YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

2006

Volume I

Summary records
of the meetings
of the fifty-eighth session
1 May–9 June and
3 July–11 August 2006

UNITED NATIONS
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 ... 2006*).

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

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

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

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

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

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This volume contains the summary records of the meetings of the fifty-eighth session of the Commission (A/CN.4/SR.2867–A/CN.4/SR.2913), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.
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<tr>
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### OFFICERS

**Chairperson:** Mr. Guillaume Pambou-Tchivounda  
**First Vice-Chairperson:** Mr. Giorgio Gaia  
**Second Vice-Chairperson:** Mr. Víctor Rodríguez Cedeño  
**Chairperson of the Drafting Committee:** Mr. Roman Kolodkin  
**Rapporteur:** Ms. Hanqin Xue

Mr. Nicolas Michel, 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 2867th meeting, held on 1 May 2006:

1. Organization of work of the session.
2. Diplomatic protection.
3. 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).
4. Responsibility of international organizations.
5. Shared natural resources.
6. Unilateral acts of States.
7. Reservations to treaties.
8. Expulsion of aliens.
9. Effects of armed conflicts on treaties.
10. The obligation to extradite or prosecute (aut dedere aut judicare).
11. Fragmentation of international law: difficulties arising from the diversification and expansion of international law.
13. Cooperation with other bodies.
14. Date and place of the fifty-ninth session.
15. Other business.
ABBREVIATIONS

AALCO       Asian–African Legal Consultative Organization
CAHDI      Committee of Legal Advisers on Public International Law
CIA        Central Intelligence Agency
CODEXTER   (Council of Europe) Committee of Experts on Terrorism
ECOWAS     Economic Community of West African States
FAO        Food and Agriculture Organization of the United Nations
GRECO      Group of States against Corruption
IAEA       International Atomic Energy Agency
IAH        International Association of Hydrogeologists
ICSID      International Centre for Settlement of Investment Disputes
ICJ        International Court of Justice
ILO        International Labour Organization
IMF        International Monetary Fund
INTERPOL   International Criminal Police Organization
IOM        International Organization for Migration
NATO       North Atlantic Treaty Organization
OAS        Organization of American States
PCIJ       Permanent Court of International Justice
SADC       Southern African Development Community
UNESCO     United Nations Educational, Scientific and Cultural Organization
USSR       Union of Soviet Socialist Republics
WTO        World Trade Organization

*   *

AJIL       American Journal of International Law
I.C.J. Reports ICJ, Reports of Judgments, Advisory Opinions and Orders
ILM        International Legal Materials (Washington, D.C.)
ILR        International Law Reports
PCIJ, Series A PCIJ, Collection of Judgments (Nos. 1–24: up to and including 1930)
UNRIAA     United Nations, Reports of International Arbitral Awards

*   *

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.

*   *

NOTE CONCERNING QUOTATIONS

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

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

*   *

The Internet address of the International Law Commission is www.un.org/law/ilc/.
CASES CITED IN THE PRESENT VOLUME

Abbas and Juma v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department

Administrative Decision No. V

Aerial Incident of 27 July 1955

Aerial Incident of 3 July 1988


Al-Adans v. The United Kingdom


Armed Activities on the Territory of the Congo

Arrest Warrant

Association S.O.S Attentats et de Boeiry v. France

Avena

Barcelona Traction

Bellis

Branigan and McBride

Center for Constitutional Rights et al. v. Donald Rumsfeld et al.

Certain Expenses of the United Nations

Certain Norwegian Loans

Chorzów Factory

East Timor

ELSI

English Channel

Eschmayer

European Communities—Biotechnical Products

F. v. R. and the Council of State of Thurgau Canton


Judgement of 21 November 2001, Application no. 33783/97, Grand Chamber, European Court of Human Rights, Reports of Judgments and Decisions 2001-XI.


Judgement of 4 October 2006, Application no. 76642/01, Grand Chamber, European Court of Human Rights, Reports of Judgments and Decisions 2006-XIV.


Branigan and McBride v. the United Kingdom, 26 May 1993, European Court of Human Rights, Series A: Judgments and Decisions, no. 258-B.


Case Concerning the Factory at Chorzów, Claim for Indemnity, Merits, Judgment No. 13 of 13 September 1928, PCIJ, Series A, No. 17.


Fernando Hernández de Agüero v. Secretary General of the Organization of American States


International Tin Council


Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and Another


LaGrand

(Korea—Measures Affecting Government Procurement)

(Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 466.

Land and Maritime Boundary between Cameroon and Nigeria


Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory


Legal Opinion of the Threat or Use of Nuclear Weapons


Legality of Use of Force


(Yugoslavia v. Canada), ibid., p. 259.

(Yugoslavia v. France), ibid., p. 363.

(Yugoslavia v. Germany), ibid., p. 422.

(Yugoslavia v. Italy), ibid., p. 481.

(Yugoslavia v. Netherlands), ibid., p. 542.

(Yugoslavia v. Portugal), ibid., p. 656.

(Yugoslavia v. Spain), ibid., p. 761.

(Yugoslavia v. United Kingdom), ibid., p. 826.

(Yugoslavia v. United States of America), ibid., p. 916.


(Yugoslavia v. Canada), ibid., p. 195.

(Yugoslavia v. France), ibid., p. 198.

(Yugoslavia v. Germany), ibid., p. 201.

(Yugoslavia v. Italy), ibid., p. 204.

(Yugoslavia v. Netherlands), ibid., p. 207.
(Yugoslavia v. United Kingdom), ibid., p. 213.


(Serbia and Montenegro v. Canada), ibid., p. 429.
(Serbia and Montenegro v. France), ibid., p. 575.
(Serbia and Montenegro v. Germany), ibid., p. 720.
(Serbia and Montenegro v. Italy), ibid., p. 865.
(Serbia and Montenegro v. Netherlands), ibid., p. 1011.
(Serbia and Montenegro v. Portugal), ibid., p. 1160.
(Serbia and Montenegro v. United Kingdom), ibid., p. 1307.

Lockerbie


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Mavrommatis

Mavrommatis Palestine Concessions, Judgment No. 2, 1924, PCLI, Series A, No. 2.

Military and Paramilitary Activities in and against Nicaragua


Namibia


North American Dredging Company


North Sea Continental Shelf

Judgment, I.C.J. Reports 1969, p. 3.

Nottebohm


Nuclear Tests


(New Zealand v. France), ibid., p. 457.

Oil Platforms


“Patmos”


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Pulp Mills on the River Uruguay


Reparation for Injuries


Reservations to the Convention on Genocide

Right of passage over Indian Territory: Case concerning right of passage over Indian Territory, (Preliminary Objections), Judgment of 26 November 1937, I.C.J. Reports 1937, p. 125.

Rights of Minorities in Upper Silesia (Minority Schools): Judgment No. 12, 26 April 1928, PCLJ, Series A, No. 15.


Senator Lines: Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, Application No. 56672/00, Grand Chamber, European Court of Human Rights, Reports of Judgments and Decisions 2004-IV.


SS "Wimbledon": (United Kingdom et al. v. Germany), Judgments, 1923, PCLJ, Series A, No. 1.


MULTILATERAL INSTRUMENTS CITED IN THE PRESENT VOLUME

Pacific Settlement of International Disputes

American Treaty on Pacific Settlement (Pact of Bogota) (Bogota, 30 April 1948)

Privileges and Immunities, Diplomatic and Consular Relations, etc.

Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)

Vienna Convention on Consular Relations (Vienna, 24 April 1963)

European Convention on State Immunity (Basel, 16 May 1972)


Human Rights


Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (Strasbourg, 13 May 2004)

International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966)

International Covenant on Civil and Political Rights (New York, 16 December 1966)

International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)

European Convention on the adoption of children (Strasbourg, 24 April 1967)

American Convention on Human Rights “Pact of San José, Costa Rica” (San José, Costa Rica, 22 November 1969)

International Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)

European Convention for the prevention of torture and inhuman or degrading treatment or punishment (Strasbourg, 26 November 1987)

Framework Convention for the Protection of National Minorities (Strasbourg, 1 February 1995)

Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005)

Refugees and Stateless Persons

Convention relating to the Status of Refugees (Geneva, 28 July 1951)

Protocol relating to the Status of Refugees (New York, 31 January 1967)

Convention on the reduction of statelessness (New York, 30 August 1961)

OAU Convention governing the specific aspects of refugee problems in Africa (Addis Ababa, 10 September 1969)

Council of Europe Convention on the avoidance of statelessness in relation to State succession (Strasbourg, 19 May 2006)

International Trade and Development

Convention on the settlement of investment disputes between States and nationals of other States (Washington, 18 March 1965)

Convention on Choice of Court Agreements (The Hague, 30 June 2005)

Transport and Communications

Convention on International Civil Aviation (Chicago, 7 December 1944)

Convention on offences and certain other acts committed on board aircraft (Tokyo, 14 September 1963)

Convention for the suppression of unlawful seizure of aircraft (The Hague, 16 December 1970)

Convention for the suppression of unlawful acts against the safety of civil aviation (Montreal, 23 September 1971)
Penal matters

European Convention on Extradition (Paris, 13 December 1957)


International Convention against the taking of hostages (New York, 17 December 1979)


International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)


Council of Europe Convention on the Prevention of Terrorism (Warsaw, 16 May 2005)

Law of the Sea


Law applicable in armed conflict

Hague Convention 1907 (IV) respecting the Laws and Customs of War on Land (The Hague, 18 October 1907)

Regulations respecting the laws and customs of war on land (The Hague, 18 October 1907) Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919)

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


Law of Treaties


Source

Ibid., vol. 1496, No. 5146, p. 328
Ibid., vol. 472, No. 6841, p. 185.
Ibid., vol. 1438, No. 24381, p. 194.
Ibid., vol. 1137, No. 17828, p. 93.
Council of Europe, European Treaty Series, No. 190.
Ibid., vol. 2375, No. 14843, p. 178.
Ibid., vol. 2329, No. 41737, p. 301.
Ibid., vol. 2051, No. 35457, p. 363.
A/60/618.

Ibid., vol. 2216, No. 39391, p. 225.
Ibid., vol. 2466, No. 39391, p. 168.
Ibid., vol. 2178, No. 38349, p. 197.
Ibid., vol. 2296, No. 40916, p. 167.
Ibid., vol. 2466, No. 40916, p. 205.
Ibid., vol. 2349, No. 42146, p. 41.
Council of Europe, European Treaty Series, No. 198.
Ibid., No. 196.


Ibid., p. 107.
Ibid., vol. 75, No. 973, p. 287.
Ibid., vol. 1125, No. 17513, p. 609.
Ibid., vol. 1125, No. 17512, p. 3.
Ibid., vol. 249, No. 3511, p. 215.
Ibid., vol. 1690, No. 29137, p. 51.

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)

**Disarmament**

Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, 1 July 1968)

**Environment**

Vienna Convention on civil liability for nuclear damage (Vienna, 21 May 1963)

Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)

Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987)


Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran, 4 November 2003)

**Miscellaneous**

Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (Montevideo, 26 December 1933)

Charter of the Organization of American States (Bogotá, 30 April 1948)

Statute of the Council of Europe (London, 5 May 1949)

Treaty of Guarantee (Nicosia, 16 August 1960)

Convention concerning judicial competence and the execution of decisions in civil and commercial matters (Brussels, 27 September 1968)

Constitutive Act of the African Union (Lomé, 11 July 2000)

Southern African Development Community (SADC) Protocol on Politics, Defense and Security Cooperation (Blantyre, 14 August 2001)

Inter-American Democratic Charter (Lima, 11 September 2001)

Treaty establishing a Constitution for Europe (Rome, 29 October 2004)

Source


ECE/MP.WAT/11-ECE/CP.TEIA/9.


*OEA, Official Documents, OEA/Ser.G/CP-1*.

# Checklist of Documents of the Fifty-Eighth Session

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Opening of the session

1. The OUTGOING CHAIRPERSON declared open the fifty-eighth session of the International Law Commission, the last session of the current quinquennium, and extended a warm welcome to members.

2. The Commission’s report on the work of its fifty-seventh session had been considered by the Sixth Committee of the General Assembly at its 11th to 20th and 22nd meetings, between 24 October and 16 November 2005. A topical summary of the discussion, prepared by the Secretariat, was contained in document A/CN.4/560. Member States had expressed interest in the new topics on the Commission’s agenda, namely, “Expulsion of aliens” and “Effects of armed conflicts on treaties”, and had welcomed the inclusion of an item on “The obligation to extradite or prosecute (aut dedere aut judicare)”.

3. In accordance with the practice established in 2004, the first week of the Commission’s consideration of the report had been designated “International Law Week”. During that week, legal advisers of Member States had exchanged views with the Special Rapporteurs on the topics of responsibility of international organizations and effects of armed conflicts on treaties, and fruitful informal contacts had taken place between delegations and other members of the Commission. He himself had also represented the Commission at the forty-fourth and forty-fifth sessions of the Asian–African Legal Consultative Organization (AALCO), the latter session coinciding with the fiftieth anniversary of that organization’s establishment.

4. The CHAIRPERSON thanked members for the confidence they had placed in him in according him the privilege of chairing the Commission. He would spare no effort to show himself worthy of that confidence, and would do his utmost to ensure that the session was successful and productive.

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

Organization of work of the session

[Agenda item 1]

6. The CHAIRPERSON suggested that the meeting should be suspended to enable the Enlarged Bureau to consider the programme of work of the session.
The meeting was suspended at 3.35 p.m. and resumed at 4.40 p.m.

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

It was so decided.

Filling of casual vacancies (article 11 of the Statute) (A/CN.4/563 and Add.13)

8. The CHAIRPERSON announced that the Commission was required to fill a casual vacancy created by the election of Mr. Bernardo Sepúlveda to the International Court of Justice and his subsequent resignation from the Commission. He would suspend the meeting to enable the members of the Commission to hold informal consultations.

The meeting was suspended at 4.50 p.m. and resumed at 4.55 p.m.

9. The CHAIRPERSON announced that the Commission had elected Mr. Eduardo Valencia-Ospina to fill the casual vacancy. On behalf of the Commission, he would inform the newly elected member and invite him to take his place in the Commission.


[Agenda item 2]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

10. Mr. DUGARD (Special Rapporteur), introducing his seventh report (A/CN.4/567), said that it was an examination of the draft articles on diplomatic protection adopted on first reading, taking account of recent developments, including the comments by 11 States contained in document A/CN.4/561, the comments by Belgium and the United Kingdom to be found in document A/CN.4/561/Add.1, and a comment by Italy circulated in document A/CN.4/561/Add.2. The report also responded to observations by States in the Sixth Committee (A/CN.4/560, paras. 112–127) and to scholarly comments referred to in the bibliography annexed to the report. In March 2006, the European University Institute in Florence, Italy had held a seminar on diplomatic protection based on his draft report, and the comments made during that event had also been taken into account. While it was disappointing that so few States, whether developed or developing, had reacted in writing to the draft articles adopted on first reading, the comments received had nevertheless been very helpful. Interestingly enough, several States had chided the Commission for its unduly cautious approach and had enjoined it to move more rapidly and to engage in more radical progressive development.

11. The report made no proposals for provisions on dispute settlement or the question of signature and ratification, the reason being that it was not yet clear what form the draft articles would take. His own view was that they were closely linked to the draft articles on responsibility of States for internationally wrongful acts and that their future would largely be determined by the fate of those draft articles.

12. The seventh report contained proposals for changes to certain draft articles. Proposals regarding issues of principle would need to be discussed in plenary session; those of a technical or linguistic nature, and those relating to changes to the commentary, were of interest only to the Drafting Committee. The Commission also had before it one entirely new proposal: a new draft article 20 would propose that States be obliged to transfer any compensation received on behalf of an individual to that individual—a proposal made by Mr. Pellet at the previous session and one which he himself had initially opposed but which, on reflection, he was now inclined to endorse. A proposal to that effect was to be found in paragraph 103 of the report.

13. The comments on draft article 1 fell into three categories: those calling for clarity in language or changes to the text; those suggesting additions to the commentary; and those calling for a clear distinction to be made between diplomatic protection and consular assistance. The third category was certainly the most important and would be fully considered. Other comments and suggestions could be more easily disposed of.

14. Two important issues needed to be considered in respect of draft article 1: the proposal by Italy, to be found in document A/CN.4/561/Add.2, and his own proposal relating to a provision on consular assistance. The Government of Italy was of the view that draft article 1, in giving a definition of the concept of diplomatic protection, adopted a wording which was too traditional, especially when it referred to a State “adopting in its own right the cause of its national”. According to the Government of Italy, that wording implied not only that the right of diplomatic protection belonged only to the State exercising such protection, but also that the right that had been violated by the internationally wrongful act belonged only to the State exercising such protection, but also that the right that had been violated by the internationally wrongful act belonged only to the same State. That approach, it argued, no longer accurately reflected current international law in the light of the decisions of the ICJ in the LaGrand (para. 77 of the judgment) and Avena (para. 40 of the judgment) cases and Advisory Opinion OC-16/99 (The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law) of the.

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2 Reproduced in Yearbook ... 2006, vol. II (Part One).

3 Idem.

4 Idem.


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

7 See Yearbook ... 2005, I, 2846th meeting, pp. 113–114, paras. 27–30.
Inter-American Court of Human Rights (paras. 80–84 of the decision), all of which, in the view of the Government of Italy, had established that the breach of international norms on treatment of aliens might produce both the violation of a right of the national State and the violation of a right of the individual. Italy therefore suggested that draft article 1 should be amended to read: “Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State claiming to have suffered the violation of its own rights and the rights of its national in respect of an injury to that national arising from an internationally wrongful act of another State”. In his personal view, the Italian proposal was worthy of serious attention. The issue was one of principle and could not be left entirely to the Drafting Committee.

15. The second issue arising out of draft article 1 concerned the difference between diplomatic protection and consular assistance. International law recognized two kinds of protection that States might exercise on behalf of their nationals: consular assistance and diplomatic protection. The fundamental differences between them frequently gave rise to misunderstanding, particularly in respect of the definition of the term “action” in relation to diplomatic protection. Diplomatic action was sometimes mistakenly classified as consular assistance. The problem was that diplomatic protection was often considered to involve judicial proceedings only; in other words, interventions outside the judicial process on behalf of nationals were sometimes not regarded as constituting diplomatic protection, but instead as falling under consular assistance. That, in his view, was too narrow a view of diplomatic protection. Any intervention, including negotiation at the inter-State level, on behalf of a national vis-à-vis a foreign State should be classified as diplomatic protection and not as consular assistance, provided that the general requirements of diplomatic protection had been met, namely, that there had been a violation of international law for which the respondent State could be held responsible; that local remedies had been exhausted; and that the individual concerned had not been allowed to bring the claim before the ICJ had been that of diplomatic protection. While Mr. Dugard had some sympathy with the United States’ argument that the parties in those cases had confused consular assistance and diplomatic protection, the Court had nonetheless found that the two could and should be distinguished and that the individual right to consular assistance could be claimed through the vehicle of diplomatic protection. There was no need for the Commission to attempt to unravel the Court’s judgments: suffice it to say that the two judgments confirmed the importance of distinguishing between consular assistance and diplomatic protection.

16. Unfortunately neither government officials nor legal scholars distinguished clearly between diplomatic protection and consular assistance. There were, however, three structural differences: first, the limited nature of consular functions provided for in the 1963 Vienna Convention on Consular Relations compared with the less limited function of diplomats contained in the 1961 Vienna Convention on Diplomatic Relations; second, the difference in level of representation between consular assistance and diplomatic protection; and third, the preventive nature of consular assistance as opposed to the remedial nature of diplomatic protection. Consuls were seriously limited in respect of the action they might take to protect their nationals. Their main function was to assist nationals who had got into trouble, for example by finding lawyers to assist them, visiting prisons and contacting local authorities, but they were unable to intervene in the judicial process or internal affairs of the receiving State. That meant that consuls were permitted to represent the interests of the national, but not the interests of the State in the protection of the national. That was a matter for the diplomatic branch. There was another important distinction between the two: consular assistance had a largely preventive nature and took place before local remedies had been exhausted or before a violation of international law had occurred. It was primarily concerned with the protection of the rights of the individual and required the consent of the individual concerned. A diplomatic démarché, on the other hand, was designed to bring the matter to the international, or inter-State, level and might ultimately result in international litigation. Moreover, the individual concerned could not prevent his national State from taking up the claim or from continuing procedures in the exercise of diplomatic protection.

17. The relationship between diplomatic protection and consular assistance had been an issue in both the LaGrand and Avena cases. The merits of the cases concerned the exercise of consular assistance, but the mechanism used to bring the claim before the ICJ had been that of diplomatic protection. While Mr. Dugard had some sympathy with the United States’ argument that the parties in those cases had confused consular assistance and diplomatic protection, the Court had nonetheless found that the two could and should be distinguished and that the individual right to consular assistance could be claimed through the vehicle of diplomatic protection. There was no need for the Commission to attempt to unravel the Court’s judgments: suffice it to say that the two judgments confirmed the importance of distinguishing between consular assistance and diplomatic protection.

18. Another source of confusion was the provision in the Treaty establishing a Constitution for Europe, article 1-10, paragraph 2 (c) of which provided that “Citizens of the Union … shall have … the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State”. That provision suggested that any member State of the European Union could exercise diplomatic protection on behalf of any national of any member State of the European Union. There were many objections to

that provision, the main one being that it offended the principle of *pacta tertiis nec nocent nec prosum*, because any provision contained in a European Union treaty was not binding on States that were not members of the European Union. Third States were under no obligation to respect any of the provisions contained in European Union treaties and were not obliged to—and indeed were unlikely to—accept consular assistance by States that were not the State of nationality of an individual European Union citizen.

19. A “citizen” of the European Union was not a national of all member States of the European Union, which meant that European Union citizenship did not fulfill the requirement of nationality of claims for the purpose of diplomatic protection. The European Union treaty provisions purporting to confer the right to diplomatic protection on all European Union citizens by all member States of the European Union was therefore seriously flawed—unless it was interpreted as applicable to consular assistance only. It was submitted that that was indeed its intention. Although consular assistance was usually exercised only on behalf of a national, international law did not prohibit the rendering of consular assistance to nationals of another State. Since consular assistance was not an exercise in the protection of the rights of a State nor an espousal of a claim, the nationality criterion need not be applied as strictly as in the case of diplomatic protection. Thus, it was not necessary to establish the bond of nationality in such a case.

20. In theory, the distinction between diplomatic protection and consular assistance was clear. The former was an inter-State intervention conducted by diplomatic officials or government representatives attached to the foreign ministry, which occurred when a national was injured by an internationally wrongful act committed by another State and the national had exhausted local remedies. It was an intervention designed to remedy an international wrong, whereas consular assistance involved assistance to nationals who found themselves in difficulties in a foreign State, and was rendered by career consuls or honorary consuls not engaged in political representation. Such assistance was preventive in the sense that it aimed to prevent the commission of an international wrong. The national was provided with consular advice and legal assistance to ensure that he received a fair trial if charged with a criminal offence, or to protect his personal or proprietary interests in the host State. Despite the clear theoretical distinction between the two institutions, there were overlaps (as illustrated by the *LaGrand* and *Avena* cases) and failures to distinguish between the two (as shown by the European Union treaties). It might be wise to make it clear that the Commission was aware of the distinction and wished it to be maintained, and it was therefore suggested (paragraph 21 of the report) that a new paragraph should be included in draft article 1, to read: “(2) Diplomatic protection shall not be interpreted to include the exercise of consular assistance in accordance with international law”. While the matter could perhaps be dealt with in the commentary, he thought it sufficiently important to warrant an additional provision. Paragraph 21 of the report also contained a proposal for an amendment to draft article 1, paragraph 1, to give effect to the proposal by the Government of Italy.

21. Draft article 2 presented two problems. First there was the question, raised by the Government of Italy, whether a duty should be imposed on States to exercise diplomatic protection in the case of serious human rights violations; secondly, there was the general comment by the Government of Austria in document A/CN.4/561, to the effect that the respondent State should be under an obligation to accept the claim of diplomatic protection.

22. In 2000, the Commission had debated whether or not, by way of progressive development, States should be required to exercise diplomatic protection where the national had been subjected to a human rights violation amounting to a violation of a *jus cogens* norm; that proposal had, however, met with little enthusiasm in the Commission, and he had accordingly withdrawn his suggestion. Since then, there had been a number of interesting national developments on the subject. Increasingly, litigants had sought to compel their States to exercise diplomatic protection on their behalf, the two best-known cases being *Abassi and Juma v. Secretary of State for Foreign and Commonwealth Affairs* and *Secretary of State for the Home Department and Kaunda and Others v. President of the Republic of South Africa and Others*. In the former, Mr. Abbasi and others had attempted to compel the United Kingdom Government to exercise diplomatic protection on their behalf against the United States of America arising out of their detention in Guantánamo Bay. The United Kingdom court had held that they had no right to diplomatic protection. Interestingly, it had considered at some length the debate in the Commission on the subject (paras. 36 and 88 of the decision). It had approached the matter largely from the perspective of domestic law and had held that in the particular circumstances of the case, the United Kingdom Government could not be compelled to exercise diplomatic protection, because it was endeavouring to assist the claimants. Mr. Abbasi and others had in fact been released several months after they had failed in their litigation. In the *Kaunda* case, which had involved the alleged participation of a group of South African mercenaries in an attempted coup to overthrow the Government of Equatorial Guinea, the South African Constitutional Court had likewise addressed the question whether there was an obligation under international law to afford diplomatic protection and had considered at some length, and been guided by, the debates in the Commission. The Court had held that, in the circumstances, the Government of South Africa had done something to help its nationals and that there was therefore no call for an order from the Court on the subject.

23. Thus, following those domestic developments, the Government of Italy was suggesting that the Commission should reconsider the matter. It proposed that a legal duty should be imposed on States to exercise diplomatic protection where the individual had been subjected to a serious human rights violation, and that States should be obliged to make provision in their municipal law for the enforcement of such a right. That was a radical suggestion, but it was not new, and the Government of Italy made it clear that the proposal was made by way

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of de lege ferenda, not with a view to codification. It therefore required the Commission’s close attention.

24. The Government of Austria was perhaps less far-reaching. The Government of Austria argued that “the Commission concentrated only on one aspect of diplomatic protection, namely as a right of a State to make certain claims in the interest of its nationals. This right is, however, balanced by the corresponding obligation of the other States to accept such claims by a State. The legal regime on diplomatic protection also stipulates under which conditions a State has to accept such interventions by another State.”12 Draft article 2 could therefore be amended by adding a second paragraph, to read: “A State is under an obligation to accept a claim of diplomatic protection made in accordance with the present draft articles”.

25. On draft article 3, he said that the Netherlands’ proposal to formulate the article more elegantly was a matter for the Drafting Committee. The same applied to Austria’s comment with regard to the formulation of draft article 4 (paragraph 29 of the report).

26. Draft article 5 had elicited the most comments, in particular from the United States. The comments on the subject of continuous nationality could best be left to the Drafting Committee or dealt with in the commentary. Then there were the questions of whether to retain draft article 5, paragraph 2; whether to provide that the time between the dies a quo and the dies ad quem should be covered by the provision; and whether the final date should be the date of presentation of the claim or the date of the award—the problem of the dies ad quem.

27. He was not certain what course of action should be followed with regard to draft article 5, paragraph 2. The United States had suggested that it should be deleted, arguing that its main purpose was to protect a person whose nationality had changed as a result of succession; laws did not necessarily mandate a change of nationality in the case of marriage and adoption. The United States believed that the right of diplomatic protection passed in State succession; the right to diplomatically protect in such a situation should not be viewed as an exception to the general requirement. It accordingly suggested that the issue should be addressed through the addition of a reference to the “predecessor State” in draft article 5, paragraph 1. It should, however, be borne in mind that paragraph 2 had been intended to introduce an element of flexibility to the continuous nationality rule. As paragraph 177 of the report of the Commission on the work of its fifty-third session stated,

there was agreement that the rule needed to be made more flexible so as to avoid inequitable results … most members preferred a middle course whereby the traditional rule would be retained, albeit subject to certain exceptions aimed at those situations where the individual would otherwise have no possibility of obtaining protection by a State.13

At Mr. Candioti’s suggestion, a rider had been added, stating that such exceptions “should relate to involuntary changes of nationality of the protected person, arising from succession of States, marriage and adoption”. On mature reflection, he believed that to have been the right approach and he recommended that paragraph 2 should be retained. That position had the support of the United Kingdom, which stated that its own claims rules allowed it to exercise diplomatic protection on behalf of a national who ceased to be or became a national after the date of the injury. In practice, however, such an approach was adopted only in concert with the State of former or subsequent nationality. The United Kingdom was opposed to forum shopping but seemed to believe that no problem arose, thanks to the inclusion of the words “for reasons unrelated to the claim”. The Commission would need to decide whether or not to delete the paragraph.

28. As for continuity of nationality, there was virtually no State practice to support a requirement that nationality should be retained continuously from the time of injury to the date of presentation or resolution of the claim. Yet, as the United States pointed out, it was incongruous to draft a rule on continuous nationality that failed to take account of the period between the dies a quo and the dies ad quem. It was suggested that draft article 5, paragraph 1 should be adjusted accordingly. The United States acknowledged that the provision might be an exercise in progressive development, but such an exercise seemed to be justified. Belgium and the United Kingdom, on the other hand, were opposed to the provision.

29. The most controversial aspect of the continuous nationality rule concerned the dies ad quem—the final date or stage of the proceedings at which the injured individual must still be a national of the claimant State. The Commission had chosen, on the basis of its reading of State practice, the date of the official presentation of the claim. That position was supported by several States in their written comments and in statements to the Sixth Committee. On the other hand, it was strongly opposed by the United States, which argued that the date of the resolution of the claim—the date on which the award was made—should be the criterion.

30. The United States relied heavily on the decision of an arbitral tribunal of the International Centre for Settlement of Investment Disputes (ICSID) in The Loewen Group Inc, Inc. and Raymond L. Loewen v. United States of America, which had held that “[i]n international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the dies a quo, through the date of the resolution of the claim, which date is known as the dies ad quem” (para. 225 of the decision). That decision, it argued, was supported by a number of other arbitral decisions and claims presented through diplomatic channels in which the person on whose behalf the claim was presented had changed his/her nationality after the claim was officially presented but before the final resolution of the claim. According to the United States, in each of those cases the international claim had been dismissed or withdrawn when it became known that the claim was being asserted on behalf of a national of a State other than the claimant State. The United States argued that such cases reflected a consistent State practice amounting to a customary rule, and that, as a policy matter, that rule was preferable, as

13 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 198, para. 177.
it avoided a situation where the respondent State owed the claimant State for an injury to a person who was no longer the legal concern of that State.

31. Academic opinion was not very helpful on the subject. Most writers acknowledged that the dies ad quem was uncertain. State practice was equally unclear, as treaties differed in their formulation of the dies ad quem. The United States cited the 1930 League of Nations Conference for the Codification of International Law in support of the date of the award, but it was important to recall that that “support” was based on a survey of only 20 States, eight of which had rejected continuous nationality as a rule, while three had abstained and nine had voted in favour.14 Those nine had included four dominions of the United Kingdom, which had probably been blindly following the United Kingdom’s lead.15

32. Judicial decisions on the subject were too uncertain to provide evidence of a rule of customary international law. In large part, the divergences of judicial opinion could be ascribed to the divergences in treaties regulating such claims. In such circumstances, it was not surprising that some decisions favoured the date of presentation, some favoured the date of the award, and others were inconclusive. It was, however, important to stress that many of the decisions in favour of the date of the resolution of the claim—in which the United States relied—included instances in which the national changed his/her nationality after the presentation of the claim and before the award, to that of the respondent State. In such a case it could hardly be expected that the claim would succeed, as the respondent State would in effect then be paying compensation to another State in respect of an injury to its own national. That had been the case in many of the instances on which the United States relied.

33. The United States relied heavily on the decision in the Loewen case, but, while most of that decision was carefully reasoned and researched, it was seriously flawed in respect of the dies ad quem. The tribunal had simply asserted that there was a continuous nationality requirement, without any examination whatsoever of authority. The tribunal had referred critically to his own first report, which in its paragraphs 200 to 20416 had noted that the continuous nationality rule was not an accepted rule of customary international law (paras. 235–236 of the award), but it had failed to refer to the report’s examination of the dies ad quem dispute. Moreover, had it, before giving its award on 26 June 2003, inquired about the work of the Commission on the subject, the tribunal would have learned that in 2002 the Commission had adopted a draft article on continuous nationality which gave approval to the date of the official presentation of the claim as the dies ad quem.17 However, it had made no attempt to do so. Had it taken the slightest trouble to find out what the Commission had decided, the tribunal would in all likelihood have adopted a different rule, or at least a different approach. While his comments might seem harsh, responses to the Loewen decision by such writers as Jan Paulsson18 and Matthew Duchesne19 had been very critical. In those circumstances, it was small wonder that the Netherlands Government doubted whether the Loewen case truly reflected the law as it currently stood.

34. In the light of the uncertainty surrounding the dies ad quem, the Commission must make a choice between the date of the official presentation of the claim and the date of the resolution of the claim. The authorities were inconclusive and the response of States, although scanty, favoured the date of the presentation of the claim. The Commission must be guided by principle and policy. Principle supported the date of the presentation of the claim, as which most favoured the interests of the individual. So, too, did policy, if policy was equated with fairness. Many years might pass between the presentation of a claim and its final resolution and it would be unfair to deny the individual the right to change nationality, through marriage or naturalization, during that period. Moreover, the date of presentation was significant, as it was the date on which the State of nationality showed its clear intention to exercise diplomatic protection. Perhaps the strongest statement on policy was to be found in the Eschauzier case, on which the United States relied for its position.

35. Different policy considerations applied where the national on whose behalf the claim was brought acquired the nationality of the respondent State after the presentation of the claim, as had occurred in Loewen and many of the other cases on which the United States relied. In such circumstances, fairness dictated that the date of the award should be selected as dies ad quem, as the contrary position would be grossly unfair. It was therefore proposed that the Commission retain the official date of presentation of the claim as the dies ad quem for the continuous nationality rule, but that an exception be made for the case in which the national on whose behalf the claim was brought acquired the nationality of the respondent State after the presentation of the claim. In such a case, the date of the resolution of the claim should be the dies ad quem.

36. The questions before the Commission were thus to consider whether to retain draft article 5, paragraph 2; whether to extend the continuous nationality rule to the period between the dies a quo and the dies ad quem; and whether to retain the date of the presentation of the claim as the dies ad quem in most circumstances, subject to the exception outlined above. In short, draft article 5 still required considerable attention.

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17 Yearbook ... 2002, vol. II (Part Two), draft article 4 [9], pp. 70–72.


19 Duchesne, loc. cit. (footnote 14 above).
37. With regard to draft article 6, there had been no strong opposition from Governments, although the United Kingdom had queried whether it yet constituted a rule of customary international law.

38. As for draft article 7, the provision had been hotly debated in the Commission but broadly welcomed by States, although some had raised questions about the use of the word “predominant”. Italy, for example, had suggested that the provision should revert to the requirement of a genuine link. As no State had raised any objection of principle, any further amendments might be made by the Drafting Committee.

39. Draft article 8 had also been highly controversial within the Commission, but, surprisingly, it had been generally welcomed by States. A number of suggestions had been made relating to the wording but there had been no objection to the principle. The final wording should therefore be left to the Drafting Committee.

40. With regard to the claims of corporations and the shareholders of corporations, covered in draft articles 9 to 13, the comments by States had raised two important questions: first, whether the final phrase “or some similar connection” should be retained, since it implied that a genuine link between the corporation and the State exercising diplomatic protection was required. Secondly, there was the problem of the corporation “formed” (incorporated) in one State but with a registered office in another State. That raised the question of which State could exercise diplomatic protection.

41. Aware that the phrase might be misunderstood, the Commission had, in its commentary to draft article 9, gone out of its way to make it clear that a “similar connection” did not imply a genuine link. Despite that, States seemed unhappy with the phrase, believing, understandably, that it would be construed as requiring some form of genuine link. In his view, therefore, the Commission should eliminate the requirement. Secondly, it should consider the question of a corporation that had a registered office in a State other than that in which it was incorporated. During the drafting process, the Commission had inclined to the view that the State that protected the corporation should be required to show not only that the corporation had been formed in its territory but also that it had its registered office in that territory. In the commentary, it had been emphasized that the Commission did not wish to contemplate the suggestion that a corporation might possess dual nationality.21 That was an error, and one that must be rectified. In commercial life it was not infrequent for a corporation to be formed in one State and have its registered office in another. Guatemala had put forward a useful proposal, whereby draft article 9 would be divided into three paragraphs. Paragraph 2 would read: “For the purposes of diplomatic protection of corporations, a corporation has the nationality of the State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection”. Paragraph 3 would read:

“Whenever the application of paragraph 2 means that two States are entitled to exercise diplomatic protection, the State with which the corporation has, overall, the closest connection shall exercise that protection”. That might be the best solution, but the Commission would clearly have to give the draft article further close consideration.

42. As for draft article 10, on continuous nationality of a corporation, he had already discussed the continuous nationality rule in respect of natural persons. It was therefore unnecessary to revisit the arguments in favour of the continuous nationality requirement between the dies a quo and the dies ad quem. Once more, the Commission would be wise to refer to the “predecessor State”, as suggested by the United States in relation to draft article 5. Again, he believed that the dies ad quem should be the date of the official presentation of the claim.

43. The United States, however, objected to draft article 10, paragraph 2, arguing that the protection of extinct corporations should not be an exception to the rule of continuous nationality. It claimed that “a State may continue to exercise protection with respect to the claims of a corporation so long as the corporation retains a legal personality, which can be as bare as the right to sue or be sued under municipal law”. It therefore argued that there was no need for such a provision. Unfortunately, it failed to consider the concerns raised in that connection by judges (notably the United States judge, Judge Jessup, in the Barcelona Traction case), tribunals and scholars, all of which had been examined exhaustively in his fourth report on diplomatic protection.22 In the light of the failure of the United States to refute (or even to consider) those authorities, and in the absence of a wider comparative survey of corporate law and practice to establish that many legal systems allowed corporations to sue and be sued following dissolution, his inclination was to retain paragraph 2; that position was supported by the United Kingdom Government, which, however, favoured deletion of the phrase “as the result of the injury”. That suggestion too, he was inclined to accept.

The meeting rose at 6 p.m.

2868th MEETING
Tuesday, 2 May 2006, at 10.05 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escaramiea, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Montaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Ms. Xue, Mr. Yamada.


21 Ibid., para. (7) of the commentary.


[Agenda item 2]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the Special Rapporteur to continue his introduction of his seventh report on diplomatic protection.

2. Mr. DUGARD (Special Rapporteur), after reading out draft article 11 (Protection of shareholders), said that he was inclined to support the proposal by Austria that the phrase “for a reason unrelated to the injury” in subparagraph (a) should be deleted, for the reasons indicated in paragraph 60 of the report. In view of the reasoning by the ICJ in favour of the exception made in the Barcelona Traction case (paras. 64–68 of the judgment), however, he could not support the deletion of the entire subparagraph, as suggested by the United States.

3. Subparagraph (b) had been the subject of debate and controversy within the Commission but had been generally accepted by States, as evidenced by the comments received from States and the statements made in the Sixth Committee: the Russian Federation, Germany, Greece and, perhaps more surprisingly, Cuba had given their approval to the draft provision. Only the United States had objected to the subparagraph on the grounds of law and policy set out in paragraph 63 of the report. He could not accept the arguments marshalled by the United States, for the reasons set out in paragraphs 64 and 65. In general, the arguments put forward were rather weak, and he found them difficult to accept. He therefore recommended that the Commission should retain subparagraph (b). The Nordic countries, the United Kingdom and Belgium objected to the reference to the fact that a company was compelled to incorporate under the law of the responsible State, considering that a corporation might be compelled to incorporate in a State as a result of political pressure. He shared that objection and suggested that the qualification, which also did not appear in the Barcelona Traction case, should be deleted. Accordingly, draft article 11 should be retained in the form adopted by the Commission, subject to deletion of the phrase “for a reason unrelated to the injury” in subparagraph (a) and the phrase “under the law of the latter State” in subparagraph (b).

4. There had been no serious objection to draft article 12 (Direct injury to shareholders), although the United States considered it superfluous; he thought that it should be retained, in the interests of fully codifying the principles expounded in the Barcelona Traction judgment and providing a comprehensive picture of the law on that aspect of diplomatic protection.

5. Lastly, with regard to draft article 13 (Other legal persons), he thought that the proposal by Guatemala to replace the words “articles 9 and 10” with the words “articles 9 through 12 inclusive”, so as to include limited liability companies among the other legal persons, should be referred to the Drafting Committee.

6. Mr. GAJA said that the reports on diplomatic protection had always reflected a certain tension between the traditional approach to diplomatic protection as a State prerogative and a greater concern for the position of individuals. The first-reading draft appeared to follow the traditional approach, particularly in the commentary to draft article 2, which emphasized the dictum of the ICJ in the Mavrommatis case. The definition in draft article 1 was more ambiguous. The wording, borrowed from the Interhandel judgment, did not, unlike the Mavrommatis judgment, stress the right of the State exercising diplomatic protection. At the same time, it did not refer to rights that individuals might have under international law. Although the ICJ had held, in the LaGrand and Avena cases, that nationals of States parties to the Vienna Convention on Consular Relations possessed rights under international law arising from that Convention, it had not said that all the principles and rules of international law concerning the treatment of aliens gave individuals rights under international law. In the Avena judgment, the Court had made a significant distinction between action that the claimant Government took with regard to the rights of individuals under the Convention on the one hand, and diplomatic protection of the same individuals on the other.

7. For that reason, the Commission should hesitate before adopting the proposal made at the previous meeting by the Special Rapporteur to the effect that diplomatic protection always concerned the rights of individuals under international law. It was clear that diplomatic protection essentially concerned injuries that affected individuals. Such injuries set limits on any claim a State could make when no direct injury to that State was involved. The wording suggested at the previous meeting, however, seemed to convey the view that there was always some kind of direct injury for the State concerned. Traditionally, injury affecting an individual was regarded only as an element that could trigger action by the State of nationality. The individual’s current position in international law with regard to the primary rules concerning the treatment of aliens and the rules concerning human rights called for a new approach to the secondary rules concerning diplomatic protection, since they were necessarily linked to the primary rules. That was not to say that, contrary to practice, the State should be regarded merely as an instrument for the protection of individual rights. The idea that a State had an obligation under international law to exercise diplomatic protection had been rejected at first reading and should not be revived at the current stage. That also applied in cases of infringements of jus cogens, which should be regarded as the concern of all States and not specifically of the State of nationality.

8. The current position of the individual in international law implied some other changes in an institution that had traditionally been regarded as a State prerogative. One of those implications had been outlined by the Special Rapporteur in his proposal concerning the right of an injured national to reparation: since reparation was
given to the State on behalf of the injured individual, reparation ought to accrue to the individual concerned. The Commission might also consider, first, the question of whether a State was entitled to put forward a claim of diplomatic protection irrespective of the individual’s request or wishes: such cases, though rare, existed in practice. Secondly, it might consider whether the individual should have a role with regard to the modalities of reparation, when a choice arose between restitution and compensation. Thirdly, it might consider whether the individual’s consent should be required for a settlement to become effective. While it would be difficult to find practice that would support the existence of rules on such matters and there might be some hesitation about expressing such rules by way of progressive development, the draft articles could well include some recommendations to States to apply certain criteria in their practice that would give greater weight to the position of the individual than had traditionally been the case.

9. Turning to certain points raised by the Special Rapporteur in his report, he noted that, while attempting to define the distinction between diplomatic protection and consular assistance, the Special Rapporteur had acknowledged that the distinction might be blurred in practice and that the two sometimes overlapped. Apart from the fact that such overlapping was more common than the report seemed to indicate, neither the 1969 Vienna Convention on the Law of Treaties (hereinafter the “1969 Vienna Convention”) nor bilateral treaties on consular relations gave support to the idea expressed in paragraph 19 of the report that consular assistance might be given by a State to a non-national, irrespective of the express or implied consent of the host State. Moreover, contrary to the suggestion in paragraph 20, it was not necessarily the case that consular assistance was preventive and must therefore cease when an injury occurred. More fundamentally, he did not believe that a reference to an undefined institution called “consular assistance” would bring clarity to the text. It would therefore be necessary to define the concept and see to what extent it could be distinguished from diplomatic protection.

10. The new paragraph that the Special Rapporteur suggested (in paragraph 24 of the report), should be added to draft article 2, seemed ambiguous. To say that a State was under an obligation to accept a claim of diplomatic protection appeared to mean that the State allegedly responsible should provide reparation; that was clearly not what the provision was intended to say, which was simply that the claim should be regarded as admissible. However, that was already implied by the very fact of setting out certain conditions of admissibility; once those conditions were met, it followed that the claim was admissible.

11. With regard to draft article 5, while it was true that the term “continuity of nationality” appeared at first sight to mean that nationality had to exist continuously between the two critical dates mentioned in paragraph 47 of the report, that was not how the term had been understood and applied in practice. There was a policy reason for referring only to the two critical dates: namely, the difficulty of providing evidence that no change of nationality had occurred between those dates. The question also arose as to why it should be significant that a person had not changed nationality in the meantime, since the important factor was that it should be the same State that brought the claim. Again for policy reasons, he tended to agree with the Special Rapporteur that the second critical date should be that of the presentation of the claim rather than that of its resolution, as a different rule could encourage delays in settling the claim. There would be no need, in his view, to provide an exception for the case in which an individual acquired, after presentation of the claim, the nationality of the respondent State if the Special Rapporteur’s proposal to the effect that the claimant State should transfer compensation to the aggrieved individual, even if he no longer had the nationality of that State, was accepted. Similar considerations applied to the proposed amendments to draft article 10, concerning the continuous nationality of a corporation.

12. He was also not persuaded by the proposed changes to draft article 9, concerning the State of nationality of a corporation, which appeared in paragraph 55 of the report. The requirement of both incorporation and registered office in a given State had been set out by the ICJ in paragraph 70 of its judgment in the Barcelona Traction case. The Court had not viewed the registered office as representing an effective link; it had addressed the question of whether the Barcelona Traction, Light and Power Company had an effective link with Canada only in a later passage, at the end of paragraph 70 and in paragraph 71. A registered office needed to be no more than a letterbox. When corporations moved their registered office to another country, they often sought a new incorporation. Should the Commission encourage companies to incorporate in one country and have their registered office in another in order to enjoy diplomatic protection from more than one State? It was true that the Special Rapporteur had suggested that only the State of predominant nationality could bring a claim, but that would create uncertainty, as it was unclear which nationality would be considered predominant. Moreover, such a position would be inconsistent with the rule set out in draft article 6 concerning individuals of dual nationality, with regard to whom two States might exercise diplomatic protection.

13. His preference was mainly to retain the text submitted on first reading.23 He hoped that the Commission would be able to conclude its consideration of the topic of diplomatic protection during the current session.

14. Mr. PELLET said that the Special Rapporteur’s seventh report on diplomatic protection was courageous and interesting, but was also somewhat overcautious and disappointing in some respects. It was courageous because it gave a forthright and precise account of Governments’ comments and observations—which unfortunately were few in number—on the draft articles; the Special Rapporteur took account of all the views expressed by a number of States, not hesitating to criticize them sharply when there was cause to do so, such as when he took the United States to task for its incredible assault on draft article 5, paragraph 1. The report was also courageous because it dealt with a question that had not appeared in the draft articles adopted on first reading, namely the

23 See footnote 7 above.
right of the protected person to compensation, the words “protected person” being more exact than the term “injured national” used in the report. The seventh report was interesting because it shed light most usefully on a number of provisions in the draft articles by considering them in depth and from perspectives that had been neglected or even forgotten. Thus far, such as the analysis of the Loewen case, the question of the relationship between diplomatic protection and consular protection, or the problems posed by the notion of European citizenship, even though Mr. Dugard’s treatment of that subject was hopelessly conservative. Notwithstanding certain disagreements on substance, he welcomed the opportune changes to the draft articles, even though the problems identified were not new, the draft had perhaps been prepared too hastily and more thorough consideration would probably have been more useful.

15. In view of the incomplete nature of the draft articles adopted on first reading, and given States’ ready acceptance of the rare elements of progressive development they contained, in particular draft article 7, on the principle of predominant nationality, and draft article 8, on stateless persons and refugees, the Commission had been unnecessarily cautious. In listening to members’ statements, one had the impression that the provisions referred to States for comments had been so revolutionary that they could only be rejected, although it must be said that such had not been the case. In the future it would be preferable not to anticipate the reactions of States and instead to make a greater effort to ensure the proper codification and progressive development of international law. The Commission had thus been overly prudent, conservative and cautious in producing the draft articles, and it was unfortunate that it had not been bolder in its proposals for codifying existing rules. With the exception of draft article 8 and a few aspects of draft article 7, the proposed text was limited to ready-made solutions which moreover concerned only the conditions for the exercise of diplomatic protection, i.e. the least interesting or most traditional part of the subject. He regretted that the Commission had engaged in self-censorship and agreed with the Special Rapporteur’s comments in that regard. Although it was too late to overcome the draft articles’ serious deficiencies, it was still possible to attenuate them, and he proposed to go through the Special Rapporteur’s proposals for reformulating draft articles 1 to 8, which he supported on the whole.

16. A number of comments were called for on draft article 1 concerning, in declining order of generality, the concept of diplomatic protection itself, the difference between diplomatic and consular protection, and the impact that the notion of European citizenship might have on diplomatic protection. Regarding the concept of diplomatic protection, he was grateful to the Government of Italy for daring to challenge, even at the current stage of work, the postulates—completely outdated at the beginning of the twenty-first century—on which the Mavrommatis (or Vattel) fictions24 were based. The traditional institution of diplomatic protection, in the sense of those fictions, could be separated into two very different propositions. The first, which could be regarded as constituting the very definition of diplomatic protection, was that the State had the right to protect its nationals injured by an internationally wrongful act when they could not obtain reparation by other means. Neither the Government of Italy, subject to its proposals concerning draft article 2, nor he himself had the intention of revisiting that aspect: diplomatic protection was indeed a right vested in the State, to exercise at its discretion. According to the second proposition, that is, the Mavrommatis fiction as such, which was much more questionable, when a State exercised its right to protect its national, it was said to be exercising its own right, namely its right to ensure respect for international law in the person of its nationals. Whereas such a fiction might have been necessary in 1924, when the State had been the sole subject of international law, it no longer had any reason to exist, because the individual now had established rights under international law. As the Government of Italy had noted, it was no longer acceptable to consider that the law that had been violated belonged only to the State exercising such protection. In contemporary international law, individuals had rights, and it was those rights for which the State could ensure respect by means of diplomatic protection. It was thus absurd to say that when the State ensured respect for the rights of the individual, it was in reality ensuring respect for its own right, and he did not understand why the Commission clung to that notion, which dated back to the beginning of the eighteenth century.

17. In other words, diplomatic protection was a right that the State could exercise or not, in principle in a discretionary manner, while the rights protected by diplomatic protection, which was merely a means, were those of individuals and not of the State, contrary to what followed from the Mavrommatis fiction and, unfortunately, from the current draft article 1, owing to the extraordinary parenthetical clause “in its own right”. In actual fact, the State did not act in its own right but on behalf of its national, with a view to protecting the national’s rights. He noted that the phrase had been deleted, and very rightly so, from the new text proposed for draft article 1 (A/CN.4/567, para. 21), thereby making the draft acceptable in his view, but the Special Rapporteur had not explained why, which was most intriguing.

18. The great merit of Italy’s observations had been to provide an explanation for that deletion, but unfortunately it had not taken its comments to their logical conclusion, no doubt terrified by its own boldness, and appeared to have confused two different things. In challenging the Commission’s approach, Italy based itself not only on the correct assertion that when it exercised diplomatic protection, the State defended the rights of a national who had been injured by the internationally wrongful act of another State, but also on another, equally correct assertion, although one of very different significance, that a State could sometimes defend both the right of its national and its own right, as Mexico and Germany had done in the LaGrand and Avena cases. However, that was a completely different problem that had nothing to do with draft article 1, but rather with draft article 15. The Government of Italy had drawn the wrong conclusions: the wording proposed by Italy for that provision of draft article 1 maintained the confusion because it had diplomatic protection

covering both the rights of the injured national, which were the actual subject of diplomatic protection, and the State’s own rights, which were in fact excluded from the scope of diplomatic protection because the State that was a victim of an internationally wrongful act had no need to resort to that mechanism to ensure respect for its rights, as the Special Rapporteur had correctly pointed out in paragraph 18 of his report. He wished to stress again that diplomatic protection concerned the rights of individuals and not the rights of the State. The Commission must thus choose between adopting the new wording of draft article 1, paragraph 1, proposed by the Special Rapporteur, which had the advantage of avoiding the Mavrommatis fiction but would entail heavily rewriting the French version of the text, or accepting the text proposed by Italy, provided that it left out the phrase “in its own right” and perhaps even the words “in respect of an injury to that national”, which did not seem essential. The latter version would be almost ideal, but might have rather serious consequences for the remainder of the text. The paragraph would then read: “Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State which maintains that the rights of its national have been violated by the internationally wrongful act of another State”. That was precisely what diplomatic protection was. Unlike the current definition, such a definition was largely sufficient and was consistent with contemporary international law.

19. Draft article 1 posed another, much less serious problem, that of the confusion that arose in the current text between diplomatic protection and consular assistance. It was the first time that that problem had come up in the course of the Commission’s work, which perhaps showed that it was not so serious and that it should not be given too much importance. Although the Special Rapporteur seemed to have carefully analysed the differences between the two institutions, he did not draw convincing conclusions. It was not advisable to include a new paragraph on the question in draft article 1 itself, particularly as no definition of consular assistance was given. Moreover, it was strange, to say the least, to define the concept of diplomatic protection by what it was not, particularly after saying what it was in paragraph 1. It would be preferable to explain those differences in the commentary rather than in a paragraph, which would weaken draft article 1.

20. The last problem in draft article 1 had to do not with its actual wording, but with the Special Rapporteur’s objections to article I-10 of the stillborn Treaty establishing a Constitution for Europe. The Special Rapporteur’s criticism, which appeared in paragraph 19 of his report, seemed excessive, since no one was claiming, at least for the moment, that European citizenship was the equivalent of nationality. No such assertion was to be found in any European text. European citizenship superseded itself on the nationalities of the 25 member States without replacing them, and it was certain that no other State was required to accept the protection of a European citizen that a State other than the State of nationality or the European Union itself might want to exercise on behalf of a European citizen. There was thus no reason to get upset by the possibility that the European Union or another member State might try to exercise protection, whether consular or diplomatic, in respect of its citizen; non-member States were certainly not bound to reply to such an attempt at protection. That was a matter that concerned only Europeans, and the Commission should not set out to criticize a development that might take place and was in no way shocking. For the same reason, he was quite opposed to the highly restrictive wording proposed for draft article 5, paragraph 1 (para. 47 of the report). Employing the word “only” would unnecessarily prejudice the future of integration organizations in general, and not just the European Union, and would prevent them from inventing new forms of protection for their citizens.

21. Draft article 2 as currently formulated was rather insignificant, not to say totally superfluous, and he was not surprised that it had hardly attracted States’ attention. That was not the case with the proposals made on the subject by Austria and Italy. The wording proposed for the new draft article 2, paragraph 2, on Austria’s initiative was quite ambiguous (para. 24 of the report), because it seemed to say that the State in respect of which diplomatic protection was exercised had an obligation to comply; that could not be taken for granted, however, and he supported the comments made in that regard by Mr. Gaja. A State was certainly bound to examine a claim for diplomatic protection, but examining did not imply an obligation to accept, for those were two different things. If the State was internationally responsible, it must accept the consequences stemming from its responsibility, but diplomatic protection was an earlier stage in the process of deciding whether or not responsibility actually existed, and it could not be prejudged. The draft articles under consideration concerned a procedure for bringing responsibility into play when the victim of an internationally wrongful act was a private individual, but the effects of diplomatic protection should not be confused with those of responsibility itself. He therefore believed, with regard to the innovation proposed by the Special Rapporteur in response to the Austrian suggestion, that the Drafting Committee should give careful consideration to the wording used, even though he himself was in favour of the underlying idea of the proposed paragraph 2, especially since the draft articles focused much too heavily on the presentation of claims in exercise of diplomatic protection while neglecting the other equally important aspect, that of the effects of claims.

22. By and large, he supported the Italian proposal regarding draft article 2, according to which the State would have a duty to exercise diplomatic protection in the case of a violation of an absolutely essential right. Although it was true that the right to exercise diplomatic protection was a right of the State which it could exercise in a discretionary manner, and that this power of discretion, in which highly political considerations could play a role, should be respected, it was not unreasonable to think, at the beginning of the twenty-first century, that when an individual was the victim of a violation of an absolutely fundamental right, he ought to be able to count on the protection of his national State. That said, he wished to qualify his agreement in principle with Italy’s proposal. First of all, the text of the new provision must be modelled on articles 40 and 41 of the draft articles on responsibility of States for internationally wrongful acts,23 for since an obligation to protect was incumbent on the State, the State

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23 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 29, and pp. 112–116 for the commentary to these draft articles.
should take action only in the event of a serious breach of an obligation arising under a peremptory norm of general international law. Secondly, he was categorically opposed to the idea of giving examples of internationally wrongful acts that might justify the exception contemplated in the discretionary exercise of diplomatic protection by the State. The idea included in that new provision, if it was retained, should be illustrated in the commentaries. Thirdly, he was not sure that the wording of subparagraph (b) of Italy’s proposal was necessary. Fourthly, he was very opposed to paragraph 3, pursuant to which States would be obliged to make provision in their municipal law for a procedure before a domestic court. The Commission’s job was to establish norms, not to impose institutional obligations on States.

23. Lastly, once it was acknowledged that breaches of peremptory norms of general international law which caused injury to private individuals came under a special regime, consideration should be given to the possibility that, in such cases, States other than the State of nationality might exercise protection on behalf of the injured person. That would be in keeping with article 48 of the draft articles on responsibility of States,26 according to which in the case of a serious breach of a peremptory norm of international law, the State of nationality lost its protection monopoly, and the international community as a whole was concerned. Without necessarily codifying that idea, the Commission should at least express it, and he would be in favour of doing so in an article, perhaps by following the procedure adopted for article 54 of the draft articles on responsibility of States.27

24. He had no particular comment on draft article 3 (Protection by the State of nationality), apart from his earlier criticism of the Special Rapporteur’s remarks on European citizenship in paragraph 26 of his report. He endorsed the wording of the new draft article 4 (State of nationality of a natural person), but wondered why the French version spoke of “ascendance” rather than “filiation”.

25. With regard to draft article 5, he said that he had always considered the continuous nationality rule to be absurd and illogical, and practice was too uncertain for it to be regarded as customary. According to the Mavrommatis fiction, the relevant nationality was the one that had been in effect on the day the injury had been caused. According to the more realistic fiction that he supported, it was the nationality in effect on the day of the claim that was important, because the State was not defending its own right but that of the injured individual. In neither of those two cases was the requirement of continuous nationality justified. He had always been alone in insisting that a rule was pointless if no one knew how to apply it. He noted that the position of States during the travaux préparatoires of the 1930 League of Nations Conference for the Codification of International Law, to which the Special Rapporteur attached great importance and to which he referred in paragraph 39 of his report, in fact reflected a tendency to reject that rule.28 In any event, if the rule of continuous nationality, indefensible as it was, had to be retained, at least its drawbacks should not be made worse. He supported the views of the Special Rapporteur on the whole, but wished to point out that the considerations of principle and policy that the Special Rapporteur cited in paragraph 43 actually tended to favour abandoning what was an arbitrary and useless rule. The risk of “nationality shopping” that lay behind it was illusory because individuals did not choose a nationality on the basis of the rules of diplomatic protection, which no one knew, and even if they did choose on that basis, there were many other ways apart from the continuous nationality rule of dealing with the matter.

26. He was, however, opposed—for the reasons already mentioned—to the restrictive formulation (“only”) in the new draft article 5, paragraph 1, proposed by the Special Rapporteur (para. 47 of the report). It would be regrettable to delete the current paragraph 2, which had the merit of introducing a minimum of flexibility into the principle of continuous nationality, which was too rigid, and he did not understand why the Special Rapporteur, who himself seemed to be in favour of that paragraph, had not retained it. The new paragraph 2, which would become paragraph 3 again, was necessary because it might help to avoid such absurd solutions as the one reached in the Loewen case. Referring to a comment by Mr. Gaja, he stressed that it would in fact be bizarre for a State to be bound to accept a claim lodged on behalf of a person who had its nationality. Nor was it certain that draft article 20 would be accepted by the Commission or judged acceptable by States; caution dictated the inclusion of paragraph 2 bis proposed by the Special Rapporteur. As for paragraph 3, which would become paragraph 4 if paragraph 2 was reintroduced, he had never understood its point, but he was not opposed to its inclusion if the paragraph was deemed necessary.

27. Draft article 6 (Multiple nationality and claim against a third State) elicited no comment, except to say that the term “multiple nationalité” should rightly read “nationalité multiple” in the French version. He did not see why paragraph 2 should be deleted, as it made a useful point. When several States could jointly exercise diplomatic protection, there was no reason that one of them should have any priority over the others or that several States should not lodge a claim.

28. Draft article 7 (Multiple nationality and claim against a State of nationality) should be retained in its current form. He was not convinced by the reasoning of the Government of Italy, although he agreed that the preponderant nationality should result in a link that was not “authentique”, as rendered in the French version of the Italian proposal, but “effectif”. At issue was the most preponderant effectiveness, but that needed only to be dealt with in the commentary.

29. Lastly, he was pleased that States had not been opposed to draft article 8 (Stateless persons and refugees). In reply to the question asked by the Special Rapporteur

27 Ibid., p. 30, and pp. 137–139 for the commentary.
28 See footnote 14 above.
in paragraph 51 of the report, he said that while the respondent State could certainly refuse to recognize the right of a claimant State to exercise diplomatic protection on behalf of a person who did not fulfill all the requirements of the definition of refugee, nothing prohibited the claimant State from taking such action, and nothing prohibited the respondent State from going along with it. That should not result in any change in the text of draft article 8, which in his view was the most convincing and courageous of all the draft articles.

30. Mr. MATHESON commended the Special Rapporteur on the quality of the seventh report on diplomatic protection, which skilfully managed to accommodate the views of States on the draft articles adopted on first reading in 2004.  

31. With regard to draft article 1, he agreed with the Special Rapporteur on the need to distinguish clearly between diplomatic protection and consular functions, but he did not understand the exact significance of the Italian proposal to rewrite the definition of diplomatic protection. He wondered whether it should be taken to mean that diplomatic protection should be available only where there was a violation of the rights both of the State and of its national, as had occurred in the Avena case. If so, he would have doubts about the proposed formulation.

32. The use of the word “accept” in the new formulation proposed for draft article 2, paragraph 2, might suggest that a State must pay a claim that met the procedural requirements of the draft articles, which was not the case. Another term, such as “receive”, “consider” or “address”, would be more appropriate. As for the Italian proposal to impose a legal duty on States to exercise diplomatic protection for certain claims, Governments would undoubtedly register strong objections, since States had always insisted on the fact that diplomatic protection was a right rather than a duty and that they could opt not to exercise it on such grounds as foreign policy, practicality or the conduct of the national concerned. The Commission should not adopt such a radical measure. There was no reason to single out any particular category of conduct, however serious it might be, for different treatment. There were other possible remedies for the serious offences described in the Italian proposal, such as consular protection, resort to international human rights mechanisms, national or international criminal prosecution, or action by the Security Council, which might constitute a more sensible response than diplomatic protection.

33. With regard to draft article 5 (Continuous nationality), he expressed support for the revised version of paragraph 1, including the addition of the word “only”, which restricted the right of diplomatic protection to individuals who met the condition of continuous nationality. The requirement of continuity was the best protection against manipulative changes in nationality. Moreover, the revised formulation also addressed the case of State succession, which should not interrupt the continuity of nationality.

34. There remained the question of what effect a change of nationality between the date of presentation and the date of resolution of a claim might have. The new paragraph 2 proposed by the Special Rapporteur covered the most compelling circumstance, in which an injured person acquired the nationality of the State against which the claim was brought. In such cases a State’s right to exercise diplomatic protection should lapse, since a State should not be required to pay compensation to another State for injuries to its own national. That was not, however, the only situation in which a change in nationality after presentation of a claim should cause the right of diplomatic protection to lapse. It would, as the United States had argued, be inconsistent with the rationale of diplomatic protection to allow a State to receive compensation for injury to a person who was not its national at the time compensation was awarded. That consideration, along with the possibility of manipulative changes of nationality, was presumably the reason that many arbitral tribunals had decided that continuous nationality should apply up to the date of resolution of the claim.

35. The work of an international tribunal would, however, be further complicated if it had the burden of discovering all the changes in nationality that might occur after presentation and before resolution of a claim. For that reason, he would suggest that the new paragraph 2 should be amended to say that a State was not entitled to exercise diplomatic protection where the respondent State demonstrated that the person in question had lost the nationality of the claimant State after presentation of the claim. That would put the burden on the respondent State and not on the tribunal. In any event, the Commission should not adopt a rule that precluded a tribunal from finding that there were other circumstances in which a change of nationality after the date of presentation would preclude further exercise of diplomatic protection. For example, a tribunal might find that a person had manipulative motives in maintaining one nationality up to the point of presentation and then changing it for his own purposes. In other words, the Commission should at least make it clear that paragraph 1 was without prejudice to the possible effect on the continued assertion of diplomatic protection of a change in nationality after the presentation of the claim. In that way, the further development of the law by State practice and jurisprudence would continue.

36. The proposed deletion of the former text of draft article 5, paragraph 2, seemed appropriate, since the only justification for its retention—State succession—was explicitly dealt with in the new paragraph 1. If the old paragraph 2 was revived in any form, it should be formulated more clearly.

37. Turning to draft article 8, he said, in response to the Special Rapporteur’s request for guidance as to how the term “refugee” should be understood, that the Commission should retain the internationally accepted definition contained in the 1951 Convention relating to the Status of Refugees. As for draft article 9, concerning the State of nationality of a corporation, he endorsed the new wording proposed by the Special Rapporteur but believed that the provision should make it clear that a corporation did have the nationality of the State in which it had been formed.
providing that it was treated as such under the law of that State. Otherwise, a respondent State could challenge the right of that State to exercise diplomatic protection on the grounds that the corporation had links with other States.

38. With regard to the continuous nationality of a corporation, dealt with in draft article 10, his comments on that topic in the context of draft article 5, paragraphs 1 and 2, applied a fortiori to corporations. The United States was opposed to the former paragraph 2, which had become paragraph 3, apparently for fear that it would enable a State to ignore reasonable requirements for the timely filing of claims against a defunct corporation. That concern could be adequately addressed, however, by making clear that reasonable time limits for the admissibility of such claims must be complied with, so that the situation of a defunct corporation could be resolved in timely fashion. If that was made clear, then the new paragraph 3 should be retained, since it guaranteed that there would be at least one State with the ability to exercise diplomatic protection in such a case. Indeed, he would favour the deletion of the phrase “as a result of the injury”, which did not constitute a logical basis for distinction.

39. Draft article 11 was more controversial. Its purpose, which was presumably to ensure some possibility of diplomatic protection for shareholders in cases where protection by the State of nationality of the corporation might be unlikely, was understandable, yet on the other hand, giving a right of protection to all the States of nationality of the shareholders, of whom there might be many, could make it very difficult to resolve a dispute. It could put the respondent State at a serious disadvantage and give foreign shareholders protection that local shareholders would not enjoy. That was why developing States in particular had traditionally resisted exceptions such as those provided for in draft article 11, which the United States argued were not consistent with customary international law.

40. The Commission should therefore look at the two exceptions carefully and sceptically. That contained in subparagraph (a) could be deleted if draft article 10, paragraph 3, proposed in paragraph 59 of the report, was retained without its limiting phrase. The State of nationality of a defunct corporation would then have the right to continue to protect it, which would give all its shareholders as much protection as those of any other corporation. There was no reason to give them special treatment by allowing them to be protected by their own State of nationality, particularly since that would, as noted earlier, put the respondent State at a considerable disadvantage and complicate the resolution of the matter. Subparagraph (b) was a more difficult case. There might be reason to doubt that any real protection would be offered by a State that had required incorporation under its law as a condition for doing business and had then been responsible for injuring the corporation concerned. In principle, the United States was probably correct in opposing the exception in that subparagraph, but in practice its proponents also had valid arguments. One solution would be to eliminate the multiplicity of claimant States by limiting the right of protection to the State whose shareholders had a majority ownership interest. In any event, the exception should be restricted to a situation in which the offending State had required incorporation under its law as a condition for doing business in its territory.

41. Lastly, he saw no need to delete draft article 12 (Direct injury to shareholders), as the United States had proposed.

42. The CHAIRPERSON invited the Special Rapporteur to introduce the final part of his seventh report.

43. Mr. DUGARD (Special Rapporteur), introducing draft articles 14 to 20, thanked the members of the Commission who, through their constructive suggestions, had made him more aware of many of the difficulties raised by his proposals.

44. There had been no comments on the substance of draft article 14, which dealt with the fundamental principle of the exhaustion of local remedies.

45. Draft article 15 (Category of claims) provided that local remedies had to be exhausted only in cases of indirect injury to a State. The Avena judgment added considerably to an understanding of the difference between direct and indirect injury, but it did not affect the validity of the formulation of the principle. He proposed to deal extensively with the Avena case in the commentary.

46. Draft article 16 dealt with exceptions to the local remedies rule. Subparagraph (a) stipulated that there was no need to exhaust local remedies where there was no reasonable possibility of effective redress. The United States had raised objections to that provision. When the Commission had formulated it, it had had to opt for one of three conditions: obvious futility; no reasonable prospect of success; and no reasonable possibility of effective redress. It had shown a preference for the third option, but the United States had called on it to reconsider its decision and opt for the futility rule, on the ground that it reflected customary international law more accurately. He was not generally in favour of reopening issues that had already been decided, but, given that the futility rule had enjoyed some support in the Commission, it might be wise to reconsider the principle. The Commission should, however, recall that the issue had been thoroughly debated when the provision had been adopted and that the general view had been that the futility rule was too stringent, which was why the Commission had adopted the proposal by Sir Hersch Lauterpacht to introduce into the text the element of “reasonableness”. The text proposed by the Government of Italy, which also considered subparagraph (a) too strict, used the words “inexistent”, “inaccessible”, “ineffective” and “inadequate”, but even Italy seemed to recognize that the phrasing was clumsy, since it had subsequently suggested using the term

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30 See Yearbook ... 2002, vol. II (Part Two), pp. 55–57, paras. 177–188.
31 Ibid., p. 56, para. 186.
32 Yearbook ... 2004, vol. II (Part Two), pp. 38–39, para. (3) of the commentary to article 16 adopted on first reading by the Commission. See also the separate opinion of Sir Hersch Lauterpacht in Certain Norwegian Loans, p. 59.
“reasonable prospect of success”, which was close to the second possibility considered by the Commission. The Government of Italy had also suggested introducing the concept of the denial of justice into subparagraph (b), which provided that there was no need to exhaust local remedies in cases where there had been an undue delay on the part of the respondent State. The Commission had, however, deliberately resisted making any reference to the concept, the general view being that it was a primary and not a secondary rule and that, in any case, it was already covered by subparagraphs (a), (b) and (c). Subparagraph (b) dealt with the principle that there was no need to exhaust local remedies where there was no relevant connection between the injured person and the State alleged to be responsible or where the circumstances of the case otherwise made it unreasonable to require the exhaustion of local remedies. Two very different proposals had been made in that respect. Austria had proposed the deletion of the first phrase and the retention only of the second, whereas the United States had proposed the retention of the first phrase and the deletion of the second. He had sympathy with the United States’ position, but the main purpose of subparagraph (c) was to provide for an exception to the rule of the exhaustion of local remedies where the injured person had no voluntary connection with the State alleged to be responsible for the injury. During the debate in the Commission, some members had referred to other situations in which there was no need to exhaust local remedies, such as a situation in which the injured person was denied entry to the territory of the State concerned or the costs of litigation were prohibitive. The second part of subparagraph (c) had been adopted with such situations in mind. However, the United States was correct in saying that such situations were already covered by subparagraph (a). Italy, emphasizing the importance of the reference to special considerations that might exclude the use of local resources, had suggested retaining subparagraph (c) in its entirety, with the addition of a list of special circumstances, but in his view the examples provided by Italy were already covered by subparagraph (a). Lastly, subparagraph (d) had not elicited any particular comment.

47. It had been suggested that the Commission should merge draft articles 17 (Actions or procedures other than diplomatic protection) and 18 (Special treaty provisions), which served the same purpose, namely to specify that the draft articles did not affect and were not affected by other procedures or mechanisms of customary international law or treaty law that provided certain rights for the settlement of claims. On reflection, he considered it wiser to retain both sets of provisions, since they dealt with very different questions. Although it did not expressly mention human rights, draft article 17 essentially sought to guarantee that the institution of diplomatic protection should not hinder or prevent the protection of human rights by other means. The Commission acknowledged that diplomatic protection was only one means of protecting human rights, and a very limited one at that, since it was restricted to nationals. There were other procedures for the protection of human rights that were not so restricted. Human rights treaties conferred rights and provided remedies for anyone whose human rights had been violated, irrespective of nationality. Moreover, as Mr. Gaja and Mr. Pellet had noted, recent developments in international law enabled a State to protect both its nationals and non-nationals who were victims of violations of human rights norms—especially those with the status of jus cogens—in the territory of another State. Unfortunately, the whole purpose of draft article 17 had been misunderstood by some writers, who had taken it to mean that the Commission was trying to restrict the scope of article 48, paragraph 1 (b) of the draft articles on the responsibility of States for internationally wrongful acts. The best way of dispelling such doubts was to retain draft article 17 as a separate provision. Meanwhile, draft article 18 served a very different purpose, namely to make it clear that the draft articles were not intended to interfere in any way with rights and obligations under bilateral and multilateral investment treaties.

