

Document:-
A/CN.4/SR.2764

Summary record of the 2764th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2003 vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

48. He thanked the many members who had attended the meeting of the Working Group for their constructive contributions.

49. Mr. PAMBOU-TCHIVOUNDA said that, since he was not a member of the Drafting Committee, he wished to express his full support for revised article 2, on condition that the phrase in square brackets was deleted.

50. Ms. XUE said she had been unable to attend the meeting of the Working Group, but it seemed the plenary was still expected to comment on the policy considerations underlying the new text. She agreed that article 2 was one of the most difficult of the draft articles. Previous conventions had used the term “intergovernmental organization” without defining it, but since the Commission had agreed that “intergovernmental organizations” were the target of the draft articles, it might be worthwhile trying to arrive at a definition.

51. She had some reservations regarding article 2 as originally proposed by the Special Rapporteur in his report (A/CN.4/532, para. 34), but the new version still contained some problematic terms. For instance, the wording “established by a treaty or other instrument of international law” did not necessarily reflect the real practice of States and international organizations. With regard to the phrase “possessing its own international legal personality”, although in the 1949 Advisory Opinion in the *Reparation for Injuries* case, ICJ had said that an international or intergovernmental organization possessed “international personality” [p. 15], it was still not clear that this phrase was meant to include “intergovernmental organizations” only. It was meant to include other types of organizations as well. However, not all international organizations necessarily possessed such personality, and including that essentially theoretical concept in the revised text made it more confusing than the original draft article. Finally, with regard to the wording “in addition to States ... may include as members entities other than States”, she felt that the organization’s composition was a matter to be decided by its constituent instrument. If the Commission retained that wording as it stood, it would have to make clear the relationship between the character of such an organization and the status of such non-State entities. Otherwise the scope might become too broad.

52. The revised version was confusing. If there was already a consensus on policy considerations, meaning that the text could be referred to the Drafting Committee, the Committee would have to work very hard to make plain what international organizations the Commission intended to include.

53. Mr. Sreenivasa RAO thanked the Working Group and the Special Rapporteur for accommodating the diversity of views on the definition of “international organization”. There was a kernel of truth, however, to what Ms. Xue had said about the drafting of the revised text. The first sentence referred to the organization’s establishment by a treaty or other instrument under international law, which did not make it clear whether such an instrument could be negotiated by non-State actors as well as States. As long as an organization was established by an instrument negotiated only among States, no problem arose if the instrument created a membership that could include

non-State entities. Otherwise, there would be a gap which the Drafting Committee would have to fill.

54. Mr. ECONOMIDES noted that the definition chose three criteria. The first, namely establishment by a treaty or other instrument of international law, posed no problems because it was true of all international organizations. The second, that of international personality, was true of all international organizations that had international powers, such powers being implicit. If an organization did not have international personality, but simply internal legal personality in the territory where it operated, the draft articles would not apply to it. The third criterion, relating to membership, was a useful addition, in that it reflected the fact that an increasing number of international organizations had non-State members. The revised text was perfectly acceptable, although the Drafting Committee might refine it further.

55. Mr. CHEE said that in the Working Group he had raised the issue to which Ms. Xue had referred, namely, what was meant by “instrument of international law”. Ms. Escameia had said that it could include a resolution of the General Assembly. The term was very broad and imprecise. He had also raised in the plenary the issue of the distinction between “international personality” and “international legal personality”, which had a bearing on the term “instrument of international law” and needed to be clarified.

56. The CHAIR said that, if he heard no objection, he would take it that the Commission decided to refer article 2 to the Drafting Committee.

It was so decided.

57. Mr. PELLET said that the definition in article 2 was excellent. He emphasized that, if the plenary referred to the Drafting Committee an article already discussed at length in the Working Group, the Committee was bound to respect the position of the full Commission and not reopen the debate on the many problems that had led to the adoption of the article in question.

The meeting rose at 11.30 a.m.

2764th MEETING

Wednesday, 28 May 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivouna,

Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (continued)* (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,² A/CN.4/L.631)

[Agenda item 3]

REPORT OF THE WORKING GROUP

1. The CHAIR invited the Special Rapporteur on diplomatic protection to introduce the report of the Working Group on draft article 17.

2. Mr. DUGARD (Special Rapporteur) recalled that Mr. Gaja had proposed merging draft article 17, paragraph 1, with paragraph 2 of the same article. The Working Group established to consider the matter had drafted a provision that took account of that proposal, which read:

“For the purposes of diplomatic protection [in respect of an injury to a corporation], the State of nationality is [that according to whose law the corporation was formed]/[determined in accordance with municipal law in each particular case] and with which it has a [sufficient]/[close and permanent] [administrative]/[formal] connection.”

