Group, had reviewed the approach adopted in the Commission’s earlier work, which had relied on GATT practice prior to the establishment of WTO and had regarded the most-favoured-nation clause as a unique legal institution. It had been found that those draft articles were couched in language that had little bearing on current practice.

38. On reviewing the 1978 draft articles to see which were of relevance for the areas to be scrutinized by the Study Group, it was noted that draft article 2 (Use of terms) aptly encapsulated the relationship between the

²⁷⁹ *Yearbook ... 2008*, vol. II (Part Two), annex II.

granting State, the beneficiary State and third States; most-favoured-nation treatment was accorded in a narrowly bound “determined relationship” (draft article 5); such treatment was treaty-based (draft article 7); and that it was premised on the notion that the treaty containing the most-favoured-nation clause was the basic treaty establishing the juridical link between the granting State and the beneficiary State and that no third party rights were acquired under a treaty in which a granting State extended favours to a third State, but rather that the most-favoured-nation clause conferred the rights enjoyed by the third party upon the beneficiary State (draft article 8). The issues broached by draft articles 7 and 8 were of current relevance, since they pertained to the context in which most-favoured-nation treatment was accorded.

39. Draft articles 9 and 10 were also still relevant because they raised the issue of the scope of the most-favoured-nation clause, the question on which the *Maffezzini* case hinged, although they did not necessarily answer that question. The limits of the subject matter of a most-favoured-nation clause had sometimes been determined by the *ejusdem generis* rule, or in the context of WTO/GATT by the concept of “like product” as defined by external characteristics, or in the North American Free Trade Agreement and some bilateral investment agreements by the concept of “like circumstances”.

40. Draft article 16 raised an issue of significance for the current relevance of the 1978 draft articles. The notion that it was immaterial if a third State acquired rights under a multilateral treaty restricting the application of rights to the parties themselves had been regarded as a problem by States that wanted the draft articles to make an exception for customs unions and free-trade areas. The principle had, however, been attenuated in respect of trade in goods by article XXIV of GATT and by a comparable provision on trade in services, both of which permitted exceptions for custom unions and free-trade areas, or interim agreements relating to the formation of customs unions or free-trade areas. The nature of the problem had also altered as membership of WTO had been extended to countries from the former Council for Mutual Economic Assistance (COMECON).

41. In the past, draft articles 23 and 24, which had been influenced by the debate on the new international economic order, had been deemed important because they addressed the questions of development and the generalized system of preferences. Developments within WTO/GATT had meant that those issues were being handled through the “enabling clause” and the concept of “special and differential treatment”. On the other hand, bilateral investment agreements were based, not on any system of preferences or preferential treatment, but on an economic relationship predicated on equality. Wider use of those agreements had sidestepped issues raised by a system of preferences and moved beyond the debate on the new international economic order. Current debate centred on a new wave of investment agreements that would depart from the assumption of equality and acknowledge the need to provide some protection for States receiving investments because relations between developed and developing States under investment agreements tended to be asymmetrical. A further development that might

merit some attention was the growing body of investment agreements between developing countries.

42. Although draft articles 25 and 26 were of some interest, their current scope was unclear, since some of the issues they covered had been further elaborated, for example, in article 126 of the United Nations Convention on the Law of the Sea. They might, however, be considered in the Commission’s forthcoming studies.

43. Conversely, draft articles 11 to 15, on compensation, were premised on an obsolete distinction between conditional and unconditional most-favoured-nation clauses and were not of any core relevance to the Study Group, because they did not reflect current reality in the WTO/GATT context. Under article 1 of GATT and in other WTO agreements, most-favoured-nation treatment was unconditional, although the negotiating process was reciprocal.

44. Similarly, articles 17 to 21 did not seem to raise matters of importance for the Study Group, as they reflected self-evident propositions that were consistent with current practice. The remaining articles were essentially “without prejudice” clauses.

45. In the ensuing discussion within the Study Group, it had been agreed that it would be necessary to clarify the status of the Commission’s earlier work on the topic in order to ensure that there was a clear delineation between that work and the current exercise, without undermining earlier achievements or hampering work and developments in other forums. It was to be hoped that the papers to be prepared would flesh out the issues that ought to be addressed. It has also been pointed out that the Study Group would have to be careful in extrapolating from one area to another, in particular bearing in mind that there was no multilateral regime covering the whole subject of investment. It had been noted that while draft articles 9 and 10 of the 1978 draft articles would form the points of departure for examining most-favoured-nation treatment in the context of investment, further thought should be given to the scope of the exercise; if it were limited solely to investment treaties, it would be necessary to consider the thorny question of the definition of investment.

46. The CHAIRPERSON said he took it that the Commission wished to take note of the progress report of the Study Group on the most-favoured nation clause.

It was so decided.

Treaties over time²⁸⁰

[Agenda item 10]

REPORT OF THE STUDY GROUP

47. Mr. NOLTE (Chairperson of the Study Group on treaties over time) recalled that the Commission, at

²⁸⁰ At its sixtieth session, in 2008, the Commission decided to include the topic “Treaties over time” in its programme of work, based on a proposal by Mr. Nolte, updated and revised, and to establish a Study Group therefor (see *Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 353 and p. 164, annex II). For a summary of the topic, see *ibid.*, annex I.

its 2997th meeting on 8 August 2008, had decided to include the topic “Treaties over time” in its programme of work. At its 3012th meeting on 29 May 2009, it had established the Study Group on the topic. At its two meetings on 7 and 28 July 2009, the Study Group had based its discussions on two informal papers presented by its Chairperson outlining the possible scope of future work on the topic; the proposed approach to the topic set out in annex I to the Commission’s report on the work of its sixtieth session,²⁸¹ some background material, including relevant excerpts from the Commission’s articles on the law of treaties and commentaries thereto,²⁸² from the *Official Records of the United Nations Conference on the Law of Treaties*,²⁸³ and from the conclusions and report of the Study Group on the fragmentation of international law;²⁸⁴ together with a letter of 17 February 2009 from the Legal Service of the European Commission containing comments and observations on the subject.

48. The Study Group had mainly endeavoured to identify the issues to be covered, its working methods and the possible outcome of the Commission’s work on the topic. The main question with regard to the scope of the topic had been whether the Study Group should focus on subsequent agreement and practice, or whether it should also examine the effects of certain acts or circumstances on treaties—such as termination and suspension, other unilateral acts, material breaches and changed circumstances; the effects of other sources of international law—such as subsequent treaties, supervening custom, *desuetudo* and obsolescence; and amendments and *inter se* modifications of treaties.

49. Several members of the Study Group had expressed a preference for a narrow approach initially confined to the subject of subsequent agreement and practice, which in itself was wide-ranging, as it took in not only treaty interpretation but also related aspects. Others had contended that the Group’s approach should be considerably broader. Some members had been of the view that it was inadvisable to restrict the scope of the topic to subsequent agreement and practice from the outset, and that work could be conducted in parallel on that subject as well as on some other aspects of the topic.

50. As far as working methods were concerned, several members had been in favour of a collective effort

and had emphasized the need for a proper distribution of tasks among interested members, but if that were done, contributions to the deliberations of the Study Group should be adequately reflected. At the same time, some members had felt that the Chairperson should play a strong role in coordinating and guiding the Study Group’s work.

51. As regards the possible outcome of the Commission’s consideration of the topic, several members had stressed that the final product should offer practical guidance to States. There had been broad support for the idea of drawing up a repertory of practice accompanied by a number of conclusions. Other members had been of the opinion that the Commission should keep an open mind as to the outcome of its work.

52. The Study Group had agreed that it should begin its work by considering subsequent agreement and practice on the basis of papers to be prepared by its Chairperson, but that the possibility of adopting a broader approach should be explored. In 2010, the Chairperson would therefore submit a report on subsequent agreement and practice, which would draw on the case law of the ICJ and other international courts and tribunals with general or *ad hoc* jurisdiction. Other members of the Study Group were encouraged to contribute information on the way in which subsequent agreement and practice was handled at a regional level, under special treaty regimes or in specific areas of international law. Members were likewise invited to contribute papers on other issues falling within the broader scope of the topic.

53. The CHAIRPERSON said he took it that the Commission wished to take note of the progress report of the Study Group on treaties over time.

It was so decided.

The obligation to extradite or prosecute (*aut dedere aut judicare*)²⁸⁵ (A/CN.4/606 and Add.1, sect. H, A/CN.4/612²⁸⁶)

[Agenda item 7]

REPORT OF THE WORKING GROUP

54. Mr. PELLET (Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)) recalled that at its sixtieth session the Commission had decided to set up an open-ended Working Group on the topic and had implemented that decision during the current session at its 3011th meeting. The Working Group had held three meetings, on 28 May and 29 and 30 July 2009. For its first meeting, it had

²⁸¹ See the footnote above.

²⁸² *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 187 *et seq.* See also *Yearbook ... 1982*, vol. II (Part Two), pp. 17 *et seq.*

²⁸³ *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7); *ibid.*, second session, Vienna, 9 April–22 May 1969, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1, United Nations publication, Sales No. E.70.V.6); and *ibid.*, first and second sessions, Vienna, 26 March–27 May 1968 and 9 April–22 May 1969, *Official Records, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5).

²⁸⁴ *Yearbook ... 2006*, vol. II (Part Two), para. 251, and document A/CN.4/L.682 and Corr.1 and Add.1 (mimeographed; available on the Commission’s website, documents of the fifty-eighth session; the final text will appear as an addendum to *Yearbook ... 2006*, vol. II (Part One)).

²⁸⁵ In 2008, at its sixtieth session, the Commission considered the third report of the Special Rapporteur (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603) and the comments and observations received from Governments (*ibid.*, document A/CN.4/599). At the same session, in addition to considering the topic, the Commission decided to establish a Working Group, chaired by Mr. Pellet, whose mandate would be determined at the sixty-first session (*ibid.*, vol. II (Part Two), para. 315).

²⁸⁶ Reproduced in *Yearbook ... 2009*, vol. II (Part One).

had before it an informal paper prepared by the Special Rapporteur, Mr. Galicki, containing an overview of the debate on the topic in the Commission at its sixtieth session and in the Sixth Committee at the sixty-third session of the General Assembly, as well as a list of issues that might be considered by the Working Group. For the second meeting, the Special Rapporteur had prepared an annotated list of the questions and issues raised by the topic. Members of the Working Group had also had before them copies of a report by Amnesty International, dated February 2009, entitled *International Law Commission: the Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare).²⁸⁷

55. The Working Group had first considered the question of its mandate. While some members would have liked it to address some of the substantive issues, most had deemed it more appropriate to develop a general framework for consideration of the topic, so as to determine the questions to be dealt with and establish an order of priority.

56. At its third meeting, the Chairperson had submitted a document setting out a general framework for the topic containing a set of questions and issues, organized thematically. Members of the Group had suggested the inclusion of additional questions or issues. On that basis, the Chairperson had drafted a revised version of the document, which was now before members of the Commission.²⁸⁸ It was short and schematic in nature, since it would have been impossible and indeed premature to enter into a drafting exercise. The document thus simply attempted to set out, as comprehensively as possible, the questions to be addressed, without establishing hierarchy among them. The general categories within which the questions were grouped did not conform to Cartesian logic and were in some cases quite heterogeneous. That was especially true of section (d) (Relationship between the obligation to extradite or prosecute and other principles).

57. On the substance of the document, he noted that the first two sections could be seen as covering the general issues pertaining to the topic, whereas the remaining sections dealt with the legal regime governing the obligation to extradite or prosecute. It was obviously crucial to know whether that regime was exclusively treaty-based or also had a source in customary law, but it was not the purpose of the document to take a position on that point. Whatever the answer to that question, the work on the topic must be continued, because the regime of treaty obligations to extradite or prosecute was far from clear, and nothing prevented the Commission from engaging in the progressive development of international law, to which the topic undoubtedly lent itself.

58. As to the legal regime of the principle, or better, of the “standard”, it was possible, and in fact probable, that it was not uniform, but variable, depending on the wording of the relevant treaty provisions and on the nature of the offences in question. The same legal regime was unlikely to apply to piracy, genocide and offences under domestic law, for example.

59. As indicated by the title of section (d) (Relationship between the obligation to extradite or prosecute and other principles), the obligation to extradite or prosecute might at times compete with other fundamental principles, and to specify how those principles should be reconciled or how they interrelated was surely one of the major challenges posed by the topic. The questions raised in sections (e) to (g) concerning the conditions that triggered the obligation, the implementation of the obligation and its relationship to the “third alternative” of surrender to a competent international criminal tribunal, though technical, were far from trivial, and the responses that might be given would surely be of great use to States. Indeed, he wished to warn against the intellectual excitement that might be generated by sections (a) and (b) on the legal bases and material scope of the obligation to the detriment of the other sections, which were equally important.

60. The document before the Commission was intended simply to facilitate the Special Rapporteur’s work on future reports; it would be his task to determine the order, structure and interrelationship of the draft articles. Opposing views had emerged within the Working Group on a number of points, particularly the order in which the questions should be addressed and whether the Commission should adopt a general approach emphasizing the sources of the obligation or a more specific approach centred on the relevant treaty provisions and the customary or treaty regimes applicable to specific offences. Some members had been of the view that it was essential for the Commission to examine the customary basis of the obligation, while others had thought that the Commission did not need to settle that question or could defer it until after a thorough examination of practice. Differing views had likewise been expressed on whether and to what extent the question of surrender to an international tribunal should be addressed. Some members had thought the focus should be less on extradition and more on the obligation to prosecute when extradition did not take place. All had agreed, however, that work on the topic should not include detailed consideration of extradition law or the principles of international criminal law. With regard to methodology, the importance of taking account of domestic legislation and decisions had been stressed and the possibility had been raised of drawing on the work of certain academic institutions and NGOs.

61. Mr. GALICKI (Special Rapporteur) expressed his appreciation to the Working Group for helping to identify the most important questions raised by the topic and to its Chairperson for his dedicated efforts.

62. The CHAIRPERSON said he took it that the Commission wished to take note of the report.

It was so decided.

The meeting rose at 12.30 p.m.

²⁸⁷ London, Amnesty International Publications, 2009.

²⁸⁸ *Yearbook ... 2009*, vol. II (Part Two), para. 204.

3030th MEETING

Monday, 3 August 2009, at 3.05 p.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vas-ciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/606 and Add.1, sect. I, A/CN.4/L.759²⁸⁹)

[Agenda item 12]

REPORT OF THE PLANNING GROUP

1. Mr. WISNUMURTI (Chairperson of the Planning Group) said that the Planning Group had held three meetings which had been devoted, *inter alia*, to the following items: the Working Group on the long-term programme of work; consideration of General Assembly resolution 63/128 of 11 December 2008 on the rule of law at the national and international levels; documentation and publications; the dialogue between the Commission and the Sixth Committee; the proposal to stagger the elections of the Commission; the date and place of the sixty-second session of the Commission; and other matters. The report of the Planning Group, which was self-explanatory, had been organized to reflect the outcome of discussions on those items.

2. He wished to highlight three issues. First, on the basis of a proposal by Mr. Pellet, the Planning Group had held an extensive discussion on procedures and criteria applicable to elections of the Commission. It had been unable to reach any specific conclusions on the matter at the present stage of its work, however, and had accordingly decided not to keep the item on its agenda.

3. Secondly, under “Other matters”, the Planning Group had considered a proposal by Sir Michael Wood concerning settlement of disputes clauses, which had been inspired by the Commission’s discussion of the rule of law in its report of the previous year,²⁹⁰ by the statement of the President of the ICJ to the Commission on 7 July 2009 (3016th meeting above, paras. 2–47) and by other developments. The Planning Group had held a debate on the proposal, including on the Commission’s policy in relation to such clauses. It recommended that, at its sixty-second session, under “Other business”, the Commission devote at least one meeting to a discussion of settlement of disputes clauses. In order to facilitate the discussion, the Secretariat had been requested to prepare a note on the Commission’s past practice in relation to such clauses, taking into account the recent practice of the General Assembly.

4. Thirdly, also under “Other matters” and at the request of Ms. Escarameia, who considered it useful for the Planning Group to keep on its agenda an item on the methods of work of the Commission, the Planning Group had exchanged views on that matter. Among the issues it had addressed were the importance of reports of Special Rapporteurs for the functioning of the Commission and the relationship between the plenary Commission and its subsidiary bodies. It had been recommended that an open-ended working group of the Planning Group on the Commission’s methods of work should be convened early in the sixty-second session, subject to availability of time and space.

5. If approved by the Commission, the Planning Group’s recommendations would be incorporated, with the necessary adjustments, in the Commission’s report to the General Assembly, in the chapter entitled “Other decisions and conclusions of the Commission”.

6. It was understood that the three issues he had just highlighted would not appear in the report of the Commission.

7. The CHAIRPERSON invited members of the Commission to adopt the report of the Planning Group (A/CN.4/L.759) on the understanding that, as the Chairperson of the Planning Group had pointed out, paragraphs 10, 11 and 12 had been drafted for information purposes only and would not appear in the report of the Commission to the General Assembly.

8. Mr. PELLET said that even if those paragraphs did not appear in the Commission’s report, the discussion relating to them would be reflected in the summary record of the current meeting. Consequently, and with reference to paragraph 12, he said that he would prefer that the Planning Group itself, and not a working group established by it, consider the methods of work of the Commission, as that was an integral part of its responsibilities.

9. The phrase “in the form prior to typesetting and publication” in paragraph 6 of the report was unclear. In paragraph 7, the amount of voluntary contributions made to the trust fund to address the backlog in publication of the *Yearbook of the International Law Commission* should be mentioned. Lastly, in paragraph 14, there was no reason to qualify as “immediate” the research work required for the drafting by Special Rapporteurs of their reports.