48. Draft article 19 (Ships’ crews), which formed part of an exercise in progressive development, had received the support of most States. The United States had no objection to its content but considered that it had no place in draft articles on diplomatic protection, a view shared by the United Kingdom. The Commission should therefore reconsider the question of whether the provision relating to the protection of ships’ crews should be included. In that context, Belgium had proposed that draft article 19 should be extended to cover members of aircraft crews, but, first, there was no State practice to support such a move and, secondly, the human rights considerations that had guided the Commission in drafting article 19 did not apply to aircraft cabin crew, who seemed to enjoy greater status and protection.

49. Lastly, he turned to the new proposal, contained in paragraphs 93 et seq. of the report, concerning the right of an injured national to receive compensation. As Mr. Pellet had pointed out earlier, the draft articles did not deal with the consequences of diplomatic protection, since most aspects of that topic were covered by the draft articles on the responsibility of States for internationally wrongful acts. One aspect of such consequences was not, however, covered by those draft articles: namely, whether a State that had satisfactorily brought a claim was obliged to pay the injured national any compensation received. The draft articles had been criticized, by, among others, the representative of France to the Sixth Committee in 2005, Austria, in its comment to the Commission, and Mr. Pellet at the previous session for having missed the opportunity to recognize such a rule, if only by way of progressive development. On reflection, he thought that the Commission should consider the question, even at the eleventh hour. As Mr. Pellet had noted, the stumbling block in the provision was the rule established in the Mavrommatis case. It seemed logical to assume that, if a State had absolute discretionary power to exercise diplomatic protection, it ought to be able to keep the compensation that it had received following a claim on behalf of its national. That idea was supported by the fact that, in practice, States often agreed on a partial settlement of claims without consulting the injured person. The best way of dispelling such doubts was to retain article 17 as a separate provision. Meanwhile, article 18 served a very different purpose, namely to make it clear that the draft articles were not intended to interfere in any way with rights and obligations under bilateral and multilateral investment treaties.

53 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 29, and pp. 126–128 for the commentary thereto.

individual. As Mr. Pellet had pointed out earlier in the meeting, the Mavrommatis case was also responsible for the decision not to impose on States an obligation to exercise diplomatic protection. In his own view, it had to be admitted that the Mavrommatis case was undermined by a number of institutions relating to diplomatic protection, especially the continuous nationality rule and the requirement of the exhaustion of local remedies. Moreover, it did not apply to the payment of claims, since the damages claimed by a State were calculated on the basis of the damage suffered by the individual. It might therefore be argued that the obligation on States to consult the national had become a part of customary international law. That clearly showed that the Mavrommatis case was not sacrosanct. State practice in that area was, as explained in paragraphs 96 et seq. of the report, contradictory, but the trend was towards an erosion of the State’s discretionary power to bring a claim. For all that, it could not be said that that amounted to a rule of customary international law. Under the circumstances, he proposed that the Commission, in the interest of progressive development of the law, adopt a provision on the topic, the text of which appeared in paragraph 103 of the report.

50. Mr. PELLET, referring to his earlier statement, said that he did not entirely agree with the proposed new wording of draft article 1 that appeared in paragraph 21, since it contained the words “in its own right”, which had, in fact, been accidentally omitted from the French version.

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

[Agenda item 1]

51. Mr. CANDIOTI (Chairperson of the Working Group on Shared natural resources) announced that the Working Group on Shared natural resources, which was to resume its work, was composed of the following: Mr. Yamada (Special Rapporteur), Mr. Baena Soares, Mr. Comissário Afonso, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Mansfield, Mr. Matheson, Mr. Operti Badan, Mr. Sreenivasa Rao and Ms. Xue, who, as Rapporteur, was a member ex officio.

The meeting rose at 1.05 p.m.

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**2869th MEETING**

**Wednesday, 3 May 2006, at 10.05 a.m.**

**Chairperson:** Mr. Guillaume PAMBOU-TCHIVOUNDA

**Present:** Mr. Addo, Mr. Baena Soares, Mr. Candiotti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Mootaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Ms. Xue, Mr. Yamada.


[Agenda item 2]

**SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. Mr. GALICKI said that, while the flexibility and spirit of compromise displayed by the Special Rapporteur in his seventh report (A/CN.4/567) were commendable, he should resist the temptation to accede too readily to some of the opinions and views expressed by Governments on the set of draft articles on diplomatic protection adopted by the Commission on first reading at its fifty-sixth session. As to the amendments proposed by the Special Rapporteur, he personally doubted whether introducing a reference to the concept of consular assistance alongside that of diplomatic protection in draft article 1 would really help to draw a clear distinction between those two institutions. He agreed with Mr. Gaja that the term “consular assistance” required more precise definition.

2. The principal difference appeared to reside in the fact that it was an internationally recognized right of States to exercise diplomatic protection, whereas not only was it the right of States to provide consular assistance, but it was also the unquestionable right of individuals to seek, enjoy and claim such assistance from their State of nationality, a right that was guaranteed constitutionally in some countries. Yet in practice the two institutions overlapped, as the LaGrand and Avena cases had illustrated. Furthermore, the argument in paragraph 20 of the report that “[s]uch assistance is preventive in the sense that it aims to prevent the commission of an international wrong” was unconvincing, for, although the commission of an international wrong was a precondition for the operation of diplomatic protection, the commission of such an act did not preclude the possibility of rendering consular assistance to persons injured by an internationally wrongful act committed by another State. Consular assistance did not therefore seem to be exclusively preventive in nature.

3. The addition to draft article 2 of a second paragraph pursuant to which a State was under an obligation to “accept” a claim of diplomatic protection made by another State was possibly contentious, as it was unclear whether “accept” referred to the right to exercise diplomatic protection, or to the substance of the claim brought by the State exercising that right. Care should therefore be taken in the formulation of such an obligation, and the meaning, scope and legal effects of such acceptance should be precisely defined. In practice, striking a proper balance between the right of a State to advance certain claims in the interests of its nationals and the obligation of other States to accept such claims might prove difficult.

4. The suggested amendments to draft article 5 concerning continuous nationality would greatly limit a State’s right to exercise diplomatic protection and might also adversely affect the potential benefits to individuals. For example, one possible consequence of the changes

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35 See footnote 7 above.
proposed by the Special Rapporteur in paragraph 47 of his report was that persons who changed their nationality between the dies a quo and the dies ad quem might be totally deprived of the right to diplomatic protection. That situation could not be justified by a wish to prevent “nationality shopping” and might affect persons acting in good faith, for example those whose nationality changed automatically as a result of marriage. The Commission should review that issue when considering the proposed new provision concerning the right of the injured national to receive compensation.

5. The term “predecessor State” which figured in the proposed new version of draft article 5 needed some explanation and definition. Hence it might be useful to include in the commentary the definition of “predecessor State” to be found in the text of 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.38 His comments on draft article 5 also applied, mutatis mutandis, to the amended version of draft article 10.

6. Mr. GAJA said that the new definition of the local remedies rule suggested in paragraph 74 of the seventh report was rather unusual in that the injured person was not required to exhaust local remedies. The reference to the ELSI case in paragraph 72 in support of that position was, however, misleading. All that the Court’s ruling had stated was that a certain local remedy could be regarded as ineffective on the strength of the result of proceedings initiated by the receiver of ELSI. There was no reason to require the injured shareholders to exhaust a remedy that had proved to be unsuccessful in a case which was in substance parallel. The Court had found that the essence of the claim had been brought before the competent tribunals and concluded that the defendant State had not been “able to satisfy the Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of ELSI, and of ELSI’s trustee in bankruptcy, ought to have pursued and exhausted” (para. 63 of the decision). That conclusion made it clear that the Court’s sole concern had been whether there was an effective remedy for the injured aliens. The Court had not held that local remedies could be regarded as exhausted because someone else had done so. In his opinion, draft article 14 as adopted on first reading was both more traditional and more accurate and should be retained.39

7. The same was true of draft article 16 (a), because the words “available and” in the amended version were superfluous: effective redress was impossible if no remedies were available. Moreover, the alternative text proposed in paragraph 81 of the report was contradictory. On the one hand, it made the exhaustion of local remedies requirement more stringent by stipulating that a remedy should be exhausted unless it was obviously futile or manifestly ineffective, a test expounded in the Finnish Ships Arbitration, and one that had been abandoned in practice. On the other hand, it weakened the rule by stating that a forum should be reasonably available to provide effective redress, which was more or less what had been said in the original text.

8. He was strongly in favour of retaining draft article 17, because it was a useful reminder that States other than the State of nationality were entitled to put forward claims if infringements of erga omnes obligations caused injury to individuals. The article also served as a reminder that under certain treaties, especially some human rights treaties, injured individuals had direct access to remedies. The relationship between the remedies open to individuals and diplomatic protection varied according to the instrument governing those remedies. There would therefore be no basis for stating, as a general rule, that exhaustion of the remedies directly accessible to an individual at the international level was a precondition for the exercise of diplomatic protection on behalf of that individual.

9. He also preferred the text of draft article 18 adopted on first reading,38 which envisaged the eventuality of special treaty provisions derogating from the rules set forth in the draft articles. He was opposed to restricting the scope of that draft article to investment treaties because, although most of the multilateral or bilateral treaties containing provisions of that nature might be defined as investment treaties, there were also other treaties concerning the treatment of aliens.

10. Paragraph 2 of the new draft article 20 on the right of the injured national to receive compensation, to be found in paragraph 103 of the report, could form part of a set of recommendations indicating what action should be taken by claimant States. Further recommendations could be formulated on the role that the injured individual should play in the choice between restitution and compensation and the need for the individual’s consent in order for a settlement to become effective. He therefore advocated the use of the word “should” rather than “shall”. Furthermore, such a recommendation would reflect the growing role of the individual in international law and would make for more satisfactory practice, although arguably it already reflected the practice followed by many States.

11. Mr. DUGARD (Special Rapporteur) said that, notwithstanding the fact that he had proposed the word “should” rather than “shall” as an alternative wording of what might eventually become draft article 20, paragraph 2, the latter formulation would create an imperfect obligation of the kind contained in other treaties, rather than a recommendation. He wondered what form the recommendations envisaged by Mr. Gaja would take.

12. Mr. GAJA said that he had been under the impression that the use of the term “should” did not imply the imposition of an obligation. He would not insist on the term “recommendation”. The main body of the text could set out the existing legal rules and the contents of draft article 20 could be placed in a separate set of final provisions whose purpose would be to encourage States to follow desirable patterns of conduct.

13. Mr. DUGARD (Special Rapporteur) said that Mr. Gaja’s proposal was most helpful: the Commission might

38 Yearbook ... 1999, vol. II (Part Two), pp. 20–21, para. 47, article 2 (Use of terms).
be less reluctant to support a number of de lege ferenda provisions in the draft articles if they were to take the form of recommendations. That was true not only of his proposed draft article 20, but also of Italy’s proposed formulation of draft article 2. He asked whether Mr. Gaja would be prepared to accept such a solution with regard to the latter proposal.

14. Mr. CANDIOTI said he agreed with the substance of draft article 20 as proposed but was unhappy with the idea of establishing an imperfect obligation or recommendation in a text intended to codify legal rules. Perhaps it would be better to include such provisions in an annex or guide to practice, rather than in the main body of the text.

15. Mr. CHEE endorsed the suggestion made by Mr. Candiotti. The Commission should clearly distinguish between recommendations and guidelines. Recommendations were stronger than guidelines, but a provision in the form of an article clearly had greater force than such soft law provisions.

16. Mr. ECONOMIDES said that, pursuant to its mandate, the Commission engaged both in the codification and in the progressive development of international law; when engaging in the latter exercise, it made recommendations regarding the adoption of new rules. If, in the context of progressive development, the Commission did not wish to formulate a rule, the alternative was for it to note that a trend was emerging and invite States to follow that trend. Such recommendations could not take the form of separate rules, but must instead be consigned to the commentary.

17. An important matter of principle that had not been sufficiently discussed was whether diplomatic protection could be afforded only with the consent of the injured party. Another question of capital significance, raised by Italy and further developed by Mr. Pellet, was whether, in certain extreme cases, diplomatic protection was a duty both of the State of nationality and of third States. The possibility, raised by the Special Rapporteur in paragraph 6 of his report, of incorporating the draft articles in a future treaty on the responsibility of States for internationally wrongful acts, required careful consideration, as, albeit logical, it might not be the wisest solution.

18. Mr. PELLET said that a distinction should be drawn between the Commission’s own work and the desired outcome of that work. He disagreed with Mr. Economides: while the Commission could not make decisions, nothing prevented it from making recommendations. For example, the draft articles on reservations to treaties were basically recommendations which the General Assembly was not asked to transform into a treaty.39

19. He was a strong supporter of soft law. Recommendations were just as much a part of law as prohibitions and obligations. A rule could be soft when it was part of a soft instrument, for example a recommendation, a non-binding resolution of an international organization, or a set of guidelines; or else it could be drafted as a soft provision in a hard instrument, so that failure to respect it did not entail responsibility, although it was expected that States would give it due attention. Proposed draft article 20, paragraph 2 would be substantive soft law if it provided that the State should transfer the sum received to the national. It was not unprecedented for a treaty to contain provisions worded in the conditional, whose implementation was not absolutely obligatory, although he personally was not in favour of such an approach.

20. Mr. Gaja had introduced an element of confusion by using the word “recommendation”. Recommendations could of course be included in a treaty, but, for his own part, he was firmly opposed to asking the General Assembly to adopt both hard and soft law in separate instruments: first, because the draft articles on diplomatic protection should be accorded the same fate as the draft articles on responsibility of States for internationally wrongful acts,40 which were currently soft law but might in the fullness of time become hard law in the form of a treaty. By making a formal differentiation between the text on diplomatic protection and that on responsibility of States, the Commission would complicate matters unnecessarily. Secondly, it was rather late in the day to start thinking about soft rules, now that the draft articles were being considered on second reading. Thirdly, there was a danger that the formal device of a recommendation would serve as a convenient place of exile to which all the more daring or radical provisions could be banished. The result would be a dry and uninteresting text, rather than one committed to progressive development.

21. Ms. ESCARAMEIA said she agreed with many of Mr. Pellet’s remarks and took strong issue with Mr. Economides’s contention that the progressive development of international law must necessarily lead to recommendations, while codification would result in hard law in the form of articles. That distinction had never been set out in any document, nor indeed should it be. Any number of conventions had developed international law. In point of fact, the Charter of the United Nations and the Commission’s own Statute described the Commission’s tasks as “the progressive development of international law and its codification”, in that order. Unfortunately, the Commission had nearly always been content to codify rules that dated back a century or more, to the detriment of its work. States themselves had urged the Commission to take a more progressive approach to the topic of diplomatic protection: some of the draft articles, such as article 8 on stateless persons and refugees and article 19 on ships’ crews, had even been acceptable to States but not to the Commission. She shared Mr. Pellet’s concern that all the more interesting provisions would be relegated to the status of recommendations, a course of action to which she was totally opposed. The Commission’s approach to the topic had been too conservative. With regard to proposed draft article 20, the Special Rapporteur and many members actually favoured the wording “shall” rather than “should”, the latter formulation being merely a bracketed alternative. The fact that the Commission was developing international law did not mean that the product must invariably take the form of recommendations; it should also sometimes take the form of binding rules.

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40 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 26, para. 76.
22. Mr. KEMICHA said that, like Mr. Pellet, he was opposed to the formulation of a separate recommendation. He favoured the approach taken in proposed draft article 20 as currently worded, and the use of the word “should”, because a provision incorporated in the body of the text would carry more weight with States than a separate recommendation. If recommendations were added to a set of 19 draft articles, the result would be a hybrid text which might be less well received.

23. Mr. GAJA said that he had never suggested removing some of the provisions relating to progressive development from the draft articles and placing them in a separate text. His own remarks had related to proposed draft article 20, which the Commission might decide to construe as a firm obligation. In that case, it would not be a recommendation. However, substantive soft law was not so very different from a recommendation: the Commission was not setting out a binding rule for States, but was suggesting that States should take a particular course of action. His concern was that while proposed draft article 20, paragraph 2 contained an important statement, whether couched in the form of an obligation or as a soft law recommendation, other questions too deserved consideration, which it might not be too late to include, regardless of whether binding language was used. One such question was whether the consent of the injured person was needed for diplomatic protection to be exercised. Whether such soft law indications to States should be included in the text of the draft articles themselves or in an annex was not the main issue.

24. Mr. MOMTAZ said he agreed with Mr. Economides’ equation of a recommendation with the progressive development of international law, provided that the recommendation figured in the draft articles. If it was placed in the commentary, it might, at best, serve as a means of interpreting the rule contained in the provision. However, it would be unfortunate if a substantive recommendation were to be consigned to the commentary.

25. Mr. MATHESON said that one encouraging aspect of the Commission’s recent activities was that it had been able to adopt different forms of action to meet the specific requirements of each of the topics concerned. The draft articles on diplomatic protection contained traditional hard law, whereas those on international liability contained recommendations. The draft articles on reservations to treaties contained a guide to practice, and the topic of fragmentation of international law would result in an expository study. All of those products and approaches were valid. The Commission should not confine itself to one particular hard and fast approach. Instead, it should decide what made the most sense for each particular topic. He was in favour of flexibility and opposed to rigidity.

26. Mr. KOLODKIN said he was not an advocate of soft law, which was useful in interpretation, but was not law as such. To produce a separate document containing recommendations would be a perilous course of action. While he was not opposed in principle to drafting recommendations in addition to the draft articles, the Commission should not try to place elements of progressive development in a separate text. It was worth noting in passing that if the recommendations were consigned to the commentary, they would carry less weight than they would if they were included in a separate document.

27. Mr. DUGARD (Special Rapporteur) said that the issue was an important one that he would like to see resolved at the current meeting. Mr. Economides had been right to refer to paragraph 6 of the report, and to the need to decide on the form that the draft articles were to take. Personally, he was in favour of a set of draft articles which constituted an exercise in codification, with some progressive development. Whether the Commission should recommend that the draft articles take the form of a treaty and include provisions on dispute settlement was a matter that remained to be considered. As he understood it, that question was normally taken up after the draft articles had been adopted, but he saw no reason why the Commission should not give it some preliminary consideration.

28. With regard to the precedent of the draft articles on responsibility of States, members would recall that the main reason the Commission had recommended that they should not be hastily referred to an international conference for adoption as an international convention was that a number of the more radical proposals, in particular draft articles 40, 41, 48 and 54, had constituted an exercise in progressive development. The draft articles on diplomatic protection, including his proposed article 20, contained no such radical proposals. Thus, the Commission had already shown itself willing to engage innovatively in the progressive development of international law. He agreed entirely with Mr. Pellet and Ms. Escarameia that it would be most undesirable to relegate all such innovative provisions to an annex. Instead, the Commission must bear in mind that it was drafting a set of articles that would take the form of hard law and, when confronted with an innovative proposal, should consider whether to include it by way of progressive development in what was essentially an exercise in hard law. As some members had noted, many States had indicated a willingness to see the Commission adopt a more progressive approach than it had done in the past. That must be taken into account when considering the more innovative proposals. Draft articles 7 and 8, for example, had been widely accepted by States. None of the proposals made were as innovative as those that had ultimately been included in the draft articles on responsibility of States, and there was no reason why they should not be included as hard law provisions in a text on diplomatic protection.

29. The CHAIRPERSON, speaking in his capacity as a member of the Commission, welcomed the Special Rapporteur’s proposed draft article 20, paragraph 2, concerning the fate of the sum received by the State in diplomatic protection. Whether the consent of the injured person was needed for diplomatic protection to be exercised. Whether such soft law indications to States should be included in the text of the draft articles themselves or in an annex was not the main issue.

41 Ibid., pp. 24–25, paras. 61–67.
which, as diplomatic protection was a discretionary right of the State, should read: “a State … may transfer that sum”. If, however, the Commission wanted to stress the need to protect the rights of the victim, then the text should read: “a State … shall transfer that sum”. The Drafting Committee should be given guidance on that point.

The meeting rose at 11.15 a.m.

2870th MEETING
Thursday, 4 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA
Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Montaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Ms. Xue, Mr. Yamada.


[Agenda item 2]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ECONOMIDES thanked the Special Rapporteur for the quality of his work, which had greatly facilitated the Commission’s task during second reading.

2. In paragraph 6 of his report, the Special Rapporteur stressed that the fate of the draft articles on diplomatic protection was closely bound up with that of the draft articles on State responsibility for internationally wrongful acts.42 It was true that the two subjects had special links, as the essential condition for the exercise of diplomatic protection was the commission by a State of an internationally wrongful act. However, diplomatic protection was also closely bound up with human rights—not all human rights, but those of individuals abroad who had suffered injury to themselves or to their property as the result of the unlawful act of a State. Traditionally, diplomatic protection also had fairly close ties to the settlement of disputes between States. For all those reasons, diplomatic protection was a sufficiently independent subject that had its own rules and could be addressed separately if need be. The question posed in paragraph 6 was thus important and merited in-depth consideration. In any event, he would not agree to the proposal to link the draft articles on diplomatic protection to the draft articles on State responsibility unless the Commission recommended in the strongest possible terms that the two drafts should take the form of an international treaty.

3. In draft article 1 (Definition and scope), the term “diplomatic action” was not defined, whereas elsewhere in the draft articles other expressions were used, such as “international claim” (arts. 14 and 15) or “claim of diplomatic protection” (art. 2, para. 2). Moreover, the wording of draft article 1 might give the impression that diplomatic action was regarded as a means of peaceful settlement, which was not true, because diplomatic action was always a unilateral act. The Drafting Committee should therefore review the wording of draft article 1, and of the above-mentioned term in particular. The proposal concerning a paragraph 2 that would cover consular assistance was superfluous, as there could be no confusion between diplomatic protection, which occurred at the level of the international responsibility of the State, and consular assistance, which was a daily, ongoing duty that fell under consular law, and in particular consular functions, which were defined in detail in bilateral and regional treaties and, albeit more succinctly, in the Vienna Convention on Consular Relations. That distinction should at least be made clear in the commentary.

4. Paragraph 2 proposed by the Special Rapporteur for draft article 2 (Right to exercise diplomatic protection) was a sensitive provision which it would be wiser not to include in the draft articles. It was unnecessary, because it was implicit for all States that respected the principle of good faith. If the principle was not respected, who would decide whether a request for diplomatic protection was formulated in conformity with the draft articles? No provision had been made for an appropriate mechanism that could settle such disputes. As for the proposals by Italy and by Mr. Pellet—which went much further—to make diplomatic protection obligatory, not only for the State of nationality but also for other States authorized to act in defence of the collective interest if individuals abroad were victims of grave violations of peremptory norms of general international law (jus cogens), they were certainly commendable and should be retained. However, in the current state of international law, no one could guarantee that such a progressive provision would not be used improperly to exert undue pressure on weak States. Thus while he was in agreement with the substance, he believed that it was premature to proceed along that path, which entailed obvious risks.

5. The rule of continuous nationality, the subject of draft article 5, was perhaps not logical in legal terms, but it was wise practically and politically. It was in fact deeply rooted in doctrine. He was not opposed to the rule being worded even more strictly to include the entire critical period from the time of the injury until the official presentation of the claim and even until the final resolution of the claim through an award or otherwise. However, should any changes of nationality occur between the date of the presentation of the claim and the date of its final resolution, provision should be made for a general exception on behalf of all persons who had involuntarily changed nationality for a reason unrelated to the claim. Such persons must not be deprived of the benefit of diplomatic protection. He agreed with Mr. Galicki that the expression “predecessor State” should be explained, preferably in the commentary. He was also in favour of retaining draft article 5, paragraph 3.

42 Ibid., para. 76.
6. Draft articles 17 (Actions or procedures other than diplomatic protection) and 18 (Special treaty provisions) should be replaced by a general provision that might be worded: “The present draft articles are of a supplementary nature and do not apply where, and to the extent that, a lex specialis may, through an action or procedure other than diplomatic protection, secure redress for injury suffered as a result of an internationally wrongful act”. It was important that priority should clearly be given to lex specialis in all cases.

7. He fully supported the Special Rapporteur’s proposal to adopt a new draft article on the right of the injured national to compensation and said that it would be preferable to use the word “shall” rather than “should” in paragraph (2) of draft article 20, proposed in paragraph 103 of the report. In addition, States should obtain the injured person’s consent before exercising diplomatic protection.

8. Mr. MOMTAZ thanked the Special Rapporteur for analysing the work of major legal scholars, whose publications clearly constituted a source, albeit a secondary one, for the determination of the customary rule the Commission had to codify. According to the Special Rapporteur, those writings “serve to emphasize that diplomatic protection is an instrument which allows the State to become involved in the protection of the individual and that the ultimate goal of diplomatic protection is the protection of the human rights of the individual” (para. 3 of the report). That idea was defended by some of the States that had submitted observations to the Commission and had called on it to focus greater attention on the place of the individual in the formulation of draft articles on diplomatic protection; in addition to the Netherlands, which the Special Rapporteur had mentioned, those States included Italy and, to a certain extent, Austria. Recent cases before the ICJ, in particular the LaGrand and Avena cases, confirmed that diplomatic protection and human rights law were complementary.

9. Some of the provisions of the draft articles adopted on first reading in 200443 unquestionably took account of developments in international law that favoured the protection of the individual. That was true above all for draft article 7 (Multiple nationality and claim against a State of nationality), which provided for an exception to the rule prohibiting the exercise of diplomatic protection by a State against a State of nationality. That exception, which compromised the principle of the sovereign equality of States, as Morocco had pointed out, was clearly a rule of progressive development. State practice in the area was very rare, and to create the exception the Special Rapporteur had relied primarily on the case law of the Iran–United States Claims Tribunal, although it was generally agreed that the claims submitted to that body had nothing to do with diplomatic protection. In any event, draft article 7 had been well received as progressive development, a situation he welcomed, as it reflected the movement of international law towards human rights protection.

10. The same applied to draft article 8 on the exercise of diplomatic protection in respect of stateless persons and refugees, which was also the product of progressive development and not of codification and had been quite well received by States, despite fears expressed in the Commission during its drafting.

11. That being said, he wondered whether it might not be possible to use the second reading to further strengthen that approach, which favoured the protection of human rights. It was in that context that the question arose as to whether a State that exercised diplomatic protection was asserting its own right or that of its national.

12. As currently worded, draft article 1 confined itself to the classic approach based on the case law of the PCIJ, in particular the Mavrommatis case, according to which a State that exercised diplomatic protection adopted in its own right the cause of one of its nationals. It would seem that the time had come to put an end to that legal fiction, which had been elaborated at a time when the ultimate goal of diplomatic protection had probably not been the protection of human rights. In specifying in draft article 1 that by exercising diplomatic protection the State sought to protect the rights of the individual injured by a violation of international law, the Commission would merely be adapting the text of the draft to current reality, which international case law had confirmed in the two above-mentioned decisions. On the other hand, if the Commission insisted on retaining the Mavrommatis formulation, it would have to abandon any idea of including a provision or a recommendation in the draft articles on the right of the injured national to compensation. The lack of a legal obligation for the State exercising diplomatic protection to pay the amounts received as compensation to the victims of the violation of international law might be justified to the extent that the State adopted in its own right the cause of its national. He personally favoured the text used in the draft articles of a provision recognizing a right to compensation for persons injured by an internationally wrongful act, because such a provision, far from being an innovation, would be in conformity with what appeared to be emerging practice.

13. It was in a similar spirit, namely strengthening protection of the human rights of the victims of internationally wrongful acts, that he wished to address the proposal by Italy on draft article 2, according to which a State would have a legal duty to exercise diplomatic protection on behalf of a national who was the victim of a breach of a peremptory norm of international law where the injured person was unable to bring a claim before an international court or tribunal or quasi-judicial authority. That proposal deserved close attention. The Special Rapporteur had already cited a number of provisions of the draft articles on State responsibility for internationally wrongful acts, notably articles 44 and 48,44 which contained an argument that supported it. He himself wished to draw attention to draft article 54,45 which provided that a State other than the State injured by the breach of an obligation owed to the international community, as was the case of the obligation incumbent on States to respect the norms of jus cogens, could take lawful measures against the State responsible to ensure

43 See footnote 7 above.

44 Yearbook ... 2001, vol. II (Part Two) and corrigendum, pp. 29–30.
reparation in the interest of the injured State, and more specifically of its nationals. Under those conditions, a directly injured State that refused to exercise diplomatic protection, regardless of the reason, would find itself in an untenable situation if a State that had not been directly injured decided to avail itself of the possibility offered by draft article 54 of protecting the injured person by means other than diplomatic protection. The Italian proposal, which followed that logic, was liable to encourage the directly injured State to exercise its diplomatic protection and would prevent it from having to deal with such rather embarrassing situations. The proposal was also in keeping with the trend in international criminal law towards combating impunity for international crimes and protecting the victims of such crimes.

14. Lastly, he reiterated that if draft article 19 (Ships’ crews) was retained, it should be placed after draft article 17. The possibility which current draft article 19 offered the State of nationality of the ship of claiming compensation for the benefit of its crew members, regardless of their nationality, when they had been injured by an internationally wrongful act was a type of action other than the diplomatic protection provided for in draft article 17. In other words, the possibility thus afforded to the flag State of acting on behalf of the members of its ship’s crew who did not have its nationality was a typical example of the actions other than diplomatic protection covered by draft article 17.

15. Ms. ESCARAMEIA commended the Special Rapporteur for his hard work, his spirit of independence and, of course, the quality of the final product he had submitted to the Commission.

16. Addressing the “tension” that existed between human rights and the rights of the State, she said she was pleased that greater emphasis was currently being placed on human rights, which was not simply one area of law, but a pillar of both international law and modern society. The question of diplomatic protection could not be considered as though it concerned only States, because the injury that could be done to individuals or corporations was increasingly becoming an issue.

17. It was unfortunate that the Commission had not taken up a number of important questions, such as the diplomatic protection of persons living in a territory administered by an international organization, namely the United Nations. Such persons were virtually stateless, for they had no State to protect them. It was likely that such situations, which could last quite some time, would become more common in the future. Another issue was the diplomatic protection of entities other than corporations, such as non-governmental organizations, foundations or universities. Different rules should have been drawn up for such cases. She also regretted that the Commission had tended to codify old models and would have preferred that it had taken recent developments more fully into account.

18. She then turned to the draft articles themselves. With regard to draft article 1, paragraph 1, as modified by the Special Rapporteur, she approved the Italian proposal to delete the words “in its own right” for the reasons already given by other members of the Commission. She endorsed the Special Rapporteur’s proposal to add a reference in paragraph 1 to the persons mentioned in draft article 8. As for paragraph 2, she feared that the proposed wording would cause greater confusion; it would be preferable to delete it and to relegate the question of consular assistance to the commentary.

19. On draft article 2, she agreed with those who advocated making it a duty for the State to exercise diplomatic protection. The report contained a number of examples of decisions by domestic courts along those lines, and domestic jurisprudence was also a source of international law. If the proposal did not have sufficient support, the idea should at least be reflected in the commentary. Paragraph 2, which was superfluous and also gave the impression that the State must agree to pay compensation, should be deleted.

20. She supported the Special Rapporteur’s proposed changes to draft article 3 (Protection by the State of nationality). With regard to draft article 4 (State of nationality of a natural person), she noted that the Special Rapporteur had been kind enough to record in the commentary the concerns which she had raised at a previous session, but said she still had some problems with the proposed revised version. For instance, a person who acquired the nationality of a State in a manner consistent with the law of that State but inconsistent with international law would not enjoy diplomatic protection. That would be the case of a woman who, in marrying, automatically lost her nationality of origin and acquired that of her husband, a situation that was certainly not consistent with international law. Another example would be that of persons residing in the territory of a State that had been illegally conquered by another State and who were forced to adopt the latter’s nationality. The problem might be resolved by clarifying the wording and stating that it was not the acquisition of nationality by the person concerned that was sometimes illegal, but the situation which gave rise to that development.

21. With regard to paragraph 1 of draft article 5 (Continuous nationality), she agreed with the idea of retaining the date of the official presentation of the claim. Turning to paragraph 2, she said that the injured person might very well have acquired the nationality of the claimant State without fraudulent intent and even involuntarily, and the Commission should be more flexible as to which State could exercise diplomatic protection on his or her behalf. The same remark applied to corporations in draft article 10.

22. With regard to draft article 8, she agreed with Mr. Koskenniemi and Mr. Mansfield that the criterion of “lawfully and habitually resident” made the threshold too high. Refugees were in an abnormal situation and were very vulnerable, and obtaining a habitual residence in another State might take many years, during which time they had no protection. They were virtually stateless, because their State of origin would not protect them (that was why they had fled from it), and they could not enjoy the protection of the host State. She therefore supported the proposal by the Nordic countries and others to replace “lawfully and habitually resident” by “lawfully staying”. The definition of refugee did not have to be the one set
out in article 1 of the Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, which was too inflexible. It was sufficient that a refugee be someone whom the State recognized as such.

23. She did not really agree with the new version of draft article 9 (State of nationality of a corporation). If two or more States were entitled to exercise diplomatic protection, any one of them should be able to defend the corporation. It was not realistic to think that a corporation would become incorporated in one State, establish its registered office in another and open its headquarters in a third just to benefit from diplomatic protection from multiple States, because bilateral investment treaties usually made provision for their protection. The Commission should be more flexible on that issue.

24. It was a pity that draft article 13 (Other legal persons) had not been further developed. She endorsed the revised version of draft article 16 (Exceptions to the local remedies rule) and said she preferred subparagraph (a) as initially proposed: "The local remedies provide no reasonable possibility of effective redress". She was in favour of the second version of draft article 17 in paragraph 87 of the report, which read "The right of States, natural persons or other entities ... is not affected by the present draft articles", and she agreed with draft article 19. She also fully supported what might become draft article 20 on the question of the payment of compensation to injured persons and thought that in the proposed paragraph (2), it was preferable to use the word "shall" rather than "should" and that the State should be required to consult with the injured national. With regard to the eventual form of the draft articles, it was clear from the comments in the Sixth Committee and by States that they ought to become a convention, since most States supported that solution, which guaranteed greater predictability and certainty.

25. Mr. PELLET said that he endorsed most of the points made by Ms. Escarameia, although he saw no need to elaborate a convention on diplomatic protection: the draft on State responsibility for internationally wrongful acts, for example, was in fact applied in large part by all States even though it was not a convention, and the same could hold for the draft under consideration. His view on draft article 4 was that expressed by the ICJ in its advisory opinion in the *Namibia* case, in which it had decided that one could not deprive of protection persons who had already suffered injury once by being forced to change nationality. Indeed, the problem was not that nationality had to be acquired properly but rather that when it was unlawfully imposed, the victims must not be deprived of protection; thus Ms. Escarameia’s reasoning would have to be turned around almost completely.

26. Turning to protection of legal persons, he observed that article 9 (State of nationality of a corporation) was the article that raised the most issues, which were detailed quite nicely in paragraph 52 of the report; accordingly, the article must be thoroughly reviewed. First, it was necessary to know what link or links should exist between a corporation and a State for the State to be able to exercise protection on behalf of the corporation, then one had to ask whether it was likely that two or more States would want to exercise their protection on behalf of a single corporation. Concerning the nature of the link of nationality between a corporation and a State, he welcomed the fact that some States had raised the issue of a genuine link, as he had never understood why the Commission had not taken it up. Without reintroducing the criterion of control, as Austria suggested, one might try to specify the legal criterion or criteria that the Commission could ultimately adopt as the condition or conditions for the exercise of diplomatic protection on behalf of a corporation. In that connection he was quite attracted by Italy’s proposal not to take the place of incorporation into account but rather to concentrate on where the corporation had its registered office or the seat of its management, as long as the principal place of the corporation’s activity was considered as well. In the interests of realism and clarity, then, the meaning of “registered office” should be stated in the body of the text, and it should be stipulated that if both criteria—place of incorporation and place of registered office—were maintained, they should not have to apply simultaneously. The concept of registered office was in fact ambiguous and multifaceted: it could be the statutory registered office, the actual registered office or the main centre or centres of operation. If the objective was to facilitate effective protection of the corporation, then it should be acknowledged that all of those were valid as linkage criteria. In reality, the most important criterion was the one excluded by the current wording, namely the main centre of actual operations. In contrast, the place of formation or incorporation was a totally abstract concept that facilitated incorporations of convenience; nevertheless, one could not exclude it without taking liberties with positive law. It would certainly be less useful to retain the option of taking into account a “similar connection”, a phrase which had been criticized by several Governments. If one relaxed the criteria, and especially if one introduced the criterion of main centre of activity, the concept of “similar connection” opened the door to a variety of subjective interpretations. Consequently, the term “registered office” must be construed in a broad, realistic manner, based on the corporation’s actual activities. In any event, it was essential to remove the requirement that all the criteria should apply simultaneously. The effect of that requirement was that corporations that had their registered office in a State other than the State in which they were formed were not entitled to benefit from any protection whatsoever. That resulted in the arbitrary and artificial creation of a category of “stateless” corporations, to which he did not think one could extend, by analogy, the provisions of draft article 8. If one replaced the word “and” by “or” in draft article 9, the possibilities (or dangers) of multiple protection were increased, but that was progress: the function of diplomatic protection was to enhance the effectiveness of international law, and if several States might be able to contribute to that effectiveness, so much the better.

27. He had always maintained that a corporation, like an individual, could have two or more nationalities, and he was therefore glad to see that States were more realistic than most Commission members, as they had pointed out that that phenomenon did exist in reality; he was likewise pleased that the Special Rapporteur acknowledged, in paragraph 54, that failing to take that phenomenon into account was “an error that must be rectified”. Still, he did not think one should therefore conclude that if a
corporation had dual or multiple nationality, a single State must exercise protection in respect of it, as would be the case under the new paragraph 3 proposed for draft article 9 in paragraph 55 of the report. Draft article 6 (Multiple nationality and claim against a third State), which related to natural persons, imposed no such restriction, and there was no justification for adopting a different solution for legal entities. There was no reason not to retain the principle of predominant nationality, so long as it was not used to prevent protection from coming from numerous quarters. In short, he thought that the criterion of where the corporation was formed should be removed from paragraph 2 of revised draft article 9. If that criterion was retained, however, then the word “formed” should be replaced by “incorporated” and the two criteria should be made into alternatives; in other words, the word “and” should be replaced by “or” in the French text, which did not conform to the original English. Lastly, paragraph 3 should be reworded along the lines of draft articles 6 and 7 dealing with natural persons, with the necessary changes.

28. Concerning article 10 (Continuous nationality of a corporation), he thought, unlike Mr. Economides, that the principle of continuous nationality had no justification in either practical or intellectual terms. Nevertheless, if the principle was retained, he could go along with paragraph 1, provided that in the French version the phrase “Un État est en droit d’exercer sa protection diplomatique seulement au bénéfice” (“A State is entitled to exercise diplomatic protection only in respect of”) was reworded to read “Un État n’est en droit d’exercer sa protection diplomatique qu’au bénéfice” or “au seul bénéfice”. He endorsed the inclusion of paragraph 2, which again would avoid the aberration of the Loewen decision. Like Mr. Matheson, he was in favour of retaining paragraph 3, although he thought it should go even further by stipulating that the corporation must have ceased to exist not only legally, under the law of the State, but also in fact; if the corporation was prevented from functioning by the State, paragraph 3 would nevertheless apply.

29. With regard to the wording of subparagraph (a) of draft article 11 (Protection of shareholders) proposed in paragraph 68 of the report, the highly conservative positions taken by the Commission on the issue were a matter of concern. The prevailing considerations that had motivated the ICJ to deny Belgium any right of protection on behalf of the corporation’s shareholders in the Barcelona Traction case were without a doubt fairly convincing. According to the decision in that case, it could legitimately be held that when individuals set up a corporation in a State other than that of which they were nationals, the shareholders accepted, in exchange for the primarily fiscal advantages that they expected of such “delocalization”, the risk created by the fact that protection of the corporation fell to a State other than their State of nationality (para. 99 of the judgment). As the Court had pointed out, it was also extremely difficult to determine who the shareholders of a corporation were (para. 87 of the judgment). The fact remained that other considerations had to be taken into account: leaving without protection the foreign shareholders of a corporation having the nationality of the State that caused the injury was unacceptable. The Commission had been aware of that, but the extraordinarily timid solution it had chosen in draft article 11 (b) seemed to have no justification in law or in equity. Similarly, the requirement in subparagraph (a), whose applicability or lack thereof to corporations having the nationality of the host State remained uncertain, that the corporation should quite simply have ceased to exist in the State of nationality seemed untenable. There again, the Commission had confined itself to the Barcelona Traction judgment, which it had also interpreted in a very restrictive manner: it seemed strange that shareholders should be deprived of protection when the host State effectively froze the operations of the corporation, and that their protection should be limited to cases in which the corporation’s failure was unrelated to the injury ( paras. 64–68 of the judgment), when it would seem that it was precisely when the corporation, irrespective of its nationality, ceased to exist in law or in fact because of the conduct of the host State that shareholders had the greatest need for protection and should be entitled to obtain it. The Commission’s position in draft article 11 was at odds with contemporary judicial practice, especially the practice of ICSID. The new wording for the article proposed in paragraph 68 of the report was undoubtedly a small step in the right direction, but the Commission could doubtless do something much better and much more useful.

30. Regarding draft article 15, if the Commission accepted the Special Rapporteur’s proposal to replace the current title, “Category of claims”, with “Mixed claims” (para. 75 of the report), which was a good idea, it should take advantage of the opportunity to completely overhaul the draft article, taking into account, among other things, the comments by Italy on draft article 1. As to draft article 16 (Exhaustion of local remedies), the uncertainty that inevitably arose owing to the subjectivity of the interpreter or judge would never be dispelled no matter what wording was adopted, so either version was acceptable. Draft articles 17 and 18 seemed to say the same thing, namely that the right of States to exercise diplomatic protection in respect of their nationals who had been injured by the internationally wrongful act of another State was without prejudice to other direct remedies available to the injured individuals; accordingly, the two draft articles could not be separated. Those who advocated keeping them separate argued that draft article 17 concerned human rights remedies, whereas draft article 18 dealt with protection of investors. There was no cause to make such a distinction, however, since the legal issue involved was exactly the same. Irrespective of whether it was human rights law, investment law or another type of law that was involved, what must be indicated was that treaty provisions or special customary rules giving individuals remedies other than diplomatic protection were not being called into question by the draft articles and that, like the Convention on the settlement of investment disputes between States and nationals of other States, such special rules could even hold their own against the rules of diplomatic protection. That having been said, one might also say three more things. First, unless the treaties in question expressly provided otherwise, the two roads ran parallel—in other words, one could have the benefit of both a direct remedy and diplomatic protection; however, that was something about which he had grave doubts. Secondly, and conversely, one might think that when a direct remedy was available to an individual, the State could not exercise diplomatic protection on his
or her behalf, at least while the remedy was pending, a position that seemed to be better founded. Remedies such as those provided by the European Court of Human Rights, the Inter-American Court of Human Rights or the African Court on Human and Peoples’ Rights could be likened to domestic remedies, and such regional remedies must be exhausted before diplomatic protection could be considered. The problem of remedies at the universal level was fairly complicated, particularly in the case of the Human Rights Committee, whose decisions were not binding, and one solution might be to indicate that when such remedies were available, the State could exercise its diplomatic protection only when the direct remedies had been exhausted. Thirdly, it should also be indicated that in the event of a serious breach of an obligation arising from a peremptory rule of general international law, the injured person could enjoy the protection of States other than his or her State of nationality. Yet that was not at all what draft article 17 said, and in any case that article was not the appropriate place to say it: it would be better to deal with the matter in a special provision or in a second paragraph under draft article 2. In any event, he remained vehemently opposed to the coexistence of two separate articles, 17 and 18, either in their current wording or in the wording proposed by the Special Rapporteur in paragraphs 87 and 89 of his report.

31. Draft article 19 (Ships’ crews) was laudable but not germane to the subject; while defensible from an empirical point of view, it was not defensible logically. It skewed the internal logic of the draft articles, since the remedies and procedures it contemplated were in fact associated with draft articles 17 and 18. That was why, if a vote had to be taken on the provision, he would vote against it even though he endorsed its contents. However, he suggested that the Special Rapporteur and the Chairperson of the Commission should jointly address a letter to the Secretary-General of the International Maritime Organization requesting that organization to take up the issue.

32. The future draft article 20 on the right of the injured national to receive compensation heralded the desire to include in the draft articles provisions relating not only to the conditions for the exercise of diplomatic protection but also to the consequences of its exercise. He heartily welcomed that proposal by the Special Rapporteur, which went in the right direction, even if it was neither perfect nor sufficiently far-reaching.

33. While he endorsed the thrust of the draft article, he disapproved of mingling essentially dissimilar problems and regretted the fact that the Special Rapporteur was unduly cautious, which only exacerbated the confusion. For example, paragraph 1 covered two subjects, the taking into account by the protecting State of the injury suffered by its national and possible consultation with the national, but it overlooked the main point, which was that in a case involving diplomatic protection, compensation had to be determined on the basis of the injury suffered not by the protecting State but by the injured individual. That went against the Mavrommatis fiction, but as the Special Rapporteur quite rightly pointed out in paragraph 95 of his report, the logic of Mavrommatis did not by any means always prevail; in reality, the legal regime of diplomatic protection took exceedingly little account of it. Moreover, it was now a rule consistently applied in practice, an indisputable and perfectly unproblematic customary rule, that the amount and modality of compensation should be aligned with the injury suffered by the individual. Moreover, it was not a new rule, since in 1928 the PCIJ had decided in the Chorzów Factory case that the damage suffered by the individual afforded a convenient scale for the calculation of the reparation due to the State. That well-established basic principle, specific to the field of diplomatic protection, was the source of the first idea contained in draft article 20, paragraph 1, namely that the State should “have regard” to the injury. That cautious wording seemed reasonable in view of the fact that diplomatic protection was a discretionary power of the State; the State might choose not to exercise it except where a rule of jus cogens had been breached, and accordingly should be entitled to ask for only partial compensation—again, as long as a grave breach of an obligation arising from a peremptory rule of general international law was not involved.

34. He also could not see why the Special Rapporteur had included in draft article 20, paragraph 1, the phrase “material and moral consequences of the injury”, when it seemed sufficient to say “injury”. He wondered, too, why the two provisions in draft article 20 should apply only to nationals when the draft very fortuitously extended the benefits of diplomatic protection to stateless persons and refugees, and it was sometimes argued that corporations had nationality. In draft article 20, or in articles that might replace it, it would be better to use the term “protected person” instead of “national”. He also wondered why the Special Rapporteur restricted the principle he enunciated in paragraph (2) to “compensation”, when reparation could take three forms: satisfaction, which was hardly appropriate in the case of injury suffered by individuals, compensation and restitutio in integrum, an example being the restitution of an illegally confiscated sum of money.

35. While he was not in principle averse to the use of the conditional in legal texts, he thought that the indicative or the imperative was called for in paragraph (2) of the proposed draft article. He could not see why States should oppose such progressive and forward-thinking development of the law, given that both common sense and fairness justified the existence of a rule for allocating compensation or restitution among private individuals. The legal foundation of that obligation would be the unjustified enrichment of the State that held on to the recovered amounts. In his view, it was essentially a rule of customary law and consistent practice that was so clearly based on common sense that one might wonder whether it involved progressive development at all. The idea set out in the bracketed phrase in draft article 20, paragraph (2) which read “after deduction of the costs incurred in bringing the claim” should not be included in the provision, since it was derived from the principle of full reparation that was itself rooted in the decision of the PCIJ in the Chorzów Factory case to the effect that, in the case of internationally wrongful acts, the State responsible must wipe out all the consequences, which surely included reasonable expenditure incurred in the context of diplomatic protection.
36. In conclusion, he said that if the Commission wished to respond to the appeals made to it by the Special Rapporteur and some States to finish its draft articles on diplomatic protection, it must abandon the outdated principle, open to criticism, that had been posited at the start of the eighteenth century and set out in 1924 by the PCIJ in the \textit{Mavrommatis} case to the effect that States acted on their own behalf, and acknowledge the truth, which was that States acted to uphold the rights of their nationals. The Commission should then consider which special rules were applicable when injury was caused to a protected person through the breach of a peremptory rule of general international law. In view of its bolder stance in the draft on State responsibility for internationally wrongful acts, it was difficult to understand the Commission’s timidity in the current draft, which was a mere adjunct to the first. The Commission must also spell out more clearly what the means of exercising diplomatic protection were and must include in its draft articles rules that were as detailed as possible on the consequences of the exercise of diplomatic protection, particularly where diplomatic protection overlapped with direct remedies available to individuals, an exercise that implied a substantial redrafting of draft articles 17 and 18. Rules specifically applicable to reparation in the particular context of diplomatic protection must also be included, in keeping with what the Special Rapporteur proposed in draft article 20, but supplementing and strengthening his proposals. If all that was done, the Commission would not have laboured in vain.

37. Mr. RODRÍGUEZ CEDEÑO said that the topic of diplomatic protection was ripe for an exercise in codification and progressive development. The Special Rapporteur’s endeavours in that direction had been very useful, and it was to be hoped that the Commission would adopt the final version of the draft articles and the relevant commentaries, subject to certain amendments, at the current session. While the text was not perfect, it restated and reinforced the basic secondary rules governing the exercise of diplomatic protection. The first point to note was that the issue of diplomatic protection was closely linked to that of the international responsibility of States and to human rights protection mechanisms because its underlying purpose was in fact to protect the rights of persons. In his opinion, the Commission’s work should culminate in a set of draft articles from which an international instrument on the subject could subsequently be drawn up, that being the option favoured by the Commission itself and by the Sixth Committee. In that case, it would be necessary to contemplate in due course the inclusion in the draft of the technical and legal provisions generally contained in such instruments, as the Special Rapporteur had pointed out in paragraph 6 of his report.

38. Commenting on the proposed draft articles, he said he shared the opinion expressed by other members of the Commission that it was necessary to distinguish in draft article 1 between diplomatic protection and consular assistance, but that that distinction ought to be elucidated in the commentary rather than in a new paragraph 2, the solution proposed by the Special Rapporteur in paragraph 21 of his report. Consular assistance as understood in the 1963 Vienna Convention on Consular Relations consisted in action taken on behalf of one of its nationals by the consulate of a country \textit{vis-à-vis} the territorial authorities of the State in which it exercised its functions. In practice, the aim of that assistance was to ensure that due process was observed with respect to the person in question and that his or her rights were not violated, especially if he or she was accused of a specific offence. Diplomatic protection was action taken by a State in the event of a violation of international law after the injured person had exhausted all domestic remedies. The nationality link, except in the case of refugees and stateless persons, was a fundamental principle in the context of diplomatic protection, whereas it was not always required for consular assistance, since a State could represent the interests of other States and consequently act on behalf of persons who were not its nationals. Thus consular assistance did not have the same significance, scope or basis as diplomatic protection. That was, however, a matter that should be discussed in the commentary and not in the body of the draft articles. The definition of diplomatic protection given in draft article 1 was consistent with practice, precedent and a large part of doctrine on the subject, but it should be made more precise in order to clearly reflect the fact that diplomatic protection was exercised principally by a State in response to an injury suffered by one of its nationals as a result of an internationally wrongful act of a State. Doing so would also take account of developments in the very notion of diplomatic protection. In that connection, the Italian proposal contained in the Special Rapporteur’s report and the implications of the ruling in the \textit{Avena} case were worth considering. It was also crucial that the definition of diplomatic protection should expressly mention the persons referred to in draft article 8 (Stateless persons and refugees), which laid down an exception to the principle of the nationality link, along the lines of the Special Rapporteur’s apt proposal in paragraph 21 of his report.

39. Some confusion might arise if the paragraph proposed by the Special Rapporteur in paragraph 24 was added to draft article 2. It would be better to keep to the current wording of the draft article, which expressed the essential idea that a State had the discretionary right to exercise diplomatic protection on behalf of one of its nationals or on behalf of the persons covered by draft article 8.

40. Draft article 3 was acceptable as it stood. The text adopted on first reading plainly established the fundamental nature of the nationality link in paragraph 1, and referred to the exceptions for which provision was made in draft article 8. The proposal of the Netherlands therefore appeared to be unnecessary, although the Drafting Committee was at liberty to study it more closely. Moreover, it emerged from draft article 4 that the granting of nationality was governed by the rules of international law provided that they were not inconsistent with international law. That draft article was sufficiently clear to be approved in its current form. There was therefore no need to take up the amendments proposed by some Governments.

41. He was pleased that States had welcomed draft article 8, which made it possible for a State to exercise diplomatic protection in respect of stateless persons and
refugees, in other words on behalf of persons who were
not its nationals but who had their habitual residence in
that State. That draft article filled a substantial lacuna
and was an exercise in the progressive development of
international law that took international realities into
account, although it could be argued that such cases
would not be very numerous and would be inherently
limited in time. While a provision of that kind was
necessary, it raised two major issues regarding refugees:
the first was the definition of the term “refugee” and the
establishment of conditions governing the exercise of
diplomatic protection in respect of a refugee. He did not
entirely agree with the opinion that it would be advisable
to clarify the meaning of the term “refugee” or at least
raise the question. The definition in the 1951 Convention
relating to the Status of Refugees and the 1967 Protocol
thereto, whose retention was recommended by some, had
evolved over the years, a development that was reflected
in the practice of States, including States that were
parties to those instruments, especially in the regional
context of Africa and the Americas, and it had acquired
a much wider scope. When granting refugee status in
their respective territories, then, States did not base their
decisions solely on the definition contained in that treaty,
but also on other international documents and texts which
had subsequently become legally binding. However,
the most important factor was that refugee status must
be recognized by the host State in accordance with its
internal procedures, in which the competent bodies and
the Office of the United Nations High Commissioner for
Refugees participated. The latter played a leading role in
ensuring the application of and respect for the pertinent
norms. That was why it was necessary to clearly establish
that the person must have refugee status both at the time
of the injury and on the date of the official presentation
of the claim. As for the criteria for exercising diplomatic
protection, the proposal of the Nordic countries was
interesting: in draft article 8, they had suggested replacing
the expression “is lawfully and habitually resident in that
State” with the notion of “lawful stay”, since the point at
issue was the legal situation of the person, namely whether
he or she had been granted refugee status at a specific time
by the State and was legally “staying” in its territory. The
expression “lawfully and habitually resident” might have
a different connotation. In some countries, the granting
of refugee status was not tantamount to permitting lawful
residence within the strict meaning of the term. The key
criteria for determining whether a person could receive
diplomatic protection were that he or she had refugee
status awarded in good faith and not obtained fraudulently
and that he or she resided in the country which had granted
that status. Perhaps the Drafting Committee could look at
the question in greater detail.

42. The current wording of draft article 14 on the
exhaustion of local remedies rule was the most acceptable
and should not be replaced with the wording proposed
by the Special Rapporteur in paragraph 74 of his report.
Draft article 16 on exceptions to the local remedies rule
should also be left unchanged; the amendments suggested
in paragraph 81 of the report should not be adopted.

43. Lastly, the inclusion of a provision on the right
of the injured national to receive compensation or,
more generally speaking, reparation was a particularly
important question related to the very notion of diplomatic
protection. He agreed that such a matter should not form
the subject of a separate recommendation or guideline.
That provision had to be sufficiently clear and precise
and must expressly stipulate that the State of nationality
must pass on the compensation received to the injured
person in accordance with terms and conditions which the
Commission and the Drafting Committee must consider
in greater depth.

44. Mr. KOLODKIN commended the Special
Rapporteur for the quality of his seventh report on
diplomatic protection, which contained many interesting
thoughts and proposals.

45. Referring to draft article 1, he said that the proposed
new paragraph 2, which drew a distinction between
diplomatic protection and consular assistance, was not
necessary. In fact, he was not certain that the expression
“consular assistance” was more appropriate than “consular
protection”. The 1963 Vienna Convention on Consular
Relations and many bilateral agreements spoke at great
length about “protection”. The task of consular agents was
to protect the rights and interests of nationals and legal
persons but also those of the State itself, within the limits
permitted by international law, and he drew attention in
that connection to article 5 (a) of the 1963 Convention. It
was true that there was a difference between diplomatic
protection and consular protection, but it was perhaps not
necessary to devote a paragraph to it; a reference in the
commentary should suffice.

46. He was opposed to the addition of a second
paragraph to draft article 2 to meet Austria’s concern
that a State should be required to accept a claim made
against it. Such an obligation stemmed implicitly from the
right of the other State to submit a complaint. Otherwise,
every provision that established a right would also have to
specify the corresponding obligation. In any case, the new
paragraph 2 proposed in paragraph 24 of the report should
not be retained in its current wording, especially since, as
had already been pointed out, the word “accept” was not
the best choice. As to draft article 3, a reversing of the two
parts of the sentence in the new version of paragraph 1
proposed in paragraph 27 of the report was inappropriate
because it gave the impression that the Commission was
defining the State of nationality. The actual objective was
to define the State that was entitled to exercise diplomatic
protection, something which the old paragraph 1 did
very clearly.

47. He agreed with the changes proposed by the Special
Rapporteur to draft article 4. Concerning draft article 5,
paragraph 1, he subscribed in principle to the ideas set
out in paragraph 43 of the report. Continuous nationality
should extend from the time of the injury to the date of
official presentation of the claim. It would not be fair for a
respondent State to be able to assert that the injured person
no longer had the nationality of the claimant State on the
date of settlement of claim. The same considerations were
applicable to draft articles 7, 8 and 10. It was difficult to
see why the Special Rapporteur had not retained draft
article 5, paragraph 2 adopted on first reading. 46 That was

46 See footnote 7 above.
a very useful provision which covered very real situations, and not just that of State succession. It should therefore be retained. The proposed new paragraph 2 was likewise welcome. Draft article 6, paragraph 2, was also useful. The Russian Federation and Israel had referred to that provision when they had exercised diplomatic protection in respect of persons with dual nationality.

48. He endorsed the recommendations regarding draft article 8 formulated in paragraph 50 of the report. The proposal by the Nordic countries to replace the words “lawful and habitual resident” by “lawfully staying” should not be adopted, because that would allow a State to exercise diplomatic protection on behalf of an injured person to whom it had no sound legal link. The words used in the current version of the paragraph were entirely consistent with the 1951 Convention relating to the Status of Refugees. As to the meaning to be given to the word “refugee”, it was for the State that was entitled to exercise diplomatic protection to define the category of persons who were “lawfully and habitually resident”, provided that the definition was not contrary to international law.

49. The Special Rapporteur’s proposal in paragraph 53 of his report to divide draft article 9 into several paragraphs was a good idea, as was the proposal to delete the reference to “similar connection”, but the Commission should be cautious about adding alternative criteria that would lead to a situation where several States would be entitled to exercise diplomatic protection. The proposed new paragraph 3 covered that particular situation, but did so by introducing the problematic notion of “closest connection”. The text should confine itself to the criterion of State of incorporation, as proposed by the United Kingdom, but he remained open to any solution that would reconcile the various viewpoints.

50. The proposed new version of paragraph 2 of draft article 10 was useful. In draft article 11, the part of the sentence in square brackets in the proposed new version of subparagraph (a) should be retained. If it was deleted, it might appear that the diplomatic protection of shareholders could also be exercised when their corporation had ceased to exist for reasons unrelated to the injury, yet draft article 10, paragraph 2, provided that diplomatic protection would be exercised by the State of nationality of the corporation that had incurred the injury and had ceased to exist as a result of that injury. Thus, if the phrase in square brackets in draft article 11 was deleted, diplomatic protection could be exercised by both the State of nationality of the shareholders and the State of nationality of the corporation. That was not a result the Commission was seeking to achieve.

51. The words “under the law of the latter State” in subparagraph (b) should not be deleted either. If a corporation was willing to be incorporated in a foreign State because such incorporation was required by the State as a precondition for doing business there even if its law contained no such provision, then the risk that the corporation would knowingly take would be much too great. It would be very difficult for the shareholders and the State exercising diplomatic protection on their behalf to prove that such a precondition had actually been set if the foreign State’s law did not contain such a provision. Thus the words “under the law of the latter State” introduced an important detail.

52. Draft article 12 should be retained as it stood, as the Special Rapporteur rightly suggested. The proposed change to draft article 13 met Guatemala’s concern to include the principles applicable to shareholders contained in draft articles 11 and 12. The question of such inclusion would not arise if draft article 13 addressed only legal persons involved in business activities, but there were other legal persons besides commercial entities, such as universities or municipalities. Draft article 13 had been the subject of considerable controversy in the past, and the Commission had decided, as a compromise, to confine the reference to principles concerning the nationality of corporations. It would be difficult to go back on that compromise.

53. In draft article 16, it was not advisable to adopt wording that was radically different from the one adopted on first reading, which on the whole was satisfactory. In particular, he was opposed to the proposal to delete the reference in subparagraph (c) to cases in which “the circumstances of the case otherwise make the exhaustion of local remedies unreasonable” on the grounds that such a situation was already spelled out in subparagraph (a); actually, that was not so at all. He noted that in the Avena case, Judge Vereshchetin had stressed that in certain special circumstances, such as those of the Mexican nationals already on death row, to demand the exhaustion of local remedies could lead to an absurd result (separate opinion, p. 83, para. 12). The second part of subparagraph (c) covered that very type of special circumstances, and it should therefore be retained, if necessary in a separate subparagraph.

54. Draft article 17 was useful in its current version. In the proposed new version of draft article 18, the reference to special regimes provided for under bilateral and multilateral treaties regarding the protection of investments was particularly welcome, for it helped clarify the subject of the provision. As to draft article 19, it was preferable to retain it in the version adopted on first reading. The new wording had at least one drawback: it made the right of the State of nationality or of the flag ship the subject of regulations in the draft articles on diplomatic protection.

55. With regard to the proposed future article 20, he said that it would be inconceivable in the Russian Federation for compensation obtained as a result of diplomatic protection not to be paid to the person concerned. Recently, for example, compensation obtained from Ukraine in the case of the aircraft shot down over the Black Sea in 2001 had been distributed in full to the families of the victims. However, as State practice and legislation in that area were very varied, it would be difficult to arrive at a uniform practice. It should be possible, through recommendations, to promote the development of a practice of transfer of compensation obtained as a result of diplomatic protection to the persons concerned, but even the tenor of such recommendations was difficult to define at the current time.

56. He did not see how the fate of the draft articles on diplomatic protection was bound up with that of the draft
articles on State responsibility for internationally wrongful acts, as the Special Rapporteur argued in paragraph 6 of the report. He did not understand why the draft articles on diplomatic protection that were to a great extent the codification of customary international law could not be adopted as a treaty, without looking back to the fate of the draft articles on State responsibility.

57. Mr. MATHESON, commenting first on draft article 14, said that he agreed with the amendment of paragraph 1, which recognized that local remedies might be exhausted by an entity other than the injured party itself, as the ICJ had ruled in the ELSI case.

58. Turning to draft article 16 (a), he noted that with regard to the exhaustion of local remedies the Special Rapporteur evidently preferred to adopt the criterion of the absence of a “reasonable possibility of available and effective redress”. That criterion could, however, be interpreted as allowing a claimant to forego local remedies which might be perfectly adequate but unlikely to provide redress for other reasons, such as the inadequacy of the claim. That was why the United States was proposing that it was unnecessary to exhaust local remedies if they were “obviously futile” or “manifestly ineffective”, having made it clear, however, that that would not be the case where a forum was “reasonably available to provide effective redress”. That proposal had the merit of focusing on the adequacy of the local forum rather than on the likelihood of a favourable result. It was true that the phrases “obviously futile” and “manifestly ineffective” might seem to require that the ineffectiveness of the local remedy should be immediately apparent. The two alternatives in the Special Rapporteur’s report could be reconciled by stating that local remedies need not be exhausted where they did not offer a reasonably available forum to provide effective redress. That would make it possible to keep the terms preferred by the Special Rapporteur while emphasizing the adequacy of the local forum.

59. The revision of subparagraph (c) of draft article 16 was welcome. Circumstances which would make the exhaustion of local remedies “unreasonable” were already covered by subparagraph (a), and the commentary could make that clear. That solution was far better than a vague and entirely open-ended reference to “reasonability”, which could effectively negate the entire requirement to exhaust local remedies.

60. He was not opposed to replacing the phrase “special treaty provisions” in draft article 18, but he thought that the proposed reference to “special regimes provided for under bilateral and multilateral treaties regarding the protection of investments” would not cover the specific investment provisions of broader bilateral agreements such as friendship, commerce and navigation treaties. He would prefer a reference to “specific treaty provisions regarding the protection of investments”, but would leave the matter in the hands of the Drafting Committee. Although draft article 19 was unnecessary, it could be retained, preferably in its original version.

61. He approved of the Special Rapporteur’s proposal to add an article on the right of injured nationals to receive compensation. States must be encouraged to treat their nationals fairly when those States received compensation as a result of diplomatic protection. However, it was unfortunate that that issue had been addressed at such a late stage. If innovations were introduced during second reading, the Commission was more likely to make errors or produce results that States would not accept.

62. Those concerns were particularly important in that they touched on an area that fell within the realm of State policy and practice and the State’s treatment of its nationals, and because the intention was to guide or regulate the conduct of Governments. Any pronouncement on that subject should at least be based on a thorough study of State practice with regard to claims negotiation and administration.

63. With respect to the substance of the proposals, it was quite true that in the normal course of events a State should have regard to the consequences suffered by its injured national and, where feasible, consult that person before quantifying a claim. However, it must be borne in mind that in some circumstances a Government could not always do that if, for example, it had to process a large number of claims, such as the hundreds of thousands of claims brought against Iraq in the wake of the first Gulf War. If paragraph 1 of the text proposed by the Special Rapporteur was retained, it ought to contain a recommendation to States rather than impose an obligation on them.

64. Even more caution was required with respect to paragraph (2). It was not at all unusual for States to withhold a portion of the amounts received from a foreign Government. The United States, for example, regularly deducted a fixed percentage of amounts recovered from foreign Governments in order to pay for action to defend the interests of its nationals. Otherwise, the United States Government would have to subsidize the considerable effort required to present complex claims on behalf of multinational corporations that had ample resources to deal with such contingencies, or to face the prospect of prolonged disputes with those corporations over the amount to be deducted. Other Governments would undoubtedly face the same dilemma if such deductions were prohibited or limited to the actual costs incurred. Furthermore, if a Government used part of the amounts recovered for other legitimate public purposes, such as the maintenance of its foreign policy operations which formed the necessary basis for the protection of its nationals, that could not be deemed illegal or improper. States did have a right to require their nationals to contribute to such legitimate purposes. Thus the most that could be asked of States was that they should make a fair and reasonable payment to a claimant when they received compensation in fulfilment of a claim.

65. For those reasons, he was of the opinion that the Commission should defer any pronouncements on those points until a thorough survey of State practice could be carried out and States had given their views. If the Commission nonetheless decided to address that question at the current stage, it should be careful not to announce any new obligations or make categorical recommendations. The best solution would be to discuss the matter in the commentary.
66. Other suggestions that had been made could impose even more serious restrictions on the ability of States to deal with their nationals’ claims, such as requiring the consent of claimants for the exercise of diplomatic protection, or for the form and amount of redress. States must retain control over their claims negotiations with other countries, for those negotiations were often a key element in resolving dangerous crises. In that context, a State might be led to lodge a claim against the will of its national, or to fix a form and an amount of recovery that did not satisfy its national. For example, one element of the 1981 Algiers Declaration,47 which had resolved a potentially dangerous situation in relations between Iran and the United States, had been the compulsory resolution of claims from nationals of both countries by means of a bilateral arbitration process; subsequently a large number of claims had been settled by the two sides through bilateral negotiation. The Supreme Court had dismissed one corporation’s suit challenging the right of the United States Government to settle its case in that manner against its will. If the United States Government had been unable to agree to a compulsory settlement of its nationals’ claims, the Accords might well have collapsed, with potentially serious consequences.

67. In short, States must retain the right to exercise diplomatic protection and settle such claims even when the claimant objected. Any other rule could seriously impair the ability of Governments to resolve foreign policy crises.

The meeting rose at 1.05 p.m.

2871st MEETING

Friday, 5 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissario Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaia, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Ms. Xue, Mr. Yamada.


[Agenda item 2]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. KATEKA, after commending the Special Rapporteur’s willingness to accommodate the views of Member States and of the Commission, said he endorsed the Special Rapporteur’s belief that European citizenship was applicable to consular assistance and not to diplomatic protection. He was of the view, however, that the Special Rapporteur had overemphasized the importance of article 1-10, paragraph 2 (c) of the Treaty establishing a Constitution for Europe, which surely related to diplomatic representation under the 1961 Vienna Convention on Diplomatic Relations and to consular assistance under the 1963 Vienna Convention on Consular Relations rather than to diplomatic protection.

2. He had some difficulty with the revised proposal for draft article 1, contained in paragraph 21 of the report. The addition of the phrase “or a person referred to in article 8” created problems on which he would elaborate when commenting on draft articles 3 and 8. Paragraph 2 of the revised draft article was unnecessary: it did not detail exhaustively enough what was not covered by diplomatic protection.

3. With regard to draft article 2, he did not share Italy’s view that a State had a legal duty to exercise diplomatic protection, which, as the Commission had correctly stated, was a discretionary right. Thus, he did not see the desirability of adding a second paragraph to the draft article, declaring that a State was under an obligation to accept a claim of diplomatic protection. In his view, if a claimant State fulfilled the requirements for the exercise of diplomatic protection, the respondent State was obliged to comply. Paragraph 2 could, however, find a place in the commentary.

4. In connection with the reservations that he had previously expressed concerning the need for draft article 3, paragraph 2, on the exercise of diplomatic protection in respect of a non-national, he would take the opportunity to express his views concerning draft article 8 on stateless persons and refugees. During the first reading, he had expressed misgivings regarding the draft article.48 In theory, it was right for the Commission and some States to express solidarity with refugees by seeking to protect their human rights; and for countries of the North, which did not suffer from the phenomenon of refugees to the same extent as those of the South, the progressive development contained in draft article 8 was ideal. In practice, however, the provision would have the tendency to make permanent what was supposed to be a situation of limited duration. Some countries already played host to refugees in the hundreds of thousands—a heavy burden in an environment where burdens were rarely shared by the international community.

5. In that regard, he agreed with Austria’s comment that an open definition of the term “refugee”, as suggested in the commentary to draft article 8, should be avoided: the definition contained in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol was sufficient. The 1969 OAU Convention governing the specific aspects of refugee problems in Africa had adopted the definition contained in the Convention relating to the Status of Refugees, but had gone further by saying that the term “refugee” also applied to “every person who, owing to external aggression, occupation, foreign domination or


48 See footnote 7 above.
events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.“ (art. 1, para. 2). He wondered if the Special Rapporteur could clarify whether that definition could be of global application.

6. In many instances, injury was caused by the State of origin of the refugee, in that it had violated the primary rules that had led to the refugee situation. That raised the question of whom the refugee should be protected against. Experience had also shown that a country of origin might attack refugee camps in the host nation in reprisal for alleged wrongs committed in the context of ethnic conflicts. That had occurred in the Great Lakes region of Africa. He therefore concurred with Belgium’s comment that, if the broad interpretation of diplomatic protection was to be retained, draft article 8, paragraph 3 should be deleted in order to allow for certain informal remedies against the State of nationality of the refugee.

7. Some members of the Commission and some States had deplored the excessively high threshold set by the phrase “lawfully and habitually resident” and wished to replace it by “lawfully staying”, which appeared in article 28 of the Convention relating to the Status of Refugees. That Convention had, however, been adopted as a result of events occurring in Europe before 1951. The definition might have been acceptable as applicable to Europe after the Second World War, but modern realities would hardly permit such a low threshold.

8. As for draft articles 17 and 18, he shared the Special Rapporteur’s view that each should be retained as a separate provision. It would, however, be inappropriate to replace the phrase “special treaty provisions” by the phrase “special regimes”. Since, as Morocco pointed out, the 1969 Vienna Convention did not recognize the concept of “special treaties”, draft article 18 should simply state that “the present draft articles do not apply where, and to the extent that, they are inconsistent with provisions provided for under bilateral and multilateral treaties regarding the protection of investments”.

9. He supported the inclusion of draft article 19. Some concern had been expressed that the provision did not belong to diplomatic protection, although it should be pointed out that the United Kingdom had said the same about draft article 8. If, however, draft article 8, which related to non-nationals, was acceptable, logic demanded that the Commission should support the seeking of redress on behalf of crew members who were not nationals of the State of nationality of a ship. The flag State should be entitled to seek redress for such crew members.

10. He was in favour of the inclusion of a new draft article 20 to deal with the consequences of diplomatic protection. In view of the fact that the draft articles were already receiving their second reading, such a provision should be modest rather than radical. Although the draft articles were mainly premised on the Mavrommatis case, as well as partly on the Barcelona Traction case, the Commission should not be wholly tied to the Mavrommatis fiction. Some progressive development was called for to recognize the growing importance of the individual in international law. Lastly, he noted that, in paragraph 6 of the report, the Special Rapporteur linked the fate of the draft articles with that of the draft articles on responsibility of States for internationally wrongful acts. He hoped that one day both sets of draft articles would lead to a diplomatic conference that would adopt treaties on both topics.

11. Mr. KEMICHA said that, in response to the oft-repeated question of whether the Commission was engaged in the codification or the progressive development of international law, he was inclined to say that the two went hand in hand. The Special Rapporteur’s intellectual honesty and scrupulous attention to every facet of the subject had ensured that advances had been made in both respects, albeit sometimes gingerly.

12. The main surprise in the report was the encouragement given to the Commission by some States to adopt a new approach that would give the individual a more significant role in the exercise of diplomatic protection, while—to cite the comment by Italy—leaving unchanged the basic concept according to which the right to exercise diplomatic protection belonged to the State.