3. The Working Group had had before it proposals by Mr. Economides, Mr. Brownlie, Mr. Gaja and Mr. Pellet and had reached a consensus on the need, first of all, to cater for situations when a municipal system did not know the practice of incorporation, but applied some other system of creating a corporation, and, second, to establish some connection between the company and the State along the lines of the links enunciated by ICJ in the *Barcelona Traction* decision. At the same time, however, the Working Group had been careful not to open Pandora’s box by adopting a formula which might suggest that the tribunal considering the matter should take into account the nationality of the shareholders that controlled the corporation, something which the Court had rejected in the *Barcelona Traction* case. Several different wordings were put forward in the text submitted by the Working Group for article 17, and the Special Rapporteur proposed that that provision should be referred to the Drafting Committee.

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)*

4. The CHAIR invited the Special Rapporteur to sum up the debate on articles 18 to 20 of the draft articles on diplomatic protection.

* Resumed from the 2762nd meeting.

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

² Reproduced in *Yearbook ... 2003*, vol. II (Part One).

5. Mr. DUGARD (Special Rapporteur) said that the debate had centred, quite rightly, on criteria to be used for identifying the nationality of a corporation. Before turning to the three draft articles in question, and in response to an issue raised by Mr. Brownlie, who had said the Commission should look more closely at the status of legal persons other than corporations, he would submit an addendum on the subject to the Commission. Because legal persons came in extremely varied types, however, it was impossible to provide a generalized regime for all legal persons in international law. Some members of the Commission had in fact suggested that it was inadvisable to go further into the matter. He would therefore not go into the minutiae of the topic from the standpoint of diplomatic protection.

6. Draft article 18 set out two exceptions to the rule that diplomatic protection was to be exercised by the State in which the corporation was registered, extending that possibility to the State of nationality of the shareholders. The first exception, contained in draft article 18, subparagraph (a), posed no particular problem, the majority of the Commission’s members being in favour of the test that the corporation should have ceased to exist for the State of nationality of the shareholders to be able to exercise diplomatic protection. Other useful suggestions had been made: Mr. Kamto had proposed that a time limit should be imposed for bringing a claim, and Mr. Addo had raised the possibility that the shareholders might bring their claims against the liquidator of the corporation. He himself thought that that could be done during the period of liquidation, but that after the company had completely ceased to exist, the shareholders must have the right to persuade their State of nationality to intervene. Since there had been no serious objection to article 18, subparagraph (a), he recommended that it should be referred to the Drafting Committee.

7. Draft article 18, subparagraph (b), had given rise to a much more vigorous debate and created something of a division among members of the Commission. Fifteen members had been in favour of including subparagraph (b), namely, Mr. Al-Baharna, Mr. Chee, Mr. Daoudi, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Pellet, Mr. Yamada and himself, and nine against, namely Mr. Addo, Mr. Brownlie, Mr. Economides, Mr. Kateka, Mr. Koskenniemi, Mr. Mansfield, Mr. Rodríguez Cedeño, Mr. Sreenivasa Rao and Mr. Sepúlveda. He himself believed that the exception set out in subparagraph (b) was part of a cluster of rules and principles which together made up the decision of ICJ in the *Barcelona Traction* case, as was attested to by the fact that the Court had raised the possibility of such an exception, although it had not been relevant to the case itself. For that reason, he thought it should be included. As to whether the exception was part of customary international law or not, the views of members of the Commission had likewise been divided. His own view was that a customary rule was developing and if the Commission wished to engage in progressive development of the law in that area, it should do so with great caution.

8. Many members of the Commission had argued that article 18, subparagraph (b), was unnecessary because the shareholders had other remedies such as domestic

courts, ICSID or the international tribunals provided for in some bilateral or multilateral agreements. That was not always true, either because there was no domestic remedy or because the State of nationality or the host State had not become a party to ICSID or to a bilateral investment treaty. He had been surprised that Mr. Sreenivasa Rao and Mr. Sepúlveda had been in favour of the availability of ICSID-type protection when neither India nor Mexico was a party to that arrangement and, indeed, many other important States, including Brazil, Canada, Poland, the Russian Federation and South Africa, were also not parties.