10. The CHAIRPERSON said that if there was no objection, Mr. Pellet’s comments would be taken into consideration.

11. Ms. ESCARAMEIA expressed surprise that paragraph 10, containing proposals on the elections of the Commission, was to be omitted from the Commission’s report to the General Assembly, in contrast to what had been done in previous years.

12. She recalled that there had been two salient issues in connection with elections to the Commission: gender balance and the staggering of the elections. The decision of the Planning Group that this item “should not be kept on its agenda” dealt only with the second issue.

²⁸⁹ Mimeographed; available on the Commission’s website.

²⁹⁰ *Yearbook ... 2008*, vol. II (Part Two), pp. 146–147, paras. 341–346.

13. Mr. VASCIANNIE, Mr. SABOIA, Mr. CANDIOTI, Mr. HASSOUNA and Ms. JACOBSSON (Rapporteur) confirmed that such had been the case.

14. Ms. ESCARAMEIA, supported by Mr. CANDIOTI, proposed that, in order to avoid any confusion, the final sentence of paragraph 10 should be deleted.

15. Mr. HASSOUNA said that the most important thing now was to decide whether paragraphs 10, 11 and 12 of the report of the Planning Group were to appear in the report of the Commission to the General Assembly. If they were not, then, he would like to know why.

16. Mr. VALENCIA-OSPINA said that it was important to differentiate among the various stages of the procedure. The Planning Group had adopted a report that did not address the issue of gender balance among the members of the Commission. It was up to the Commission, meeting in plenary, not to reopen consideration of the report, as it was in the process of doing, but simply to take note of it. When it came to adopt chapter XII of its report to the General Assembly, the Commission could then decide to state that the issue of gender balance remained open.

17. Ms. JACOBSSON (Rapporteur) endorsed the comment just made by Mr. Valencia-Ospina.

18. Mr. PELLET said that the Commission would make its task much more difficult if it adopted the report of the Planning Group without taking a position now on whether to include paragraphs 10, 11 and 12 of that report in its own report, as the question would no doubt arise again at a later meeting. It should therefore decide without further delay whether the Secretariat should include the three paragraphs concerned in the Commission's report on the work of its sixty-first session. If an indicative vote was taken on the matter, he would vote in favour of their inclusion, since there was no reason to conceal the contents of a report of the Planning Group.

19. Ms. ESCARAMEIA supported Mr. Pellet's proposal: the Commission should decide at once whether to include paragraphs 10, 11 and 12 of the report of the Planning Group in its own report. It had already done something similar at its 2001 session by reflecting in its report the discussion on staggering its elections:²⁹¹ there was thus a precedent for such a procedure. In any case, as Mr. Pellet had rightly pointed out, the main question was whether the Commission wished the important issues that had been considered by the Planning Group to be brought to the attention of the Sixth Committee. For the sake of transparency, she personally would reply to that question in the affirmative.

20. Mr. KOLODKIN said that, as he recalled it, the Planning Group had felt that paragraphs 10, 11 and 12 of its report were not user-friendly, unlike the rest of its report, and should therefore not appear in the report of the Commission.

21. The CHAIRPERSON suggested that an indicative vote should be taken on whether to include paragraphs 10,

11 and 12 of the report of the Planning Group in the report of the Commission on the work of its sixty-first session.

22. Mr. VALENCIA-OSPINA said that since paragraphs 10, 11 and 12 of the report of the Planning Group each dealt with separate issues, a separate vote should be taken on each of them.

23. Mr. PELLET said that, logically, the Commission should begin by determining whether the paragraphs should be included in its report and only then decide whether to amend them.

24. Mr. VALENCIA-OSPINA said that he had suggested, not that the paragraphs should be amended, but simply that a separate vote should be taken on whether each of them should be incorporated in its report.

25. The CHAIRPERSON announced that an indicative vote would be taken on whether to include each of the paragraphs in the report of the Commission on the work of its sixty-first session.

Following an indicative vote, it was decided to include paragraph 10 of the report of the Planning Group in the report of the Commission on the work of its sixty-first session.

Following an indicative vote, it was decided to include paragraph 11 of the report of the Planning Group in the report of the Commission on the work of its sixty-first session.

Following an indicative vote, it was decided to include paragraph 12 of the report of the Planning Group in the report of the Commission on the work of its sixty-first session.

The report of the Planning Group contained in document A/CN.4/L.759 was adopted.

Draft report of the Commission on the work of its sixty-first session

CHAPTER VI. *Expulsion of aliens* (A/CN.4/L.750 and Corr.1 and Add.1)

26. The CHAIRPERSON invited the Commission to take up chapter VI of its draft report, beginning with paragraphs 1 to 7.

27. Mr. PELLET, noting that Ms. Jacobsson was referred to as "*rapporteur*" in the French version of document A/CN.4/L.750 and "*rapporteuse*" in that of A/CN.4/L.750/Corr.1, said that, regardless of which of the two forms it adopted, the Commission should strive to ensure consistency. Personally, he was in favour of using the feminine form of titles.

28. Following an exchange of views in which Mr. CAFLISCH, Ms. ESCARAMEIA, Mr. HASSOUNA and Ms. JACOBSSON took part, the CHAIRPERSON suggested that the Secretariat should use the same wording as in the previous year, 2008, when Ms. Escarameia had served as Rapporteur.

It was so decided.

²⁹¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 206, para. 258, and *ibid.*, vol. I, 2695th meeting, p. 193, paras. 62–63.

A. Introduction

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 6

29. The CHAIRPERSON said that as he understood it, the text in square brackets should be deleted.

Paragraph 6, as amended, was adopted.

Paragraph 7

30. The CHAIRPERSON announced that the following sentence should be added at the end of the paragraph: "At its 3028th meeting, on 28 July 2009, the Commission decided to postpone its consideration of the revised draft articles to its sixty-second session."

31. Mr. PELLET asked how the sentence just read out related to the version of paragraph 7 contained in document A/CN.4/L.750/Add.1.

32. Mr. MIKULKA (Secretary to the Commission) said that paragraph 7 was to begin with the following sentence: "At its 3006th meeting, the Special Rapporteur undertook to present to the Commission a revised and restructured version of draft articles 8 to 14, taking into account the plenary debate." Next would come the following text, contained in document A/CN.4/L.750/Add.1: "The Special Rapporteur then submitted to the Commission a document containing the draft articles on protection of the human rights of persons who have been or are being expelled, restructured in the light of the plenary debate (A/CN.4/617). He also submitted a new draft workplan with a view to restructuring the draft articles (A/CN.4/618)." The paragraph would end with the sentence read out by the Chairperson.

33. Mr. VALENCIA-OSPINA said that for the sake of consistency, in the first sentence of the part of paragraph 7 contained in document A/CN.4/L.750/Add.1, the word "restructured" should be replaced by "revised".

Paragraph 7, as amended, was adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS FIFTH REPORT

Paragraph 8

Paragraph 8 was adopted.

Paragraph 9

34. Mr. PELLET proposed that, at least in the French version of the text, the phrase "*dont la situation juridique créait une fragilité de condition*"—which made little sense—should be replaced by "*que leur situation juridique rendait vulnérables*".

Paragraph 9, as amended, was adopted.

Paragraphs 10 to 16

Paragraphs 10 to 16 were adopted.

Paragraph 17

35. The CHAIRPERSON said that paragraph 17 should be replaced by the following text:

"In his future reports, the Special Rapporteur intended to discuss the problems of disguised expulsion, expulsion on grounds contrary to the rules of international law, conditions of detention and treatment of persons who have been or are being expelled, before turning to procedural questions."

Paragraph 17, as amended, was adopted.

2. SUMMARY OF THE DEBATE (A/CN.4/L.750/Add.1)

36. The CHAIRPERSON invited the Commission to consider document A/CN.4/L.750/Add.1, which contained the continuation of chapter VI, on a paragraph-by-paragraph basis, beginning with paragraph 18, since paragraph 7 had already been adopted.

Paragraphs 18 to 62

Paragraphs 18 to 62 were adopted.

Section B, as amended, was adopted.

Chapter VI, as a whole, as amended, was adopted.

CHAPTER IV. Responsibility of international organizations (A/CN.4/L.748 and Add.1–2 and Add.2/Corr.1)**A. Introduction****B. Consideration of the topic at the present session**

37. The CHAIRPERSON invited the Commission to consider chapter IV of its draft report, entitled "Responsibility of international organizations". Only document A/CN.4/L.748 was available for its consideration at the current meeting.

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Paragraph 8

38. Mr. GAJA (Special Rapporteur) said that, in order to better reflect his own remarks, the following amendments should be incorporated in paragraph 8. In the first sentence, the term "generally" should be inserted before "positive", and at the end of the second sentence, the text following the term "circumstances" should be replaced by "and to clarify the relation existing between the provision of competence to the organization and the commission of the act in question".

Paragraph 8, as amended, was adopted.

Paragraphs 9 to 11

Paragraphs 9 to 11 were adopted.

Paragraph 12

39. Mr. GAJA suggested that the phrase “such as questions of legal personality,” should be deleted, as it gave rise to confusion.

Paragraph 12, as amended, was adopted.

Paragraphs 13 and 14

Paragraphs 13 and 14 were adopted.

Paragraph 15

40. Sir Michael WOOD expressed surprise that the Commission’s report gave no account of its discussion of the Special Rapporteur’s seventh report.

41. Mr. MIKULKA (Secretary to the Commission), supported by Mr. GAJA (Special Rapporteur), said that the Commission normally did not recount discussions that resulted in its adoption of draft articles accompanied by commentaries, since the latter, in essence, summed up its final position.

42. Sir Michael WOOD said that in that case, it was important for the summary records of the Commission’s meetings to be published at the earliest possible date.

Paragraph 15 was adopted.

Paragraphs 16 to 19

Paragraphs 16 to 19 were adopted.

Sections A and B of chapter IV, as amended, were adopted.

CHAPTER V. *Reservations to treaties* (A/CN.4/L.749 and Add.1–7)

43. The CHAIRPERSON invited members of the Commission to take up documents A/CN.4/L.749 and A/CN.4/L.749/Add.3, the only documents available at the current meeting.

A. Introduction (A/CN.4/L.749)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS SIXTY-FIRST SESSION (A/CN.4/L.749/Add.3)

Paragraph 1

Paragraph 1 was adopted.

Commentary to guideline 2.4.0 (Form of interpretative declarations)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

44. Mr. PELLET (Special Rapporteur) said that in the French version of the text, the final sentence should read: “*Son influence effective dépend en effet en grande partie de la diffusion dont elle fait l’objet.*”

Paragraph (2), as amended, was adopted.

Paragraph (3)

45. Mr. PELLET (Special Rapporteur) said that, in the French version, the phrases “*Traduction du Rapporteur spécial*” and “*Traduction en vue du rapport*” should be deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

The commentary to guideline 2.4.0, as amended, was adopted.

Commentary to guideline 2.4.3 bis (Communication of interpretative declarations)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

46. Ms. ESCARAMEIA proposed that, in the final sentence of the English version, the word “invalid” should be replaced by “impermissible”, since the subject was substantive validity, a concept that in English was conveyed by reference to permissibility. It might even be better simply to delete the phrase “and, on the other, an interpretative declaration can only be considered invalid in truly exceptional cases where the treaty itself excludes or circumscribes interpretative declarations”, since the Commission had decided that interpretative declarations were not permissible, not only in the exceptional cases mentioned in paragraph (4), but also when they were contrary to *jus cogens*.

47. Mr. PELLET (Special Rapporteur) proposed that, in the first sentence, the phrase “the depositary should be able to initiate a consultation procedure ... in which case” should be deleted, and that the second sentence should be retained.

48. Sir Michael WOOD suggested that the current wording of the paragraph should be retained, but that in order to take into account Ms. Escarameia’s proposal, the phrase “where the treaty itself excludes or circumscribes interpretative declarations” should be deleted.

49. Mr. PELLET said he could accept that suggestion, but that, in the second sentence, the word “truly”, before “exceptional”, should then be deleted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

50. Ms. ESCARAMEIA proposed the addition of the following sentence: “Some members, however, thought that the meaning of interpretative declarations was often ambiguous, and that therefore statements of reasons would clarify it.”

51. Mr. PELLET (Special Rapporteur) said he could consent to that addition, provided that it was placed at the beginning of paragraph (5), in order to make it clear that that had not been the majority view.

Paragraph (5), as amended, was adopted.

The commentary to guideline 2.4.3 bis, as amended, was adopted.

CHAPTER X. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.754)

52. The CHAIRPERSON invited the Commission to take up document A/CN.4/L.754.

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Chapter X, as a whole, was adopted.

The meeting rose at 5.40 p.m.

3031st MEETING

Tuesday, 4 August 2009, at 3.10 p.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-first session (continued)

CHAPTER V. Reservations to treaties (continued) (A/CN.4/L.749 and Add.1-7)

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (continued)

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS SIXTY-FIRST SESSION [A/CN.4/L.749/ADD.4]

1. The CHAIRPERSON invited the Commission to continue its consideration of chapter V of its draft report and drew attention to the portion of chapter V contained in document A/CN.4/L.749/Add.4.

2. Mr. PELLET (Special Rapporteur) said that in such a lengthy document, despite his own attention to detail and the laudable efforts of his assistants, a few errors had slipped by. The cross references between footnotes were occasionally inaccurate or missing, but such details would be corrected in the final version of the text. References to *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2005 (ST/LEG/SER.E/24)*, the last printed version available, would be replaced by references to the more recent electronic versions. Quotations would be given in the original languages, accompanied by translations into each of the language versions in which they appeared. Lastly, as reflected in the footnote to paragraph 123 of its report on the work of its sixtieth session,²⁹² the Commission had decided that to avoid endless repetition of the word “draft”, the text of the draft guidelines and commentaries thereto should simply refer to “guidelines”, without prejudice to their legal status.

3. The CHAIRPERSON, after consulting with Mr. MIKULKA (Secretary of the Commission), confirmed that the points raised by Mr. Pellet would be taken into account in the preparation of the final version of the report.

Commentary to guideline 2.8.1 (Tacit acceptance of reservations)

Paragraph (1)

Paragraph (1) was adopted.

New paragraph (1 bis)

4. Mr. GAJA proposed that the last two sentences of paragraph (2) of the commentary to guideline 2.8.3 be transferred to form a new paragraph (1 bis) of the commentary to guideline 2.8.1. His reasoning was that the two sentences dealt with tacit acceptance, covered in guideline 2.8.1, as well as express acceptance, the subject of guideline 2.8.3, and were better placed in the earlier commentary.

New paragraph (1 bis) was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

5. Mr. PELLET (Special Rapporteur) said that in the footnote before the quote, the reference should be to paragraph (10) below instead of to paragraph (7).

6. Sir Michael WOOD suggested that the phrase “almost useless clarification” should be replaced by “words”.

7. Mr. PELLET (Special Rapporteur) said that he could agree to that proposal, provided that the above-mentioned footnote was deleted and the reference to paragraph (10) was inserted in the following footnote, at the end of the paragraph.

Paragraph (5), as amended, was adopted.

²⁹² *Yearbook ... 2008*, vol. II (Part Two), p. 69, footnote 227.

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

The commentary to guideline 2.8.1, as a whole, as amended, was adopted.

Commentary to guideline 2.8.2 (Unanimous acceptance of reservations)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

8. Mr. GAJA said that, if the scenario envisaged was that of a State acceding to a treaty already in force, it could, of course, object, as the penultimate sentence said, but its objection would have no effect. In the final sentence, the word “precaution” seemed out of place, and the clause following the dash did not seem to make sense.

9. Ms. ESCARAMEIA said that she had the same problems with the final sentence as Mr. Gaja and thought that the words at the end, “unless it expresses that consent within 12 months following notification of the reservation”, should be deleted.

10. Mr. PELLET (Special Rapporteur) said that he agreed with Mr. Gaja’s remarks on the penultimate sentence, but with neither his nor Ms. Escarameia’s comments on the final sentence. Perhaps “precaution” was not the right word. Still, it was always possible for a State to object, as long as it did so within 12 months, and that was the point that the final clause was intended to convey. It came not from his own report, but from the report of the Drafting Committee, because some of its members had insisted on the point.

11. Mr. GAJA endorsed Ms. Escarameia’s proposal to delete the last clause of the final sentence and suggested that the word “precaution” should be replaced by “step”. The penultimate sentence could be retained, with the addition of wording in the footnote to make it clear that the case envisaged was a possibility, although not a very likely one.

12. Mr. PELLET (Special Rapporteur) suggested that the words “as to the limited effect of such an objection” could be inserted at the beginning of the footnote.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (7)

Paragraphs (6) to (7) were adopted.

The commentary to guideline 2.8.2, as a whole, as amended, was adopted.

Commentary to guideline 2.8.3 (Express acceptance of a reservation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

13. Mr. GAJA said that, since the last two sentences had been transferred to the commentary to guideline 2.8.1, the

second sentence seemed superfluous. It anticipated the later discussion on validity and could safely be deleted.

14. Mr. PELLET (Special Rapporteur) said he would prefer to retain the sentence, as it introduced arguments to be made later, but suggested that it could be put into a footnote, which would also refer back to paragraph (1 *bis*) of the commentary to guideline 2.8.1.

15. Sir Michael WOOD raised the issue of whether the word “validity” should be replaced by “permissibility” in paragraph (2) and in many other provisions.