13. Taking his cue from the LaGrand and Avena cases, and partially adopting the proposal by Italy, the Special Rapporteur suggested a new wording for draft article 1, covering not only nationals but also those individuals covered by draft article 8 (Refugees and stateless persons). He himself would have preferred the formulation suggested by Italy, which referred to the State’s “own rights and the rights of its national”, but, even as it stood, the proposed new wording constituted a significant advance.

14. Like other members, he considered paragraph 2 to be superfluous: the distinction between diplomatic protection and consular assistance could more usefully be made in the commentary.

15. Draft article 2, as currently worded, might also appear redundant; some States, such as the Netherlands, favoured its deletion, while others, such as the United Kingdom, found it a useful vehicle for affirming the discretionary nature of the State’s power to exercise diplomatic protection. Italy, on the other hand, saw it as an opportunity to engage in the progressive development of international law by imposing on the State the obligation to exercise diplomatic protection on behalf of the injured person upon request “when the protection of fundamental values pertaining to the dignity of the human being and recognized by the international community as a whole is at stake”. The Special Rapporteur seemed to have opted for the approach suggested by Austria, whose comment concerning the “corresponding obligation of the other States to accept such claims by a State” formed the basis for the new paragraph 2 of draft article 2. Having heard the wide range of reactions to the new paragraph from other members of the Commission, he had a better understanding of the reasons for opting for a minimalist but innovative approach, although he himself could not share the Special Rapporteur’s views in that regard.

49 See footnote 8 above.
16. Draft articles 3 and 4 presented no particular problem for him, although the Drafting Committee would need to take particular care in finalizing their wording.

17. Having read the comments on draft article 5 contained in paragraph 31 et seq. of the report, he was inclined to support the position adopted by the Special Rapporteur, who had wisely opted, in paragraph 1, for the date of the official presentation of a claim to meet the requirements of the continuous nationality rule, at the same time providing for an exception in paragraph 2, in cases where a national in respect of whom a claim was brought had acquired the nationality of the respondent State after the presentation of the claim. He would make no comment on the insertion of the word “only” in paragraph 1, since that was a matter for the Drafting Committee. Paragraph 3 was useful and should be retained.

18. Draft articles 6 and 7 presented only drafting problems. Draft article 8, meanwhile, represented, as everyone had agreed, a real advance in the progressive development of international law. With regard to the Special Rapporteur’s request for guidance in paragraph 51 concerning the meaning to be given to the term “refugee”, in the light of the suggestion by the Nordic countries that the phrase “lawfully and habitually resident” in paragraph 2 should be replaced by the phrase “lawfully staying”, he said that, although the proposal evidenced a generous approach towards the difficulties suffered by refugees throughout the world, the Special Rapporteur seemed to wish to consolidate the progress already made without risking the displeasure of the many States that had not expressed an opinion and whose positions on that question were very much less liberal.

19. With regard to draft articles 9 to 12, he noted the efforts the Special Rapporteur had made to accommodate the two main problems that States had seen in the previous wording of draft article 9—namely, the possible need for a genuine link between the corporation and the State exercising diplomatic protection (para. 53 of the report), and also the problem of the corporation formed in one State but with a registered office in another (para. 54)—by proposing to add a second paragraph making provision for a corporation that “has the nationality of the State under whose law the corporation was formed or in whose territory it has its registered office or the seat of its management”. The complexity of business life in an age of globalization meant that no definition could cover all the cases that arose in the real world. He therefore supported the approach advocated by Mr. Pellet, whereby the possibility of there being more than one State of nationality would enhance the effectiveness of the diplomatic protection of corporations.

20. With regard to draft articles 14 to 16, it was noteworthy that only the latter had been the subject of comment by States. He supported the proposed new wording of draft article 16 contained in paragraph 81 of the report, his own preference being for the longer version of its paragraph (a).

21. Like the Governments of Qatar and El Salvador, he considered that draft articles 17 and 18 should be merged, since the same problems arose in the context of protection of human rights and of treaty provisions relating to the settlement of disputes between corporations or shareholders of a corporation and States.

22. Lastly, he wished to express his support for the proposed new draft article 20, which appeared in paragraph 103 of the report. The Special Rapporteur had noted in paragraph 102, that, despite the rule established by the Mavrommatis case, with its recognition of the discretionary nature of the State’s exercise of diplomatic protection, which formed the foundation for the draft articles, no rule of customary international law existed in that regard. The proposed new draft article remedied that deficiency. He was in favour of the existing wording, from which the square brackets could be deleted. As for the question of whether a State “shall” or “should” transfer compensation received to the national in respect of whom it had brought the claim, or whether the State could decide for itself, he was inclined to think that there was little difference between the two versions, since a State was always sovereign in matters that ultimately concerned only its own nationals.

23. Mr. Pellet asked why Mr. Kemicha favoured the wording for draft article 1 proposed by Italy, which confused diplomatic protection proper with the separate question of a State’s own rights. An injury to a State was an “immediate” injury. He did not see what was gained by including a reference to the violation of the State’s own right.

24. Mr. Kemicha said that he supported the text proposed by Italy because it placed the individual and the State on an equal footing with regard to injury suffered. The proposal represented a real advance in the development of the individual’s involvement in diplomatic protection. Perhaps the provision was premature, but it undoubtedly prefigured the course of international law.

25. Mr. Pellet said that his objection was to the inclusion of the reference to the rights of the State, which was irrelevant in the context of diplomatic protection.

26. Mr. Sreenivasa RAO, after commending the Special Rapporteur’s careful and scholarly approach and his willingness to innovate and accommodate the views of others, even when they went against his inclination, said that in considering the topic it was important to keep in view the origin and nature of diplomatic protection. Clearly, for diplomatic protection to be invoked, certain preconditions must first be satisfied. It was essentially a default procedure, as opposed to diplomatic representation, which was more flexible. The fact that diplomatic protection had been abused in the past could also not be ignored. While the Mavrommatis fiction was deplorable in some respects, it had undeniably served a useful purpose in helping the State to sponsor the claim of its injured national at the international level; even under modern conditions, an injured person could not make a claim in his or her own right in the absence of special arrangements among States.

27. In that context, he concurred with the view expressed in paragraph 3 of the report that “the ultimate goal of diplomatic protection is the protection of the human rights
of the individual”, rather than with the assertion by Mr. Pellet that the interests of natural and legal persons were identical and that they needed to be protected equally. He wondered whether that was the case at all times and in every respect. The problems associated with the nationalization or expropriation of the assets of a foreign company were different from those encountered in, for example, the case of appropriation by a State of the private property of an alien without proper compensation. In an age when bilateral investment protection agreements were common, diplomatic protection for corporations and legal persons was perhaps not as relevant as it had been in the immediate post-colonial era. It was understandable that the invocation of diplomatic protection in isolated or non-systematic cases might no longer be readily forthcoming.

28. The Special Rapporteur had sufficiently distinguished between diplomatic and consular protection, but comments by Mr. Gaja and Mr. Kolodkin should be taken into consideration for the purpose of the commentary. With regard to the right of more than one State to sponsor a diplomatic claim on behalf of a person possessing multiple nationality, the best policy was, as far as possible, to allow only the State most closely connected with the interests of the person concerned to sponsor the diplomatic claim.

29. Turning to the consideration of individual articles, he said that he concurred with most of the comments on the various articles made by Mr. Kolodkin at the previous meeting. With regard to draft article 1, the important point was that the exercise of diplomatic protection was essentially a discretionary right of the State of nationality of the injured person. There were circumstances in which a State might decide, under pressure and against its original inclination, to exercise such protection, but the question whether it was obliged to sponsor a diplomatic claim in cases of egregious breaches of human rights that were of a peremptory nature was an important one, on which more thought was required. The arguments advanced so far were not very convincing.

30. The proposed new paragraph 2 of draft article 2 was unnecessary: the conditions required for the right of diplomatic protection to be exercised were the same as those under which the responsible State would be obliged—under penalty of sanctions—to respond positively to any claim made by the State of nationality of the injured person.

31. With regard to draft article 5, the question of the relevant dates and periods for establishing continuous nationality was crucial to the subject of diplomatic protection. The proposed revision of draft article 5, which appeared in paragraph 47 of the report, was acceptable.

32. Draft article 8 was also acceptable, and he was glad that most States saw the provision in a positive light. Unlike some members of the Commission, he believed that the issue of the definition of a “refugee” was best resolved by reference to the law governing the matter.

33. Draft article 9, like draft article 7, raised few problems. He doubted that, in practice, the test of a “predominant” link would differ from that of a “genuine” or “effective” link. Certainly, the establishment of a registered office would not, in itself, lend any special weight to the effectiveness of the link that needed to be established.

34. With regard to draft article 11, the points made by Mr. Matheson (2868th meeting, above, para. 39) should be borne in mind. The problems of all the shareholders, whether domestic or foreign, should be treated on an equal basis and a claim of diplomatic protection should be made only in order to ensure compensation no less prompt and adequate than that afforded to domestic shareholders.

35. With regard to draft article 16, the Commission should, when considering whether local remedies could be deemed to have been exhausted without having actually been resorted to, continue to be guided by the well-tested criteria of non-availability or ineffectiveness, rather than the test of futility.

36. As for the suggestion made in paragraph 103 of the report concerning the obligation of the sponsoring State to seek and quantify damages having regard to the actual injury suffered by the national and to transfer any sum received to the national concerned, he was sympathetic to the ideas expressed by the Special Rapporteur and Mr. Pellet. After listening to the comments by Mr. Matheson (2870th meeting, above, para. 61 et seq.) and Mr. Kolodkin (2870th meeting, para. 55), however, he had become convinced that the Commission should tread with great caution in that area. There was more to the issue than met the eye.

37. He hoped that the second reading could be completed at the current session as expeditiously as possible, thereby moving forward the Commission’s work on the progressive development and codification of international law in the area of State responsibility. He noted, however, that, although the Commission was entitled to consider all the current trends in a given field, it could not be totally academic in its approach and ignore the political sensitivities of its immediate audience, the Member States, in framing recommendations.

38. Ms. XUE said that the draft articles on diplomatic protection had aroused great interest among government departments, academic institutes and law schools in China. While the government departments considered that the draft articles on issues such as the nationality and continuous nationality principles and the exhaustion of local remedies basically reflected customary international law and State practice, they had adopted a more guarded approach to the articles involving progressive development.

39. She believed that those draft articles that were of a technical nature—as opposed to those involving questions of policy or principle—should be retained with as little amendment as possible. The draft articles must be predicated on the basic principle established in the Mavrommatis case that a State of nationality had the right, under international law, to exercise diplomatic protection in respect of its injured nationals.
40. The existing text of draft article 1 was precise enough not to require any mention of persons referred to in draft article 8; any such mention would merely disrupt the logic of the original text. By merging the Mavrommatis fiction with the ruling of the ICJ in the LaGrand case, the amendment proposed by Italy was likely to cause confusion and practical difficulties. If diplomatic protection could be exercised only when the interests of both the nationals and of the State of nationality were involved, the principle of continuous nationality embodied in draft article 5 would not serve much purpose. Since diplomatic protection involved the interests of natural or legal persons, their rights should normally be protected through recourse to domestic legal procedures. The Mavrommatis rule had, however, provided a legal basis for State intervention. Obviously such diplomatic action was often prompted by diplomatic, economic and other considerations as well as by a concern to protect the rights and interests of the individuals concerned. In practice, the former still weighed more heavily than the latter in a State’s decision whether or not to exercise diplomatic protection, notwithstanding the increasingly benign influence of human rights law on the rules of diplomatic protection. For that reason, the text of the draft article rightly emphasized the protection of the rights and interests of individuals and adequately reflected State practice and opinio juris.

41. While she basically agreed with the Special Rapporteur’s comprehensive analysis of the distinction between diplomatic protection and consular assistance (paras. 15–20), she was not convinced of the need to add a second paragraph to draft article 1. The relevant explanation could be placed in the commentary in order to enlighten the layman. In fact, confusion arose not only between diplomatic protection and consular assistance, but also between diplomatic protection proper and the diplomatic protection exercised by embassies which, as article 3 of the Vienna Convention on Diplomatic Relations made clear, was wider in scope than that of consular assistance, yet different from that of the subject matter being examined by the Commission. Clarification of that point in the commentary to draft article 1 would be helpful.

42. Consular assistance was both preventive and remedial. A lack of information might prevent an embassy or consulate from forestalling the unjustifiable detention or torture of its nationals or affording them legal assistance, with the result that it would be in a position to make diplomatic representations only after the violation of rights had occurred. The principal distinction between consular assistance and diplomatic protection was that the former mainly consisted in efforts to urge the receiving State to preserve and respect, within its own legal procedure, the rights and interests of the nationals of the sending State and to urge the receiving State to fulfill its international obligations. That function of consular assistance was both a right and a duty. Diplomatic or consular representatives did not make direct claims, whereas in the case of diplomatic protection, it was the State that made a direct claim on behalf of its nationals. There was, however, a link between the two institutions and, in some circumstances, they constituted different stages or procedures for representation.

43. The example of the European Union was not pertinent and the concept of European citizenship was inappropriate to the context of the Commission’s deliberations, since a citizen of the European Union was not a national of all the member States of the European Union and, from a legal point of view, the concept of a “European citizen” diverged from that of a national. For that reason, citizenship of the European Union did not fulfil the nationality requirement for the purpose of diplomatic protection and even if, one day, it evolved into nationality, it could only replace the nationality of States rather than being additional to it. Applying the principle of nationality among the member States of the European Union and the principle of European citizenship outside the Union would not only lead to legal confusion, but also create inequality vis-à-vis non-member States of the Union.

44. On draft article 2, she concurred with the Special Rapporteur that diplomatic protection was a right, not an obligation, of a State. A State’s obligation to protect its nationals did not necessarily have to be met through diplomatic protection. Even when domestic laws stipulated that the Government had an obligation to extend diplomatic protection to its nationals, that protection encompassed assistance by embassies or consulates and was therefore broader in scope than the diplomatic protection being discussed by the Commission. The issue of whether a State was obliged to accept a claim of diplomatic protection merited careful analysis. While a State undoubtedly bore responsibility for its internationally wrongful act, it was questionable whether redress for such acts had to be pursued through diplomatic protection. Under international law, while it was incumbent upon States to settle international disputes peacefully, they were entitled to choose the means of settlement. An obligation on the part of a respondent State always to accept a claim of diplomatic protection from another State was not in line either with general practice or with the fundamental principles of international law.

45. There was no need to amend draft article 3, but the proposed amendment to draft article 4 was desirable.

46. Draft article 5 on continuous nationality was rather controversial. First, it was necessary to consider whether the principle of continuous nationality was absolute or relative. There was, however, no need to consider the issue of stateless persons or refugees, as their special situation had rendered their nationality non-existent or meaningless. As for the dies ad quem, many legal writers contended that the date of the official presentation of the claim was more certain than the date of its resolution. Since the dies ad quem was important for determining the admissibility of claims and the jurisdiction of courts, the question arose why it differed in practice in the manner noted by Umpire Parker in Administrative Decision No. I (p. 143 of the decision). The criticism of the decision in the Loewen case, quoted in paragraph 42 of the report, was possibly too severe. Although the arbitrators had, perhaps, opted for the least plausible date, their decision was highly relevant to the principle of continuity and meant that the nationality link must exist from start to finish, “from the date of the events giving rise to the claim … through the date of the resolution of the claim”. In other words,
if the nationality of the natural or legal person were to change after the official presentation of the claim, the claimant State would have the obligation to terminate diplomatic protection and the respondent State would have the right to request the claimant State to terminate that protection. Situations such as that in the Loewen case had seldom been discussed, mainly because cases in which an applicant’s nationality had changed between the official presentation of a claim and its resolution were rare. The example given by the Netherlands could not invalidate the Loewen decision, because the same situation could also arise where the individual was left without any possibility of receiving diplomatic protection, if his nationality changed before diplomatic protection was exercised. That was the continuity rule adopted by the Commission under article 5.

47. The only exception to the continuous nationality rule contemplated in amended paragraph 1 of draft article 5, proposed in paragraph 47 of the report, was that of the involuntary change of nationality resulting from the succession of States. Nevertheless the definition of “predecessor State” required clarification because, when a State disintegrated, a change of nationality might or might not be compulsory for all its nationals. The proposed amendment to paragraph 2 was acceptable but the inclusion therein of a reference to the nationality of a third State would resolve the controversy over the dies ad quem, since diplomatic protection would terminate for any person whose nationality had changed after the presentation of the claim. In paragraph 3 the words “shall not” should be retained, as the obligation was one of prohibition, whereas draft articles 7 and 14 were provisions subject to conditions rather than prohibitions.

48. After due reflection, she agreed that paragraph 2 of draft article 6 should be deleted, as suggested by the Special Rapporteur in paragraph 48 of the report, but the criterion of genuine, effective nationality must not be evaded in practice. In the event of dual or multiple nationality, only the State to which the person had a genuine link should exercise diplomatic protection. Any other solution would likely encourage dual and multiple nationality.

49. In draft article 8, the term “refugees” should be defined in accordance with the 1951 Convention relating to the Status of Refugees. The Nordic countries’ proposal would not guarantee that the persons concerned were fully connected with the protecting State and should therefore be rejected. The more stringent criteria applied to the territorial connection between refugees and a protecting state for the purposes of diplomatic protection did not mean that that category of persons would go unprotected.

50. It might be better to retain the original text of draft article 9, in order to preclude the possibility of multiple claims from corporations formed in one State but with a registered office in another. The possibility of exercising diplomatic protection should be reserved for the State to which the company was most closely connected, or whose nationality it actually had. The Commission should devote more attention to the law of corporations and to international economic law. According to the definition given in draft article 9, the subsidiaries of many transnational corporations might possess multiple nationalities. The element of control should therefore be stressed. The principle of continuous nationality as adopted in draft article 5 applied also to corporations.

51. Given the complex structure of corporations and shareholdings, multiple claims from shareholders should also be avoided whenever possible. The dictum of the ICJ in the Barcelona Traction case was not borne out by international practice. Many investment protection agreements did, however, provide guarantees for the rights and interests of corporations and their shareholders. The phrase “for a reason unrelated to the injury” in draft article 11(a) should be retained in order to prevent the manipulation of the injured State or shareholders. That subparagraph should be brought into line with draft article 10, paragraph 3. Subparagraph (b) should be dropped because, from the outset, corporations could freely choose where to do business. Hence they voluntarily accepted local conditions which might differ from their own domestic law. As long as those conditions were not discriminatory, they could not be cited as a reason for granting additional rights and protection to shareholders.

52. Similarly, there was no need for draft article 12, as the provisions it contained were already to be found in the draft article on natural persons. Moreover, it would be improper to extend the principles of draft articles 11 and 12 to the other legal persons covered in draft article 13.

53. In view of the commentary to draft article 13, she asked whether public universities which were funded from multiple sources and which enjoyed considerable autonomy would be eligible for diplomatic protection. She considered that it would be unfair to deny them such eligibility.

54. The arguments in the commentary to article 16(a), listing a series of situations where local remedies are deemed to provide no reasonable possibility of effective redress, if employed out of context as a yardstick for passing judgement, might cease to be convincing, as they could be heavily tainted with subjectivity or even biased. An interested party might well, on the basis of its own subjective assessment or its own domestic legal system, use those arguments as a pretext for rejecting the jurisdiction of the local courts. As judicial systems varied from one State to another, a system unique to one State should not be used as the criterion for judging the appropriateness of that of another State. As long as a judicial system afforded equal treatment to nationals and aliens and did not permit discriminatory provisions or practices, such a system should be deemed appropriate and fair. Those policy considerations should be reflected in some way in the commentary to the draft article; otherwise, developing countries might balk at groundless criticism of their judicial sovereignty, and diplomatic protection might still be used as a tool for interfering in their internal affairs. Accordingly, the current wording of subparagraph (a) should be retained, with no reference to the criterion of obvious futility. The same considerations applied to subparagraph (b).

55. As for subparagraph (c), in the event of transboundary damage, the lack of a voluntary connection between the injured person and the State allegedly responsible for the injury did not prevent that person from resorting to local remedies in North America and Europe, especially Western Europe. That trend was therefore a subject amenable to progressive development, that is, in the event of environmental damage, foreign victims would be provided with access to the same judicial remedies as nationals. In the Trail Smelter case, major policy considerations, rather than the lack of a voluntary connection, had lain behind Canada’s willingness not to insist on the exhaustion of local remedies. The exception referred to in the first part of the subparagraph should therefore be dropped, while the remainder should be retained.

56. She had no objection to the substance of the proposal to draft a new article on the right of the injured national to receive compensation. In the very few cases in which compensation was obtained as a result of China exercising diplomatic protection, that compensation was duly transferred to the persons concerned, without deduction by the State, although Chinese law did not have any specific provisions on the matter. The moot point was not whether there was room for progressive development, or whether the provision to be added should take the form of a draft article or a recommendation. When disbursing compensation, it was necessary to balance the individual rights and interests of injured persons against public order and policy. When large sums of money or a great number of victims were involved and when the State had already devoted huge efforts to reducing losses, providing medical and rescue services and repairing environmental damage, compensation might become a very sensitive matter, as it sometimes raised issues involving not only individual justice, but also collective justice. Whether it should be governed by international law or left to the discretion of States was primarily a policy issue.

57. She rejected criticism that the Commission was being too conservative. The draft articles on diplomatic protection had developed traditional international law in many respects and had fully taken into account the trends in modern international law. Some scholars had failed to comprehend that the rules of diplomatic protection were not a human rights bill, but must strike a balance between States’ interests, and between the interests of States and those of individuals. If the Commission neglected that essential balance, favouring one side at the expense of the other, its codification work would not be recognized or accepted by Governments.

58. Mr. FOMBA said the main issue at hand was the very nature of diplomatic protection: did it aim to protect the rights of States or those of individuals? The Mavrommatis rule had determined in favour of the State, and, rightly or wrongly, the Commission had followed its lead. Some said wrongly, since it had not taken account of developments in international law and the role accorded to the individual therein—a point brilliantly made by Mr. Pellet and Mr. Momtaz. While he had no intention of breaking the consensus reached, he supported that view.

59. The Commission had likewise been reproached for not having dared, in the context of progressive development, to impose upon States an obligation to exercise diplomatic protection. Attention had been drawn to the particular case of diplomatic protection following a serious breach of an obligation arising out of jus cogens. On the link between the draft articles on diplomatic protection and those on responsibility of States, the trigger for the whole mechanism of diplomatic protection was an internationally wrongful act; thus there was a relationship of cause and effect between the two, and logically speaking, the fate of the two sets of draft articles must be linked.

60. The Special Rapporteur proposed to re-examine the draft articles adopted on first reading in the light of comments made, to amend or replace certain provisions where necessary and to propose one major innovation, namely, a provision devoted to the right of an injured national of a State, or rather, of a person protected, to compensation.

61. Draft article 1 dealt with the definition and scope of diplomatic protection. The new paragraph 2 of the article proposed in paragraph 21 of the report covered the case of refugees and stateless persons, and rightly so.

62. On the distinction introduced between diplomatic protection and consular protection or assistance (the former term being the one employed in the Vienna Convention on Consular Relations), he wondered whether it was really necessary or possible to distinguish clearly between the two institutions. The new paragraph 2 proposed for draft article 1 put forward a solution consisting in stating that diplomatic protection did not include the exercise of consular assistance, but that left the problem unresolved. Either a clear and incontrovertible definition should be given of consular assistance, or else the proposed new paragraph 2 should be deleted. Mention had been made of European citizenship, leading to some very interesting remarks by Mr. Pellet. In that connection, he drew attention to a recent amendment to the 1991 Protocol on the Community Court of Justice of ECOWAS, which now gave States the option to institute proceedings on behalf of their nationals against other member States in cases where attempts at amicable settlement failed (art. 9, para. 3). An analysis of the case law of that African subregional court would be interesting.

63. Turning to draft article 2, he said that the new paragraph 2 was acceptable as long as its scope was limited exclusively to the most pressing cases. On draft article 3, the proposed new version of paragraph 1 did not differ fundamentally from the previous version. The proposed new text of draft article 4 must not be construed as implying that succession of States was the sole means of acquiring nationality through naturalization.

64. The new version of paragraph 1 of draft article 5 proposed in paragraph 47 of the report was more acceptable than the earlier version. The new paragraph 2 seemed logical and was likewise acceptable. No particular problems arose with regard to draft articles 6 to 8. On draft article 9, while the three paragraphs that it now comprised seemed to constitute a step in the right direction (para. 55 of the report), questions remained regarding the article as a whole. Accordingly, it deserved further consideration.
65. Draft article 11 dealt with an important matter, and both its content and its form had been criticized, by Mr. Pellet among others. Those remarks should be taken into account insofar as was possible. He had no particular difficulties with draft article 14; as for draft article 15, the title should be amended for the sake of clarity. On draft article 16, difficulties arose with regard to the classification, evaluation and effectiveness of remedies. Nevertheless, the new subparagraphs (a) and (c) seemed to be a step in the right direction, although their drafting could certainly be improved. The functional autonomy of draft articles 17 and 18 should be reviewed by the Drafting Committee. On draft article 19, he endorsed the views expressed by Mr. Momtaz and others.

66. The proposed new draft article 20 on the right of the injured national, or protected person, to receive compensation was a fundamental provision which merited close consideration. The Drafting Committee should endeavour to take account of the interesting remarks already made about that provision by Mr. Pellet and others.

67. Mr. CHEE said that the seventh report on diplomatic protection was well researched, balanced and written in an accessible style. On draft article 1, the Special Rapporteur devoted much space, beginning with paragraph 15 of his report, to drawing a distinction between diplomatic protection and consular assistance. However, the role of the consular office was not restricted to providing assistance: diplomatic and consular officers could perform their substantive rules interchangeably. Under article 3 of the 1961 Vienna Convention on Diplomatic Relations and article 17 of the 1963 Vienna Convention on Consular Relations, consular officers could perform a representative function, something which was normally reserved for the diplomatic officer. That being the case, the distinction introduced between the functions of diplomatic and consular officers did not seem warranted. Draft article 1 should therefore omit any reference to consular assistance.

68. Pursuant to the proposed new paragraph 2 of draft article 2, when a State exercised diplomatic protection, a respondent State had an obligation to accept a claim of diplomatic protection made in accordance with the draft articles. That raised the question whether a respondent State should be under an obligation to recognize an unacceptable or unfounded claim. The Special Rapporteur’s proposal was based on the Austrian comment on draft article 2, reproduced in paragraph 24 of the report, but that view was too one-sided to be acceptable. The proposed new paragraph 2 of draft article 2 should be deleted. Draft article 3 should be merged with draft article 8 in order to streamline the references to diplomatic protection of lawful residents, refugees and stateless persons.

69. He endorsed draft article 4, which covered the traditional mode of acquisition of nationality, with the addition of the phrase “if it is not inconsistent with international law”. Draft article 5, on continuous nationality, had found its place in customary international law, supported by the rulings of international tribunals and scholars. Draft articles 6 and 7 were basically procedural. He also supported draft article 9, which reflected the ruling of the ICJ in the 1970 Barcelona Traction case. The reference in draft article 10 to the case of diplomatic protection for a corporation which had ceased to exist appeared to concern recovery of assets from a bankrupt corporation. It applied the same rule as was applicable to natural persons and had his support.

70. On draft article 11, he agreed with the Special Rapporteur’s suggestion in paragraphs 63 and 65 of his report that subparagraphs (a) and (b) should be retained. It should be recalled that in the Barcelona Traction case, the ICJ had held that bilateral investment treaties should be concluded to protect the interests of foreign shareholders in a corporation. Draft article 12, on direct injury to shareholders, should be retained for the reasons explained in paragraph 69 of the report. With regard to draft article 13, no objections had been voiced extending diplomatic protection to other legal persons, and he agreed with the views outlined in paragraph 70 of the report. He endorsed the revised draft article 14 and, on draft article 15, agreed with the views expounded in paragraph 75 of the report.

71. On draft article 16, relating to exceptions to the local remedy rule, he preferred the shorter of the two proposed new formulations of subparagraph (a), which retained the element of “reasonableness” advocated by Judge Lauterpacht. Draft article 17 was a “without prejudice” clause which enabled victims of injury and States to secure redress for an injury by means other than diplomatic protection, such as conciliation, arbitration or judicial settlement. Draft article 18 recognized the validity of bilateral and multilateral investment treaties for the protection of foreign investors, and merited support. Draft article 19 raised various issues concerning the human rights of ships’ crews, for which reason it had his support.

72. In paragraph 96 of his report, the Special Rapporteur observed that State practice in providing compensation for injured nationals was contradictory, some States holding that an injured national had no right to claim any compensation received by the State, while others acknowledged some obligation to disburse compensation to the injured national. He supported the practice of the United States, which had established a Foreign Claims Settlement Commission to distribute funds received from foreign Governments among the various claimants. After all, if injured nationals could not receive compensation from the wrongdoing State, diplomatic protection would be futile from the point of view of the injured person. Accordingly, he supported the proposed article 20, paragraph 2 as set out in paragraph 103 of the report.

73. As to the final form that the draft articles should take, the Special Rapporteur should aim for them to become a convention, as they constituted an exemplary exercise in codification in accordance with article 15 of the Commission’s Statute. Lastly, he wished to commend the excellent comment by Italy contained in document A/CN.4/561/Add.2 to the Special Rapporteur’s close scrutiny.

51 See footnote 32 above.
74. Mr. CANDIOTI said that the seventh report on diplomatic protection contained voluminous information, new analysis and useful new proposals that would facilitate a thorough second reading of the draft articles, which should be ready in time for submission to the sixty-first session of the General Assembly. On draft article 1, he agreed that the clearest possible description of what was meant by diplomatic protection was needed. The confusion engendered by the frequent use of the words “protection” and “diplomatic” in lay parlance should be avoided and the institution of diplomatic protection should be clearly differentiated from other concepts such as the protection or assistance afforded by diplomatic and consular missions to their nationals abroad. The distinction would be reinforced if the article stated directly that diplomatic protection was a means of invoking and implementing the responsibility of a State for an internationally wrongful act inflicted on a person who was the national of another State. He agreed with those who advocated abandoning old-fashioned fictions and terminology, and accordingly proposed that the Drafting Committee should consider the following alternative formulation for draft article 1:

“For the purposes of the present draft articles, diplomatic protection consists of resort by a State to diplomatic action or other means of peaceful settlement in order to invoke and implement the responsibility of another State for an injury caused by an internationally wrongful act of this State to a natural or legal person that is a national of the former State”.

Any ambiguities would be dispelled if, from the outset, diplomatic protection was explicitly set within the framework of responsibility of States for an internationally wrongful act.

75. He endorsed the Special Rapporteur’s suggestion in paragraph 6 of his report that diplomatic protection was in fact a subset of the topic of responsibility of States for internationally wrongful acts and that accordingly, the fate of the present draft articles was closely bound up with that of the draft articles on that topic. Strictly speaking, the entire draft was a development of article 44 of the draft articles on responsibility of States. Accordingly, he saw no need to include in draft article 1 the new paragraph 2 suggested by the Special Rapporteur. He agreed with the view that if the article clearly defined what was meant by diplomatic protection, it was neither necessary nor technically desirable to expressly exclude something that was not diplomatic protection. Similarly, he saw no need to include in the definition a reference to the exception set out in draft article 8.

76. On draft article 2, he had a preference for retaining the clear and concise wording used in the version adopted on first reading. Like others, he had doubts about the need for a new paragraph 2 concerning the obligation of the State to accept a claim of diplomatic protection. Perhaps what was meant was that the State to which the internationally wrongful act was attributed should receive the claim and process it in good faith, and if the claim fulfilled the conditions for admissibility laid down in the draft articles, the processing would not stop there but would entail establishing the scope of responsibility and its consequences. But he had doubts even about including a more precise formulation. The 2001 draft on State responsibility for internationally wrongful acts said nothing on the subject and he was inclined to think that would also be the wisest approach in the context of the articles on diplomatic protection.

77. He endorsed the proposed amendments to draft articles 3 and 4. On draft article 5, he endorsed the new formulation of the principle of continuous nationality and the Special Rapporteur’s arguments for rejecting the date of the final resolution of the claim as dies ad quem. The new formulation proposed for paragraph 1 of the article was considerably more exacting than the previous wording, since it required continuity from the date of injury to the date of the presentation of the claim, whereas the previous formulation had required the individual should be a national of the protecting State solely at those two moments. The new requirement was more consistent with the principle of continuity. The same change had been made in the new version of draft article 10 with regard to the continuous nationality of corporations.

78. On the other hand, in draft article 7 on the predominant nationality in the event of multiple nationality, the earlier wording was used: a given nationality had to be predominant only at the time of the injury and at the date of the presentation of the claim. It would be interesting to hear why changes had been made to draft articles 5 and 10 but not to draft article 7.

79. Concerning draft article 8, an exception in favour of stateless persons and refugees, his preference was to maintain the flexible approach to the concept of refugee set out in the draft adopted on first reading. Moreover, he generally agreed with the proposals made by the Special Rapporteur for revision of the wording of draft articles 9 to 11, 13 and 14.

80. With regard to exceptions to the exhaustion of local remedies rule under draft article 16, he tended to prefer the first alternative reformulation of subparagraph (a), and agreed with the proposed changes to subparagraph (c). On the other hand, he would like to retain the earlier version of draft articles 17, 18 and 19, which had been the result of extensive discussion on first reading.

81. He welcomed the Special Rapporteur’s considerable efforts to submit a new draft article 20 on the subject of the right of an injured national to receive compensation obtained by the protecting State as a result of diplomatic protection—a matter not yet broached. He understood the reservations of some members of the Commission about the relatively late submission of the proposal, the advisability of keeping to the Commission’s well-honed methods of work by examining the precedents and implications for each rule and the desirability of giving States the opportunity to study a provision before giving it final form. Nevertheless, he thought it laudable and justifiable to include in the draft articles the principle that injury suffered by a protected natural or legal person should be taken into account in quantifying the claim and that the person had the right to receive any compensation paid. He could accordingly endorse any decision taken to incorporate provisions, recommendations or commentaries along the lines set out in the proposed new draft article 20.

82. Mr. MANSFIELD said that the more the Commission discussed the topic of diplomatic protection and the more
deeply it explored the issues, the less sure he was of its practical significance as a whole, let alone the practical application of some of the relatively rarefied points to which so much time had been devoted. The Commission had always accepted that its work on the topic was essentially residual in character, given the developments in international human rights law on the one hand and bilateral investment treaties on the other. That did not mean that it was not a worthwhile task, but it did suggest an appropriate context in which it could be viewed.

83. It was interesting that few members of the Commission had spoken of their experience in the lodging and processing of formal claims of diplomatic protection of individuals. In 20 years of wide-ranging foreign office legal work, he personally did not recall ever having been on either end of a formal claim, and he suspected that that might well be the case in most smaller countries. Certainly there had been situations in which the actions of the authorities in other States in relation to a New Zealand national had been the subject of enquiries or discussions through consular or diplomatic representatives, but they had not proceeded to the lodging of a formal claim for compensation, hence his hesitation. In a topic such as diplomatic protection, in which the Commission’s task was to codify practice and incorporate such changes as experience suggested would be sensible or helpful in current international life, he would be much more comfortable if he could draw on practical case experience from his own or other small States.

84. On the other hand, the relative paucity of small State experience with formal claims was scarcely surprising and might in itself indicate some factors which the Commission should take into account. If it appeared that a State had committed an internationally wrongful act against the national of another State, it was reasonably easy for the State of nationality, even a small State, to make enquiries and have discussions at the diplomatic level about the alleged injury. In many if not most circumstances, that would result in an appropriate resolution of the matter. However, if the wrongdoing State either refused to acknowledge that an internationally wrongful act had been committed or simply refused to do anything about it, there had to be a serious question whether there was anything to be gained from taking the further step of lodging a formal claim. In the absence of a pre-existing dispute settlement agreement, it was unlikely, unless the State of nationality had substantial leverage, that the recalcitrant State would be persuaded to agree to consideration of the claim by an independent tribunal. If that was so, then it might mean that the less formal process of enquiry and discussion at diplomatic level (the “lower end” of diplomatic action) might be of more practical relevance in the diplomatic protection of individuals than the lodging and processing of formal claims. Of course, when large numbers of individuals were involved in a major tragedy or some similar situation, that situation was likely to be governed by a specially negotiated arrangement.

85. In the case of corporations, much of the discussion on the seventh report as well as on the Special Rapporteur’s earlier reports suggested that the paradigm about which the Commission needed to be concerned was how to protect small foreign investors in a company whose interests might have been adversely affected by the wrongful act of a host State and, in particular, how to ensure that the State or States of nationality of those small investors were able to lodge and process formal claims in respect of the wrong committed. He wondered whether that was an accurate picture, or whether it was a fiction that might be as potentially misleading as the Mavrommatis fiction.

86. In the case of small businesses, he suspected that, just as with individuals, it was in the process of informal enquiry and discussion through the diplomatic channel that a resolution was most likely to be found, if it was to be found at all. The lodging and processing of formal claims of diplomatic protection, with the attendant tribunals and counsel, was much more likely to involve large multinational corporations, whose decisions as to where they were incorporated and the places from which they conducted their business were usually the result of a complex economic and political analysis. The shareholders of such corporations who might decide to request or press a State or States to exercise formal diplomatic protection in respect of their interests through the lodging of a claim were unlikely to be small investors, but rather, large shareholding interests of parent companies or managers of huge investment funds.

87. Another controlling image that seemed to underlie the Commission’s discussions on claims in respect of corporations was that of an arbitrary confiscation of corporate assets or rights through some form of nationalization. However, a quite different image could be the lobbying for a claim of diplomatic protection by a foreign company that had a monopoly on a particular industry, as a means of effectively blocking the passage of legislation by the host State which the latter had come to realize was essential, for example to protect its environment.

88. Precision in legal rules was a good objective, especially when there was reasonable confidence that it would produce a just and equitable outcome in all reasonably imaginable situations, but where the situations of application might vary widely, too much precision might work against the achievement of equity and justice.

89. It was against that background, and with the caveat about the lack of practical cases to draw on, that he would offer a number of comments on the draft articles themselves.

90. In respect of draft article 1, he agreed with those who suggested that it was not necessary to include the proposed new paragraph 2 and that the distinction between diplomatic protection and consular functions was best dealt with in the commentaries. However, in the light of the potential importance of enquiry and negotiation in resolving many situations, he invited the Special Rapporteur to have another look at the fourth sentence of paragraph 16 of the seventh report: as currently worded, it could be interpreted as meaning that the lower end of diplomatic action, such as enquiry, discussion and negotiation, could not be undertaken unless local remedies had been exhausted. He did not think that was what had been intended, it was not what draft article 14 said, and in practical terms it might be useful to emphasize that that was not the case.
91. He had no difficulty with the underlying thought in the proposed new second paragraph for draft article 2, but as other members had noted, the current wording must be modified. Although he sympathized with the thinking behind the Italian proposal to institute a duty to exercise diplomatic protection in certain cases, it raised significant difficulties, and there were other solutions to the problem that it attempted to address. It might be noted in passing that, in the modern world, many people could live their entire lives away from their State of nationality and maintain little or no connection with it. The process of instituting a claim was complex and time-consuming and would be a major undertaking for a small State, and one that could distort national priorities. Such a burden would be unwarranted where little or no connection had been maintained and where there were, for example, other States or non-governmental organizations better positioned to use other and potentially more effective procedures.

92. The thrust of draft article 4 was sound, and the new version was an improvement, but it might benefit from further attention in the Drafting Committee in the light of the comments by Ms. Escarameia and Mr. Pellet.

93. With regard to draft article 5, on which there had been much discussion, he was inclined to think that the Special Rapporteur’s proposed formulation struck a reasonable balance.

94. Draft article 8 was particularly important, as it established new categories of persons in respect of whom diplomatic protection might be exercised. Along with draft article 19 on ships’ crews, it might prove to be of significant practical benefit. He continued to think that the criterion of “lawfully and habitually resident” raised the bar rather high, but in the end there had been a consensus in the Commission on the formulation, which it was probably not worth revisiting unless there was a clear trend in the comments of States. The meaning of “refugee” was best dealt with in the commentary. Clearly, the claimant State could not invent its own standards as to what persons might be classed as refugees. On the other hand, there might be persons who would be generally recognized internationally as “refugees” who might not, at a particular point in time, fall strictly within the definition of the 1951 Convention relating to the Status of Refugees.

95. In respect of draft article 9, he had never seen the justification for attempts to find ways of including all the various mechanisms through which a company might establish links with a State with formulations such as “or some similar connection”. Companies made hard-headed commercial decisions about where they incorporated, and those decisions ought to include the question of what they might expect in terms of diplomatic protection, should it be needed. That said, it seemed to be a fact of life today that many corporations actively sought to have bipolar or multipolar personalities, and paragraph 3 of the proposed new draft was probably the only reasonable way of dealing with that fact, however difficult it might be to apply in any particular case. There again, it was to be hoped that in most cases the situation would be covered by a bilateral investment treaty.

96. He had no practical insights that led him to favour either the earlier or the proposed new version of draft article 10. The same was largely true of draft article 11.

97. With regard to draft article 16, he was among those who favoured the original proposal over the suggested new wording, and there he agreed with Mr. Pellet. The question whether local remedies needed to be exhausted in all circumstances was best left to the judicial body which could fully assess those circumstances. It did not need detailed guidance, and subparagraphs (a) and (c) in the original text seemed quite sufficient. In earlier discussion of subparagraph (c), he had attempted to give some examples of situations in which it would simply be unreasonable for the local remedies rule to be insisted upon.

98. Draft article 19 on ships’ crews was of real practical benefit and could be of direct importance for sailors from small States with few, if any, overseas representatives. He was strongly opposed to deleting the provision and sending the issue to another international body, which might take years to get around to considering it. Mr. Momtaz was, however, right to point out that draft article 19 could well be placed after draft article 17.

99. The general policy concerns that underpinned the proposed draft article 20 deserved support in principle. However, Mr. Matheson’s comments at the previous meeting on the practical and policy difficulties that could arise with the text as it stood suggested that it was an issue which needed further exploration before the Commission could adopt it. It might be possible to work on it further during the current session and develop some formulations that might attract consensus. As a minimum, it could be dealt with in the commentaries in the light of the discussion in the Commission. As Mr. Gaja had suggested, there were also intermediate possibilities.

100. He had no objection to the work eventually becoming a convention, but saw no strong need for such an outcome. Were it to become a convention, States would probably decide whether to become parties to it on the basis of how the rules would apply to situations they thought most likely to be relevant to them. The situations in respect of possible claims relating to corporations might vary enormously. To that extent, it might be helpful, regardless of whether the eventual outcome was a convention, if the commentaries indicated that while the articles represented an effort to formulate rules of general application, States might wish to use them as reference points for the development in bilateral arrangements of variations on those rules that suited their particular circumstances.

101. It was important for the Commission to complete its work on the topic of diplomatic protection at the current session. He had absolute confidence that, under the Special Rapporteur’s guidance, and with careful work in the Drafting Committee, it would be possible to do so.

102. Mr. DAOU DI noted that whereas some members had considered that the draft articles adopted an unduly conservative stance with regard to the development of international law and in particular human rights law, others contended that it departed from the traditional notion of...
diplomatic protection, as reflected in the *Mavrommatis* case, by enabling certain categories of persons (stateless persons and refugees in draft article 8) to enjoy diplomatic protection and by involving the protected individual in the protection procedure or granting that person a right to compensation (the proposed draft article 20). Those differing perceptions resulted from the fact that the institution was rapidly evolving. The *Mavrommatis* formula reflected past practice, in which diplomatic protection had been considered to be the right of a State, and had been criticized as a fiction, because the injury had in fact been suffered by the individual. The recent linking of the evolution of the institution of diplomatic protection to that of human rights was an acknowledgement that there was an overlap between diplomatic protection and protection of the rights of the individual. Viewed from that perspective, the individual acquired a limited international legal personality, but did not have the legal capacity to protect his own rights. To remedy that situation, it would be necessary to make use of another fiction, namely, that of representation, in which the State represented its national in the exercise of his rights. That hypothesis would imply either that the individual derived a right of his own from the violation, or else that international law conferred on the individual his own right to diplomatic protection. It was not clear that this was the case, because if the individual had his own rights in international law, the exercise of which he could entrust to the State of which he was a national, nothing would prevent him from entrusting the exercise of those rights to another State—a step which the rules of diplomatic protection did not currently permit. Moreover, it was not established that the individual had a right of his own to diplomatic protection. There was as yet no question of imposing on the national’s State an obligation to exercise diplomatic protection on his behalf, as could be seen from the wording of draft article 2 and in paragraph (2) of the commentary, according to which “a State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so”.

103. Nor was it certain that this was the case with regard to the recognition of the right of the national to compensation, as set out in the proposed draft article 20, paragraph 2. That had been illustrated by Mr. Matheson at the previous meeting when he had pointed out that the State exercising the protection had the power to engage in bilateral negotiation on compensation and that the United States Supreme Court had recognized the discretionary power of the United States Government in that area.

104. With regard to proposed new draft article 1, paragraph 2, he noted that diplomatic assistance differed from consular assistance, and that the consuls of a State could not grant consular protection to the national of a third State without the prior consent of that State and of the State to which the consul was accredited. That provision reflected the pleadings of the United States before the ICJ in the *LaGrand* case, but as that argument challenged the Court’s competence, it had no place in the draft articles.

105. Proposed draft article 2, paragraph 2, which was based on the Austrian proposal, was unnecessary for the reasons set out by Mr. Kolodkin at the previous meeting.

106. The new version of draft article 3, paragraph 1, merely expressed the same idea as the previous version, in different words. As to draft article 3, paragraph 2, he noted that the cases cited in draft article 8 were not the only ones in which a State exercised diplomatic protection in respect of a person who was not its national. In the example of conventions on diplomatic assistance or agreements on the representation of interests when diplomatic relations had been severed, a State could very well exercise diplomatic protection in respect of the nationals of the other contracting party, subject, of course, to the consent of the State vis-à-vis which the protection was exercised.

107. He endorsed the new wording of draft article 4 proposed by the Special Rapporteur in paragraph 30.

108. For the convincing reasons given by the Special Rapporteur in paragraph 43 of the seventh report, he considered that the link of nationality should be continuous from the date of injury until the date of the presentation of the claim. He therefore endorsed the new wording of draft article 5, paragraph 1, and also supported the new draft paragraph 2.

109. Draft article 8 was acceptable in its current formulation. The Commission should not adopt the ideas put forward by the Nordic countries. The definition of “refugee” should be the one used in the 1951 Convention relating to the Status of Refugees; he endorsed Austria’s reasoning in that regard.

110. The new wording of draft article 9 was in keeping with the evolving structure of modern corporations, and a situation in which two or more States could exercise diplomatic protection was entirely plausible.

111. It was preferable to retain the existing formulation of draft article 16 (a), with the addition of the words “available and”, as suggested by Austria. Draft articles 17 and 18 covered analogous problems, and should therefore be merged to form a single provision.

112. The proposed draft article 20 took into account the rights of the protected person from two perspectives. Under paragraph 1, the person was involved in quantifying the injury suffered, prior to the transfer to him, in principle, of the full amount of the compensation received. The drafting of paragraph 1 did not prevent the State from claiming compensation for the injury it had suffered as a result of the violation of international law by the wrongdoing State when both the State and its national suffered injury. Accordingly, he favoured the current formulation.

113. Paragraph 2 established the right of the person concerned to receive, at the end of the diplomatic protection process, the compensation awarded. As currently worded, it did not establish a clear link between what had been quantified as the injury suffered by the person concerned and what the State must pay him from the sum recovered, after deduction of the costs incurred in bringing the claim. The problem would be more pressing still if the wording “should” was adopted in preference to “shall”.

114. In closing, he said that both the draft articles on responsibility of States and those on diplomatic protection
should take the form of international conventions, since the two subjects were complementary.

115. Mr. ADDO said he fully agreed with the changes the Special Rapporteur had made to a number of the draft articles. However, he was troubled by the proposed draft article 20. He endorsed the right of the injured national to receive compensation, so that a duty should be imposed on the State to hand over the compensation to the injured individual.

116. Where injury was suffered by a natural person or other legal entity recognized by domestic law, the general rule was that the right to bring a claim in respect of the wrong lay with the State of the victim’s nationality. There was thus a presumption that nationals were indispensable elements of a State’s territorial attributes, so that a wrong done to the national invariably affected the rights of the State.

117. Since the exercise of diplomatic protection was generally viewed as the right of the State, it had been consistently argued, for example in the Barcelona Traction case, that the State had absolute discretion in exercising that right. It was further accepted that the decision whether to exercise diplomatic protection was invariably influenced by political considerations rather than the legal merits of the claim. That point was made succinctly in paragraph 79 of the judgment in the Barcelona Traction case, in which the Court had found that:

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action.

118. As a corollary, the State was under no obligation to transmit the compensation obtained to any of the individuals concerned. Moreover, as the right of protection was that of the State, a State might therefore choose to lodge a claim even in the face of opposition from the injured person.

119. Although the discretionary nature of diplomatic protection had been sharply criticized in recent years as being incompatible with international human rights mechanisms, there was insufficient evidence to support the thesis that general international law already imposed an obligation on States to exercise diplomatic protection, even though that might be desirable as part of the progressive development of the law.

120. In closing, he said that all the draft articles with the exception of the proposed draft article 20 should be referred to the Drafting Committee.

121. The CHAIRPERSON invited the Special Rapporteur to address some general remarks to the Commission to assist it in the process of referring the seventh report to the Drafting Committee.

122. Mr. DUGARD (Special Rapporteur) said that two provisions still raised difficulties. First, there was the proposal by the Government of Italy to impose, in draft article 2, an obligation on States to exercise diplomatic protection. That proposal had met with the approval of a few members of the Commission, and he was to some extent in favour of it himself. However, the majority of members had either been silent on the subject—implying support for the status quo, which vested discretion in the State—or else had spoken against it. He therefore suggested that the proposal should not be referred to the Drafting Committee, and that instead it could perhaps be pointed out in the commentary that international law was developing in that direction. As for his proposed new draft article 20, according to his own count, 12 members had spoken in favour of its inclusion, while six had been against. Of the 12 in favour, many had expressed the view that the Commission should adopt a cautious and moderate position. Of the six who had spoken against it, four had said that it was unwise or premature to engage in such an exercise. He therefore suggested that all 19 draft articles contained in the seventh report, which had been adopted on first reading, together with his proposed draft article 20, should be referred to the Drafting Committee for consideration in the light of comments by members of the Commission and by Governments, with the caveat that the latter should not engage in too radical an exercise on the subject, since the majority of the Commission favoured a cautious approach.

123. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to refer all the proposals to the Drafting Committee for consideration on second reading.

It was so decided.

Organization of work of the session (continued)

[Agenda item 1]

124. Mr. KOLODKIN (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of diplomatic protection was currently composed of Mr. Brownlie, Mr. Chee, Mr. Candioti, Mr. Economides, Ms. Escarameia, Mr. Gaja, Mr. Kemicha, Mr. Mansfield, Mr. Matheson, Mr. Momtaz and Mr. Yamada, together with Mr. Dugard (Special Rapporteur) and Ms. Xue (Rapporteur), ex officio.

The meeting rose at 1.10 p.m.

2872nd MEETING

Tuesday, 9 May 2006, at 10.02 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi,

* Resumed from the 2868th meeting.

52 See footnote 7 above.
Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Organization of work of the session (continued)

[Agenda item 1]

1. The CHAIRPERSON welcomed Mr. Valencia-Ospina and said that the Commission was pleased that such an eminent practitioner of international law had become one of its members.

2. Mr. VALENCIA-OSPINA said that he looked forward to contributing to the work of the Commission. He looked back to the day, 40 years earlier, when as a young lawyer he had realized his dream of attending one of the Commission’s annual sessions. He recalled his meeting with Mr. Sepúlveda, whose place he was honoured to take and who had just been appointed judge of the ICJ where he himself had served as Registrar in the past. He was most grateful to the members of the Commission for allowing him to join them, as membership of the highest United Nations body active in the field of the codification and progressive development of law was the crowning achievement of a lifetime devoted to the legal activities of the United Nations.


[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

3. The CHAIRPERSON invited the Special Rapporteur, Mr. Sreenivasa Rao, to introduce his third report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/566).

4. Mr. Sreenivasa RAO (Special Rapporteur) explained that he first analysed (in paragraphs 3 and 4) the comments and observations received from Governments (A/CN.4/562 and Add.1) on the draft principles of the allocation of loss, which had been adopted on first reading in 2004. In general, Governments had supported the policy decisions underlying the draft principles, namely, that their scope should be coterminous with that of the draft principles on prevention of transboundary harm from hazardous activities, on which a General Assembly decision had been pending since 2001, and that the draft should be general and residual to allow States the necessary flexibility for constructing liability regimes suited to their needs and to the special features of the sector concerned.

5. More importantly, States had strongly endorsed the obligation to ensure, through the establishment of an efficient system of remedies, prompt and adequate compensation for victims of transboundary damage arising from hazardous activities. That obligation was reflected in draft principle 4, which defined the measures to be taken to that end. It provided for the operator’s strict but limited liability, subject to a minimum of exceptions. The operator should take out insurance to cover possible compensation. Moreover, States were increasingly in favour of widening the base of funds, especially when the operator was exempt from liability, when his limited liability could not fully meet the claims or when he was unable to meet his obligations.

6. States likewise deemed it essential that provision should be made for appropriate procedures to ensure that the compensation provided for in draft principle 4 was effective. That was the purpose of draft principle 6, which dealt with international and domestic remedies. The procedures envisaged included the establishment of international claims commissions and lump sum payments. The right to information, non-discriminatory access to administrative and judicial forums, and expeditious and inexpensive access to justice were also necessary ingredients of an efficacious mechanism. Draft principle 6 noted that such remedies must not be any less effective, prompt and adequate than those available to nationals for the same purpose. States had acknowledged the importance of those various measures in their comments, but essentially they felt that no one standard model could combine all the ingredients and that a flexible approach was therefore preferable.

7. There was broad support for the definition of the term “damage” in draft principle 2. Opinions had diverged, however, on the questions of damage to the environment per se, standing to sue and the type of claims considered admissible. States had also generally endorsed draft principles 5, 7 and 8, concerning response measures, the need to develop more specific regimes for transboundary damage (“development of specific international regimes”) and the utility of incorporating the draft principles into domestic legislation (“implementation”). Some Governments had thought it would be useful for the Commission to identify ways and means of making the basic obligation to provide prompt and adequate compensation more effective, but others had cautioned that any attempt to go into too much detail would compromise the general and residual nature of the scheme and lead to excessive legislation. Opinions had also diverged on the form the draft principles should take.

8. In the next section of the report, the Special Rapporteur addressed Governments’ requests for clarification on various points raised under different principles. Paragraphs 11 to 22 dealt with claims concerning damage to the environment and non-use values, management of a multiplicity of claims and the legal status of the draft principles. He submitted that although some people might find the definition of the environment too broad,
in a general and residual regime it should be cast in the broadest terms possible in order to “attenuate any limitation imposed under liability regimes on the remedial responses acceptable”. A broader definition was also needed in order to facilitate recovery of the costs of reasonable response measures to avoid or mitigate damage to the environment and to help the progressive development of law by building on the decisions reached by the United Nations Compensation Commission on claims concerning environmental damage per se.

9. Multiplicity of claims was admittedly a genuine problem that could arise in different scenarios in cases of transboundary damage. In dealing with such matters the tendency was to allow the victim to choose the forum, for example between the State in which the hazardous activity was located and the State in which the damage had occurred. With a single jurisdiction, the possibility of a multiplicity of claims was reduced. When several claims were lodged at the same time against the operator and the State of origin, the same cause of action might result in double recovery of compensation. The court could prevent that outcome by clubbing claims together or by apportioning the award of damages between the operator and the State of origin in proportion to their respective shares of liability and responsibility. However, other solutions were also possible. In any case, the presumption for the purposes of the draft principles was that State responsibility was not attracted, for it was assumed that the State had fully discharged its obligation of due diligence.

10. As far as the legal status of the draft principles was concerned, it was not the Commission’s practice to specify which parts of a draft text constituted codification of customary law and which fell into the category of the progressive development of the law. Nevertheless there was undeniably legal value in the Commission’s efforts “[to consolidate] developments in a particular area of law and [to make] them part of the droit acquis”.

11. In response to the comments made by some States he pointed out that paragraphs 7 to 10 of the report reiterated the rationale behind the adoption of a threshold for the application of the draft principles. They likewise explained why there was no point in drawing up a list of activities that would be covered by the draft principles and why it would be difficult to expand the topic.

12. The next chapter reviewed developments in the basic norms on which the draft text rested, such as the precautionary principle, the “polluter pays” principle, the legal basis of liability, notable obligations of States to regulate hazardous activities and minimum standards guaranteeing equal access to justice and the award of prompt and adequate compensation.

13. The precautionary principle played a prominent role in the discharging by a State of its duty of prevention, particularly during the phase in which a hazardous activity was being authorized. Its role was equally noteworthy when transboundary damage was imminent or had already occurred, since a State’s obligation to avoid transboundary damage or to mitigate its effects with the best available technology flowed from that very principle. Moreover, the fact that courts often decided to suspend or close down an activity that endangered the environment even when there was no scientific evidence to indicate a threat of serious and irreparable damage showed that the precautionary principle also came into play after the activity had been authorized.

14. The “polluter pays” principle, which had its genesis in customary law and which consisted in channelling strict but limited liability to the operator, however that term was defined, was gaining wide acceptance. If, however, strict liability was to be adopted as an international standard for hazardous activities entailing a risk of transboundary harm, the elements of such liability must be carefully defined. A proper definition was crucial to the realization of the core objective of the draft principles, which was to ensure the payment of prompt and adequate compensation to victims. In that connection, current practice reflected a trend towards liberalization of the concept of foreseeability, a downplaying of the defence of “natural use” and an increasing limitation of exceptions to operator liability (paras. 29–30 of the report).

15. Notable obligations of States had to do with the management of hazardous activities entailing a risk of transboundary harm, particularly after the occurrence of an incident giving rise to damage. States were obliged to monitor hazardous activities continuously, to draw up the best possible contingency plans based on the most up-to-date knowledge of risks and technical, technological and financial resources, and to employ state-of-the-art technology to avoid or mitigate transboundary damage. States were further obliged to notify all States concerned when an emergency arose. Once they had been notified, those States must in turn take all appropriate and reasonable measures to mitigate transboundary damage. The duty of due diligence was an obligation of good governance that every State must honour in accordance with its social and economic situation. The standards applicable to some countries might not be suitable for others, particularly developing countries, owing to their unwarranted economic and social costs (para. 32 of the report).

16. The State also had an obligation to establish a suitable legal regime providing effective remedies that would enable its own nationals to obtain prompt and adequate compensation. That obligation should then be extended to the victims of transboundary damage without discrimination, a requirement that was gaining acceptance. At the very least, however, the State must ensure that the remedies available to victims of transboundary damage were no less prompt, adequate and effective than those available to its own citizens (para. 33 of the report).

17. On the question of prompt and adequate compensation, the report indicated that, at the international level, not all countries had welcomed proposals to establish international and domestic environmental courts to expedite procedures. Moreover, it was hard to define “adequate compensation” precisely. However, as long as compensation was neither arbitrary nor grossly disproportionate to the damage actually suffered, it might be regarded as “adequate”, even if it was less than full.

In other words, “adequate” was not synonymous with “sufficient” (para. 37 of the report).

18. The Commission had reserved its position on the final form of the draft principles when it had last considered the topic in 2004\textsuperscript{38} (paras. 38–44). The report reiterated the recommendation that the format of principles should be retained and that the draft should not be turned into a convention. That was largely because it would take time for all the requirements associated with the basic obligation to secure prompt and adequate compensation to be recognized by the courts and uniformly affirmed in State practice. They were currently treated differently in different jurisdictions, depending on the type of activity (paras. 39–40). Draft principles on which there was wide consensus would be of far greater value for the development of the law than draft articles, which were likely to be adopted only by a qualified majority.

19. The final chapter of the report ( paras. 45–46) dealt with the relationship between the draft principles and the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001. It was suggested that the General Assembly might consider the adoption of the draft articles on prevention in the form of a convention after a review of those articles in a working group of the Sixth Committee. As part of that review, some elements of liability might be considered for inclusion as an additional article to the convention, where it would be indicated that the obligation of offering prompt and adequate compensation to victims of transboundary damage could be fulfilled by States along the lines set out in the draft principles on allocation of loss, which could be annexed to that convention. Another solution would be for the General Assembly to adopt two separate resolutions, one adopting a draft convention on prevention and the other adopting the draft principles on allocation of loss.

20. He had done his best to respond to the various points raised by Governments and to address important issues which had been the subject of extensive comments in the Commission and elsewhere. While he had not attempted to duck any questions, he had admitted that he did not have full and final answers to all of them. In recommending the format of draft principles he had relied on his best judgement and intuition, and he could only hope that the other members would do likewise.

21. Mr. MANSFIELD said that the Special Rapporteur’s third report was encouraging, for it revealed a very different picture of the topic from that which had prevailed during the very long time it had been on the Commission’s agenda. The analysis of Governments’ views on the draft principles on the allocation of loss in the event of transboundary harm arising from hazardous activities showed a convergence of views that was a far cry from the strongly oppositional positions of the past.

22. The Commission could reasonably expect to complete its consideration of the topic at the current session and submit a long-awaited product to the Sixth Committee. If it managed to do so, it would be a tribute to the Special Rapporteur and his tireless efforts. He had listened carefully and sympathetically to very different points of view, calmed a wide variety of fears and sought compromises and constructive solutions even when disagreements had seemed to block the way forward. He had also sought and obtained the involvement and assistance of all members of the Commission and had turned their skills and experience to good account. He personally wished to express his appreciation and admiration for the Special Rapporteur’s legal and diplomatic skills.

23. After the introduction, the Special Rapporteur described what he called “significant trends” in Governments’ comments and observations. Those trends showed how far the Commission had come on the topic. As the Special Rapporteur pointed out, they amounted to a general endorsement by States of the policy considerations forming the basis of the draft principles adopted by the Commission on first reading in 2004.

24. The first reason it was essential that the Commission should tackle and complete its consideration of the topic was that its work on State responsibility was confined to internationally wrongful acts or omissions attributable to the State. The second was that, while the draft articles on prevention of transboundary harm from hazardous activities and response measures that had been drawn up by the Commission were very important, they could never entirely eliminate the risk of an accident, even if they were followed to the letter. Thirdly, if loss occurred even though the relevant State had fulfilled its prevention obligations, there was no internationally wrongful act on which a claim could be founded. Fourthly, unless that loss was to be borne by an innocent victim, there was an obvious gap in the Commission’s work, given the current technological complexity of the world. The fact that States had generally supported the main policy considerations underlying the draft principles reflected their concern to see that gap filled in an appropriate and sophisticated manner that offered sufficient flexibility to take account of the specific requirements of various sectors of potentially hazardous activity and of the different mechanisms employed by different legal systems to ensure compensation for victims.

25. It also reflected a growing understanding and acceptance that compensation of victims of transboundary harm arising from hazardous activities was an inherent but controllable cost of doing business. As he had noted before, the costs occasioned by accidents were huge, irrespective of any liability to pay compensation. Accordingly, it did not matter whether the activity was carried out by the State or the private sector or in a developed or developing country, for the prevention of accidents must be the highest priority, if only from the standpoint of efficiency and profitability. It had come to be widely understood that the cost of prevention and the associated costs incurred if prevention failed were not some kind of extraneous, unnecessary or additional burden, and that prevention was an essential component of effectiveness and efficiency without which a business was unlikely to survive for long without costly subsidies that were not acceptable or sustainable in the current international environment.

\textsuperscript{38} Ibid., p. 68, para. 176, General commentary, para. (14).
26. In the next section (paras. 5–22), the Special Rapporteur commented on some of the issues that Governments had raised in connection with the draft principles. He himself could accept the application of the adjective “significant” to the question of the threshold, on the understanding that, as stated in paragraph 7 of the report, “that the threshold [was] designed to prevent the lodging of frivolous or vexatious claims and [was] defined so as to practically allow all claims [involving] more than a negligible amount of damage”. He assumed that that explanation would appear in the commentary.

27. On the points in paragraphs 9 and 10 of the report, relating respectively to the suggestion of incorporating a list of activities falling within the scope of the draft principles and to the idea of expanding their scope, he concurred with the Special Rapporteur that there was no need to modify the text adopted on first reading in 2004.

28. With regard to point 4 (“damage to the environment per se and claims of compensation for damage to “non-use” values”), it was true that the exclusion of the global commons from the definition of the environment in draft principle 2 left a large gap, but that deliberate decision of the Working Group, of which he had been a member, did not represent any lack of interest in the question. On the contrary, as the Special Rapporteur had pointed out (para. 12), it reflected that fact that the global commons raised particular problems in relation to standing to sue, proper forum, applicable law and quantification of damage that needed to be examined in a separate exercise. On the other hand, he agreed with the view expressed by the Special Rapporteur in paragraph 13 that it was desirable to maintain a broad definition of “environment”, and he supported the Special Rapporteur’s comments in paragraph 14 that there was growing international recognition of the significance of the “non-commercial” value of the environment and that it was legitimate to bear that value in mind in claims relating to environmental damage.

29. As far as the next point was concerned, he was not persuaded that a risk of multiplicity of claims really existed. He was not aware of any situation in which a victim had received double compensation. Claims were always handled in such a way as to ensure that this did not occur. Admittedly, the possibility of presenting a claim for failure to fulfil a duty of prevention might not become apparent until damage had been caused and had given rise to a claim for that damage, but international and domestic courts could be relied upon to ensure that all such issues and claims were handled appropriately.

30. The Special Rapporteur’s comments concerning the legal status of the draft principles were well founded (paras. 19–22). There might not be much to be gained from further analysis. He had no doubt that the principles would have value and weight at both the political and the legal levels. Moreover, as the Special Rapporteur had stated in the chapter of his report reviewing some of the salient features of the draft principles, some principles might already have the status of general rules of international law. In general, he supported the Special Rapporteur’s comments on the five aspects of the principles discussed in these paragraphs (23–37). One of the chapter’s features was that the Special Rapporteur had included additional references to recent practice, decisions and writings that strengthened the principles themselves. There was, however, an error in the English version of the footnote to paragraph 30, which should read “could not have been reasonably foreseen” rather than “could have been reasonably foreseen”.

31. On the basis of the Special Rapporteur’s third report, he was in favour of referring the draft principles to the Drafting Committee. In doing so he acknowledged that a consensus on that sensitive subject, which had long eluded the Commission, had emerged around the form of a set of draft principles and, for the additional reasons given by the Special Rapporteur, it was appropriate that the end product should remain in that form. Nevertheless, he would certainly support any efforts on the part of the Drafting Committee to consider more prescriptive formulations in some places, in keeping with the status of the principles, at least to ensure that casting the principles in non-binding wording did not call into question the fact that at least some of them might have obtained a higher status.

32. He did not have very strong views on the relationship between the draft principles and the draft articles on prevention. Both the possibilities outlined by the Special Rapporteur seemed workable, but once the Drafting Committee concluded its work, that Committee or a working group might be better placed to issue some more specific and nuanced recommendations.

33. Ms. ESCARAMEIA thanked the Special Rapporteur for his availability, his patience and his hard work in seeking to strike a balance between very different points of view in a field that was evolving rapidly.

34. Beginning with the final form of the document, she noted that the Commission had reserved the right to reconsider that question during the second reading9 in the light of comments by Governments. Of the three States that had commented in writing, two—Mexico and the Netherlands—had been in favour of a framework convention, whereas the United States preferred principles because they were “more likely to gain widespread acceptance in their current form than they would be were they not recommendatory”. That argument had been constantly put forward, but she was not at all convinced by it. Actually, the opposite conclusion seemed more plausible. Both the comments of Governments and the debates in the Sixth Committee showed that most States were either in favour of a convention or were open to the idea. That was why the General Assembly, in paragraph 3 of its resolution 56/82 of 12 December 2001, had indicated that prevention and allocation of loss was a single topic and had stated that the Commission should bear in mind “the interrelationship between prevention and liability”. It necessarily followed from that mandate that it was not possible to have a convention for prevention and a set of principles for allocation of loss. In its written comments, Mexico stated that not having a set of draft articles went against legal certainty and did not serve the ultimate aim

9 Ibid.
of protecting the global environment and ensuring that the “polluter pays” (A/CN.4/562). Moreover, the innocent victim should not have to bear the loss. If obligations were to be legal, a set of prescriptive rules, and not just a few general principles, was needed. The topical discussion in the Sixth Committee of the General Assembly at its fifty-ninth session in 2005 seemed to suggest that States favoured that approach.\(^6\) Moreover, the need for a set of prescriptive rules was almost universally recognized by non-governmental organizations and academic scholars such as Alan E. Boyle, so often cited by the Special Rapporteur.

35. In view of the above, it was regrettable that in paragraph 44 of his report the Special Rapporteur seemed to favour the form of draft principles, thereby endorsing the view of only a few Governments.

36. With regard to general comments, she noted that the draft principles did not in any way make compensation compulsory. Even if they were framed as draft articles, they would not give victims a right to compensation, but would merely provide for having a compensation mechanism in place—and as they were only draft principles, the guarantee of compensation was very tenuous. Such mechanisms were not even set up in a way that afforded easy access to remedies to victims who needed considerable time and energy, knowledge and financial resources to be able to use the procedures contemplated in the principles.

37. With regard to the draft principles themselves, she endorsed the proposal by the Netherlands to delete the words “as far as possible” in the fifth preambular paragraph, because effective measures should be in place to ensure that natural and legal persons did not incur loss. Noting that she had already called for the deletion of the notion of “significant harm” in draft principle 1, she pointed out that in its written comment, the Netherlands, adopting a position already put forward by the Nordic countries in the Sixth Committee, had been opposed to the adjective “significant”, arguing that several conventions, including the Vienna Convention on civil liability for nuclear damage, did not require that threshold and that a much lower threshold was needed because the issue was not relations between States, as in the context of prevention, but the compensation paid to an individual for any damage. It was also important to avoid any discriminatory practice, yet victims who were nationals did not have to prove that they had suffered significant damage and could obtain compensation for any damage, whereas foreign victims had to prove that the damage was significant. In that connection, she had not fully understood what the Special Rapporteur had meant in paragraph 8 of the report when he wrote that “international law [tolerated] certain forms of discrimination in treatment between nationals and foreigners”. If such discrimination existed, it was probably in favour of foreigners, whereas in the draft principles it was in favour of nationals. It would be useful to have some clarification in that regard.

38. On the issue of time, to which other members had already referred, she said that damage might not appear to be significant until 20 years had elapsed, but then issues such as obligations and prescription would arise. Moreover, individual cases of damage might not be significant in themselves but could become so through repetition. That raised the question of frequency, which must also be addressed to determine the threshold of “significant”. Nor had the Special Rapporteur taken account of the fact that in the Trail Smelter case, which was perhaps the first to have considered questions relating to the environment, it had been sufficient to argue that harm, and not significant harm, had occurred, as a number of delegations had pointed out in the Sixth Committee.

39. In the context of draft principle 4 (Prompt and adequate compensation), she endorsed the suggestion by one State to insert the word “all” before “necessary measures” in paragraph 1. With regard to paragraph 3 (c), she was pleased that the Special Rapporteur agreed with the comment by Mexico that the burden of proof of a causal connection between the damage and the operator should not reside with the innocent victim. A presumption of causality must be established, and it was the defendant who must prove that no causal connection existed. That should be made clearer in draft principle 4, either by adding a sentence in paragraph 2 or by inserting a new paragraph to that effect. The words “where appropriate” should be deleted in the first part of paragraph 2 and the words “including the State” should be inserted after “other person or entity”. That point had been the subject of a lively debate, but although it was established that the State must set up funds and mechanisms, the question of whether it must use its own funds still needed to be clarified. It was widely recognized that, as the United Kingdom had noted, “securing insurance and other financial guarantees is not an easy matter”; and thus the State must also be held liable, as had been argued in the Sixth Committee by Mexico, Portugal, Sierra Leone and several other delegations (see paragraph 10 of the report).

40. In conclusion, she welcomed the progress that had been made in the sense that States had accepted the idea that resources should be allocated for such situations, although she considered the current proposals to be insufficient. The question of form was essential for guaranteeing compensation to the victim, whether an individual or the environment. In addition, she did not believe that there should be a threshold for harm, since it was not easily measured in an accurate way. Lastly, the State should make provision for funds to compensate victims when all other means failed, which was all the more probable when damage was extensive. The draft principles before the Commission were thus encouragements for the good intentions of States to set up compensation mechanisms, and they focused primarily on procedural issues. She would have preferred the Commission to have introduced obligations and for the principles to have focused more on securing the right of innocent victims to obtain compensation, and she hoped that the Drafting Committee would take her comments in that regard into account.

41. Mr. GAJA said that the Special Rapporteur’s third report had enabled the Commission to make progress on a subject which had given rise to an exchange of many interesting views over the past 30 years, with no result

\(^6\) 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/Add.1), para. 98 (mimeographed; available on the Commission’s website, documents of the fifty-seventh session).

\(^1\) Ibid., para. 72.
in sight. The report dealt with questions raised in the comments on the draft adopted on first reading in 2004 and for the most part gave convincing reasons for retaining the previously adopted solution, subject to a few drafting changes. One difficulty was that the Special Rapporteur sometimes covered new ground without saying whether he favoured additions or changes to the text; he took it that the Special Rapporteur did not want to prejudge certain issues and would like to have the views of the Commission before making any specific proposals thereon.