9. Some members were probably hostile to article 18, subparagraph (b), because of a historical opposition to foreign investment on the grounds that it was contrary to the interests of developing countries. As Mr. Kamto and Mr. Momtaz had pointed out, however, the situation had changed considerably since ICJ had handed down its decision in the *Barcelona Traction* case. The type of situation he had in mind was that of an entrepreneur who, having set up a company in a developing country at the request of its Government, had the assets of the company confiscated following a change in government and found that there was neither a domestic nor an international remedy. It was in a sense a matter of protecting the human rights of the investor.

10. Many members had stressed that the exception contained in article 18, subparagraph (b), should be used only as a final resort. He thought that that went without saying: the exception was not a remedy that should be used lightly, and it should be resorted to only when there was no other solution. He accordingly recommended that subparagraph (b) should be referred to the Drafting Committee.

11. Draft article 19 presented very few problems. Some members had taken the view that it was an exception that would be better placed in article 18. He, however, was persuaded that, with a view to conformity with the *Barcelona Traction* decision, the two articles should be separated. There had been no objections to draft article 20. There had, however, been a division of opinion over the proviso, with some members suggesting that it should be dealt with in the commentary, and he had no objections to that. It had also been rightly proposed that the text of the article should be harmonized with that of article 4. He consequently recommended that the two draft articles should be referred to the Drafting Committee.

12. Mr. Sreenivasa RAO said that India had carefully considered becoming a party to the ICSID arrangement, but that, for various domestic reasons, that action had been delayed. In any case, the opposition to or defence of draft article 18, subparagraph (b), could not rest entirely on whether a State recognized the competence of ICSID, or not as long as effective remedies were available.

13. He was in favour of the inclusion of draft article 18, subparagraph (b), in the draft on the understanding that the exception it provided for should come into play only as a last resort.

14. Mr. BROWNLIE said that a number of very important public law institutions, such as cities or universities, were treated analogously to corporations by major judicial bodies. Admittedly, not all municipal systems dealt with

those matters in the same way. He also hoped that the Special Rapporteur would reconsider his statement that the *Barcelona Traction* case supported the exception in draft article 18, subparagraph (b).

15. Mr. ECONOMIDES suggested that it should be stated, either in the body of the articles or in the commentary, that the draft articles were without prejudice to rules applicable to legal persons, other than corporations, that came under municipal law.

16. Mr. GALICKI said that he endorsed the referral of draft articles 17 to 20 to the Drafting Committee, but thought that draft article 20 should be brought into line not only with article 4, as proposed by the Special Rapporteur, but also, in respect of the second part, with draft article 18, subparagraph (a). The relationship between those two provisions might be explained either by the Drafting Committee or in the commentary.

17. Mr. PELLET said that he appreciated the resoluteness shown by the Special Rapporteur, who had not only defended his positions ably but also been receptive to other opinions. Concerning the question whether to focus on other legal persons, he said that he had always been in favour of doing so. It would be better to cover the entire subject, since the principles applicable to non-profit organizations should not be very different from those applicable to corporations. However, a savings clause like the one proposed by Mr. Economides would not suffice to settle the question, and the addendum promised by the Special Rapporteur would therefore be welcome. With regard to draft article 18, subparagraph (b), he reiterated his disagreement with Mr. Brownlie: *Barcelona Traction* was not an argument for either side. Like Mr. Sreenivasa Rao, he believed that the problem was not one of human rights, but one of law. After all, when a State committed an internationally wrongful act, someone had to be able to hold it responsible; diplomatic protection was one way of doing so when all other remedies had been exhausted.

18. He did not think that a draft article should be referred to the Drafting Committee until the questions of principle had been settled in plenary because, otherwise, that would burden the Drafting Committee with too heavy responsibilities. That was the case with draft article 18, subparagraph (b), and above all with draft article 17 as proposed by the Working Group. He was nevertheless in favour of referring those draft articles to the Drafting Committee.

19. The CHAIR said that, if he heard no objection, he would take it that the members of the Commission wished to endorse draft article 17 in the new form proposed by the Working Group and to refer draft articles 18 to 20 to the Drafting Committee, subject to the comments made during the debate.