16. Mr. PELLET (Special Rapporteur) said that, indeed, the term “substantive validity”, and, where appropriate, the term “validity”, should be replaced by “permissibility” throughout the text.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (6)

Paragraphs (3) to (6) were adopted.

Paragraph (7)

17. Mr. GAJA pointed out that the way that the last sentence in the penultimate footnote had been translated from French into English distorted the meaning somewhat. The sentence should read: “This effect may be produced by an acceptance as well as by an objection.”

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

The commentary to guideline 2.8.3, as a whole, as amended, was adopted.

Commentary to guideline 2.8.4 (Written form of express acceptance)

The commentary to guideline 2.8.4 was adopted.

Commentary to guideline 2.8.5 (Procedure for formulating express acceptance)

Paragraph

18. Mr. PELLET (Special Rapporteur), noted that the word “draft” should be deleted wherever it appeared before the word “guideline” or “guidelines”.

The paragraph, as corrected, was adopted.

The commentary to guideline 2.8.5, as corrected, was adopted.

Commentary to guideline 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation)

19. Mr. PELLET (Special Rapporteur) noted that in the French text of the guideline itself the words “*au projet de*” should be deleted and the remaining brackets should be removed.

The correction to the text of guideline 2.8.6 was noted.

The commentary to guideline 2.8.6 was adopted.

Commentary to guideline 2.8.7 (Acceptance of a reservation to the constituent instrument of an international organization)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

20. Mr. PELLET (Special Rapporteur) said that the footnote at the end of the paragraph should be amended to refer to the documents of the Vienna Conference.

Paragraph (4), as amended, was adopted.

Paragraph (5)

21. Mr. GAJA said that the second sentence of paragraph (5) was historically inaccurate. At the 1986 Vienna Conference, there had been a strong tendency to align all the provisions of the 1986 Vienna Convention with the 1969 Vienna Convention. The commentary should therefore merely state that the Commission had inserted paragraph 3 of article 20 and article 5 and that the Vienna Conference had followed suit.

22. Mr. PELLET (Special Rapporteur) said that the necessary research would be done to clarify the point.

Paragraph (5) was adopted, subject to the requisite editorial adjustments.

Paragraphs (6) to (9)

Paragraphs (6) to (9) were adopted.

The commentary to guideline 2.8.7, as a whole, as amended, was adopted.

Commentary to guideline 2.8.8 (Organ competent to accept a reservation to a constituent instrument)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

23. Mr. GAJA said that the commentary slightly contradicted the text of the guideline, which placed three different organs on the same level. Since that was the case, the phrase “in the absence of a formal admissions procedure” should be deleted from the commentary, because its retention would introduce a hierarchy among those organs, in that it suggested that the organ that decided on the reserving State’s admission took precedence over the organs competent to amend the organization’s constituent instrument or to interpret it.

24. Mr. PELLET (Special Rapporteur) agreed to that amendment.

25. Sir Michael WOOD said that it would be easier to avoid that contradiction by deleting the last sentence and retaining the phrase “in the absence of a formal admission procedure”, which was meaningful.

26. Mr. GAJA, supported by Mr. PELLET (Special Rapporteur) said that, if the commentary were to be amended as suggested by Sir Michael Wood, it would no longer be consistent with the text of the guideline because it would, in fact, introduce a hierarchy of organs.

27. The CHAIRPERSON said he took it that the Commission wished to delete the phrase, “in the absence of a formal admission procedure”, as proposed by Mr Gaja.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The commentary to guideline 2.8.8, as a whole, as amended, was adopted.

The portion of chapter V contained in document A/CN.4/L.749/Add.4, as a whole, as amended, was adopted.

CHAPTER IV. *Responsibility of international organizations (continued)* (A/CN.4/L.748 and Add.1–2 and Add.2/Corr.1)

C. *Text of the draft articles on responsibility of international organizations adopted by the Commission on first reading*

2. *TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO* (A/CN.4/L.748/Add.2 and Corr.1)

28. The CHAIRPERSON invited the members of the Commission to resume their consideration of chapter IV of the draft report. He drew attention to the portion of the chapter contained in document A/CN.4/L.748/Add.2 and Corr.1, setting out the commentaries to the draft articles which were to be found in document A/CN.4/L.748/Add.1.

29. Sir Michael WOOD noted that the commentaries to the draft articles on the responsibility of international organizations were much shorter than the detailed commentaries to the draft articles on the responsibility of States for internationally wrongful acts,²⁹³ even where the language of the draft articles was similar. For example, the commentary to draft article 13 (Aid or assistance in the commission of an internationally wrongful act) was very brief, whereas the commentary to the corresponding article on State responsibility contained pages of very interesting background material that elucidated the concept of “aid” or “assistance”.²⁹⁴ He therefore suggested the insertion somewhere in the text, or in a footnote, of the following sentence: “To the extent that the present articles are based on those on the responsibility of States for internationally wrongful acts, reference may also be made to the commentaries to those earlier articles.” That sentence would be a useful pointer to the reader, or to a judge in an English court, for example, since it would explain that it might be relevant to refer to the commentaries to the articles on State responsibility.

30. Mr. VALENCIA-OSPINA said that, given the size of the document to be considered, he wondered if it was really necessary to readopt those commentaries which, to large extent, reproduced those on the articles on State

²⁹³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77.

²⁹⁴ *Ibid.*, commentary to article 16, pp. 65–67.

responsibility. Perhaps the Commission could simply concentrate on those which were new.

31. Mr. GAJA (Special Rapporteur) said that, although the second proposal was tempting, the articles had been restructured to some extent and some modifications had been made to them. If members had any concerns about the substance of any of the paragraphs in the commentaries, they should raise those concerns. Nevertheless, he urged members to exercise self-restraint and to pass any minor editorial changes to the Secretariat.

32. He was not enthusiastic about the first proposal. He had tried to pick out some essential points from the earlier commentaries, but he had often been unable to refer to practice, as the earlier commentaries had pertained to practice in relation to States. It would not be a good idea to make a general statement, as it would reinforce the idea that the Commission was merely engaging in an exercise to replace a few words here and there. It might, however, be possible to say in a footnote that, where appropriate, additional reference could be made to the commentaries to the articles on State responsibility.

33. Sir Michael WOOD said that he would be quite happy with the inclusion somewhere of the statement that reference might, where appropriate, be made to the commentaries to the articles on State responsibility.

34. Mr. GAJA (Special Rapporteur) suggested that the best place for that statement would be in the first footnote to paragraph (1) of the commentary to article 3. It could be inserted before the reference to “the classical analysis”.

35. Mr. VASCIANNIE said that he was not convinced that the Commission needed to help Sir Michael in that way. In some instances the provisions were analogous with the articles on State responsibility, in others they were not. He saw no reason to include a general statement that leaned towards one perspective, when in fact it was the job of lawyers in English courts to make the case that a particular provision was of relevance.

36. Mr. GAJA (Special Rapporteur) explained that the idea was not to make a general reference in the body of the commentaries themselves, but to use the language initially suggested by Sir Michael with the addition of the phrase “where appropriate” in the first footnote to paragraph (1) of the commentary to article 3. In that way, the Commission would not give the impression that all the commentaries on State responsibility were relevant to the responsibility of international organizations.

37. Ms. ESCARAMEIA said that she agreed with Mr. Vasciannie. The Commission had not examined the commentaries on State responsibility one by one to see which were applicable, possibly with some amendment, to the responsibility of international organizations. Such references to the articles on State responsibility, as had been incorporated in the commentaries currently before the Commission, sufficed. A general comment along the lines proposed by Sir Michael would be dangerous, because the responsibility of international organizations differed greatly from that of State responsibility, even though there might be some ostensible similarities. She

was therefore against the inclusion of the proposed wording, even in a footnote.

38. Mr. VASCIANNIE said that he remembered some of the discussions that had taken place on countermeasures and self-defence, where major differences had come to light. Where the Commission contemplated applying the same rules as those pertaining to State responsibility, that point could be made in the commentary and that should be sufficient for Sir Michael’s purposes. In other instances, the matter had not been expressly considered and the Commission should not therefore create a presumption that the rules on the responsibility of international organizations were analogous to those on State responsibility.

39. Sir Michael WOOD said that he was not trying to create such a presumption. The commentary to draft article 13 referred to “[t]he application to an international organization of a provision corresponding to article 16 on the responsibility of States for internationally wrongful acts”. That was why he was suggesting the inclusion, somewhere in the commentary, of the sentence: “To the extent that the present articles correspond to those on the responsibility of States for internationally wrongful acts, reference may be made, where appropriate, to the commentaries on those earlier articles.” The alternative would be to introduce large parts of the previous commentaries into the commentaries on the responsibility of international organizations. He would be quite happy to do so, although it would be a major task.

40. Mr. HMOUD said that there was merit in both points of view. He wondered if the Special Rapporteur was happy with the commentaries as they stood, or if he regarded the commentary to draft article 13 as inadequate. Did he think that it would be advisable to include more of the material from the commentaries to the articles on State responsibility? If the Special Rapporteur had stunted on references to the commentaries to the articles on State responsibility in the commentaries to specific draft articles on the responsibility of international organizations, the point made by Sir Michael was valid. If, however, the Special Rapporteur thought that the commentaries to the draft articles on the responsibility of international organizations were sufficient by themselves, no reference to the commentaries to the articles on State responsibility was needed.

41. Mr. GAJA (Special Rapporteur) said that he had tried not to reproduce the commentaries on State responsibility *in extenso*. In some cases he had summarized their content, in others he had highlighted certain points and in yet others he had introduced slightly different wording. Draft article 13 was an example where the commentary was extremely brief because there was nothing specific to add. In his opinion, it contained an implied reference, since it was unnecessary to spell out everything in detail. He realized that English judges liked to have express wording on which to base their decisions. The problem encountered by the Commission in the current context therefore stemmed from the different legal traditions in the world. In the Italian legal tradition, there would be no need for a specific reference in a footnote. If, however, members considered that such a reference was necessary, it would do no harm if it were carefully worded and included the phrase “where appropriate”.

42. Mr. McRAE said he agreed with Ms. Escameia that, unless the Commission went through the commentary to the articles on State responsibility and decided exactly which parts should be included in the commentary to the draft articles on the responsibility of international organizations, it would be unclear what was being incorporated if the general statement proposed by Sir Michael were inserted. The phrase “where appropriate” might do no harm, but it would not necessarily help English judges to decide what was relevant. They would still have to reach their own conclusion in the light of the arguments put forward by counsel. For that reason, the Special Rapporteur’s suggestion that the proposed wording, with the qualifying phrase “where appropriate”, could be put in a footnote as far as he personally was prepared to go.

43. The CHAIRPERSON said he took it that the Commission wished to include the proposed wording with the qualifying phrase “where appropriate” in the first footnote to paragraph (1) of the commentary to draft article 3.

It was so decided.

PART ONE. INTRODUCTION

Commentary to article 1 (Scope of the present draft articles)

The commentary to article 1 was adopted.

Commentary to article 2 (Use of terms)

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

Paragraph (14)

44. Mr. McRAE said that the third sentence, which read “In the application of these principles and rules, the specific, factual or legal, circumstances pertaining to the international organization concerned may be of some relevance”, should be stronger. He therefore suggested that the sentence should be recast to read: “The principles and rules set out in these draft articles are to be applied in the light of the specific factual or legal circumstances pertaining to the international organization concerned.” That would reflect more closely the discussion in the Drafting Committee.

45. Mr. GAJA (Special Rapporteur) said that the existing text attempted to balance opposing views expressed in the Drafting Committee. He could accept the proposed amendment, since it was followed by an example that was not open to question. His only concern was that the commentary should not be phrased in such a way that an organization might claim exemption from any particular rule simply because it did not suit that organization.

46. Mr. HMOUD said that the proposed amendment was acceptable so long as it did not give the impression that the draft articles applied only when the legal or technical facts relating to an organization made them applicable to that organization. As an alternative, he would suggest that the original sentence could be retained with the deletion of the word “some” from the phrase “of some relevance”. However the provision was phrased, the message should be that the draft articles applied at all times.

47. Mr. McRAE said that his proposed wording—“... applied in the light of ...”—achieved the balance sought by Mr. Gaja. Another way to achieve that balance would be to replace the words “may be of some relevance” by “are relevant”. The factual and legal circumstances were necessarily relevant in the application of the principles and rules of the draft articles.

48. Mr. GAJA (Special Rapporteur) said that the reason for the wording “may be” was that, for the majority of the draft articles, the specific circumstances were immaterial: for instance, if an organization breached an obligation, that breach entailed responsibility. However, he could accept the amendment. The commentary could convey the idea that the draft articles were relevant “where appropriate” without using that phrase, simply by the examples that followed.

49. Mr. VASCIANNIE said that the existing text accurately reflected the outcome of the long discussion in the Drafting Committee and should be retained.

50. Sir Michael WOOD said that, knowing that the Special Rapporteur had undertaken to include such a sentence, he had been surprised to find it buried in paragraph (14) of the commentary to draft article 3 and to find it rather weak. He would therefore support either of the formulations suggested by Mr. McRae. Alternatively, the phrase “may be of some relevance” might be replaced by the phrase “should be taken into account where appropriate”.

Paragraph (14), as amended, was adopted.

Paragraphs (15) to (20)

Paragraphs (15) to (20) were adopted.

The commentary to article 2, as a whole, as amended, was adopted.

PART TWO. THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I. GENERAL PRINCIPLES

General commentary

The general commentary to Part Two, chapter I, was adopted.

Commentary to article 3 (Responsibility of an international organization for its internationally wrongful acts)

Paragraph (1)

51. The CHAIRPERSON recalled the amendment decided on earlier to the first footnote to the paragraph.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were adopted.

The commentary to article 3, as a whole, as amended, was adopted.

Commentary to article 4 (Elements of an internationally wrongful act of an international organization)

The commentary to article 4 was adopted.

CHAPTER II. ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

General commentary

The general commentary to Part Two, chapter II, was adopted.

Commentary to article 5 (General rule on attribution of conduct to an international organization)

The commentary to article 5 was adopted.

Commentary to article 6 (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

52. Sir Michael WOOD proposed that, in the penultimate sentence, after the words “[o]ne may note that”, the following phrase should be inserted: “the Court was addressing the question of its own jurisdiction and that”. It was an important point that had been made during the debate in the Drafting Committee, in that the case was different from the kind that the Commission had had in mind when it drafted the article.

53. Mr. GAJA (Special Rapporteur) said that he had no objection to the proposed addition. He had not stressed the issue in the commentary, since he could not see the connection between the two elements. True, the Court had had to examine its jurisdiction, but it had considered the problem of “ultimate” control independently of that issue.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (14)

Paragraphs (10) to (14) were adopted.

The commentary to article 6, as a whole, as amended, was adopted.

Commentary to article 7 (Excess of authority or contravention of instructions)

The commentary to article 7 was adopted.

Commentary to article 8 (Conduct acknowledged and adopted by an international organization as its own)

The commentary to article 8 was adopted.

CHAPTER III. BREACH OF AN INTERNATIONAL OBLIGATION

General commentary

The general commentary to Part Two, chapter III, was adopted.

Commentary to article 9 (Existence of a breach of an international organization)

The commentary to article 9 was adopted.

Commentary to article 10 (International obligation in force for an international organization)

The commentary to article 10 was adopted.

Commentary to article 11 (Extension in time of the breach of an international organization)

The commentary to article 11 was adopted.

Commentary to article 12 (Breach consisting of a composite act)

The commentary to article 12 was adopted.

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

General commentary to Part Two, chapter IV

The general commentary to Part Two, chapter IV, was adopted.

Commentary to article 13 (Aid or assistance in the commission of an internationally wrongful act)

The commentary to article 13 was adopted.

Commentary to article 14 (Direction and control exercised over the commission of an internationally wrongful act)

The commentary to article 14 was adopted.

Commentary to draft article 15 (Coercion of a State or another international organization)

The commentary to article 15 was adopted.

Commentary to article 16 (Decisions, recommendations and authorizations addressed to member States and international organizations)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

54. Sir Michael WOOD said that, in the last sentence, the clause “if the threshold of international responsibility is advanced” was obscure. He proposed that it should be replaced by the clause “if international responsibility arises at the time of the taking of the decision”.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (13)

Paragraphs (6) to (13) were adopted.

The commentary to article 16, as a whole, as amended, was adopted.

Commentary to article 17 (Responsibility of an international organization member of another international organization)

The commentary to article 17 was adopted.

Commentary to article 18 (Effect of this chapter)

The commentary to article 18 was adopted.

CHAPTER V. CIRCUMSTANCES PRECLUDING WRONGFULNESS

General commentary

The general commentary to Part Two, chapter V, was adopted.

Commentary to article 19 (Consent)

The commentary to article 19 was adopted.

Commentary to article 20 (Self-defence)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

55. Sir Michael WOOD said that the phrase “in a wider sense” in the first sentence should be replaced by “in a different sense”, in order to indicate that the term “self-defence” was not being used in the sense in which it was used in Article 51 of the Charter of the United Nations.

56. Mr. KOLODKIN said that he was troubled by the word “different”. He suggested that the words “in a wider sense” should be deleted altogether, so that the phrase would read: “the term ‘self-defence’ has often been used with regard to situations other than those contemplated in Article 51”.

57. Sir Michael WOOD said that, in the penultimate sentence, the words “cases which go well beyond” should be replaced by “cases other than”.

Paragraph (3), as amended by Mr. Kolodkin and Sir Michael Wood, respectively, was adopted.

Paragraph (4)

58. Sir Michael WOOD said that, in the second sentence, the words “has become the object of an armed attack” should be replaced by “is the object of an armed attack”.