42. In paragraph 8 the Special Rapporteur considered whether prescribing a threshold might be in violation of the principle of non-discrimination and carry the risk that a State might discriminate against those who suffered transboundary damage that was not significant. It was clear, however, that discrimination would not be caused by limiting the general principles to be adopted to instances of significant damage. Other cases would not be covered, because they would be beyond the scope of the draft principles, for reasons that were given in paragraph 7. However, those reasons by no means excluded the application of the principle of non-discrimination in international law also to cases not covered in the draft principles; a provision to that effect should perhaps be added.

43. In paragraphs 17 and 18 the Special Rapporteur provided an analysis of certain issues relating to jurisdiction and applicable law. Some of the explanations he had given on the subject suggested that he had intended not to introduce new issues in the draft principles, but rather to take into account the fact that some States had criticized paragraph 6, which provided for access for victims of transboundary damage to "administrative and judicial mechanisms", for being insufficiently precise because it did not specify which courts would have jurisdiction or which law applied. Although trends existed in those areas, the Commission should be very careful and avoid suggesting, even in the commentary, that there were general rules by which States should abide with regard to jurisdiction and applicable law. Those questions were more complicated than they seemed at first glance, and the Commission did not have the necessary expertise to suggest appropriate solutions. The current discussions in the European Union relating to the law applicable to non-contractual obligations (the "Rome II Regulation") showed how controversial the question was: it was much more complicated than simply establishing a general rule that allowed the injured party to choose between the place where the damage occurred and the place where the damage was caused. Instead of proposing solutions that would inevitably give rise to criticism, it would be preferable not to go beyond the general statement contained in draft principle 6, paragraph 3.

44. The approach taken in paragraphs 27 to 30 was inconsistent with the adoption of specific rules on the applicable law, because in those paragraphs the Special Rapporteur was not suggesting that each State should adopt its own rules on conflict but was considering instead whether uniform rules on strict liability should be applied. It might be possible to go a step further than the phrase in draft principle 4 which read "liability should not require proof of fault" and to say that it was not absolute liability. It was even conceivable to exclude liability in case of an act of God or nature, as the Special Rapporteur had suggested in paragraph 30, although to go that far would be problematic: if there was a risk of earthquake, for example, the State would have an obligation of prevention and could not build a dam in an area at risk because of the predictable consequences. However, it would be difficult to assume that liability would be totally excluded just because the obligation of prevention was complied with. Thus, when a hazardous activity was carried out, it must be clear that there could be liability for the consequences even if they were not necessarily attributable to the conduct of a particular operator.

45. He had no firm views on the nature of the instrument that the Commission should suggest but believed, like Mr. Mansfield, that States could take the draft principles into consideration in various ways, such as when adopting treaties applicable to particular categories of hazardous activities—and it was clear that for many activities, specific provisions were needed. Some general principles devised by the Commission might help in defining the content of such instruments. General principles could also be taken into account and applied by an international arbitration tribunal when ruling on a dispute involving those matters, or a national court could draw on the draft principles and decide that they should be regarded as binding or could at least take them into consideration when applying the law. In any case, the nature of the instrument, whether a treaty or general principles, could not be regarded as decisive.

46. The fact that the Commission favoured the adoption of a treaty on prevention did not necessarily imply that it should opt for the same solution with regard to liability. It must be clear that infringement of an obligation under a treaty on prevention would give rise to international responsibility, and not to liability, which occurred when there was no breach of an obligation under international law. Thus two different areas were involved, and the Commission had been right to differentiate between the two in order to dispel any confusion. If the Commission tried to make a single instrument or to have the draft articles and the draft principles refer to each other, that might lead to further confusion. He was therefore in favour of keeping the two instruments separate and giving each its own form so as to make that distinction clear.

The meeting rose at 11.30 a.m.

2873rd MEETING

Wednesday, 10 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOUT-TCHVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Daudui, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

[Agenda item 3]

THIRD report of the SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the Commission to continue its consideration of the third report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities.

2. Mr. MATHESON said that the Special Rapporteur was to be congratulated for the outstanding work he had done in a remarkably short time in bringing about the adoption on first reading of a set of draft principles on international liability for transboundary harm. Those principles had received widespread support and praise from States, both in the Sixth Committee62 and in informal comments from Governments.

3. In many important respects the draft principles constituted a significant step towards the goal of ensuring prompt and adequate compensation for all victims of transboundary harm caused by hazardous activities. Among the most important advances were: a recognition that compensation should be provided for the victims of hazardous activities, even where those activities were not prohibited by international law; a broad definition of compensable damage, including the impairment of the environment itself, and the costs of reasonable measures of reinstatement and response; a recognition of the desirability of imposing strict liability on the operator—i.e., the party in control of the activity at the time the incident occurred—and that any conditions or exceptions to that liability should be consistent with the overriding principle of prompt and adequate compensation; a recognition of the importance of providing arrangements to supplement the operator’s liability, including insurance, financial guarantees, industry-wide funds and possibly State contributions; and an emphasis on the importance of providing appropriate procedures, both domestic and international, to guarantee that compensation was provided, and that it should be expeditious, non-discriminatory, and not place undue burdens on the victim.

4. The fact that States had indicated their acceptance of those advances was an important and encouraging development. It was now the Commission’s task to conclude its work on the topic in a manner that preserved that important degree of consensus on the principles.

5. The third report disposed of several basic questions in a manner with which he was in total agreement. First, the Special Rapporteur concluded that the Commission needed to retain the threshold of “significant” damage, which was necessary to exclude frivolous or vexatious claims but was also a flexible standard that could take account of variations in circumstances in particular situations. Second, he cautioned against the expansion of the scope of the principles to include global commons, which raised particular problems of standing to sue, proper forum and remedies, applicable law and quantification of damage that would require entirely separate treatment and would not fit sensibly within the current principles. Third, the Special Rapporteur concluded that the Commission should retain the current format of recommendatory principles rather than attempt to transform them into a different and more obligatory format such as a convention or draft articles. He personally entirely agreed with that conclusion. By his count, a substantial majority of those States that had commented on the matter, in the Sixth Committee in 200464 and 200565 and in formal comments in 2006 (A/CN.4/562 and Add.1), had supported the Commission’s decision to produce recommendatory principles—to say nothing of the many other States that presumably had not commented on the point because they agreed with what the Commission had done. That had the advantage of not requiring a potentially unachievable harmonization of national laws and legal systems and was more likely to lead to widespread acceptance of the substantive provisions.

6. The Special Rapporteur had encouraged the Commission to consider ways of enhancing the formulation of certain propositions in draft principles 4, 5 and 6. That was something to which the Commission should give serious thought. Perhaps it could find ways of making clear to States the importance of following those core principles as part of their general effort to bring their conduct into conformity with international law, best practices and responsible norms of behaviour.

7. In doing so, however, it was essential not to convert recommendatory principles into statements of legal obligation—for example, by using terms of obligation like “shall” or “duty”. The draft principles went well beyond what could fairly be seen as current customary law, and that was indeed one of their basic strengths. States had indicated that they supported them as guidelines and calls for action, but such support would decline dramatically if they were changed into statements of legal obligation. There was hardly a consensus at the current time that States had a duty to ensure compensation for activities that were themselves internationally lawful—which was the scope of the principles. If the Commission asserted such an obligation, then the consequence, under the normal rules of State responsibility, would be that States would themselves be liable if such compensation were not provided, and, needless to say, States were not currently prepared to accept such generic State liability for private activities. Agreement had been reached on a very forward-looking and innovative set of norms precisely because they were not represented as obligations, and if the

62 See footnote 55 above.

63 See Topical summary of the discussion held in the Sixth Committee (A/CN.4/549/Add.1) (footnote 60 above), paras. 57–107.
language on that point were altered, the question would arise whether those innovations could be maintained or needed to be watered down. The Commission should not sacrifice the great substantive progress it had made to a reflexive desire to have obligatory language. If it were to turn those principles into statements of obligation, then as a minimum it would have to reformulate them as convention articles, which would take considerable time and effort and might not be feasible during the remainder of what promised to be a busy session. Certainly it should not make such a fundamental change on second reading, when States would no longer have the opportunity to give their views.

8. On the other hand, the Commission could make it clear that States should implement the principles by negotiating and entering into specific obligatory arrangements: that was the most important function that the principles could serve. That might include bilateral or regional arrangements, or agreements governing particular types of activities, where States could agree on the precise terms and conditions for liability and compensation. In short, the Commission should not take any action that would lower the current level of State acceptance of the principles themselves, which would be the consequence of adding language of obligation to them. He therefore urged the Commission to retain the recommendatory format that had gained such broad State acceptance.

9. Turning to other matters raised in the Special Rapporteur’s report, he noted, first, that a suggestion had been made that the Commission should include a presumption of causal connection between a hazardous activity and transboundary damage. He shared Mr. Gaja’s concerns about the Commission’s ability to prescribe rules of proof and procedure in that complex area. The Commission could caution against imposing unfair burdens of proof on injured parties, but logically there needed to be a demonstration that a particular activity had causal connection to a particular incident of transboundary damage, otherwise all operators could be presumed liable for all damage.

10. Secondly, the question had been raised whether the principles covered or should cover so-called “pure environmental damage”—namely, damage to the environment that went beyond impairment of its commercial use. He had assumed that the principles already covered such damage and that the definition of “damage” in principle 2 was already sufficient on that point. Indeed, that was one of the positive features of the draft. Perhaps that could be confirmed in the commentary.

11. Thirdly, a suggestion had been made that a “most favourable law principle” should be adopted, apparently meaning that, in deciding which State’s law should be applied in a particular case, a forum should always choose the law of the State that most favoured the victim. He was unclear as to how such a principle would work in practice. For example, if there were a serious pollution incident in Mexico that caused much damage locally but also some lesser damage in the United States of America, would a Mexican court always be obliged to give a United States plaintiff the benefit of the more expansive provisions of United States law on such matters as the amount of recovery for pain and suffering, punitive damages and attorneys and fees while restricting Mexican victims to less expansive standards? He had doubts about such a requirement.

12. Fourthly, he noted that there was much disagreement on how the precautionary approach should be described and what its content might be. His only comment on the matter in the current context was that it was not necessary to go into those issues in connection with the principles, since they did not have a direct bearing on liability and compensation.

13. Fifthly, a suggestion had been made that it might be opportune to designate a minimum of exceptions to the liability of operators, such as hostilities, insurrection and acts of nature. His initial reaction was that it would be better to give States the flexibility to decide what exceptions to allow in a particular context, subject to the overriding requirement that they must not compromise the principle of providing prompt and adequate compensation to all victims.

14. On the whole, the draft principles adopted on first reading were an excellent product that could have far-reaching and progressive effects on the conduct of States. If the Commission was to consider changes to the text, it should proceed cautiously so as not to diminish the level of support and acceptance that they had already received.

15. Ms. XUE said that the draft principles adopted on first reading in 2004 represented a great achievement for the Commission. Although the draft itself had as yet attracted few comments from States, those that had responded were generally appreciative of the fact that the drafting had been completed so expeditiously.

16. Generally speaking, she agreed with the Special Rapporteur’s analysis of the seven significant trends listed in paragraph 3 of his third report, and shared his view that the draft should be general and residual. The operators of hazardous activities should in principle incur strict liability for causing transboundary damage. States should see to it that mechanisms for remedies were established in order to settle claims.

17. In the light of the comments made by Governments in the Sixth Committee or submitted later in writing, three points should be taken into consideration during the second reading. First, compensation mechanisms for victims of transboundary damage must be established and the amount of compensation calculated taking account of the particular context and circumstances of the sector concerned. The draft principles had been developed on the basis of existing international mechanisms for compensation and in the light of the latest developments in international law. That did not mean, however, that they were automatically applicable to compensation mechanisms for all types of hazardous activities, because existing mechanisms differed widely. The future mechanisms would still have to take into account the characteristics and operating methods of the industrial activities concerned with regard to such issues as channelling of and limits to liability, financial guarantees and harmonization of national laws.
18. The main objective of establishing strict liability was to ensure reasonable compensation even without any proof of the operator’s fault. The principle of prompt and adequate compensation did not entail that the standard of remedies and compensation for harm caused by hazardous activities was even higher than in the case of liability involving fault.

19. States had the obligation to prevent, through legislation, transboundary damage caused by hazardous activities carried out in their territory, to mitigate such damage and to provide appropriate remedies in case of an incident. That was an established principle of international law. However, the assertion, in paragraph 3 (e), that “it is regarded as no longer acceptable under international law for a State to authorize a hazardous activity within its territory with a risk of causing transboundary harm and not have legislation in place which guarantees suitable remedies and compensation in case of an incident causing transboundary damage”, was questionable. Such legislation was not well developed in most States. Moreover, many of the existing international conventions on compensation for hazardous activities had very few States parties and thus lacked universality. Accordingly, the Commission’s report should indicate that there was still much room for development in both national and international law.

20. Paragraphs 27 to 30 of the report offered useful analyses and suggestions on a number of important questions concerning the “polluter pays” principle. The issues of damage to environment and damage to “non-use” values (paras. 11–14) and multiplicity of claims (paras. 15–18) were all highly technical in nature and went beyond the scope of general principles. The participants in the discussion in the Hague Conference on Private International Law on the draft international convention on jurisdiction and foreign judgments in civil and commercial matters had taken more than 10 years to reach agreement.66 When, in June 2005, the Conference had finally adopted the Convention on Choice of Court Agreements, the text had differed drastically from the 2001 draft.67 That example showed that it was not necessary for the Commission to address such technical details as jurisdiction or applicable law.

21. The Special Rapporteur had provided a balanced analysis of the legal status of the draft principles. As could be seen from the comments of Governments, even such a strong advocate of strict liability for transboundary damage as the Netherlands Government had been surprised by the text of the draft principles adopted on first reading in 2004. Far from being too conservative, the Commission had been in the vanguard in elaborating the principles, which were clearly aspirational. However, she agreed with the Special Rapporteur that the legal value of the draft principles lay in the fact that they were conducive to strengthening the responsibility of States for environmental protection.

22. The precautionary approach discussed in paragraphs 24 to 26 of the report was of great importance for the prevention of harm, although views still differed among States as to whether it could be taken as a principle or could merely serve as a standard. Careful study was required on whether such a standard should apply in allocation of loss, because the regime currently being designed was premised upon several understandings. First, although highly hazardous activities were at issue, they were not activities prohibited by international law. Secondly, risk assessments had been conducted in the prevention phase to determine whether those activities should be permitted. If an incident occurred, the activity should not be terminated or suspended, because it was usual for the affected State to make such a request. As defined, the precautionary approach was not based on conclusive scientific evidence, and therefore disputes might arise as to the exact role that it could play in presenting evidence. The Trail Smelter arbitration showed that a request for termination or suspension of an industrial activity of another State could be based only on hard evidence, not on precaution. Thirdly, the purpose of allocating loss was to avoid a situation in which innocent victims were unable to receive any compensation or remedy. When transboundary harm occurred, such issues as what rescue measures could reduce loss and what measures could avoid medium- or long-term impact on the environment would probably give rise to disputes as to how precautionary those measures should be. Emphasis should be placed on cooperation between the State of origin and the affected State. The report of the Commission should give some expression to that policy consideration so as to draw Governments’ attention to it.

23. On the “polluter pays” principle, paragraph 29 of the report applied a very rigorous criterion for the application of strict liability by stating that “it is sufficient if the use posed a risk of harm to the others”. Pending a clear identification of which activities fell within the category of highly hazardous activities, that criterion could be taken to extremes. What was more important was how to bring the criterion into line with the regime of State responsibility.

24. With regard to notable obligations of State (paras. 31–32), she fully agreed with the Special Rapporteur’s analysis and comments. On the principle of non-discrimination (paras. 33–35), the practical criterion in matters of procedure and substance should be that of national treatment.

25. Ensuring prompt and adequate compensation (paras. 36–37) was considered to be the most significant contribution of the draft principles. However, the Special Rapporteur rightly pointed out that that the criterion of adequacy did not denote the highest possible amount of compensation, but rather a reasonable and appropriate amount.

26. As to the final form of the draft principles, it was clear that they still needed to be tested in international practice to see to what degree they could be accepted

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67 For more information on the historical origins of the Convention, see F. Pocar and C. Honorati (eds.), The Hague Preliminary Draft Convention on Jurisdiction and Judgments, CEDAM, Milan, 2005.
by States. The Special Rapporteur had wisely adopted a cautious approach, pointing out in paragraph 39 the legal uncertainties surrounding some of the draft principles. In her view, the most pragmatic course of action, and the best so far proposed, would be for the final product to be cast in the form of draft principles. On the relationship between the draft principles and the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001, the Sixth Committee might wish to consider establishing a working group to review the matter further.

27. Mr. KOSKENNIEMI said he wished to make three points: first, he would refer to a paradoxical aspect of the topic which revealed something about the situation in which the Commission found itself; second, he would express sympathy with Ms. Escarameia’s frustration about the current situation and explain why, regretfully, he could not support her suggestions; and last, he would make one substantive proposal on the draft.

28. As to the paradoxical aspect of liability, he said he had been struck, when reading the account of the debate on the topic in the Sixth Committee, by the extent to which Governments had internalized the language of allocation of loss which the Commission had decided to use when dealing with the topic. When he had started his career in the Ministry of Foreign Affairs many years earlier, his first assignments had been with the Organisation for Economic Co-operation and Development, the United Nations Environment Programme and other international organizations that had been addressing questions of environmental law and struggling to deal with problems which arose from non-prohibited, useful activities that nevertheless caused pollution and were harmful to society in various ways. At the time, concepts such as the “polluter pays” principle—which was actually an economic allocation principle and not at all a principle of private or public liability—and the precautionary principle had been new, and lawyers had been uncertain as to what they might mean in relation to standards of proof in law. Nowadays, lawyers in the Sixth Committee and elsewhere readily spoke the languages of law and of economics and thought of liability in terms of allocation of losses. That seemed to be progress, but it had come at a price. A consensus had emerged around the vocabulary and approach, and it had become customary for international organizations and the Commission itself to address environmental problems in the language of technical sophistication and economic feasibility. That, however, had made everything excessively general, fluid, tentative and exhortatory. Meanwhile, as Ms. Escarameia had asked, what had become of the rights of the victim of pollution? Everything in the draft principles ultimately reduced to the question of the optimal economic solution, which was sometimes for the loss to be borne where it fell. While in some sense that was reasonable, as a lawyer he felt frustrated and angry at such a result. Surely it was the business of legal instruments and of law to establish subjective rights which were non-negotiable in that, regardless of the economically optimal solution, certain rights must be protected and could not be a function of macroeconomic rationales about industrial activities.

29. The draft principles were hortatory, not binding; indeed, Mr. Matheson had said that it was a precondition of his acceptance of them that they should not be obligations. He therefore had great sympathy with Ms. Escarameia’s sense of frustration, which he shared: the concept of threshold damage had been included in the draft principles in order to enable lawyers to calculate the outcome that best suited the interests of a given State. When the law began to involve calculations of economic losses, the upshot would be that the most powerful interests would hold the upper hand in negotiations. Such a situation was difficult to accept. Of course, it was possible that environmental, indigenous or other groups affected by large-scale industrial or commercial activities could so organize themselves as to become accepted as effective stakeholders. That situation was rare, however. The more powerful interests could usually dictate terms, and the law let them do so.

30. Ms. Escarameia had suggested that the draft principles should be made more substantive and that they should be upgraded so as to form a convention. If that approach were feasible, he would support it. However, for the draft principles to be recast in the form of a convention but remain non-binding would be the worst possible outcome. As Prosper Weil had written, such outcomes did away with the distinction between rights and privileges and between obligations and hortatory statements, making everything negotiable and giving the most powerful interests a free hand. Political realism suggested that States—and the Commission—were not ready for the draft principles to be turned into binding provisions, and to adopt a so-called “binding” convention with non-binding obligations would be hypocritical.

31. Most of the principles and the language used by the Special Rapporteur favoured a case-by-case approach to assessing what would be a reasonable solution in a given situation. Although that approach too was problematic, it seemed the only feasible one, in most cases, at least. The section of the report comprising its paragraphs 33 to 35, however, did not fit that rationale. Whereas such concepts as threshold damage, the precautionary principle or the liability of the operator were all aspects of a contextual assessment of what was reasonable, non-discrimination and minimum standards were non-negotiable absolutes: the State had a non-negotiable obligation to provide equal access to remedies for foreign victims and its own nationals, for example. It was a matter not of a human rights obligation, but of a procedure which by its nature was non-negotiable. As the articles on prevention stood a better chance of being adopted as a convention than did the present draft principles, he therefore wished to propose that the provisions relating to non-discrimination and minimum standards should be incorporated in the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001.

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69 See footnote 56 above.

68 See Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session (footnote 60 above).

That said, generally speaking he found the draft principles acceptable, though he regretted the Commission’s lack of ambition in falling back on ad hoc negotiations instead of setting out binding rules. It was a melancholy fact that, in the modern world, the latter would not be acceptable to States.

32. The CHAIRPERSON said that, melancholy though Mr. Koskenniemi’s conclusion might be, it raised a fundamental issue, namely, whether a convention should contain only binding provisions.

33. Mr. GAJA concurred with Mr. Koskenniemi’s view that the principle of non-discrimination was binding. The non-discrimination principle would apply to damage caused to an alien located in the territory of the State where damage originated. However, remedies were generally not available in the State of origin in case of damage caused outside its territory. States should therefore be encouraged to provide persons beyond their borders with remedies.

34. Ms. XUE said that Mr. Koskenniemi took too cynical a view of the situation. If the Commission concluded that there could not be a binding international agreement on the topic, it would not be because industry had the upper hand in negotiations. In cases of transboundary harm, a balance often had to be maintained not only between the interests of industry and those of the individual victims but also between those of States. Scholars often cited the arbitral award in the Trail Smelter case, which had concerned damage to agricultural interests in Washington State caused by a smelter in the Canadian town of Trail. After extensive research, however, she had found that surprisingly little had been written on the actual facts of the arbitration. It had emerged that, initially, the Canadian side had feared that the case would come before the Canadian courts, thus bringing into play Canadian air pollution laws. The Trail smelter and other industries along the United States–Canadian border were of the utmost importance to Canada and, for that reason, the Canadian side had sought to apply United States water laws, which would have opened the possibility that the smelting industry could continue, whereas application of Canadian law would have inevitably led to closure of the smelter. In the end the two sides, having jointly investigated the level of pollution, had agreed that the victims would be compensated and the emission of fumes gradually reduced. It was often held that, because United States water law had been applied, the case did not form part of the body of international law, but it was nonetheless a case of great relevance to the Commission and the draft principles, in that at its core lay the conflicting interests of States rather than of individual industries.

35. Mr. MATHESON said that, in his view, the message of the draft principles was not at all that the interests of the victims in compensation should be compromised and subordinated to the interests of corporations. Quite the contrary: the overriding objective of the draft principles was to ensure prompt and adequate compensation for all victims, as was evidenced by, for example, draft principles 4 and 6, even if it was open to States to choose the mechanisms and procedures to secure such compensation. Mr. Koskenniemi should take a rosier view.

36. Ms. ESCARAMEIA, after expressing her gratitude to Mr. Koskenniemi for his understanding, even in the absence of his full support, said that, as ever, she had been impressed by the brilliance of Mr. Koskenniemi’s analysis but frustrated by the conclusions he drew. Whereas his inclination was to see reality as static and unchangeable, she herself was confident that the draft principles could, if not immediately then in 20 years’ time, take the form of a convention. Unlike Mr. Matheson, who seemed convinced that States were happy with non-binding principles, she had come to believe, drawing on her experience as a delegate to the Sixth Committee and on the basis of the written comments from Governments, that the majority of States—indeed, all but the most powerful—were in favour of a convention with binding effects. She would continue to argue that case in every forum, and she was confident that public opinion would eventually prevail over vested economic interests.

37. Mr. MOMTAZ, after commending the third report as a work both of synthesis and of balanced research, said he would comment on two aspects of the topic: the final form that the draft principles should take, and the scope of their application ratione materiae. With regard to the former, much depended on the relationship between the draft principles and the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001. The question was one not of form but of substance, and would affect the ultimate fate of the Commission’s work on the topic. Its importance was recognized by States in their comments and observations. The Czech Republic, for example, had described the draft principles as “a promising tool for the progressive development of international law”, while Mexico considered that the Commission’s work would result in “the strengthening of existing rules” and stressed that the purpose of the draft text was “not only to develop international law but to codify rules applicable”. It had also expressed the view that, if the provisions continued to take the form of principles, some should be reformulated, especially draft principles 4 to 8, so that they became “prescriptive rather than hortatory in nature”. That approach coincided with Ms. Escarameia’s views on the matter, which he shared. If the Commission was to respond to Mexico’s request, it would clearly need to move beyond the principles already set out in the Declaration of the United Nations Conference on the Human Environment (the “Stockholm Declaration”)71 and the Rio Declaration on Environment and Development (the “Rio Declaration”),72 which contained assertions regarding the precautionary approach and the “polluter pays” principle that the United States rightly described as “controversial”. Although the principles set out in those Declarations had been very useful in their time, international law had since developed in important ways that must not be overlooked. The Commission should therefore not content itself with general assertions from which any prescriptive element was lacking.


38. The best way forward was to adopt the text in the form of a treaty or framework agreement. In that way, the principles set out in the Stockholm and Rio Declarations could be developed on the basis of existing practice. That would then serve as a basis for cooperation between the States parties to such an instrument, allowing them to decide through separate agreements on detailed arrangements for conducting such cooperation.

39. Such a framework arrangement would be comparable to a pactum de contrahendo and would, over a period of time, lead to the creation of standards. The draft framework convention he proposed should first clarify the meaning and scope of the principles on which the legal regime for the allocation of loss should be predicated. The most important principle was the “polluter pays” principle, and its corollary, the strict liability of the polluter, would constitute the cornerstone of any draft articles on compensation. That exercise was crucial inasmuch as the Rio Declaration had affirmed the “polluter pays” principle in an extremely timid manner. Since then, it had been embodied in numerous international agreements, one of the most recent being the Framework Convention for the Protection of the Marine Environment of the Caspian Sea, signed in Tehran on 4 November 2003. The writings of legal scholars testified to the fact that the “polluter pays” principle, which had originally been rooted in economic considerations, was in the process of becoming a binding principle of international environmental law. Since it was generally agreed that that principle was at the interface between prevention and compensation, it had a bearing on the law on liability in the absence of proof of fault, or strict liability.

40. Given that the national legislation concerning abnormally dangerous activities listed in the survey conducted by the Secretariat had generally opted for strict liability, it was puzzling that the Special Rapporteur had not come out more strongly in favour of deeming strict liability to be an international legal rule. The emphasis placed on the operator’s primary liability did not, of course, exempt from liability the State on whose territory the injurious act had occurred, possibly as a result of its failure to comply with a primary rule of international environmental law, namely its obligation to prevent such acts. Accordingly, the Commission could not but endorse paragraph 5 of draft principle 4, whose merits had been confirmed by State practice in the wake of the environmental disasters triggered by the oil spills that had polluted the coasts of Western Europe.

41. As for the scope ratione materiae of the draft principles, they were unquestionably intended to cover any act not prohibited by international law which might give rise to transboundary damage reaching or exceeding a specified threshold. It was unnecessary to draw up a list of activities. A case-by-case approach would suffice. Since terrorist acts were indubitably prohibited by and incompatible with international law, damage arising from such acts should certainly not fall within the scope of the draft principles. The same was true of damage inflicted by a belligerent State on a neutral State because, under international humanitarian law, it was incumbent upon belligerent States to refrain from causing injury to third States, hence damage to a neutral State could not be held to have been the result of a lawful act.

42. He failed to comprehend the reasoning behind the footnote on the implications of international humanitarian law concerning armed conflict with regard to liability principles, in paragraph 10 of the third report. In international humanitarian law, it was immaterial whether recourse to war had been wrongful; all parties must abide by the provisions of that law. That was the very foundation of the distinction between jus ad bellum and jus in bello. Even a State which had been the victim of an act of aggression and which was exercising its right of self-defence must respect international humanitarian law. In the case of the conflict between Iraq and Kuwait, Iraq’s liability stemmed not from the fact that it had resorted to force in a manner contrary to international law, but from its deliberate pollution of the environment and its confiscation of the property of neutral States’ nationals. Similarly, as attacks on dams, which international humanitarian law termed “installations containing dangerous forces”, were subject to a whole series of rules when such attacks occurred in the context of an armed conflict, there was no need for the Commission to deal with that question.

43. He shared the views expressed by the Special Rapporteur in paragraphs 7 and 8 of his third report and fully agreed that the threshold of significant damage should be retained, as should the principle of guaranteeing equal treatment between nationals and foreigners.

44. The CHAIRPERSON, speaking as a member of the Commission, welcomed Mr. Momtaz’s support for the idea of a framework convention that he himself had floated the previous year. The subject being considered by the Commission lay at the crossroads of environmental law, international economic law and the law on responsibility. It was a subject replete with major principles which ought to be guided by legal, rather than political, considerations. In view of the fact that a framework convention would in effect lay down rules for States’ conduct it might be wise to reformulate some of the principles. He therefore urged Mr. Momtaz and Ms. Escarameia to join the Drafting Committee, to ensure that their approach was better reflected in the final text.

45. Mr. ECONOMIDES said that the points made by Mr. Momtaz and Ms. Escarameia had been of great significance. The suggestions contained in the report of the Special Rapporteur were a step backwards in two respects. The proposed adoption of principles worded as non-binding recommendations would constitute neither the codification nor the progressive development of the law on the subject. If the principles contained customary rules, turning the principles into recommendations would weaken the standard-setting nature of those rules, and, in so doing, the Commission would be betraying its codification function. If, on the other hand, the principles dealt with matters that had not yet acquired the status of customary rules, by casting them in the form of recommendations rather than rules, the Commission would be shirking its duty to engage in progressive development.

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46. It might be preferable for the Commission to draw up draft articles, but to leave any decision on their final form to the General Assembly—the procedure that had been followed with respect to the draft articles on the responsibility of States for internationally wrongful acts.\textsuperscript{74} In his view, the Special Rapporteur had not been bold enough. He had greatly diminished the force of the text by couching it in a recommendatory form throughout, even when the issues in question were covered by customary law, and by drafting a non-binding text which could be consigned to a drawer and forgotten.

47. Mr. Sreenivasa RAO (Special Rapporteur), replying to members’ comments, concurred with Ms. Escarameia that the topic under consideration was an emotive issue. The difficulty was to know how to translate emotion into forward motion. Caution must be exercised in order to produce a text which would not suffer the same fate as the excellent draft articles proposed by Mr. Barboza,\textsuperscript{75} which had been rejected by the Sixth Committee in 1996.\textsuperscript{76} With all due respect to Mr. Economides, who was a highly experienced legal adviser and negotiator, he personally believed that it was vital to ascertain whether States actually wished to have a formal convention, and to ensure that such a convention would not simply be ignored once it had been adopted.

48. He had not wilfully or maliciously set out to water down a draft text which was the product of 27 years of scholarly debate. Nevertheless, good intentions were not enough; experience had shown that, in the past, even after major disasters, compensation had not been forthcoming, or only \textit{ex gratia} payments had been made. Although nuclear warships roamed the seas, no financial safety net had been provided to deal with the consequences of any potential accidents. The immediate compensation for which Ms. Escarameia yearned did not exist and the only remedy available to victims of transboundary harm was court action, which could drag on for years. Be that as it might, there was reason to hope that slow and steady action would ultimately lead to progress. The Commission would continue to face the paradox to which Mr. Koskenniemi had referred: the survival of the fittest had been the rule throughout history.

49. Legal writings about compensation raised many questions concerning the form that compensation should take, its quantification, the promptness with which it was to be paid, the amount which might be deemed adequate, and forum shopping. As Mr. Gaja had pointed out, some of those matters were outside the scope of the topic, but, as Special Rapporteur, it was his duty to endeavour to provide an answer to at least some of the queries raised by States. Many of those issues would, however, have to be decided at the national level and were not amenable to international harmonization.

50. Initially he had favoured a very strongly worded convention, but he had been warned that there was no likelihood of such a convention ever being ratified. While he would not stand in the way of the Commission if it nonetheless wanted to adopt a convention of that kind, he had found ample evidence in his own country that national courts were more likely to apply principles and to incorporate them in their decisions, than to pay any heed to a convention which had not been ratified. The precautionary approach, the “polluter pays” principle and the principles of compensation which he had discussed in his report had all been applied by national courts. The adoption of a good set of draft principles accompanied by an excellent commentary was therefore the right way to deal with the topic.

51. He fully agreed with the scholarly analysis put forward by Mr. Montaz of the implications of international humanitarian law concerning armed conflict with regard to liability principles. If any aspects of the issue were not already covered in the footnote to paragraph 10 in his report, he would be pleased to rectify the omission.

\textit{The meeting rose at 11.35 a.m.}

\textbf{2874th MEETING}

\textit{Thursday, 11 May 2006, at 10 a.m.}

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Montaz, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.


\textit{[Agenda item 3]}

Third report of the Special Rapporteur (continued)

1. Mr. FOMBA said that, as stated in paragraph 2 of the report, the Special Rapporteur had not included specific drafting suggestions offered by Governments, but instead proposed leaving them to be considered by the Drafting Committee. However, the Special Rapporteur should perhaps have first submitted those suggestions to the Committee so as to give members who were not on the Drafting Committee some idea of the proposals that had been made. Nonetheless, by producing a synthesis of significant trends on the basis of the comments from Governments, the Special Rapporteur had performed a useful task. The fact that, despite some differences of

\textsuperscript{74} See footnote 8 above.

\textsuperscript{75} \textit{Yearbook … 1996}, vol. II (Part Two), annex I, p. 100.

\textsuperscript{76} Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-first session, prepared by the Secretariat (A/CN.4/479), p. 15, para. 64 (mimeographed; available on the Commission’s website, documents of the forty-ninth session).
opinion on the final form the draft principles should take, States had endorsed the general considerations on the basis of which the Commission had adopted the draft principles on first reading, clearly showed that the Commission was moving in the right direction and that a final consensus on the matter was within reach.

2. Turning to the Special Rapporteur’s clarification of various points raised by States, he said he was persuaded by the Special Rapporteur’s conclusion that there was no compelling reason for reconsidering the threshold of “significant damage” in respect of the liability aspects of the topic, despite the concern expressed, rightly or wrongly, that such a definition might violate the principle of non-discrimination. He supported the Special Rapporteur’s argument, cogently set out at the end of paragraph 9 of the report, that the Commission should refrain from embarking on the sensitive and risky task of drawing up a list of activities that might be considered as coming within the scope of the draft principles. He also found himself in sympathy with the Special Rapporteur’s conclusions concerning the possibility of broadening the scope of the draft principles to include liability for transboundary damage caused to neutral States in case of war between two or more States, transboundary damage caused by terrorism and transboundary damage caused by benign activities such as storage of water in dams. As for the scope of the term “damage to the environment”, he concurred with the view expressed by the Special Rapporteur in connection with the three different sets of issues raised by Governments in that regard—namely, global commons, the broad definition of the word “environment” and the admissibility of claims for so-called “pure environmental damage”—that a broader definition of the term “environment” in the context of the draft principles opened up possibilities for further development of the law of liability. Noting that the Special Rapporteur rightly saw a real possibility of a case of multiplicity of claims arising, he welcomed the fact that important issues raised by Governments in that regard—namely, the applicability of the “most favourable law principle” were dealt with in the report. As for the legal status of the draft principles, the Special Rapporteur was right to conclude that, despite the provisions of article 15 of its Statute, the Commission did not, in practice, make any distinction between recommendations that it adopted as an exercise in the codification of existing international law and those relating to its progressive development. He also concurred with the view that the legal value of the draft principles should not in any case be underestimated.

3. With regard to the review of some of the salient features of the draft principles, he found the Special Rapporteur’s conclusions concerning the precautionary principle (para. 26) and the “polluter pays” principle (para. 27) fair, logical and acceptable. As for the section on “Notable obligations of State”, it was significant that the issue of State liability for transboundary damage arising out of either ultrahazardous or hazardous activities did not appear to have gained any support, even as a measure of progressive development of law, and that the Special Rapporteur cited the case law established by the ICJ in Gabčíkovo–Nagymaros Project to illustrate the principle of international law whereby the State had an obligation to exercise due diligence, both at the stage of authorization and monitoring of hazardous activities, and also in the phase when damage might actually materialize, in spite of best efforts to prevent it. He shared the view, cogently set out by the Special Rapporteur, that such an obligation of due diligence carried with it some ancillary duties. He also concurred with the Special Rapporteur’s assertion that equal compliance with the obligation of due diligence should not be expected of all States, for the reasons given at the end of paragraph 32. On the principle of non-discrimination and minimum standards, he believed that the principle of equal treatment of nationals and transboundary victims, which was firmly established in customary international law, should be paramount. The obligation to ensure prompt and adequate compensation was clearly the key issue, and he found the Special Rapporteur’s interpretation of the concept of “adequate” compensation in paragraph 37 of the report correct and acceptable.

4. Lastly he said that, since prevention and liability were so closely interrelated, he would prefer to see the draft principles ultimately adopted in the form of a convention proper or, failing that, a framework agreement. They should be adopted as guidelines only as a last resort.

5. Mr. DAOUDI, referring first to the comments by Governments examined in the beginning of the report, said that the Commission should retain the threshold of damage provided for in the current text of the draft, since non-significant damage could, if repeated, become significant. At the very least, any raising of the threshold should be considered on a case-by-case basis. As for the question of broadening the scope of the topic, he noted that military operations undertaken pursuant to a Security Council resolution using unenriched uranium-based weapons, which were not yet prohibited by international law, could cause damage to the population, property or environment of a third State and to its own forces. Damage caused by a burst dam, as envisaged by the Special Rapporteur, was entirely relevant to the topic. In his own view, damage caused to the global commons should be treated separately, because of the special nature of the questions it raised. The two scenarios envisaged by the Special Rapporteur in relation to multiplicity of claims also raised sensitive questions, to which, as matters currently stood, there were only theoretical solutions.

6. With regard to the main objective of the draft principles, namely, to ensure “prompt and adequate compensation to natural or legal persons, including States, that are victims of transboundary damage, including damage to the environment”, he thought that the obligation to provide compensation should be couched in stronger terms, given that the obligation of the State to exercise due diligence and the liability of the operator were elements of customary law, as was stated in several paragraphs of the report. He also wondered whether the wording of draft principle 4, paragraph 3, should be amended in line with the Special Rapporteur’s comments on strict liability and reversing the burden of proof in paragraphs 3 (c), 26, 27 and 29 of his report.

7. The report linked the performance of obligations by States to prevent environmental damage with the notion of “good governance”. at the same time stressing that not all States—particularly developing countries—had the
economic resources to discharge such obligations. The prevention of environmental damage was surely reason enough to justify a concomitant obligation to engage in the necessary technology transfer. It was regrettable that draft principle 5 did not reflect those important concerns, and he hoped that it would be possible to rectify that omission on second reading.

8. With regard to the form that the draft principles should take, he said that it was difficult to combine provisions of different kinds—some pertaining to public international law, others to customary rules—in a set of codifying draft articles or to incorporate binding customary rules into a set of draft principles. He therefore supported the suggestion in paragraph 45 of the report that the Sixth Committee should appoint a working group that would include in the draft articles on the prevention of transboundary harm from hazardous activities an obligation of States to ensure effective judicial access and remedies and prompt and adequate compensation to victims of transboundary damage. The draft articles could contain a provision stating that the obligation to ensure compensation should be in line with the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.

9. In conclusion, he said he was in favour of referring the draft principles to the Drafting Committee.

10. Mr. KEMICHA congratulated the Special Rapporteur on his third report and welcomed the fact that the draft principles had been favourably received by States. As noted by the Special Rapporteur in paragraph 4 of the report, the question of the final form that the draft should take remained undecided. However, the emotional exchanges to which the question had given rise suggested that, whatever the solution adopted, it should respect the Commission’s mandate. In that regard, he shared the concern expressed by Mr. Economides and others that, by restricting itself to a set of draft principles, the Commission might fail in its mission of codification and progressive development of international law.

11. Turning to specific points raised in this part of the report, he said that the precautionary principle should play a role in the implementation of the draft principles. The Special Rapporteur seemed to suggest that the principle should be mentioned, but did not expand on that suggestion. The question was therefore whether it should appear in the main body of the text, thus shifting the burden of proof to the operator, or in the commentary. The same applied to the “polluter pays” principle, which established the operator’s liability for damage arising out of hazardous activities. The course of action outlined in paragraph 29 of the report, namely, that a proper definition of the word “damage” should be adopted, should be explored further. The Special Rapporteur was also right to dwell on the question of State liability for transboundary damage arising out of hazardous activities and to require States to exercise due diligence, although the former proposal did not seem to have enjoyed any support, even as a measure of progressive development of international law.

12. He also noted that, according to the report, the principle of non-discrimination referred to in draft principle 6, paragraph 3, assumed that suitable remedies and adequate compensation would be available to nationals in the first instance in case of any damage arising from hazardous activities, but would also be available to transboundary victims. The main contribution of the draft principles, however, was the assurance contained in draft principle 3 of prompt and adequate compensation for victims of transboundary damage, based firmly on State practice and judicial decisions and considered to constitute a general rule of international law in the same way as the other principles, as stated in paragraph 23 of the report. In that context, it was understandable that there should be a temptation to extend to the international community as a whole the possibility of adopting the principles, to which an ever increasing number of States subscribed, in the form of a framework convention, a possibility that the Commission had by no means rejected, since all that was needed was to amend the text of draft principles 4 to 8. According to the Special Rapporteur, however, draft principles were preferable to a convention or “framework arrangement”, in that, as he said, “[t]here is value in couching the entire end-product in a more prescriptive form only if it is possible and feasible”. He himself supported that approach and understood the Special Rapporteur’s decision to look to the long term, allowing the draft principles time to mature and acquire legitimacy, without ruling out the possibility of “reflecting the basic obligation on the duty to pay compensation and the right to seek remedies in language that is more prescriptive”.

13. Mr. YAMADA commended the quality of the third report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities and welcomed the prospect of the Commission finally completing its work on the topic after 27 years.

14. The Commission had long struggled to conceptualize that broad topic, before deciding in 1997 to focus on activities with a risk of causing significant transboundary harm and to concentrate first on the issue of prevention and then on liability.” Thereafter, within a short period of five years, the Commission had been able to produce in 2001 draft articles on prevention of transboundary harm arising out of hazardous activities, on which the General Assembly had regrettably not yet acted but which, it was to be hoped, would be adopted as a convention. Then, again in a very short span of time, the Special Rapporteur had produced an excellent set of draft principles on the very complex subject of liability, principles that enjoyed general support.

15. Concerning the final form of the draft, some argued that the same treatment as had been given to the draft articles on prevention should be accorded to the draft principles, in accordance with the wish expressed by Member States in General Assembly resolution 56/82 of 12 December 2001 (para. 3). Nevertheless, in 1996 the Commission had clearly stated that the two aspects of the topic, though related, were distinct. A separate decision would therefore have to be made about regarding the final form of the draft principles. Accordingly, he supported

79 Ibid., para. 165.
the conclusion drawn by the Special Rapporteur, who had an unparalleled grasp of the issues, that the end-product should be cast in the form of draft principles.

16. Regarding the threshold for transboundary damage, he was pleased that the Special Rapporteur had maintained the established policy of the Commission. The concept of “significant damage” was relative and flexible. It should be kept in mind that the hazardous activities in question were not undesirable or unnecessary: on the contrary, they were essential for the welfare of peoples and their development.

17. Concerning the widely held perception that polluters were powerful actors and victims weak ones, he said that while that was often the case, the opposite scenario could also arise. In that connection he cited the example of the many foreign ships that came to grief on Japan’s coastline every year. Most were from small and weak States. The operators lacked the financial capacity to reimburse Japan for the enormous sums it spent to rescue the crews, clean up the pollution and salvage the abandoned ships. The sole possible solution was to formulate a specific international regime, as described in draft principle 7. While he hoped that a convention could be concluded to cover such situations, he was not so optimistic as to suppose that weak States were ready or able to assume such heavy obligations.

18. Lastly, he pointed out that as the present session was the last in which the Special Rapporteur would participate, the Commission must either support him in completing his work or else risk having to start again from square one. Accordingly, he was in favour of referring the draft principles adopted on first reading to the Drafting Committee for finalization.

19. Mr. KOLODKIN said that he, too, wished to congratulate the Special Rapporteur, not only on his third report but also on all his work on the subject of international liability in case of loss from transboundary harm arising out of hazardous activities. The Special Rapporteur had achieved a breakthrough that would enable the Commission to finish its consideration of the topic much more rapidly. It was likely that an end-product could be submitted to the General Assembly at its next session.

20. He endorsed most of the report’s conclusions and positions. Among other things, he favoured retaining the scope of application and the threshold of “significant damage” already adopted by the Commission on first reading and agreed that there was no need to list the activities falling within the scope of the draft principles. During the consideration of the draft on first reading, he had had doubts about the advisability of including damage to environment per se, but in the light of the subsequent debate, he now thought it was a wise decision.

21. As the Special Rapporteur pointed out, State liability for transboundary damage arising out of ultrahazardous or hazardous activities did not have support even as a measure of progressive development of law. In that connection it should be noted that such activities, notwithstanding their dangerous character, were not prohibited by international law and were also necessary for the social and economic development of States. On the other hand, a general principle of international law had emerged under which the State had an obligation of due diligence both at the stage of authorization of hazardous activities and in monitoring the activities authorized. However, a breach of that obligation of due diligence entailed the responsibility of the State for an act prohibited by international law, rather than liability for an activity not prohibited by international law. Accordingly, it was justifiable not to oblige the State in whose territory the damage-causing activity was carried out to provide compensation for the victims. On the other hand, due importance was attached to the principle whereby each State should take the necessary measures to ensure that the victims received prompt and adequate compensation, inter alia by imputing liability to the operator.

22. The principle of strict but limited operator’s liability was already established as a principle of international law in the field of protection of the environment. It was important to specify, as was done in draft principle 4, paragraph 2, that such liability did not require proof of fault. In addition, it should be indicated in the commentary that in the event of fault, the operator’s liability could be unlimited. Such unlimited liability of the operator had already been envisaged, for example in the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents. The draft principles allowed for exceptions to operator’s liability as long as they were consistent with the objective set forth in draft principle 3, namely, ensuring prompt and adequate compensation to victims. The commentary should emphasize that such derogations were exceptions and examples should be given.

23. Whether or not exceptions were to be included depended on the form to be taken by the end-product. A number of provisions would have to be reviewed, if it was decided to submit to the General Assembly draft articles or a draft international convention. The Drafting Committee must have a clear mandate on that question. He personally thought that it would be best for the Commission to confine itself to recommendations at the present stage, since most of the provisions of the draft principles had not yet become rules of international law. Moreover, a set of recommendations was probably what was expected by States, which could use them in drafting legislation and in the administration of justice in that field.

24. The Commission should not simply submit a set of draft principles to the General Assembly, but should also recommend their adoption in the form of a declaration that could serve as the basis for the future adoption of an international convention.

25. Mr. ECONOMIDES commended the Special Rapporteur’s wisdom, experience and talent, which had

80 See footnote 55 above.
enabled him to deal with an extremely difficult subject in a very short period of time.

26. Like Ms. Xue, he found it encouraging that Governments had welcomed the significant trends to which the Special Rapporteur devoted seven subparagraphs in paragraph 3 of his report.

27. Regarding the threshold of damage, he recalled that for over 20 years he had been fighting a losing battle against the concept of “significant” damage. This time, though, it was clearer than ever that the expression did not fit the situation the Commission wished to address, since it sought to exclude liability for minimal or negligible damage. Obviously, however, “significant” went further. He therefore proposed the replacement of “significant damage” by “damage other than minimal”, a negative formulation that was preferable by virtue of its greater flexibility. In addition, the opportunity to place greater emphasis on the principle of non-discrimination between nationals and foreigners gave the Commission a strong reason to lower the bar and lessen the scope of damage to some extent. The Special Rapporteur judiciously raised the question of non-discrimination in paragraph 8 of his report but failed to draw the necessary conclusions.

28. Although he was also in favour of excluding from the draft any questions relating to damage to global commons, he thought that the Commission had a duty to propose officially that such questions, which were of interest to the international community as a whole, should be included in its work programme for consideration at some point in the future.

29. He was in full agreement with Mr. Momtaz regarding the categorical exclusion from the scope of application of the draft of acts of terrorism, acts of war of every type and all acts prohibited under international law—a view that the Special Rapporteur also shared. His reading of paragraph 14 of the report, and particularly the footnote on the F-4 category of environmental and public health claims, brought to mind a question he had never previously considered, namely, whether the recent decisions of the United Nations Compensation Commission concerning environmental damage could be viewed as representative and as a step in the right direction. He would like to hear the Special Rapporteur’s opinion on that point.

30. The Special Rapporteur was right to emphasize in paragraph 15 of his report that the international responsibility of the State of origin for failure to discharge obligations of due diligence set out in the draft articles on prevention of transboundary harm arising from hazardous activities could exist alongside the liability of the operator. Although such responsibility and liability were closely connected, they appeared to be independent of one another, particularly since their implementation was subject to differing conditions. In that regard he did not share the view expressed in the footnote according to which affected individuals and States would be estopped from raising issues of State liability if they had not done so within a reasonable time period. A failure to act on the part of the States and persons concerned could indeed reduce the responsibility of the State of origin, but it could not expunge it entirely, at least as a general rule. From that standpoint, the particular circumstances of each case were decisive.

31. Lastly, as he had already stated at the previous meeting, he favoured the submission of a set of draft articles, which would be more useful to States and national and international courts than a mere list of recommendatory principles. Certainly, the Commission should indicate as clearly as possible, in the commentary to each article, whether the provision resulted from codification of customary international law or constituted a new rule in the context of progressive development. That, after all, was in keeping with its Statute and its practice.

32. However, regarding the final form of the draft, he believed that at the present stage of work the Commission should show more flexibility and adopt the same solution as for the draft articles on responsibility of States, by requesting the General Assembly simply to take note of the draft for the time being, and to defer consideration of the final form it should take until a later stage.

33. Meanwhile, he favoured the referral of the draft principles and comments and suggestions made during the general debate to the Drafting Committee at the earliest opportunity. Nevertheless, like Mr. Kolodkin, he thought that the Commission should be more specific about the question of form. The Special Rapporteur himself had not ruled out the possibility that some draft principles might eventually become primary rules. In his own view, that would be a useful interim solution. In any case, the Drafting Committee should be given a good deal of latitude on the matter.

34. Mr. CANDIOTI congratulated the Special Rapporteur on his excellent work and assured him of his full support. He thanked Mr. Yamada for outlining the history of the topic. When he himself had first entered the Commission, a well-nigh funereal atmosphere had attended the debates on the topic, and many eminent members had advocated abandoning it on grounds of a lack of solid theoretical foundations. It was only when Mr. Sreenivasa Rao had been appointed Special Rapporteur on the topic that the Commission had, in a short span of time, been able to develop final draft articles on the obligations of prevention that had won the support of Governments and that was worthy of being set forth in the form of a convention. The Commission should not lose heart: once again, in a short span of time, the Special Rapporteur had elaborated an extremely interesting set of draft principles that introduced a fundamental change of approach.

35. Accordingly, he considered that the Commission should further refine the eight draft principles and submit them to the General Assembly, which should then decide on the most appropriate course to follow. Nevertheless, it was important to respond to the request of the Chairperson of the Drafting Committee by giving the Drafting Committee some guidance. The Commission

81 See footnote 78 above.
could recommend that the Drafting Committee determine
whether certain provisions could be formulated in a
more prescriptive fashion, for example by replacing the
numerous instances of the word “should” in the English
text by “shall”.

The meeting rose at 11.20 a.m.

2875th MEETING

Friday, 12 May 2006 at 11.35 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Later: Mr. Victor RODRÍGUEZ CEDEÑO

Present: Mr. Addo, Mr. Baena Soares, Mr. Candidoti,
Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr.
Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba,
Mr. Gaja, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin,
Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr.
Mottaz, Mr. Sreenivasa Rao, Mr. Valencia-Ospina, 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.4/562 and Add.1, A/

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. CHEE commended the Special Rapporteur’s
tenacity and diplomatic skills, which had enabled him to
overcome many obstacles. Equipped with his excellent
third report on the legal regime for the allocation of loss
in case of transboundary harm arising out of hazardous
activities, the Commission would undoubtedly bring its
work to a successful conclusion.

2. Following the adoption of the draft articles on
prevention of transboundary harm from hazardous
activities, the Special Rapporteur had produced the draft
principles on liability arising from transboundary harm,
which were intended to be a soft law instrument. The core
of the instrument was the provision of remedies for damage
sustained by victims; if compensation for the damage was
not adequate, additional financial resources would be
provided based on allocation of loss. The formulation in
principle 4 seemed to be based upon the Hull formula,
articulated by United States Secretary of State Cordell Hull
in 1938 in response to the nationalization of United States
assets by the Government of Mexico.85

3. The preamble to the draft principles referred to the
1992 Rio Declaration,84 which had followed up on the
1972 Stockholm Declaration.85 It was significant that
both declarations contained a clause on the obligation of
States to ensure that “activities within their jurisdiction
or control do not cause damage to the environment of
other States or of areas beyond the limits of national
jurisdiction”.

4. The Special Rapporteur’s report highlighted
three principles, namely the precautionary approach,
the “polluter pays” principle and the principle of due
diligence. In paragraph 42 of his report the Special
Rapporteur declared his objective of casting the end-
product in the form of draft principles, an approach
which had the twofold advantage of not requiring the
potentially unachievable harmonization of national laws
and legal systems, and of being more likely to meet the
goal of widespread acceptance. Paragraph 43 of the report
stated that such a course might pave the way for eventual
codification of international law on the subject.

5. Principle 21 of the 1972 Stockholm Declaration
was also of great relevance to the topic, and a reference
thereto should be included in the preamble to the draft
principles on allocation of loss. While both developing
and developed States continued to seek industrial
development, the reality was that environmental
pollution had been mainly caused by the developed
countries. Their reluctance to regulate environmental
pollution was therefore to be expected. Nevertheless,
the stakes were high: unless industrial pollution was
regulated, the very future of human life on earth could
be jeopardized.

6. On the threshold of “significant” harm adopted in
draft principle 1, he noted that that criterion needed to
be weighed against the extent of the risk of such harm
arising. Draft principle 2 provided comprehensive
definitions of “damage”, “environment”, “transboundary
damage”, “hazardous activity” and “operator”. Draft
principle 3 was crucial in that it defined the objective
of the draft principles as being to provide compensation
which was prompt and adequate. Accordingly, pursuant
to draft principle 4, paragraph 1, each State should
take necessary measures to ensure that prompt and
adequate compensation was available for the victims
of transboundary damage. Paragraphs 3, 4 and 5 of the
same draft principle related to financial security such as
insurance to cover claims of compensation, including
industrywide funds at the national level where appropriate
and, where such measures proved to be inadequate, called
upon the State to ensure that additional financial resources
were allocated. Draft principle 5, on response measures,
provided that States should, inter alia, take steps promptly
to notify other States affected. Draft principle 6 indicated
that States should provide appropriate procedures to
ensure that victims received compensation for damage
caused by transboundary harm. In draft principle 7,
States were urged to cooperate in the development of
global, regional or bilateral agreements on prevention and
response measures.

84 See footnote 56 above.
85 See footnote 72 above.
7. Draft principle 8, paragraph 2, called upon States to apply the draft principles and any implementing measures without any discrimination such as that based on nationality, domicile or residence. Paragraph 3 urged States to implement the draft principles in a way that was consistent with their obligations under international law. The language of draft principles 4 to 8 was, of course, recommendatory rather than prescriptive.

8. As to the final form that should be taken by the draft principles, they should be transformed into a legally binding instrument. Precedents existed in some of the principles of the Stockholm and Rio Declarations that he had cited earlier, which could be regarded as norm-creating declaratory principles of international law. Another precedent was provided by the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the Commission in 1950. In any case, whether the draft principles were adopted as an instrument containing prescriptive articles or as a recommendatory soft law instrument, the Special Rapporteur had his support.

9. Mr. BAENA SOARES said that while the Chairperson had already welcomed Mr. Valencia-Ospina on behalf of the Commission, he wished to extend him an especially warm welcome on behalf of the Latin American members of the Commission.

10. The third report on allocation of loss in case of transboundary harm constituted new evidence of the Special Rapporteur’s talent for synthesizing and harmonizing positions and for giving careful consideration to all aspects of an issue. It therefore came as no surprise that the draft principles had been well received by the General Assembly. The fact that the Commission was now embarking on the final phase of its work on the draft was evidence of the extraordinary progress made. As the Special Rapporteur had pointed out, 24 reports had been devoted to the topic over a period of 27 years, and Mr. Candioti had recalled how, 10 years previously, a number of eminent jurists had attempted to bury the topic. The fact that the work could be completed at the current session was truly a splendid reversal of fortunes.

11. Generally speaking, he supported the Special Rapporteur’s wise and prudent recommendations. Flexibility and effectiveness should be the watchwords informing the decisions made, especially with regard to the final form that the draft principles should take. The Special Rapporteur was right to suggest, in paragraphs 42 to 44 of his report, that the best way of working with States was for the Commission to offer the end-product as draft principles with commentaries and to wait until the time was ripe for a binding instrument. It would appear that that time had not yet come. The fact that as of October 2005, nearly 10 years after its adoption, the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter “1997 Watercourses Convention”) had been ratified by only 6 States and signed by only 16 was hardly auspicious.

12. In view of the variety of factors involved and the diversity of situations, flexibility was of the utmost importance for the success of his work, a fact of which the Special Rapporteur was well aware. He agreed with the Special Rapporteur that the draft should be general and residual to enable States to fashion specific regimes taking into consideration particular sets of circumstances. In addition, it was essential to ensure that victims of hazardous activities received prompt and adequate compensation, as the report asserted when designating the liability of operators as being strict but limited, with a minimum of exceptions. The report cautiously endorsed the “polluter pays” principle and, with regard to multiplicity of claims, referred to the considerable support given to adopting the “most favourable law” principle.

13. The Special Rapporteur rightly remained of the opinion that there was no good reason not to maintain the threshold of “significant” harm, thereby excluding negligible damage and frivolous claims. He had no reservations regarding the Special Rapporteur’s handling of the question of damage to environment per se, and considered the Commission’s definition of “environment” to be sufficiently broad.

14. In the section entitled “Notable obligations of State”, the Special Rapporteur pointed out that State liability for transboundary damage for either ultrahazardous activities or hazardous activities did not appear to have support, but that the obligation of due diligence had emerged as a general principle of international law to be observed by States both at the stage of authorization of hazardous activities and in monitoring the activities authorized, with the ancillary duty of mitigating the effects of damage when it took place. In paragraph 32, the Special Rapporteur quite rightly referred to principle 11 of the Rio Declaration and to the need to take account of the wide divergence of social and economic conditions obtaining among States. The standards applied by some countries might be inappropriate and of unwarranted economic and social cost to other countries.

15. At the end of the report, the Special Rapporteur raised the issue of the relationship between the draft articles on prevention adopted by the Commission in 2001 and currently awaiting further action by the General Assembly, and the draft principles under consideration, offering the Commission, in paragraphs 45 and 46 of the report, two alternative courses of action. In his personal view, both suggestions should be transmitted to the General Assembly for consideration and decision, as both were relevant and appropriate. For his own part, he preferred the proposed course of action set forth in paragraph 45 of the report.

16. Mr. Sreenivasa RAO (Special Rapporteur), summing up the discussions, said it was regrettable and frustrating that, session after session, the Commission had been unwilling to devote the necessary time to such a complex topic. Although Mr. Pellet had rightly noted that the subject required careful study and should not be rushed through, it had been on the Commission’s agenda for nearly 30 years but had gone nowhere. The Commission should decide whether it really wanted to pursue the topic, or to accord it an honourable burial.
17. He was grateful to all members who had commented on his third report, which he had sought to keep short and concise. He could not have hoped to solve the problems left in abeyance for so many years, especially as the issues were becoming increasingly technical and politically sensitive. Stressing the need for the work in the Commission to be based on a spirit of compromise, good faith and transparency so that the views of all members could be taken into account and no one was left isolated, he thanked Mr. Economides for his independence of mind, Ms. Escarameia for her valiant efforts, Mr. Matheson for bringing in a completely new perspective and for his cooperation in seeking a common goal, and Mr. Gaja for drawing attention to a number of aspects of a given issue which had hitherto gone unnoticed. It should be borne in mind, however, that not all goals could be attained. Aware of the heavy burden of responsibility he bore, he had been unable to move ahead as quickly as some might have liked. He himself could only make proposals, and he relied on members for their contributions and comments in what should be a collegial effort.

18. Much work remained for the Drafting Committee. Like the Sixth Committee, the Commission in plenary session had identified some clearly established principles. Mr. Matheson had summed up the situation in his excellent statement on the topic. He himself had done so to a certain degree in the section of the report on “Notable obligations of State”.

19. Throughout the 27 years of debate, the State had been the main focus, but it had become clear in the mid-1990s that, although not directly liable, a State had an obligation to set up a liability regime and would be responsible if it failed to do so. For the past 10 or so years, the Commission had promoted the ideas of civil liability and of strict and limited liability of the operator as far as was possible; that notion had already been accepted in most jurisdictions. There could, however, be no single set formula even in that respect. If liability were made less strict and fault liability established, some goals could still be achieved. Moreover, as Mr. Kolodkin had rightly pointed out, in the case of fault and negligence on the part of the operator, the operator’s liability was unlimited. However, although the literature showed that strict and limited liability was not the only way of achieving prompt and adequate compensation for victims, the general tendency was to require strict and limited liability of the operator with respect to hazardous activities. That was because it was difficult to obtain proof: the activities were complex, and industrial secrecy and other requirements of confidentiality did not permit full disclosure of how they were carried out. If it was difficult for nationals or Governments to obtain proof, it was even more difficult for victims of transboundary harm to do so. Hence the need for strict liability, which lightened the burden of proof. As Mr. Yamada had noted, such liability must be limited, because in the modern world, there was universal interest in such activities continuing; no one wanted an operator to be put out of business because of a single accident, especially if he was irreplaceable. Moreover, it was still difficult for operators to obtain security such as insurance to cover themselves against claims, and thus some obligations could not be strictly imposed.

20. No State could any longer allow hazardous activities within its territory without putting some kind of compensatory mechanism or liability regime in place for the potential victims of transboundary damage. States could not shelter themselves behind the excuse that they had no relevant legislation and thus could not pay compensation. If the operator did not pay, the State should do so. Ultimately, it was no longer acceptable in terms of human rights and the development of international law that the State should fail to intervene and pay compensation.

21. The question was how to incorporate those considerations in the draft principles. The Commission had reason to be pleased with draft principle 4, but it had to be strengthened. As Ms. Escarameia had observed, the problem was one of content. He urged members to put forward their own proposals for new formulations.

22. The Commission had agreed that supplementary funding mechanisms were very important. As in other contexts, States must attract contributors other than the operator on the basis of a common interest in the continuation of an activity. Alternatively, they might introduce tax mechanisms. It was in the common interest of other stakeholders to establish supplementary funding mechanisms to deal with oil spills or nuclear accidents. In some instances, the State itself had contributed to establishing liability for accidents in nuclear power plants, because it was directly involved in running the plants and wanted the operating process to continue. It would be difficult to introduce a supplementary mechanism as a mandatory obligation without identifying which stakeholders had a common interest in contributing to it. Different types of contributor would have to be found for each hazardous activity.

23. It was important to place on record those areas in which consensus existed. The State had considerable flexibility in deciding how to go about ensuring that the operator, however he might be defined, paid compensation to victims of transboundary damage arising out of hazardous activities, but that idea must emerge clearly and unambiguously at some point in the draft principles; that was a job for the Drafting Committee. He would indicate in the commentaries to what extent some of the principles were in the process of crystallizing into clear obligations. It was not necessary to include everything in the text itself; many issues could be dealt with in the commentaries, thereby opening the way to compromise. The format would have to be that of draft principles; but the Commission could not establish a principle without fleshing it out, and if a principle remained hollow, it would serve no purpose. That was why he was not prepared to cast the draft principles in the form of a convention, because then everything would have to be spelled out in mandatory, normative terms, which was not possible.

24. Accordingly, it would be best for the Drafting Committee to consider the draft principles in the light of the drafting suggestions and comments made, before discussing how some of the formulations could be strengthened, bearing in mind Mr. Koskenniemi’s comment about the fundamental need to ensure that victims
received compensation. If the Commission lost sight of that fundamental objective, then the entire exercise would have been in vain. That would be a shame, since there was still time to realize the topic’s great potential.

25. The CHAIRPERSON said that the Commission had thus completed its consideration of the topic of 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). In keeping with the Commission’s practice, the draft principles would be referred to the Drafting Committee so that their consideration on second reading could begin, having regard to the Special Rapporteur’s proposals, the comments of Governments and the observations made by members of the Commission during the debate.

26. The Bureau was of the opinion that the Commission should follow the Special Rapporteur’s recommendations and that it was for the General Assembly to decide whether the results of the work on the topic should take the form of a convention or of a statement of principles. Furthermore, the Drafting Committee should bear in mind that there were two groups of principles: those which were already regarded as being part of general or customary international law, and those which fell within the area of progressive development. The principles that were already part of customary international law should be couched in normative terms, whereas those that sought to gain entry into general international law should allow for some flexibility so that the Commission could rally the support of all States and the international community as a whole. The Chairperson asked whether, bearing in mind the convergence of approach that had emerged in the comments of members, the guidance offered by the Special Rapporteur and the Bureau’s assessment, the Commission wished to refer the draft principles to the Drafting Committee.

27. Mr. MATHESON said that the Drafting Committee would undoubtedly take into account the Chairperson’s comment regarding the possible customary law basis of some of the draft principles. He sought reassurances, however, that the Commission was not instructing the Drafting Committee to draw up two separate sets of principles, one of which pertained to customary law while the other did not. Such an approach would be impracticable and have an adverse impact on the Commission’s work. The Drafting Committee would be wise to work on the basis of the principles put forward by the Special Rapporteur.

28. The CHAIRPERSON said that there had never been any suggestion, from any quarter, that two sets of principles should be prepared. Each draft principle would be considered and dealt with as appropriate. If he heard no objection, he would take it that the Commission wished to refer the draft principles to the Drafting Committee.

It was so decided.

Mr. Rodríguez Cedeño (Vice-Chairperson) took the Chair.

Responsibility of international organizations


FIFTH REPORT OF THE SPECIAL RAPPORTEUR

29. Mr. GAJA (Special Rapporteur), introducing his fourth report on responsibility of international organizations, said that he would discuss only the first part of the report. The second part of his report would be presented during the current session if the programme of work allowed. Comments received from international organizations following the Commission’s fifty-seventh session appeared in documents A/CN.4/568 and Add.1. He would refer extensively to two comments—from the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO)—which had been received after the date of submission of the report but which included a brief discussion of circumstances precluding wrongfulness.

30. In recent months there had been a positive increase in the interest shown by international organizations in the Commission’s work on responsibility of international organizations, as evidenced by two meetings that he had attended. The first had been organized by the World Bank and had involved lawyers from the World Bank, the International Monetary Fund (IMF) and other financial institutions. The second, held in Vienna on the initiative of the Legal Counsel of the United Nations, had been attended by the legal counsels of all the United Nations specialized agencies and of the host agency, the International Atomic Energy Agency (IAEA).

31. Regarding circumstances precluding wrongfulness, it must be emphasized that there was a dearth of available practice and literature on the subject. That should not be taken to mean that circumstances precluding wrongfulness were not relevant with regard to wrongful acts of international organizations, that, for example, consent would preclude the wrongfulness of an act of a State but not that of an act of an international organization. Nor would it be tenable to hold that an international organization could never invoke force majeure. At the same time, however, not all the circumstances precluding wrongfulness should be applied in the same way to States and to international organizations.

32. Although the report considered all the circumstances precluding wrongfulness that had been dealt with in the context of States, he would, in his introduction, consider only three circumstances that appeared to raise specific problems with regard to international organizations, on the basis of what little practice he had gleaned in that area. The three were self-defence, countermeasures and necessity.

87 See the text of the draft articles adopted so far by the Commission in Yearbook … 2005, vol. II (Part Two), chapter VI, section C.
89 Idem.
33. The conditions for an act to be regarded as lawful because it was performed in self-defence were to some extent controversial. The Commission had not conducted an examination of those conditions when drafting the articles on responsibility of States for internationally wrongful acts,90 nor, in his view, should it do so in the context of international organizations. The first question that arose was whether self-defence was relevant to international organizations. The term had frequently been used in United Nations documents—probably not always appropriately—in order to specify the circumstances in which the use of force by United Nations peacekeeping forces was permissible. According to the position taken by the United Nations, they were entitled to react to attacks—including for the defence of the mission—and such a reaction was to be regarded as lawful. The same would apply to organizations other than the United Nations that lawfully employed armed forces. Self-defence could also be invoked by an international organization under other circumstances, such as an armed attack on a territory that it administered. Although the World Health Organization held that “a circumstance such as self-defence is by its very nature only applicable to the actions of a State”, that view appeared to ignore circumstances in which self-defence would be relevant. UNESCO, on the other hand, had favoured including self-defence as a circumstance precluding wrongfulness.

34. The second question was whether an international organization that was the target of an armed attack could invoke self-defence under the same conditions as a State. There again, he could see no reason why a different condition should apply to an international organization. As noted in paragraph 18 of the report, the ICJ had stated, in its judgment in Oil Platforms, that it did “not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the ‘inherent right of self-defence’” (para. 72 of the judgment). That was, admittedly, a broad conception of self-defence, but it stood to reason that the same solution should apply if an armed force deployed by an international organization or a territory that an organization administered was the object of a similar attack.

35. Countermeasures had been referred to in article 22 of the draft articles on responsibility of States for internationally wrongful acts,91 within the chapter on circumstances precluding wrongfulness, only because of the effect that they had on the wrongfulness of the act by the State resorting to such a measure. Detailed provisions on countermeasures had been included in Part Three of the draft articles. A similar approach should be taken with regard to international organizations. It could not be ruled out that such an organization might take countermeasures under certain circumstances. For example, should a State or another international organization breach an obligation under a bilateral agreement with an international organization, there was no reason why the latter should not be entitled to resort to countermeasures. The conditions under which it might do so would need to be discussed. UNESCO had noted that the issue should be “clearly distinguished from that of sanctions, which may be adopted by an organization against its own member States”. The Commission would need to reflect on whether sanctions could be regarded as countermeasures. It should do so, however, only when it came to discuss the implementation of international responsibility. Meanwhile, the provision could either be left blank save for the title, or else a text modelled on article 22 of the draft articles on responsibility of States for internationally wrongful acts could be included, with an implied reference to the provisions—yet to be written—that would specify the conditions under which an international organization might resort to countermeasures.

36. There were a considerable number of references to necessity in the practice of international organizations. The main question was whether, as a circumstance precluding wrongfulness, the concept of necessity should be applied to international organizations as liberally as it was to States. According to article 25 of the draft articles on responsibility of States for internationally wrongful acts,92 States could invoke necessity when a grave peril threatened one of their essential interests or an essential interest of the international community as a whole. The essential interests that an international organization could invoke should not, however, be as wide-ranging as those of States. Paragraph 42 of the report referred to the way in which the term was understood by various international organizations, including the World Bank and the IMF. The European Commission referred to the need to protect an “essential interest enshrined in its Constitution as a core function and reason of its very existence”. The first part of this wording was explicitly endorsed by ILO, and UNESCO also referred to the “functions” of the organization. Indeed, the latter had—somewhat prematurely—approved the text of draft article 22 appearing in paragraph 46 of the report, which stated that the only essential interests for which an international organization might invoke necessity were those which the organization had the function to protect. That would exclude, on the one hand, other interests pertaining to the international community but not entrusted to that organization and, on the other hand, interests relating to the very existence of the organization, unless the grave peril would also affect the essential interests that the organization had the function to protect.

The meeting rose at 1 p.m.

2876th MEETING

Tuesday, 16 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Opetti Badan, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

90 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 26, para. 76.
91 Ibid., p. 27 and pp. 75–76 for the commentary.
92 Ibid., p. 28 and pp. 80–84 for the commentary.

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the members of the Commission to comment on the Special Rapporteur’s fourth report on responsibility of international organizations.

2. Ms. ESCARAMEIA congratulated the Special Rapporteur on his excellent work on a highly technical subject, the study of which was made all the more difficult by the dearth of practice in the matter. The absence of practice might explain why the draft articles closely followed the pattern of the draft articles on responsibility of States for internationally wrongful acts. Nonetheless, she did not understand why some areas had been included and others excluded, especially situations of coercion, to which reference was made in paragraph 8 of the report. Such situations had likewise been excluded from the draft articles on responsibility of States for internationally wrongful acts, but since she had not participated in the debate on that subject, she was unaware of the precise reasons for that decision, and the commentary threw no light on the matter. Very small organizations could easily be coerced by a strong State or another organization, as had been pointed out by Belarus (see paragraph 8 of the report). Coercion not only engaged the responsibility of the coercing State, it also precluded the wrongfulness of the act of the organization being coerced, yet even from reading of the commentary to article 18 of the draft articles on responsibility of States, it was unclear why coercion was not listed among the circumstances precluding wrongfulness since, according to paragraph (2) of the commentary, “[C]oercion … has the same essential character as force majeure”, inasmuch as the coerced State would have no effective choice but to comply with the wishes of the coercing State. Similarly, paragraph (4) of the commentary to the same draft article, indicated that “the wrongfulness of an act is precluded vis-à-vis the coerced State”, while paragraph (3) of the commentary to draft article 23 stated that coercion might also amount to force majeure if it met the various requirements of that article. It therefore seemed that the reason for excluding coercion from the circumstances precluding wrongfulness was essentially a question of degree and that it was necessary to ascertain whether the force was so irresistible as to prevent the organization from performing its obligations. Since force majeure covered several other situations, such as unforeseen events, coercion should be granted some autonomy in the draft articles, though possibly within strict limits. She did not see why it should be necessary to decide that coercion produced effects only on the entity exerting coercion and not on the coerced entity, although that choice was doubtless explained by reasons given when the draft articles on responsibility of States for internationally wrongful acts had been debated. Those considerations might also apply to cases of fraud, in which an international organization was mistakenly induced by a State or another organization to commit an act.