It was so decided.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from trans-

boundary harm arising out of hazardous activities)
(*continued*) (A/CN.4/529, sect. D, A/CN.4/531³)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

20. Mr. KATEKA, recognizing that the Commission had embarked on a difficult subject, said he hoped that the doubts of some members about the project's viability would not prevent it from moving ahead, if only for posterity's sake. He regretted that in 1998 the Commission had decided to exclude from the scope of the draft harm caused to the environment in areas beyond national jurisdictions, as the Special Rapporteur had stated in paragraph 35 of his report (A/CN.4/531). The recent case of the *Prestige*, the Greek-operated oil tanker registered in the Bahamas which had been repaired in China and had been heading for Asia with its cargo of Russian oil, showed that the price of negligence could be high. Spain had decided to tow the damaged tanker out to sea, 270 km off the coast, and it had sunk in waters 3,500 m deep with its dangerous cargo, polluting beaches in Spain and France for several months. It was regrettable that the Special Rapporteur had excluded damage to the environment *per se* not resulting in any direct loss to individuals or the State (para. 153 (k)).

21. He commended the Special Rapporteur for reviewing various regional and international environmental instruments in his sectoral and regional analysis (paras. 47–113), but it would have been better if he had considered more national legislation from other regions of the world. It would also be useful for the Special Rapporteur to provide more details on such incidents as the *Bhopal* case, referred to in a footnote to paragraph 149 of the report, so as to elaborate on the subject.

22. In paragraphs 122 to 149, the Special Rapporteur analysed some elements of civil liability, there again preferring damage to persons and property at the expense of the environment *per se* and going so far as to say that, in certain cases, such damage could indirectly benefit the environment. He hoped that the Commission would do better than that.

23. Although he had some misgivings about subparagraphs (f), (g) and (k), he agreed with most of the recommendations made in paragraph 153, particularly on the threshold of significant harm in paragraph 153 (c). As to the form of the future draft articles, he was of the view that it was too early to decide, but he did not agree with the Special Rapporteur's idea to adopt them as a protocol to the draft framework convention on the regime of prevention because a soft-law approach, for example, might be more appropriate. The Special Rapporteur should ask himself why several of the conventions to which he referred in paragraphs 47 to 113 were still not in force. Perhaps it was due to the lack of specificity and the scope of the subject matter. The Fifth Ministerial Conference "Environment for Europe", which had been held in Kiev in May 2003, had emphasized the importance of insurance and other financial instruments for making civil liability regimes work effectively. Of course, the Commission did

not have expertise on such questions, but, as in the past, the special rapporteurs might make use of specialists.

24. Mr. PAMBOU-TCHIVOUNDA said that, although the Special Rapporteur had done an excellent job, he should perhaps have delimited the topic more precisely, because it was not certain that the report had helped "throw some useful light on the model of allocation of loss the Commission may wish to recommend", as was noted in paragraph 4. From a terminological point of view, it would be better to use only the word "damage", which was used in almost all the conventions cited in paragraphs 47 to 113 of the report, rather than the word "loss".

25. The question of prevention having been settled, the Commission should now shift the focus of its work to compensation for transboundary harm arising out of hazardous activities. One of the problems to which the topic gave rise was the result of the fact that the role of the State was built on a fiction, particularly with regard to harm arising out of hazardous activities which were not prohibited by international law and which were industrial or commercial—in other words, purely private—activities usually carried out by private individuals. They were carried out by States, without the latter losing their character as private activities, only because the States decided, on an exceptional basis, to place themselves in the same conditions as private individuals. That gave rise to consequences at the level of liability when those activities caused transboundary harm and States were affected. He had two comments to make in that regard, one conceptual and the other methodological. At the conceptual level, if those activities were not prohibited by international law, it was not because they were private activities, but because States benefited from them. The involvement of the State in a compensation process was a logical consequence of that relationship of dependence on the activity in question. At the methodological level, if the aim was a global regime of State liability, it was necessary to know which activities or sectors of activities were likely to entail the liability of the State on account of their harmful effects. He therefore wondered whether it was possible to draw up a complete or partial list of those activities or sectors of activities and whether that list could be corrected and amended and, if so, under whose authority. He also wondered to what extent such a list might influence the scope and impact of the regime of compensation and to what extent its inclusion in an annex to the draft might strengthen the regime's credibility.

26. Defining the role of the State in the compensation of transboundary harm gave rise to problems of substance before problems of form and modalities. The first case considered the risk to which the State exposed itself by assuming the obligation to compensate when it acted as the operator or carried out a hazardous activity, particularly for reasons of national security. In that case, the State would be fully liable for compensation subject to the modalities for the settlement of compensation, which, following the negotiation with the other State, might take different forms in keeping with the whole range of possibilities for dispute settlement. The second case was that of an internationally wrongful act when it was established that the State, which was not the operator of the activity in question, did not fulfil the obligations provided for in the draft articles on the prevention of transboundary harm.

³ See footnote 2 above.