59. Ms. JACOBSSON (Rapporteur) said that the proposed amendment changed the meaning of the sentence. She asked whether it was acceptable to the Special Rapporteur.

60. Mr. CAFLISCH said that, even if the English text was changed, the French should remain unchanged. The phrase “*a fait l'objet*” conveyed either of the English versions.

61. Mr. GAJA (Special Rapporteur) said that he had taken Sir Michael’s suggestion to be a simple stylistic improvement. He hoped that someone could explain the implications.

62. Sir Michael WOOD said that the change would avoid any implication that the armed attack in question had to have occurred before the self-defence was engaged in. The word “is” was neutral on that issue and related to the phrase “if an armed attack occurs” in Article 51 of the Charter of the United Nations.

63. Mr. McRAE said that, if the change was made, the phrase “is given the power to act” should be replaced by “has been given the power to act”.

64. Mr. VASCIANNIE said that the Commission should retain the phrase “has become”.

65. Sir Michael WOOD proposed that the entire clause should read: “when one of its members is the object of an armed attack and the international organization has the power to act in collective self-defence”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to article 20, as a whole, as amended, was adopted.

Commentary to article 21 (Countermeasures)

Paragraphs (1) and (2)

66. Mr. GAJA (Special Rapporteur) said that the reference in paragraph (1), and the two references in paragraph (2), to “articles 57 to 62” were incorrect and in each case should read “articles 50 to 56”.

Paragraphs (1) and (2), as corrected, were adopted.

Paragraphs (3) and (4)

67. Ms. ESCARAMEIA said that, although the commentary was written in a style that implied a consensus, in a set of draft articles adopted on first reading there was, she believed, scope for indicating areas in which strongly divergent views had been expressed. Such had been the case with the issue of countermeasures, as evidenced by the fact that it had been necessary to set up a working group to address it.²⁹⁵ In order to reflect that controversy, she wondered whether members might agree to an addition, to be placed before the first sentence in paragraph (4), along the following lines: “There was a view among members of the Commission that countermeasures taken by an injured international organization against one of its members should not be allowed. However, a majority of the members had considered that such a possibility existed within certain limits.”

68. Mr. GAJA (Special Rapporteur) said that, although he had no objection to registering the existence of divergent views on a particular matter, he had not understood the view in the Drafting Committee to be that countermeasures should never be taken by an international organization against its members. To his recollection, the Drafting Committee had primarily discussed the reverse situation, that of countermeasures taken against an international organization by its members. Despite the fact that some members had argued against formulating any articles on countermeasures whatsoever or had advocated greater limitations than the ones that were ultimately accepted, consensus had been reached on the text as it currently stood. That said,

²⁹⁵ *Yearbook ... 2008*, vol. II (Part Two), pp. 106–107, paras. 128–131 and pp. 109–110, paras. 148–153.

he would not object if members wished to register their opposition in the commentary but thought that it should be placed in paragraph (3), which dealt more generally with the question of countermeasures taken against the members of an international organization. He would suggest following the usual procedure, which was to draft a proposed text, decide on its placement and then proceed to its adoption.

69. The CHAIRPERSON said he took it that the Commission wished to defer the adoption of paragraph (3) until the proposed additional text had been formulated and inserted.

It was so decided.

70. Sir Michael WOOD proposed that in the first sentence of paragraph (4), in order to temper the wording of the phrase “two additional conditions are required”, which sounded somewhat too definite, the phrase should read “it is proposed that two additional conditions be required”.

71. Mr. GAJA (Special Rapporteur) said that Sir Michael’s proposal struck him as unusual, since all the draft articles constituted proposals, and the Commission was certainly not setting binding rules. It was merely indicating the way in which the matter should be regulated. That said, if the phrase “two additional conditions are required” was too firm, he would not object to replacing the word “required” by “listed”.

Paragraph (4), as amended by the Special Rapporteur, was adopted.

Paragraph (5)

72. Ms. ESCARAMEIA said that she applauded the skillful wording of the second sentence but would like to see the aspect of timeliness as it related to the term “appropriate means” made more explicit. Alongside proportionality and effectiveness, the means to which an international organization would have recourse before resorting to countermeasures against its members had to be available within a reasonable period of time. In order to convey that more explicitly, she proposed inserting the words “timely and” before “proportionate”.

73. Mr. McRAE said that if Ms. Escarameia’s proposal was accepted, the word “[h]owever” in the next sentence ought to be deleted, because that sentence also contained the word “timely”, and it would not make sense to begin the sentence with a contrasting conjunction.

74. Mr. GAJA (Special Rapporteur) said that it would be unfortunate to repeat the word “timely”, since it would mean using the same word to convey two different meanings. In one instance, it would refer to the fact that the means should be available without delay and, in the other, that they should be implemented without delay.

75. Mr. VASCIANNIE said that he objected to the use of the word “timely” in two places with two different meanings and would prefer to retain the original wording.

76. Mr. PERERA suggested that Ms. Escarameia’s concern might be met by the insertion of the word “expeditious” or the phrase “provide expeditious relief”.

77. Mr. GAJA (Special Rapporteur) said that the concern was not that the remedies themselves should be expeditious but that they should be readily available. He therefore suggested inserting the words “readily available and” before “proportionate”.

Paragraph (5), as amended by the Special Rapporteur, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Adoption of the commentary to article 21, as a whole, was deferred.

Commentary to article 22 (Force majeure)

The commentary to article 22 was adopted.

Commentary to article 23 (Distress)

The commentary to article 23 was adopted.

Commentary to article 24 (Necessity)

The commentary to article 24 was adopted.

Commentary to article 25 (Compliance with peremptory norms)

The commentary to article 25 was adopted.

Commentary to article 26 (Consequences of invoking a circumstance precluding wrongfulness)

The commentary to article 26 was adopted.

PART THREE. CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

General commentary to Part Three

The general commentary to Part Three was adopted.

CHAPTER I. GENERAL PRINCIPLES

Commentary to article 27 (Legal consequences of an internationally wrongful act)

The commentary to article 27 was adopted.

Commentary to article 28 (Continued duty of performance)

The commentary to article 28 was adopted.

Commentary to article 29 (Cessation and non-repetition)

The commentary to article 29 was adopted.

Commentary to article 30 (Reparation)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

78. Sir Michael WOOD queried the accuracy of the second sentence, which seemed to equate the breach of aiding and assisting the commission of a wrongful act with that of the commission of a wrongful act.

79. Mr. GAJA (Special Rapporteur) said that the idea conveyed by the second sentence was that, while the principle of full reparation clearly applied to an entity that was solely responsible for an internationally wrongful act, that principle did not necessarily apply in the case in which more than one entity bore responsibility, since each could have had a different degree of involvement and thus a different extent of responsibility. In other words, all responsible entities were not necessarily required to provide full reparation. To his recollection, the question had not been dealt with in the articles on State responsibility with any thoroughness. In his view, the sentence in question did contribute to an understanding of how the principle of full reparation worked. On the other hand, if the problem was one of language, he would welcome suggestions for its improvement.

80. Sir Michael WOOD proposed that the second sentence should state: "... when the organization is held responsible in connection with a certain act together with one or more States or one or more other organizations ...".

81. Mr. GAJA (Special Rapporteur) said that he could accept Sir Michael's proposed amendment, since it would cover the example cited in the second sentence of aiding or assisting in the commission of a wrongful act and would not preclude further developments of the issue in the future.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to article 30 as a whole, as amended, was adopted.

Commentary to article 31 (Irrelevance of the rules of the organization)

The commentary to article 31 was adopted.

Commentary to article 32 (Scope of international obligations set out in this Part)

The commentary to article 32 was adopted.

CHAPTER II. REPARATION FOR INJURY

Commentary to article 33 (Forms of reparation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

82. Sir Michael WOOD asked whether the last sentence added anything useful, since it almost cast doubt on whether satisfaction was a form of reparation and did not seem to fit in with the rest of the paragraph.

83. Mr. GAJA (Special Rapporteur) said that it was important to include that sentence because, in one of the few examples of practice, cited in the paragraph, the Director General of the International Atomic Energy Agency had referred to satisfaction as being distinct from reparation, placing it in a different category than the one

used in the articles on State responsibility, where the Commission had defined satisfaction as a form of reparation.²⁹⁶ However, he would be willing to move the last sentence to a footnote.

Paragraph (2), as amended, was adopted.

The commentary to article 33 as a whole, as amended, was adopted.

Commentary to article 34 (Restitution)

The commentary to article 34 was adopted.

Commentary to article 35 (Compensation)

The commentary to article 35 was adopted.

Commentary to article 36 (Satisfaction)

The commentary to article 36 was adopted.

Commentary to article 37 (Interest)

The commentary to article 37 was adopted.

Commentary to article 38 (Contribution to the injury)

The commentary to article 38 was adopted.

Commentary to article 39 (Ensuring the effective performance of the obligation of reparation)

The commentary to article 39 was adopted.

CHAPTER III. SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Commentary to article 40 (Application of this chapter)

The commentary to article 40 was adopted.

Commentary to article 41 (Particular consequences of a serious breach of an obligation under this chapter)

The commentary to article 41 was adopted.

PART FOUR. THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

General commentary to Part Four

The general commentary to Part Four was adopted.

CHAPTER I. INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Commentary to article 42 (Invocation of responsibility by an injured State or international organization)

The commentary to article 42 was adopted.

Commentary to article 43 (Notice of claim by an injured State or international organization)

The commentary to article 43 was adopted.

Commentary to article 44 (Admissibility of claims)

The commentary to article 44 was adopted.

²⁹⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 95, commentary to article 34, paragraph (2).

Commentary to article 45 (Loss of the right to invoke responsibility)

The commentary to article 45 was adopted.

Commentary to article 46 (Plurality of injured States or international organizations)

The commentary to article 46 was adopted.

Commentary to article 47 (Plurality of responsible States or international organizations)

84. Mr. GAJA (Special Rapporteur) said that in the text of the draft article itself, the word “draft” should be deleted from paragraph 2.

The correction to the text of article 47 was noted.

The commentary to article 47 was adopted.

Commentary to article 48 (Invocation of responsibility by a State or an international organization other than an injured State or international organization)

85. Mr. GAJA (Special Rapporteur) said that in paragraph 3 of the text of the draft article itself, the phrase “that is not” should be replaced by “other than” in order to align it with the wording used in paragraphs 1 and 2. In addition, the word “draft” had mistakenly been left in the text in paragraphs 4 (a) and 5 but should be deleted.

The corrections to the text of article 48 were noted.

The commentary to article 48 was adopted.

The meeting rose at 6.05 p.m.

3032nd MEETING

Wednesday, 5 August 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-first session (continued)

CHAPTER IV. *Responsibility of international organizations (concluded)* (A/CN.4/L.748 and Add.1–2 and Add.2/Corr.1)

C. **Text of the draft articles on responsibility of international organizations adopted by the Commission on first reading (concluded)**

2. **TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (concluded)** (A/CN.4/L.748/Add.2 and Corr.1)

PART FOUR. THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION (*concluded*)

CHAPTER I. INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION (*concluded*)

Commentary to article 49 (Scope of this Part)

The commentary to article 49 was adopted.

CHAPTER II. COUNTERMEASURES

Commentary to article 50 (Object and limits of countermeasures)

The commentary to article 50 was adopted.

Commentary to article 51 (Countermeasures by members of an international organization)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

1. Ms. ESCARAMEIA suggested that, in order to reflect the Commission’s heated debate over the issue of countermeasures, a sentence similar to the one added to the commentary to article 21 (Countermeasures) should be inserted, indicating that some members thought that members of an international organization should never be authorized to take countermeasures against the organization.

2. Mr. VASCIANNIE said that the phrase proposed by Ms. Escarameia should be worded in such a way as to make it clear that the point of view had been expressed by a minority of members.

3. The CHAIRPERSON suggested using the phrase “a view was expressed”.

4. Mr. GAJA (Special Rapporteur) endorsed this proposal and said that the phrase should be inserted at the end of the paragraph. The same wording, “a view was expressed”, should also be used in the commentary to article 21 (Countermeasures).

5. He outlined for members of the Commission the written comments provided to him by Mr. Nolte, who was absent from that meeting. Mr. Nolte had pointed out that the second sentence of paragraph (3) might in some respects appear to contradict what was said later regarding the principle of cooperation. For international organizations, that principle was not merely a general principle or a duty to cooperate, but a specific treaty-based obligation arising from membership of the organization, as the ICJ had pointed out in paragraph 43 of its advisory opinion of 20 December 1980, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*. The advisory opinion stated that “[t]he very fact of Egypt’s membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization.” A reference to that statement might be included in paragraph (3).

6. He himself did not think that there was really a contradiction in paragraph (3), where two distinct points

were made: first, that it was impossible to find a general basis for the exclusion of countermeasures in the relations between an international organization and its members, and secondly, that the principle of cooperation had an impact on whether countermeasures could be taken, but did not totally exclude them. While he was not against a reference to paragraph 43 of the advisory opinion, he thought that it should be included in a footnote, to be placed at the end of the paragraph.

7. The CHAIRPERSON said he took it that the Commission wished to endorse Mr. Gaja's proposals.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

The commentary to article 51, as amended, was adopted.

Commentary to article 52 (Obligations not affected by countermeasures)

The commentary to article 52 was adopted.

Commentary to article 53 (Proportionality)

The commentary to article 53 was adopted.

Commentary to article 54 (Conditions relating to resort to countermeasures)

The commentary to article 54 was adopted.

Commentary to article 55 (Termination of countermeasures)

The commentary to article 55 was adopted.

Commentary to article 56 (Measures taken by an entity other than an injured State or international organization)

The commentary to article 56 was adopted.

PART FIVE. RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF AN INTERNATIONAL ORGANIZATION

General commentary

The general commentary was adopted.

Commentary to article 57 (Aid or assistance by a State in the commission of an internationally wrongful act by an international organization)

The commentary to article 57 was adopted.

Commentary to article 58 (Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization)

The commentary to article 58 was adopted.

Commentary to article 59 (Coercion of an international organization by a State)

The commentary to article 59 was adopted.

Commentary to article 60 (Responsibility of a member State seeking to avoid compliance)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

8. Sir Michael WOOD proposed that the second sentence be deleted since it was, to say the least, unclear.

9. Mr. GAJA (Special Rapporteur) said that he had no objection, since the sentence said the same thing as the first, but in a different way.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

The commentary to article 60, as amended, was adopted.

Commentary to article 61 (Responsibility of a State member of an international organization for the internationally wrongful act of that organization)

Paragraph (1)

10. Mr. Gaja (Special Rapporteur) said that in the first line of the English version, the word "draft" should be deleted.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (13)

Paragraphs (2) to (13) were adopted.

The commentary to article 61, as amended, was adopted.

Commentary to article 62 (Effect of this Part)

The commentary to article 62 was adopted.

PART SIX. GENERAL PROVISIONS

General commentary

The general commentary was adopted.

Commentary to article 63 (Lex specialis)

11. Mr. Gaja said that in the penultimate line of the English text, the words "between an international organization" should be replaced by "between the international organization".

It was so decided.

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to article 63 was adopted.

Commentary to article 64 (Questions of international responsibility not regulated by these articles)

The commentary to article 64 was adopted.

Commentary to article 65 (Individual responsibility)

The commentary to article 65 was adopted.

Commentary to article 66 (Charter of the United Nations)

The commentary to article 66 was adopted.

Section C.2, as reproduced in document A/CN.4/L.748/Add.2 and Corr.1, as a whole, as amended, was adopted.

1. TEXT OF THE DRAFT ARTICLES [A/CN.4/L.748/Add.1]

12. The CHAIRPERSON invited the members of the Commission to consider the text of the draft articles on responsibility of international organizations adopted by the Commission on first reading, which formed section C.1 of chapter IV of the Commission's draft report and was contained in document A/CN.4/L.748/Add.1.

13. Mr. GAJA (Special Rapporteur) recalled that the Commission had decided to delete the word "draft" in article 47, paragraph 2, article 48, paragraphs 4 and 5, and article 61, paragraph 1; replace the words "that is not" by "other than" in article 48, paragraph 3; replace "an" by "the" after the word "between" in the penultimate line of article 63; and replace "the" by "these" in article 66.

14. Sir Michael WOOD proposed that the title of article 16 should be amended to read "Decisions, authorizations and recommendations addressed to member States and international organizations", to reflect the word order in the article itself.

It was so decided.

Section C.1, as reproduced in document A/CN.4/L.748/Add.1, as a whole, as amended, was adopted.

Chapter IV, as a whole, as amended, was adopted.

CHAPTER VII. Protection of persons in the event of disasters (A/CN.4/L.751)

15. The CHAIRPERSON invited the members of the Commission to consider chapter VII of its draft report, contained in document A/CN.4/L.751, paragraph by paragraph.

Paragraphs 1 to 14

Paragraphs 1 to 14 were adopted.

Paragraph 15

16. Ms. ESCARAMEIA said that she was one of the members whose views had been recorded in paragraph 15; the end of the first sentence, after the words "each concept", was difficult to understand and did not correspond to what she had said. She proposed that it should be deleted and the first two sentences combined, to read: "Other members disagreed with the equation of 'rights' and 'needs', maintaining that while 'rights' referred to a legal concept, 'needs' implied a reference to particular factual situations."

Paragraph 15, as amended, was adopted.

Paragraph 16

17. Mr. GAJA, recalling that the views mentioned in the last two sentences of paragraph 16 were his, said that the words "did not comply with the obligation not to reject" should be replaced by "unreasonably rejected", and that in the final sentence the phrase, "bear in mind" should be replaced by "address".