3. As in the draft articles on responsibility of States, the Special Rapporteur had identified six circumstances precluding wrongfulness. The first was consent; there were several examples of practice, so that it was possible to have a very clear idea of the subject matter. Draft article 17 ought to indicate that other entities besides States and international organizations, for example territories or autonomous regions, which might be members of international organizations, could give their consent to the commission of a given act by an international organization. There was no reason to exclude such entities.

4. The question of self-defence was more controversial because it was normally associated with the defence of a population or territory and hence did not apply to international organizations except when they administered territories. In all other cases it was the defence of the forces in the service of the international organization that was at issue. Since States could obviously invoke the right of self-defence if their armed forces were attacked, a parallel could be established if, for example, United Nations armed forces were attacked. As the Oil Platforms case plainly demonstrated, territory was not the sole target. Practice provided several examples, including the rules of engagement of United Nations forces, to which the Special Rapporteur alluded. If force was used by an international organization one of whose members had been the object of an armed attack, especially if that organization was a collective defence organization such as NATO or certain other regional organizations, the right of self-defence could be invoked only if the response was from the international organization itself and not from its members, even if they were acting collectively. She suggested that in draft article 18, which dealt with that issue, the words “the Charter of the United Nations” should be replaced by “international law”, because the Charter contained no reference to self-defence on the part of international organizations.

5. As for draft article 19 (Countermeasures), international organizations could very well apply countermeasures; indeed, they were a fairly common device, especially where commercial interests were at stake, and organizations with a commercial purpose, such as the European Union, had already used them against other international organizations or non-member States. Countermeasures therefore had a place in the draft articles. She favoured alternative B of draft article 19, as proposed in paragraph 25 of the report, as a basis for the Commission’s work.

6. In dealing with force majeure, the Special Rapporteur had raised the very interesting issue of the inability of an international organization to perform its obligations for financial reasons. The point certainly deserved closer examination, but if that circumstance were included, the requirement set out in draft article 20, paragraph 2 (b), was too stringent. It would be difficult for an international
organization not to assume the risk of such a situation occurring, because that risk was always present, since an international organization did not have the same means as a State with which to secure its financial resources. Although it could expel members that did not pay their contributions, that step was more likely to exacerbate the problem than to solve it.

7. As for distress, it was difficult to envision examples in practice, at least as far as international organizations were concerned. Nevertheless, when they administered territories, possible instances were non-compliance with the obligation to save the lives of the people in those territories, or a situation in which the armed forces of an international organization needed to enter a territory without prior authorization in order to save the lives of members of those forces. Perhaps it might be advisable to broaden the scope of draft article 21 by replacing, in paragraph 1, the phrase “other persons entrusted to the author’s care” with a phrase such as “persons with whom it has a special relationship”, since paragraph (7) of the commentary to article 24 of the draft articles on responsibility of States used the wording “where there exists a special relationship between the State organ or agent and the persons in danger”\footnote{Ibid., p. 80.}—a formulation which seemed preferable, as the persons in question might not have been entrusted to the author’s care, but could be relatives, or any other persons whose fate was important to the author. In a different context, but for the same reason, the Rome Statute of the International Criminal Court excluded international criminal responsibility in situations where the life of the author or of other persons close to him was at stake.

8. She concurred with the view of most States and international organizations that necessity was a notion which ought to be included in the text. On the matter of the essentiality of the interests to be protected, she disagreed with the view expressed by the Special Rapporteur in paragraph 41 of the report: the interests defended by international organizations such as the United Nations, were much more important than those of certain small States, and the disappearance of the Organization would be of far wider implications in terms of international affairs than would the disappearance of some small island States. Consequently the interests championed by an international organization were not necessarily less essential than those defended by a State. As UNESCO had pointed out, those interests should not be confined to those enshrined in its constituent instrument—the Special Rapporteur seemed to agree on that point—but should also include those mentioned in other documents, or even implied powers. In draft article 22, paragraph 1 (a), mention should therefore also be made of the very existence of the international organization as an essential interest, even if that appeared a risky course of action for reasons that the Special Rapporteur had probably borne in mind; for that existence could in itself have dramatic consequences for the international community as a whole. In subparagraph (b), it was likewise necessary to consider whether the obligation of not seriously impairing an essential interest should refer not only to the interest of States, but also to that of other international organizations or other entities. Basically she approved of draft article 22, subject to the two points she had raised. She had no comments on draft article 23.

9. Lastly, she concurred with the Special Rapporteur’s comments on draft article 24 (Consequences of invoking a circumstance precluding wrongfulness), and especially with his remarks concerning the temporal limitation implied in subparagraph (a). She therefore proposed that the words “no longer exists” should be replaced by “does not exist”.

10. Mr. MANSFIELD said that the examination of the issue of circumstances precluding the wrongfulness of an act of an international organization confirmed the wisdom of the Special Rapporteur’s approach of following the general pattern of the draft articles on responsibility of States, while considering carefully in each situation whether there were grounds for departing from or modifying the relevant provisions in the case of international organizations. He supported the Special Rapporteur’s view that the Commission’s reason for not employing the distinction between “justification” and “excuse” in the draft articles on responsibility of States was equally valid in the case of responsibility of international organizations.

11. He agreed with the Special Rapporteur that the circumstances in which consent might preclude the wrongfulness of an act of an international organization did not give rise to any particular issues, and supported his proposal that the relevant draft article should follow the model of the corresponding provision on responsibility of States, with only the necessary textual modifications. The inclusion of an article establishing self-defence as a ground for precluding the wrongfulness of an act of an international organization seemed at first sight more problematic; one did not immediately think of an international organization needing to use force in self-defence. However, as the report rightly pointed out, the need for self-defence might well arise in the context of United Nations peacekeeping missions and also in respect of other organizations that had military forces or were administering territories. Thus, there was no reason why an international organization should not be able to respond lawfully to an armed attack. Draft article 18 seemed a satisfactory formulation which left it to the commentary to make the point that in some circumstances an international organization might be able to invoke self-defence in its response to an attack on a member State.

12. As pointed out by the Special Rapporteur, the issue of countermeasures could not be fully dealt with until the conditions under which an international organization might resort to countermeasures had been considered. However, there seemed to be no reason why an international organization should be precluded from resorting to countermeasures in appropriate circumstances, and it therefore seemed desirable at the current stage to include a provisional article along the lines of Alternative B suggested by the Special Rapporteur in paragraph 25.

13. While he saw no reason why an international organization should be unable to invoke force majeure as a circumstance precluding wrongfulness, in particular for
natural events or “an irresistible happening of nature”, he was less happy with the idea, discussed in paragraph 31, that “financial distress”, might constitute an instance of force majeure. A failure by member States to pay their financial contributions might well place an international organization in a very difficult position, but a State could not invoke force majeure as a circumstance precluding wrongfulness merely because it had failed to receive payments or revenue that were critical to its solvency, and he did not see why an international organization should be any different. At the very least, it would seem unacceptable that an international organization should take on new contractual obligations, in the knowledge that it would be unable to fulfil them because its members were deliberately withholding the necessary contributions. That said, article 20 was satisfactory as drafted.

14. He still had concerns about the idea that States could invoke necessity as a circumstance precluding the wrongfulness of an act which would otherwise be contrary to international law, given the risk of abuse, and in the case of an international organization, the argument was significantly weaker. An international organization could not invoke the necessity of its own survival, but only the preservation or protection of an interest that it existed to protect, in other words an essential interest the protection of which was part of the functions that had been specifically entrusted to it. As draft article 22 reflected that restrictive view, set out in paragraphs 41 to 44 of the report, of the circumstances in which an international organization could invoke the state of necessity, he could go along with it, albeit with some continuing misgivings.

15. Mr. ADDO congratulated the Special Rapporteur on the quality of his fourth report, the content of which he endorsed almost in its entirety. He supported the Special Rapporteur’s approach of following the general pattern adopted in the draft articles on responsibility of States. Commenting on the various draft articles on circumstances precluding the wrongfulness of an act of an international organization, he supported draft article 17 (Consent) and draft article 18 (Self-defence), which were modelled on draft articles 20 and 21 respectively of the draft articles on responsibility of States for internationally wrongful acts.98 With regard to countermeasures, he endorsed the idea of leaving the text blank, as envisaged in paragraph 25 of the report. As for force majeure, he noted that international law did not impose responsibility where the non-performance of an obligation was due to circumstances entirely beyond the control of the State, and was of the view that the same must apply in the case of international organizations. Draft article 20, which was in conformity with article 23 of the draft articles on responsibility of States,99 was therefore acceptable.

16. On distress, he agreed with the Special Rapporteur that there was no reason why different rules should apply to States and to international organizations; draft article 21, which was based on article 24 of the draft articles on responsibility of States, was thus satisfactory. On necessity, he agreed with the Special Rapporteur that there was no reason to depart from the model provided by draft article 25 on responsibility of States, and he supported the proposed wording for draft article 22. He also endorsed draft articles 23 (Compliance with peremptory norms) and 24 (Consequences of invoking a circumstance precluding wrongfulness), which were modelled on draft articles 26 and 27 of the draft articles on responsibility of States respectively.100
on an equal footing. If that reading of draft article 18 was correct, and to judge from paragraphs 17 and 18 of the report, the provision was incontestably based on a broad interpretation of Article 51. In paragraph 17 the Special Rapporteur concluded that, in practice, self-defence on the part of United Nations peacekeeping and peace-enforcement forces constituted a circumstance precluding wrongfulness irrespective of whether an armed attack against them was carried out by a State or a non-State entity.

3. The approach taken in draft article 18 posed no intrinsic problem, because attacks by non-State entities on United Nations facilities, particularly in Iraq, unquestionably confirmed the need to allow international organizations to defend themselves against such attacks. He was, however, concerned about the legal basis for such an approach, given that the whole question of States’ recourse to self-defence against armed attacks from non-State entities continued to be highly controversial. In the wake of the tragic events of 11 September 2001 and the adoption of Security Council resolutions 1368 (2001) and 1373 (2001) of 12 and 28 September 2001 respectively, some legal writers held that the Security Council had expanded the possibility of invoking the right of self-defence in response to such attacks.

4. In his own submission, that was not the case; first, because, when the Security Council had wished to adopt counter-terrorism measures under Chapter VII of the Charter, on the basis of the aforementioned resolutions, it had been obliged to establish a link between Afghanistan and Al-Qaida. In other words, the acts of terrorism justifying recourse to self-defence had been imputed, not to a non-State entity, but to a State—Afghanistan.

5. Moreover, the ICJ had always rejected the idea that the right to self-defence could be relied upon after an armed attack conducted by a non-State entity. For example, in paragraph 139 of its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004, the Court had found that since Israel did not claim that the attacks against it were imputable to a foreign State, it could not affirm that it was exercising a right of self-defence under Article 51 of the Charter. Hence the Court took the view that, for the right of self-defence to be invoked, the armed attack must be conducted by a State, or must be imputable to a State if carried out by non-State entities. Admittedly that line of reasoning had been challenged by some members of the Court, including Judge Higgins, the current President of the Court, who had stated in paragraph 33 of her separate opinion that “[t]here is ... nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State” (p. 215 of the opinion). Judge Higgins therefore considered that attacks against a State by non-State actors were covered by Article 51 of the Charter. She further contended that the Court’s refusal to extend the inherent right of self-defence to situations where armed attacks were carried out by non-State entities was the result of the Court so determining in its judgment rendered in 1986 in the Military and Paramilitary Activities in and against Nicaragua case. It was interesting to note that while Judge Higgins had acknowledged that the interpretation of Article 51 in that case “is to be regarded as a statement of the law as it now stands” and accepted that conclusion, she also maintained all the reservations as to that proposition that she had expressed elsewhere in writing (ibid.).

6. In paragraph 11 of his separate opinion in the Armed Activities on the Territory of the Congo case, Judge Simma, too, had taken issue with the restrictive reading of Article 51 of the Charter. He had submitted that Article 51 also covered defensive measures against terrorist groups and had considered that Security Council resolutions 1368 (2001) and 1373 (2001) justified an extensive interpretation of Article 51 (p. 337 of the judgment).

7. While those opinions heralded a new approach to the notion of self-defence, the fact remained that State practice and most legal writers still tended to adhere to a restrictive interpretation of Article 51 of the Charter. He therefore wondered if it would not be wise for the Special Rapporteur to provide additional arguments in support of his thesis, especially as he was proceeding on the basis of the draft articles on responsibility of States. He was not convinced by the Special Rapporteur’s reference in paragraph 18 of his report to the Court’s reasoning in the Oil Platforms case. He personally failed to see how the Court’s broadening of the concept of armed attack could warrant an extensive interpretation of Article 51 justifying the exercise of the inherent right of self-defence by an international organization against armed attack by a non-State entity—unless inclusion of that right was considered as falling within the area of progressive development of international law. He had absolutely no objection to adopting that broad interpretation as an exercise in progressive development.

8. He fully supported draft article 22 on necessity, but was puzzled by the explanations and comments in paragraph 37 of the report. In particular, he was troubled by the references in that paragraph to the notions of “operational necessity” and “military necessity” which had nothing to do with the state of necessity with which the Commission was concerned in the context of draft article 22. He wondered if the Special Rapporteur wished to suggest that, in instances in which interference with private property had occurred during military operations conducted by United Nations peacekeeping forces, operational necessity would preclude the wrongfulness of such acts. Such questions, which related to the law of armed conflicts rather than the state of necessity, should not be discussed in the fourth report. United Nations forces engaged in military operations under Chapter VII of the Charter were subject to international humanitarian law, as had been recalled by the Secretary-General in his circular of 6 August 1999.101 Accordingly, although an international organization—in the case in point, the United Nations—was not a party to an armed conflict, it had to abide by international humanitarian law and any violation of that law by its forces would therefore engage the responsibility of the Organization. That question should not be dealt with in the draft articles on circumstances precluding wrongfulness, as it might give rise to misunderstandings.

9. Moreover, the state of necessity as a circumstance precluding wrongfulness was inapplicable to a violation of the law of armed conflicts. The commentary to article 25 of the draft articles on responsibility of States for internationally wrongful acts had made it very clear that international humanitarian law expressly excluded reliance on necessity in the event of armed conflict.102

10. Turning to draft article 23 on compliance with peremptory norms, he noted that in paragraph 47 of the report the Special Rapporteur stated that “[i]n principle, peremptory norms bind international organizations in the same way as States. However, the application of certain peremptory norms with regard to international organizations may raise some problems.” He wished to know whether that observation was based on common article 5 of the 1969 Vienna Convention and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the “1986 Vienna Convention”), which contained an exception in respect of international organizations inasmuch as the Conventions applied without prejudice to any relevant rules of the organization. If the reply was in the affirmative, the Special Rapporteur should take account of that exception in the wording of draft article 23, since that issue was highly controversial and the subject of intense debate among legal writers. The question was whether the reference in common article 5 to the relevant rules of the organization should be seen as authorizing certain international organizations to derogate from the peremptory norms of international law. Was it conceivable that the constituent instrument of an international organization expressly empowered an organ of that organization to derogate from peremptory norms? That was a particular question in the case of an organ such as the Security Council which was supposed to represent the international community of States as a whole. If so, the Security Council could be exempted from its obligation to comply with the norms of *jus cogens* when exercising its powers under Chapter VII of the Charter. For example, it might empower a State to have recourse to armed force against other States in the absence of any armed attack, in other words when Article 51 of the Charter did not apply. Such a situation might arise where a State engaged in massive and systematic violations of the human rights of its citizens, in which case the Security Council might well adopt a resolution under Chapter VII of the Charter authorizing States to use force in breach of a peremptory norm of international law in order to assist the population of that country by halting the human rights abuses. Article 16 of the Rome Statute of the International Criminal Court also afforded the Security Council the possibility of requesting the Court to defer the prosecution of persons accused of having committed the crime of genocide. He was personally of the opinion that impeding the trial of persons accused of genocide was also a violation of *jus cogens*. He was sure that the Commission would pay due heed to those issues when considering draft article 23.

11. Mr. GAJA (Special Rapporteur), responding to the statement by Mr. Momtaz, said that the latter had read too much into his report and had raised matters which did not require the Commission’s consideration, as they did not fall within the scope of the topic. There was nothing in his fourth report to suggest that self-defence should apply with regard to non-State entities, or that the question should be dealt with in the current context. Paragraph 17 merely stated that United Nations practice in relation to self-defence did not make a distinction according to the source of the armed attack. That practice was referred to because it did seem to lend support to the idea that self-defence could apply to international organizations.

12. It was understandable that Mr. Momtaz did not see the connection in paragraph 18 between the *Oil Platforms* case and the question of self-defence, because in that paragraph he had considered not the source of the attack, but what constituted an armed attack and when it was possible to say that an armed attack was sufficient to trigger self-defence. It was not possible to draw a distinction on those lines between international organizations and States. That was the reason why he had referred to Article 51 of the Charter.

13. As for necessity, nowhere in the report had he implied that the provision on necessity should allow any derogation from the obligations imposed by international humanitarian law beyond those permitted on the grounds of military necessity when the latter was applicable. The purpose of his reference in paragraph 37 to practice concerning situations of military necessity which might be covered by international humanitarian law was to show that the concept of necessity was not alien to international organizations, but not that necessity could otherwise justify a breach of international humanitarian law. There was nothing in his report to suggest anything to the contrary, nor was it the Commission’s task to express an opinion in that regard.

14. Lastly, as far as obligations under peremptory norms were concerned, the report said nothing about the possibility of allowing international organizations to derogate from them. That would be a strange proposition, whether based on common article 5 of the 1969 and 1986 Vienna Conventions or on any other provision. The problem he had mentioned arose in the context of the Charter of the United Nations. When it came to the use of force, it might be difficult for international organizations to be placed in the same position as States and to react, for example, in collective self-defence. States might then be justified in using force notwithstanding Article 2, paragraph 4, of the Charter of the United Nations, but would that also hold good for an international organization? It was, however, not necessary for the Commission to express an opinion on that matter. While the Commission should discuss all the issues which were relevant to the preclusion of wrongfulness, it should not concern itself with matters that could not be so regarded even by implication. If some of the comments in the report seemed ambiguous, they could in due course be clarified.

15. Mr. KOLODKIN said that broadly speaking he endorsed the Special Rapporteur’s remarks. Many of the issues raised by Mr. Momtaz were unrelated to the topic under consideration.

102 Yearbook … 2001, vol. II (Part Two) and corrigendum, pp. 80–84.
16. Mr. CHEE, referring to the nature of military activities under United Nations peacekeeping operations, said that in its 1962 advisory opinion in the Certain Expenses of the United Nations case, the ICJ had distinguished between peace observation operations, peace enforcement and peacekeeping. It was in the nature of United Nations peacekeeping operations that they were not directed against any State and did not constitute measures within the meaning of Chapter VII of the Charter. The distinction set out in the 1962 advisory opinion had led to peacekeeping operations being described as “Chapter VI and a half” operations by Dag Hammarskjöld.

17. Mr. ECONOMIDES said that although he had been surprised by Mr. Momtaz’s remarks, he agreed with their substance. He did not see how a report on responsibility of international organizations could address such crucial questions as the scope of self-defence, the powers of the Security Council with regard to norms of *jus cogens* or circumstances in which force might be used other than in cases of self-defence. However, the Special Rapporteur had allayed his fears by pointing out that the report had nothing to do with those questions and that if it contained any comments that might be misconstrued and lead to misunderstandings, then they would have to be corrected. He commended the comments by Mr. Momtaz, notably with regard to self-defence, a notion which must always be interpreted in a restrictive manner.

18. Mr. BROWNLIE said that the subject of what he preferred to call “justifications” was a very difficult aspect of the topic under consideration, as indeed it was in the context of responsibility of States. That was relevant, because the Commission had taken the metaphor of responsibility of States as the starting point for its consideration of the topic of responsibility of international organizations, and had given the Special Rapporteur a licence—perhaps even a mandate—to treat the subject on that basis. With hindsight, it was clear that in the context of the draft articles on responsibility of States for internationally wrongful acts, the question of justifications had never been properly worked out. With every new case that came before the ICJ and every new arbitration, it became increasingly clear that the subject was immature, yet the Commission had adopted an “emperor’s new clothes” policy, so that it now had a splendid set of draft articles relating to justifications in the context of responsibility of States, which were very difficult to apply. The Commission had then embarked on another subject on which there was much less practice or support in legal sources and had instructed its intrepid Special Rapporteur to address it. No Special Rapporteur would ever venture to say that there was insufficient evidence to support any norm whatsoever on any given point.

19. Notwithstanding all of the above, the Commission had been provided with a courageous, well-organized and clear exposition of the problems. His only general reservation was that the report was over-succinct. On the important question of whether there was State practice on countermeasures in relation to international organizations, he noted that paragraph 22 contained a reference to the monograph of Pierre Klein, but did not explain what support it provided, nor was any information given on practice or opinions. Sometimes more evidence of the building blocks the Special Rapporteur had employed would have been welcome.

20. He had no problems with regard to consent, *force majeure* or peremptory norms, but had considerable difficulties with some of the other categories. The analogue of inter-State relations, which was the basis for the Commission’s work on the topic, was placed under particular strain when the question of justifications arose. Self-defence was the perfect example of that: the political and strategic geography of self-defence in relation to inter-State relations was completely different from the counterpart in the activities of international organizations. The question of peacekeeping illustrated the difficulties. In its paragraph 15, the report used the category of self-defence as such, in terms of Article 51 of the Charter of the United Nations, and stressed that international organizations obviously had such a right. He did not follow that reasoning at all. Admittedly, there must be some analogue, but it did not seem correct to say that it was the same right. As could be seen from paragraph 17, opinions had evolved, and thus a peacekeeping operation could use force in order to protect a mission. That made sense to him. He was not opposed to the idea of having an article covering the situation in which an international organization, acting within its mandate, had the right to use force to implement its purposes or conduct a special, authorized mission—perhaps one outside the normal purposes of the organization, perhaps one conducted by a regional organization or the Security Council. The textbook case was that of the United Nations Operation in the Congo created on 14 July 1960 by Security Council resolution 143: the peacekeeping mandate had included the right of free movement and had permitted the use of force to clear away roadblocks. That had been a lawful action in pursuance of the mission. Thus, self-defence was just one of a spectrum of lawful actions which an international organization might have to take as part of its mandate. The Commission must give further thought to that category; in his view, self-defence was a misnomer.

21. The Special Rapporteur had recognized that countermeasures posed particular difficulties; indeed, in the last sentence of paragraph 23 of his report he suggested that there might be good reasons for deferring the examination of the conditions under which an organization was entitled to resort to countermeasures against another organization. He personally would like to see more detail on the practice of organizations in those matters. Once again, the analogue of inter-State relations did not work well in the context of countermeasures.

22. Draft article 21 on distress seemed to be a subset of necessity. He did not see the need for a separate article, but if it were to be retained, legality should be conditioned by compensation. There was a tendency to deal with

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104 See in particular resolutions 161 (1961) and 169 (1961) of 21 February and 24 November 1961, respectively, in which the Security Council authorizes “the use of force, if necessary, in the last resort”. 
compensation by reserving the question, as had been done in the “without prejudice” clause of draft article 24. That put him in mind of the law of tort. Under the doctrine of incomplete privilege in United States case law, if a ship caused damage to a landing place to which it had been forced to moor in a storm, that did not constitute a tort in the ordinary sense, but instead a conditional wrong which could be expunged by the payment of reasonable non-penal compensation for the costs of relieving the distress. Occasionally, municipal law sources were of interest in such matters.

23. The category of necessity was one with which he had never been very happy, although it had received ample recognition in article 25 of the draft articles on responsibility of States105 and had been recognized, with some caution, by the ICJ in the Gabčíkovo–Nagymaros Project case. If the Commission was to retain necessity, it should place more emphasis on the issue of proportionality, and again the question arose of whether compensation should be dealt with more positively.

24. Mr. ECONOMIDES said he was pleased that Mr. Brownlie had questioned whether countermeasures at the inter-State level could be equated with countermeasures at the level of international organizations. The question raised a problem of substance. Countermeasures had always been an archaic, anachronistic and somewhat primitive practice that disregarded international law—one, moreover, that was based on force and exercised unilaterally. He wondered whether such a practice should be transposed to the law of international organizations. What justification was there for recommending recourse to countermeasures rather than the exhaustion of all avenues open to international law to settle differences peacefully? A more general question of principle was at issue and deserved close consideration.

25. Mr. KOSKENNIEMI said he agreed with Mr. Brownlie about the complex nature of self-defence and countermeasures when applied to international organizations. It would be interesting to have an in-depth discussion on how the inter-State concepts of countermeasures and self-defence would need to be modified in order to be applicable to activities in which international organizations were involved. However, the Commission faced a dilemma: if it wished to hold a substantive debate on self-defence, countermeasures and necessity with regard to international organizations, the report did not provide the necessary information on practice. If it did not wish to enter into that debate, it would have to follow the structure of the draft articles on responsibility of States and merely note that the same “justifications”, as Mr. Brownlie had put it, were applicable, mutatis mutandis, to international organizations. On the basis of the available information, he believed that the Commission must take the latter approach, even though to do so might be intellectually unsatisfactory and uninteresting. That seemed to be the approach favoured by the Special Rapporteur, who had noted that the issues raised by Mr. Monttaz, although interesting, were irrelevant. Thus, either members should cite practical problems with regard to international organizations so as to provide substance for a discussion of how the concepts of self-defence, countermeasures and necessity should be modified, or else the Commission should confine itself to the rather limited proposals which the Special Rapporteur had made.

26. Mr. GAJA (Special Rapporteur) said that the subjects of necessity and self-defence must certainly be addressed. He had tried to glean as much practice as possible, had requested international organizations to provide further practice, and would welcome any relevant information that members could provide. Some questions, such as those raised by Mr. Monttaz, had been deliberately left aside in the work on State responsibility, but should be dealt with in the current context. Countermeasures, on the other hand, should not, in his view, be discussed at the present stage. They would be comprehensively addressed in the context of implementation of international responsibility. He had simply wished to state that, if it were found that countermeasures were allowed, action taken as a countermeasure would not be unlawful.

27. Mr. Sreenivasa RAO said that the discussion had been beneficial in that it clarified once and for all which issues the Special Rapporteur deemed to be irrelevant in the present context. State responsibility and the responsibility of international organizations were parallel but very different cases. States’ inherent right of self-defence under Article 51 of the Charter was one thing; self-defence as a circumstance precluding wrongfulness where international organizations or non-State actors were involved was quite another matter. Arguably, action by States or international organizations against an armed attack by a non-State actor was a circumstance precluding wrongfulness, but such a right was of a lesser order than the right of self-defence under Article 51.

28. Mr. MATHESON said that the Special Rapporteur’s reports on the responsibility of international organizations had been thorough, concise, meticulous in their research and legal analysis and perceptive in their assessment of practical considerations. The fourth report was no exception. In general, due account must be taken of the fact that the competence and responsibilities of international organizations had greatly expanded in recent decades. In many cases, organizations had taken on functions fully comparable to those of States, particularly with regard to the governance of territories under international control. It therefore followed that they should have grounds for preclusion of wrongfulness that were comparable to those of States: otherwise, they might be unable effectively to carry out the duties entrusted to them by the international community, or find themselves incapable of responding to emergency situations or contingencies that could threaten their mission or the lives and well-being of innocent persons. The commentary should make it clear where appropriate that only limited circumstances comparable to those which had given rise to similar provisions in the draft articles on State responsibility were being envisaged.

29. Turning to specific articles, he said the need for draft article 17 on consent was obvious, since consent could preclude wrongfulness in many situations, from the mundane case of permission to use proprietary material to the weightier one of armed entry into the territory of a State. He also thought there was a clear need for draft article 18 on self-defence, since international organizations were...

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105 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 28.
now called on to become involved in situations entailing serious risks to life and security. Mr. Momtaz had raised interesting questions about the extent of the right of self-defence, but he himself agreed with the Special Rapporteur that it would be unwise for the Commission, either in the text or in the commentary, to attempt to define the extent of that right or the circumstances that might trigger it. That was a matter to be reserved for consideration by the Security Council, by another authorizing body in the case of a peacekeeping operation or, in the case of collective defence, by a collective security organization or its members. Of course, draft article 18 was without prejudice to the right of the Security Council, under Chapter VII of the Charter, to authorize the use of force by an international organization going beyond the scope of self-defence, and the commentary should perhaps make that clear.

30. With respect to draft article 19, the legitimacy of countermeasures needed to be recognized for international organizations, just as it was for States. Like States, international organizations needed to have lawful options for dealing with unlawful actions by other entities.

31. With respect to force majeure, he had no problem with the proposed draft article 20, but like Mr. Mansfield, he had difficulty with the suggestion in paragraph 31 of the report that force majeure in the form of insufficient funding could be used as an excuse for the failure of an international organization to comply with its obligations. That would shift the consequences of such financial lapses away from the organization and its members and place them on the shoulders of other parties that had dealt in good faith with the organization. Lack of funding was not an “irresistible force” or “unforeseen event” for the purposes of force majeure, but rather a foreseeable and common occurrence. The organization should manage its finances and commitments so that it could deal with such funding shortfalls, rather than simply being relieved of its obligations.

32. With respect to distress, he agreed that international organizations should have the benefit of an exception such as that contained in draft article 21. It might be, however, as Ms. Escarameia had suggested, that the language of paragraph 1 needed adjustment, given that international organizations were now frequently responsible for the lives and safety of many persons in dangerous situations.

33. Draft article 22 on necessity was perhaps the most controversial of all the provisions. Like Mr. Mansfield, he had real doubts about the way that principle had been embodied in the draft articles on the responsibility of States. Nevertheless, if that excuse had been recognized for States, the same should probably be done for international organizations. While such organizations did not, for the most part, have the same interests as States, in some situations they might have comparable “essential” interests that they had a duty to protect. He would therefore not object in principle to draft article 22, but would suggest that it be made clear that it was primarily designed for situations where international organizations were exercising functions comparable to those of States, such as when charged with the governance of a territory and the protection of the lives and welfare of its population.

34. With respect to compliance with peremptory norms, he had no problem with the proposed draft article 23, but he did have difficulty with paragraph 48 of the report, which seemed to suggest that consent could be given for military intervention only in specific instances and not in advance for a defined category of situations. States, he believed, had the sovereign right to give advance consent to military activities in their territory by other States or by international organizations, and in fact that was often done. The Commission should not attempt, either in the commentary or in the draft articles, to resolve such highly controversial and difficult issues about the substance of peremptory norms or their relationship to other hierarchical principles of international law, a matter being considered under the topic of fragmentation of international law.

35. Lastly, he had no problem with draft article 24, which was logically parallel to the disclaimers in the draft articles on responsibility of States. In conclusion, he said he was in favour of referring of the proposed draft articles to the Drafting Committee.

36. Mr. YAMADA commended the Special Rapporteur’s concise and well-reasoned report, with which he agreed almost in its entirety. It was gratifying to note that international organizations were now demonstrating keen interest in the Commission’s work on the topic.

37. Circumstances precluding wrongfulness was one area where there was no reason to depart from the substantive principles set forth in the provisions on responsibility of States. Those principles were in the process of becoming customary international law and were soon to be reviewed by the General Assembly. The Commission should not create confusion by proposing alterations to those substantive principles. Accordingly, he supported the Special Rapporteur’s proposals, which introduced only necessary textual changes and drafting improvements.

38. He favoured deferring consideration of draft article 19, on countermeasures, until a decision was made on whether the question of countermeasures by an international organization against a State should be addressed in the current draft articles. With the exception of draft article 19, therefore, the proposals proposed in the report should be referred to the Drafting Committee.

The meeting rose at 11.30 a.m.

2878th MEETING

Thursday, 18 May 2006, at 10.05 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Opertti Badan, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

FOURTH report of the SPECIAL RAPPORTEUR (continued)

1. Mr. KEMICHA commended the Special Rapporteur for the quality of his work. He noted that in an effort to ensure consistency with the draft articles on State responsibility for internationally wrongful acts, the Special Rapporteur had avoided, apparently without much conviction, circumstances precluding wrongfulness that were not so characterized, a case in point being that of an international organization acting under coercion, which he cited in paragraph 8 of the report.

2. On the question of consent, he said that the example of election-monitoring missions was entirely relevant and draft article 17 did not pose any difficulty. Self-defence, on the other hand, might provide an opportunity for determining how far it was possible to go in transposing the draft articles on State responsibility into articles on the responsibility of international organizations, a transposition that was usually justified. As in draft article 21 on State responsibility, draft article 18 required that the measure of self-defence must be “lawful” and must be “taken in conformity with the Charter of the United Nations”. He endorsed Ms. Escarameia’s proposal not to refer solely to the Charter, but to international law in general. The Special Rapporteur had himself argued in paragraph 18 of his report that the invocability of self-defence should not be limited to the United Nations.

3. On countermeasures, he noted that the Special Rapporteur had considered whether to provide for an article along the lines of draft article 22 on State responsibility107 without knowing whether the question of countermeasures taken by an organization against a State would eventually be addressed. He personally preferred to include a proper article 19 provisionally rather than leave a blank in the text.

4. Force majeure, which the Special Rapporteur addressed in draft article 20, was clearly a circumstance precluding wrongfulness. As to distress, he did not subscribe to the Special Rapporteur’s proposal in paragraph 31 of the report that financial distress might constitute an instance of force majeure that the organization concerned could invoke in order to exclude wrongfulness of its failure to comply with an international obligation. He understood the feeling of helplessness and frustration that some parties might have when States abdicated their financial obligations and their duty to show solidarity, but as Mr. Mansfield had pointed out, financial distress could on no account be regarded as force majeure, since those entrusted with running international organizations had an obligation of diligence and caution, and situations of financial distress seldom arose without warning. The situation of distress contemplated in draft article 21 was of a completely different nature, and had to do with saving the life of the author or of other persons entrusted to the author’s care. In paragraph 33 the Special Rapporteur noted that practice did not offer examples of the invocation of distress by an international organization in a similar situation, and it was therefore unclear why he had proposed a provision modelled on draft article 24 on State responsibility.108

5. With regard to necessity, he agreed with the Special Rapporteur’s comment in paragraph 35 of the report that when the ICJ had said that the state of necessity was a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation, it had only considered relations between States, and that an international organization could not invoke necessity as an excuse for non-compliance as a matter of general international law (Gabčíkovo–Nagymaros Project, para. 51). He endorsed the idea of providing stricter conditions for international organizations than those applying to States in order to avoid any risk of abuse and shared the view that the criterion of safeguarding “an essential interest against a grave and imminent peril”, which draft article 25 on State responsibility109 required as a ground for invoking necessity, must be understood in the case of international organizations as being “an interest that the organization has the function to protect”.110

6. Whereas draft article 23 on compliance with peremptory norms did not pose any difficulty, draft article 24, which dealt with the consequences of invoking a circumstance precluding wrongfulness and reproduced the text of draft article 27 on State responsibility,110 could have afforded an opportunity, as the Special Rapporteur himself suggested in paragraph 52 of the report, to make a worthwhile and innovative improvement to the wording of subparagraph (a) by referring more generally to all the elements of the circumstance and not only to the temporal element. The question of compensation, which the draft articles on State responsibility did not cover, should also have been addressed more thoroughly. Such caution on the part of the Special Rapporteur was not, however, surprising, since the Commission had asked him to follow the draft articles on State responsibility closely, and he wished to thank the Special Rapporteur once again for his admirable efforts.

7. Mr. Sreenivasa RAO congratulated the Special Rapporteur on his fourth report, which, like its predecessors, was rich and well thought out, yet concise and logically structured.

8. Aligning the draft articles on responsibility of international organizations with the draft articles on State responsibility for internationally wrongful acts had some advantages but also some disadvantages, to which he would revert later.

9. As noted in the report, an interesting debate that had taken place during consideration of the draft articles on

106 Ibid., p. 27.
107 Ibid.
108 Ibid., p. 28.
110 Ibid.
State responsibility was also relevant to the responsibility of international organizations, the question being whether the exceptions listed constituted a justification precluding wrongfulness in a given case or whether they were simply factors having the effect of limiting the scope of wrongfulness while the act was being committed. The Special Rapporteur invited the Commission to adopt the view that it had espoused in the context of State responsibility, which was not to consider such exceptions as justifications and to specify that, even if the wrongfulness was suspended, the obligation to compensate remained. If a given act was lawful, the question of compensation did not arise. If it was unlawful, however, but the unlawfulness had been temporarily suspended, compensation remained a possibility. It would, however, be useful if the Special Rapporteur could share his thinking more fully with the Commission.

10. With regard to consent, he wondered whether the example given in the report, namely that of election-monitoring missions, was sufficiently relevant to settle the question of consent once and for all. Further information on the mandate of the Aceh Monitoring Mission in Indonesia, mentioned in paragraph 13 of the report, would be welcome, and other examples drawn from practice would be even better.

11. The expression “defence of the mission”, which appeared in paragraph 17 of the report to explain the term “self-defence” when applied to the mandates of peacekeeping and peace-enforcement forces, was far too broad and gave too much weight to the possible use of force in such circumstances, going far beyond the situation contemplated in Chapter VII of the Charter of the United Nations. It was thus out of place in the present text. The comments in paragraph 18 of the report concerning self-defence as a circumstance precluding wrongfulness were most pertinent, but it should be emphasized that the “inherent right of self-defence” mentioned by the ICJ was an inherent right of States, not of international organizations. Even if, as the Special Rapporteur maintained, the Commission should not address the question of the extent to which an international organization might resort to force, that distinction should be borne in mind, particularly when the Drafting Committee considered draft article 18. It was just one of several examples that showed—if there were any need to do so—that the draft articles on State responsibility could not simply be copied and applied to international organizations.

12. The question of countermeasures was one that seemed to get more complicated the more closely it was examined, as had been the case with State responsibility. For that reason, there was much to be said for Mr. Yamada’s suggestion at the previous meeting that the provision should be omitted. Clearly, though, the Special Rapporteur was best placed to choose a solution that would save the Commission from going around in circles, as it had in the past.

13. With regard to peremptory norms, he would prefer to avoid the expression “political integration”, which was used in paragraph 48 of the report, as it did not seem appropriate in the context. Moreover, as in the case of self-defence, the Special Rapporteur would have made his point more clearly if, in considering peremptory norms, he had clearly distinguished between such bodies as the United Nations, NATO and peacekeeping forces, for example.

14. In summation, he recommended that draft articles 17 to 23 on responsibility of international organizations should be referred to the Drafting Committee.

15. Mr. BROWNIE said that in his remarks at the previous meeting he had not been referring to self-defence and that he had had no intention of suggesting that the concept should be defined. The section on self-defence did, however, contain quite serious inconsistencies; a much clearer indication of what was intended was needed. First, draft article 18 was somewhat surprising, since it did not really reflect the content of paragraphs 15 to 17 of the report, especially the quotation from the report of the High-level Panel on Threats, Challenges and Change, according to which “the right to use force in self-defence … is widely understood to extend to ‘defence of the mission’”. It was abundantly clear from the context that the quotation related not to self-defence but to the lawful use of force in reasonable implementation of the purposes of a given mission. Draft article 18, however, appeared to be restricted to self-defence as it was used in Article 51 of the Charter of the United Nations; indeed, the draft article gave the impression that it referred only to the United Nations, whereas in fact the Commission was certainly not seeking to restrict the application of the provisions to a single organization. The other problem was that when the Commission was engaged in the progressive development of the law, it should say so. The draft article on self-defence seemed to contain elements of progressive development, yet it also relied on the Charter, even if it did not explicitly mention Article 51, which was generally understood to be a “without prejudice” clause incorporating customary international law relating to self-defence. The result was confusing, since no one had ever suggested that customary law referred in any way to the activities of international organizations. It was therefore an unnecessary precaution to refer to Article 51, even indirectly. It would be preferable not to give the impression either that an international organization could lawfully resort to force only in self-defence and not in any other circumstances to implement its mission or, on the other hand, that the Charter was applicable, since that was not, in fact, a possibility. Some of the problems that he had mentioned could be dealt with without any major change to the text, and the result would be more in keeping with the Special Rapporteur’s intentions.

16. Mr. GAJA (Special Rapporteur) said that he wished to make it clear that the references to the practice relating to United Nations peacekeeping or peace-enforcement forces and to financial distress, mentioned by the INTERPOL, had been made simply in order to reflect all practices and all the points of view that had been expressed on the subject. It had certainly not been his intention to pronounce definitively on whether a United Nations peacekeeping force could resort to force or the extent to

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which it could do so under the Charter, since that naturally depended on the force’s mandate and the interpretation put on that mandate. The High-level Panel on Threats, Challenges and Change had clearly described what the practice was, namely that it was generally understood that the right to use force extended to “defence of the mission”. That, however, did not amount to self-defence, and in any case it was not the kind of self-defence that was regarded as a circumstance precluding wrongfulness. He ought perhaps to have added a more explicit commentary to that effect. Paragraph 18 specifically stated that “[t]he invocability of self-defence should not be limited to the United Nations”, but that did not mean that paragraphs 17 and 18 should be read as forming a continuous argument. The content of paragraph 17 was not what was covered by draft article 18.

17. The CHAIRPERSON said that the topic gave rise to a problem of methodology. The Commission was at one on the general principles and supported the Special Rapporteur’s alignment of the draft articles with the draft articles on responsibility of States for internationally wrongful acts. However, that alignment was impossible in the case of circumstances precluding wrongfulness for the simple reason that the nature of international organizations as subjects of international law differed from that of States. Accordingly, the Commission ought, as had been recommended in every comment made, to consider whether it was possible to retain the approach adopted in the case of State responsibility or whether adjustments needed to be made.

18. Speaking as a member of the Commission, he said that it might be appropriate to go back to the advisory opinion on Reparation for Injuries issued by the ICJ in 1949, since the issue before the Commission was the interests, missions and purposes of an international organization, all of which related to the enjoyment by a subject of international law of a range of prerogatives and rights recognized by international law. The enjoyment of such prerogatives was accompanied by international responsibility, but in its management of that responsibility, an international organization was not a State or even a super-State. Secondly, the Commission was anxious to find examples of practice, and the report did not provide enough such examples. Some of the leading regional organizations in Africa had had some interesting experiences in that respect over the past few years, particularly when one international economic integration organization had unexpectedly found itself having to undertake peacekeeping missions in the territory of one of its member States. When a security problem had arisen in Liberia, a contingent of armed forces had been provided by Nigeria, which had used its dominant position within ECOWAS to justify its military presence in Liberia. The mission had been called an ECOWAS mission, but it had in fact been undertaken by Nigeria alone. That raised the question of whether an organization whose purpose was economic integration but which acted on a given occasion in pursuance of a mission or a mandate not its own would have to take responsibility for the consequences of such a change in its nature. In the case of confrontations on the ground, the question was whether the organization was justified, if responsibility was incurred, in invoking self-defence or any other circumstance precluding wrongfulness. Other examples of practice could be found. In the case of Darfur, for instance, the African Union had announced an intention—to restore peace and install democracy—that was beyond its capacity to realize, with the result that it had been forced to call on the European Union, NATO and the United Nations for help. When the issue of responsibility arising from the participation of third international organizations in African Union missions or activities arose, it had to be determined whether the wrongfulness could, if necessary, be covered by the “host” or the “participating” international organization. Examples of practice could surely be found somewhere, since they certainly existed. The Commission should request the Special Rapporteur to look more closely into practice and to provide further information at the next session on the question of circumstances precluding wrongfulness, although it should not call into question the draft articles as a whole.

19. Mr. Sreenivasa RAO said that he had not meant that the Special Rapporteur ought to have considered existing practice and had failed to do so, but that no such practice existed. He fully supported the methodology adopted by the Special Rapporteur, who could not be faulted for not mentioning practice if none existed. That being the case, if members of the Commission could obtain relevant material to which the Special Rapporteur did not have access, it would be helpful if they made it available to him.

20. Mr. GAJA (Special Rapporteur) said that neither he, as Special Rapporteur, nor the Commission was mandated to pass judgement on specific cases or to determine whether, for instance, there had been consent or what the consequences might have been. However, if examples of practice did exist in the form of positions adopted by States or international organizations that had not been published, but of which members of the Commission were aware, he would be very glad to refer to them. Perhaps Commission members could use their personal contacts to get international organizations to communicate to them—and thus make available—relevant material, in which case the Commission could still reconsider the issues concerned on second reading. However, it would not be sensible to suspend the Commission’s work in the hope of ultimately obtaining materials. Experience showed that States and international organizations were rather reluctant to transmit to the Commission material that was not published elsewhere. It was to be hoped, however, that the Commission’s work would alert States and international organizations to what it needed, so that the Commission could revise its current activities in the light of further knowledge.

21. The CHAIRPERSON said that he would attempt to obtain material from Addis Ababa and Lagos, which he would immediately pass on to the Special Rapporteur.

22. Mr. ECONOMIDES likewise noted that the debate had demonstrated the impossibility of always following the general pattern of the draft articles on State responsibility; it was in fact the first time that there had been an acknowledgement that the situations involved could be completely different rather than identical. As several members of the Commission had rightly observed, practice was non-existent, which explained
why, despite the Special Rapporteur’s endeavours, the report remained somewhat insubstantial. The absence of practice had two consequences: first, codification was impossible, since there was nothing to codify—as United Nations law was a lex specialis relating solely to the United Nations and the Charter, it could not be applied to all international organizations, even those with military functions; secondly, progressive development was impossible because it presupposed a knowledge of the issues and the existence of a modicum of practice. It was not even possible to draw analogies between States and international organizations, because the concerns were not the same. Some notions, like state of necessity, were already extremely difficult, if not impossible, to apply to States, and it was therefore obvious that they could not be applied blindly to international organizations in the absence of any practice.

23. In conclusion, he believed that the Commission must make a choice: either it copied a text in an artificial manner, which entailed certain risks, or it innovated by not always following the draft articles on State responsibility relating to circumstances precluding wrongfulness. He would endeavour to return to that point at a later stage.

24. Mr. RODRIGUEZ CEDEÑO commended the Special Rapporteur on his full and well-structured fourth report on responsibility of international organizations, which was based on some particularly pertinent examples. The dearth of such examples, however, complicated the Commission’s task. The draft articles proposed in the report were based on the corresponding draft articles on State responsibility of which the General Assembly took note in resolution 56/83 of 12 December 2001; that reference was necessary, even though the draft articles on State responsibility could not be applied mutatis mutandis to the responsibility of international organizations but had to be adapted, since two different subjects of international law were involved. Indeed, whereas the competence of an international organization was predicated on basic documents and the rules governing the organization, in other words on the organization’s constituent instrument and the relevant regulations and resolutions of its various organs, a State’s powers derived from the sovereignty implicit in the very definition of a State. Furthermore, given the diverse structure, purposes and competence of international organizations, any standards that were formulated would have to be of a very general nature that could cover all situations, for the draft articles could not apply exclusively to the United Nations. Moreover, the topic was more closely related to the progressive development of law than to codification, which was why the Commission should be extremely cautious when taking decisions. The practice mentioned by the Special Rapporteur was not sufficient to codify the rules governing circumstances precluding wrongfulness or, as others termed them, justifications. In any case, progressive development did not require repeated or constant practice, but simply the existence of sufficient material for the elaboration of standards or rules in that area. It was thus the evolution of international law, more than the existence of practice, that would permit the progressive development of that body of law.

25. Self-defence was a natural right constituting a customary exception to the use of force, which was prohibited by international law, in particular by Article 2, paragraph 4, of the Charter of the United Nations. That circumstance or justification, which was applicable in the context of relations between States, was acceptable in the context of the responsibility of international organizations, provided that two essential elements were borne in mind: necessity and proportionality. Naturally, preventive self-defence exercised under the theory of an imminent threat, which had been largely rejected by the international community, must be ruled out. The right of self-defence had been confirmed in several international texts, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. That was why he supported Ms. Escarameia’s proposal to replace, in draft article 18, the words “Charter of the United Nations” with “international law”, for the Charter did not cover certain aspects of the law on the use of force, including necessity and proportionality. In that context, he recalled the judgment of the ICJ in the Military and Paramilitary Activities in and against Nicaragua case of 1986, in which the Court had not upheld the argument that there was complete identity between the rules of customary international law on the lawfulness of the use of force and the provisions of the Charter (para. 176 of the judgment). In any event, he agreed with the Special Rapporteur that there were enough arguments in favour of including a provision of that nature in the draft text, and he agreed that draft article 18, together with the suggestions and comments as to how to improve it, should be referred to the Drafting Committee.

26. Force majeure, which might in some cases constitute a circumstance precluding wrongfulness, was an exception that was capable of being raised in international law, as the Permanent Court of Arbitration had found in the context of inter-State relations, and was transferable to the context of responsibility of international organizations. It was an external event comparable to an unforeseen occurrence that was beyond the control of the subject in question—in the case at hand, an organization—and prevented it from honouring an international obligation or complying with international law. The conditions governing situations of force majeure must be as clear and precise as they were in cases involving States.

27. The issue of whether an international organization’s financial difficulties could be deemed a justification or circumstance precluding wrongfulness was a sensitive one. He did not believe that it was always possible to claim that the financial situation of an organization that was dependent on States’ contributions justified the organization’s failure to honour its international obligations. As the question was more closely related to the responsibility of States vis-à-vis the international organization, the two issues should be studied in tandem in due course.

28. As the Special Rapporteur stated in his report, necessity was one of the most controversial circumstances precluding wrongfulness. The state of necessity was not brought about intentionally, but stemmed from a State’s
need to protect itself from a grave and imminent peril. The result was a dilemma in which the need to protect essential State interests had to be weighed against the violation of or non-compliance with international obligations. A number of conditions, set forth in article 25 of the draft articles on State responsibility, had to be met in order to invoke necessity in that context. The assessment of the situation could not be prejudged, as the ICJ had found in its 1997 judgment in the Gabčíkovo–Nagymaros Project case. That exception, as the Special Rapporteur had noted, was valid in the context of the responsibility of international organizations, even if the expression “essential interests” meant something different. In any event, as the Court had noted in the aforementioned judgment, that ground could be accepted only on an exceptional basis (paras. 51–58 of the judgment).

29. In conclusion, he supported referring the draft articles to the Drafting Committee, whose task would be extremely complicated, since the final wording would have to take account of the nature of international organizations as subjects of international law and would have to be based, to the extent possible, on the relevant provisions of the draft articles on State responsibility.

30. Mr. FOMBA said that the Special Rapporteur had brilliantly elucidated the main issue raised by the topic, namely the similarities and differences between an international organization and a State and the legal consequences that must be drawn therefrom with respect to responsibility. By way of general remarks, he said that he found the analogical approach taken by the Special Rapporteur in his report to be justified and noted that he had not maintained the distinction between causes of consequences that must be drawn therefrom with respect to an international organization and a State and the legal topic, namely the similarities and differences between an international organization and a State and the legal consequences that must be drawn therefrom with respect to responsibility. By way of general remarks, he said that he found the analogical approach taken by the Special Rapporteur in his report to be justified and noted that he had not maintained the distinction between causes of

33. The Special Rapporteur’s argument in favour of the invocation by an international organization of force majeure as a circumstance precluding wrongfulness presented no particular difficulty either in terms of justification, even if it was not always obvious, or in terms of coherence. According to the Special Rapporteur, “financial distress” could constitute an instance of force majeure, and the fact that it could be due to the conduct of the organization’s member States did not prevent the organization, as a separate entity, from availing itself of that situation. The Special Rapporteur rested his argument on the principle that the personality of the international organization was superimposed upon that of its member States, and not upon the principle of subrogation. He had no real difficulty with the draft article proposed in paragraph 20 of the report, which was modelled on draft article 23 of the text on State responsibility.

34. Turning to distress, he said that unless practice on the matter was clarified, there might be some reluctance to support the Special Rapporteur’s proposal, as the hypothetical example given by Klein and mentioned in a footnote to paragraph 33 might lead some to urge caution. On the question of necessity, the Special Rapporteur reached the conclusion that there was no reason for departing from the model provided by draft article 25 on State responsibility. Absent an in-depth consideration of practice, if any existed, the Special Rapporteur’s argument, which seemed driven by a particular interpretation of the functional and legal nature of international organizations, might furnish a good working hypothesis.

35. With regard to compliance with peremptory norms, he regretted that the Special Rapporteur did not explain why the attribution to a regional organization of certain powers of military intervention could be viewed as contravening a peremptory norm. Nevertheless, he fully endorsed the idea put forward by the Special Rapporteur that the situation might be different for regional organizations that were given the power to use force if that power represented an element of political integration among the member States. In a footnote to paragraph 48, the Special Rapporteur rightly cited the relevant provisions of article 4 (h) of the Constitutive Act of the African Union, which provided, inter alia, for the “right

112 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 27, and pp. 69–70 for the commentary thereto.

113 Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 12th meeting (A/C.6/60/SR.12), paras. 50 and 70, respectively.

114 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 27, and pp. 76–78 for the commentary thereto.

115 Ibid., p. 28, and pp. 80–84 for the commentary thereto.
to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity". One might also cite in that context the relevant provisions in articles 2, 6 (3) and 52 of the Protocol relating to mutual assistance on defence and articles 1 and 52 of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, adopted by ECOWAS on 29 May 1981 and 10 December 1999, respectively. In paragraph 49 of the report, the Special Rapporteur pointed out that the application to international organizations of the "without prejudice" provision in Chapter V of Part One of the draft articles on State responsibility might present some "special features", without specifying what those features were, while indicating that the general statement contained in draft article 26 on State responsibility116 could be reproduced by inserting the term “international organization" instead of "State". In the absence of an in-depth analysis substantiating the existence of such special features, he could accept the practical solution envisaged by the Special Rapporteur. Lastly, he had no special problems with draft article 24 on the consequences of invoking a circumstance precluding wrongfulness. In conclusion, he endorsed the referral of the draft articles to the Drafting Committee.

36. Mr. CHEE commended the Special Rapporteur on his well-researched fourth report on the responsibility of international organizations in relation to circumstances precluding wrongfulness, which paralleled eight corresponding draft articles in the text on State responsibility. His proposed draft article 17 on consent, for example, used the same wording as draft article 20 of the draft on State responsibility,117 and he supported it.

37. Draft article 18 provided that self-defence constituted a circumstance precluding the wrongfulness of an act of an international organization taken in conformity with the Charter of the United Nations. The Special Rapporteur referred to the distinction between peacekeeping and peace enforcement that had been made by the ICJ in its 1962 advisory opinion on Certain Expenses of the United Nations, a distinction based on the idea that peacekeeping operations were not directed at anyone in particular but were simply intended to separate the parties to a conflict, whereas peace-enforcement actions fell under Chapter VII of the Charter. Article 51 of the Charter provided that an armed attack against a State was a precondition for the exercise of self-defence. The application to United Nations peacekeeping forces of the Charter’s prerequisites for action in self-defence imperilled those forces when they were engaged in a military operation. United Nations peacekeeping forces were thus placed at a disadvantage if the rules of engagement were based on Article 51 of the Charter. According to the Charter, the right of self-defence came into play for the victim only after the armed attack had occurred and it might be too late for the victim to respond. He noted in that connection that while the Charter permitted self-defence, it left the modalities for exercising that right unclear. Moreover, the right of self-defence could be exercised until the Security Council had taken measures necessary to maintain international peace and security. The time between the action by the Security Council and the act of self-defence by the victim might be too long for the victim to respond to the immediate use of destructive force by the attacking side, especially in view of the destructive nature of modern weaponry. In the light of that consideration, the Commission could perhaps resort to the classical or customary rule of international law dealing with self-defence. One last point to be borne in mind was that under that rule, an act of self-defence must observe the proportionality rule.

38. Regarding countermeasures in respect of an internationally wrongful act, he suggested that alternative B for draft article 19, proposed by the Special Rapporteur in paragraph 25 of his report, reflected the view expounded in paragraph 22 of the report that a substantial body of literature analysing practice relating to the admissibility of countermeasures by international organizations showed that the fact that international organizations could in certain cases take countermeasures was not contested. However, the circumstances in which an organization could resort to countermeasures under the current regime of responsibility of international organizations had yet to be determined. The Special Rapporteur had been wise to defer consideration of that subject until State practice and doctrine were sufficiently developed.

39. On the question of force majeure, the Special Rapporteur had reproduced in draft article 20 the wording of article 23 of the draft articles on State responsibility.118 The situation was analogous to the one contemplated in article 61 of the 1969 Vienna Convention, in which non-performance of a treaty obligation could be justified by a situation that made such performance impossible. In article 21, on distress, the Special Rapporteur invoked the wording of article 24 of the draft articles on State responsibility.119

40. Necessity, as the Special Rapporteur noted, had always been considered only in relation to States, but there were several cases, referred to in paragraphs 37 to 41 of the report, in which necessity had been invoked by an international organization as a circumstance precluding wrongfulness. He supported draft article 22, which the Special Rapporteur had proposed on that question. He likewise endorsed draft articles 23 (Compliance with peremptory norms) and 24 (Consequences of invoking a circumstance precluding wrongfulness) and recommended that the entire set of draft articles on responsibility of international organizations should be sent to the Drafting Committee.

41. Mr. KOLODKIN said that he considered the fourth report on responsibility of international organizations to be of high calibre. The Special Rapporteur’s work on circumstances precluding wrongfulness was entirely in line with the contemporary state of affairs. Practice in that area was indeed limited, and even though one might wish to see additional examples, they were not to be found. The most appropriate tactic was to follow the pattern of the

116 Ibid., p. 28.
117 Ibid., p. 27.
118 Ibid.
119 Ibid.
draft articles on responsibility of States for internationally wrongful acts.

42. He saw no need to analyse the conditions under which self-defence on the part of an international organization was or was not lawful. It was simply necessary to stipulate that an act could not be considered unlawful if it constituted a measure of self-defence as defined in international law. As for coercion, it was adequately covered by draft article 14 (a), and to devote a separate article to it as a circumstance precluding wrongfulness was unwarranted, as the Special Rapporteur rightly pointed out.

43. The examples given by the Special Rapporteur were not always well chosen. For example, judgment No. 24 of the Administrative Tribunal of the Organization of American States in Fernando Hernández de Agüero v. Secretary General of the Organization of American States, cited in paragraph 29 in the context of force majeure, concerned a contract that had not given rise to obligations under international law. Similarly, it was difficult to understand the distinction between consent to a specific military intervention and general consent (para. 48). Nor was it easy to understand how the lawfulness of consent to an intervention could be based on the degree of political integration.

44. Nevertheless, he was in favour of referring the entire set of draft articles to the Drafting Committee, with the exception of draft article 19, which ought to be left blank, as the Special Rapporteur proposed in alternative A in paragraph 25 of the report.


[Agenda item 5]

REPORT OF THE WORKING GROUP

45. Mr. CANDIOTI (Chairperson of the Working Group on Shared natural resources), introducing the report of the Working Group (A/CN.4/L.683), said that the Group had held five meetings in May 2006, during which it had continued its consideration of the draft articles submitted by the Special Rapporteur in his third report.121 It had also considered the report of the Working Group from the fifty-seventh session122 and a working paper prepared by the Special Rapporteur containing revised texts of draft articles 9 to 22. A groundwaters expert from UNESCO had been present at the first three meetings. The Working Group was submitting, in the annex to its report, a revised text of the 19 draft articles which could be referred to the Drafting Committee.

46. As at the previous session, the Working Group had taken the view that it was premature to prejudge the final form of the document, given the differing views expressed on the subject by States in the Sixth Committee (A/CN.4/560, paras. 42–43). For that reason, draft article 4 as proposed by the Special Rapporteur had been deleted, and draft article 19 had been shortened considerably. The Working Group had also decided not to deal with the final clauses (arts. 22–25).

47. The Working Group had agreed to organize the draft articles in such a way that the general principles would appear in the earlier parts. Accordingly, draft article 3 (Bilateral and regional arrangements) had been shifted to Part V and draft article 10 (Monitoring) to Part III. At the fifty-seventh session the Working Group had discussed whether it would be necessary to distinguish among obligations that applied to all States generally, obligations of aquifer States vis-à-vis other aquifer States and obligations of aquifer States vis-à-vis third States. At the current session it had decided that some draft articles should impose obligations on third States while others would cover the obligations of aquifer States vis-à-vis third States. In reaching those conclusions the Working Group had favoured the protection of transboundary aquifers or aquifer systems.

48. The footnotes denoted aspects that might require clarification or elaboration in the commentary. The draft article numbers appearing in square brackets corresponded to those of the draft articles in the Special Rapporteur’s third report.

49. Turning to the draft articles themselves, he recalled that he had already introduced the revised texts of draft articles 1 to 8 at the fifty-seventh session.123 Only draft articles 2, 3, 5 and 6 had been amended since then. The definition of “non-recharging aquifer” had been removed from draft article 2, because the Working Group had decided to delete the term from all the draft articles. On the other hand, definitions of the terms “recharge zone” and “discharge zone” had been added. After considering the draft articles as a whole, the Working Group had decided not to change the second sentence of draft article 3, which enunciated the principle that each aquifer State had sovereignty over the portion of a transboundary aquifer or aquifer system located within its territorial jurisdiction. However, that sovereignty was not absolute. Paragraph 2 of draft article 5 (Factors relevant to equitable and reasonable utilization) had been amended to include the idea—previously reflected in draft article 11 in the Special Rapporteur’s third report—that special regard should be given to vital human needs in determining which utilizations of a transboundary aquifer or aquifer system were reasonable and equitable. Former draft article 11 had been deleted because it duplicated the new draft articles 4 and 5. In draft article 6 (Obligation not to cause harm to other aquifer States), the controversial phrase “in their territories” had been deleted from paragraph 2, but the commentary would reflect that that article was intended to cover activities undertaken in a State’s own territory, although it was unlikely that an aquifer State would cause harm to another State through an aquifer or aquifer system by engaging in activities outside its territory. The Working Group had also decided not to address the issue of compensation in circumstances where harm

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resulted despite efforts to eliminate or mitigate such harm, because it considered that the issue was already covered by other areas of international law and did not require special treatment with respect to transboundary aquifers. Accordingly, two footnotes referring to the question had been deleted.

50. Turning to Parts III, IV and V of the draft articles, he said that draft article 9 (Protection and preservation of ecosystems) had been reformulated to clarify its meaning. The Working Group had decided to limit the obligation of States to the taking of “all appropriate measures” for the protection of ecosystems so as to allow States greater flexibility in the implementation of their responsibilities under that provision. There might be instances in which changing an ecosystem in some appreciable way might be justified by other considerations, including the utilization of the aquifer in accordance with the draft articles.

51. On draft article 10, the Working Group had decided to merge the obligations relating to the protection of recharge and discharge zones in a single paragraph because they were similar. It had also considered that the obligation to prevent pollution in the recharge zone would fit better in the context of draft article 11 (former article 14), which dealt specifically with pollution. The Working Group had also decided that the obligation to protect the aquifer should include all States in whose territory a recharge or discharge zone was located, even if they were not aquifer States. Aquifer States were themselves covered by the duty to cooperate in draft article 7.

52. The Working Group’s discussions on draft article 11 (Prevention, reduction and control of pollution) had focused on whether more emphasis should be placed on prevention by having an independent article on the precautionary principle. Given the fragile nature of transboundary aquifers, it had decided to strengthen the obligation by changing the wording from “are encouraged to take a precautionary approach” to “shall take a precautionary approach”.

53. Draft article 12 (Monitoring) had been moved from Part II to Part III, since it related more directly to protection, preservation and management rather than to general principles. It had also been rearranged, so that it set forth the general obligation to monitor transboundary aquifers, jointly if possible, in the first paragraph and the modalities of such monitoring in the second. The modalities remained recommendatory in order to facilitate State compliance.

54. Draft article 13 (Management) was substantially the same as the text proposed by the Special Rapporteur in his third report as draft article 15, except that it now mandated that a joint management mechanism should be established wherever appropriate, given the importance attached to that question by groundwater experts. However, it was recognized that it might not always be possible to establish such a mechanism in practice.

55. Part IV, on activities affecting other States, currently contained only draft article 14 (Planned activities): it consisted of the merged texts of draft articles 16 and 17 proposed by the Special Rapporteur, which had covered the same situation. The Working Group had decided to broaden the scope of draft article 14 substantially by making it apply not only to aquifer States, but to any State that had reasonable grounds for believing that a planned activity in its territory could affect a transboundary aquifer or aquifer system and thereby have a significant adverse impact on another State.

56. Part V was entitled “Miscellaneous Provisions” and contained draft articles 15 to 19. In draft article 15, the Working Group had preferred the word “cooperation” to “assistance”, since it better represented the two-sided process needed to foster sustainable growth in developing countries. The commentary would indicate that the types of cooperation listed in the article were merely examples. States could choose the type of cooperation that they wished to engage in to fulfil the obligation set forth in the first sentence.

57. Draft article 16 dealt with emergency situations. The concept of “emergency” was defined in paragraph 1 as a situation resulting suddenly that posed an imminent threat of causing serious harm to States. The commentary would make clear that the requirement of suddenness would not exclude situations that could be predicted in a weather forecast. Paragraph 2 allowed States to derogate from the provisions of draft articles 4, 5 and 6 when an emergency posed a threat to vital human needs. Paragraph 3 set out the modalities for responding to an emergency that affected a transboundary aquifer.

58. Draft article 17 had not elicited any particular discussions in the Working Group and had not been the subject of any amendments. Draft article 18, on the other hand, had been one of the most contentious draft articles. Some members had had difficulty imagining a situation in which national security issues should take precedence over other provisions of the draft articles. Others had expressed the view that such protection was of the utmost importance to States and would be called for by the Sixth Committee. They had argued that in many circumstances, the draft articles required States to share more information than was strictly necessary for the protection of the aquifers and that the protection of information vital to national security would not interfere with the functioning of the other provisions of the draft articles. In any case, the Working Group had decided that the disagreement on that point would be reflected in the commentary. As there had been differences of opinion with regard to the suggestion to include the protection of industrial secrets and intellectual property in draft article 18, the Working Group had decided that the matter should likewise be dealt with in the commentary.

59. Draft article 19 (Bilateral and regional arrangements) had been considerably shortened so as not to prejudice, as had been noted earlier, the final form of the draft articles. The final two paragraphs had been deleted, because they had not been considered relevant to non-binding instruments. Should the Commission decide to recommend a binding instrument, it might wish to revisit draft article 19 as originally proposed by the Special Rapporteur. The same reasoning applied in the case of draft article 4.
60. Mr. BAENA SOARES commended the Special Rapporteur and the Working Group for their excellent work on a difficult and little-known topic for which a great quantity of information was required. He was in favour of referring the draft articles to the Drafting Committee, because they provided States with a useful set of non-binding guidelines. However, he wished to stress the importance of bilateral and regional arrangements as the best way of regulating the utilization of transboundary aquifers and aquifer systems. Given the considerable diversity of those resources, there could be no single model for their use and protection. That said, the Commission had not finished with the topic of natural resources because there was still the question of oil, to which, it had not finished with the topic of natural resources because there was still the question of oil, to which, it was to be hoped, it would give the same attention as it had groundwaters.

The meeting rose at 1.05 p.m.

2879th MEETING

Friday, 19 May 2006, at 11.10 a.m.

Chairperson: Mr. Guillaume PAMBÔU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameria, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Opertti Badan, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.


[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ECONOMIDES said that in his excellent report the Special Rapporteur had, as closely as was possible, skilfully aligned the text on responsibility of international organizations with the draft articles on responsibility of States for internationally wrongful acts. When it came to the section relating to circumstances precluding wrongfulness, however, that alignment became more problematic, even artificial, and at times positively naïve. There were two main reasons for that, as several other speakers, including Mr. Brownlie, Mr. Sreenivasa Rao and the Chairperson, had already pointed out. The first was the essential difference between States and international organizations, which was so marked that like treatment could not be given to two institutions that were profoundly unlike.

2. The second reason was that there was next to no significant practice relating to circumstances precluding wrongfulness in the case of international organizations. Most of the examples given in the report were, in his view, either irrelevant or extremely weak, as he would hope to show. Clearly, in the absence of significant practice, neither codification nor useful progressive development of international law was possible.

3. That being so, the Commission should not blindly follow the text of the draft articles on responsibility of States. On the contrary, three circumstances precluding wrongfulness in the case of States should be deleted from the draft articles on responsibility of international organizations. Those circumstances were—to take them in reverse order—necessity, distress and countermeasures. Necessity did not merit a place in the draft articles, for a number of reasons. First, as the Special Rapporteur recognized, it was the most controversial circumstance precluding wrongfulness as far as States were concerned, and all the more so in the case of international organizations. Secondly, it had often been used arbitrarily in the past for purely selfish reasons. Thirdly, its purpose was to protect a State’s essential interests against serious and imminent peril. International organizations, being essentially functional institutions, did not have essential interests in the same way as States. The provision concerning necessity was in any case almost impossible to implement even in the case of States, because the conditions required for its implementation were extremely difficult to meet. It would therefore be foolhardy to seek to apply it to international organizations. The inclusion of such a provision ran the risk of creating more problems than it solved. Moreover, the examples given in paragraph 42 of the report were not pertinent or convincing. Necessity was a passive concept—a means of defence—rather than an active concept or a means of attack. Nor did paragraph 44 correctly describe the state of necessity. Furthermore, operational or military necessity related, as Mr. Momtaz had said, to the law of armed conflicts and not to the state of necessity as a circumstance precluding wrongfulness.

4. The second circumstance that should be excluded was distress. It had never yet arisen in the case of international organizations, and he saw no reason why that state of affairs should change. The irrelevance of distress to the case of international organizations could be explained in the commentary. If, in the future, distress evolved into a circumstance precluding wrongfulness, the door would be left open for the development of customary law.

5. The third circumstance precluding wrongfulness, and undoubtedly the most important, was that of countermeasures. It should be excluded from the draft articles, for the reasons that he had given at an earlier meeting, namely, that countermeasures constituted an archaic and primitive practice that worked to the advantage of the strong, who took justice into their own hands by adopting unilateral measures. International organizations should not be permitted to go down that road. Countermeasures should be excluded in the interests of the progressive development of international law, which was perfectly able to regulate the settlement of any dispute that might arise between international organizations.

124 See footnote 8 above.
6. As for other circumstances precluding wrongfulness, they should be covered by a single article stating that the provisions of the draft articles on responsibility of States for internationally wrongful acts relating to consent, self-defence and force majeure applied also to international organizations, where and to the extent that they could apply. He fully supported draft articles 23 (Compliance with peremptory norms) and 24 (Consequences of invoking a circumstance precluding wrongfulness).

7. He would end with three specific comments. First, the commentary to draft article 17 should specify that consent was not valid if it ran counter to a *jus cogens* rule of international law. Secondly, since Article 51 of the Charter of the United Nations concerning self-defence did not apply to international organizations, draft article 18 should refer not to the Charter but to general international law, as had been suggested by several speakers. Lastly, he did not consider that the word “intervention” in the second sentence of paragraph 48 of the report was the appropriate term.

8. Mr. KATEKA said that self-defence, countermeasures and necessity, all of them controversial topics, should be omitted from the list of circumstances precluding wrongfulness in relation to international organizations. He was particularly concerned by the inclusion of self-defence: it was not possible, as some had suggested, to differentiate between an international organization and its member States in that context. For example, the Chairperson had referred at the previous meeting to an occasion when Nigeria, acting on behalf of ECOWAS, had intervened in Liberia. A similar situation had arisen when the forces of NATO had bombed positions in the Federal Republic of Yugoslavia (Serbia and Montenegro) in 1999. On the other hand, the ECOWAS intervention in Sierra Leone in February 1998 had been criticized as illegal by the United Kingdom, because it had not been authorized by the Security Council under Article 53 of the Charter of the United Nations. That would suggest that no regional problem could be addressed without prior authorization. Article 2 (f) of the Southern African Development Community (SADC) Protocol on Politics, Defense and Security Cooperation adopted in 2001 by the 14 States of SADC stated that the organ established by the Protocol would “consider enforcement action in accordance with international law and as a matter of last resort where peaceful means have failed”. The SADC countries, represented principally by one of the major countries of the region, had intervened under that provision to restore the Government of Lesotho, which had been overthrown in a coup. In another case, the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), together with the Government of that country, had been engaged in pursuing insurgents in the eastern Congo, who had been a destabilizing element. He wondered how either of those two actions would be characterized under the terms of the draft articles.

9. It was very difficult to decide which particular actions could be described as self-defence. The term should not, for example, be used in connection with forces trying to enforce peace. If action was taken with the concurrence of the host Government and with United Nations assistance, no problem arose, but the sensitivity of the issue was pointed out by the fact that the Commission had avoided the daunting task of defining self-defence in the draft articles on responsibility of States for internationally wrongful acts. Moreover, although the Commission had considered the question of conditions in relation to countermeasures, it had avoided doing so in relation to self-defence. It was therefore on dangerous ground, especially if reference was made to Article 51 of the Charter of the United Nations, or even simply to customary international law. The fact that some speakers had referred to factors that the Special Rapporteur deemed irrelevant showed the complexity of the whole question of self-defence, which should be excluded from the draft articles.