In that case, State responsibility was international responsibility, and mere recognition of responsibility might already constitute a form of compensation, as ICJ had stated in the *Corfu Channel* case. That was token compensation, and it supplemented that of the operator or of “the party with the most effective control of the risk at the time of the accident” (para. 114 of the report). The third case was that of the liability of the operator himself, when it was established that the State had conformed in full to the obligations of prevention. The coverage of damage would then bring other mechanisms into play, private-law mechanisms in particular. His brief three-case summary might find a place in a provisional outline of principles, and the Commission might reserve for later consideration the question of the definitive form that the principles might take. He encouraged the Special Rapporteur to work in that direction.

27. Mr. BROWNLIE said that he remained concerned about the structural relations between the Commission’s work on the topic and other areas of existing international law. He asked Mr. Pambou-Tchivounda whether he would accept that most of the cases he had described were adequately covered by State responsibility and, if so, why the concept of State liability was needed. He would also like to have the views of other members on that question.

28. Mr. PAMBOU-TCHIVOUNDA explained that he had referred to possible situations while bearing in mind those envisaged in the report. The questions were (a) whether the Commission should work towards proposing a range of generally applicable rules, and (b) whether it should first draw up an inventory or whether the examples provided by the Special Rapporteur were sufficient. As for the rationale behind the draft articles on liability arising out of acts not prohibited by international law, it might be the case that the State on whose territory the activity took place had behaved punctiliously; nevertheless, in the event of an accident, a frame of reference must be available with which to deal with compensation. Hence the value of a regime other than one of responsibility based on a wrongful act of the State.

Cooperation with other bodies

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

29. The CHAIR welcomed Mr. João Grandino Rodas, Observer for the Inter-American Juridical Committee, and invited him to report to the Commission on the work of the Committee.

30. Mr. GRANDINO RODAS (Observer for the Inter-American Juridical Committee) said that he was very honoured to address the Commission, whose members were among the world’s most eminent contemporary international lawyers. The Inter-American Juridical Committee was the oldest legal body in the Americas and would be celebrating its centenary in 2006. The agenda for the Committee’s August 2003 session was divided into two sections. Section A comprised items under consideration, while section B contained follow-up items. The first item in section A concerned the Seventh Inter-American

Specialized Conference on Private International Law. The General Assembly of OAS had requested the Committee to support the consultation of governmental and non-governmental experts and to prepare such reports, recommendations and other materials as would be necessary for the consultation on that occasion.

31. The second item related to applicable law and competency of international jurisdiction with respect to extra-contractual civil liability. The documents presented by the co-rapporteurs had defined the complexity of that topic, which was compounded by the great differences in the treatment of the subject by common-law and civil-law countries. Proposed approaches to dealing with those issues had included the adoption of a convention on extra-contractual liability, specific conventions on the various categories of liability and the adoption of a model law. Discussions had centred around the kind of rules which should determine applicable law and jurisdiction, the choice being between a method that afforded a measure of predictability and one that was more flexible. A uniform approach in that area throughout the hemisphere would seem advisable. However, given the cost of preparing such a convention, account should be taken of the severity of the problem posed by the diversity of approaches to resolving the issue and the funds available, and of the likelihood of the problem being resolved in other forums and of finding a satisfactory solution in the inter-American sphere. Concerns had been expressed about the need to indicate, in addition to the internal legislation of the States, the general principles of law governing the subject and the exceptions to those principles. The generality of the criterion of *lex loci delicti* and of the exceptions presented in the context of the principles on the most significant relationship had been cited as examples. It was important to note that most of the countries in Latin America, Canada and the Caribbean, as well as 10 of the United States of America, applied some version of *lex loci delicti*, which had the virtue of predictability, although it had been pointed out that that could lead to unjust or arbitrary results. Discussion of which standards to apply involved the consideration of changing conflict-of-law rules in most countries of the hemisphere and would be difficult to accept, unless the instrument containing it was limited to a particular sub-category of extracontractual liability. The Committee had asked for a final report on the subject, taking into account the preliminary reports already submitted and the points of view expressed during the session, to the effect that, given the complexity of the subject and the broad variety of types of liability included under the category of “extra-contractual civil liability”, it would be better initially to recommend the adoption of inter-American instruments governing jurisdiction and applicable law with respect to specific subcategories of extracontractual civil liability and only later, if circumstances were appropriate, to seek the adoption of an inter-American instrument governing jurisdiction and applicable law with respect to the entire area of extracontractual civil liability.