It was so decided.

18. Ms. ESCARAMEIA proposed that the following sentence be inserted at the end of paragraph 16: "Others thought that the rights-based approach did not preclude any of the above-mentioned considerations and merely placed the individual at the centre of the efforts of all those involved."

19. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the arguments put forward in favour of the rights-based approach were set out in paragraph 13; in his view, the sentence proposed by Ms. Escarameia should be inserted in that paragraph, not in paragraph 16, which covered the arguments against that approach.

20. Ms. JACOBSSON (Rapporteur) said that the sentence could be added to paragraph 13, preceded by the words "It was pointed out that".

21. Ms. ESCARAMEIA said that the sentence she was proposing referred to the arguments developed in paragraph 16, as indicated by the words "the above-mentioned considerations", and would therefore be meaningless if separated from that paragraph.

22. Mr. GAJA, supported by Ms. JACOBSSON (Rapporteur), suggested that the sentence be made into a new paragraph 16 *bis*.

23. Mr. WAKO said that while he endorsed the sentence Ms. Escarameia proposed to add, he would like reference also to be made to collective rights. As paragraph 13 indicated, it was not solely individual rights that were "at the centre of the efforts of all those involved".

24. Mr. VALENCIA-OSPINA (Special Rapporteur), supported by Mr. WISNUMURTI, said that the sentence proposed by Ms. Escarameia should be inserted at the beginning of paragraph 13, rather than at the end.

25. Ms. ESCARAMEIA said that if the sentence were inserted in paragraph 13, it would make no sense. In her view, the best solution would be to adopt a paragraph 16 *bis*; if that were not possible she would withdraw her proposal.

26. Mr. VALENCIA-OSPINA (Special Rapporteur) said that Ms. Escarameia's suggestion should be taken up: he was in favour of creating a paragraph 16 *bis*.

27. Mr. WAKO said that while he did not entirely approve of that solution, he was prepared to accept it. Perhaps, however, Ms. Escarameia could agree to refer in her proposal not only to individual rights but also to collective rights.

28. Ms. ESCARAMEIA said that the issue in question was not one of individual rights as opposed to collective rights. Moreover, the issue of collective rights had not been raised during the discussion.

29. Mr. SABOIA said that collective rights were discussed at length in paragraph 13 of the report, and that should satisfy Mr. Wako.

Paragraph 16, as amended, and paragraph 16 bis, were adopted.

Paragraph 17

30. Mr. VASCIANNIE said that he was not convinced that the paragraph, as it stood, fully reflected what had been said during the discussion on the possibility of intervention. He therefore put forward the following sentence: "According to some, the rights-based approach did not suggest that forceful intervention to provide humanitarian assistance in disaster situations was lawful."

31. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, for reasons of consistency, a paragraph 17 *bis* should be added to accommodate Mr. Vasciannie's proposal.

32. Sir Michael WOOD said that he was not entirely satisfied with the sentence, since the words "according to some" suggested that others thought that forceful intervention was lawful. That was not at all the case; the proposed wording was extremely problematic.

33. Mr. MELESCANU said that paragraph 17 of the report had been drafted very carefully, and the wording was balanced. The term "non-applicability" meant that one acknowledged the existence of the concept of responsibility to protect, yet agreed that it was not applicable, whereas Mr. Vasciannie's proposal alluded to the unlawful nature of that approach. In his view, the Commission should incorporate Mr. Vasciannie's suggestion into the current version of the paragraph, with the necessary editorial changes, rather than add a new paragraph. The important thing was to maintain a balance between the two parts of the sentence, leaving open the option of taking a decision on the concept in the future.

34. Mr. McRAE said that Mr. Vasciannie's proposal did indeed reflect the actual discussion. He proposed that the expression "according to some" should be replaced by "the view was expressed that", which simply indicated that the view had been expressed during the discussion. 35. Ms. JACOBSSON (Rapporteur) said that paragraph 17 had been carefully drafted. In reality, it covered a slightly different issue than the one addressed in Mr. Vasciannie's proposal. While it was true that the view in question had been expressed, it was also true that during the discussion, some other members had not necessarily drawn a link between responsibility to protect and forceful intervention. Associating the two concepts in a single paragraph implied that such a link existed, which was not the case. She urged, therefore, that Mr. Vasciannie's proposal should be reflected in a different paragraph.

36. Following a discussion in which Sir Michael WOOD, Mr. SABOIA, Mr. VASCIANNIE, Mr. CANDIOTI and Mr. VALENCIA-OSPINA (Special Rapporteur) took part, it was decided to include Mr. Vasciannie's proposal in a paragraph 17 *bis*, to read: "The view was also expressed that the rights-based approach did not suggest that forceful intervention to provide humanitarian assistance in disaster situations was lawful."

Paragraphs 17 and 17 bis were adopted.

Paragraphs 18 and 19

Paragraphs 18 and 19 were adopted.

Paragraph 20

37. Ms. ESCARAMEIA proposed that the second sentence should be amended to read: "However, several members emphasized the importance of the pre-disaster stage", in order to stress the importance of disaster prevention.

38. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the addition of the word "however" weakened the paragraph instead of strengthening it: the second sentence did not contradict the first. When the Drafting Committee's report had been considered in plenary, several members had emphasized the importance of the pre-disaster stage.

39. After an exchange of views in which Ms. JACOBSSON (Rapporteur), Ms. ESCARAMEIA and Mr. MELESCANU took part, Sir Michael WOOD proposed the following wording: "Several members emphasized the importance of addressing the pre-disaster stage."

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 25

Paragraphs 21 to 25 were adopted.

Paragraph 26

40. Ms. ESCARAMEIA proposed that a sentence should be inserted at the end of the paragraph in order to reflect a view that she and other members had expressed. It would read: "A view was expressed that a State had a duty to accept international assistance if it could not adequately protect victims of disasters on its territory."

Paragraph 26, as amended, was adopted.

Paragraph 27

Paragraph 27 was adopted.

Paragraph 28

41. Ms. ESCARAMEIA proposed that between the second and third sentences, a new sentence should be inserted, to read: "Instead, some members preferred that the expression 'non-governmental organizations' be used, as is done in other legal instruments."

Paragraph 28, as amended, was adopted, subject to minor drafting changes in the English version.

Paragraphs 29 to 35

Paragraphs 29 to 35 were adopted.

Chapter VII of the draft report as a whole, as amended, was adopted.

42. Mr. HMOUD said he strongly hoped that the adoption of a chapter of the draft report not available in all working languages would not set a precedent. He could go along with it as an exception, and on the understanding that it would not happen again.

43. The CHAIRPERSON assured Mr. Hmoud that a precedent had not been set.

CHAPTER VIII. Shared natural resources (A/CN.4/L.752)

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

44. Sir Michael WOOD said that in the second sentence, the words “including the existence of a practical need” should be replaced by “including whether there was a practical need”.

Paragraph 6, as amended, was adopted.

Paragraph 7

45. Ms. ESCARAMEIA proposed that a second sentence should be added at the end of the paragraph, to read: “They also thought that the General Assembly had already considered that oil and gas were going to be part of the topic ‘Shared natural resources’.”

46. Mr. McRAE said that at the previous session, the Working Group on shared natural resources had questioned whether there was a mandate from the General Assembly for work in the area of oil and gas, and no one had been able to reply.

47. Ms. ESCARAMEIA said that the source of the mandate dated back to when the topic had first been proposed: an annex prepared by Mr. Rosenstock indicating that the subject covered groundwater, oil and gas,²⁹⁷ of which the General Assembly had taken note in paragraph 8 of its resolution 55/152 of 12 December 2000. She herself had raised the question in the Working Group during the current session, but it was true that she had been the only member to do so. It would therefore be more accurate for the additional sentence she was proposing to start not with “They also thought” but with “The view was expressed”.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

Chapter VIII of the draft report, as a whole, as amended, was adopted.

The meeting rose at 12.30 p.m.

3033rd MEETING

Wednesday, 5 August 2009, at 4 p.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-first session (continued)

CHAPTER V. Reservations to treaties (continued)* (A/CN.4/L.749 and Add.1–7)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of Chapter V of the draft report and drew attention to section B of the chapter contained in document A/CN.4/L.749/Add.1.

B. Consideration of the topic at the present session (A/CN.4/L.749/Add.1)

2. Ms. ESCARAMEIA recalled that the Commission had decided, at its 3031st meeting, that the term “*validité materielle*” and, where appropriate, the term “*validité*” in the French would be rendered as “permissibility” throughout the chapter. Paragraphs could be adopted on that understanding.

Paragraphs 1 to 16

Paragraphs 1 to 16 were adopted with editorial corrections.

Paragraph 17

3. Ms. ESCARAMEIA proposed the insertion before the last sentence in the paragraph of a new sentence reading: “Therefore, the need for guidelines addressing the issue of permissibility was questioned.”

4. Mr. PELLET (Special Rapporteur) said that, in the English version of the last sentence, the words in French “*validité substantielle*” should be added in brackets after the word “permissibility”, as a counterpart to the reverse clarification in the French version.

Paragraph 17, as amended, was adopted.

Paragraphs 18 to 20

Paragraphs 18 to 20 were adopted.

Paragraph 21

Paragraph 21 was adopted with an editorial correction.

²⁹⁷ Yearbook ... 2000, vol. II (Part Two), annex, p. 141.

* Resumed from the 3031st meeting.

Paragraph 22

Paragraph 22 was adopted.

Paragraph 23

5. The CHAIRPERSON called attention to the fact that, in the penultimate sentence, the words “interpretative declarations” should be preceded by the word “conditional”.

6. Mr. HMOUD proposed that, at the end of the paragraph, a sentence should be added which would read: “The point was also made that, if the conditional interpretative declaration was accepted by all the contracting parties, or by an entity authorized to interpret the treaty, then that declaration should be treated as an interpretative declaration, not as a reservation, for permissibility purposes.”

7. The CHAIRPERSON drew attention to the fact that “contracting parties” should read “contracting States”.

8. Sir Michael WOOD said that the reference to “an entity authorized to interpret the treaty” was rather vague and could cover entities authorized to interpret a bilateral treaty between two States, or to interpret the treaty in a non-binding fashion as part of their supervisory or monitoring role. He asked Mr. Hmoud why, in those cases, the declaration should be treated for all purposes as an interpretative declaration. In short, he wondered if the sentence would be just as good without the reference to “an entity authorized to interpret the treaty”.

9. Mr. HMOUD said that the argument presented in the Special Rapporteur’s fourteenth report was basically that if there was a judicial or arbitration body that was authorized to give a binding interpretation in respect of a certain treaty, then it should be deemed to give the correct interpretation. If that body overruled a State’s conditional interpretative declaration, the latter became a reservation and the State did not become a party to the treaty. If that body accepted the interpretative declaration, the interpretation contained in it then became the accepted interpretation.

10. Mr. VASCIANNIE said that a Government was authorized to interpret a treaty, but its interpretation was not necessarily authoritative. He therefore suggested as an alternative wording “an entity empowered to give an authoritative interpretation of the treaty”.

11. Mr. KOLODKIN asked whether the Commission was considering the substance of the matter, or whether it was trying to ascertain if what had been said during the debate on the topic was faithfully reported or needed to be recast. In his opinion, that paragraph merely reflected the Commission’s discussions. In that case, if Mr. Hmoud wanted to include what he had said, that should be done. The Commission should not try to improve on the terminology he had used.

12. Ms. ESCARAMEIA said that she did not understand why the term “contracting parties” should be replaced by “contracting States”, since the latter expression would exclude international organizations. It would therefore be better to refer to “parties”.

13. Ms. JACOBSSON said that Mr. Kolodkin had made a valid point. The report should reflect what Mr. Hmoud had said. Otherwise the Commission ran the risk of reopening the debate on the topic.

14. The CHAIRPERSON, speaking as a member of the Commission, said that he was worried by the tendency to include everything that had been said in the debate in the report. He was personally not in favour of that trend and considered that the Commission’s report should inform the General Assembly and other readers only of the main thrust of the debate.

15. Sir Michael WOOD agreed with the Chairperson that it was inadvisable to include individual viewpoints in the report. He therefore drew attention to the importance of placing the summary records of debates on the Commission’s website at the earliest opportunity, so that it would be possible to see what positions had been expressed. He had no problem with the inclusion of the sentence proposed by Mr. Hmoud, but wondered if it should not be prefaced with the phrase “the view was expressed” in order to indicate that it was an individual view and not the Commission’s opinion.

16. Mr. HMOUD said that the sentence he had suggested reflected an opposing view to that expressed earlier in the paragraph and was intended to enlighten readers about the circumstances in which a conditional interpretative declaration should not be treated as a reservation.

17. Mr. GAJA said that, as the sentence which Mr. Hmoud wished to incorporate conveyed an opinion contrary to that set out in the second sentence, it would be better to place it immediately after the second sentence, as it would be helpful for the reader to be able to contrast the two viewpoints.

Paragraph 23, as amended, was adopted.

Paragraphs 24 to 27

Paragraphs 24 to 27 were adopted.

Section B, as reproduced in document A/CN.4/L.749/Add.1, as a whole, as amended, was adopted.

18. The CHAIRPERSON invited the members of the Commission to consider the portion of chapter V contained in document A/CN.4/L.749/Add.5.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (continued)*

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIRST SESSION (A/CN.4/L.749/Add.5)

Commentary to guideline 2.9.1 (Approval of an interpretative declaration)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

19. Mr. KOLODKIN noted that the commentary contained the text of a declaration made by the Government of Norway, which it interpreted as implying acceptance of a declaration by France²⁹⁸ to the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973. He was, however, unsure that the interpretation tallied with the actual contents of the declaration. He did not, of course, exclude the possibility that the Government of Norway might concur with that interpretation, but it had formulated its declaration in neutral terms: “the Government of Norway has taken due note of ... a declaration on the part of the Government of France”. Moreover, he was not sure that the commentary should offer any interpretation at all and he therefore suggested that it should be deleted.

20. Mr. PELLET (Special Rapporteur) said that he did not see why the Commission should not interpret the declaration of the Government of Norway. He agreed that his interpretation might be open to debate, although it was hard to see how the declaration could be interpreted otherwise. The French version was more cautious than the English version, which said “It appears that this statement can be interpreted” whereas the French expression “*Il semble que l'on puisse*” was less categorical. He therefore suggested that the English should read “It appears that this statement might be interpreted”. He did not agree that the Commission should forgo an interpretation. He would be loath not to quote that example because, unfortunately, examples of declarations which could be interpreted as approvals of interpretative declarations were extremely rare.

21. Mr. KOLODKIN said that he was in favour of demonstrating much greater caution, but if the other members of the Commission considered that it was right to retain that text with a slight modification of the English, he would not demur.

22. Mr. CAFLISCH suggested that one way out of the dilemma would be to word the English version “It appears that this statement could be interpreted”, which, he hoped, was sufficiently guarded to satisfy Mr. Kolodkin, but which still allowed for the possibility of the interpretation given in paragraph (4).

23. Sir Michael WOOD said that a direct translation of the French would be “It seems that this statement could be interpreted”, which introduced a double note of hesitation.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (6)

Paragraphs (5) to (6) were adopted.

The commentary to guideline 2.9.1, as a whole, as amended, was adopted.

Commentary to guideline 2.9.2 (Opposition to an interpretative declaration)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

²⁹⁸ United Nations, *Treaty Series*, vol. 1341, No. 22484, pp. 330 and 323, respectively.

Paragraph (4)

24. Mr. GAJA said that paragraph (3) of the commentary cited a statement by Italy, but the first sentence of paragraph (4), “Examples can also be found in the practice of States members of the Council of Europe”, gave the impression that Italy was not a member of the Council of Europe. He accordingly proposed that the phrase “of State members of the Council of Europe” should be replaced by “relating to conventions adopted within the Council of Europe”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

25. Mr. GAJA said the final sentence referred to “an interpretative declaration comparable to that of Italy”, whereas in fact Italy had made a statement in reaction to an interpretative declaration. That inaccuracy should be rectified.

Paragraph (5) was adopted on the understanding that the text would be adjusted to correspond to the factual situation regarding the statement by Italy.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

26. Mr. McRAE queried the term “Western”, before the word “States”, in the first sentence, and suggested that it be deleted.

27. The CHAIRPERSON, speaking as a member of the Commission, said that he, too, found the term to be out of place and supported the proposal to delete it.

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (15)

Paragraphs (8) to (15) were adopted.

The commentary to guideline 2.9.2, as a whole, as amended, was adopted.

Commentary to guideline 2.9.3 (Recharacterization of an interpretative declaration)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

28. Mr. GAJA said that the second sentence contained the words “recharacterization seeks to change the legal status of the unilateral statement”, but that was not the case. He proposed that the word “change the” should be replaced by the phrase “identify the appropriate”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

29. Mr. GAJA said that the phrase “does not in and of itself change the status of the declaration in question”

posed the same problem as had arisen in paragraph (5). He proposed that the word “change” should be replaced by the word “affect”.

30. Mr. PELLET (Special Rapporteur) said that he could not agree with that proposal, because with the neutral term “affect” the idea underlying the sentence was lost. It was important to point out that an attempt by a State to characterize as a reservation a unilateral statement submitted by another State brought about no change in the statement’s status.

31. Mr. GAJA said that the phrase “does not in and of itself change” implied that if other elements were present, recharacterization would indeed change the status, and that was not the case. The purpose of recharacterization was to identify the correct status.

32. Mr. McRAE proposed that the word “change” should be replaced by “determine”, which would be consistent with the amendment made to the previous paragraph.