10. Mr. GAJA (Special Rapporteur) said that several speakers had emphasized that international organizations could not be likened to States. The prevailing view, however, was that the differences were generally not relevant when it came to circumstances precluding wrongfulness. That largely explained the inclusion in the draft articles of several texts similar to those adopted in the draft articles on responsibility of States. As some speakers had noted, the latter draft articles were not perfect and it might be that some matters could be dealt with more appropriately in a different way. Mr. Brownlie, for example, considered that distress should be viewed as a part of necessity and that the question of compensation should be dealt with in a more positive manner. While sharing certain opinions expressed in that regard, he had decided, in his fourth report, to maintain consistency with the Commission’s previous work on State responsibility. Some speakers, such as Mr. Yamada and Mr. Kolodkin, had urged the Commission not to introduce changes that could also affect States. That suggestion was a timely reminder that the draft articles on responsibility of States were delicate plants that might suffer from any inconsistency with the Commission’s current work. Until such time as the General Assembly had reached a decision on the draft articles on responsibility of States, it was preferable not to make changes, such as the identification of additional circumstances precluding wrongfulness that would apply also to States.

11. Draft article 17, concerning consent, had received general approval. He wished to point out that the example given in paragraph 12 of the report, concerning verification of the electoral process, had been chosen because consent was not part of a formal agreement between the supervising organization and the State in which it operated. The same applied to the Aeheh Monitoring Mission in Indonesia, mentioned in paragraph 13, or at least to its initial deployment, which had come about because the Government of Indonesia had invited several States and the European Union to send a monitoring mission.

12. The report attempted to give as full a picture as possible of the available practice, which was admittedly...
scanty. Some instances of practice were not immediately relevant but were useful to the extent that they showed a widespread acceptance of categories such as self-defence, necessity and force majeure. For example, the use of the term “self-defence” with regard to United Nations peacekeeping forces showed that the United Nations considered itself entitled to invoke self-defence; indeed, United Nations organs had often given the term a wider meaning than it had in Article 51 of the Charter of the United Nations. There had been no intention on his part to build a rule exclusively on United Nations practice, nor to pronounce on when peacekeeping forces should be regarded as entitled to use force. Draft article 18 had been drafted on the basis of an analogy between States, on the one hand, and those organizations that deployed armed forces or administered territories, on the other. It could be assumed that, in a given case, deployment of forces was lawful, perhaps on the basis of an authorization by the Security Council. The question before the Commission, however, was whether an international organization lawfully deploying peacekeeping forces could respond to an armed attack, invoking self-defence, in the same way as could a State. Clearly, only a few organizations would be in a position to invoke self-defence. Self-evident though the point might be, reference could be made in the text or in the commentary to the fact that self-defence could not be invoked by organizations that did not deploy armed forces or administer territories, such as those dealing with health matters or postal services.

13. As in the case of States, the conditions under which an international organization could resort to self-defence were somewhat controversial. Since the prevailing view was that the current study was not the appropriate place to analyse such controversial issues, the Commission should follow the same approach that it had taken in the draft articles on responsibility of States, article 21 of which referred merely to “conformity with the Charter of the United Nations”. A reference to the same effect in article 18 of the draft articles on responsibility of international organizations was certainly not based on an assumption that the Charter expressly governed self-defence on the part of international organizations. Although the reference to international law that some had suggested would probably have a similar result, such a reference might lend itself to the interpretation that an international organization could invoke self-defence also in certain circumstances not permitted under the Charter. That was not to say that such an interpretation would necessarily be correct. The Drafting Committee might perhaps consider making a reference to “the principles of international law as enshrined in the Charter”.

14. The question of countermeasures presented certain difficulties. The prevailing view seemed to be that the question of countermeasures would have to be examined when the Commission came to consider the implementation of the responsibility of international organizations. It also seemed to be widely accepted that international organizations did indeed take countermeasures and should be entitled to do so in certain circumstances. That would justify a reference to countermeasures in the chapter concerning circumstances precluding wrongfulness. If, as Mr. Kolodkin, Mr. Economides and Mr. Kateka had suggested, draft article 19 was not referred to the Drafting Committee, the impression would be created that the Commission was of the view that international organizations were never entitled to take countermeasures.

15. However, in his view, an article entitled “countermeasures” was needed in that chapter. One solution would be to include an article with that title, but to leave the provision itself blank, pending an examination of countermeasures at a later stage. If the Commission were subsequently to conclude that countermeasures were never permissible, that blank article could be deleted. Another possibility would be to insert a text along the lines suggested in alternative B in paragraph 25 of the report. Opinions in the Commission seemed to be evenly divided between those two alternatives. The Drafting Committee could, however, steer a middle course by incorporating a text along the lines of alternative B, but leaving it in brackets. That would be preferable to including a blank provision, an approach that might puzzle many readers.

16. The statement in paragraph 31 that the financial distress of an international organization might constitute an instance of force majeure had given rise to some criticism. In that paragraph, he had merely quoted at length the view expressed by INTERPOL to the effect that financial distress was invincible, but he had not endorsed that position. He believed it was important for the Commission to have before it all the opinions expressed by international organizations. Financial distress could be regarded as relevant only if the conditions listed in draft article 20 were met, namely, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization. While those conditions might appear too lenient, they mirrored those set forth in article 23 of the draft articles on responsibility of States for internationally wrongful acts and hence should be retained for the sake of consistency.

17. Although known practice did not offer examples of the invocation of distress by an international organization, the possibility that it could be invoked was far from remote, in view of the number of people who might be regarded as having been entrusted to the care of a given organization. The paradigm in the drafting of the provision on distress in the draft articles on responsibility of States had been that of a ship’s captain who, during a storm, entered a foreign port without consent. The reference to “persons entrusted to the author’s care” in article 24 of the draft articles on responsibility of States was designed to deal with that type of situation. A similar relationship might exist between an international organization, or an organ of an organization, and some of the people who were entrusted to it. The introduction of more specific wording—such as a reference to “a special relationship” between the organization and the persons in danger—might operate against the vital interests of some of the people concerned, who might not be deemed to be sufficiently closely related to the organization.

126 Yearbook … 2001, vol. II (Part Two) and corrigendum, pp. 74–75.
127 Ibid., p. 27.
128 Ibid.; see the commentary to article 24, pp. 78–80, paras. 2–6.
18. In view of the fact that several States in the Sixth Committee and a number of international organizations had been in favour of including necessity in the draft articles, he had drawn up an article on that subject covering the eventuality of a grave and imminent peril to an essential interest. As the Commission had not been entirely comfortable with the provision on necessity in the draft articles on responsibility of States, he believed that the Commission had good reason not to reiterate the rule accepted with regard to States, but to make it clear that the essential interest in question had to be one that the organization had a function to protect. That proposal had met with substantial approval, notwithstanding the criticism voiced by Ms. Escarameia, who was in favour of extending the possible range of situations in which international organizations could rely on necessity so as to include, for example, those where the very existence of the United Nations might be imperilled. That dramatic eventuality would, however, be indirectly covered by the reference to the essential interests that the organization had a function to protect, because some of the interests currently protected by the United Nations would be jeopardized if the Organization ceased to exist. On the other hand, Mr. Matheson had proposed limiting the reference to those functions of organizations that were similar to those of States. While that would generally be the case, it was possible to envisage cases in which necessity could be invoked in order to safeguard an essential interest which an organization had a function to protect, but which constituted a function that States were not in a position to exercise, such as the supervisory functions entrusted to the ILO.

19. He had never said or written that international organizations were not bound by peremptory norms. Paragraph 48 of his report, which had given rise to some difficulties, had been based on the premise that a treaty between States allowing military intervention in one State by another State at the latter’s discretion would contravene a peremptory norm. Although some members had expressed scepticism, he submitted that it was a tenable position. It was the one taken by Cyprus before the Security Council in 1964. Cyprus had held that if the Treaty of Guarantee were interpreted in that manner, it would contravene a peremptory norm. That had been one of the first occasions on which peremptory norms had been invoked with regard to the use of force. It could be contended that the Member States had given the United Nations a general power of intervention which clearly did not conflict with a peremptory norm.

20. The question which would have to be answered if the Commission were to consider the issue of the manner in which peremptory norms concerning the use of force applied with regard to international organizations was whether States could grant a regional organization a general power to intervene militarily in that territory at the organization’s discretion without contravening a peremptory norm. A problem would arise if a general power to intervene were to be given to the international organization without the specific consent of the State in which the intervention was to take place. Some of the examples given by Mr. Fomba and some of the questions raised by Mr. Kateka would be worth discussing if that issue were to be examined, but he personally was opposed to doing so, or even to mentioning it in the commentary. A “without prejudice” clause along the lines of the one adopted in the draft articles on responsibility of States would be sufficient.

21. Accordingly, he proposed that draft articles 17 to 24 should be referred to the Drafting Committee.

22. The CHAIRPERSON, endorsing the Special Rapporteur’s proposal, urged the Commission to show forbearance if the Drafting Committee found that it was unable to complete its task at the current session. If he heard no objection, he would take it that the Commission wished to refer draft articles 17 to 24, contained in the Special Rapporteur’s fourth report, to the Drafting Committee.

It was so decided.

Shared natural resources (continued)


[Agenda item 5]

REPORT OF THE WORKING GROUP (continued)

23. Mr. OPERTTI BADAN said that his observations would focus on what he believed were crucial aspects of the Commission’s further examination of the topic. First, it was vital to avoid any outright departure from the earlier course of the Commission’s deliberations. It should be remembered that, in 2003, the Special Rapporteur had envisaged that his first report on the 1997 Watercourses Convention that its object was quite different from that of the draft articles on transboundary aquifers. Consequently, it seemed somewhat strange to contemplate the possibility of turning those draft articles into an additional protocol to an instrument with a different


object, one which, moreover, had still not entered into force almost 10 years after its conclusion.

25. Thirdly, it was essential to decide what normative status the text should have. That was an issue not of form but of substance, because the question of the binding or non-binding status of the provisions was a central aspect of their content. In that connection, he wished to make a suggestion. Part II of the text, entitled “General principles”, was uncontroversial. One way of striking a balance between international and regional situations might be for aquifer States—which alone were entitled to regulate and control their own commitments—to take those general principles into account as a basis for developing their own regional or bilateral arrangements, without having to adopt the draft text in its entirety as a set of binding provisions.

26. Fourthly, it was necessary to consider the relationship between the draft articles and other instruments. More specific norms were required than the majority of those contained in the 1997 Watercourses Convention. He therefore endorsed Ms. Escarameía’s view that there would be no point in drawing up a new instrument which merely repeated what had already been established in that Convention. Accordingly, he urged the Commission to draft a set of articles tailored to the very different object of regulating the management of aquifers.

27. With regard to regional arrangements, he was concerned about the issue of precedence. Would it be based on temporal or on hierarchical considerations, or governed by the rules concerning lex specialis? What would be the relationship between the new convention—if it was decided that that was the form the draft articles were to take—and regional arrangements between aquifer States? His concern was prompted by the fact that old draft article 3, which had since become new draft article 19, had contained two additional paragraphs dealing with precisely that situation, based on sources cited in great detail by the Special Rapporteur. One of the principles had been that nothing in the convention affected the sovereign right of States to exploit, develop and manage their natural resources. That was tantamount to a twofold restatement of the principle of sovereignty and the principle that the convention would not be imposed on countries that had concluded special arrangements. He agreed with Mr. Kolodkin, who, at the meeting of the Commission held on 6 May 2005, had said that the term “arrangements” could include political or administrative arrangements, which were dissimilar in nature to the traditional sources of international law. Mr. Galicki had expressed similar concerns about the use of that expression in his statement at the same meeting. Over and above the use of that term, which seemed to have been adopted provisionally in order to pave the way for future discussion of the matter, it was necessary to take into account the sensitive issues of precedence and coordination, which were of central importance.

28. Consideration must also be given to the role played by third States with regard to aquifers. He supposed that it was the same role as that played by third States with regard to gas and oil, namely that of purchasing, importing and utilizing those resources. In the microclimate of the Drafting Committee and the Commission, it was sometimes forgotten that their work was addressed to the international community of States and to Governments. The extreme sensitivity of those matters made it imperative for the Commission to return to the sources of its work on the topic, in particular the mandate given to it by the General Assembly, treaty law and the general principles of international law. As Mr. Candioti had rightly indicated at the 2834th meeting, the Commission must concentrate on the obligations of each of the aquifer States. He therefore welcomed the Commission’s intention to focus on the rights and obligations of those States.

29. Another point related to the international community. At the Commission’s 2834th meeting, Mr. Candioti had also warned against the internationalization or universalization of aquifers. He wished to draw attention once again to that point, which was of central importance.

30. His next point was that any bilateral or regional agreements must be consistent with the general principles set out in the future instrument, whether it took the form of a convention or some other form. Those principles encompassed a commitment to equitable and reasonable utilization, in other words protection, of natural resources, a commitment that should be extended to all sources of energy, including gas and oil. By 2027, all non-renewable energy sources were likely to be depleted. Accordingly, it was up to society to ensure that they were used in a rational and responsible manner.

31. A further point was that the problem of sovereignty had been only half-solved. The draft articles affirmed it as a general principle, but, without disregarding General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources, it nevertheless also indicated that sovereignty was to be exercised in accordance with the limitations established by the draft articles. There was a technical distinction to be made: sovereignty meant having decision-making power, but the means of exercising that power could and should be limited, inasmuch as international law was evolving in that direction. Decision-making power should not be confused with regulation of the exercise of that power. The footnote to draft article 2 (a) in the report of the Working Group (A/CN.4/L.683) stated that the commentary would indicate that the phrase “water-bearing” had been employed to draw a distinction with gas- and oil-bearing geological formations. That was an important distinction and one that kept alive the link with other geological formations.

32. The new draft article 19 should not be construed as suggesting that the draft articles as a whole were simply a set of standards governing utilization and prevention of contamination. They were much more, and their significance was not confined to environmental matters alone. He endorsed the general philosophy behind the

132 Ibid., 2834th meeting, p. 21, para. 34.
134 Ibid., p. 22, para. 44.
135 Ibid.
provisions on monitoring, management and responsible use of resources. He found the reference in draft article 12 to “competent international organizations” fairly vague, and would prefer a reference to international or regional organizations.

33. In conclusion, he said that the topic had evolved considerably since its inception under the aegis of Mr. Rosenstock.\textsuperscript{136} Even though Mr. Pellet had suggested that a section on reservations should be included, in his own view, it was now ripe for completion. However, the international community had a responsibility to deal with all shared natural resources, not just groundwaters. The Commission’s current work on the topic would have a bearing on other exercises involving regulation or the adoption of principles, \textit{inter alia}, on gas and oil.

34. Mr. MATHESON said he was fully satisfied with the report of the Working Group and with the text of the draft articles, which should be referred to the Drafting Committee. The Chairperson of the Working Group and the Special Rapporteur deserved special thanks for producing so expeditiously a draft that covered many technical issues and matters of importance to States. Although the question of form had not yet been decided, the text appeared to be taking the form of a future framework convention. That was an appropriate format for a text containing specific obligations and dealing with a specific resource. He hoped that the Drafting Committee would bear that point in mind when working on the text.

35. Mr. Operti Badan had raised the important question of the relationship between the text and regional or bilateral agreements. As had often been noted, the only way to achieve effective regulation of an underground aquifer that had transboundary characteristics was through cooperation and agreement among the aquifer States. That, indeed, would be the primary source of obligation and implementation. The Commission therefore needed to take care not to encroach on the ability of bilateral and regional groups of States to regulate aquifers effectively; it should not derogate from existing agreements or undermine the ability of States to make special provision to deal with their aquifers in a manner that best suited their populations.

36. The Commission should exercise considerable caution with regard to the subject of gas and oil. The draft articles on aquifers did not necessarily provide an appropriate model for oil and gas. Aquifers had special characteristics, especially vulnerability to use and pollution, which differed substantially from those of oil and gas. Moreover, before venturing into such a politically sensitive area, the Commission needed a new mandate from the General Assembly: its work on that subject could not be merely an extension of the work done on aquifers. Vital interests of States were at stake, and the Commission needed to know whether the international community really wanted it to regulate that difficult and important area.

37. Mr. CHEE congratulated the Chairperson of the Working Group and the Special Rapporteur on producing a set of draft articles worthy of adoption on first reading. His initial misgivings as to whether the topic of groundwaters was worthy of the Commission’s attention had been dispelled by the Special Rapporteur’s unstinting efforts. Water shortages had become a threat to the whole future of humanity.

38. Articles 4 and 5 of the draft, dealing with equitable and reasonable utilization and sharing of resources, were the core articles. Allocation of water resources would be a crucial question, decisions regarding which should be entrusted to the joint management mechanism envisaged in draft article 13. Another important provision was draft article 11 on prevention, reduction and control of pollution. Those activities too could be brought under the control of the joint management mechanism, as could monitoring activities pursuant to draft article 12.

39. Draft article 14, on planned activities, provided for assessment of activities and reciprocal notification by aquifer States. The link between those obligations and the general obligation to cooperate contained in Part II of the draft articles should in some way be given greater prominence. Draft article 17 dealt with the protection of aquifer systems and related facilities in time of armed conflict. While incidents involving the destruction of oil installations had already occurred, that provision rightly envisaged the comparable case of deliberate damage to water resources. Draft article 19 dealt with bilateral and regional arrangements of the sort that already existed in South America and Africa. However, further clarification of the Special Rapporteur’s decision to opt for the term “arrangement” rather than “agreement” would be helpful.

40. The advice received from technical consultants and experts from bodies such as the FAO in the course of informal briefings had been of enormous assistance to the Working Group. He was confident that the Commission’s work on aquifer systems and protection of transboundary groundwaters would eventually constitute a valuable legacy to the world’s population. Lastly, regarding the form to be taken by the instrument, he endorsed Mr. Matheson’s view that it should take the form of a framework convention.

41. Mr. OPERTTI BADAN said he agreed with Mr. Matheson’s remark that the Commission’s work on aquifers was unlikely to be transposable to other areas such as oil and gas, but disagreed with his suggestion that a new mandate was needed. In response to General Assembly resolution 54/111 of 9 December 1999, the Commission had elaborated in 2002 a tentative work programme and timetable for the remainder of the quinquennium, which had included a report on oil and gas.\textsuperscript{137} That information had been communicated to the General Assembly, and no mention had been made in the Sixth Committee of any need to alter the mandate given to the Commission in 1999.

42. Mr. KEMICHA endorsed the important point made by previous speakers that it was not feasible to transpose the approach used for aquifers to the domain of oil and

\textsuperscript{136} Yearbook … 2000, vol. II (Part Two), annex, p. 141.

\textsuperscript{137} Yearbook … 2002, vol. II (Part Two), p. 100, para. 520.
gas, for political, technical and also normative reasons, in the light of the United Nations resolutions already adopted on the matter. As Mr. Operti Badan had pointed out, the Commission already had a mandate for its future work. However, at the start of the next quinquennium, the newly constituted Commission could review the question in the light of political, legal and other considerations. For his own part, he would want to see a very broad consensus reached before the Commission addressed the subject of oil and gas.

43. Mr. BAENA SOARES said that, as one of the longest-serving members of the Commission, he was a strong believer in mandates. Since the Commission already had a mandate from the competent authority, it must not shrink from carrying it out. It could hardly request the General Assembly to reiterate or alter that mandate, or decide to fulfil it only in part; to do so would undermine its credibility as a body.

44. Mr. CANDIOTI (Chairperson of the Working Group), thanking the members of the Commission for their comments and the support expressed, noted that no specific suggestions on the draft articles had been made. It should be remembered that the Commission was only beginning its consideration of the draft on first reading, and that much remained to be done before the work was completed.

45. The CHAIRPERSON, speaking as a member of the Commission, saluted the efforts that had produced results on a highly technical subject that had significant implications. At the previous session, he had said that the topic needed to be refocused, and he was gratified to see that that had been done, although he would have liked to see more emphasis placed on groundwaters, not least in the title of the Working Group’s report.

46. If he heard no objection, he would take it that the Commission wished to refer the draft articles contained in the report of the Working Group on Shared natural resources to the Drafting Committee.

It was so decided.

The meeting rose at 12.45 p.m.

2880th MEETING
Tuesday, 23 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson and Mr. Yamada, together with Mr. Pellet (Special Rapporteur) and Ms. Xue, ex officio.


[Agenda item 2]

1. The CHAIRPERSON introduced the texts and titles of the draft articles adopted by the Drafting Committee, as contained in document A/CN.4/L.684 and Corr.1–2, which read:

Organization of work of the session (continued)’

[Agenda item 1]

1. The CHAIRPERSON extended a welcome to Sir Kenneth Keith, a judge of the International Court of Justice, and expressed gratification that the Commission’s work aroused the interest of eminent figures in the field of international law. He then invited the Chairperson of the Drafting Committee on reservations to treaties to inform the Commission of the Committee’s membership.

2. Mr. KOLODKIN (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of reservations to treaties was composed of Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Mansfield, Mr. Matheson and Mr. Yamada, together with Mr. Pellet (Special Rapporteur) and Ms. Xue, ex officio.

3. The CHAIRPERSON submitted the programme for the following fortnight, which would complete the first part of the session, and noted that the programme had been drawn up in such a way as to enable the Commission to complete its work as originally planned.

The meeting rose at 10.14 a.m.

2881st MEETING
Tuesday, 30 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Montaz, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

DIPLOMATIC PROTECTION

PART ONE

GENERAL PROVISIONS

Article 1. Definition and scope

For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Article 2. Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

PART TWO

NATIONALITY

CHAPTER I

GENERAL PRINCIPLES

Article 3. Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

CHAPTER II

NATURAL PERSONS

Article 4. State of nationality of a natural person

For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law.

Article 5. Continuous nationality of a natural person

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.

4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquired the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

Article 6. Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 7. Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

Article 8. Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

CHAPTER III

LEGAL PERSONS

Article 9. State of nationality of a corporation

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

Article 10. Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.

3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

Article 11. Protection of shareholders

A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

(a) the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

(b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

Article 12. Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Article 13. Other legal persons

The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

PART THREE

LOCAL REMEDIES

Article 14. Exhaustion of local remedies

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.
2. “Local remedies” means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.

3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

Article 15. Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

(b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(d) the injured person is manifestly precluded from pursuing local remedies; or

(e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.

PART FOUR

MISCELLANEOUS PROVISIONS

Article 16. Actions or procedures other than diplomatic protection

The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Article 17. Special rules of international law

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

Article 18. Protection of ships’ crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

Article 19. Recommended practice

A State entitled to exercise diplomatic protection according to the present draft articles, should:

(a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;

(b) take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and

(c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

2. The Drafting Committee had held 10 meetings on the topic from 8 to 16 May 2006, as well as one additional meeting on 19 May to review the text, and had succeeded in completing the second reading of all the draft articles. It had reviewed the draft articles adopted on the first reading at the fifty-sixth session,\(^{139}\) taking into account the comments made by Governments either in the Sixth Committee or in writing and the views expressed by members of the Commission in plenary, as well as the recommendations of the Special Rapporteur in his seventh report.

3. The Drafting Committee was submitting its report with the recommendation that the Commission adopt the draft articles on second reading.

4. The Drafting Committee had decided to retain the structure of the draft articles as adopted on first reading. Two draft articles had been merged and one new draft article had been added.

5. Part One was entitled “General Provisions” and contained the first two articles applicable to the entire set of draft articles.

6. Draft article 1 dealt with the definition of diplomatic protection for the purposes of the draft articles and the scope of the draft articles. During the plenary debate, several speakers had expressed opposition to the inclusion of the reference to the State adopting “in its own right” the cause of its national, which had been included on first reading as a reflection of the principle in the Mavrommatis Palestine Concessions case. There had also been a suggestion by the Government of Italy that the Commission take a different approach to draft article 1 by inserting a reference to the rights of the injured individual (its national). The Drafting Committee had proceeded on the basis of a proposal which had emerged from the plenary debate and which had avoided any reference to the basis upon which the State was invoking diplomatic protection, focusing instead on the responsibility of the injuring State. The understanding had been that such reformulation did not prevent the State from acting in its own right, a principle which was well established in international law. Instead, the new formulation reserved the question as to whether the State was acting in its own right or that of the individual, or both. That proposal had become the basis of the article subsequently adopted on second reading.

7. The opening phrase, “[f]or the purposes of the present draft articles”, had been added to limit the definition to the draft articles. Next, the provision stated that “diplomatic protection consists of the invocation by a State ... of the responsibility of another State for an injury caused by an internationally wrongful act”; that was a conscious attempt to align the text with the language of the 2001 draft articles on responsibility of States for internationally wrongful acts.\(^{140}\) Thus, the Drafting Committee had decided to indicate that the State of nationality would be “invoking” the responsibility of the wrongdoing State through diplomatic action or other means of peaceful settlement “with a view to the implementation of such responsibility”. The latter phrase further captured the notion that diplomatic protection was a process of invocation of responsibility for the purpose of implementing such responsibility. The understanding was that reference was being made to State-to-State claims.

\(^{139}\) See footnote 7 above.

\(^{140}\) Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 26, para. 76.
8. With regard to the phrase “through diplomatic action or other means of peaceful settlement”, the Drafting Committee had also considered whether the word “action” had to be aligned with other terminology used in the draft articles, such as “diplomatic protection” in draft article 2 and “international claim” in draft articles 14 and 15. The prevailing view had been that the reference to diplomatic “action” was nonetheless appropriate in the draft article since it was one of the forms of diplomatic protection, which, as a broader concept, also included “other means of peaceful settlement”, it being recalled that the latter phrase had been inserted during the first reading to make it clear that diplomatic action did not include resort to the use of force.

9. One of the issues considered in the Drafting Committee had been whether low-level interactions between States would be regarded as diplomatic protection and thereby require the exhaustion of local remedies, the concern being that such a requirement could interfere with the daily interaction between States. The Committee’s understanding had been that what was important was whether the action in question amounted to the invocation of the responsibility of the respondent State. If so, then the draft articles, including the provisions on the exhaustion of local remedies, would apply.

10. The reference to “natural or legal person” had been inserted to replace the word “national” in the text adopted on first reading because of the difficulty faced by some States in categorizing legal persons as “nationals”. In his report, the Special Rapporteur had proposed (para. 10 of the report), on the suggestion of the Netherlands, to include a reference to draft article 8 so as to recognize the extension of diplomatic protection to stateless persons and refugees under that article. However, the Drafting Committee had felt that it was not necessary to include exceptions in a definition.

11. It would be recalled that in his seventh report (para. 21), the Special Rapporteur had proposed a paragraph 2 specifically excluding the exercise of consular assistance from the scope of the draft articles. However, as there had been no support for the proposal in the plenary, the Drafting Committee had decided not to include such a paragraph, leaving the issue to be covered in the commentary.

12. The title of draft article 1 remained “Definition and scope”, as in the text adopted on first reading.

13. Draft article 2 established the principle that it was States that were entitled to exercise diplomatic protection in accordance with the provisions of the draft articles. The Drafting Committee had adopted the same text as had been adopted on first reading.

14. In his seventh report (para. 24), the Special Rapporteur had included a second paragraph in his proposal for draft article 2, dealing with the obligation of the respondent State to accept a claim of diplomatic protection made in accordance with the draft articles, as had been proposed by the Government of Austria. The Drafting Committee had noted that the Special Rapporteur’s proposal had been opposed in plenary, and it had decided not to include the new paragraph, but to refer to the matter in the commentary.

15. Italy had proposed an even more far-reaching addition to draft article 2, purporting to establish a duty of a State to exercise diplomatic protection on behalf of its injured national in certain cases involving serious breaches of international law. The Drafting Committee had also taken into account similar proposals made during the plenary debate. Nonetheless, the Committee’s view had been that such proposals had not been supported by the majority in the Commission and, accordingly, should not be dealt with in the draft articles.

16. The title of draft article 2 remained the same as that adopted on first reading, namely “Right to exercise diplomatic protection”.

17. The Drafting Committee had decided to retain the structure of Part Two as adopted on first reading. Part Two, which dealt with the nationality of claims, was divided into three chapters, the first establishing the general principle applicable to both natural and legal persons, the second and third dealing with natural and legal persons respectively. Part Two was entitled “Nationality”.

18. With regard to Chapter I of Part Two, which comprised only draft article 3, the Drafting Committee had decided to retain the title “General principles”.

19. For draft article 3, the Drafting Committee had had before it a proposal for a reformulation of paragraph 1, based on a proposal by the Government of the Netherlands. However, it had been of the view that the original formulation was preferable because it answered the question as to which State was entitled to exercise diplomatic protection, whereas the new proposal emphasized the State of nationality and was more open-ended, since it begged the question of which State was the State of nationality.

20. The Drafting Committee had also decided to retain the text of paragraph 2 adopted on first reading, replacing the word “non-national” by “person that is not its national” to make the text more precise.

21. The title of draft article 3 was “Protection by the State of nationality”.

22. Chapter II of Part Two dealt with the nationality of natural persons and comprised draft articles 4 to 8. The Drafting Committee had decided to retain the title “Natural persons”, used in the text adopted on first reading.

23. The Drafting Committee had noted that the Special Rapporteur had included in his proposal for draft article 4 a suggestion by the Government of Austria that the reference to “succession of States” in the text adopted on first reading be replaced by “a consequence of the succession of States” (para. 30). However, the Committee had not accepted the proposal, since it was already implied that it was as a consequence of any of the factors listed in the draft article, namely birth, descent, naturalization and succession of States, that nationality was acquired.
In addition, a specific reference to the “consequences of succession” would require a consideration of the consequences of succession of States, which was beyond the scope of the current topic. The Drafting Committee had also regarded the matter as having been dealt with by the inclusion, on the suggestion of the Government of Uzbekistan, of a reference to the “law of the State” conferring the nationality, a suggestion that the Committee had accepted. Indeed, the phrase “in accordance with the law of that State” had been inserted before the list of the various possibilities to indicate that it would be that law that would govern the matter, as long as it was not inconsistent with international law. The Committee had further decided to tighten the text by replacing the phrase “the individual sought to be protected” by “that person”.

24. As to the phrase “not inconsistent with international law” at the end of the provision, the Drafting Committee had noted, as had been pointed out during the plenary debate, that it created a lacuna in the case of individuals upon whom nationality had been conferred in a manner inconsistent with international law. Under the draft articles, the conferral of such nationality would not be opposable to other States, leaving those individuals without the possibility of diplomatic protection. The matter had been dealt with in the commentary to the text adopted on first reading, specifically with regard to the case of women having a new nationality conferred on them automatically upon marriage. However, after considering proposals for dealing with the issue in the text in the form of a “without prejudice” clause, the Committee had decided against doing so as that would be tantamount to recognizing that an unlawful situation would nonetheless have consequences for the respondent State. Instead, it had decided to refer more extensively to the issue in the commentary.

25. The title of draft article 4 remained “State of nationality of a natural person”.

26. Draft article 5 dealt with the continuous nationality rule in the context of natural persons, and in the new version adopted by the Drafting Committee on second reading had four paragraphs.

27. On paragraph 1, the Drafting Committee had decided against specifying that diplomatic protection could be exercised “only” in the manner set forth in the paragraph, because it was possible for a State to exercise diplomatic protection under the draft articles in respect of a person who was not its national, particularly in the case of stateless persons and refugees mentioned in draft article 8. The Committee had, however, accepted the suggestion that the text adopted on first reading should be modified to require that the nationality had to remain that of the claiming State continuously from the dies a quo to the dies ad quem; whereas the text adopted on first reading had required such conformity of nationality only at both those dates. At the same time, it was recognized that this was a more restrictive provision and that it placed a burden on the claimant State to prove continuity over what could be a substantial period of time. Therefore, the Committee had included an additional sentence at the end of the paragraph establishing a rebuttable presumption in favour of continuity if the relevant nationality existed at the two relevant dates.

28. With regard to the question of the dies ad quem, the ending date for purposes of the continuous nationality rule, the Drafting Committee had decided to retain the date of the official presentation of the claim, as had been proposed in the text adopted on first reading and which had been supported by the majority in the Commission. The Drafting Committee had felt that the date of the resolution of the claim proposed by the Government of the United States was not sufficiently supported in State practice and that the particular state of affairs that had given rise to the application of the later date for the dies ad quem in some decisions, namely that the individual had acquired the nationality of the respondent State after the date of the official presentation of the claim, could be dealt with separately in what was now paragraph 4. In addition, it had been considered illogical to base the admissibility of a claim on the question whether the relevant nationality had existed at the date of the settlement of the claim. The Committee had also harmonized all the references in the draft articles to the “time” of injury to read “date” of injury.

29. Although the Special Rapporteur had proposed including a reference to the “predecessor State” in paragraph 1, the Drafting Committee had nonetheless decided to deal with the question of succession of States in paragraph 2, since it was not a common situation, thereby leaving paragraph 1 to deal with the vast majority of cases of diplomatic protection, which typically did not involve predecessor States.

30. Paragraph 2 was based on the text adopted on first reading, with the added refinement of the reference to the “predecessor State”. Some concerns had been expressed that paragraph 2 could be read as being open-ended and allowing some scope for “nationality shopping”. However, the Drafting Committee had considered that the phrase “for a reason unrelated to the bringing of a claim” sufficiently met those concerns and that the provision maintained a certain level of flexibility in the continuous nationality rule. It had been agreed that the commentary would make it clear that the reason had to be one unrelated to the advancement of the commercial interests of the individual. The reference to the “former” State had been added at the end of the paragraph to make it clear that it was the State of nationality, not the predecessor State, that was being referred to.

31. For paragraph 3, the Drafting Committee had retained the text adopted on first reading. Paragraph 4 had been introduced following the proposal by the United States to extend the dies ad quem to the date of the making of the award, following the decision in the Loewen case. While the Committee had not accepted the extension of the dies ad quem to that date for all cases of diplomatic protection, it had favoured the inclusion of paragraph 4 as a useful accommodation to cover the unique factual situation of the individual acquiring the nationality of the respondent State after the date of the official presentation of the claim. It had been decided to locate that provision at the end of the article because paragraphs 2 and 3 dealt with admissibility. Paragraph 4 addressed the case of a claim that had been admissible but was no longer so.
32. The title of draft article 5 had been modified to read “Continuous nationality of a natural person” so as to align it with draft article 9.

33. With respect to draft article 6, the Drafting Committee had retained the version of paragraph 1 adopted on first reading, changing the word “individual” to “person” for the sake of consistency in the text.

34. The Drafting Committee had noted the Government of Austria’s proposal to delete paragraph 2. However, it had seen no reason to depart from the formulation of the paragraph adopted on first reading, which could be regarded as an innovative element in the draft articles, as it recognized the fact that two or more States could not be prevented from jointly exercising diplomatic protection on behalf of a dual national.

35. The title of draft article 6 remained “Multiple nationality and claim against a third State”.

36. With regard to draft article 7, the Drafting Committee had decided to retain the text adopted on first reading, including the word “predominant”, which had been debated at length during the first reading and had not been opposed by the Commission during the debate in plenary. It had also decided not to align the provision with the new language in draft article 5, since it would be difficult to provide continuity of nationality between the dies a quo and the dies ad quem. What was important was predominance at the two critical points in time.

37. The title of draft article 7 remained “Multiple nationality and claim against a State of nationality”.

38. For draft article 8, the Drafting Committee had essentially adopted the same formulation for the entire provision as in the text adopted on first reading, with an amendment to paragraph 2. The main issue considered had been whether to retain the threshold for protection adopted on first reading, namely “lawful and habitual residence”, or to adopt a lower threshold, such as “lawfully staying”, as had been proposed, inter alia, by the Nordic countries. With regard to stateless persons in paragraph 1, the Committee had noted that the 1961 Convention on the reduction of statelessness made reference to “habitual” residence and that “habitual residence” was a term increasingly accepted in private international law. Clearly, for purposes of diplomatic protection such habitual residence would have to be “lawful”, or else the protecting State would probably be unwilling to exercise its discretion to protect. Therefore, the reference to “lawfully and habitually” in the text adopted on first reading had been appropriate.

39. Similar considerations had applied to refugees in paragraph 2. The Drafting Committee had decided to retain the threshold in the text adopted on first reading since, for the purposes of the progressive development of the rules of diplomatic protection, it was wiser to recognize a higher threshold. In short, if the individual was recognized as a refugee by the State wishing to exercise diplomatic protection on his or her behalf, then the assertion of the right to protect was opposable to the respondent State when the individual had been lawfully and habitually resident in the claimant State.

40. The Drafting Committee had also decided to include a reference, in paragraph 2, to the recognition of a refugee being “in accordance with internationally accepted standards”, so that such recognition should not be limited to that in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol but should cover, for example, individuals under the protection of the United Nations High Commissioner for Refugees who were not recognized as refugees but were lawful residents in States. The effect of that additional language was to provide a broader standard to cover a range of people. The Committee had preferred a reference to “international standards” as opposed to “international law” so as to avoid the implication that only the 1951 Convention and its Protocol or some other treaty (such as one of the regional conventions) were being referred to.

41. The Drafting Committee had retained paragraph 3 as adopted on first reading. The title of draft article 8 was “Stateless persons and refugees”, as adopted on first reading.

42. Chapter III of Part Two dealt with the nationality of legal persons and comprised draft articles 9 to 13. The Committee had also decided to retain the title of the chapter adopted on first reading, namely “Legal persons”.

43. The text of draft article 9 adopted on first reading had been substantially modified in response to comments from Governments and those made by members of the Commission in plenary session. There had been three major concerns concerning the text adopted on first reading. First, the last phrase of the text seemed to suggest a genuine link requirement between the corporation and the State exercising diplomatic protection, but did not specify the content of such a link. Second, the cumulative requirements to be satisfied in order to allow a State to exercise diplomatic protection did not take account of the possibility that a corporation might be incorporated in one State but have its registered office in another, in which case it was unclear which State was entitled to exercise diplomatic protection. Third, the text adopted on first reading had not allowed for the fact that more than one State might have sufficient interest in exercising diplomatic protection, and that there should be some criteria to identify those States. At the same time, only one State should eventually be entitled to exercise diplomatic protection for a corporation, and every effort should be made to avoid the possibility that more than one State would be so entitled.

44. The Drafting Committee had redrafted the text of article 9 in the light of those concerns. Draft article 9 did not purport to interfere in or affect how internal law might define nationality of a corporation. It viewed the nationality of a corporation from the perspective of international law, and even then only for the purposes of exercising diplomatic protection.

45. The present text of draft article 9 comprised two sentences and recognized the State of incorporation as the State of nationality of a corporation. However, it acknowledged that, in certain specific situations, the State in which both the seat of management and the
financial control of the corporation were located would be considered to be the State of nationality. That was a recognition that there might be circumstances in which the connection between the corporation and the State of incorporation was so insignificant that it would not justify giving priority to that State for exercising diplomatic protection, and that instead there was another State with a stronger interest to exercise diplomatic protection. The cumulative criteria for establishing such an insignificant connection with the State of incorporation, however, were set rather high and were to be found in the second sentence of paragraph 2. They were situations in which: (a) the corporation was controlled by nationals of another State or States; (b) the corporation had no substantial business activities in the State of incorporation; and (c) the seat of management and the financial control of the corporation were both located in another State. In such situations, that State, namely the State in whose territory the seat of management and the financial control of the corporation were located, was considered to be the State of nationality for the purposes of exercising diplomatic protection. The requirements were cumulative. In any other situation, the State of incorporation would be considered the State of nationality, entitled to exercise diplomatic protection. That provision had been constructed specifically to make it clear which State might be considered the State of nationality of a corporation for the purposes of exercising diplomatic protection.

46. The draft article was entitled “State of nationality of a corporation”, as in the text adopted on first reading.

47. Draft article 10 was in many respects similar to draft article 5 and dealt with the general principle of continuous nationality for corporations. Many of the issues that had been raised in the context of draft article 5 also applied to draft article 10 and for that reason it had been redrafted. The present text comprised three paragraphs instead of two.

48. Paragraph 1 corresponded to paragraph 1 of draft article 5. The modifications were related to the requirement of “continuity” of nationality between the two relevant dates of injury and the presentation of the claim. The paragraph also addressed the issue of the predecessor State, which had been addressed in a separate paragraph in the context of natural persons in draft article 5. Paragraph 1 asserted the principle that a State was entitled to exercise diplomatic protection in respect of a corporation that had been its national or a national of its predecessor State continuously from the date of injury to the date of the official presentation of the claim. The second sentence, as in paragraph 1 of draft article 5, made a presumption in favour of continuity of nationality if the nationality had existed at both those dates. As in draft article 5, that presumption was, of course, rebuttable.

49. Paragraph 2 was new and corresponded to paragraph 4 of draft article 5. It excluded diplomatic protection of a corporation that became the national of the defendant State after the date of the official presentation of the claim. Under draft article 10, the corporation must remain the national of the same State at the time of injury and the presentation of the claim. The change of nationality between those two dates would exclude the right to diplomatic protection. Moreover, the issue of the predecessor State in draft article 10 was covered in its paragraph 1. The reference to the predecessor State was intended to allow diplomatic protection for a corporation which had been a national of a predecessor State at the time of injury and a national of a State that had succeeded that State at the time of the presentation of the claim.

50. Paragraph 3 dealt with the dissolution of a corporation after the date of injury but before the date of the official presentation of the claim. Under that paragraph, a State was entitled to exercise diplomatic protection for a corporation that had been its national at the time of injury but had ceased to exist, as the result of the injury, according to the law of the State of incorporation.

51. The title of draft article 10 remained unchanged and read: “Continuous nationality of a corporation”.

52. Draft article 11 had been generally accepted by Governments and therefore no substantial modification had been necessary. A suggestion by one Government to extend the scope of the draft article to trustees, debenture holders or other financial stakeholders in a corporation had not been supported in the plenary and had therefore not been included in the draft. The text was thus almost identical to that adopted on first reading, with some minor changes. The first word, the definite article “The”, had been replaced by the indefinite article “A”. In subparagraph (b), the phrase “the time of the injury” had been replaced by the phrase “the date of the injury”, in the interests of consistency with other provisions. Lastly, the phrase “under the law of the latter State”, in the same subparagraph, had been replaced by the phrase “in that State”. The latter change was intended to take account of situations in which an injured corporation was compelled to incorporate in the State that had caused the injury, in order to be able to do business there. Such compulsion might take the form either of legislation or of other pressures so strong that the corporation had no choice in the matter. The commentary would elaborate on the issue, explaining that the subparagraph referred not to reasonable modes of inducement but to any pressure that amounted to compulsion. The title of the draft article (“Protection of shareholders”) remained unchanged.

53. With regard to draft article 12, there had been no calls from Governments or members of the Commission for its modification, although there had been a suggestion that it might be superfluous, given the provisions of draft articles 2 and 3. The Drafting Committee had, however, felt that, since the draft article was intended to articulate a significant exception made in the Barcelona Traction case that had been generally viewed as an important contribution to the diplomatic protection of corporations, it should be retained. It had not been found necessary to provide separately for situations in which there were shareholders from several States of nationality, since, in practice, the various States of nationality of shareholders generally cooperated with one another. In any case, all were entitled to exercise diplomatic protection in respect of shareholders who were their nationals. The title of the draft article (“Direct injury to shareholders”) remained unchanged.
54. Turning to draft article 13, Mr. KOLODKIN recalled that the article was intended to apply to other, non-commercial legal entities. It had not elicited much comment and seemed generally acceptable. There had been some question as to whether it should apply only with respect to the principles contained in draft articles 9 and 10—which essentially related to nationality issues—or also to those contained in draft articles 11 and 12. The Drafting Committee had taken the view that there were many other forms of legal entity that were neither corporations nor organized for commercial purposes and that it would therefore be more appropriate to draft a provision that covered all such other legal persons. The use of the phrase “as appropriate” had been felt to provide a safeguard that made it unnecessary to limit the article to the principles contained in draft articles 9 and 10. As the commentary would explain, the phrase meant that the provisions would apply to the extent that the legal characteristics of a legal person were analogous to those of a corporation. The title (“Other legal persons”) remained unchanged.

55. Part Three dealt with the exhaustion of local remedies rule and comprised only two draft articles, as opposed to the three in the text adopted on first reading. That was because the Drafting Committee had decided to merge two of the three original draft articles.

56. Draft article 14, paragraph 1, set out the general rule of the exhaustion of local remedies. The Drafting Committee had considered a suggestion that it was not necessary or desirable to specify that local remedies must be exhausted only by the injured person, but had decided that the text adopted on first reading should be retained because it tracked the traditional formulation of the rule and made it clear who had to exhaust local remedies. The fact that they had been exhausted by someone else served only as an indication of the effectiveness or otherwise of local remedies, so that the issue would be best dealt with under the corresponding rubric in draft article 15 (formerly 16).

57. The only change to paragraph 2 had been the insertion of the word “causing” before the words “the injury”, in the interests of consistency. Paragraph 3 comprised the text of what had been adopted as draft article 15 on first reading. The Drafting Committee had decided on that course of action, because the text dealt with the type of claim that required exhaustion of local remedies in situations in which claims were brought both for direct injury to the State and for injury to the individual. By combining the two, the Committee had avoided the question of reformulating the title of former draft article 15, as had been suggested by some Governments.

58. The title of draft article 14 (“Exhaustion of local remedies”) remained as adopted on first reading.

59. Draft article 15 corresponded to draft article 16 adopted on first reading and contained the exceptions to the exhaustion of local remedies rule. The revised text included five provisions, as against four in the first version, because the Committee had decided to divide subparagraph (c) into two separate provisions. In subparagraph (a), it had decided to adopt a new formulation to cover both the reasonable possibility of redress, which had appeared in the text on first reading, and the reasonable availability of remedies to provide effective redress. The concept of reasonable availability had been introduced in response to the concern that the phrase “reasonable possibility of success” was too open-ended: there might be a range of reasons why success might not be reasonably possible. He noted, in that context, that the Committee had declined to revert to the phrase “futile and manifestly ineffective”, a test which it had rejected on first reading as no longer reflecting the law in that regard. Subparagraph (b) had not been changed.

60. As for subparagraph (c), it would be recalled that the first version had attempted to cover two situations: that in which there was no relevant connection between the injured person and the State alleged to be responsible; and that in which the circumstances of the case otherwise made the exhaustion of local remedies unreasonable. The Committee had considered several proposals to adopt provisions covering either one of the situations but had eventually decided to retain both, albeit reformulated and in separate subparagraphs. Both provisions, it had been felt, covered specific types of difficulty that individuals faced in attempting to exhaust local remedies, although it was also understood that both situations were rare. Whereas subparagraphs (a) and (b) dealt with failures in the administration of justice, subparagraph (c) and new subparagraph (d) covered special situations in which exhaustion of local remedies would not be expected for reasons of equity. Thus, by providing for the lack of a “relevant” connection, subparagraph (c) covered the situation of the Aerial Incident of 27 July 1955 case, in which it had been unreasonable to expect the individuals concerned to have to exhaust local remedies in a State with which they had no relevant connection. The wording of the subparagraph was based on the first part of that adopted on first reading, with some technical refinements.

61. Subparagraph (d), which was based on the second part of subparagraph (c) as adopted on first reading, dealt with such special circumstances as cases in which entry was denied, where the safety of the person concerned was at risk or where criminal conspiracies obstructed the bringing of proceedings. In all those cases, it might be unreasonable to require the exhaustion of local remedies. The Drafting Committee had, however, decided to tighten up the language. The reference to circumstances that made “the exhaustion of local remedies unreasonable” had been replaced by a provision that spoke of an injured person being “manifestly precluded from pursuing local remedies”. The new wording, rather than considering the “reasonableness” of the circumstances, focused on the effect of the special circumstances, namely the fact that they precluded the pursuit of local remedies. It also served to minimize the overlap with subparagraph (a), the distinction between the two being that under subparagraph (d), local remedies might be available in fact, but there were circumstances that precluded the injured person from taking advantage of them. The matter would be discussed in the commentary, which would make the point that the provision was an example of progressive development of international law.
62. The wording of subparagraph (e) remained unchanged, as did the title of draft article 15 (“Exceptions to the local remedies rule”).

63. Part Four contained the same miscellaneous provisions as had been adopted on first reading, subject to some drafting refinements, together with the addition of one new article. The title remained “Miscellaneous Provisions”.

64. Draft article 16 corresponded to draft article 17 adopted on first reading. The Drafting Committee had considered proposals to merge it with draft article 17 (old draft article 18) but rejected them on the grounds that the two provisions dealt essentially with two different issues: the former with human rights protection and the latter with bilateral investment treaties. The wording adopted was based on a text suggested by the Government of the Netherlands. To the original list of States, natural persons or other entities entitled to resort to other procedures, the Drafting Committee had added a reference to legal persons, since they, too, might be the beneficiaries of rights and existing remedies, for example, under the ICSID Convention on the settlement of investment disputes between States and nationals of other States. It had retained the reference to “other entities” in order to cover, for example, international organizations involved in the protection of human rights. It had also decided to retain a reference to international law, since, unlike domestic remedies, remedies available under international law might be affected by the operation of the draft articles.

65. The title of draft article 16 (“Actions or procedures other than diplomatic protection”) remained unchanged.

66. Draft article 17, which corresponded to draft article 18 adopted on first reading, dealt with the situation of special investment treaties, either bilateral or multilateral; but it had been redrafted to take into account criticisms levelled against the earlier text. The provision made it clear that, while the draft articles established general rules, it must be borne in mind that special rules concerning or excluding diplomatic protection applied elsewhere. States were fully entitled to conclude treaties concerning or excluding diplomatic protection or diplomatic protection altogether. The Drafting Committee had considered various formulations to replace the phrase “special treaty provisions” in the text adopted on first reading, finally settling on wording taken from article 55 of the draft articles on responsibility of States for internationally wrongful acts, which referred to “special rules of international law”.141 The reference to inconsistency with special rules of international law had been retained in order to stress that, if the relevant provisions of the draft articles were not inconsistent, they could still apply in the interpretation of special provisions. The phrase “such as treaty provisions for the protection of investments” had been included so as to indicate that the Commission had in mind mostly but not exclusively that type of treaty provision. The reference to “treaty provisions” as opposed to “treaties” reflected the recognition that not only special treaties for the protection of investments but also provisions within other treaties, such as treaties of friendship, commerce and navigation, might derogate from the residual rules contained in the draft articles on diplomatic protection.

67. The title of draft article 17 had been changed to read “Special rules of international law”.

68. With regard to draft article 18, which corresponded to draft article 19 of the text adopted on first reading, Mr. KOLODKIN said that, despite suggestions that it should be deleted as not being strictly applicable to diplomatic protection, the Drafting Committee had decided that it served the useful function of recognizing a procedure that might be of assistance to ships’ crews. The only change to the previous wording was the replacement of the words “in the course of an injury” by the phrase “in connection with an injury”, in order to indicate that the injury to a crew member might arise not only during the injury to a vessel but also as a consequence of that injury. The Drafting Committee had also considered but rejected a proposal to locate the provision after draft article 16.

69. The title of draft article 18 had been amended to read “Protection of ships’ crews”.

70. Turning to draft article 19, he said that the provision dealt with one aspect of the consequences of diplomatic protection. Since the text adopted on first reading had not contained any provision of that kind, Governments had not had the opportunity to express their views on a specific text. The question had, however, been raised in the Special Rapporteur’s seventh report (paras. 93–103). Views had been divided within the Commission as to whether the draft articles should deal with the consequences of diplomatic protection at all and, if they did, why only certain aspects of such consequences should be considered. The view had also been expressed that, even if any such provision were to be included, it should not be compulsory but should appear in the form of a recommendation. Similar views had been expressed in the Drafting Committee, some members of which had suggested that such a provision was better suited to inclusion in a resolution or recommendation that could be adopted in connection with the final text of the draft articles but independently of them. It had ultimately been agreed that the content of such a provision was in the realm of progressive development and that what was important was how it was formulated and explained in the commentary. On that basis, it had been agreed to draft a provision in which the ideas were expressed in non-binding language. The result was the text now before the Commission.

71. Draft article 19 gave expression to three ideas: that States should consider the possibility of exercising diplomatic protection (subpara. a); that they should consult the injured person on whether to do so and on what forms of reparation should be sought (subpara. b); and that compensation obtained should be transferred to the injured person (subpara. c). He drew the Commission’s attention to the use of the word “recommended” in the title of the draft article and the word “should” in the chapeau, both of which indicated the recommendatory nature of the provision.

141 Ibid., p. 30.
72. The language of subparagraph (a), which provided that a State should give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury had occurred, was not intended to undermine the importance of such protection when the injury was not significant. On the contrary, the intention was to emphasize the utility of the institution of diplomatic protection as one means for the peaceful settlement of disputes among States when their nationals were injured, although it did not undermine a State’s discretion as to whether to exercise diplomatic protection.

73. Subparagraph (b) provided that States should, whenever feasible, take into account the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought. States normally did so as a matter of effective management of a particular dispute, but the word “feasible” was intended to take account of situations in which there were a number of injured persons and consultations could not reasonably be held with each individual as to whether a State should exercise diplomatic protection or what form of reparation they preferred. The subparagraph was also intended to take account of situations in which injured persons might not want their State of nationality to exercise diplomatic protection for their benefit, and the State should take that preference into account in formulating its own decision. It was useful for a State to consider such issues in consultations with injured persons.

74. Subparagraph (c) provided that the State should transfer to the injured person any compensation obtained for the injury from the responsible State, subject to any reasonable deductions. It recognized that the primary beneficiary—the injured person—should be the recipient of compensation, but it also took account of situations in which the State might have incurred costs and was entitled, in accordance with its laws and practices, to deduct those costs from compensation.

75. The draft article was entitled “Recommended practice”, which accurately reflected its character and purpose.

76. The CHAIRPERSON invited the Commission to proceed to adopt the draft articles on diplomatic protection, as contained in document A/CN.4/L.684 and Corr.1–2, on second reading.

PART ONE
GENERAL PROVISIONS
Draft articles 1 and 2

Draft articles 1 and 2 were adopted.

PART TWO
NATIONALITY
CHAPTER I
GENERAL PRINCIPLES
Draft article 3

Draft article 3 was adopted.

CHAPTER II
NATURAL PERSONS
Draft article 4

77. The CHAIRPERSON, speaking as a member of the Commission, said, with reference to the French text, that the phrase “de toute autre manière non contraire au droit international” should be replaced by the phrase “d’une manière non contraire au droit international”, thus bringing the text into line with the French text of draft article 5, paragraph 2.

78. Mr. GAJA said he had suggested the new wording because, in the French version, the words “not inconsistent with international law” appeared to qualify only the noun “manner”, an ambiguity that did not arise in the English text.

79. Mr. ECONOMIDES said that although Mr. Gaja had done sterling work on the French text, there remained room for improvement. He therefore suggested that the French-speaking members of the Drafting Committee should review the text again.

80. The CHAIRPERSON said that he would welcome the opportunity to take part in such a review. He had also been intending to query the wording of draft articles 5 and 9.

Subject to possible editorial amendments to the French text, draft article 4 was adopted.

Draft articles 5 to 8

Draft articles 5 to 8 were adopted.

CHAPTER III
LEGAL PERSONS
Draft article 9

Subject to possible editorial amendments to the French text, draft article 9 was adopted.

Draft articles 10 to 13

Draft articles 10 and 13 were adopted.

PART THREE
LOCAL REMEDIES
Draft article 14

81. Mr. VALENCIA-OSPINA said that while he did not object to the text of draft article 14, he wished to draw attention to the absence of any reference to the Calvo clause in the commentary. In his third report on the topic,142 the Special Rapporteur had proposed a draft article 16 on the Calvo clause, which had been considered by the Commission at its fifty-fourth session in 2002.143 As the Special Rapporteur had emphasized at the time, the Calvo clause had been an integral part of the history and development of the exhaustion of local remedies rule and continued to be of relevance. The Commission had subsequently decided not to refer draft article 16 to the Drafting Committee—a decision which he did not question. The Special Rapporteur had, however, indicated that, if that provision were to be omitted, the subject would have to be dealt with extensively in the commentary, specifically to draft article 10 and draft article 14 (b) of

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the text adopted on first reading, which had now become draft articles 14 and 15, paragraph (e) of the text adopted by the Drafting Committee on second reading. But no reference to the Calvo clause, as such, appeared in any of the commentaries to the text adopted on first reading. During the presentation of his third report, the Special Rapporteur had given a very complete exposition of the genesis and relevance of the Calvo clause.  

Hence the Commission would be well advised to explain why it had decided to make no reference to the Calvo clause, even in the commentary.

82. Draft article 14, paragraph 1, introduced the idea of bringing an international claim. As had been explained in the commentary adopted on first reading, the phrase “bring an international claim” had been chosen in preference to “present an international claim”, as the word “bring” more accurately reflected the process involved than the word “present”, which suggested a formal act to which consequences were attached and was best used to identify the moment in time at which the claim was formally made. The second reading text used the expression “presentation” in draft articles 5, 7, 8 and 10, although draft article 5 contained a reference to both the bringing and the presentation of a claim. If there was a distinction between bringing and presenting, then clearly the draft articles were using two different criteria ratione temporis to establish the relevant date. But in all cases except with regard to the exhaustion of local remedies, the draft articles used the phrase “presentation of the claim”; the notion of bringing the claim was employed only in draft article 14. It was not apparent that such a distinction was warranted. Moreover, it could be argued that the presentation, rather than the bringing of the claim, should be the criterion for the exhaustion of local remedies.

83. Unnecessary controversy as to the effective date and the distinction between bringing and presenting a claim could be averted by replacing the whole phrase “bring an international claim in respect of an injury to a national or other person referred to in draft article 8” with the more succinct expression “exercise diplomatic protection”. That minor drafting change would not only ensure coherence with the rest of the text, but would also avoid the theoretical issue of the difference between “bringing” and “presenting” a claim. Furthermore, it would have the added advantage of eliminating the repetition of the persons with respect to whom the State had the right to exercise diplomatic protection, since it would cover the natural and legal persons mentioned in draft article 1 and the stateless persons and refugees mentioned in draft article 8.

84. Mr. MANSFIELD said that, while he appreciated the reasoning behind the proposal made by Mr. Valencia-Ospina, he had difficulties with it. There had been substantial discussion both in the plenary meetings of the Commission and in the Drafting Committee of the significant difference between formally presenting a claim—the “upper end” of diplomatic protection—and the kind of informal discussion, negotiation or inquiry that typified the lower levels of diplomatic action. For small States, discussions, inquiries and notification were more important than a formal presentation of a claim. It would therefore be unacceptable to suggest that such informal action could not take place until local remedies had been exhausted. The advantage of the current formulation was that it did not imply that the informal lower end of diplomatic protection or action must be preceded by the exhaustion of local remedies. For that reason, although a different term had been employed in that draft article, there was merit in its retention.

85. Mr. DUGARD (Special Rapporteur) said he subscribed to Mr. Mansfield’s explanation of the reasons for the adoption of the wording in question, which had been debated in depth in the Drafting Committee. Although he appreciated the clarity and succinctness of Mr. Valencia-Ospina’s proposal, he suggested that the existing formulation should be retained.

86. He wished to apologize for failing to include a reference to the important institution constituted by the Calvo clause in the commentary. He would insert a paragraph on that subject, which the Commission could discuss at a later stage. It would not, however, be appropriate to discuss the considerations leading to the rejection of the original draft article 16, as that was not the practice followed with respect to the commentary on second reading.

87. Mr. VALENCIA-OSPINA thanked the Special Rapporteur for his willingness to include a mention of the Calvo clause in the commentary. He was, of course, aware of the difference between bringing and presenting a claim, but it was precisely for the grounds stated by Mr. Mansfield that it was vital to identify methods of action other than the formal presentation of a claim. Draft article 14 provided that a State might not bring a claim unless local remedies had been exhausted, which meant that the text was asserting precisely the opposite of what Mr. Mansfield wished it to say.

88. Mr. CANDIOTI said that draft article 14 should contain wording as clear and succinct as that to be found in draft article 3, paragraph 1, on the nationality rule. It should simply provide that a State could not exercise diplomatic protection until the injured person had exhausted local remedies. Those two draft articles set forth the two general rules; the terms, conditions and exceptions came afterwards. The unambiguous, concise wording proposed by Mr. Valencia-Ospina had great merit, since it obviated any confusion. The draft article referred to international claims, but there could be international claims which did not necessitate the exhaustion of local remedies. Exhaustion of local remedies was a basic rule of traditional diplomatic protection which had been incorporated in the first draft. The notion of diplomatic protection had subsequently been very clearly defined and the wording proposed by Mr. Valencia-Ospina was therefore appropriate.

89. The commentary to paragraph 3, which referred to mixed claims where there had been injury to both the State and the protected person, should emphasize that, in that case, local remedies should first be exhausted when an international claim was brought preponderantly on the basis of an injury to the protected person.

144 Ibid.
90. Mr. MANSFIELD reiterated that a failure to exhaust local remedies should not preclude general diplomatic action. The definition of diplomatic protection included the whole spectrum of diplomatic action. The wording proposed by Mr. Valencia-Ospina raised a problem insomuch as the exercise of diplomatic protection was defined so as to include all levels of diplomatic action. If the draft article were to use the term “present” instead of “bring”, that would be a different proposition. He personally could accept wording to the effect that a State might not present an international claim before all local remedies had been exhausted. Mr. Valencia-Ospina’s proposal was too broad as it stood and therefore caused the problem to which he had just alluded.

91. The CHAIRPERSON suggested that, as a compromise, the word “bring” should be replaced by “present”.

92. Mr. ECONOMIDES endorsed the proposal by Mr. Valencia-Ospina and the statement by Mr. Candioti. The newly proposed wording was shorter, more elegant and perhaps more attractive. Nevertheless he could accept the compromise suggested by the Chairperson.

93. Mr. KOLODKIN (Chairperson of the Drafting Committee), responding to a query by the Chairperson, said that while he fully agreed with Mr. Mansfield as to the substance, he was prepared to accept the compromise solution.

94. Mr. DUGARD (Special Rapporteur) said that although, like Mr. Kolodkin, he was prepared to accept the amendment, the reasons given by Mr. Mansfield for opposing Mr. Valencia-Ospina’s proposed formulation were nonetheless correct.

Draft article 14, as amended, was adopted.

Draft article 15
Draft article 15 was adopted.

PART FOUR
MISCELLANEOUS PROVISIONS

Draft article 16

95. Mr. VALENCIA-OSPINA said that draft article 16 was a “without prejudice” clause referring to the subjects to which the draft articles, as a whole, applied, namely States, natural persons (nationals, individuals, stateless persons and refugees) and legal persons (corporations and legal persons other than corporations), as provided for in draft articles 1, 8, 9 and 13. Draft article 16 added another category—other entities—an example of which was given in paragraph (1) of the commentary to draft article 17 of the text adopted on first reading, namely non-governmental organizations. In his introduction of the Drafting Committee’s report, the Chairperson of the Drafting Committee had explained that the reference had been retained in order to cover international organizations involved in the protection of human rights. But, as it stood, the provision implied that those other entities were not legal persons, because a distinction was drawn between legal persons and other entities. If that was indeed the intention of the Commission, those other entities were not subject to diplomatic protection, since they were not legal persons and did not therefore fall within the scope of the draft articles pursuant to draft article 1. If that were so, there would be no need to mention other entities in the text of the article. It was inconsistent to refer in a “without prejudice” clause to entities that were not covered by the draft articles as a whole. He therefore suggested that the reference to “other entities” should be deleted.

96. Mr. GAJA said that, despite the fact that the wording of draft article 16 might be read as implying that “other entities” were not legal persons, that was a misapprehension. Consequently, the text did not fully support Mr. Valencia-Ospina’s interpretation. The main point made by the draft article was not that people who had been injured could resort to procedures other than diplomatic protection but that when, for instance, human rights were infringed, States other than the State of nationality might be able to intervene and other entities, such as international organizations, might also have a role. It did not purport to say that individuals or legal persons could benefit both from diplomatic protection and from other remedies. Its purpose was to show that while diplomatic protection sought to offer some protection to legal persons and particularly to individuals, rights of other institutions to resort under international law to other means or procedures to secure redress were not affected by the draft articles. The substance of draft article 16 did not appear to be contradictory.

97. Mr. CHEE said that, on a matter of fact rather than of interpretation, the term “legal person” referred to a commercial corporation, whereas “other entities” meant bodies of a non-commercial nature. He cited the example of the Harvard Corporation, which engaged in commercial activities. If, in that context, it were to suffer injury, it ought to be able to obtain protection. That, in his view, was the import of draft article 16.

98. The CHAIRPERSON, speaking as a member of the Commission, said that the expression “actions … other than diplomatic protection” was somewhat ambiguous: it was hard to see how States, in their relations with other States, could directly benefit from diplomatic protection. The end of the draft article, however, was quite clear as to the objective pursued. Perhaps the Special Rapporteur could try to cover in the commentary the substance of the explanation that Mr. Gaja had just given.

99. Ms. XUE said that, as a member ex officio of the Drafting Committee, she would not normally be advocating drafting changes at the present stage. However, Mr. Valencia-Ospina had made a very good point: the protection of “other entities” was beyond the purview of the draft on diplomatic protection. All that was needed was a logically coherent saving clause to address human rights protection for natural and legal persons.

100. Mr. ECONOMIDES agreed: the logic of the draft article was problematic, since it referred to the rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures
other than diplomatic protection, thereby giving the impression that natural and legal persons could exercise diplomatic protection. That was certainly not the way diplomatic protection was understood. Some more neutral formulation should be found, along the lines of “These draft articles are without prejudice to any actions or procedures to which States, natural persons and legal persons might resort to secure redress …”.

101. Mr. DUGARD (Special Rapporteur) said that the issue had been debated at some length in the Drafting Committee whose position, namely that the phrase “or other entities” should be included, had been comprehensively explained by Mr. Gaja. It was difficult to see how that position could be reversed. The proposed deletion of the phrase “or other entities” was a matter, not of form, but of substance.

102. Mr. Sreenivasa RAO said that the issue of other entities had not been discussed at any stage in the consideration of the topic, and that inclusion of that point, however legitimate it might be, was not within the scope of the exercise. He would prefer the phrase “or other entities” to be deleted.

103. Mr. BROWNLIE pointed out that the phrase “legal persons” was regarded as not covering unincorporated associations, the assumption—perhaps a careless one—being that it referred to corporations. Accordingly, legal persons and unincorporated associations was the usual pairing. However, the phrase “or other entities” would probably not do much harm.

104. Mr. CHEE concurred with the Special Rapporteur that to omit the phrase “or other entities” would be, not a drafting issue, but one of substance. The phrase was intended to cover the situations to which he had already alluded, and should be retained.

105. Mr. FOMBA said that the fundamental idea behind draft article 16 was that the exercise of diplomatic protection as an institution was without prejudice to resort to other actions or procedures. However, there seemed to be some confusion about the scope of the draft article ratione personae: if the concept of “other entities” were eliminated from the article, other organizations of a social, economic or other nature could be wrongly excluded.

106. Mr. KOLODKIN (Chairperson of the Drafting Committee) said that he had no proprietary interest in the text: it had been adopted by a committee of which he had been elected Chairperson. It had been adopted after lengthy, in-depth discussions in which, among other things, the questions now raised had been aired. All members of the Commission who were members of the Drafting Committee had participated in the discussion. In the first place, the text in no way implied that any natural or legal person had the right to exercise diplomatic protection. On the contrary, at least in the English and Russian versions, it made it clear that States, natural persons, legal persons or other entities could resort to mechanisms other than diplomatic protection for the protection of their rights. Secondly, the phrase “other entities” had been included precisely to ensure that the text had the broadest possible scope. It had been pointed out that even States and international organizations could be viewed as legal persons, yet after extensive discussion, the Drafting Committee had decided to include the phrase as it filled what would otherwise be a gap. While he was entirely in the hands of the Commission, he personally would prefer to leave the text as it stood. If there were problems with the versions in French or in other languages, those problems could be addressed in specific language groups.

107. Mr. KATEKA suggested that, if the Commission could not agree on the text, a straw poll should be taken.

108. Mr. DAOUDI said that the present discussion had arisen because the provision had been discussed only in the Drafting Committee. All members of the Commission were entitled to express their views on the issue in plenary session. The problem was not one of form solely, but of substance. Mr. Valencia-Ospina’s remarks would help to ensure that the draft text to be submitted to the General Assembly would be logical and consistent. He did not see why, in a text dealing with diplomatic protection, it was necessary to draw attention to the existence of mechanisms other than diplomatic protection. While he had no objection to mentioning all possible forms of protection for persons under international law, that did not necessarily warrant the inclusion of a provision like draft article 16. Accordingly, he would prefer the matter to be covered in the commentary; however, if draft article 16 was to be retained, he supported Mr. Economides’ proposal to redraft it as a simple “without prejudice” clause.

109. Mr. MOMTAZ said that Mr. Valencia-Ospina’s point was well taken: the phrase “other entities” clearly referred to non-governmental organizations and universities, which were indisputably legal persons. Yet to speak of “legal persons or other entities” was to imply that those other entities were not legal persons. To resolve the problem, the words “or other entities” could be deleted and it could be explained in the commentary that the term “legal persons” was to be understood as referring not only to corporations but also to non-governmental organizations and universities.

110. Mr. DUGARD (Special Rapporteur) said that some speakers had given the impression that the phrase “or other entities” had emerged out of nowhere and had not been discussed in plenary. That, of course, was incorrect: it had appeared in draft article 17 of the text adopted on first reading. The Drafting Committee had actually incorporated an additional phrase, “legal persons”, that had not appeared in the original text. Mr. Momtaz had asserted that all other entities were covered in the phrase “legal persons”, but the Drafting Committee had taken the view that there were some entities that might not qualify as legal persons. It had been fairly difficult to find a way to address legal persons other than corporations. The special provision contained in draft article 13 would probably cover most but not all non-governmental organizations and human rights organizations, and the Drafting Committee had wanted the draft to be as comprehensive as possible.

116. Ibid.
The problem raised by Mr. Valencia-Ospina would best be dealt with in the commentary.

111. The CHAIRPERSON noted that the phrase had elicited no comment or observation from Governments. Draft article 16 simply indicated that the system set up under the 19 articles of the draft was in no way incompatible with any other actions that might be implemented by the various entities listed in order to secure redress under a general or special system of international responsibility.

112. Mr. BROWNLie proposed that the Commission should follow the advice of the Chairperson of the Drafting Committee and adopt the text submitted by the Drafting Committee, particularly in view of the fact that Governments had not criticized the expression “or other entities”.

113. The CHAIRPERSON said that the debate had raised a number of interesting points, which the Special Rapporteur would try to cover in the commentary.

Draft article 16 was adopted.

Draft articles 17 to 19 were adopted.

114. The CHAIRPERSON said he took it that the Commission wished to adopt on second reading, the titles and texts of the draft articles on diplomatic protection, as a whole, as amended.

It was so agreed.

115. Mr. DUGARD (Special Rapporteur) expressed his gratitude to the Commission for having adopted the draft articles on second reading. In particular, he wished to thank the Chairperson of the Drafting Committee, Mr. KoIodkin, the other members of the Drafting Committee and the Chairperson of the Commission for guiding it through the final stage of the proceedings.

Organization of work of the session (continued)

[Agenda item 1]

116. Mr. KOLODKIN (Chairperson of the Drafting Committee) announced that the Drafting Committee on responsibility of international organizations was composed of Mr. Economides, Ms. Escarameia, Mr. Mansfield, Mr. Matheson, Mr. Valencia-Ospina and Mr. Yamada, together with Mr. Gaja (Special Rapporteur) and Ms. Xue (Rapporteur), ex officio. The Drafting Committee on shared natural resources was composed of Mr. Candioti, Mr. Comissário Afonso, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Mansfield, Mr. Matheson and Mr. Pambou-Tchivounda (Chairperson of the Commission), together with Mr. Yamada (Special Rapporteur) and Ms. Xue (Rapporteur), ex officio.

The meeting rose at 12.30 p.m.

2882nd MEETING

Friday, 2 June 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. KoIodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. ValenciaOspina, Ms. Xue, Mr. Yamada.


[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. KOLODKIN (Chairperson of the Drafting Committee on 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)), introducing the report of the Drafting Committee on the Commission’s second reading of the draft principles on the allocation of loss arising out of hazardous activities (A/CN.4/L.686), said first of all that the question of the final form of the instrument had continued to elicit different views at various stages of the Commission’s consideration of the topic, and that the majority of Commission members had favoured an outcome in the form of principles; it was on that basis that the Drafting Committee had proceeded. It should be recalled that the Commission had adopted texts cast as principles in the past: in 1950, for example, it had adopted the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.147

2. The title and structure adopted on first reading had been retained.148 The Drafting Committee had been mindful of the fact that some of the principles, such as draft principle 1, on scope of application, or draft article 2, on the use of terms, would not qualify as principles in the strict sense of the term. It had nevertheless decided to retain the term “principle”, a decision that simply reflected the Commission’s wish to arrive at a text that was legally non-binding and used the term with some coherence and consistency.

3. The Drafting Committee was conscious that through the draft principles the Commission was endeavouring to

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* Resumed from the 2875th meeting.
147 See footnote 86 above.
148 See footnote 55 above.
set out a coherent set of standards of conduct and practice that all States were expected to comply with. Some aspects might correspond to existing or developing customary international law. However, the Drafting Committee had focused its work on formulating the substance of the draft principles, and it had therefore chosen not to consider in depth or evaluate the current status of different principles, or various aspects of the principles, in international law. Thus the wording of the draft principles, including the verb forms used, did not reflect that concern.

4. Turning to the text of the draft principles, he said that the Drafting Committee had considered the preamble on the basis of the draft adopted on first reading, to which it had made a number of changes. It had felt it necessary to retain in the first paragraph the specific references to principles 13 and 16 of the Rio Declaration149 rather than a general reference to the Declaration itself. It had also decided that those two principles provided a rationale for the current exercise, and had therefore changed the word “recalling” to the more affirmative “reaffirming”. The third preambular paragraph had also been changed: in order not to prejudice the outcome of the work of the General Assembly, where the draft articles on prevention of transboundary harm from hazardous activities150 were still being considered,151 the reference to the provisions of the draft articles on prevention had been changed to reflect the general need for States to comply with their obligations relating to the prevention of transboundary harm. As the purpose of the preamble was to set out objectives, the Drafting Committee had strengthened the language of the fifth paragraph by deleting the phrase “as far as possible”, as some Governments had wished, and amending the phrase “should be able to obtain” to read “are able to”. Moreover, the word “emphasizing” had replaced the word “concerned” in order to avoid repetition, as the latter word was used in the subsequent paragraph. That paragraph was an addition, becoming the sixth preambular paragraph, and stressed a point that was also covered in the draft principles, namely the need for appropriate response measures when an incident occurred. In the seventh preambular paragraph, formerly the sixth, the phrase “States shall be responsible” had been amended to read “States are responsible”. The Drafting Committee had also deleted what had been the seventh preambular paragraph for reasons of economy and in order not to cast doubt on the importance of international cooperation among States. Lastly, the eighth preambular paragraph had been changed in order to recall the significance of existing international agreements that dealt with specific hazardous activities and to stress the importance of concluding additional agreements of that type.