32. The third item under consideration was cartels in the framework of competition law in the Americas. The Committee had already considered the topic of competition law in the Americas as part of the issue of the juridical dimension of integration and international trade, initially conducting a preliminary comparative analysis of exist-

ing laws and legislation on competition or protectionism in member States. Subsequently, the topic had been expanded to include a survey of international rules on competition law in the hemisphere, focusing more specifically on cartels, with particular regard to their international aspects. Specific concerns had been raised about export cartels formed to produce effects in the countries to which they exported their products, thereby creating a problem for those countries. A questionnaire had been designed requesting domestic authorities responsible for supervising competition in the OAS member States to provide information on laws, recent cases and practices concerning competition and cartels.

33. Following various initial studies, a consolidated report for the March 2003 session of the Committee had presented an overview of the evolution of competition law, focusing on the role of cartels and incorporating results of the questionnaire completed by 20 member States of the region. The report also included sections on regional and multilateral arrangements and cooperation in international forums, as well as a final section on future directions for competition and cartel policies. It was planned to publish a final, expanded version of the study in the four official languages of OAS. Concerns had been expressed regarding the fact that currently every matter relating to law on competition and cartels was governed by the internal law of States, as inter-American international law contained no provision making free competition obligatory or giving OAS the power to impose sanctions for breaches of that law. A convention on the subject would be more likely to be successful if it was consistent with what was actually provided in the national legislation of the respective States, as long as general principles of law were respected. Those concerns, as well as the special problems facing small economies in the area of competition law and the need for assistance and cooperation for countries faced with potential international regulation, would be reflected in a more fully refined report on the topic, to be submitted to the Committee for approval at its August 2003 session.

34. The fourth item under consideration was the enhancement of the administration of justice in the Americas, with particular reference to access to justice, a question that the OAS General Assembly had requested the Committee to continue studying in all its different aspects, while maintaining the necessary coordination and the highest possible degree of cooperation with other organs of the Organization working in that area, and especially with the Justice Studies Centre of the Americas, based in Santiago. That issue had received increasing attention at the Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas, and various delegations had drawn attention to it during the presentation of the Annual Report of the Committee at the most recent General Assembly. Discussions in the Committee had included seeking analysis of specialized means of justice designed to facilitate access to justice and studying the underlying causes of the problem of access to justice in general, and for disadvantaged people in particular, and also the problems of funding.

35. The fifth item under consideration concerned the Fifth Joint Meeting with Legal Advisers of the Foreign Ministries of OAS Member States and the International Criminal Court. The OAS General Assembly had request-

ed the Committee to ensure that the agenda for the next meeting included a discussion of mechanisms to address and prevent serious violations of international humanitarian law and international human rights law, as well as the role of the International Criminal Court in that process. Accordingly, the Committee had prepared a basic document to be submitted at the next Joint Meeting, contributing to the analysis of a number of issues connected with the entry into force of the Rome Statute of the International Criminal Court and setting out the problems that might arise from the way in which the Statute had been adopted, as well as possible solutions. The Committee had requested the OAS General Assembly to submit to it a report on the status of signatures, ratifications and accessions to the Rome Statute, pertinent references to the instruments adopted by the Preparatory Commission for the International Criminal Court and any other information that might be relevant to that meeting. Necessary measures, including financing measures, were being taken to secure the participation of legal advisers of the foreign ministries at that important meeting.

36. Among the items in section B of the agenda concerning follow-up, the Committee would first deal with hemispheric security, an item that had already been studied in several reports. The second item was the implementation of the Inter-American Democratic Charter. A document on that subject had been submitted and would be analysed by the Committee at its next regular session. The third item related to preparations for the commemoration of the centennial of the Inter-American Juridical Committee, which would fall in 2006. As part of the programme of activities for that occasion, a draft declaration on the role of the Committee in the development of inter-American law might be prepared, for consideration in due course by the General Assembly. Furthermore, the 2006 session of the international law course held in August each year in Rio de Janeiro, Brazil, would focus on the topic of the contribution of the Committee to the development of inter-American law. The Committee had created a working group to coordinate and implement activities related to the celebration. A book celebrating the centennial was to be published shortly.

37. The last item in section B of the agenda was the preparation of a draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, which the Committee had decided to include once again in its agenda in view of the importance assigned to it during the meeting of the Committee on Juridical and Political Affairs of the Permanent Council of OAS in March 2003. In conclusion, he thanked the members of the Commission who had honoured the Committee with their presence and expressed the hope that the relationship between the two bodies would continue to grow.