33. Sir Michael WOOD said that for further consistency, the word “declaration” should be replaced by “unilateral statement”.

Paragraph (6), with the amendments proposed by Mr. McRae and Sir Michael Wood, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

The commentary to guideline 2.9.3, as a whole, as amended, was adopted.

Commentary to guideline 2.9.4 (Freedom to formulate approval, opposition or recharacterization)

Paragraphs (1) to (2)

Paragraphs (1) to (2) were adopted.

Paragraph (3)

34. Mr. GAJA drew attention to the final sentence, which stated that it was “perfectly logical that the Secretary-General should have accepted” the opposition by Ethiopia to an interpretative declaration formulated by Yemen. What the Secretary-General in fact did, however, was to accept a document transmitting the position communicated by Ethiopia. The word “accepted” gave the idea that his role involved more than just receiving and communicating the document outlining the position of Ethiopia. He proposed that the word “accepted” should be replaced by the phrase “communicated” to avoid any possible confusion.

35. Mr. PELLET (Special Rapporteur) said the French text, “*ait accepté la communication de l’opposition de l’Éthiopie*”, was much clearer: the English should be aligned with the French.

Paragraph (3), as amended, was adopted.

The commentary to guideline 2.9.4, as a whole, as amended, was adopted.

Commentary to guideline 2.9.5 (Written form of approval, opposition and recharacterization)

36. Mr. PELLET (Special Rapporteur) said that, without wishing to reopen debate on the guideline itself, he had an overriding problem with it. In many guidelines, examples being 2.9.6, 2.1.9 and 2.6.10, the words “to the extent possible” were used, but curiously, guideline 2.9.5 employed the word “preferably”. When jurists read guidelines 2.9.5 and 2.9.6 one after the other, they would surely be at a loss to understand the change in language. He himself did not see any distinction between the two guidelines that might justify using different phrases. A paragraph should be added to the commentary to explain the different wordings, but he himself was at a loss to draft it and he appealed to his colleagues to help him.

37. Mr. McRAE said that he, too, was at a loss to explain the distinction and had been in favour of replacing the phrase “to the extent possible” with “preferably” throughout the text, not just in guideline 2.9.5. Perhaps the problem could be resolved by reverting to the phrase “to the extent possible” in that guideline.

38. Ms. ESCARAMEIA said that the word “preferably” referred to one of two options, the written form of approval, as opposed to the only possible other form, oral acceptance. “To the extent possible”, on the other hand, meant that the fullest possible explanation should be given in support of a position. She saw no need to harmonize the wording of the two guidelines.

39. Mr. PELLET (Special Rapporteur) said that he still did not see the distinction and thought that the use of the conditional “should” in guideline 2.9.5, obviated the need for the word “preferably”, since it conveyed the notion of preference.

40. Sir Michael WOOD said the difference had been very well explained by Ms. Escarameia. It would be very odd to say that approval of an interpretative declaration should “to the extent possible” be formulated in writing. It was either possible or impossible to do something in writing. However, the explanation of reasons for approval could be affected by many factors, such as confidentiality. There was thus a factual difference between the situations described in the two guidelines that made the word “preferably” more appropriate in the first.

41. Mr. CAFLISCH said that the question was whether the text should state an obligation, in which case “to the extent possible” should be used, or a wish, which would be better expressed by “preferably”. There was indeed a difference between the two wordings, and he preferred the latter.

42. Mr. PELLET (Special Rapporteur) said that, though he remained unconvinced by the arguments for keeping the two separate wordings in the text, he was willing to go along with the majority that favoured their retention. The problem remained, however, that some explanation needed to be provided in the commentary.

43. Ms. ESCARAMEIA, supported by Mr. SABOIA, said there was no need for a paragraph explaining the

obvious. The two guidelines were not at all similar, one addressing the form to be used in making interpretative declarations, the other, whether or not reasons were to be given for making interpretative declarations. There was no need for the wording to be parallel.

44. Mr. PELLET (Special Rapporteur) proposed the following text, to become paragraph (7 *bis*): “A majority of the members of the Commission were of the view that the word ‘preferably’ was more appropriate than the expression ‘to the extent possible’ used in the text of guidelines 2.1.9 (Statement of reasons [for reservations]), 2.6.10 (Statement of reasons [for objections]) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization), because in the context of guideline 2.9.5, States were not faced with alternatives.”

45. Mr. GAJA said that the most logical place for the Special Rapporteur’s proposed additional text was immediately following paragraph (6), which explained that the decision of whether to formulate in writing a reaction to an interpretative declaration was a matter of preference for States or international organizations. However, the last phrase of that text was incorrect: States faced the choice of using the written form or the oral form.

46. Mr. VALENCIA-OSPINA said that it would be better to place the Special Rapporteur’s new text in paragraph (5) because that paragraph referred to the option that States and international organizations had to formulate their reaction in writing or orally, whereas paragraph (6) dealt with the issue of whether to formulate an interpretative declaration as such.

47. Sir Michael WOOD suggested that the concluding phrase might be “because these provisions addressed different situations”, although, in fact, he felt that no explanation was necessary.

48. Mr. VASCIANNIE said that the Special Rapporteur was operating on the false premise that there was a need to explain the difference between the term “preferably”, used in one context, and the phrase “to the extent possible”, used in another. He agreed entirely with Ms. Escarameia that the two were not parallel provisions and that, consequently, there was no need to provide an explanation in the commentary.

49. Mr. PELLET (Special Rapporteur) said that the reason the two provisions did not appear to be parallel was precisely because their wording had been changed so that they were now different. To his mind, they were parallel provisions, and it was therefore necessary to explain why their wording was not consistent. He wished to amend the last clause of his proposed new text in order to indicate that “States were faced with an alternative, which was not the case in the situations described in the other guideline”. He remained unconvinced by that explanation, but at least it represented an attempt to justify the difference in wording between the various provisions, and he agreed that the text could be placed after paragraph (5). It was not the normal practice to indicate in the commentary that the Special Rapporteur had been opposed to a particular point, and he was not asking for his position necessarily to be reflected.

50. Sir Michael WOOD said that a State or an international organization could formulate its reaction either in writing or orally: there was no middle ground, as one could not formulate something in writing to a certain extent. In the other guidelines in which the expression “to the extent possible” was used, the choice was not between two alternatives but rather between a range of possibilities. The Commission could simply say that it had not used the term “to the extent possible” in guideline 2.9.5 because it did not make sense in that context.

51. Mr. McRAE said that he had always seen both guideline 2.9.5 and guideline 2.9.6 as involving a choice: in the case of the former, one could choose to make one’s statement in writing or not, and in the case of the latter, one could choose to state one’s reasons or not. The simple meaning of guideline 2.9.5 was that a reaction to an interpretative declaration should, where possible, be formulated in writing, and the meaning of guideline 2.9.6 was that such a reaction should, where possible, include a statement of reasons. In guideline 2.9.6, the use of the expression “to the extent possible” had created confusion by suggesting that it referred to the extent of the reasons, rather than to the option of whether or not to state one’s reasons.

52. Mr. GAJA pointed out that paragraph (6) was actually a continuation of paragraph (5) and that the Commission would be ill-advised to break the flow between the two by inserting new text there. He reiterated that it would be better to place any new text, particularly if it reflected the view of the majority but not of the Commission as a whole, after paragraph (6).

53. Mr. FOMBA said that paragraph (5) described the reason for offering States and international organizations the choice between two alternatives and indicated why it was preferential for their reactions to interpretative declarations to be formulated in writing. Those arguments seemed to constitute sufficient explanation and he would be hard-pressed to come up with any others.

54. Mr. MELESCANU said that, since both the text of guideline 2.9.5 and that of guideline 2.9.6, with their differences in language, had been adopted by the Drafting Committee, it was inappropriate to change the text of guideline 2.9.5 at the current stage. He suggested that perhaps on second reading the Commission could take up the issue of harmonizing the relevant guidelines or explaining why it had not used parallel wording in them.

55. Mr. PELLET (Special Rapporteur) said that he was not advocating an amendment to the text of the guideline and agreed with Mr. Melescanu that the matter could be dealt with on second reading. His point was that the difference in wording between the two guidelines should be explained in the commentary, which was what the commentary was for. The Commission had come close to reaching a consensus with Sir Michael Wood’s explanation that the term “preferably” implied a choice between two alternatives, whereas the phrase “to the extent possible” implied a range of choices. His own position, and that of Mr. McRae, was that both guidelines involved a choice between two alternatives and that the difference in their wording was not justified. However, if the majority

of the members felt that the reason for the difference in language between them was that something to be provided preferably in writing implied a choice between two alternatives, whereas indicating one's reasons to the extent possible implied that such reasons could be provided to a varying extent, then that was what should be reflected in the commentary. He volunteered to draft a text in both French and English that would summarize the views presented, and he would submit it to the Commission at its next meeting.

56. Mr. VALENCIA-OSPINA warned that he was not ready to agree to the placement of the Special Rapporteur's text in the commentary until he had read it.

The adoption of the commentary to guideline 2.9.5 was deferred.

57. Ms. ESCARAMEIA said that, with respect to the title of guideline 2.9.5 itself, the Commission's past practice had been to include the word "written" in the title only when a written form of a submission was required. She therefore proposed that, for the sake of consistency, in the title of guideline 2.9.5, the Commission should delete the word "written".

58. Mr. PELLET (Special Rapporteur) said that that particular matter had been discussed in the Drafting Committee, which he thought had accepted Ms. Escarameia's point. However, the change did not appear in any of the documents. In any case, he agreed with the proposal to delete the word "written" from the title for the reason given by Ms. Escarameia.

59. The CHAIRPERSON suggested that, since the Drafting Committee had apparently already agreed on the title as it currently stood, the Commission should defer a decision on amending it until the second reading.

60. Sir Michael WOOD said that, irrespective of whatever agreement had been reached in the Drafting Committee, if there was now a general consensus among members of the Commission that the title should be amended, the word "written" should be deleted from the title of guideline 2.9.5.

It was so decided.

Commentary to guideline 2.9.6 (Statement of reasons for approval, opposition and recharacterization)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

61. Mr. PELLET (Special Rapporteur) suggested that, in the second sentence, the phrase "the equivalent for interpretative declarations of the 'reservations dialogue'" should be deleted, as it was an unnecessary repetition of the last sentence of paragraph (2).

Paragraph (4), as amended, was adopted.

The commentary to guideline 2.9.6, as a whole, as amended, was adopted.

Commentary to guideline 2.9.7 (Formulation and communication of an approval, opposition or recharacterization)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

62. Mr. PELLET (Special Rapporteur) said that in the French version the word "il" in the first sentence should be replaced by "elle", since the pronoun referred to the feminine noun "diffusion".

63. Mr. VALENCIA-OSPINA asked whether, in the English version, the plural noun "interests" was correctly used, or whether that noun should be in the singular.

64. Mr. HASSOUNA said that, although English was not his native tongue, he thought the singular was the correct form.

65. Mr. McRAE said that the word "interests" should remain in the plural since it referred to the different interests of a number of parties, namely, both the authors of a reaction to a unilateral declaration and all the entities concerned.

Paragraph (2), as corrected in the French version, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to guideline 2.9.7, as a whole, as corrected was adopted.

Commentary to guideline 2.9.8 (Non-presumption of approval or opposition)

The commentary to guideline 2.9.8 was adopted.

Commentary to guideline 2.9.9 (Silence with respect to an interpretative declaration)

Paragraphs (1) to (3)

The commentary to paragraphs (1) to (3) was adopted.

Paragraph (4)

66. Mr. McRAE said that, according to the commentary, "the silent State may be considered as having acquiesced to the declaration by reason of its conduct or lack of conduct in relation to the interpretative declaration", whereas draft guideline 2.9.9 itself referred only to conduct, not to lack of conduct. The point being made in the draft guideline was that silence could have an effect as part of conduct. The reference to "lack of conduct" in the commentary, however, reinstated a position that the guidelines had sought to avoid, namely, that silence on its own could have an effect. He therefore suggested either the deletion of the phrase "or lack of conduct" or the insertion, after "lack of conduct", of the phrase "in circumstances where conduct is required".

67. Mr. PELLET (Special Rapporteur) said that, of the two options, he preferred the second.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to guideline 2.9.9, as a whole, as amended, was adopted.

Commentary to guideline [2.9.10 (Reactions to conditional interpretative declarations)]

Paragraph (1)

68. Mr. VARGAS CARREÑO said that he did not propose any change to the commentary, but he wished to draw the Special Rapporteur's attention to aspects of the involvement of France in Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean ("Treaty of Tlatelolco"),²⁹⁹ when he came to provide a definitive version of the commentary on second reading. In common with the other declared nuclear-weapon States—the United States of America, the Russian Federation, China and the United Kingdom—France was a party to Additional Protocol II, under which it undertook to respect the denuclearized zone in Latin America and the Caribbean covered by the Treaty and not to install or use nuclear weapons in the region. France had made an interpretative declaration, one element of which was that, in the event of any armed attack on French possessions in the area, such as Guadeloupe, French Guiana or Martinique, France would no longer feel bound by the Protocol. In other words, it would feel free to use nuclear weapons. In the view of the members of the body set up to monitor the Treaty, the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL), that position was contrary to international customary law, which stated that legitimate defence must be proportionate: nuclear weapons should not be used to repel an attack involving conventional weapons.

69. That interpretation had been communicated to France, orally at first, by a number of South American ambassadors, including those of Brazil, Cuba and Mexico, who had asked France to withdraw its interpretation. An exchange of correspondence had ensued, but France had maintained its position, even though its interpretation dated back to the time when the French were conducting nuclear tests in the area. France nonetheless expressed a desire to continue to be a party to the Protocol and to cooperate with OPANAL. The Special Rapporteur might care to bear the situation in mind for his future work.

70. Ms. ESCARAMEIA said that, if guideline 2.9.10 was in square brackets, the commentary ought also to be in square brackets.

71. Mr. PELLET (Special Rapporteur) confirmed that, until a final decision had been reached on the treatment of conditional interpretative declarations, both the guideline and the commentary should be in square brackets. As for the statement by Mr. Vargas Carreño, he would be most interested to be given access to the exchange of letters between France and OPANAL, since very little material existed on reactions to interpretative declarations.

Paragraph (1) was adopted.

²⁹⁹ *Ibid.*, vol. 936, No. 9068, annex A (ratification by France of Additional Protocol II), p. 419.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraphs (4) and (5)

72. Ms. ESCARAMEIA said that, after the statement in paragraph (4) that the procedure for conditional interpretative declarations was the same as for reservations, paragraph (5) added that there might be doubts about the 12-month time period set out in article 20 of the 1969 and 1986 Vienna Conventions and quoted an explanation by Sir Humphrey Waldock of why that period had been chosen, rather than a shorter one.³⁰⁰ In her view, however, there should be no time limit for reactions to conditional interpretative declarations. Whereas the parties to a treaty, when notified of a reservation, knew that they had 12 months in which to object, the same was not true when they were notified of a conditional interpretative declaration. Some parties might think that it was really a reservation, others that it was merely an interpretative declaration. The effect was that they were not fully aware that it was something they should react to within 12 months.

73. The text of paragraph (4) gave the impression that the Commission as a whole was in agreement that the procedure for conditional interpretative declarations should be identical to that for reservations. However, she disagreed. She therefore suggested the addition of the following sentence at the end of paragraph (4): "There was a view, however, that the time period for reaction to reservations should not be applicable to conditional interpretative declarations." The first sentence of paragraph (5) should then begin: "There may be doubts about the length of the 12-month time period set out in article 20".

74. Mr. PELLET (Special Rapporteur) said that he had no objection, provided that it was clear that it was the expression of one person's view.

75. Mr. VALENCIA-OSPINA said that there was a difference between the commentary and the summary of the debate. The point of the commentary was to explain the Commission's view of the meaning of the text. He did not object to the addition proposed by Ms. Escarameia, however, since the commentary was still provisional and appeared in square brackets. Otherwise, the addition would be more problematic.

76. Mr. MELESCANU seconded that view. The commentary was not the place to express individual points of view, but, since the text was in square brackets, the proposed addition was acceptable.

77. Ms. ESCARAMEIA said that, according to her understanding, there was a significant difference between the commentaries on first reading and on second reading. On first reading, the commentary gave guidance to States on their options. That being so, it was important for States to know that different views had been expressed. Only with the second reading did the commentary express the Commission's final conclusions.

³⁰⁰ First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144, commentary on article 18, para. (16), p. 67.

78. Mr. GAJA said that, as a general rule, the commentary should follow a single line. If every individual view was reflected, the commentary would become incomprehensible. Where, however, there was dissent on a particularly important point, it was permissible—so long as great restraint was shown—to add a sentence to that effect. He noted that it was not the Commission's custom to provide a detailed account of its debate in the report. Perhaps that practice should be reviewed.

79. Sir Michael WOOD, after agreeing with Mr. Gaja's suggestion, which could be taken up by the Planning Group at the next session, proposed that, in paragraph (5), the clause "which is probably not reflective of customary international law" should be deleted. The statement might be true, but it would not be wise for the Commission to draw attention to the fact, particularly when it was itself proposing a guideline setting a 12-month time limit. Even if the provision was not customary international law, it ought to develop into such law. It was hard to see why States that were parties to the 1969 Vienna Convention should have a different rule from those that were not. Secondly, in the interests of clarity, he suggested that the words "this solution" in the second sentence should be replaced by the words "12 months", since the length of the time period was the point at issue in that paragraph.