5. He next proposed to take up the draft principles individually. With regard to draft principle 1 (Scope of application), there had been a general understanding that the draft principles had the same scope of application as the draft articles on prevention in that they were both intended to cover “activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences”. On first reading the language of the draft principle had thus been aligned with the corresponding language in the draft articles on prevention. On second reading the Drafting Committee had found that wording too verbose, and it had sought to overcome that lack of elegance without losing the essential connection to the draft articles on prevention. Accordingly, the text had been simplified without changing its substantive scope. The phrase “transboundary damage caused by hazardous activities not prohibited by international law” continued to embrace four essential elements that were prominent in the draft articles on prevention. The first two—the fact that such activities were not prohibited by international law and the fact that they involved a risk of causing significant harm—had been captured in the new wording of draft principle 1 and were partly reflected in the definition of the term “hazardous activity” contained in subparagraph (c) of draft principle 2 (Use of terms). The third, or territorial, element was currently reflected in the notion of “transboundary” and the consequent definition of “transboundary damage” contained in subparagraph (e) of the same draft principle. The fourth element, i.e., the physical consequences, had been deleted from the text on the understanding that it would be reflected in the commentary. The draft principles continued to apply to hazardous activities involving a risk of causing transboundary damage through their physical consequences. Thus transboundary harm caused by State policies in monetary, socio-economic or similar areas was excluded from the scope of the draft principles. It should be noted that the term “transboundary damage” was used for the purposes of the draft principles simply to draw attention to the emphasis placed in the liability phase on the damage actually caused.

6. With regard to draft principle 2 (Use of terms), he noted that some paragraphs had been renumbered because of the introduction of two additional terms that the Drafting Committee had felt needed to be defined for the purposes of the draft principles: “State of origin” and “victim”. The definition of “damage” in subparagraph (a) remained unchanged. It was directed at three essential elements, namely persons, property or the environment, and it was understood to include damage to State property. There had been a brief discussion as to whether the tautology in the definition ought to be removed by using a term such as “significant harm”, but it had been felt that the term “damage” had a particular meaning in the context of the draft principles, intended to distinguish the current work from the work on prevention, and the Drafting Committee had therefore decided to retain the original definition. It would have to be clarified in the commentary that the threshold of “significant” was also intended to avert frivolous or vexatious claims. The definition of the term “environment” in subparagraph (b) had also remained unchanged.

7. There had been a slight change, however, in the definition of the term “hazardous activity” in subparagraph (c), which had previously been subparagraph (d). As a result of the changes made to draft principle 1, the phrase “through its physical consequences” at the end of the original text had been deleted, and it would be explained in the commentary that

149 See footnote 72 above.
150 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 146, para. 97.
151 Ibid., p. 145, para. 94.
the hazardous activities implied by the draft principles were activities that had a risk of causing transboundary harm through their physical consequences. Once again, there had been a discussion as to whether the expression “significant harm” should be changed to “significant damage”. It was understood that the phrase reflected the general thrust of the Commission’s work on the topic over the years. The notion of “damage” had been introduced in the draft principles simply to denote the specificity of the transboundary harm that occurred; accordingly the term “significant harm” had been retained.

8. The definition of “State of origin” in subparagraph (d) was the same as the definition in the draft articles on prevention and had a similar import. The commentary would clarify other terms that had been used in the text of the draft principles, such as “State affected”, “State likely to be affected” and “States concerned”, but the Drafting Committee had decided not to specifically define them in order to retain a certain balance in the text of the principles as a whole.

9. The definition of “transboundary damage” in subparagraph (e), formerly subparagraph (d), had undergone two changes. First, the phrase “to persons, property or the environment” had been inserted between “damage caused” and “in the territory” to clarify the meaning of the word “caused”, which in the case at hand was “suffered”. Secondly, as a consequence of the introduction of the definition of “State of origin” in the draft, the phrase “other than the State in the territory, or otherwise under the jurisdiction or control of which the activities referred to in draft principle 1 is carried out” had been replaced by the phrase “other than the State of origin”. Thus formulated, the definition of “transboundary harm” covered damage that might be caused, for example, to exclusive economic zones, as provided for in some liability regimes, or to oil platforms.

10. A new subparagraph (f) that defined the term “victim” had been added, following consideration of a proposal by the Special Rapporteur concerning draft principle 3, which sought to clarify that for the purposes of the draft principles, natural or legal persons, including States, could be considered victims, depending on the nature of the damage involved. Since it was felt that that wording would be better placed in the provision on use of terms than in draft principle 3, the Drafting Committee had decided to define the term “victim” for the purposes of the draft principles. The definition of “operator” in subparagraph (g), formerly subparagraph (e), remained unchanged; the definition was a functional one, and the wording “at the time the incident … occurs” was intended to establish a connection between the operator and the transboundary activity.

11. Turning to draft principle 3, he noted that the title had been changed from “Objective” to “Purposes”, to better reflect the essential rationale for developing the draft principles. The Drafting Committee had proceeded on the basis of a proposal by the Special Rapporteur to separate the various elements covered in the previous text, which had been densely worded. The new wording captured two of those core issues in two separate paragraphs, namely, “to ensure prompt and adequate compensation to victims of transboundary damage” (subparagraph (a)) and to preserve and protect the environment (subparagraph (b)). As was borne out by practice, the latter objective would be accomplished primarily by taking response measures aimed at mitigating the damage and reasonable measures of restoration or reinstatement, concepts referred to in draft principle 2. The third purpose was to identify the victims of transboundary damage; that question was currently addressed in the provision on “Use of terms”.

12. Draft principle 4 (Prompt and adequate compensation) was essential to the scheme of allocation of loss and was virtually identical to the text adopted on first reading. It reflected four important elements of the scheme for allocation of loss. First, States must establish a liability regime that afforded redress and compensation to victims of transboundary harm. Secondly, the regime should impose liability on the operator without requiring proof of fault. Thirdly, such liability could be subject to conditions, limitations or exceptions, which should be consistent with the purposes of draft principle 3. Lastly, provision must be made for a tiered scheme for ensuring that compensation was available to those suffering damage. Such a scheme would seek to integrate and harness, in as flexible a manner as possible and taking particular needs and interests into account, the various forms of security, insurance and industry funding to provide sufficient financial guarantees of compensation. It should be noted that the notion of liability without proof of fault in paragraph 2 embraced the various designations used in different legal systems to describe “strict liability”. It was understood that the commentary would elaborate on the meaning of “prompt and adequate compensation” more fully. Some minor changes had been introduced in draft principle 4. For example, paragraph 5 did not directly require the State of origin to set up government funds to guarantee prompt and adequate compensation; it did have to ensure that additional financial resources were made available. The Drafting Committee had also felt that the words “are made available” were more felicitous than “are allocated”.

13. With regard to draft principle 5 (Response measures), it would be recalled that the provision adopted on first reading had brought together a series of different notions in a single paragraph. That provision had undergone structural and substantive changes. On the basis of a proposal by the Special Rapporteur, the various levels of interaction anticipated in the event of an incident had been made more specific. The first three measures—notification, response, and consultation and cooperation—were the responsibility of the State of origin. The other two, mitigation and assistance, applied to States that were affected or were likely to be affected by the damage and the States concerned. The adoption of expeditious response measures following the occurrence of an incident was an important element in the mitigation of the overall damage that could result from such an incident.

14. Draft principle 6 (International and domestic remedies) had undergone some changes, on the basis of a proposal by the Special Rapporteur, in order to highlight further the principle of equal access to domestic remedies, which comprised three elements: participation in administrative hearings and judicial proceedings;
non-discrimination; and access to information. Those elements were dealt with separately and in detail in the new text. Initially they had been grouped together in paragraph 3 of the original principle 6, whereas they were now covered in paragraphs 1, 2, 3 and 4. The reference to international claims settlement procedures, formerly in paragraph 2, had been retained and moved to paragraph 4. Such procedure included mixed claims, commissions and negotiations for lump-sum payments. The international component did not preclude the possibility of a State of origin participating in the disbursement of compensation to an affected State through a national claims procedure established by the affected State.

15. Draft principle 7 (Development of specific international regimes) built on principle 22 of the Stockholm Declaration\textsuperscript{152} and principle 13 of the Rio Declaration.\textsuperscript{153} The change in the wording of paragraph 1 sought to strengthen the text by emphasizing the need to conclude such specific agreements that would deal with the three main aspects of the draft principles, namely, compensation, response and remedies. Paragraph 2 had also undergone some drafting modifications. As currently worded it provided that such agreements should, as appropriate, include arrangements for industry or State funds as a third tier of compensation. The word “losses” in the initial draft had been changed to the more precise “damage”, which was used throughout the draft principles. The flexibility afforded by the paragraph was comparable to that which the parties to negotiations of such agreements enjoyed in establishing arrangements that were suitable for a particular sector or activity.

16. The changes introduced in draft principle 8 (Implementation) had been made to improve and tighten the language used as well as to ensure clarity. The reference to nationality, domicile or residence was merely intended to stress the circumstances in which discrimination frequently manifested itself in situations covered by the draft principles without excluding other forms of discrimination. The phrase “consistent with their obligations under international law” at the end of paragraph 3 of the text adopted on first reading, considered superfluous and imprecise, had been deleted. The key element to be stressed was the duty of States to cooperate in the implementation of the draft principles.

17. He concluded by recommending to the Commission that it should adopt on second reading the draft principles submitted to it by the Drafting Committee.

18. The CHAIRPERSON suggested that the Commission should consider and, where appropriate, adopt the draft principles on prevention of transboundary harm arising out of hazardous activities (A/CN.4/L.686) submitted by the Chairperson of the Drafting Committee.

Preamble

First preambular paragraph

*The first preambular paragraph was adopted.*

19. Mr. VALENCIA-OSPINA said that it should be recalled, if only implicitly, that the draft articles on prevention of transboundary harm had already been submitted to the General Assembly.\textsuperscript{154}

20. The CHAIRPERSON suggested that this information should be included in a footnote, in accordance with standard practice.

It was so decided.

*The second preambular paragraph, with the proposed addition, was adopted.*

Third to eighth preambular paragraphs

*The third to eighth preambular paragraphs were adopted.*

Ninth preambular paragraph

21. Mr. ECONOMIDES proposed that the word “further” should be deleted, as it seemed to him superfluous in qualifying the development of international law.

22. Mr. Sreenivasa RAO (Special Rapporteur) endorsed that proposal.

*The ninth preambular paragraph, as amended, was adopted.*

Draft principle 1 (Scope of application)

Draft principle 1 was adopted.

Draft principle 2 (Use of terms)

Subparagraph (a)

*Subparagraph (a) was adopted.*

Subparagraph (b)

23. The CHAIRPERSON suggested that in the French text subparagraph (b) should begin with the words “Le terme”, to make it consistent with the preceding subparagraph.

*It was so decided.*

24. Mr. KATEKA said that he saw no reason for the colon after the word “includes”.

25. The CHAIRPERSON agreed that the colon should be deleted in all language versions.

*Subparagraph (b), as amended by the Chairperson and Mr. Kateka, was adopted.*

Subparagraphs (c) to (g)

*Subparagraphs (c) to (g) were adopted.*

Draft principle 3 (Purposes)

Draft principle 3 was adopted.

\textsuperscript{152} See footnote 71 above.

\textsuperscript{153} See footnote 72 above.

\textsuperscript{154} See footnote 56 above.
Draft principle 4 (Prompt and adequate compensation)

Draft principle 4 was adopted.

Draft principle 5 (Response measures)

Draft principle 5 was adopted.

26. Mr. VALENCIA-OSPINA proposed that the word “transboundary” in subparagraph (a) should be deleted, as the words “transboundary damage” already appeared in the chapeau, and the adjective was not used again in subparagraphs (c) and (d).

27. Mr. GAJA said that deletion of the word would alter the meaning. There should at least be some sort of link to the first mention of transboundary damage by referring to “that damage” or “such damage”.

28. Mr. VALENCIA-OSPINA suggested that the reference should then be to “transboundary damage” in all subparagraphs.

29. Mr. Sreenivasa RAO (Special Rapporteur) endorsed that proposal but pointed out that the expression “transboundary damage” would then appear twice in subparagraph (d). He proposed that the adjective should be used only in the second reference in order to avoid repetition.

30. Mr. VALENCIA-OSPINA suggested that the opposite might be done: the word “transboundary” would appear in the first reference and the word “that” or “such” would be used in subsequent references.

31. The CHAIRPERSON said he would take it that subparagraph (d) would read in all languages: “the States affected or likely to be affected by transboundary damage shall take all feasible measures to mitigate it and if possible to eliminate the effects of such damage”.

Subparagraphs (a) to (e) were adopted, with the amendments proposed by Mr. Valencia-Ospina.

Draft principle 6 (International and domestic remedies)

Draft principle 6 was adopted.

Draft principle 7 (Development of specific international regimes)

Draft principle 7 was adopted.

Draft principle 8 (Implementation)

Draft principle 8 was adopted.

The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, as a whole, were adopted.

32. Ms. ESCARAMEIA said that she did not object to the adoption of the draft principles, solely out of respect for the work of her colleagues; however, she was incapable of agreeing with the content of the Commission’s work on the topic and would like to make a declaration for the record.

33. The only way that the Commission could discharge the mandate entrusted to it by the General Assembly in its resolution 56/82 of 12 December 2001 would be to adopt a set of draft articles on allocation of loss that complemented the draft articles on prevention of transboundary harm, since they were two sides of the same topic. As stated in that resolution, prevention and allocation of loss was a single topic and the Commission should “[bear] in mind the interrelationship between prevention and liability” (para. 3). Instead, the Commission had decided to adopt a declaration containing a set of draft principles whose legal status was far from clear. That form had been used only once before, back in 1949, in dealing with the rights and duties of States, and had used much more assertive language. The Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, to which the Chairperson of the Drafting Committee had referred at the beginning of the meeting, were a set of principles that did not in fact take the form of a declaration. More recently, the Commission had adopted a set of draft articles in the form of a declaration in dealing with the nationality of natural persons in relation to the succession of States, but there again the language had been prescriptive.

34. Moreover, it was essential that victims should have the right to reparation if the Commission wished to guarantee them prompt and adequate compensation and preserve the environment as was prescribed in principle 3 of the present project. Yet the draft principles before the Commission merely pointed to the desirability of setting up mechanisms to respond to situations involving loss. In some ways, the draft principles were a move away from the principles established 14 years earlier in the Rio Declaration.

35. The declaration just adopted amounted to very little in a world that was increasingly threatened by dangerous environmental pollution. She had tried, but failed, to convey that view to her colleagues. She could only hope that States members of the Sixth Committee would realize that and give the draft principles the substance they deserved.

36. Mr. MANSFIELD said that he fully respected the right of Ms. Escaramiea to express her opinion, but he wished to have his heard as well. The Commission had travelled a long way and made considerable progress since it had started its work on the topic. When the first Special Rapporteur had submitted his initial report, most States had been of the view that victims of transboundary harm should be compensated only for the loss occasioned by the harm. It had subsequently been accepted that States undertaking hazardous activities ought to have certain obligations, particularly in the area of prevention, but the situation of victims suffering harm even when those obligations had been fulfilled continued to be a matter of concern. Currently, as the Special Rapporteur explained in his third report, it was considered unacceptable for States to engage in hazardous activities without providing appropriate mechanisms to guarantee prompt and adequate compensation to any victim of transboundary harm resulting from those activities. In the light of that requirement, the draft principles that had just been adopted were a coherent and relevant whole. No State that

wanted to maintain its standing in the international arena would think of neglecting them, and in that sense they represented considerable progress. Naturally, it would be extremely desirable for the principles to be strengthened and to take the form of a convention that could be universally adopted, but the current situation was far preferable to one involving a convention that attracted the participation of only a handful of States. The potential influence of a declaration of that type, formulated by a body such as the International Law Commission, should not be overlooked.

37. Mr. Sreenivasa RAO (Special Rapporteur) thanked the members of the Commission and especially the members of the Drafting Committee and the Chairperson of the Commission for having allowed him to conclude the “saga” that had grown out of the topic of international liability since it had been included on the Commission’s agenda in 1978.

The theoretical difficulties posed by the topic, together with the emotional charge resulting from incidents that had occurred over the years throughout the world had sometimes resulted in the resources implied by such a task being exceeded. During that time State practice had continued to evolve and different measures and instruments had been adopted. The topic had grown in complexity. That was why the adoption of the draft principles represented significant progress. Certainly the question of form was important, but it could be debated further in the Sixth Committee, and it was States, after all, that were best placed to settle the matter. As for the Commission, it had finally completed its task, which had essentially been to identify all the elements that would allow it to establish reasonable criteria for ensuring that the victims of transboundary harm did not have to bear by themselves any losses that such harm might occasion, which might have been the case had the issues involved not been clarified. The Commission should be proud of the work it had done, which would doubtless have a major influence on the conduct of States.

38. The CHAIRPERSON thanked the Special Rapporteur and commended him for his work, his pragmatism and his sense of duty. He was convinced that the international community would duly appreciate the outcome of that effort.

The meeting rose at 11.30 a.m.

2883rd MEETING
Tuesday, 6 June 2006, at 10.05 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Rodriguez Cedeño, Ms. Xue, Mr. Yamada.


[Agenda item 7]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. MANSFIELD presented the report of the Drafting Committee on the topic “Reservations to treaties”, in the absence of the Chairperson of the Drafting Committee and of the Special Rapporteur on the topic, who had expressed his regret at being unable to attend the meeting. The report was to be found in document A/CN.4/L.685 and Corr.1. The Drafting Committee had held two meetings on the topic, on 23 and 24 May 2006, at which it had considered five draft guidelines referred to it by the plenary during the fifty-seventh session of the Commission. It had also reviewed two draft guidelines which had already been adopted with a view to reconsidering the terminology used therein in the light of the debate held on the issue in the Commission in 2005. The five draft guidelines dealt with the substantive validity of reservations. The term “validity” was quite general, encompassing both the substantive and formal requirements and conditions necessary for the formulation of reservations. The guidelines belonged to the third part of the Guide to Practice, which would bear the general title “Validity of reservations”. To distinguish substantive validity from general validity, the Drafting Committee had decided to use the term “permissibility” (“validité matérielle”) to denote the former. The Drafting Committee had considered that the use of the terms “validity” and “permissibility” clarified a much debated question and contributed to greater consistency and precision in the draft guidelines. The commentary would analyse the terminological issues involved and the Commission’s selection of the term “validity”.

2. Draft guideline 3.1 read:

“3.1 Permissible reservations

“A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

“(a) The reservation is prohibited by the treaty;

“(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

158 For the text of the draft guidelines provisionally adopted so far by the Commission, see Yearbook ... 2005, vol. II (Part Two), para. 437.
161 Idem.
163 Ibid.
“(c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”

The draft guideline had originally been entitled “Freedom to formulate reservations”. There had been a lengthy discussion in the plenary on both its title and its content, which faithfully reproduced article 19 of the 1986 Vienna Convention. The Committee had considered the text in great detail, and although there had initially been a suggestion that the temporal factor should be omitted, since that was to be found in the definition in draft guideline 1.1, it had finally been decided to retain it. Indeed, it also appeared in the text of article 19 of the 1986 Vienna Convention.

3. The title of the draft guideline now read “Permissible reservations” (“Validité matérielle d’une réserve”). The Drafting Committee had considered various alternatives for the title, inspired both by proposals that had been made in the plenary and by the wish to align the title with that of article 19 of the 1986 Vienna Convention, entitled “Formulation of reservations”. It had been pointed out, however, that a similar title had already been used for draft guideline 2.1.3 (Formulation of a reservation at the international level). In the end, the Drafting Committee had opted for the present title, bearing in mind that the guideline was to be the first in the third part, which dealt with validity of reservations. The term “permissible reservation” pertained to the substantive aspect of valid reservations, while the term “valid” was more generic, encompassing both substantive and formal conditions of validity. It was understood that that distinction was also to form part of the commentary to the guideline.

4. Draft guideline 3.1.1 read:

“3.1.1 Reservations expressly prohibited by the treaty

“A reservation is expressly prohibited by the treaty if it contains a particular provision:

“—Prohibiting all reservations;

“—Prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions;

“—Prohibiting certain categories of reservations and a reservation in question falls within one of such categories.”

During the debate in the plenary, a discrepancy between the chapeau of the guideline and its main text had been identified: the general term “prohibited by the treaty” in the chapeau was not quite in conformity with the second and third subparagraphs (“prohibiting reservations to specified provisions”; “prohibiting certain categories of reservations”). The Drafting Committee had felt that the addition of the phrases “and a reservation in question is formulated to one of such provisions” and “and a reservation in question falls within one of such categories”, respectively, would establish consistency between the chapeau and the text.

5. The Drafting Committee had held a long discussion on the use of the word “expressly” in the title and text of the guideline. The question of “implicit” prohibition of reservations had been raised and the view had been expressed that such an implicit prohibition was characteristic of some types of treaty such as constituent acts of international organizations and ILO conventions, although it had also been pointed out with respect to the latter that the prohibition derived from practice rather than from the conventions themselves. It had been pointed out that the “object and purpose” test was adequate for all possible categories of prohibition of reservations, whether explicit or implicit. The Drafting Committee had also considered whether a separate guideline on reservations to constituent acts of international organizations would be useful. It had decided, however, that the commentary to draft guideline 3.1.1 could cover that category, but that it would be desirable for the Special Rapporteur to draft a guideline to that effect which could be presented to the plenary.

6. The Committee had been of the view that the term “expressly” should be retained in the title and included in the introductory part of the draft guideline. Its significance should be explained in the commentary, as should the possibility of implicit prohibition of reservations. In cases where reservations were made despite their implicit prohibition, they should be subject to the “object and purpose” test.

7. Draft guideline 3.1.2 read:

“3.1.2 Definition of specified reservations

“For the purposes of guideline 3.1, the expression ‘specified reservations’ means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.”

The guideline gave a general definition of the term “specified reservations” contained in article 19 (b) of the 1986 Vienna Convention. The wording of the guideline as initially proposed had attempted to combine a definition of specified reservations with that of “authorized reservations” as described in article 20, paragraph 1, of the 1986 Vienna Convention. Bearing in mind the debate in the plenary, which had pointed to the need to determine whether the treaty permitted only specific reservations—and if that was so, whether a reservation that was formulated fell into that category—the Drafting Committee had opted for a more general and comprehensive approach. Thus the words “authorized by the treaty” had been replaced by the words “envisaged in the treaty”.

8. It had also been observed that specified reservations could be made, not only to specific provisions, but also to the treaty as a whole with regard to certain categories.

164 Ibid., pp. 68–69, paras. 400–401.
165 Ibid., p. 69, para. 402.
It had thus been felt that the terminology used in draft guideline 1.1.1 (Object of reservations) could be usefully transferred to draft guideline 3.1.2. Moreover, the phrase “which meet conditions specified by the treaty”, inspired by the arbitral award in the English Channel case, had been deemed too limiting and, eventually, unnecessary. The definition was understood as being sufficiently wide to include both general reservations and also provisions specifying in detail the content of reservations envisaged in the treaty. The commentary should explain that aspect of the draft guideline.

9. Draft guideline 3.1.3, originally entitled “Reservations implicitly permitted by the treaty”, read:

“3.1.3 Permissibility of reservations not prohibited by the treaty”

“Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.”

It had initially been proposed in an alternative version in which it was combined with draft guideline 3.1.4. The Drafting Committee had opted for two separate guidelines, for the sake of clarity. Draft guideline 3.1.3 covered the case of treaties prohibiting certain reservations. In such cases, a reservation that was not prohibited by the treaty could be formulated by a State or an international organization only if it was not incompatible with the object and purpose of the treaty. The wording of the final phrase of the guideline had been slightly modified to align it with draft guideline 3.1 and article 19 (c) of the 1986 Vienna Convention. The title had been changed to read “Permissibility of reservations not prohibited by the treaty” (“Validité des réserves non-interdites par le traité”). The term “permissibility”, as compared to the more general term “validity”, signified in the present instance the substantive requirements, as opposed to the formal ones, for the effective formulation of a reservation, in other words its compatibility with the object and purpose of the treaty.

10. Draft guideline 3.1.4 read:

“3.1.4 Permissibility of specified reservations”

“Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.”

It covered the category of specified reservations which were not defined precisely—as opposed to specified reservations the content of which was defined exactly in the treaty. In such a case, the test of compatibility with the object and purpose of the treaty was again applied. The wording of the guideline had been modified to reflect the definition of specified reservations in draft guideline 3.1.2. However, whereas draft guideline 3.1.2 gave a general definition of specified reservations, draft guideline 3.1.4 referred to a category of specified reservations whose content was not specified. It was understood that specified reservations whose content was exactly defined by the treaty would not have to be subject to the criterion of compatibility with the object and purpose of the treaty. The Drafting Committee had thought that, rather than formulating a specific guideline to that effect, that conclusion should figure in the commentary to draft guideline 3.1.4. The title of the draft guideline was rendered in French as “Validité des réserves déterminées”. In both guidelines 3.1.3 and 3.1.4, the French term “validité” should be understood as meaning “validité matérielle”. Since the latter term appeared in the title of draft guideline 3.1, the Drafting Committee had considered that it would be superfluous to repeat it in draft guidelines 3.1.3 and 3.1.4. In English, the word “permissibility” was used in both draft guidelines to denote the substantive requirements of the overall validity of reservations.

11. Draft guidelines 1.6 and 2.1.8 [2.1.7 bis] had been referred to the Drafting Committee, even though they had already been adopted, to enable it to review the term “permissibility” (“licéité”). The Special Rapporteur had advocated the use of the more neutral term “validity” (“validité”), and many members of the Commission had concurred with that approach. After a thorough discussion, the Drafting Committee had concluded that the term “validity” (“validité”) was the most appropriate to use in a general manner. That term encompassed both the formal and the substantive conditions for the formulation of reservations, presented in the second and third parts of the Guide to Practice respectively. Thus, in draft guideline 1.6, the term “validity/validité” had now replaced the term “permissibility/licéité”. The formal conditions related to questions of procedure, while the substantive ones focused mainly on compatibility with the object and purpose of the treaty. In order to distinguish the latter, the terms “permissibility/validité matérielle” should be used.

12. Draft guideline 1.6 read:

“1.6 Scope of definitions”

“The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the validity and effects of such statements under the rules applicable to them.”

13. In draft guideline 2.1.8, the terms “impermissible/impermissibility” had been replaced by the terms “invalid/invalidity”. In French, the terms “illéicité/illéicité” had been replaced by the terms “non-validé/non-validité”. The words “grounds for the invalidity of the reservations”, necessitated by the term “invalidity”, had been added. Draft guideline 2.1.8 [2.1.7 bis] read:

“2.1.8 [2.1.7 bis] Procedure in case of manifestly invalid reservations”

“Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary’s view, constitutes the grounds for the invalidity of the reservation.”
“If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.”

14. The Drafting Committee recommended to the Commission the adoption of the five draft guidelines before it and of the revisions to the two draft guidelines already adopted by the Commission.


Draft guideline 3.1

Draft guideline 3.1 was adopted.

Draft guideline 3.1.1

16. Mr. MOMTAZ proposed that the subparagraphs should be lettered (a), (b) and (c), to bring them into line with the format of draft guideline 3.1.

17. Mr. MANSFIELD endorsed the proposal.

Draft guideline 3.1.1, as amended, was adopted.

Draft guidelines 3.1.2, 3.1.3 and 3.1.4 were adopted.

Draft guidelines 1.6 and 2.1.8 [2.1.7 bis]

Draft guidelines 1.6 and 2.1.8 [2.1.7 bis], as revised, were adopted.

The meeting rose at 10.35 a.m.

2884th MEETING

Thursday, 8 June 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Rodriguez Cedeño, Ms. Xue, Mr. Yamada.


[Agenda item 4]

* Resumed from the 2879th meeting.

Report of the Drafting Committee

1. The CHAIRPERSON, in the absence of Mr. Kolodkin, Chairperson of the Drafting Committee, invited Mr. Mansfield to present the Drafting Committee’s report (A/CN.4/L.687 and Add.1 and Corr.1).

2. Mr. MANSFIELD reported that the Drafting Committee had spent three meetings considering draft articles 17 to 24 on circumstances precluding wrongfulness, which the Commission at its 2879th meeting had referred to the Drafting Committee. He wished to thank the Special Rapporteur, Mr. Gaja, for guiding the work of the Drafting Committee with his explanations and suggestions and the members of the Drafting Committee for their cooperation and valuable contributions.

3. Chapter V, entitled “Circumstances precluding wrongfulness”, of the draft articles on the responsibility of international organizations comprised draft articles 17 to 24, which had not raised serious concerns when considered in plenary session. Although some members had been of the view that certain provisions in the chapter should be deleted, since there was no corresponding practice on the part of international organizations to rely on and the exercise resembled legislation rather than codification, the Commission had agreed to retain the articles and the Drafting Committee had followed suit.

4. With regard to draft article 17 (Consent), which corresponded to article 20 of the draft articles on the responsibility of States for internationally wrongful acts, the text proposed in the fourth report of the Special Rapporteur had been favourably received by the plenary Commission, and the Drafting Committee had therefore retained it without change. Two issues in particular had been raised in the plenary debate. The first related to the inclusion in the draft article of language to the effect that consent to any act contrary to jus cogens should not be considered valid. The second point raised was the need to take into account, in the case of international organizations, situations where consent might be given to an international organization not by a State but by another entity, such as a territory or autonomous region that had not attained the status of a State. In the Drafting Committee’s view, the issue of validity of consent should be addressed in general terms in the commentary, including a reference to draft article 23 on compliance with peremptory norms. However, the commentary should avoid discussing the circumstances or conditions under which consent might be given by entities other than States or international organizations, and it should not deal with the issues of what should be considered State consent and how it should be expressed, since those were matters beyond the scope of the current exercise.

5. With regard to draft article 18 (Self-defence), which corresponded to article 21 of the draft articles on the responsibility of States, a number of issues had been raised in the plenary debate, namely, whether a distinction should be made between self-defence for

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* Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 26, para. 76.
* Ibid.
States and self-defence for international organizations; whether the notion of an inherent right to self-defence applied only to States; whether self-defence should be limited to peacekeeping operations and administration of territories; whether a distinction should be made between self-defence and acts taken by a force in defence of the mandate of the organization; and whether to address the issue of collective self-defence when a member of the organization was attacked. Following the view of most members in the plenary debate, the Drafting Committee had recognized that those were difficult questions, some of which were equally relevant to State responsibility but were not addressed in the draft articles on the responsibility of States. The point that self-defence could be invoked only by those organizations that deployed forces or administered territories could not be easily and clearly dealt with in the body of the text and should be explained in the commentary. The Drafting Committee had also been of the view that consistency between the draft articles under consideration and the draft articles on the responsibility of States should be maintained as far as possible, to avoid any unintended implication for the interpretation of the latter. A better approach would therefore be to refer to those issues in the commentary, indicating their complexity and relevance. In plenary discussions the issue had also been raised as to whether the lawfulness of self-defence should be evaluated on its “conformity with the Charter of the United Nations”, as in the corresponding provision of the draft articles on the responsibility of States. Some members had expressed the concern that the Charter requirements applied to States and it was unusual to extend them to international organizations, although they had not questioned the notion that the principles on self-defence embodied in the Charter also applied by analogy to international organizations.

The Drafting Committee had borrowed the language of article 52 of the 1969 Vienna Convention, which referred to “the principles of international law embodied in the Charter of the United Nations”. The Drafting Committee had made no further changes to the text proposed by the Special Rapporteur.

6. The Drafting Committee had proposed to leave draft article 19 (Countermeasures) blank because at the current stage a simple and general text on countermeasures could be misleading. In the draft articles on the responsibility of States,169 the conditions under which countermeasures precluded wrongfulness were stated by reference to Chapter II of Part Three. For the topic under consideration, the substantive provisions on countermeasures had not yet been considered by the Commission and would be discussed only in the context of implementation of responsibility. Clearly, countermeasures taken by international organizations raised specific questions, for example, whether sanctions were countermeasures or should be the subject of a different regime. The Drafting Committee had been of the view that it might be premature to simply provide for a text on countermeasures, a subject that was controversial, without working out the details in order to provide a more informed and complete picture of the parameters of countermeasures. The Drafting Committee had also considered the option of not including any provision on countermeasures and requesting the views of Governments, but had decided that it would be preferable to address questions to Governments at the time when the substantive provisions on countermeasures were to be discussed. It had therefore concluded that the better course of action was to reserve a place for the article, so that it was clear that a provision on countermeasures would eventually be formulated, and to include an explanatory footnote.

7. Draft article 20 (Force majeure), which corresponded to article 23 of the draft articles on the responsibility of States,170 had been generally accepted in the plenary debate; the only issue that had raised concerns was the extent to which an international organization could invoke financial distress as force majeure, justifying non-compliance with its obligations. Although the Special Rapporteur had mentioned such an occurrence as a possible example of force majeure, the Drafting Committee had held the view that there might be various reasons for financial distress of an international organization, such as poor management, non-payment of dues by member States, unanticipated expenses and the like, most of which could not be considered cases of force majeure. Financial distress of an international organization could amount to force majeure only in exceptional circumstances. The Drafting Committee had agreed that the conditions for force majeure that applied to States also applied to international organizations, so that there was no reason to make a distinction between the two. It had further agreed that, while there might be circumstances in which financial distress of an international organization could constitute force majeure, it was not prudent to use it as a prime example of a case of force majeure, even in the commentary, since that might be misleading.

8. Draft article 21 (Distress), which corresponded to article 24 of the draft articles on the responsibility of States,171 had not raised many questions in the plenary debate. The only point that had led to some discussion had been whether the qualification for invoking distress should be limited to “saving the author’s life or the lives of other persons entrusted to the author’s care”, as stated at the end of paragraph 1. That requirement had been held to be too narrow and did not take account of situations where the lives of persons not in the author’s care would be in danger and where the author was in a position to intervene to prevent the loss of life. Some members had therefore suggested that the Commission should adopt a formulation that was less restricted. Suggestions had also been made to include the criterion of a “special relationship”, used in the commentary to article 24 of the draft articles on the responsibility of States, which would expand the scope somewhat, although not enough to cover other situations. The Drafting Committee had discussed the issue at length, bearing in mind that in some situations an international organization might intervene to save the lives of individuals with whom it had no special relationship. For example, the question had been raised about what might happen if United Nations forces were deployed in a specific geographical area to which their mandate was limited, yet incidents were occurring just outside that area that could result in loss of civilian lives.

169 Ibid., draft article 22, p. 27.
170 Ibid.
171 Ibid., p. 80, para. (7).
and the United Nations forces were in a position to prevent it. Should not their intervention fall under the scope of the distress provision? The Drafting Committee had agreed that it was a difficult question and that the policy concerns behind it applied equally to the corresponding provision in the draft articles on the responsibility of States. The question involved much larger issues of the responsibility to protect and humanitarian intervention, which could not be dealt with under the current topic. Moreover, the Drafting Committee had feared that any change in approach might have unintended implications for the corresponding article on the responsibility of States. It had also been of the view that it was not always easy to distinguish between distress and necessity, covered in draft article 22, which might very well apply to specific scenarios such as the one mentioned above. The Drafting Committee had therefore agreed to maintain the text as proposed by the Special Rapporteur, since it was consistent with the corresponding article on the responsibility of States, but to address the issue in the commentary, particularly indicating the concerns that the formulation might be perceived to be too narrow.

9. Draft article 22 (Necessity) corresponded to article 25 of the draft articles on the responsibility of States. The Commission had debated the scope of application of the draft article, since, in practice, organizations had on occasion invoked necessity, in particular operational necessity or necessity as justifying access to confidential information. The general view had been that international organizations should be able to invoke necessity, provided the right was carefully circumscribed. Most of the questions raised had related to paragraph 1 (a). In the draft articles on the responsibility of States, the act for which necessity was invoked must be "the only way for the State to safeguard an essential interest against a grave and imminent peril". The Special Rapporteur had modified that language to adapt it to international organizations and had limited it to "the only means for the organization to safeguard against a grave and imminent peril an essential interest that the organization has the function to protect". That wording raised the question of what was meant by the term "essential interest" and whether it included the essential interest of a member State or a member organization. The Drafting Committee had been of the view that the term "essential interest" should be given a limited scope by setting a high threshold. To express the type of exceptional situation for which an international organization might invoke necessity, the Drafting Committee had redrafted paragraph 1 (a) of the text proposed by the Special Rapporteur to bring out two elements more clearly. First, the essential interest would be only that "of the international community as a whole"; a formulation that excluded the parochial interests of the organization itself. The Drafting Committee had considered linking the "essential interest" to the constituent instrument of the organization or to its mandate to protect but had decided against both, since neither seemed consistent with the understanding that the "essential interest", for the purposes of the draft article, should be one of paramount interest to the international community as a whole. The constituent instrument of an international organization might include a number of objectives, not all of which would reach the threshold set in the provision. The same reasoning would apply to a particular mandate that might be given to an international organization by its members.

10. The Drafting Committee had agreed, however, that there must be a legal framework within which an international organization could lawfully claim that it was authorized to act to protect that essential interest, in order to prevent any organization from invoking the protection of an essential interest of the international community even if it was not within its competence or function. In order to fill the gap, the Drafting Committee had introduced a reference to "international law", so that paragraph 1 (a) would refer to an essential interest of the international community as a whole that the organization "has, in accordance with international law, the function to protect". Some concerns had been expressed that the formulation would set the bar too high and would preclude regional organizations or organizations which did not have universal membership from invoking necessity to protect an essential interest of their members. The Drafting Committee, taking the view that a formulation that covered such situations would make the provision too broad and susceptible to abuse, had thought it preferable to keep the scope of the provision narrow and not to include the essential interest of a member State or a member organization as justification for an international organization to invoke necessity. However, the commentary would point out that member States were not precluded from protecting their essential interests acting in cooperation with the international organization.

11. Paragraph 1 (b) set a further limitation on the invocation of necessity and recognized that there might be competing essential interests that would have to be weighed against one another. The act of the international organization, even if it was intended "to safeguard against a grave and imminent peril an essential interest of the international community as a whole", must not seriously impair an essential interest of the State or States towards which the obligation existed, or an essential interest of the international community as a whole. The question had been raised whether the reference to the "international community as a whole" should be kept in that subparagraph, since it might appear illogical to say that any act for the protection of an "essential interest of the international community as a whole" referred to in paragraph 1 (a), might impair an "essential interest of the international community as a whole" referred to in paragraph 1 (b). The Drafting Committee had concluded, however, that the international community as a whole had more than one essential interest and that it was important to make sure that the protection of one essential interest would not seriously impair another essential interest.

12. Although there had been some discussion in the Commission as to whether the provision should also make reference to the essential interest of another international organization, the Drafting Committee had decided against such an inclusion. Since the essential interest of an international organization had not been thought to be sufficient reason for invoking necessity under paragraph 1 (a), its inclusion in paragraph 1 (b) as a further limitation would be inconsistent. Paragraph 2 corresponded to article 25,
paragraph 2 of the draft articles on the responsibility of States\textsuperscript{173} and laid down the two limitations on the invocation of necessity. The Drafting Committee had made no changes to the text proposed by the Special Rapporteur.

13. Draft article 23 (Compliance with peremptory norms), which corresponded to article 26 of the draft articles on the responsibility of States, had been generally supported in the plenary debate.\textsuperscript{174} Some questions had been raised as to the applicability of peremptory norms to international organizations, but the Drafting Committee had decided to retain the draft article. Mindful that the whole subject of peremptory norms to international organizations involved difficult issues that could not be resolved in detail in the text of a provision, the Drafting Committee had judged it better to address the subject in general terms both in the text of the draft article and in the commentary.

14. Draft article 24 (Consequences of invoking a circumstance precluding wrongfulness), which corresponded to article 27 of the draft articles on the responsibility of States,\textsuperscript{175} was also generally supported in the plenary debate. Some members had commented that the provision should deal with compensation more extensively. The Drafting Committee had been of the view that, for the sake of consistency with the draft articles on the responsibility of States, it was better to retain the text as proposed by the Special Rapporteur. It had also been suggested that the words “no longer exists” at the end of subparagraph (a) should be replaced with the words “does not exist”. The Drafting Committee had agreed that the latter formula was more accurate, since “no longer” had a temporal element that was unnecessarily restrictive; nevertheless, for the sake of consistency with the draft articles on responsibility of States, it had decided to retain the text as proposed and to address that particular question in the commentary.

15. The CHAIRPERSON invited the Commission to consider chapter V (Circumstances precluding wrongfulness) of the draft articles on responsibility of international organizations (A/CN.4/L.688) article by article.

\textbf{Article 17 (Consent)}

\textit{Draft article 17 was adopted.}

\textbf{Article 18 (Self-defence)}

\textit{Draft article 18 was adopted.}

\textbf{Article 19 (Countermeasures)}

\textit{Draft article 19 was adopted.}

\textbf{Article 20 (Force majeure)}

\textit{Draft article 20 was adopted.}

\textbf{Article 21 (Distress)}

\textit{Draft article 21 was adopted.}

Article 22 (Necessity)

\textit{Draft article 22 was adopted.}

Article 23 (Compliance with peremptory norms)

\textit{Draft article 23 was adopted.}

Article 24 (Consequences of invoking a circumstance precluding wrongfulness)

\textit{Draft article 24 was adopted.}

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The meeting rose at 10.50 a.m.
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\textbf{2885th MEETING}

\textit{Friday, 9 June 2006, at 10.00 a.m.}

\textbf{Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA}

\textbf{Present:} Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Ms. Xue, Mr. Yamada.

\textbf{Shared natural resources (concluded)}


[Agenda item 5]

\textbf{REPORT OF THE DRAFTING COMMITTEE}

1. Mr. MANSFIELD, introducing the report of the Drafting Committee on shared natural resources (A/CN.4/L.688) on behalf of the Committee’s Chairperson, Mr. Kolodkin, said that the Drafting Committee had completed, on first reading, a set of 19 draft articles on the law of transboundary aquifers. At its 2879th meeting, held on 19 May 2006, the Commission had referred to the Drafting Committee the draft articles contained in the annex to the report of the Working Group on Shared natural resources (A/CN.4/L.683). The Drafting Committee had considered the draft articles at five meetings on 31 May and 1, 2, 3 and 7 June 2006.

2. Mr. MANSFIELD paid a tribute to the Special Rapporteur, whose mastery of the subject, perseverance and positive disposition had greatly facilitated the Drafting Committee’s task. He also expressed appreciation to the Working Group on Shared natural resources, whose outstanding work had made it possible for the Drafting Committee to adopt several draft articles without any amendment. The Commission had also benefited from the valuable advice supplied by experts on groundwaters from UNESCO and the International Association of Hydrogeologists (IAH).

\textsuperscript{*} Resumed from the 2879th meeting.
The draft articles on the law of transboundary aquifers were divided into five parts. They were structured in such a way that some dealt with the obligations of aquifer States vis-à-vis other aquifer States, some concerned the obligations of States other than aquifer States and others covered the obligations of aquifer States to third States. Where applicable, the number of the draft article appearing in square brackets corresponded to the draft article proposed by the Special Rapporteur in his third report.

Part I, entitled “Introduction”, contained draft articles 1 (Scope) and 2 (Use of terms). The Drafting Committee had retained draft article 1 as formulated by the Working Group, although the title had been shortened by deleting the words “of the present draft articles”. The draft articles contemplated three categories of activities: (a) utilization; (b) other activities, such as farming or construction carried out above or below the surface, which might have or were likely to have an impact on an aquifer or aquifer system; and (c) measures for the protection, preservation and management of those activities. Article 1, subparagraphs (a) and (c), were similar to article 1 of the 1997 Watercourses Convention, on which the draft articles had been essentially modelled. The activities mentioned in subparagraph (b) represented a new addition that was important in that there had to be a causal link between those activities and their effects on the aquifer or aquifer system. The term “impact” in subparagraph (b) would be clarified in the commentary.

Draft article 2 defined seven terms employed in the draft articles. The text deliberately used technical language, since it was intended for use by scientists and water management administrators. Apart from some stylistic adjustments in subparagraph (g), the draft article reflected the text elaborated by the Working Group.

The term “aquifer”, in subparagraph (a), was technically more precise than “groundwaters”, the expression employed in the Special Rapporteur’s earlier texts. The term implied water-bearing, but the apparent tautology in the definition was intentional and designed to highlight the difference between aquifers and other underground geological formations containing oil and gas, which might be discussed by the Commission as part of its consideration of the topic. The reference to an “underground geological formation” underscored the fact that aquifers were found in the subsurface.

The draft articles covered both aquifers and aquifer systems. The latter were defined in subparagraph (b) as a series of two or more aquifers which were hydraulically connected. Aquifers within a hydraulically connected system did not have to have the same characteristics; aquifers of different geological formations could in fact be found within a single system. For that reason, the word “series” had been chosen instead of “ensemble”, as had been suggested during the Drafting Committee’s discussions. The commentary would explain the meaning of the term “hydraulically connected”.

The draft articles applied only to transboundary aquifers or aquifer systems, in other words to an aquifer or aquifer system part of which was situated in the territory of a different State that, for the purposes of the draft articles, was an aquifer State. The terms “transboundary aquifer” and “aquifer State” were defined in subparagraphs (c) and (d) respectively.

The draft principles covered both recharging and non-recharging aquifers. As a specific reference to a “recharging aquifer” was made in draft article 4, the term had been defined in subparagraph (e) as an aquifer receiving a non-negligible amount of the contemporary water recharge. The expressions “non-negligible” and “contemporary water” had particular technical meanings that would be clarified in the commentary.

Each aquifer or aquifer system had a “recharge zone”—for example, a catchment area—and a “discharge zone”, such as a watercourse, lake, oasis, wetland or ocean. Those zones were defined in subparagraphs (f) and (g) and were subject to particular measures and cooperative arrangements under the draft articles. A slight stylistic alteration had been made to subparagraph (g), in which each example was now preceded by an indefinite article and the disjunctive “or” had been used in place of the conjunction “and”.

Part II dealt with general principles and comprised draft articles 3 to 8. The Drafting Committee had made a few changes to draft article 3 (Sovereignty of aquifer States). In the course of the debate in plenary, members had commented on the need to bear in mind the principles of territorial sovereignty and permanent sovereignty over natural resources and had made particular reference to General Assembly resolution 1803 (XVII). The draft article reflected the proposition that an aquifer State had sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. The word “territory” had been employed in preference to “territorial jurisdiction” for the sake of clarity and in order to ensure consistency throughout the draft articles and between the draft articles and the 1997 Watercourses Convention. It was understood that sovereignty was not absolute. The two sentences of draft article 3 sought to achieve a balance by first reaffirming the principle and then stipulating how it should be exercised for the purposes of the draft articles.

The Drafting Committee had considered whether the two sentences should be merged into one, or whether the second sentence should be further qualified by a reference to international law. Ultimately both sentences had been retained, but the phrase “such sovereignty” had been replaced by “its sovereignty”. As the draft articles did not cover all the limits imposed by international law on the exercise of sovereignty, the commentary would explain that the draft article would have to be interpreted and applied in the light of general international law.

Draft article 4 (Equitable and reasonable utilization) had been discussed at length in an effort to determine whether it was possible to avoid apparent overlaps between that draft article and draft article 5, whether the concepts of equitable and reasonable utilization could be easily separated, particularly when no such separation was
implied in draft article 5, and lastly, whether, considering how difficult it was to define equity, the phrase “the benefits to be derived from such utilization shall accrue equitably to the aquifer State concerned”, proposed by the Special Rapporteur in paragraph 18 of his third report, was precise enough to convey the intended meaning.

14. After considering several proposals and suggestions, the Drafting Committee had decided to view draft articles 4 and 5 as separate articles, one setting out the general principle and the other the factors of implementation. It had also been decided to treat equitable and reasonable utilization in the same draft article even though they were two different, albeit interrelated, concepts. Accordingly, the chapeau provided that aquifer States must utilize a transboundary aquifer or aquifer system according to the principle of equitable and reasonable utilization: that was the overarching principle which, in practical terms, had a number of implications for aquifer States. Since the draft articles dealt with shared aquifers or aquifer systems, it was important that the interests of all aquifer States concerned by its utilization be taken into account. Subparagraph (a) of draft article 4 therefore provided that such States must “utilize the aquifer or aquifer system in a manner that is consistent with the equitable and reasonable accrual of benefits theretofrom to the aquifer States concerned”. That paragraph replaced the earlier provision which, by asserting “that the benefits to be derived from such utilization shall accrue equitably”, had seemed to focus more on the benefits of utilization than on the utilization itself, whether present or future. It was understood that “equitable” was not coterminous with “equal”.

15. The principle of sustainable utilization had a different connotation when applied to aquifers than when it was applied to renewable resources. In the case of aquifers, the aim was to maximize the long-term benefits deriving from the use of the water contained in the aquifer or aquifer system. In order to do so, the States concerned, either individually or jointly, should establish an overall utilization plan that takes into account present and future needs and alternative water resources available to them. Those requirements, which had originally been considered together, were now reflected separately, in subparagraphs (b) and (c). The words “individually or jointly” in subparagraph (c) had been added to highlight the importance of having a prior overall plan while indicating that such a plan did not necessarily have to emanate from a joint endeavour of the aquifer States concerned.

16. Subparagraph (d) related to a recharging aquifer. As a recharging aquifer could receive a natural or an artificial recharge, it was vital that the aquifer, as a water-bearing container, maintain certain physical qualities and characteristics. Accordingly, subparagraph (d) stipulated that utilization levels should not be such as to prevent continuance of the effective functioning of the aquifer or aquifer system. That did not, however, imply that the level of utilization must necessarily be limited to the level of recharge. That aspect, together with other notions such as “long-term benefits” and “agreed lifespan of such aquifer and aquifer system”, a phrase contained in earlier drafts and implicit in the notion of “establishing an overall utilization plan”, would be explained in the commentary.

17. A number of changes had been made to draft article 5 (Factors relevant to equitable and reasonable utilization). The first had been to delete the words “and circumstances” in paragraph 1 for purposes of economy, it being understood that “circumstances” were included in “factors”. The factors referred to in the draft article would be considered in the context of the particular circumstances surrounding each case.

18. The factors enumerated in paragraph 1 were not exhaustive. Although they had been reorganized, the rearrangement was not based on any particular order of priority, but had been influenced more by the need for internal coherence and logic. As noted in paragraph 2, however, in weighing different utilizations of a transboundary aquifer or aquifer system, special regard had to be given to vital human needs.

19. The second change had been the redrafting of subparagraph 1 (b) to read “the social, economic and other needs, present and future, of the aquifer States concerned”. The new wording was partly intended to align the text with some aspects of draft article 4, namely the present and future needs referred to in subparagraph (c) of that article.

20. The third change had been made in subparagraph 1 (i), where the word “role” had been used instead of “place” to better convey the idea of the variety of purposive functions fulfilled by an aquifer or aquifer system in a related ecosystem. That might be an important consideration when an aquifer or aquifer system was situated in an arid region.

21. Fourthly, the phrase “with regard to a specific transboundary aquifer or aquifer system” had been added to paragraph 2 to add specificity.

22. The commentary would further elaborate on the “natural characteristics” mentioned in paragraph 1 (c), elements bound up with viability and costs which might affect “the availability of alternatives”, to which reference was made in paragraph 1 (g), and the term “ecosystem” in paragraph 1 (i), which embraced ecosystems outside and inside the aquifer.

23. Draft article 6 (Obligation not to cause significant harm to other aquifer States) dealt with questions of harm arising from utilization, harm from activities other than utilization as contemplated in draft article 1 and questions connected with the elimination and mitigation of significant harm that had occurred despite efforts of due diligence to prevent such harm. Those matters were covered in paragraphs 1, 2 and 3 respectively. The Drafting Committee had not made any changes to the text of the draft article, but it had added the adjective “significant” to the title to bring it into line with the article’s content.

24. Unlike the corresponding article 7 of the 1997 Watercourses Convention, draft article 6 did not address the issue of compensation in situations where harm had occurred, despite efforts to eliminate or mitigate it.

377 Ibid.
It was understood that that area would be governed by other rules of international law, such as those relating to liability, and thus did not require specialized treatment in the draft articles.

25. The commentary to draft article 6 would explain that the article was intended to cover activities undertaken in a State’s own territory and would underscore the relative nature of the threshold of “significant harm”. It would also explain that the reference to “activities” in paragraph 3 encompassed both “utilization” and “other activities”, referred to in paragraphs 1 and 2.

26. Draft article 7 (General obligation to cooperate) had been slightly changed by the Drafting Committee. For the sake of clarity, the word “their” had been used instead of “a” to qualify “transboundary aquifer or aquifer system” in paragraph 1. There had also been some discussion as to whether the adjective “general” was required in the title. The provision was of importance for shared natural resources arrangements, and it provided a context for the application of other provisions on specific forms of cooperation, such as regular exchanges of data and information as well as cooperation in protection, preservation and management. It was partly for that reason that the word “general” had been retained in the title.

27. The commentary would indicate the types of mechanisms contemplated in paragraph 2 and would draw attention to the need to take into account the experience of other existing joint mechanisms and commissions in various regions.

28. Paragraph 2 of draft article 8 (Regular exchange of data and information) had been modified. To make the article clearer, the previous long sentence had been broken up into three sentences. A regular exchange of readily available data and information constituted the first step in the cooperative arrangements envisaged under the draft articles. Draft article 8 therefore set forth general, minimum and residual requirements. The dearth of knowledge regarding the nature and extent of some aquifers or aquifer systems meant that best efforts would have to be deployed to collect and generate complete data and that cooperation among aquifer States would have to be enhanced. The commentary would elucidate the scientific terms used in the phrase “geological, hydrogeological, hydrological meteorological and ecological nature and related to the hydrochemistry of the aquifer or aquifer system”. The “generation” of data would entail the processing of raw data into usable information.

29. Part III of the draft was entitled “Protection, preservation and management” and contained draft articles 9 to 13. Draft article 9 (Protection and preservation of ecosystems) had been changed slightly in order to clarify the text and correct the grammar. The word “measures” had been inserted between the words “including” and “to”, and the word “are” had been used to qualify the “quality and quantity of water”. The obligations of aquifer States under draft article 9 were confined to taking “all appropriate measures to protect and preserve ecosystems”, including the quality and quantity of water retained in the aquifer or aquifer systems, as well as that released in the discharge zones. The commentary would clarify the meaning of ecosystems within or dependent upon the aquifers.

30. In paragraph 2 of draft article 10 (Recharge and discharge zones) the Drafting Committee had replaced “for” by “with regard” in order to add clarity to the text. The draft article covered two types of obligations that sought to attain the same objective, namely to protect recharge or discharge zones from activities that might have an adverse impact on the aquifer or aquifer system. Paragraph 1 was concerned with the duty of aquifer States to take special measures to minimize detrimental impacts on those zones, which had been defined in draft article 2.

31. Paragraph 2 was addressed to all States in whose territory a recharge or discharge zone was located. Those States had a duty to cooperate with aquifer States to protect the aquifer or aquifer system, a duty that was complementary to aquifer States’ general obligation to cooperate, which was laid down in draft article 7.

32. The Drafting Committee had made some alterations to the last sentence of draft article 11 (Prevention, reduction and control of pollution) in order to capture not only the uncertainty caused by the lack of knowledge about the nature and extent of aquifers or aquifer systems but also the vulnerability of aquifers to pollution. The phrase “in view of” rather than “in the light of” would help to bring out the intended meaning of the sentence. The precautionary approach applied to a whole range of activities, including the process of recharging an aquifer or an aquifer system, especially when an artificial recharge was involved.

33. The Drafting Committee had not amended draft article 12 (Monitoring) in any way. The provision applied to aquifer States and served as a precursor to the management provisions set out in draft article 13. Paragraph 1 set forth the general obligation to monitor transboundary aquifers or aquifer systems jointly whenever possible. Paragraph 2 was concerned with the modalities and parameters for monitoring.

34. The technical aspects of putting the agreed or harmonized standards and methodology for monitoring into effect would be further clarified in the commentary.

35. The Drafting Committee had likewise made no alterations to draft article 13 (Management). The establishment and implementation of plans for the management of aquifers and aquifer systems were essential components of international cooperation, as were consultations. Groundwater experts considered joint management by aquifer States to be highly desirable. However, the draft article also recognized that, in practice, it might not always be possible to set up such a mechanism. The commentary would note that such plans could be established and implemented on an individual or joint basis.

36. Part IV (Activities affecting other States) contained only draft article 14 (Planned activities). The Drafting Committee had introduced a slight change to the draft article by deleting the phrase “which may be able” from the last sentence of paragraph 3 in order to remove any
suggestion that an independent fact-finding body might not be impartial.

37. Unlike the 1997 Watercourses Convention, which had detailed provisions on planned measures that were based on State practice, a minimalist approach had been chosen with respect to aquifers and aquifer systems. The draft articles applied to any State which had reasonable grounds for believing that a planned activity in its territory could affect a transboundary aquifer or aquifer system in a manner that would have a significant adverse effect on another State. Assessment, timely notification, consultations and, if necessary, negotiations or independent fact-finding were contemplated in the draft article as a means of reaching an equitable solution to a particular problem.

38. Part V (Miscellaneous provisions) contained the last five draft articles (15–19).

39. The text of draft article 15 (Scientific and technical cooperation with developing States) was identical to that formulated by the Working Group on Shared natural resources. It sought to accentuate cooperation rather than assistance. In the first sentence of the chapeau, States were required to promote scientific, educational, technical and other cooperation for the protection of transboundary aquifers or aquifer systems. The list of activities was neither cumulative nor exhaustive. States were not bound to engage in each of the types of cooperation listed but would be allowed to choose their means of cooperation. The commentary would make it plain that the types of cooperation listed in the draft article represented just some of the ways in which States could fulfill the obligation to cooperate with cooperation in the areas contemplated by the draft article.

40. The Drafting Committee had made several changes to draft article 16 (Emergency situations). The paragraphs had been reorganized: the order of paragraphs 2 and 3 had been reversed and what had been paragraph 3 had been further condensed into paragraphs 2 (a) and 2 (b).

41. In paragraph 1 the expression “the present draft article” had been used for consistency rather than “this draft article”, and in the last part of the sentence the broader phrase “harm to aquifer States or other States” had been used rather than “harm to States”. In paragraph 2 (a), the phrase “the State within whose territory the emergency originates” had been used to make it clear which State was required to take the action described in subparagraphs (i) and (ii). In addition, the definite article had been used in preference to the indefinite article to qualify “State” and “emergency”.

42. Paragraph 3, which had formerly been paragraph 2, had been recast in order to temper the possible consequences entailed by a derogation clause, the form originally proposed for that paragraph. As redrafted, the paragraph stipulated that, notwithstanding draft articles 4 and 6, aquifer States might take measures that were strictly necessary to meet vital human needs in the event of an emergency. The reference to draft article 5 had been deleted in order to remove any apparent contradiction, since draft article 5, paragraph 2, stated that, in weighing different utilizations, special regard must be given to vital human needs. Since the factors listed in draft article 5 had to be taken into account when applying draft article 4, it was unnecessary to specifically mention draft articles, as had been done in the original text.

43. The concept of “emergency” was defined in paragraph 1 as a suddenly resulting situation that posed an imminent threat of causing serious harm to aquifer States or other States. The commentary would make it clear that the requirement of suddenness would not exclude situations that could be predicted in a weather forecast. The modalities for responding to an emergency that affected a transboundary aquifer were set forth in paragraph 2. They required notification without delay of, and cooperation with, potentially affected States, as well as the provision of scientific, technical, logistical and other cooperation. The reference in paragraph 3 to articles 4 and 6 was understood to be without prejudice to the application to the draft articles of rules of international law concerning circumstances precluding wrongfulness.

44. The Drafting Committee had made no amendment to draft article 17 (Protection in time of armed conflict), which reaffirmed that, during times of armed conflict, the principles and rules of international law applicable in international and non-international armed conflicts applied to the protection and utilization of transboundary aquifers and related installations. The Hague Convention 1907 (IV) respecting the Laws and Customs of War on Land and the two 1977 Protocols additional to the Geneva Conventions of 12 August 1949 provided for the protection of water resources and related works as well as their use during armed conflict.

45. The Drafting Committee had amended the title of draft article 18 (Data and information concerning national defence or security) by deleting “vital to” and replacing it with “concerning”. That deletion and the retention of “essential” in the text instead of “vital” had been decided upon only after an unofficial vote. Article 31 of the 1997 Watercourses Convention, on which the provision was modelled, used the phrase “provide data or information vital to its national defence or security”. The two provisions had a similar import.

46. The inclusion of draft article 18 had been a contentious issue. The commentary would indicate that there had been disagreement over the need for it and the inclusion of a reference to the protection of international secrets and intellectual property.

47. Draft article 19 (Bilateral and regional agreements and arrangements) was the final draft article, and the Drafting Committee had made a number of changes to the text. First, the title now included a reference to “agreements,” and the words “agreements or” or “agreement or” had been inserted in the text wherever the word “arrangement” appeared to denote the binding character of some of the interactions envisaged for aquifer States. Secondly, in view of the fact that an aquifer State was defined in draft article 2, the phrase “in whose territory such an aquifer or aquifer system is located”, already contained in that definition, had been deleted.
48. Under draft article 19, aquifer States were encouraged to enter into bilateral or regional agreements or arrangements with respect to activities involving their transboundary aquifers. However, such arrangements must not adversely affect, to a significant extent, utilization of the water in the aquifer or aquifer system by other aquifer States without their express consent. That point would be further clarified in the commentary.

49. The draft article did not deal with the relationship between the current set of draft articles and existing or future obligations, nor did it address the relationship between the draft articles and an international agreement or general international law. Those matters were linked to the decision the Commission would take on the final form of the draft articles. Should they become a binding instrument, the Commission would have to consider those and other matters, such as dispute settlement provisions.

50. The Drafting Committee recommended to the Commission the adoption on first reading of the set of 19 draft articles on the law of transboundary aquifers.

51. The CHAIRPERSON invited the Commission to adopt the draft articles contained in document A/CN.4/L.688. He noted that although the Drafting Committee had been working only with the original English text, all the language groups had quickly mobilized to help in finalizing the other language versions. He thanked all participants as well as the translators who had joined in that effort which had greatly facilitated the concordance of the text in all languages.

Draft articles 1 to 9

Draft articles 1 to 9 were adopted.

Draft article 10

52. Mr. CHEE drew attention to the phrase in paragraph 2 which indicated that States which were not aquifer States should cooperate with aquifer States and said that he found the provision odd from the standpoint of treaty relations. The 1969 Vienna Convention exempted third parties from treaty obligations unless they expressed their consent by becoming parties to the treaty.

53. The CHAIRPERSON said that if States other than aquifer States were affected by the use of an aquifer system, the fact that they were not aquifer States did not prevent them from engaging in cooperation with the aquifer States.

54. Mr. YAMADA (Special Rapporteur) said that the point just raised had been extensively discussed in the Working Group on Shared natural resources. The Chairperson of the Working Group had described the discussion when he had presented the Working Group’s report to the plenary (see the 2878th meeting, above, para. 51). He himself had originally proposed referring to the duty of aquifer States to seek cooperation from non-aquifer States in whose territory a recharge or discharge zone was located. However, the Working Group had been of the view that that formulation was too weak, and that even non-aquifer States in whose territories the recharge or discharge process took place had the duty to cooperate with a view to the proper management of aquifers. The text before the Commission reflected that point. Nevertheless, the obligation would apply only to States that became parties to whatever international instrument ultimately came out of the draft articles. An obligation could not be imposed on a State, including an aquifer State, that was not a party to the international instrument.

55. The CHAIRPERSON said that the obligation to cooperate had in essence become a rule of general international law, from which States could benefit, regardless of the form the draft articles ultimately took.

56. Mr. MOMTAZ endorsed that view and added that in the field of environmental protection there was a general obligation of States to cooperate among themselves, an obligation which the ICJ had often stressed.

57. Mr. CHEE said that he still had reservations about the phrase but would not stand in the way of the adoption of draft article 10.

Draft article 10 was adopted.

Draft articles 11 to 13

Draft articles 11 to 13 were adopted.

Draft article 14

58. Mr. ECONOMIDES drew attention to a disparity in the French language version between draft article 14 and other provisions, particularly draft article 6. Paragraphs 1 and 2 of draft article 14 employed the phrase “effets négatifs importants” (“significant adverse effect”), whereas draft article 6 spoke of “dommage significatif” (“significant harm”). He wondered whether the distinction was intentional and, if so, which phrase established a higher threshold in terms of the obligation it placed upon States.

59. Mr. YAMADA (Special Rapporteur) said that draft article 6 established the obligation not to cause significant harm, with the threshold being “significant”, whereas in the context of planned activities under draft article 14, the State had the responsibility to carry out an environmental impact assessment if it had reasonable grounds for believing that planned activities might have a significant adverse effect. That threshold was lower than the threshold in draft article 6 because the purpose of draft article 14 was to trigger impact assessment, consultation and negotiations with a view to reaching an equitable solution.

60. The CHAIRPERSON said that there was indeed a disparity between the French versions of draft articles 6 and 14 but suggested that it could be resolved by replacing “importants” by “significatifs” in draft article 14.

61. Mr. MANSFIELD, speaking on behalf of the Chairperson of the Drafting Committee, confirmed the Special Rapporteur’s point that the distinction between the thresholds in draft articles 6 and 14 had been made intentionally. He therefore advocated adjusting the French wording as the Chairperson had suggested.
Draft article 14 was adopted, with the above-mentioned editorial amendment to the French version.

Draft articles 15 to 19 were adopted.

The titles and texts of the draft articles on the law of transboundary aquifers as a whole, as orally amended, were adopted on first reading.

62. The CHAIRPERSON said that if he heard no objection, he would take it that, in accordance with articles 16 and 21 of its Statute, the Commission wished to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations should be submitted to the Secretary-General by 1 January 2008.

It was so decided.

Organization of work of the session (continued)

[Agenda item 1]

63. The CHAIRPERSON announced that the Commission had concluded the first part of its fifty-eighth session.

The meeting rose at 11.15 a.m.

* Resumed from the 2881st meeting.
Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Montaz, Ms. Niehaus, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.


[Agenda item 6]

NINTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON, after welcoming the participants of the International Law Seminar, invited the Special Rapporteur, Mr. Rodríguez Cedeño, to introduce his ninth report on unilateral acts of States (A/CN.4/569 and Add.1).

2. Mr. RODRÍGUEZ CEDENO (Special Rapporteur) said that the topic of unilateral acts was as complex as it was important. Unilateral legal acts were a reality that was part of States’ relations with other subjects of international law. Some of those acts were legal and fell outside a treaty relationship. They could produce legal effects in the absence of any acceptance, consent or another reaction by the addressee, which was perhaps one of their main characteristics.

3. The enormous difficulties which the topic had raised had greatly influenced the final form which the product of his work had taken. He had initially thought, optimistically, that he could codify—without, however, precluding any progressive development—the basic rules governing the functioning of unilateral acts. However, as work on the study had progressed and he had compiled elements of doctrine, case law and international practice, he had realized that doctrine, although abundant, was not unanimous and that practice, although highly relevant, was not clear or sound enough to support the work of codification and progressive development, although it was not the first time that the Commission had found itself in such a position. With regard to case law, which was also considerable, the 1974 judgments in the Nuclear Tests cases had been an important reference. Years later, however, when the ICJ had considered the application submitted by the Democratic Republic of the Congo against Rwanda in Armed Activities on the Territory of the Congo and had ruled in 2006 on its jurisdiction, it had taken into account an act that was domestic in origin and unilateral as to form (a decree) and a declaration formulated by a person who in principle had not been authorized to act but had nevertheless been able to do so and to enter into legal commitments on the State’s behalf in its international relations.

4. Since being assigned the topic in 1997, he had presented conclusions on unilateral acts, treaty-based acts and the relations between subjects of international law in the context of treaty law and in a unilateral context, as well as views on formal unilateral acts, material unilateral acts and, in particular, at the Commission’s request, acts of recognition. At that stage of his work he had had to clarify a number of points, but some uncertainty remained, since the notion of a unilateral act had a number of aspects that were difficult to define, owing to differing legal conceptions. In the view of most members of the Commission, classification of the act was not crucial: an act could be termed recognition, promise or waiver, yet such labels were not even of relative utility, since it was the legal effects that such acts produced that had to be taken into account. Those difficulties, which of course also arose in connection with other topics currently on the Commission’s agenda, had led him to go beyond codification in the strict sense and to present a series of draft principles or guidelines (or draft guiding principles, as they were called in the ninth report) that could be very useful to States when they elaborated specific rules governing the functioning of unilateral acts.

180 See the sixth report of the Special Rapporteur, Yearbook ... 2003, vol. II (Part One), document A/CN.4/534.
5. The discussions in the Sixth Committee had revealed considerable differences of opinion as to the utility of the Commission’s work on the topic and the form the final product should take. Some representatives had continued, at the previous session, to draw attention to the need to adopt a set of draft guidelines or principles that would define the notion of unilateral acts and at least put States on the right track. Others, however, had not believed that the Commission’s work should necessarily aim for that objective, which was, moreover, virtually unattainable. In any event, the Commission needed to take a decision on the matter. He himself had followed the path set out for him, particularly at the 2003 session, by the members of the Working Group, whom he thanked warmly and whose differing positions he had always sought to reconcile.

6. In preparing the ninth report, he had taken account of the opinions expressed by the members of the Commission at the past nine sessions on the need to address the question of unilateral acts as well as the conclusions of the Working Groups. The views of the representatives of the Sixth Committee had also been very useful.

7. In response to the concerns expressed by the members of the Commission, and with a view to facilitating the consideration of the topic, he had divided his report into two parts. Part One referred to the grounds for invalidity of unilateral acts and the modification and suspension of such acts, together with other related concepts. While those issues had arisen in the course of previous years’ deliberations, they had not been formally presented in his reports. Part Two dealt with topics that had been considered previously, from a structural standpoint, in the Commission and in the Working Group established in 2004 and 2005. The definition of unilateral acts in a way that distinguished them from other acts which, although apparently unilateral, actually constituted a treaty relationship by the 1969 Vienna Convention while introducing the requisite nuances: invalidity on the ground that the representative lacked competence (paras. 18–34), grounds for invalidity related to the expression of consent (paras. 35–66), and invalidity of a unilateral act on the ground that it was contrary to a peremptory norm of international law or a norm of jus cogens (paras. 67–78). With regard to norms applicable to treaties and their relationship to the norms most likely applicable to unilateral acts, he said he had always thought that even if they could not be applied mutatis mutandis, a reference to them must be made. He was fully aware that unilateral acts were very different from treaty-based acts and that their particularities must be taken into account when codifying existing rules or elaborating principles or guidelines relating to them. Part One also considered in detail the termination and suspension of unilateral acts and other related concepts.

8. He had sought to accommodate the expectations of the members of the Commission as expressed at the 2005 session by recapitulating the work accomplished and, conducting a study on a matter that had been addressed when the topic had first been considered, namely conditions of validity and termination of unilateral acts, and proposing a set of guiding principles setting out criteria that States could utilize in the context of their international relations.

9. In Part One of the document, which dealt with the validity and duration of unilateral acts, he addressed the grounds for invalidity, following the structure of the 1969 Vienna Convention while introducing the requisite nuances: invalidity on the ground that the representative lacked competence (paras. 18–34), grounds for invalidity related to the expression of consent (paras. 35–66), and invalidity of a unilateral act on the ground that it was contrary to a peremptory norm of international law or a norm of jus cogens (paras. 67–78). With regard to norms applicable to treaties and their relationship to the norms most likely applicable to unilateral acts, he said he had always thought that even if they could not be applied mutatis mutandis, a reference to them must be made. He was fully aware that unilateral acts were very different from treaty-based acts and that their particularities must be taken into account when codifying existing rules or elaborating principles or guidelines relating to them. Part One also considered in detail the termination and suspension of unilateral acts and other related concepts.

10. In Part Two he had endeavoured to recapitulate the work accomplished thus far and to explain the draft guiding principles he had presented, always relying on the Commission’s deliberations and the views expressed by States in the Sixth Committee as well as on doctrine, practice and case law.

11. Addressing all those questions in a single document had been a difficult if not virtually impossible task. He had done his best in the time available to him and had taken into account the views of members of the Commission. He suggested that members should consider Part One of the ninth report on the validity and duration, and the termination and suspension of unilateral acts in plenary meeting, and leave Part Two on the definition, formulation, basis for the binding nature and interpretation of unilateral acts to the Working Group so as to expedite consideration of the topic at the current session.

The meeting rose at 4.10 p.m.

2887th MEETING

Tuesday, 4 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA
The threat or use of force, covered by paragraph 5 of draft guiding principle 7, were not already covered by paragraph 6 of that principle, since they too constituted acts in breach of *jus cogens*. Further, she noted that there was no available mechanism or entity to decide on the invalidity, termination or suspension of a unilateral act; the solution suggested in paragraph 75 of the report, that the author of the act should also rule on its validity, was far from satisfactory. Lastly, she felt that in several cases, the draft guiding principles—for example, those relating to the termination (para. 107) or the suspension (para. 124) of unilateral acts—did not logically follow from the preceding argumentation.