38. Mr. OPERTTI BADAN said that, on the current agenda of the Inter-American Juridical Committee, two items were particularly topical. The first was the competent jurisdiction in respect of extracontractual civil liability (*lex loci delicti*). The legal regime of contracts in the region was governed by norms, and the Inter-American Convention on the Law Applicable to International Contracts determined the applicable law, but that normative framework needed to be supplemented, in respect of extracontractual liability, by a regional codification exer-

cise that would define a number of general principles in that regard. The formulation of such principles did not involve the prior presentation of specific solutions for each category, but rather a pre-codification exercise that would allow progress to be made in developing the law of extracontractual liability, taking into account the work done by the Hague Conference on Private International Law, which, like the European Union, had not moved ahead as effectively in that area as in that of contractual liability. The second item concerned the absence of any regional law on competition. That item was important for MERCOSUR because of the problem of dumping. There had been attempts at codification in that area, but so far it had not been possible to arrive at a genuinely binding agreement. Dumping and trade were issues on which future work could be done within MERCOSUR, where the trend was towards adopting regional solutions.

39. Among the new items, the meeting with legal advisers of foreign ministries on the role of the International Criminal Court and on cooperation in that area was not just a question of organization. For the countries which had ratified the Rome Statute of the International Criminal Court, there were still some outstanding problems—for instance, article 98 of the Statute, on waiver of immunity, which might be an obstacle to the proper functioning of the Court. That problem should continue to receive attention, and that was why the Meeting with Legal Advisers and the inclusion of an item on the Court on the Committee's agenda were so important. Another major new development was the Inter-American Democratic Charter adopted in 2001. That document, which was very important from the standpoint of general principles of international law, regulated to some extent the principle of non-intervention and provided, *inter alia*, that a State could be prevented from participating in the meetings of inter-American bodies if it did not respect democratic principles. The Charter reflected a very strong commitment to the rule of law and representative democracy. Giving that basic political concept legal form took the sociological concept of representative democracy a step further. In adopting the Charter, which should be disseminated outside the region, the countries of the Americas had been the first to accept a code for the defence of democracy, the European Union clause being simply a general clause and not an operational norm. Finally, in an era of globalization and at a time when multilateralism and the international system adopted at the end of the Second World War were in crisis, not only politically but also in terms of financing and assistance, juridical development at the regional and sub-regional levels could revitalize the political will of States to abide by predictable rules of law. The Committee's work on racism and racial discrimination was very topical from that standpoint, in that it covered both traditional forms of discrimination and more heterodox and complex forms. The Committee's agenda demonstrated clearly the responsibility assumed by it at the regional level for the past almost 100 years, as well as its contribution to the progressive development of contemporary international law, both public and private.

40. Mr. MOMTAZ observed that many amnesty laws had been adopted in the Americas in recent decades and had been the subject of jurisprudence on the part of the Inter-American Court of Human Rights, which had judged them to be contrary to States' obligations under

the American Convention on Human Rights: "Pact of San José, Costa Rica". The United Nations Human Rights Committee had followed that jurisprudence. He wished to know whether, in its work, the Inter-American Juridical Committee had addressed the issue of amnesty laws as an obstacle to the implementation of the fundamental rights of the human person.

41. Mr. MELESCANU welcomed the continuing interest of the Inter-American Juridical Committee in the Commission's work. One of the new items taken up by the Commission was the fragmentation of international law. The view prevailing in the working group on that question was that one of the main reasons for such fragmentation was the development of regional legal systems which were autonomous on some issues and, in some cases, different from general rules. Meetings with regional legal bodies were therefore very important for ensuring that international law was diversified without being fragmented. The Committee should continue to keep the Commission abreast of its work, particularly on the two key issues of the regional application of the Rome Statute of the International Criminal Court and general principles in respect of extracontractual liability. The latter could be very important for the Commission's work on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities.

42. Mr. RODRÍGUEZ CEDEÑO said he agreed that the Inter-American Democratic Charter was a fundamental political and legal instrument for strengthening democracy in the region. The Meeting with Legal Advisers on the International Criminal Court was also important both for the universality of the Rome Statute of the International Criminal Court and for the internal legislation of countries of the region. Venezuela, for instance, had amended its Criminal Code, its Code of Criminal Procedure and its Code of Military Justice to facilitate cooperation with the Court. An effort must therefore be made to increase awareness of the Court's role as an international tribunal, which meant studying it in all its aspects, both procedural and legal, including its relationship with the legislative reforms under way in the region.