80. Mr. PELLET (Special Rapporteur) said that he found Sir Michael's position surprising: the point of ratifying a treaty was acceptance of the rules of that treaty. The application of general rules remained unchanged in any case. Footnote 74 referred the reader to the lengthy debate on the topic. Since the phrase that Sir Michael wished to delete was not of great importance, however, he would make no objection. He could also accept the other proposed amendment.

81. Ms. JACOBSSON (Rapporteur) said that the name of Sir Humphrey Waldock should be spelled out in full. In that context, she noted an inconsistency throughout the document in the use of personal names: names were given in full in footnotes 6 and 47, for example, while elsewhere, such as footnote 65, only the initial was given with the surname.

Paragraphs (4) and (5), as amended, were adopted.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were adopted.

82. The CHAIRPERSON said he took it that the commentary to draft guideline 2.9.10 should be placed in square brackets.

It was so decided.

The commentary to draft guideline 2.9.10, as a whole, as amended, was adopted.

The commentary to the draft guidelines reproduced in document A/CN.4/L.749/Add.5, as a whole, as amended, was adopted, with the exception of the commentary to draft guideline 2.9.5.

The meeting rose at 6.05 p.m.

3034th MEETING

Thursday, 6 August 2009, at 10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-first session (continued)

CHAPTER V. *Reservations to treaties (concluded)* (A/CN.4/L.749 and Add.1-7)

1. The CHAIRPERSON invited the members of the Commission to continue its consideration of section C of chapter V of the draft report and to start by taking up document A/CN.4/L.749/Add.6.

C. *Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (concluded)*

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIRST SESSION (A/CN.4/L.749/Add.6)

Commentary to guideline 3.2 (Assessment of the validity of reservations)

Paragraph (1)

2. Sir Michael WOOD said that the term used in the title of the draft guideline, "to assess", should be replicated in the English text of the second sentence: the phrase "for verifying" should therefore be replaced by "for assessing".

3. Mr. GAJA said that the phrase "common law", used in the English text of the final sentence, was a mistranslation of the French phrase "*de droit commun*": it should be replaced by the words "generally applicable".

With those amendments to the English text, paragraph (1) was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

4. Sir Michael WOOD said that the final part of the fifth indent was far too emotive—a more factual text was needed. He proposed that a semi-colon should be inserted after the word "accept" and that the remainder of the text should be amended to read: "some States have denied that the bodies in question have any jurisdiction in the matter".

5. Ms. ESCARAMEIA said that she could not accept the second part of Sir Michael's proposal. The current wording underlined the fact that the States in question

had adopted an extreme position, whereas Sir Michael's proposal made that position seem perfectly acceptable. She did not, however, oppose the deletion of the words "particularly violently".

6. Sir Michael WOOD proposed that the new phrase should read "some States have even denied ...".

7. Ms. ESCARAMEIA said that with that change, the proposal was acceptable. In the final indent, the word "hypersensitivity" was too subjective: it should be replaced by the word "reactions".

Paragraph (5), as amended, was adopted.

Paragraph (6)

8. Sir Michael WOOD said that in the second sentence of the English text, the words "to rule" should be replaced by "to assess". He also proposed that the words "of course", in the same sentence, should be deleted because they were superfluous.

9. Ms. ESCARAMEIA proposed that in the penultimate sentence, the words in parentheses, "or dispute settlement bodies", should be deleted. Some dispute settlement bodies, such as the European Court of Human Rights, could substitute their own judgement for the State's consent: the Court had done precisely that in the *Belilos* case.

10. Mr. PELLET (Special Rapporteur) said that the paragraph referred to all the bodies that might be called upon to assess the permissibility of reservations. Some had the power to make binding decisions, while others did not. No body, however, irrespective of whether it had such powers, could tell a State that it knew better than that State did whether it wished to be bound, despite the reservation. Contrary to what Ms. Escarameia seemed to believe, in the *Belilos* case, the European Court of Human Rights had not substituted its own judgement for the consent of the State concerned to be bound: it had taken great pain to say it was certain that Switzerland wished to be bound, despite its reservation. The amendment proposed by Ms. Escarameia therefore did not seem acceptable.

Paragraph (6), as amended by Sir Michael Wood, was adopted.

Paragraph (7)

11. Sir Michael WOOD said that the final phrase in paragraph (7), after the words "including" with reference to what national courts could do under domestic law, seemed superfluous. He proposed that it should be deleted and that the paragraph should end with the words "before them".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

12. Ms. ESCARAMEIA said that in the first sentence, the phrase "within the limits of their competence" should

be made to apply to domestic courts, which could not rule on the permissibility of a reservation. She accordingly proposed that the phrase should be transposed to follow the word "States".

Paragraph (9), as amended, was adopted.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

Paragraph (12)

13. Sir Michael WOOD said that in the English text, the words "determining", "rule on" and "determine" should be replaced by "assessing", "assess" and "assess", respectively.

14. Ms. ESCARAMEIA said that in the second indent, the word "now", which appeared to contradict the second sentence in paragraph (6), should be deleted.

15. Mr. PELLET (Special Rapporteur) pointed out that the treaty bodies had long maintained that they had no competence to assess the permissibility of reservations, and he had stated as much in the commentary. Now, those bodies were demanding to have such competence, in a departure from their usual position. Nevertheless, he had no objection to the amendment proposed by Ms. Escarameia.

16. Mr. GAJA said that the first indent had apparently been drafted at a time when the Special Rapporteur had been of a different view than he was now as to the role of article 20 with regard to the permissibility of reservations. He proposed that the reference to article 20 should be deleted and that the phrase should read "provided for by the Vienna Conventions".

Paragraph (12), as amended by Sir Michael Wood, Ms. Escarameia and Mr. Gaja, was adopted.

Paragraph (13)

17. Sir Michael WOOD said that in the English text, the word "verification" should be replaced by "assessment".

With that correction to the English text, paragraph (13) was adopted.

Paragraph (14)

18. Mr. GAJA said that his comment on paragraph (12) applied to paragraph (14) as well. The second sentence seemed to imply that article 20, paragraph 5, of the Vienna Conventions resolved the question of whether a reservation was permissible. He therefore proposed that the sentence should be amended to begin "In the case of the 'Vienna regime', article 20, paragraph 5, of the Convention, insofar as it is applicable, sets a time limit of 12 months ...".

19. Mr. PELLET (Special Rapporteur) said that before agreeing to Mr. Gaja's amendment, he would like to know its purpose and that of his amendment to paragraph (12).

He had thought Mr. Gaja agreed with him that reservations either were or were not permissible, and that it was article 20 of the 1969 Vienna Convention that set up the system for assessing such permissibility.

20. Mr. GAJA replied that the idea was to leave open the question of whether it was article 20, paragraph 5, of the Vienna Convention or article 20 *in toto* that applied to the assessment of the permissibility of reservations, or whether, where reservations were incompatible with the object and purpose of a treaty, other rules should apply.

21. Sir Michael WOOD said that the final part of the penultimate sentence, beginning with the words “which is designed”, was a strange way of describing the actions of monitoring bodies. He proposed that it should be deleted.

22. Ms. ESCARAMEIA said that the reference to the object and purpose of the treaty should be retained but that, to take into account the comment made by Sir Michael, the end of the sentence should read: “which is designed to ensure compliance with the treaty by parties, including the preservation of the object and purpose of the treaty”.

Paragraph (14), as amended, was adopted.

Paragraphs (15) and (16)

Paragraphs (15) and (16) were adopted.

Paragraph (17)

23. Sir Michael WOOD said that the end of the first sentence, after the footnote, was obscure.

24. Mr. PELLET (Special Rapporteur) said that the text in French was perfectly clear.

25. Sir Michael WOOD pointed out that the translation into English did not correspond to the original French text.

26. The CHAIRPERSON said that the Secretariat would have the translation aligned on the original French.

Paragraph (17) was adopted on the understanding that a correction would be made to the English language version.

The commentary to guideline 3.2, as amended, was adopted.

Commentary to guideline 3.2.1 (Competence of the treaty monitoring bodies to assess the validity of reservations)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

27. Mr. HMOUD said that in the English text of the beginning of the paragraph, the words “to rule on” should be replaced by “to assess”.

With that amendment to the English language version, paragraph (2) was adopted.

Paragraph (3)

28. Sir Michael WOOD queried what was meant, in the English text, by the words “the meaning of the last phrase”.

29. Mr. PELLET (Special Rapporteur) said that the words “the last phrase” must be replaced by “this last phrase”.

With that amendment to the English text, paragraph (3) was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

The commentary to guideline 3.2.1, as amended, was adopted.

Commentary to guideline 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the validity of reservations)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

30. Sir Michael WOOD said that, in the English text, the words “it would be appropriate” should be replaced by “it could be appropriate”.

With that amendment to the English text, paragraph (4) was adopted.

Paragraph (5)

31. Sir Michael WOOD queried what was meant, in the English text, by the phrase “flexible law”.

32. Mr. PELLET (Special Rapporteur) said that the phrase could be replaced by the words “soft law”.

With that amendment to the English text, paragraph (5) was adopted.

The commentary to guideline 3.2.2, as amended, was adopted.

Commentary to guideline 3.2.3 (Cooperation of States and international organizations with treaty monitoring bodies)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

33. Sir Michael WOOD said that in the English text of the first indent, the words “their findings” should be replaced by “their assessments”.

With that amendment to the English text, paragraph (2) was adopted.

Paragraph (3)

34. Ms. ESCARAMEIA asked what was meant by the phrase “treaty monitoring bodies”. A distinction was

made between monitoring bodies, which had no decision-making power, and dispute settlement bodies, in which such powers were vested, but paragraph (3) went on to suggest that monitoring bodies could have decision-making powers. She wondered whether the European Court of Human Rights ought to be seen as a monitoring body, and thus be covered by draft guideline 3.2.3, or as a dispute settlement body, covered by draft guideline 3.2.5.

35. Mr. GAJA said that he failed to see how regional human rights courts could be said to take, in respect of reservations, decisions that were legally binding upon States in general terms. For the sake of precision, he proposed the addition, at the end of the second paragraph, of the phrase “and even then only to the extent that the decision on the permissibility of reservations binds the parties”. He also thought a new paragraph should be drafted to indicate what was meant by the phrase “should give full consideration to” in draft guideline 3.2.3 itself. Lastly, he suggested that, perhaps in draft guideline 3.2.5, the extent to which States were bound by the decisions of the bodies in question should be made clear.

36. Sir Michael WOOD said that the wording of the second sentence of paragraph (3) left something to be desired. He proposed that it should be replaced by the following text: “Of course, if these bodies have been vested with decision-making power, which is currently only the case of the regional human rights courts, the parties must respect their decisions.”

37. Ms. ESCARAMEIA said she simply could not see how such courts could be covered by draft guideline 3.2.3. When States were involved in a case, they must not simply “cooperate” with the courts and “give full consideration” to their assessment: they must also respect their decisions. The regional human rights courts should be covered by draft guideline 3.2.5.

38. Mr. McRAE pointed out that the text drafted by Sir Michael partly solved the problem raised and that the first footnote to paragraph (3) addressed Ms. Escarameia’s concerns.

39. Mr. PELLET (Special Rapporteur) fully endorsed that remark.

Paragraph (3), as amended, was adopted.

Paragraph (4)

40. Mr. GAJA said he failed to see which “principle” was cited at the start of the paragraph.

41. Mr. PELLET (Special Rapporteur) said Mr. Gaja’s confusion was understandable: a sentence at the beginning of the paragraph, referring to a future guideline 3.2.6, was missing. He accordingly proposed that the paragraph should begin with the following sentence: “Equally, treaty monitoring bodies should take into account the positions expressed by States and international organizations with respect to the reservation.”

Paragraph (4), as amended, was adopted.

The commentary to guideline 3.2.3, as amended, was adopted.

Commentary to guideline 3.2.4 (Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body)

The commentary to guideline 3.2.4 was adopted.

Commentary to guideline 3.2.5 (Competence of dispute settlement bodies to assess the validity of reservations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

42. Mr. GAJA said that, as currently drafted, the paragraph did not indicate the extent to which the decisions of dispute settlement bodies or other legal institutions were binding upon States. He accordingly proposed the addition, at the end of paragraph (3), of the following phrase: “and only to the extent that it is so provided”. One could not work on the basis of the principle that when a judicial institution ruled on the permissibility of a reservation in a given case, that necessarily had a binding effect as a general rule for the States concerned. A distinction must be drawn between the relevance of what a dispute settlement body might say on the permissibility of a reservation and the binding nature of the decision it would hand down.

43. Sir Michael WOOD said that the translation into English of the phrase “*l’autorité relative de la chose jugée*” was not very clear. Accordingly, he proposed that that text, “is binding solely on the parties to the dispute in question” should be replaced by the words “is binding solely in respect of the dispute in question”.

44. Mr. PELLET (Special Rapporteur) said he felt somewhat at a loss, since he had assumed that *res judicata* was a general principle of the law that could be expressed in all languages. As to Mr. Gaja’s comment, he agreed that a distinction ought to be made between the general situation when a decision related directly to the issue of permissibility, and a situation when the decision related only in part to the permissibility of a reservation and was therefore not binding. Some decisions nevertheless had binding force if their grounds constituted the necessary basis for the ruling. He was not sure that the phrase Mr. Gaja had proposed to add, “and only to the extent that it is so provided”, expressed that concept very well: it was too elliptical. It would be better to say “to the extent that the position of that body on the permissibility of the reservation is of a binding nature in those circumstances”.

45. Sir Michael WOOD said that the translation into English of paragraph (3) did not fully correspond to the French text. He accordingly proposed that the English text should read: “It goes without saying that, in any event, the decision of the dispute settlement body has only the force of *res judicata* for the parties to the dispute in question.”

46. Mr. McRAE said that the very meaning of *res judicata* was that a matter was always adjudicated with reference to the parties to a dispute. That was clear from the paragraph as currently drafted, and he saw no reason to amend it.

47. Mr. GAJA said that the reference to a decision that was binding solely on the parties to the dispute in question gave the reader, including national courts, the idea that pronouncements by a legal body were generally always binding on the parties. The reader must be alerted to the fact that when a given body, even the European Court of Human Rights, ruled on the permissibility of a reservation, its assessment could not be deemed to be binding.

48. Mr. McRAE proposed that the sentence in paragraph (3) should be supplemented by the addition of the following phrase: “and only to the extent of the authority of the dispute settlement body to make such a decision”.

Paragraph (3), as amended, was adopted.

The commentary to guideline 3.2.5, as amended, was adopted.

Commentary to guideline 3.3 (Consequences of the non-validity of a reservation)

The commentary to guideline 3.3 was adopted.

Commentary to guideline 3.3.1 (Non-validity of reservations and international responsibility)

Paragraph (1)

49. Mr. PELLET (Special Rapporteur) said that the words “or an international organization” should be inserted after “a State”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

50. Mr. PELLET (Special Rapporteur) proposed that in the first sentence, the words “the reserving State” should be replaced by “the author of the reservation” and that in the second sentence, the words “are other States prevented” should be replaced by “are other parties prevented”.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (7)

Paragraphs (3) to (7) were adopted.

The commentary to guideline 3.3.1, as amended, was adopted.

The commentary to the guidelines reproduced in document A/CN.4/L.749/Add.6, as a whole, as amended, was adopted.

51. The CHAIRPERSON invited the members of the Commission to take up document A/CN.4/L.749/Add.7.

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIRST SESSION (A/CN.4/L.749/Add.7)

Commentary to guideline 2.8.9 (Modalities of the acceptance of a reservation to a constituent instrument)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

52. Mr. PELLET (Special Rapporteur) said that the text of the first footnote should be expanded, since it referred to the “footnote above”, but there was no previous footnote in the document.

Paragraph (2) was adopted on the understanding that the Secretariat would make the appropriate correction to the first footnote.

Paragraphs (3) to (6)

Paragraphs (3) to (6) were adopted.

Paragraph (7)

53. Mr. PELLET (Special Rapporteur) said that in the French text of the penultimate sentence, the words “*ceux-ci*” should be replaced by “*les États ou organisations internationales contractants*”.

Paragraph (7), as amended, was adopted.

The commentary to guideline 2.8.9, as amended, was adopted.

Commentary to guideline 2.8.10 (Acceptance of a reservation to a constituent instrument that has not yet entered into force)

The commentary to guideline 2.8.10 was adopted.

Commentary to guideline 2.8.11 (Reaction by a member of an international organization to a reservation to its constituent instrument)

The commentary to guideline 2.8.11 was adopted.

Commentary to guideline 2.8.12 (Final nature of acceptance of a reservation)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

54. Mr. PELLET (Special Rapporteur) said that in the French text of the final sentence, the word “*et*”, before “*bien que*”, should be deleted.

With that correction to the French text, paragraph (4) was adopted.

The commentary to guideline 2.8.12, as amended, was adopted.

The commentary to the guidelines reproduced in document A/CN.4/L.749/Add.7, as a whole, as amended, was adopted.

55. The CHAIRPERSON said it remained for the Commission to adopt paragraph (5) of the commentary to draft guideline 2.9.5 (Written form of approval, opposition and recharacterization reproduced in document A/CN.4/L.749/Add.5, which had been left in abeyance at the previous meeting pending a written proposal by the Special Rapporteur.

Commentary to guideline 2.9.5 (Form of approval, opposition and recharacterization) (*concluded*)

Paragraph (5)

56. Mr. PELLET (Special Rapporteur) said that he had simply written down wording proposed by Mr. Valencia-Ospina and supplemented by Mr. Gaja, which in no way reflected his own position. The following text should be added at the end of paragraph (5) of the commentary to draft guideline 2.9.5:

“(5) ... The alternative whether to use the written form or not does not leave room for any intermediate solutions. Accordingly, a majority of the members of the Commission was of the view that the word ‘preferably’ was more appropriate than the expression ‘to the extent possible’, used in the text of guidelines 2.1.9 (Statement of reasons for reservations), 2.6.10 (Statement of reasons for objections) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization), which could convey the idea of the existence of such intermediate solutions.”