43. Mr. CHEE asked how many States of the region had acceded to or ratified the Rome Statute of the International Criminal Court and to what extent the work of the Inter-American Juridical Committee had influenced the policy of the States of the region. He wondered, in fact, whether the regional solidarity which was the basis for inter-American law and whose outcomes ranged from the Calvo clause⁴ to the Inter-American Democratic Charter still prevailed. Finally, he would like to know whether the Committee's activities were disseminated globally, through journals, yearbooks and other publications.

44. Mr. BAENA SOARES said that the importance of the work of the Inter-American Juridical Committee could be explained by its tradition and authority and by the objectivity of its decisions, resolutions and reports. The items it took up were always topical and highly relevant. The Inter-American Democratic Charter reiterated and consolidated the resolutions and decisions of OAS and showed how much importance the region attached to

⁴ See 2757th meeting, footnote 5.

the strengthening of democracy. The Meeting with Legal Advisers and hemispheric security were also important items. At a more practical level, since the Committee and the Commission both held annual seminars, the programmes of those seminars should perhaps be harmonized and a dialogue encouraged between them, through their secretariats as well as reciprocal visits, possibly involving members of the two bodies.

45. Mr. GRANDINO RODAS (Observer for the Inter-American Juridical Committee) expressed satisfaction at the Commission's interest in the Committee's work and in strengthening the ties between the two bodies. With regard to the relationship between amnesty laws and access to justice, thus far, the Committee had focused on access to justice for the thousands of people who were too poor to afford a lawyer. It had considered the question of amnesty laws, but not in any depth. The issue might regain prominence. Of the 35 countries in the region, 34 belonged to the inter-American legal system, but only 16 were parties to the Rome Statute of the International Criminal Court, a number which did not include some of the region's major countries. The International Criminal Court already had two judges from the region. Inter-American law was perhaps one of the oldest examples of a regional legal system. The Inter-American Juridical Committee predated the United Nations system, as well as OAS. Currently, inter-American regional law was a reality which expressed itself in various forms, including the Inter-American Democratic Charter, attesting to the development of an objective regional legal system, not just the production of soft law. How to disseminate the experience gained in that context was one of the problems with which the Committee was dealing. A wealth of information on the subject was available on the OAS website. There was also the question of feedback on the experience that was disseminated. All the Commission's comments would be relayed to the plenary Committee at its August 2003 session in Rio de Janeiro. In any event, he hoped that cooperation between the Committee and the Commission would continue to grow.

46. The CHAIR asked the Observer for the Inter-American Juridical Committee to convey to the plenary Committee the importance that the Commission attached to the relationship between the two bodies.

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

[Agenda item 2]

47. Mr. KATEKA (Chair of the Drafting Committee) announced that the Drafting Committee on the topic of the responsibility of international organizations would comprise the following members: Mr. Gaja (Special Rapporteur), Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Kolodkin, Mr. Koskenniemi, Mr. Sreenivasa Rao, Mr. Sepúlveda, Ms. Xue, Mr. Yamada and Mr. Mansfield (*ex officio*).

The meeting rose at 1.05 p.m.

* Resumed from the 2758th meeting.

2765th MEETING

Friday, 30 May 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Ms. Xue, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (*continued*) (A/CN.4/529, sect. D, A/CN.4/531¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. KOSKENNIEMI thanked the Special Rapporteur for a useful overview of existing regimes of liability and thought-provoking suggestions. Perhaps it was impossible to trace a direct route from existing regimes to new ones, but there was an unaddressed gap between the Special Rapporteur's overview and the suggestions at the end of his report (A/CN.4/531). That gap continued to raise criticisms about the codifiability of the whole topic. In particular, five criticisms continued to be voiced. It was thus necessary to deal with them so as to demonstrate that useful work could be done.

2. One criticism, voiced by Mr. Brownlie and a number of academic commentators, was that a conceptual error had been made and the topic of liability should have been treated as part of the State responsibility project. There was some truth to that. On the other hand, responsibility and liability were both doctrinal constructions—languages, he would even call them—whose coverage could extend to the problem of uncompensated victims. Whether it should do so or not was a question of policy, not of doctrinal pigeon-holing. The criticism failed to take account of the real concern that, even after private liability regimes had been put into motion, cases might arise in which innocent victims were left without compensation. Surely the Commission should do something about that, whatever doctrinal difficulties that might create.

3. A second criticism was that the activities involved were too varied to regulate: oil pollution, nuclear pollution and hazardous waste were all very different, and

¹ Reproduced in *Yearbook ... 2003*, vol. II (Part One).