57. Paragraph (6) would then begin:

“(6) ... The Commission adopted guideline 2.9.5 ...”.

Paragraph (5) of the commentary to draft guideline 2.9.5, as amended, was adopted.

The commentary to guideline 2.9.5, as a whole, as amended, was adopted.

58. The CHAIRPERSON proposed that the Commission should adopt document A/CN.4/L.749/Add.2, containing the texts of all the draft guidelines on reservations to treaties adopted so far.

1. TEXT OF THE DRAFT GUIDELINES (A/CN.4/L.749/Add.2)

Section C, as a whole, as amended, was adopted.

Chapter V of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER IX. *The obligation to extradite or prosecute (aut dedere aut judicare)* (A/CN.4/L.753)

59. The CHAIRPERSON invited the Commission to consider chapter IX of its draft report, on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/L.753).

Chapter IX, as a whole, was adopted.

CHAPTER XI. *The most-favoured-nation clause* (A/CN.4/L.755)

60. The CHAIRPERSON invited the Commission to consider chapter XI of its draft report, on the most-favoured-nation clause (A/CN.4/L.755).

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

B. Consideration of the topic at the present session

Paragraphs 2 to 4

Paragraphs 2 to 4 were adopted.

Paragraph 5

61. Sir Michael WOOD said that the word “possibly”, at the end of the first sentence, should be deleted.

Paragraph 5, as amended, was adopted.

Paragraph 6

62. Mr. McRAE (Co-Chairperson of the Study Group on the most-favoured-nation clause) said that there was some text missing. It should follow paragraph 6, have a heading like that of paragraph 5, “Roadmap of future work”, and read:

“A preliminary assessment of the 1978 draft articles³⁰¹”

“1. During the discussion, the Co-Chairperson of the Study Group, Mr. McRae highlighted the specific articles of the 1978 draft articles which remained important to the areas of relevance to the Study Group. These included articles 1 (Scope of the present articles), 5 (Most-favoured-nation treatment), 7 (Legal basis of most-favoured-nation treatment), 8 (The source and scope of most-favoured-nation treatment), 9 (Scope of rights under a most-favoured-nation clause), 10 (Acquisition of rights under a most-favoured-nation clause), 16 (Irrelevance of limitations agreed between the granting State and a third State), 23 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences), 24 (The most-favoured-nation clause in relation to arrangements between developing States), 25 (The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic) and 26 (The most-favoured-nation clause in relation to rights and facilities extended to a land-locked third State). In particular, it was considered that draft articles 9 and 10, which focused on the scope of most-favoured nation, were of contemporary relevance, and in the context of investment would be the basic points of departure and the primary focus of the Study Group.

“2. In the ensuing discussions in the Study Group, comments were made regarding the status of the 1978 draft articles and their relationship with the current work of the Study Group. It was felt necessary to clarify in advance and reach an understanding about that earlier work and its status in order to ensure that there was a clear delineation between that work and the current exercise, without the earlier achievements being undermined or affecting adversely work and developments in other forums. It was hoped that the papers to be prepared will further reflect upon these aspects and flesh out the issues that ought to be addressed.”

63. Following a discussion in which Mr. VALENCIA-OSPINA, Mr. GAJA, Mr. McRAE (Co-Chairperson of

³⁰¹ *Yearbook ... 1978*, vol. II (Part Two), p. 16, para. 74.

the Study Group on the most-favoured-nation clause) and Ms. JACOBSSON (Rapporteur) participated, it was proposed that the heading "Roadmap of future work" should be transposed to precede paragraph 6 and to follow the part entitled "A preliminary assessment of the 1978 draft articles". In addition, it was proposed that the name of Mr. McRae, in parentheses, should be inserted at the end of the text, in subparagraph viii.

It was so decided.

Chapter IX, as a whole, as amended, was adopted.

CHAPTER XII. Treaties over time (A/CN.4/L.756)

64. The CHAIRPERSON invited the Commission to consider chapter XII of its draft report, on the evolution of treaties over time (A/CN.4/L.756).

A. Introduction

Section A was adopted.

Paragraph 1

Paragraph 1 was adopted.

B. Consideration of the topic at the present session

Paragraphs 2 to 8

Paragraphs 2 to 8 were adopted.

Paragraph 9

65. Sir Michael WOOD proposed that the second sentence, which was unclear for anyone who was not a member of the Commission, should be deleted.

Paragraph 9, as amended, was adopted.

Paragraphs 10 and 11

Paragraphs 10 and 11 were adopted.

Section B, as amended, was adopted.

Chapter XII, as a whole, as amended, was adopted.

CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.747 and Add.1)

A. Responsibility of international organizations (A/CN.4/L.747)

Paragraphs 1 and 2

66. Mr. GAJA said that section A had wrongly been broken into two paragraphs, although the document submitted to the Secretariat had comprised only one. The points raised in the second sentence of the current paragraph 1 were not questions to States; the Commission was not expecting a response from States, but simply wanted to make them aware of certain gaps. The sole question addressed to States was in the current paragraph 2. Breaking section A into two paragraphs thus caused confusion: it gave the impression, for example, that States were invited to answer the question of when an international organization was entitled to invoke the responsibility of a State. The question to which the Commission was

awaiting a response was about how it should deal with the issues concerning international responsibility between States and international organizations that had not yet been covered. He therefore proposed that the two paragraphs be merged.

67. Mr. VALENCIA-OSPINA said that the Commission might do well to refer to the timetable for its future work on responsibility of international organizations. The current wording of paragraph 2 might give the impression that it would only continue its work on the issues mentioned in paragraph 1 if States specifically asked it to do so. States should instead be requested to indicate not only in what form the Commission should deal with issues not expressly covered either in the articles on the responsibility of States for internationally wrongful acts³⁰² or in the draft articles on the responsibility of international organizations, but also, in what time frame it should do so.

68. Mr. GAJA said that he thought it would be best to leave it to States to decide on that. Everything would depend on what they wished to do with the articles on the responsibility of States. The Commission should be prepared for the unlikely event of having to propose "amendments" to the articles, with a view to a conference on the subject.

69. Mr. HASSOUNA pointed out that in section B (Shared natural resources), the Commission said that it would welcome more responses from Governments: it could include similar wording in section A.

70. Mr. GAJA said that a sentence beginning "The Commission would welcome observations on the following points" could be inserted at the start of chapter III.

71. The CHAIRPERSON said he took it that the Commission endorsed Mr. Gaja's proposals.

It was so decided.

Section A, as amended, was adopted.

B. Shared natural resources

Paragraph 3

72. Mr. GAJA proposed that, in the first sentence, the word "most", which departed from the traditional formulation, should be deleted. In the second sentence, the words "more responses from Governments are required" were a bit too strong. Instead, one might say: "In order to assist the Commission to make a full assessment of the practice, it would welcome further responses from Governments, particularly from those that did not respond to the questionnaire." The final sentence, which said that the Commission had decided to have the questionnaire on oil and gas circulated once more to States, had no real place in chapter III and should be deleted.

73. Mr. DUGARD said that if that sentence was deleted, the problem would not arise, but he nevertheless wished

³⁰² See footnote 10 above.

to know to whom the word “they” in the English text referred.

74. The CHAIRPERSON said that in the English text of the final sentence, the word “they” should be replaced by “it”.

75. Mr. CANDIOTI (Chairperson of the Working Group on shared natural resources) said he himself thought that it was important to say that the Commission had decided to address the questionnaire on oil and gas once again to States, as that reflected the discussion in the Working Group on shared natural resources.

76. The CHAIRPERSON, speaking as a member of the Commission, proposed that the final sentence of paragraph 3 should be retained unchanged.

It was so decided.

Section B, as amended, was adopted.

A bis. Expulsion of aliens (A/CN.4/L.747/Add.1)

Section A bis was adopted.

Chapter III, as a whole, as amended, was adopted.

The meeting rose at 1.05 p.m.

3035th MEETING

Friday, 7 August 2009 at 10.10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-first session (concluded)

CHAPTER XIII. Other decisions and conclusions of the Commission (A/CN.4/L.757)

1. The CHAIRPERSON invited the Commission to consider chapter XIII of its draft report as contained in document A/CN.4/L.757.

A. Programme, procedures and working methods of the Commission and its documentation

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

1. APPOINTMENT OF SPECIAL RAPPORTEUR FOR THE TOPIC “EFFECTS OF ARMED CONFLICTS ON TREATIES”

Paragraph 3

Paragraph 3 was adopted.

2. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

Paragraph 4

Paragraph 4 was adopted.

3. CONSIDERATION OF GENERAL ASSEMBLY RESOLUTION 63/128 OF 11 DECEMBER 2008 ON THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS

Paragraph 5

Paragraph 5 was adopted.

4. DOCUMENTATION AND PUBLICATIONS

(a) *Processing and issuance of reports of Special Rapporteurs*

Paragraph 6

Paragraph 6 was adopted.

(b) *Summary records of the work of the Commission*

Paragraph 7

Paragraph 7 was adopted.

(c) *Trust fund on the backlog relating to the Yearbook of the International Law Commission*

Paragraph 8

Paragraph 8 was adopted.

(d) *Other publications and the assistance of the Codification Division*

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted.

5. PROPOSALS ON THE ELECTIONS OF THE COMMISSION

Paragraph 11

2. Ms. ESCARAMEIA said that the penultimate sentence should be deleted, since it wrongly implied that the Planning Group wished to remove from its agenda the item of elections, whereas, in fact, the reference was only to a specific proposal under that item.

3. Mr. WISNUMURTI (Chairperson of the Planning Group) recalled that the sentence had been proposed by Mr. Pellet.

4. Mr. CANDIOTI said that he concurred with Ms. Escarameia. The question had been discussed, but no decision had been taken.

5. Mr. HASSOUNA said that, if the sentence was deleted, the word “however” in the last sentence would also need to be deleted.

6. Ms. JACOBSSON (Rapporteur) said that the word “however” was still needed to balance what would become, after the proposed deletion, the penultimate sentence.

7. Mr. KOLODKIN said that the proposed deletion would give a misleading impression. The Planning Group had reached a very clear understanding that the issue of staggered elections would no longer be on the agenda. He would, however, abide by any consensus decision.

8. Mr. VALENCIA-OSPINA concurred. He suggested that, in the penultimate sentence, the words “this item” should be replaced by the phrase “the proposal concerning the staggering of elections”.

9. Mr. WISNUMURTI (Chairperson of the Planning Group) said that he supported that suggestion. If the question was not dealt with, it might re-emerge in the future. The sentence should be made unambiguous.

10. Mr. GAJA said that, in the last sentence, the word “Commission” should be replaced by the words “Planning Group”. Otherwise, the text implied that the Planning Group itself had not discussed the issue of gender balance.

Paragraph 11, as amended by Mr. Valencia-Ospina and Mr. Gaja, was adopted.

6. SETTLEMENT OF DISPUTES CLAUSES

Paragraph 12

Paragraph 12 was adopted.

7. METHODS OF WORK OF THE COMMISSION

Paragraph 13

Paragraph 13 was adopted.

8. HONORARIA

Paragraph 14

Paragraph 14 was adopted.

9. ASSISTANCE TO SPECIAL RAPPORTEURS

Paragraph 15

Paragraph 15 was adopted.

10. ATTENDANCE OF SPECIAL RAPPORTEURS IN THE GENERAL ASSEMBLY DURING THE CONSIDERATION OF THE COMMISSION'S REPORT

Paragraph 16

Paragraph 16 was adopted.

11. JOINT MEETING WITH LEGAL ADVISERS OF INTERNATIONAL ORGANIZATIONS WITHIN THE UNITED NATIONS SYSTEM

Paragraph 17

11. Ms. ESCARAMEIA said that a reference should be included to the Gilberto Amado Memorial Lecture. It was

mentioned in paragraph 31, but only in the context of the International Law Seminar.

12. The CHAIRPERSON concurred. He suggested that the lecture should be the subject of a separate paragraph 17 *bis*.

Paragraph 17 was adopted.

New paragraph 17 bis was adopted.

Section A, as a whole, as amended, was adopted.

B. Date and place of the sixty-second session of the Commission

Paragraph 18

Paragraph 18 was adopted.

Section B was adopted.

C. Cooperation with other bodies

Paragraphs 19 to 23

13. Mr. GALICKI said that a reference should be made somewhere in the report to the visit paid to the Commission by the Legal Counsel.

14. The CHAIRPERSON said that the Legal Counsel was mentioned in paragraph 11 of chapter I, in document A/CN.4/L.745.

Paragraphs 19 to 23 were adopted.

Section C was adopted.

D. Representation at the sixty-fourth session of the General Assembly

Paragraph 24

15. The CHAIRPERSON said that a new paragraph 24 *bis* should be added, with the following text:

“At its 3035th meeting on 7 August 2009, the Commission requested Mr. Eduardo Valencia-Ospina, Special Rapporteur on the topic ‘Protection of persons in the event of disasters’, to attend the sixty-fourth session of the General Assembly, under the terms of paragraph 5 of General Assembly resolution 44/35 of 4 December 1989.”

Paragraph 24, as amended, was adopted.

New paragraph 24 bis was adopted.

Section D, as amended, was adopted.

E. International Law Seminar

Paragraphs 25 to 39

Paragraphs 25 to 39 were adopted.

Section E was adopted.

Chapter XIII, as a whole, as amended, was adopted.

CHAPTER I. Organization of the session (A/CN.4/L.745)

16. The CHAIRPERSON invited the Commission to consider chapter I of its draft report as contained in document A/CN.4/L.745.

Paragraph 1

Paragraph 1 was adopted.

A. Membership

Paragraph 2

Paragraph 2 was adopted.

B. Casual vacancy

Paragraph 3

Paragraph 3 was adopted.

C. Officers and the Enlarged Bureau

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

D. Drafting Committee

Paragraph 7

17. Mr. HMOUD said that his name should appear among those listed in paragraph 7 (a) as a member of the Drafting Committee on reservations to treaties.

Paragraph 7, as amended, was adopted.

Paragraph 8

Paragraph 8 was adopted.

E. Working Groups and Study Groups

Paragraph 9

Paragraph 9 was adopted.

F. Tribute to the former Secretary of the Commission

Paragraph 10

Paragraph 10 was adopted.

G. Secretariat

Paragraph 11

Paragraph 11 was adopted.

H. Agenda

Paragraph 12

Paragraph 12 was adopted.

Chapter I as a whole, as amended, was adopted.

CHAPTER II. Summary of the work of the Commission at its sixty-first session (A/CN.4/L.746)

18. The CHAIRPERSON invited the Commission to consider chapter II of its draft report, as contained in document A/CN.4/L.746.

Paragraph 1

19. Mr. GAJA said that in the first sentence the phrase “final provisions” should be replaced by the phrase “general provisions”, in order to avoid giving the impression that the Commission had completed its work on the draft articles.

Paragraph 1, as amended, was adopted.

Paragraphs 2 to 4

Paragraphs 2 to 4 were adopted.

Paragraph 5

20. Mr. GAJA said that the last sentence was identical to a sentence in the corresponding report at the previous session. Since no further action had been taken, there seemed little point in retaining the sentence.

Paragraph 5, as amended, was adopted.

Paragraphs 6 to 11

Paragraphs 6 to 11 were adopted.

Paragraph 12

21. Mr. PERERA said that, in view of the two paragraphs added to the report of the Study Group the previous day, the following phrase should be inserted in the second sentence after the words “Study Group”: “made a preliminary assessment of the 1978 draft articles.”

Paragraph 12, as amended, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

22. Ms. ESCARAMEIA said that ideally the disparate topics dealt with should each appear in separate paragraphs, but she did not wish to tamper with the traditional format. It would, however, read more logically if the order of the second and third sentences were reversed.

23. The CHAIRPERSON suggested the effect would be improved still more if the second sentence—relating to the appointment of Mr. Cafilisch as Special Rapporteur on the topic “Effects of armed conflicts on treaties”—were moved to the beginning of the paragraph.

Paragraph 14, as amended, was adopted.

Chapter II of the report as a whole, as amended, was adopted.

The report of the International Law Commission on the work of its sixty-first session, as a whole, as amended, was adopted.

Chairperson’s concluding remarks

24. The CHAIRPERSON announced that, at the invitation of the Council of Europe and after consulting

the Bureau, he had nominated Mr. Caffisch, Special Rapporteur for the topic “Effects of armed conflicts on treaties”, to represent the Commission at the meeting of CAHDI which would be held in Strasbourg on 10 and 11 September 2009.

25. In response to the invitation from the President of the International Tribunal for the Law of the Sea, he would be paying a visit to the Tribunal on 29 September in his capacity as Chairperson of the Commission. He trusted that the visit would foster good relations between the two institutions.

26. The sixty-first session had been productive despite a number of difficulties. He was grateful to his colleagues on the Bureau for their advice and guidance. He had

appreciated the assistance and continuous support offered by the secretariat, the Codification Division and the Legal Liaison Office in Geneva. He also wished to thank all the précis-writers, interpreters, conference officers, translators and other members of conference services who were not seen, but who performed valuable services daily.

Closure of the session

27. After the customary exchange of courtesies, the CHAIRPERSON declared the sixty-first session of the International Law Commission closed.

The meeting rose at 11 a.m.

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