3. She could agree to the referral of all the draft guiding principles to the Working Group. While she had a number of amendments to suggest, she would do so within that forum. It would be clear from what she had already said that she had reservations concerning draft guiding principle 6, parts of draft guiding principle 7, and draft guiding principle 9. She unreservedly supported the referral to the Working Group of draft guiding principles 1–5, 8, 10 and 11, and part of principle 7. Of the two options offered for part of draft guiding principle 1, she would prefer option B. She would also favour including a reference, in draft guiding principle 10, to the expectations of third States. In the Working Group, she would suggest a number of drafting amendments.

4. Mr. MATHESON said that the adoption of a brief set of general conclusions or guidelines would be a suitable way for the Commission to end its work on the topic, since the product would be of practical use to States and other international actors. The Working Group should convene to elaborate such a text. He agreed with the Special Rapporteur that no attempt should be made to produce a detailed legal code. Instead, the Commission should concentrate on a limited set of guidelines that would help States understand the overall factors that were relevant in determining the circumstances in which unilateral acts might produce legal obligations. He also agreed that the definition of unilateral acts should, for the purposes of the guidelines, be restricted to declarations that clearly manifested an intent to produce legal effects. Whilst other forms of unilateral conduct might produce legal results, they were too diverse and too dissimilar to be encompassed by any coherent set of principles. Rather, the Working Group should focus its attention on the very useful set of provisional conclusions that had been circulated by its Chairperson at the end of the previous session. In several respects, those conclusions were preferable to the draft guiding principles contained in the ninth report.

5. In particular, the Commission should not base its work on an application of the substance or structure of the 1969 Vienna Convention, which had been designed for the very different situation of agreements negotiated amongst States as an exchange of formal commitments. In that respect, he agreed with the comments by Ms. Escarameia. For example, the proposed guiding principles 8 and 9 largely applied the constraints of the 1969 Vienna Convention to restrict the ability of a State to suspend or terminate its unilateral declarations. That would be inappropriate, since, by definition, the State making such a declaration had received no consideration.
for doing so and no other State had made reciprocal commitments in exchange for the declaration. In those circumstances, there was no reason to prevent a State from unilaterally changing what it had unilaterally proclaimed, unless there had been actual detrimental reliance by other States. Modification, termination or suspension of a unilateral act should therefore not be limited to the restricted grounds recognized for treaties, such as a fundamental change of circumstances, since unilateral acts by definition did not involve mutual legal commitments that could be modified or terminated by a party only under extreme circumstances.

6. Nor should the rules of treaty interpretation extend to the content of unilateral acts, which by definition were not the result of negotiation with other parties. Rather, as suggested in the provisional conclusions circulated by the Chairperson of the Working Group, obligations should be interpreted in a restrictive manner, if there was any doubt about their meaning and scope. Other States should have the right to act in reasonable reliance only on what was clearly stated in the unilateral declaration, and should not be able to enlarge those commitments by reference to other contextual factors.

7. Mr. PELLET said that it would be most regrettable if, as some would wish, the Special Rapporteur’s impending departure were to be used as an excuse to bury the topic. The Special Rapporteur had been unfairly criticized for having failed to come up with a coherent draft text after eight years’ work. The truth was that the Special Rapporteur had been guilty only of following the Commission’s own vague and often contradictory instructions. Moreover, on the principle of “more haste, less speed”, it was better to have a good text that had been thoroughly discussed than a shoddy, ill-considered one, like some of those that the Commission had adopted in recent years. Thus the Special Rapporteur had been right to focus his attention on unilateral acts stricto sensu, namely declarations intended to produce legal effects under international law, as reflected in the jurisprudence of the ICJ, in, for example, the Nuclear Tests cases of 1974. The Special Rapporteur had been faithful to the letter and the spirit of the instructions given to him by the Commission at the previous session, and also to the Commission’s own mandate.

8. He felt obliged to take issue with Ms. Escarameia concerning the 1969 Vienna Convention. It was perfectly legitimate to take that Convention as the starting point for the drafting principles, since unilateral acts had much in common with treaties. Clearly, there were differences—in relation to reservations and modifications, for example—but they were not such as to make it unacceptable for the Working Group to consider whether transposition from the 1969 Vienna Convention was permissible in any given case.

9. He had a number of proposals for the successful completion of work on the topic at the current session. The Working Group should be reconstituted and, if possible, allocated more time for its work. Working on the basis of the ninth report and of its own work at the previous session, it should first draw up a list of the guiding principles to be adopted. Thereafter, it should act as a kind of drafting group, synthesizing the text contained in the draft guiding principles with elements of the Special Rapporteur’s ninth report and comments drawn from previous reports. If that was acceptable, the Special Rapporteur might be requested to prepare, with help from the Secretariat, a digest or summary of reports or parts of reports bearing on each of the 11 guiding principles. If all members of the Working Group did their homework—and it should be borne in mind that the Working Group was open-ended—it should be possible to reach agreement on both the content and the form of a set of guiding principles.

10. There remained the question of whether the principles should be accompanied by a commentary. In his view, that would be desirable, not only because such was the Commission’s usual practice but also because some of the principles—and, indeed, the topic as a whole—were controversial and it would therefore be helpful to States and the academic community to see how the Commission had reached its conclusions. It would, moreover, be a pity if all the research by the Special Rapporteur and the studies conducted by the Working Group were to be lost to posterity. That, however, posed practical problems. At the current session, the Working Group should perform its task of selecting, editing and determining the future treatment of the guiding principles so that it could lay a coherent body of work before the Commission, which would, of course, take the final decision.

11. The CHAIRPERSON suggested that, in the interests of completing its work, the Working Group should retain Mr. Pellet as its Chairperson.

12. Mr. DUGARD, after commending the intellectually challenging nature of the report, said that, in 1948, Sir Hersch Lauterpacht had made a seminal study of subjects to be considered by the Commission. Most of the topics that he had proposed had since been completed. He had not, however, proposed a study of recognition, a topic that the Commission had scrupulously avoided. Nor had he proposed an examination of unilateral acts; however, the fact that the topic was closely bound up with recognition might account for the Commission’s reluctance to engage in the study of unilateral acts and the slow progress made over the past decade. There was no denying that the task was difficult: there were too few judicial decisions and too little State practice. There was, however, surely enough State practice and case law—as reflected most recently in the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda) case—for the Commission to be able to draft a


set of articles—as opposed to guiding principles—if only in by way of progressive development. The Commission should not shrink from taking that course: States had, after all, rebuked it for its undue caution in dealing with the topic of diplomatic protection, and there was a general tendency for the Commission to be over-cautious in its approach. While some would prefer to see the topic abandoned, to do so would be construed as failure on the part of the Commission. Although the establishment of a working group was often a ploy designed to kill off a topic, he trusted that that was not the case with regard to unilateral acts.

13. He welcomed the emphasis placed by the Special Rapporteur on the Armed Activities in the Territory of the Congo case, in which, for the first time, the ICJ had acknowledged the principle of *jus cogens*, holding, however, that Rwanda’s reservation to the Convention on the Prevention and Punishment of the Crime of Genocide was not invalidated solely by virtue of the fact that it might conflict with a peremptory norm (pars. 64–69 of the judgment). The decision could also, of course, be invoked in support of the guiding principle proposed by the Special Rapporteur that a unilateral act could not be in conflict with a norm of *jus cogens*. He noted, however, that the Special Rapporteur made it clear in paragraph 128 of his report that he did not regard the formulation and withdrawal of reservations to treaties as unilateral acts.

14. The Special Rapporteur rightly argued that recognition was invalid where it violated a norm of *jus cogens*. More recent examples of State practice could, however, have been adduced than that of South Africa’s homelands. One such was the situation of the “Turkish Cypriots” in Cyprus, where the European Union was seeking a settlement to cure the non-recognition of that territory; another was that of the Occupied Palestinian Territory, where the Government of Israel had proposed a territorial realignment that would result in the annexation of 10 per cent of Palestinian territory, with little sign that the international community was prepared to oppose the annexation of a norm of *jus cogens*. He welcomed the emphasis placed by the Special Rapporteur on the Armed Activities in the Territory of the Congo case, in which, for the first time, the ICJ had acknowledged the principle of *jus cogens*, holding, however, that Rwanda’s reservation to the Convention on the Prevention and Punishment of the Crime of Genocide was not invalidated solely by virtue of the fact that it might conflict with a peremptory norm (pars. 64–69 of the judgment). The decision could also, of course, be invoked in support of the guiding principle proposed by the Special Rapporteur that a unilateral act could not be in conflict with a norm of *jus cogens*. He noted, however, that the Special Rapporteur made it clear in paragraph 128 of his report that he did not regard the formulation and withdrawal of reservations to treaties as unilateral acts.

15. He favoured the referral of the draft guiding principles to the Working Group, but his own preference would be for further work to be done on elaborating guidelines for consideration by the Commission in the next quinquennium. At that point, a decision could be made as to whether the text should take the form of guiding principles or of draft articles. In view of the importance of the topic, his own preference would be for the latter course.

16. Mr. PELLET said he wished to make two points with regard to the term “guiding principles”. First, describing the contents of the ninth report on unilateral acts of States as “guiding principles” rather than “draft articles” might create the impression that the Commission was dealing with generalities, since a principle, unlike a rule, was something very general. Moreover, a reading of the guiding principles proposed by the Special Rapporteur strengthened that impression.

17. Second, it was essential to ascertain whether the reference to “guiding principles” implied that the Commission had ruled out the possibility of drawing up a binding instrument. In his opinion, that was not necessarily the case. Whereas guidelines, like those set forth in the Guide to Practice in respect of reservations to treaties, were obviously never intended to take the form of a treaty, guiding principles could well form the basis of a future treaty, although he personally was opposed to taking any steps in that direction. The debate had shown that, were it to adopt a full and coherent set of guiding principles on unilateral acts of States, the Commission would already have accomplished a Herculean task. There would be no sense in trying to convince States that the Commission should take matters further and endeavour to draft a treaty on unilateral acts of States along the lines of the 1969 Vienna Convention. Moreover, given the Commission’s slow and hesitant progress and the likely reactions in the Sixth Committee, if it were to embark on that course of action, it would probably still be discussing the topic in 20 years’ time. He was therefore in favour of adopting guiding principles and of then deciding whether to accompany them with commentaries.

18. Mr. GAJA said he could well understand why, in his ninth report, the Special Rapporteur had chosen to set out his views on most of the controversial aspects of unilateral acts of States, even though, with regard to invalidity for instance, that approach had obliged him to re-examine questions already considered in previous reports. The ninth report was helpful in that it provided a general overview of the Special Rapporteur’s current thinking on issues relating to unilateral acts. Another welcome feature was the report’s greater focus on practice. The late submission of the report meant that the Commission would not have enough time, at the current session, to adopt a text in the form of draft articles together with commentaries—although he also doubted the wisdom of adopting even the guiding principles without providing a commentary by way of an explanation of their very concise texts. The Commission had therefore been invited to comment not on the merits of the various proposals, but on the action to be taken regarding them at the current session, bearing in mind the part played over the previous two years by the Working Group chaired by Mr. Pellet.

19. The Working Group had done much to advance the study of the topic and could clearly still play a useful role by pursuing its investigation of a particularly complex issue. What had yet to be determined was the precise mandate to be given to the Working Group. Rather than examining the various proposals made by the Special Rapporteur and reporting on its findings to the Commission in plenary session, it could make a more substantial contribution by instead presenting a survey of some of the cases drawn from practice which it had analysed in depth over the previous two years and which raised issues relating to unilateral acts or similar legal situations. It could supplement that survey with a few general comments, some of them inspired by the principles...
suggested by the Special Rapporteur. That survey, which would be included in the report following its endorsement in plenary, would represent the first tangible result of the efforts of the Special Rapporteur and the Commission and would show that the latter had examined some significant instances of practice and arrived at a number of preliminary conclusions. It would also enlighten States as to the possible direction of future work on the topic. His proposal was in line with the content of paragraph 332 of the report of the Commission on the work of its fifty-seventh session.189

20. Mr. ECONOMIDES said that the Commission was facing the prospect of failure with regard to the topic of unilateral acts of States: after 10 years’ work, it had not produced any tangible results to present to the General Assembly. It went without saying that responsibility for that state of affairs lay exclusively with the Commission as a whole and not with the Special Rapporteur, who had made a considerable effort to master an extremely difficult topic, submitting nine reports which together constituted an invaluable contribution to the literature on unilateral acts of States.

21. Turning to the ninth report, he said he could not support the use of the expression “legal effects” in draft guiding principle 1. The expression was far too general, even after the addition of the qualifier “certain”; since any unilateral act engendered legal effects, the provision was of immense scope. The only unilateral acts which should be of concern to the Commission were those which created for the author of the act positive or negative international legal obligations vis-à-vis another State or States, other subjects of international law or the international community as a whole. Option A was useful, but option B added nothing to the definition of a unilateral act. Guiding principle 1 should therefore be recast in much more restrictive language.

22. He basically agreed with draft guiding principles 2 and 3. Draft guiding principles 4 and 5 should be merged in a single provision stipulating that a unilateral act formulated by a person not authorized (or not qualified) to act on behalf of a State was invalid unless the State confirmed it expressly or tacitly, as laid down in principle 4.

23. Draft guiding principle 6 should be worded in a much more flexible manner than would be the case for a principle applying to international treaties. States had to be trusted where unilateral acts were concerned. In his opinion, any unilateral act which was manifestly unconstitutional ought not to give rise to a valid international obligation. He agreed with draft guiding principle 7, on invalidity of unilateral acts. Draft guiding principle 8 should be couched in more flexible language, since a State had to be given the opportunity freely to revoke an obligation, which patently did not satisfy the beneficiary State. The subject matter of draft guiding principle 9 (Suspension of unilateral acts) could be dealt with under principle 8. Principle 10 (Basis for the binding nature of unilateral acts) could be deleted: no one disputed the fact that a State could enter into a unilateral commitment, as had been made quite plain in draft guiding principle 2. While he agreed with the substance of draft guiding principle 11, he, too, believed that if the will of a State was unclear, that will must be interpreted restrictively in the interests of the author of the act.

24. He reserved his position on the lengthy addendum to the ninth report (A/CN.4/569/Add.1), since it had been issued only the previous day. In conclusion, he would be in favour of referring the draft guiding principles to a working group in a last-minute attempt to establish a draft text which could be submitted to the Sixth Committee. He fully endorsed the method of work proposed by Mr. Pellet, and especially his recommendation that the Working Group should transform itself into a drafting committee. The resulting text should be regarded as provisional. The Commission should not rule out the possibility of subsequently reverting to the idea of a codifying text consisting of draft articles. It might be advisable for the Working Group also to examine Mr. Gaja’s proposal.

25. Mr. CHEE commended the Special Rapporteur’s patient labours, which had culminated in the issuance of his ninth report. The chapters of the report on the definition, formulation, basis for the binding nature and interpretation of unilateral acts related to the core issues surrounding the guiding principles. On the definition of a unilateral act (paras. 126–139), he noted that, although several eminent writers on international law had discussed the substance of unilateral acts in international law, only Sir Robert Jennings had attempted to provide a brief definition of them. It should also be noted that Sir Hersch Lauterpacht had described unilateral acts as “transactions besides negotiations and treaties” in the eighth edition of Oppenheim’s International Law.190 The definition of a unilateral act given in draft guiding principle 1 confined such an act to a declaration, to the exclusion of notification, protest or renunciation (waiver). He preferred option A of principle 1. Draft guiding principles 2 and 3 could usefully be merged. Draft guiding principles 4 to 9 called for no comments. On draft principle 10, dealing with the binding nature of the unilateral declaration, he recalled that in the 1974 Nuclear Tests (Australia v. France) case, the ICJ had relied on the principle of the good faith of the States formulating the act, finding that:

Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected. (p. 268, para. 46 of the judgment)

Hence the ICJ had found that a unilateral declaration by States was binding.

26. Mr. KOSKENNIEMI said that the ninth report on unilateral acts of States was useful in that it showed that, while the Commission’s position on the topic had changed

from year to year, the Special Rapporteur had held fast to his opinion that unilateral acts could and should be codified in a text in some respect analogous to the 1969 Vienna Convention.

27. He refused to be tempted by Mr. Pellet into launching into yet another lengthy disquisition on the reasons why he believed that there was no topic to codify and that there was no point in endeavouring to produce a normative text. Nevertheless, he wished to explain how his thinking had evolved over the previous five years. From the outset, he had maintained that there was no topic to codify because unilateral acts were non-existent as a legal institution; some of the literature had merely discussed certain cases in which courts had held that States were bound by declarations of State representatives or by acts of States. Secondly, as far as diplomatic practice was concerned, he was unable to recollect a single situation where a State had engaged in the kind of activity described by the Special Rapporteur. Nor could he recall any instance of an expression of a will to be bound irrespective of a quid pro quo, or regardless of the existence of a legal framework conferring legal meaning on an action or a statement, such as the framework of treaty law or customary law in the case of reservations to treaties or recognition of new States.

28. Over the years he had, however, come to realize that the Commission had done some useful work in describing practice in respect of unilateral acts and of outlining situations in which outside observers had found that a State was bound as a result of its formulation of a unilateral act. The examination of such cases by the Working Group at the previous session had been extremely useful. In his summary of the Working Group’s deliberations, its Chairperson, Mr. Pellet, had stated that the Working Group had studied specific cases in accordance with the analytical grid established in 2004 and that some conclusions could possibly be drawn from its deliberations. For that reason, he personally had expected the Special Rapporteur’s ninth report to elaborate on the practical examples contained in the grid. Instead, the Special Rapporteur had decided to hold his ground, to produce a report in the tradition of its predecessors, which had used the deductive method of presupposing that unilateral acts could be codified in a text along the lines of the 1969 Vienna Convention, and had to draw up a set of principles.

29. He was therefore at a loss to understand why the Commission had taken one direction, while the Special Rapporteur had taken another. How could the two paths be made to converge? In view of the position of principle that he and many other members of the Commission had adopted, namely that the 1969 Vienna Convention could not be used as a model to codify unilateral acts of States, it would be very difficult to embark on a discussion of the guiding principles contained in the ninth report, since they looked like a first step towards the formulation of a set of codifying draft articles modelled on the Vienna Convention. He objected to such a move not only on principle, but also because it ran counter to the direction of the Commission’s collective approach to date. Although that had been the approach consistently adopted by the Special Rapporteur, it had not met with the approval with the majority of the Commission members.

30. Moreover, as there was in any case no time to formulate draft articles, the best way forward would be for the Working Group to continue the previous year’s useful exercise of working on the analytical grid of cases and to provide a set of comments explaining the implications of cases in which States had become bound by their words or actions. That exercise would offer some valuable lessons concerning good faith, equity and legitimate expectations in international law. The Commission could perform a useful service by drawing attention to situations in which unilateral statements or actions, whether or not of a formal nature, had entailed legal consequences. The Working Group should be reconstituted, not in order to kill off the topic, but to enable it to pursue and complete its study of practical cases on the basis of its analytical grid.

31. In sum, the Commission should not refer the draft guiding principles to the Working Group in the expectation that it would transform itself into a drafting committee. That would be an unacceptable course even if it was practically feasible, which it no longer was. Second, the Working Group should continue the survey of cases begun in 2005 and come up with conclusions based on specific cases, on which the diplomatic community could draw whenever States found themselves involved in situations where they might be bound, willingly or otherwise.

32. Mr. DUGARD said he agreed with Mr. Koskenniemi’s proposals but was unclear whether the conclusions were to be submitted to the Sixth Committee at the end of the Commission’s current session or referred to the newly constituted Commission in 2007. No attempt to rush the project through, however determined, would enable it to be completed satisfactorily at the current session. Logically, therefore, the conclusions to which Mr. Koskenniemi referred should be taken up by the new Commission in 2007.

33. Mr. KOSKENNIEMI said that ideally the Working Group should produce its conclusions by the end of the current session, for transmission to the new Commission and to the Sixth Committee at the sixty-first session of the General Assembly.

34. Mr. RODRÍGUEZ CEDENO (Special Rapporteur) said that some members of the Commission seemed to be in such a hurry to produce results that they were prejudging the whole question of the Working Group’s mandate. Most members wanted the Working Group to be reconstituted under Mr. Pellet’s chairpersonship in order to consider the draft guiding principles now available. In the weeks remaining before the end of the session, the Working Group would have ample time to accord the matter the attention it deserved and decide whether conclusions were to be adopted.

35. Mr. FOMBA congratulated the Special Rapporteur on his tireless efforts to rescue the topic from the present impasse. Unilateral acts were a fact of the diplomatic,

192 See footnote 183 above.
political and legal life of States. Accordingly, the question of what should be the legal regime for unilateral acts, as opposed to treaties, must be addressed. Unilateral acts fell into two categories: those whose fate was linked to that of treaties—whose legal regime should logically be aligned with that of treaties; and those that were autonomous, whose fate was not linked to that of treaties. It was with the latter category that problems arose. Whether it was possible or desirable to codify the law on that subject was very far from clear; neither doctrine, jurisprudence, nor State practice shed sufficient light on the subject. Hence, any attempt at a codification exercise should be abandoned. He therefore supported the idea of elaborating guiding principles, even though that approach left questions such as the current and future legal scope of the principles in abeyance. If States subsequently accorded some legal or moral weight to them, then the Commission would have done useful work. The Working Group should therefore be given a mandate to elaborate guiding principles. The approach proposed by Mr. Pellet seemed excellent, providing as it did an opportunity to contribute to the discussion in the Working Group as well as in plenary.

36. Mr. Sreenivasa RAO congratulated the Special Rapporteur for remaining true to his initial assumptions concerning a difficult topic, one on which, even after nine years, the Commission was still not able to take a clear position. Unilateral acts abounded in State practice, but few were formulated in such a manner as to become the exclusive basis for legal obligations and rights; unilateral acts had always been read in conjunction with other contextual factors. While the ICJ had on occasion looked upon them with some degree of serious interest, and while they sometimes added weight to other deliberations and negotiations, their intrinsic value was minimal. Given that factual situation, unilateral acts did not lend themselves to codification in a formal structure such as that created by the 1969 Vienna Convention.

37. The crux of the matter was that a unilateral statement by a highly placed State authority had an effect on the State’s conduct and options but could be terminated by the formulating State in the absence of any detrimental reliance on it by other States. That being so, there was no need to go into the issues of invalidity, termination or suspension of unilateral acts based on an analogy with the 1969 Vienna Convention. The Working Group should consider those draft principles that did not address invalidity, termination or suspension and develop some conclusions in that regard. The general conclusions drawn from the practical studies conducted by the Working Group could usefully be disseminated, always bearing in mind, however, that to pronounce upon such cases would be tantamount to passing judgement in the absence of adversarial proceedings.

38. The net result of the Special Rapporteur’s intrepid efforts over the years had been to go some way towards establishing which acts did not qualify as unilateral acts within the meaning of draft guiding principle 1. The Commission could now see clearly that recognition, reservations to treaties and declarations under optional clauses, to cite just three categories, were not unilateral acts for the purposes of its study. However, the goal of pinpointing those unilateral acts that produced the intended legal effects remained elusive. The Working Group should be authorized to continue its task of assisting in that quest under the able chairpersonship of Mr. Pellet.

39. Mr. CANDIOKI thanked the Special Rapporteur for his latest contribution to a deeper understanding of the topic, in the form of new precedents and an analysis of the validity, invalidity, duration, suspension and termination of unilateral acts. At the previous session, he himself had suggested that after 10 years of debate, the time had come for the Commission to present to the General Assembly, in its report on its fifty-eighth session, some general conclusions accompanied by illustrative examples of State practice, as envisaged in paragraph 332 of the Commission’s report on the work of its fifty-seventh session. However, the Working Group had instead sought to flesh out a definition of and rules applicable to formal unilateral declarations, which it had baptized “unilateral acts stricto sensu”. In the light of past discussions on the topic, however, his preference would have been for a more general document setting forth a number of conclusions on the function and consequences of unilateral acts and other forms of unilateral conduct in international law, conclusions that could command consensus within the Commission.

40. The Special Rapporteur was now proposing a set of what he referred to as “guiding principles” on unilateral acts stricto sensu, couched in prescriptive language that went well beyond what would have been the tenor of general conclusions. Were that new approach to meet with the Commission’s approval, he could agree to their referral to the Working Group for review. Without prejudice to the final wording and content of the draft to be produced, he wished to make a few preliminary comments that might be useful to the Working Group.

41. In draft guiding principle 1, more emphasis should be placed on the unilateral manner in which legal effects were produced, in other words, the fact that there was no need for the involvement of any other subject of international law. Of the two options offered with regard to addressees, he preferred the more general formulation in option B, although the entire subject might be left unmentioned in the principles and elucidated in the commentary.

42. The order of draft guiding principles 4 and 5 should be reversed, or the two combined into one. The title of draft guiding principle 7 could be made more specific, like those of principles 5 and 6, with a reference to invalidity resulting from defects affecting the expression of unilateral will. Paragraphs 5 and 6 of draft principle 7, which dealt with the substance and content of the unilateral act, should perhaps be separated from defects of will and set out as separate principles. In point of fact, paragraph 6 subsumed the contents of paragraph 5.

43. The order of draft guiding principles 8 and 9 might be reversed, as suspension preceded termination both logically and chronologically. He agreed with others that the conditions of revision and revocation of a unilateral act by its author should be made more flexible. Draft

190 See footnote 190 above.
guiding principles 10 and 11 could possibly be placed at an earlier point in the draft, perhaps before draft guiding principle 5.

44. Once the Commission adopted those and possibly other guiding principles, they should be set out in its report on its current session, if possible accompanied by commentaries. In concluding, he supported the reconstitution of the Working Group under the chairpersonship of Mr. Pellet.

45. Mr. MANSFIELD said he agreed with others that the Commission’s work had taken a useful turn when the Working Group and the Special Rapporteur had turned their attention to specific case studies. It had been instructive to see that there were very few such cases, and that there were many differences between them. What they revealed was that the unilateral actions of States could undoubtedly produce legal effects, and that in some, probably unusual, circumstances, States could end up being bound by those actions, even when such had not been the intention of those responsible. What the cases also illustrated very clearly, however, was that unlike the situation with treaties, unilateral acts raised two considerations of policy or public good between which there was some degree of tension. Clearly, it was desirable for Government ministers to be able to make political statements and carry out actions that contributed to international peace and security without being concerned about being legally bound by some aspect of such statements or actions. It was equally important, however, that they should not lightly make statements or undertake actions on which other States might reasonably be expected to rely: they should do so only in good faith and abide by those statements or actions.

46. The Working Group had made a useful start at the previous session by preparing broad conclusions or comments on the basis of the case studies, which took some of those competing policy considerations into account. Like Mr. Gaja, he believed that the way forward was for the Working Group to carry on that work and complete some general comments, based on the case studies, that would provide useful guidance for foreign ministries and others involved in dealing with statements made by Government ministers. The work should now focus, not on the draft principles, which were far too detailed and took the Commission back to a dubious analogy with the law of treaties, but rather on the broad conclusions mentioned in the report of the Working Group at the fifty-seventh session.194

47. Mr. GALICKI said that the Special Rapporteur’s ninth report summed up both the positive and negative aspects of the work done over a period of nearly 10 years. Discussion of the content of the report in the Working Group would be an extremely useful exercise. One aspect of the topic that should be taken into consideration was the interrelationship between the draft guiding principles and the 1969 Vienna Convention. The Commission remained too dependent on the Convention, and the Working Group should elaborate a more independent position. The Special Rapporteur sometimes seemed to be a slave to the provisions of the Convention, transposing certain phrases into the draft that did not fit comfortably in that context. For example, the term used in the title of draft guiding principle 8, “Termination of unilateral acts”, should perhaps be reconsidered. On the other hand, one of the grounds cited for the termination or revocation of a unilateral act was a fundamental change of circumstances. In paragraph 115 of his report, the Special Rapporteur explained his reasons for departing from the “negative and conditional” wording of article 62 of the 1969 Vienna Convention; however, in his own view, that wording should be retained in draft guiding principle 8.

48. In conclusion, he would be in favour of referring the draft guiding principles to the Working Group for further consideration.

The meeting rose at noon.

2888th MEETING

Wednesday, 5 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candidoti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escaramela, Mr. Fomba, Mr. Gaja, Mr. Galick, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Montaz, Mr. Niehaus, Mr. Opetti Badan, Mr. Pellet, Ms. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.


[Agenda item 6]

Ninth report of the Special Rapporteur (concluded)

1. The CHAIRPERSON invited the Special Rapporteur, Mr. Rodriguez Cedeño, to summarize the debate on his ninth report.

2. Mr. RODRÍGUEZ CEDEÑO thanked the members of the Commission for their comments and recalled that at the previous meeting they had discussed how to proceed in order to move the work on the topic forward and had made comments on the substance of the report, some of a general nature and others relating to the draft principles presented in A/CN.4/569.

3. With regard to the procedure to be adopted, Mr. Pellet had proposed reconstituting the 2005 Working Group to consider the draft guiding principles introduced by the Special Rapporteur. The Working Group, which would be open-ended in composition, could consider the draft guiding principles and adopt those that they thought had the broadest support for submission to the plenary Commission. They might also adopt other draft guiding

principles if they saw fit. The Working Group would also act as a drafting group so that the wording could be better honed before presentation to the plenary Commission. Mr. Gaja, however, had proposed that the Working Group should study a number of cases and present general conclusions. The majority of the members had expressed support for the reconstitution of the Working Group, to be chaired once again by Mr. Pellet, and for the mandate that the latter had outlined. It seemed appropriate for the draft guiding principles adopted by the Working Group to be accompanied by general comments, which would not constitute commentaries in the strict sense of the term like those that normally accompanied the draft articles elaborated by the Commission, but would be more in the nature of an introduction or brief explanation. In his view, the establishment of a working group with a clear mandate would make it possible to arrive at substantial conclusions during the current session, thus fulfilling the request expressed by the majority of the States members of the Sixth Committee.

4. The possibility had been broached, moreover, that the result of the work of the current session need not be final and that the Commission could take up the topic again the following year and perhaps consider casting it in the form of a work of codification and progressive development. In that regard, he wished to stress that, to begin with, the Commission should adopt a set of non-binding guiding principles that might be useful to States in their international legal relations. It was, of course, necessary to strike a balance between the freedom of action of States and legal certainty in international relations, so that the conclusions drawn by the Commission would be acceptable to States. But if it did not adopt substantial conclusions, an “open-ended Working Group” would seem to be casting doubt on the existence and importance of unilateral acts of States, which had always been recognized by most legal writers and in case law, the most recent example being the judgment handed down in February 2006 by the ICJ with regard to the application filed by the Democratic Republic of the Congo against Rwanda in Armed Activities on the Territory of the Congo, a case in which the Court had taken into account a domestic statute and a statement made by a high-level official before the United Nations Commission on Human Rights (para. 45 of the judgment). Moreover, as had been demonstrated in earlier sessions, there was a sufficient body of practice on which to base the elaboration of principles. In any case, the Commission had in the past elaborated highly important conclusions or drafted articles on topics that it had considered to be appropriate for codification and progressive development without necessarily being able to draw upon clearly established practice, a plentiful legal literature or a wealth of international court decisions or arbitral awards.

5. With regard to the substance, some Commission members felt that there was too much reliance on the Vienna regime. As Special Rapporteur he had immediately perceived the need to maintain a flexible parallel with the 1969 and 1986 Vienna Conventions, for, although the acts concerned differed, particularly with respect to their formulation, they had some very important points in common, chiefly the fact that they constituted expressions of will formulated, unilaterally or in concert, with the intention of producing certain legal effects. Naturally, it was not merely a matter of transposing the rules of treaty law, mutatis mutandis, to unilateral acts. On the contrary, it was important to maintain focus on the characteristics specific to each type of act.

6. Several members had made specific comments on the draft principles submitted by the Special Rapporteur, which would no doubt be considered by the Working Group. Some had thought that the proposed definition could serve as a good working basis. One member had been of the view that unilateral acts essentially consisted of unilateral declarations by which a State assumed international obligations and that the expression “producing certain legal effects” was too broad. Opinion was divided regarding the two options offered concerning the addressees of unilateral acts in draft guiding principle 1; some members proposed combining certain of the draft guiding principles and reorganizing the whole.

7. The majority of the members had felt that it was appropriate for the Working Group to adopt a set of principles, not necessarily those appearing in the Special Rapporteur’s ninth report, and to send them back to the plenary Commission with a view to their submission for consideration by the General Assembly as part of the Commission’s annual report.

8. The CHAIRPERSON thanked the Special Rapporteur and said that there appeared to be a consensus in the Commission to reconstitute the 2005 Working Group on Unilateral acts of States and to ask Mr. Pellet to chair it. He would suggest the following formula for the mandate of the Working Group: “The open-ended Working Group chaired by Mr. Alain Pellet is charged with preparing the Commission’s conclusions on the topic ‘Unilateral acts of States’, taking into account the guiding principles proposed by the Special Rapporteur, as well as its previous work.”

9. Mr. KOSKENNIELI, recalling that several members, himself included, were disturbed by the close parallel with the Vienna regime adhered to in the draft guiding principles proposed by the Special Rapporteur, said that the formula the Chairperson had just suggested did not reflect those concerns.

10. The CHAIRPERSON, judging Mr. Koskenniemi’s concerns to be reasonable, suggested that the formula could be amended by inserting the phrase “in the light of the plenary debate” before the words “taking into account the guiding principles”.

11. Mr. CANDIOTI said that he supported the formula suggested by the Chairperson and felt that it was important that the Working Group should be asked to prepare, not articles or principles, but general conclusions, as had been decided at the previous session, a decision reflected in paragraph 332 of the report on that session.195

12. Mr. MATHESON said that he fully endorsed Mr. Candioti’s remarks. With regard to Mr. Koskenniemi’s statement, it should be noted that the mandate of the Working Group as framed by the Chairperson referred

195 Ibid.
not only to the draft guiding principles proposed by the Special Rapporteur but also to the previous work of the Commission, which, he presumed, also included the provisional conclusions distributed by the Chairperson of the Working Group at the previous session.

13. The CHAIRPERSON confirmed that Mr. Mathe-son’s assumption was correct.

14. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he was somewhat surprised by Mr. Kosken-niemi’s statement, since the Commission had been considering the topic of unilateral acts of States for nearly 10 years with constant reference to the Vienna regime. He supported Mr. Candiotti’s proposal but would prefer to speak of “preliminary” conclusions. At the previous meeting several members had implied that in his ninth report the Special Rapporteur had departed from his mandate. However, he wished to point out that it was stated in the Commission’s report on the work of its fifty-seventh session that “it would in any event be difficult to agree on general rules, and the Commission should therefore aim in the direction of guidelines or principles which could help and guide States while providing for greater certainty in the matter”. Based on those reflections, he had taken the liberty of proposing draft principles. Naturally, the Working Group could cast its conclusions in whatever form it deemed appropriate.

15. Mr. ECONOMIDES said that all members seemed to agree that the 1969 Vienna Convention, while constituting an indispensable reference, should be followed only where necessary. Moreover, after 10 years of work on the topic, the conclusions could be nothing else but guiding principles.

16. The CHAIRPERSON recalled that the Working Group would decide what form the conclusions on unilateral acts of States should take. If he heard no objection, he would take it that the Commission approved the mandate of the Working Group.

*It was so decided.*


[Agenda item 7]

TENTH REPORT OF THE SPECIAL RAPPORTEUR

17. Mr. PELLET (Special Rapporteur) recalled that his tenth report on reservations to treaties, which consisted of four sections (A/CN.4/558 and Add.1–2) and had been introduced at the fifty-seventh session in 2005, had not been considered in depth for lack of time. Section C on reservations incompatible with the object and purpose of the treaty addressed a particularly delicate matter, namely, the definition of the object and purpose of the treaty set forth in draft guideline 3.1.5 (paras. 72–89) and supplemented by draft guideline 3.1.6 on determination of the object and purpose of the treaty. That definition had been heavily criticized as too vague, and he acknowledged that not much was gained by saying that the object and purpose of the treaty meant the essential provisions of the treaty, which constituted its *raison d’être*. He had therefore sought to formulate a new definition of the object and purpose of the treaty. In paragraphs 7 and 8 of the note on draft guideline 3.1.5 (A/CN.4/572) he had proposed two alternatives, which took account of the debate at the fifty-seventh session and were not different in general meaning, although he tended to prefer the first, since the second was more ambiguous and less precise. In thinking about how to sharpen the definition of the concept of object and purpose, so fundamental not only to the law of reservations but also to the law of treaties as a whole, he had taken into account a comment by Mr. Gaja, who had suggested borrowing some ideas from draft guideline 3.1.12 on reservations to human rights treaties, to be found in paragraph 102 of the tenth report. It had seemed to the Special Rapporteur that the sense of that draft guideline could, in fact, be generalized and that the crux of the matter was probably the impact that the reservation might have on what he had called the “balance of the treaty” in the new version of draft guideline 3.1.5. He was not particularly attached to the expression, which one might think could be made more explicit by saying, for example, that the reservation should not disturb the “balance of the rights and obligations contemplated by the treaty”; but the problem there was that the formulation involved the assumption that every treaty struck a balance between the rights and obligations of the parties, which was not the case, from a strictly legal perspective, for treaties that were not based on the principle of reciprocity. Therefore he had referred to “the balance of the treaty”, with the idea in mind that treaties constituted a whole and that if a reservation seriously disturbed that balance it was not compatible with the object and purpose of the treaty. For that reason he would prefer to retain the expression “balance of the treaty” and have the meaning made more explicit in the commentary.

18. With regard to draft guidelines 3.1.6 to 3.1.13, which he had introduced at length at the previous session, the comments, sometimes critical, of the members of the Commission had not been sufficiently convincing to persuade him to undertake a major rewrite. He did indeed recognize the pertinence of some of the comments, but felt that they concerned matters that, while far from trivial, could be dealt with by the Drafting Committee, when, as he hoped, those draft guidelines were referred to it. The inevitable looseness of any definition of the notion of the object and purpose of a treaty was offset to some extent by draft guideline 3.1.6, which proposed a method for determining the object and purpose of the treaty that seemed useful, indeed indispensable, in setting limits on the subjectivity of the interpreter. The method was based quite closely on articles 31 and 32 of the 1969 Vienna Convention and had not been criticized in principle; some members had merely felt that it was necessary to

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*196 Ibid., p. 61, para. 314.


overhaul rather thoroughly the wording and components of the provision. The somewhat loose and vague nature of the definition of the object and purpose of the treaty—even in its new version—was also offset by the 11 draft guidelines that followed, which adapted and specified the criteria to be followed in relating to particular categories of treaties or treaty provisions or particular categories of reservations. The attempt at a definition had been criticized for its empiricism, but he wished to emphasize that he had not been attempting a work of legal doctrine but had merely tried to make an inventory of the chief problems that tended to arise in practice and propose ways of viewing them that he thought would aid users of the Guide to Practice to deal with those problems when they arise in concrete situations. That approach seemed to him to be in keeping with the spirit of the Guide to Practice that the Commission should eventually adopt.

19. Draft guidelines 3.1.7 to 3.1.13 had elicited interesting reactions in 2005 from the members of the Commission. The Special Rapporteur looked forward to receiving any criticisms and any additional proposals regarding both wording and substance. As he had said earlier, the draft guidelines merely represented examples of the types of provisions or types of reservations that in practice most frequently posed the most difficult problems. If members of the Commission thought that other categories of reservations or treaty provisions posed problems of that kind and could offer concrete examples in support of the proposition, he would have no objection to extending or amending the list of examples he had chosen. However, he was by no means willing to forego illustrating the general guidance given in draft guidelines 3.1.5 and 3.1.6 through guidelines relating to specific issues. On the one hand, it would be absurd for the Commission not to try to provide a definition, however vague and general, of the concept of the object and purpose of a treaty, which was so central to the topic of reservations. That position had been supported, with only one or two exceptions, by nearly all the members of the Commission at the previous session and by the delegations in the Sixth Committee. On the other hand, the Commission should not limit itself to such generalities. To be sure, if the Commission were elaborating a draft convention on reservations to treaties, it probably would not proceed to give examples, but since its aim was to adopt a guide to practice, it would be absurd if users of the guide could not find in it some guidance on how to view, for example, vague, general reservations, which raised so many problems in the practice of reservations to treaties, or on reservations to dispute settlement clauses, or on how to deal with reservations to treaty provisions setting forth customary norms or rules of jus cogens. Since, moreover, the opposite position had been taken only by a few members of the Commission, he would be resolutely opposed to the Commission’s contenting itself with the generalities in draft guidelines 3.1.5 and 3.1.6, although he hoped that the draft guidelines in question would emerge from the plenary debate and the labours of the Drafting Committee in improved form.

20. He recalled that the year before, Mr. Gaja had found fault with the logic of draft guideline 3.1.9. On reflection, he himself agreed that the problem of reservations to a provision setting forth a rule of jus cogens paralleled that of reservations to customary norms, at least from a purely logical standpoint. Only if a State intended by such a reservation to introduce or reserve the right to apply a rule contrary to jus cogens should the reservation be considered null and void or invalid. Technically that was correct and convincing, but the Commission was not obliged to adhere solely to logic and technical legal considerations. It could consider whether it was advisable, from the standpoint of the progressive development of international law, to go further and express a more radical view by saying that reservations to treaty provisions setting forth rules of jus cogens were prohibited, which is what the draft guideline proposed. He would be pleased to hear what other members of the Commission had to say on the matter, since it was important for the Commission to give the Drafting Committee rather clear instructions on the point, which involved an issue of principle. As a last point in connection with the section of his tenth report on reservations incompatible with the object and purpose of the treaty, he would like to draw attention to the judgment of 3 February 2006 rendered by the ICJ in Armed Activities on the Territory of the Congo, in which the Court had confirmed its previous jurisprudence concerning the validity of reservations to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. That ruling, which essentially represented a recent illustration of the principle underlying draft guideline 3.1.13 on reservations to treaty clauses concerning dispute settlement or the monitoring of the implementation of the treaty, reinforced his conviction that the draft article rested on a solid basis. He assured the members of the Commission that he would take into account the comments made at the previous session, as well as those that would be made at the current session.

21. Section D of his tenth report, entitled “Determination of the validity of reservations and consequences thereof”, which the Commission had not been able to consider in 2005 because of its late submission, it also contained an annex recapitulating all the draft guidelines proposed in the tenth report. The heading of this section was somewhat misleading, because the question of consequences had not been gone into completely; he had been obliged to limit himself to the conclusions that it had been possible to draw at the current stage of the work, since the questions of objections to and acceptance of reservations had yet to be considered. In that last part of the tenth report, he had tried to answer two very important and difficult questions: who was competent to assess the validity of reservations and what were the consequences of an invalid reservation. It was not altogether impossible to answer those questions if one took a pragmatic approach and showed good sense by leaving aside abstract doctrinal considerations, which on that issue tended to obscure the matter more than they clarified it. He had therefore opted for the pragmatic approach and had not yielded to the temptation, however great, to try to construct a system.

22. With regard to competence to assess the validity of reservations, he should clarify one point at the outset: what he had said on that question in his tenth report and in
23. As it happened, such clauses relating to the assessment of the validity of reservations were extremely rare, which was perhaps regrettable. Apart from the rather unconvincing article 20 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1966 and a handful of other provisions cited in the tenth report in footnote 354 whose reference was in paragraph 151. States generally refrained from taking an explicit position on the question of who could assess the validity of a reservation in the light of the provisions of article 19 of the 1969 and 1986 Vienna Conventions, reproduced in draft guideline 3.1.

24. The problem was not very difficult when the treaty did not set up a mechanism to monitor its implementation and the treaty was not the constituent instrument of an international organization. In such a case it was clear from articles 20, 21 and 23 of the 1969 and 1986 Vienna Conventions that each State or international organization could assess, insofar as it was concerned, the validity of reservations formulated to a treaty to which it was a party, or, more precisely, to which it was a “contracting party”. In his view, the term “State” meant the entire State apparatus including, as applicable, the domestic courts. He admitted that he was aware of only a single clear case in which a domestic court had declared invalid a reservation formulated by the State, and that was in the decision handed down in 1992 by the Swiss Federal Supreme Court in the case of F. v. R and the Council of State of Thurgau Canton, cited several times. He had provided for the possibility that domestic courts might rule on the validity of a reservation by including the material in brackets in draft guideline 3.2, although he wondered whether it would be better to mention it in the draft guideline itself or in the commentary. It was not a vital point, but any comments the members of the Commission might make in that regard would certainly be helpful to the Drafting Committee.

25. Again with regard to that first bullet point in draft guideline 3.2, he had had second thoughts. He had proposed saying that the other contracting States or other contracting international organizations were competent to rule on the validity of reservations, but on reflection he thought that he had been wrong to limit that competence to “other” contracting parties. The F. v. R and the Council of State of Thurgau Canton case showed that such an assessment could also be made by the courts of the reserving State. He therefore thought that the wording of the first bullet point should be changed accordingly; that task could be left to the Drafting Committee. Otherwise, he did not believe that the first bullet point would arouse controversy. Nor should the second bullet point of draft guideline 3.2 be controversial. Clearly, if the ICJ, for example, was called upon to settle a dispute bearing on the validity of a reservation and was competent to do so, it could rule on the dispute submitted to it. It had done just that in its Judgment of February 2006 in the case bearing on Rwanda’s reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and had ruled that the reservation was valid. The same held for arbitral tribunals, as illustrated by the decision rendered in 1977 in the English Channel case between France and the United Kingdom.

26. The only real problem that arose in determining who was competent to assess the validity of a reservation was to do with the competence of treaty implementation monitoring bodies and how that competence, if any, could be reconciled with the more traditional competence of States and dispute settlement bodies. There were two aspects to the problem. For one thing, it was relatively new and had not fully emerged until after the adoption of the 1969 Vienna Convention, which thus could not take it into account. For another, the issue really only arose only in connection with the human rights treaties, for the time being, at any rate, although there was no reason why it should not arise in other contexts—and in fact that seemed to be happening, in a somewhat halting fashion, in the sphere of environmental protection. Nonetheless, the problem was well known, and he had had occasion to discuss it at some length in his second report in relation to the unity of the reservations regime.280 The question was how to determine whether a treaty implementation monitoring body could assess the validity of the reservations formulated with respect to that treaty. The Commission had already answered that question in the preliminary conclusions it had adopted in 1997 on reservations to normative multilateral treaties, including human rights treaties.281 For the reasons stated in paragraphs 154 to 155, 164 to 167 and 169 to 180 of his tenth report, he believed that the considerations that had guided the Commission in 1997 were still relevant and that it was possible to carry over the pertinent conclusions, or at any rate their general thrust, into the Guide to Practice.

27. For those reasons he had proposed, first, to recognize in principle, in the third bullet point of draft guideline 3.2, the competence of monitoring bodies to rule on the validity of reservations. That would satisfy the human rights treaty monitoring bodies and reflect actual practice, and the principle had already been accepted by the Commission in paragraph 5 of the preliminary conclusions.

28. Secondly, draft guideline 3.2.1 could spell out the idea, at the same time indicating that, in assessing validity, the monitoring bodies could go no further than their general mandate authorized. If they had decision-making power, they could also decide as to the validity of reservations, and their decisions in that regard would be binding on States parties. If, on the other hand, they were not vested with decision-making power and could only make recommendations, then they could only make recommendations regarding the validity of reservations.

That was basically what paragraph 8 of the 1997 preliminary recommendations said and what he proposed to say, in a slightly different way, in the second paragraph of draft guideline 3.2.1.

29. Thirdly, draft guideline 3.2.2 could echo paragraph 7 of the preliminary conclusions in the form of a recommendation. He would remind those who might question whether it was appropriate to make recommendations to States in the Guide to Practice that the Commission had already answered that question in the affirmative in the past. In the case at hand, the idea was to encourage States and international organizations to insert clauses in treaties establishing monitoring bodies specifying the competence of those monitoring bodies in the matter of reservations.

30. Fourthly, draft guideline 3.2.3 could remind States and international organizations that when they had established monitoring bodies and when such bodies, acting within the limits of their competence, made a pronouncement as to the validity of reservations formulated, States and international organizations were required, depending on the type of competence, to give effect to the decisions of those bodies or to take their recommendations into account in good faith.

31. Fifthly and lastly, draft guideline 3.2.4, carrying forward the sense of paragraph 6 of the preliminary conclusions adopted in 1997, would “drive home” the point of draft guideline 3.2.1 by recalling that, when there were several mechanisms for assessing the validity of reservations, they were not mutually exclusive but reinforcing, and that would tend to enhance effective application of the provisions of article 19 of the 1969 and 1986 Vienna Conventions, provisions which had been repeated in guideline 3.1, adopted by the Commission during the first part of the current session.

32. The final section of the tenth report, paragraphs 181 to 208, dealt with the consequences of the non-validity of a reservation, one of the most serious lacunae in the matter of reservations in the 1969 and 1986 Vienna Conventions, which were silent on that point. It had been referred to as a “normative gap”, and the gap was all the more troubling in that the travaux préparatoires did not offer any clear indications as to the intentions of the authors of the 1969 Vienna Convention, but instead gave the impression that they had deliberately left the question open. However, what was acceptable in a general treaty on the law of treaties, in view of the disputes raised by the question, was not acceptable in a work whose purpose was precisely that of filling the gaps left by the 1969 and 1986 Vienna Conventions in the matter of reservations.

33. The first question to be addressed in that regard was whether the effects were the same or different if a reservation was contrary to subparagraphs (a) or (b) of article 19 of the 1969 and 1986 Vienna Conventions, on the one hand, or to subparagraph (c), on the other hand. In paragraphs 184 to 186 of his tenth report, he had indicated the reasons that had led some authors to conclude that the problem posed by subparagraphs (a) and (b) was different from that posed by subparagraph (c). However, he was of the view that such a conclusion was not justified.

First of all, the text of article 19 did not support such an interpretation and, on the contrary, showed that the three subparagraphs all served the same function; that view was confirmed by the travaux préparatoires, by practice, if properly analysed, and by case law. On that basis he was proposing draft guideline 3.3, which appeared in paragraph 187 of his tenth report. Members were fully at liberty to suggest improvements to the wording, but in his view the idea of the unity of article 19 was absolutely fundamental.

34. That said, it remained to determine the consequences of such invalidity. He was aware that at the current stage that question, clearly a crucial one, could not be answered exhaustively, because the consequences obviously depended to a great extent on the reactions of the other contracting parties and in particular on their acceptance of such reservations or on their objections to them. In draft guidelines 3.3.1 to 3.3.4 he had tried to answer three questions that he thought could be answered at the current stage.

35. First, he thought it was clear, for the reasons given in paragraphs 191 and 192 of his tenth report, that the formulation of a reservation that was invalid, either because it was contrary to the object and purpose of the treaty or because it was prohibited by the treaty, did not engage the responsibility of its author in the sense of the draft articles on responsibility of States for international wrongful acts, that was the sense of draft guideline 3.3.1.

36. The second question was whether the other contracting parties could accept a reservation contrary to the provisions of article 19 of the 1969 and 1986 Vienna Conventions. That question went to the heart of the doctrinal dispute between the advocates of the theory of “opposability”—who viewed the validity of a reservation as a purely subjective matter, and the advocates of the theory of “permissibility”—who considered it an objective question and thought that validity depended solely on the criteria set out in article 19. He had tried to ignore the doctrinal quarrel and the sometimes doctrinaire, not to say “revanchist”, attitudes that it inspired, because it seemed to him that two arguments based on legal texts and one based on common sense showed that a reservation that did not fulfill the conditions for validity set forth in article 19 of the 1969 and 1986 Vienna Conventions, and repeated in draft guideline 3.1, was null and void. That was the sense of draft guideline 3.3.2.

37. The first textual argument, which the legal literature generally overlooked, was based on article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions, which showed that a reservation could not be “established” unless it was in accordance with, in particular, article 19. It followed a contrario that if a reservation was not in accordance with article 19—in other words, if it did not fulfill one or another of the conditions set forth in that article, or in guideline 3.1—it was not established, which he believed was another way of saying that it was null and void and could not produce effects. The second textual argument was based on article 19 itself, which excluded even the formulation of such reservations for

See footnote 8 above.
any of the three situations it contemplated. States could not formulate such reservations and, if they did, those reservations would have no effect. Lastly, the common sense argument was that only such an interpretation could make sense of article 19, since otherwise, if a reservation that did not fulfill the conditions of article 19 was not considered null and void, the article had no point and was devoid of meaning. It followed, moreover, that the other contracting parties, acting unilaterally, could not remedy that nullity. Otherwise, as explained in more detail in paragraphs 201 to 203 of the tenth report, States or international organizations acting independently could destroy the unity of the treaty regime, flying in the face of the collectively expressed will of the parties, which would be incompatible with the principle of good faith. That was the idea expressed in draft guideline 3.3.3, proposed in paragraph 202 of the report.

38. On the other hand, it was not at all clear to him that the contracting parties could not do collectively what they could not do unilaterally. If all the parties accepted a reservation, they could be considered to be amending the treaty by unanimous agreement, as article 39 of the 1969 and 1986 Vienna Conventions allowed them to do. That was one of the possible consequences of article 39 with respect to reservations. But such an amendment of the treaty could not come to pass in an underhanded fashion, and the absence of an express objection should not be sufficient to validate, for example, a reservation prohibited by the treaty or contrary to its object and purpose. In order for a State to be exempted from respecting a provision of the treaty or object of the treaty, the contracting parties must be aware that they were agreeing to a fundamental amendment of the treaty. With that in mind, he had proposed draft guideline 3.3.4, which expressed that idea, but he acknowledged that, in the absence of clear practice, it partook more of the nature of progressive development of law than of codification stricto sensu.

39. In concluding the introduction of his tenth report, the Special Rapporteur expressed the hope that at the conclusion of its debate the Commission would wish to refer to the Drafting Committee the draft guidelines presented in his report that had not been able to be considered in detail at the fifty-seventh session in 2005, namely, draft guideline 3.1.5, as presented in his note (A/CN.4/572); draft guidelines 3.1.6 to 3.1.13; and draft guidelines 3.2 to 3.2.4 and 3.3 to 3.3.4, presented in his tenth report.

40. Mr. GAJA said that he appreciated the flexibility the Special Rapporteur had shown in striving for a formula that would better define reservations incompatible with the object and purpose of a treaty. However, he would like to make two remarks concerning the first of the proposed alternatives for draft guideline 3.1.5. First of all, he did not quite grasp why a reservation, in order to be incompatible, should have to disturb the balance of the treaty. The notion of balance, in the sense in which the term was being used in the draft guideline—namely, the balance between the positions of the different parties—was not necessarily applicable to all treaties, particularly those relating to human rights. Moreover, the object and purpose of a treaty meant not the essential rules, rights and obligations, but the aim underlying those essential rules, rights and obligations. The object of a treaty might be, for example, the protection of human rights or of the environment, not the specific rules stipulating the way that aim should be pursued. That distinction between the object and purpose of the treaty and the provisions of the treaty could be seen in article 60, paragraph 3 (b), of the 1969 Vienna Convention.

41. Mr. MATHESON said that it was helpful that the members of the Commission had had the opportunity to reflect at length on the tenth report on reservations to treaties between the 2005 and 2006 sessions. He was pleased that the Special Rapporteur had emphasized that the use of reservations encouraged the participation of States in treaty regimes, that he had avoided any undue presumptions against the validity of reservations and that he had not created different legal regimes for specific types of treaties. His remarks would deal only with the wording of the draft guidelines that had not yet been referred to the Drafting Committee.

42. In the new version of draft guideline 3.1.5, the reference to the “essential rules, rights and obligations” was an improvement over the phrase “essential provisions” and was a better way to describe the raison d’être of a treaty, since the object and purpose was not necessarily defined in any particular set of articles but emerged from the treaty as a whole. He would prefer the first of the proposed alternatives, although better terms than “architecture” and “balance” might be found for the English text.

43. In draft guideline 3.1.6, paragraph 2, the reference to “the articles that determine [the] basic structure” of the treaty might give the impression that the object and purpose of a treaty was to be found in certain key provisions of the treaty, which was not necessarily the case. He would suggest deleting them and also favoured deleting the language in square brackets concerning subsequent practice, since the intention of the parties at the time of the conclusion of the treaty was the essential consideration.

44. With regard to draft guideline 3.1.7, even though reservations whose scope could not be determined because they were worded in vague, general language were undesirable, they were not necessarily incompatible with the object and purpose of the treaty. They might in fact affect only matters of lesser importance. The language should therefore be recast to say that such reservations were incompatible with the object and purpose if they vitiated the essential substance of the treaty.

45. He could support draft guideline 3.1.8, which offered a sensible treatment of the possibility of a reservation to a treaty provision that set forth a customary norm. He also supported draft guideline 3.1.9, but thought that the language needed some adjustment. As it stood, the draft guideline ruled out any reservation to a provision setting forth a rule of jus cogens, but it was possible to formulate a reservation to some aspect of such a treaty provision without contradicting the jus cogens norm itself. Therefore the guideline should merely say that such reservations were prohibited if they were inconsistent with the jus cogens norm in question.
46. Draft guideline 3.1.10 rightly recalled that account must be taken of the importance which the parties had conferred upon non-derogable rights. However, he would suggest saying that a reservation might be formulated to a treaty provision relating to non-derogable rights provided that it was not incompatible with the object and purpose of the treaty as a whole, rather than with the object and purpose of the provision in question or with the essential rights and obligations arising out of that provision.

47. He supported draft guideline 3.1.11 and also draft guideline 3.1.12, which treated the question of reservations to general human rights treaties in a flexible manner, but he would suggest that the wording should refer to the “relationship among” rather than the “indivisibility of” the rights set out therein, because not all rights in such treaties were necessarily indivisible.

48. The chapeau of draft guideline 3.1.13 properly stated that a reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty was not, in itself, incompatible with the object and purpose of the treaty. However, subparagraph (i) should make it clear that such a reservation was not incompatible unless it hampered the operation of the provision in question, even if the provision did constitute the raison d’être of the treaty. In subparagraph (ii), the reference to a treaty provision that the author had previously accepted seemed unnecessary and could be deleted.

49. With regard to draft guidelines 3.2 and following, which dealt with competence to assess the validity of reservations, the phrase “competent to rule on” in draft guideline 3.2 suggested that the bodies in question would have the right to make a conclusive determination as to the validity of a reservation. It would be better to say that they were “competent to comment upon” or at most “competent to assess”. Moreover, the chapeau should make it clear that competence was not automatically assumed where the treaty itself did not provide for it. Lastly, the reference in brackets to the domestic courts was unnecessary and the reference to monitoring bodies was superfluous, since they were dealt with in the next draft guideline.

50. In draft guideline 3.2.1, it should be specified that a monitoring body was competent “to the extent provided by the treaty in question”. A similar clarification should be added to both sentences of draft guideline 3.2.3, again in order to avoid giving such monitoring bodies competence that the parties may not intend. In draft guideline 3.2.2, the matter of the second sentence could be better addressed in the commentary.

51. Draft guideline 3.3 was correct in substance, but the words “express or implicit” in the first line should be deleted, since the Commission had already decided not to include references to implicit prohibitions in the earlier guidelines. The final clause could also be deleted.

52. Draft guideline 3.3.1 was also correct in substance, although the wording in English might be improved. Draft guidelines 3.3.2 and 3.3.3, which concerned the nullity of invalid reservations, raised questions that it would be premature to decide at the current stage of the work. It would also be prudent to defer a decision on draft guideline 3.3.4, because it raised the question of whether an invalid reservation might nonetheless be accepted by the other parties. In any event, as currently formulated, the guideline might encourage the acceptance of reservations contrary to the object and purpose of the treaty.

53. In conclusion, he would propose referring draft guidelines 3.1.5 to 3.3.1 to the Drafting Committee and giving further thought to draft guidelines 3.3.2 to 3.3.4.

The meeting rose at 12.05 p.m.

2889th MEETING

Thursday, 6 July 2006, at 10 a.m.

Chairperson: Mr. Giorgio GAJA (Vice-Chairperson)

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kateka, Mr. Kernica, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Opper Badan, Mr. Pellet, Mr. Sreemivas Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.


[Agenda item 7]

Tenth report of the Special Rapporteur (continued)

1. Mr. MOMTAZ said that the excellent study contained in the Special Rapporteur’s tenth report on reservations to treaties would convince not only those most sceptical about the usefulness of the exercise which the Commission had undertaken, but also those in the Sixth Committee who were of the view that it had lasted long enough and should be brought to a rapid close. The report not only cast scholarly light on the inadequacies of the 1969 Vienna Convention, which the Special Rapporteur rightly referred to as normative gaps, but also revealed the difficulties he had encountered in overcoming them by relying on State practice and that of monitoring bodies, especially since the issues raised were very sensitive and often controversial. The Special Rapporteur should be encouraged to continue in his task.

2. He would begin by focusing on the two new alternative versions of draft guideline 3.1.5 contained in paragraphs 7 and 8 of the note (A/CN.4/572) that the Special Rapporteur had produced in response to criticism of the initial version. Personally, he was in favour of the first option, entitled “Definition of the object and purpose of the treaty”, which was much clearer than the version presented in the tenth report, because it no longer referred merely to the raison d’être of the treaty in defining its
object and purpose. He shared Mr. Gaja’s concern that the phrase “balance of the treaty” was suitable only for a certain category of treaties, and did not cover human rights conventions, for which by nature no balance needed to be sought.

3. With regard to the chapter on reservations incompatible with the object and purpose of the treaty and to draft guideline 3.1.6 on the determination of the object and purpose of the treaty, Mr. Momtaz was firmly in favour of deleting the square brackets around the words “and the subsequent practice of the parties”, at the end of paragraph 2. The subsequent practice of the parties to a treaty and its consequences for the scope of the treaty obligations entered into by those parties had been the subject of the Commission’s attention during the elaboration of the draft articles on the law of treaties, and a draft article had even been devoted to it. With a view to preserving the stability of treaty instruments, the Vienna Conference had unfortunately decided not to retain the draft article in question. That was particularly regrettable in view of the fact that the practice of the Human Rights Committee and the case law of the ICJ, in particular the Court’s advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory and its recent judgment in Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), had clearly shown that the subsequent practice of the parties had greatly expanded the temporal and spatial scope of States parties’ obligations under the International Covenant on Civil and Political Rights. In his view, the subsequent practice of parties to a treaty could not only change the scope of a treaty but also, as a knock-on effect, influence the definition of its object and purpose. However, it was not his intention to challenge the Special Rapporteur’s approach: the examples cited to illustrate the use of the criterion of the object and purpose of the treaty were well chosen.

4. According to draft guideline 3.1.12 (Reservations to general human rights treaties), account should be taken of the indivisibility of the rights set out in human rights treaties. Should that be interpreted to mean that a reservation concerning one of the rights in such a treaty would be contrary to the object and purpose of the treaty because the rights to which the treaty referred formed an indivisible whole? In his view, such an interpretation would be going too far.

5. He particularly welcomed paragraph 2 of draft guideline 3.1.8 (Reservations to a provision that sets forth a customary norm), because it discouraged States from making reservations to such provisions in the hope of freeing themselves from obligations based on customary norms.

6. With regard to the section on determination of the validity of reservations and consequences thereof and to draft guideline 3.2 (Competence to assess the validity of reservations), he was in favour of deleting the reference in the first indent to domestic courts, for the reasons set out in paragraph 168 of the report. As to the last indent, he wondered whether, in the interests of clarity, it might not be preferable to refer to treaty implementation monitoring bodies that might be established “within the framework of”, rather than simply “by”, the treaty.

7. Draft guideline 3.2.1 (Competence of the monitoring bodies established by the treaty) did not pose any difficulties, but it would gain in precision if specific reference was made to monitoring by the depositary of the treaty, since that was one of the achievements of the Guide to Practice.

8. In draft guideline 3.2.2 (Clauses specifying the competence of monitoring bodies to assess the validity of reservations), he was opposed to the reference to “protocols to existing treaties [which] could be adopted to the same ends”, because of the risk that States parties to such a treaty might use such a possibility to denounce the past activities of the monitoring bodies which had interpreted their mandate in a broad manner. It would be a retrograde step and would certainly not help promote human rights in the world.

9. On draft guideline 3.3.1 (Non-validity of reservations and responsibility), he thought that only the first sentence should be retained. It was not for the Commission to say that a non-valid reservation did not engage the responsibility of its author, as such an assertion might encourage States to make non-valid reservations in the belief that they did not engage their responsibility at international level. On the contrary, the draft guideline should alert States to the consequences, in terms of their international responsibility, of their failure to comply with the provisions of a treaty to which they had formulated an invalid reservation.

10. On draft guideline 3.3.4 (Effect of collective acceptance of an invalid reservation), he noted, first, that the title was not in line with its content: it referred to a collective acceptance, whereas in reality, the issue was the collective lack of objection to an invalid reservation. It might perhaps be better for the title to read: “Effects of the absence of objections by States parties to an invalid reservation”. Secondly, the reference to express consultation by the depositary was unclear: in point of fact, the role of the depositary in such circumstances would be, not to “consult” the parties, but to draw their attention to the invalidity of the reservation.

11. Mr. Sreenivasa RAO, having commended the Special Rapporteur for his scholarly, courageous and sometimes controversial tenth report, said that in his view, the new proposals for draft guideline 3.1.5 set forth in the Special Rapporteur’s note (A/CN.4/572) were no improvement on the earlier version to be found in the tenth report and its annex. The Special Rapporteur had himself noted that the object and purpose of a treaty were something of an enigma, that it was by no means easy to put together in a single formula all the elements to be taken into account, and that such a process undoubtedly required more “esprit de finesse” than “esprit de géométrie”, like any act of interpretation, for that matter—into which category the process fell. The Special Rapporteur had introduced new elements, such as “rules”, “rights” and “obligations”, and

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204 Ibid., p. 181, article 27, paragraph 3.
new language, all of which, while well taken, could create problems of interpretation in the commentary. Moreover, whether such rules, rights and obligations were “indispensable to the general architecture of the treaty” had yet to be determined. The Special Rapporteur had further complicated matters by introducing, by way of explanation, the phrase “the balance of the treaty”, which once again could give rise to confusion and differing interpretations: as Mr. Gaja had noted, it could refer to the balance of rights and interests of the parties, or, as the Special Rapporteur himself had pointed out, it could also refer to the rights and obligations incorporated in the treaty itself. The category to which it belonged was ultimately a matter to be assessed and interpreted in the particular context of a given treaty. Regardless of the formulation used, that process could not be avoided. Accordingly, he preferred the earlier version of draft guideline 3.1.5; the commentary could explain the main difficulties involved and how to tackle them.

12. The next question was whether the Guide to Practice should distinguish between the consequences of invalidity of reservations as a result of their incompatibility with article 19 (a) and (b), on the one hand, or with article 19 (c), on the other, of the 1969 Vienna Convention. The Special Rapporteur had rightly noted that regardless of whether article 19 (a) and (b) or article 19 (c) was applied to judge the validity of a reservation, it should result in the same conclusions: if a reservation was incompatible with them, it was invalid. The question of who was to judge was the crux of the matter, because there was in fact a difference: if a reservation was incompatible with them, the validity of a reservation, it should result in the same conclusion, if a reservation was incompatible with them, it was invalid. The question of who was to judge was the crux of the matter, because there was in fact a difference: under article 19 (c), no third party or authoritative forum was designated to assess its validity, assessment being left to individual States. Thus, a dual regime had emerged over the years: it was first and foremost for the State formulating the reservation to assess whether its reservation was or was not compatible with the object and purpose of the treaty. Once a State had decided that it was, it formulated the reservation. However, since the reservation affected its relations with others, other States also had the right to decide whether or not the reservation was compatible. An inevitable consequence and a well-established practice was that a State which had made a reservation was considered to be a party to the treaty by those States that regarded such a reservation as compatible with the object and purpose of the treaty, and considered not to be a party by those other States that regarded the reservation as incompatible with the object and purpose of the treaty. That duality of regimes was a fact, and the normative gap in the 1969 Vienna Convention had been deliberate; the question was whether the Commission needed to fill it in the Guide to Practice. In his own view, the gap should be left. There was good reason not to unravel an existing, functioning regime, not only because it would be difficult to promote a compromise on the matter in a guideline, but also because the Guide to Practice should not risk diminishing its authority in the eyes of States by including material of a controversial nature. Accordingly, the Commission should perhaps suspend consideration of draft guidelines 3.3 and 3.3.1 to 3.3.4.

13. At the outset, there had been a strong feeling in the Commission that the treaty bodies were overstepping their authority in assessing the validity of reservations. However, following interaction between the Commission and various human rights treaty bodies, it had become clear that, in appropriate circumstances, they were perfectly justified in making such assessments.

14. The Special Rapporteur had noted that the legal validity of such assessments could not exceed the limits of the competence assigned to them under the treaty; it was thus only logical to provide in draft guideline 3.2.2 for clauses specifying the limits of the treaty body’s competence. The Special Rapporteur seemed to be suggesting that if only a few parties objected, a reservation which was otherwise incompatible with the object and purpose of the treaty, and thus null and void, was permissible, whereas, in cases involving a large number of parties, there was room for consultation. There appeared to be a contradiction in claiming that if one or two States objected, the reservation was null and void, whereas when several objected, it was not. He sought clarification in that regard.

15. Mr. CANDIOTI, after commending the report’s outstanding qualities, said he supported the approach adopted by the Special Rapporteur and his important contribution to establishing a definitive understanding of the object and purpose of a treaty, thus filling out what had been left unstated in the 1969 Vienna Convention with regard to important considerations such as the obligation not to defeat the object and purpose of a treaty prior to its entry into force. Of the alternative proposals contained in the Special Rapporteur’s note on draft guideline 3.1.5 (A/CN.4/572), his preference would be for the latter formulation, to be found in paragraph 8, which was a great improvement on the previous version and should be referred to the Drafting Committee.

16. Turning to the question of validity, he said he had long been uneasy about the use of the term “null and void” in relation to reservations. The 1969 Vienna Convention referred to reservations being “prohibited” or “authorized”; and to refer to nullity or invalidity would be to introduce a confusion of categories. He would prefer the use of the words “authorized”, “permissible” and “impermissible”.

17. Mr. ECONOMIDES said that the drawback to the version of draft guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty), preferred by Mr. Candioti, was that the phrase “serious impact” would make the provision extremely restrictive, since it seemed to exclude any lesser degree of impact. That wording surely ran counter to the provisions of the 1969 Vienna Convention.

18. Mr. PELLET (Special Rapporteur) said that, by definition, a reservation had an impact on the rules of a treaty, by virtue of article 2, paragraph 1 (d), of the 1969 Vienna Convention. The threshold for reservations incompatible with the object and purpose of the treaty needed to be higher. As for the proposal by Mr. Momtaz that, in draft guideline 3.2 (Competence to assess the validity of reservations), the phrase “established by the treaty” should be replaced by the phrase “established within the framework of the treaty”, he had no objection to the proposed change but questioned the need for it.
19. The CHAIRPERSON noted that the phrase “within the framework of the treaty” would apply to a body such as the Committee on Economic, Social and Cultural Rights, which had been established, not by the International Covenant on Economic, Social and Cultural Rights, but at a later date.

20. Mr. MOMTAZ said that his intention had been to highlight the fact that the provision would apply equally to treaty monitoring bodies that had not yet come into being. However, the existing version covered that situation.

21. Ms. ESCARAMEIA said she was disappointed to hear Mr. Momtaz play down the importance of his proposal. As the Chairperson had said, there were situations in which a monitoring body was established not by the treaty itself but, for instance, by a subsequent protocol. Still more pertinent was the question of powers: several human rights treaty monitoring bodies had been granted additional powers by protocols, especially in the area of considering claims from individuals. Given that the Human Rights Council had a mandate, at the moment, to negotiate a protocol to enlarge the powers of the Committee on Economic, Social and Cultural Rights, the phrase “within the framework of” was surely more comprehensive than the word “by”.

22. Mr. Sreenivasa RAO said that the question was of little account. The protocols associated with a treaty, granting a given body further powers, became part of the totality of the treaty; accordingly, fears that the existing wording would be restrictive were unfounded.

23. Mr. MOMTAZ said that while he shared Ms. Escaramie’s view as to the importance of the issue, he was satisfied that the existing wording would adequately cover the problem. The issue would have been more contentious if the phrase in question had been worded “established by a treaty”.

24. Mr. CHEE said it seemed to him that the “treaty implementation monitoring bodies” were a subject of the dispute settlement bodies referred to in the second indent of draft guideline 3.2.

25. Mr. ECONOMIDES sought reassurance that the phrase “dispute settlement bodies that may be competent to interpret or apply the treaty”, in the second indent of draft guideline 3.2, covered the ICJ, which might be competent pursuant, not to a treaty, but to a specific undertaking to that effect.

26. Mr. GAJA, speaking in his capacity as a member of the Commission, said that the section of the tenth report on determination of the validity of reservations and consequences thereof was a valuable contribution to the consideration of a number of fundamental questions relating to reservations. Although the Special Rapporteur’s conclusions were acceptable in the main, the question of how to assess the validity of reservations covered by article 19 of the 1969 Vienna Convention gave rise to some difficulties, as Mr. Sreenivasa Rao had also noted. As stated in paragraph 181 of the report, nothing in the text of the 1969 Vienna Convention indicated how article 18 related to article 20, concerning acceptance of reservations and objections. Owing to the “normative gap” thus created, it was by no means certain—and nothing in the text of article 20 of the 1969 Vienna Convention gave any indication in that direction—that the rules of article 20 applied also to invalid reservations or that the presumption in article 20, paragraph 4, as to the effects of an objection applied also, for example, in the case of reservations prohibited by a treaty. In other words, the question was not the distinction between subparagraphs (a), (b) and (c) of article 20, paragraph 4, but whether article 20 as a whole applied only where there was already a valid reservation, which a State could accept or not, or whether, on the contrary, it was a general provision, applying to any reservation, whether or not permissible.

27. With regard to reservations covered by article 19 of the 1969 Vienna Convention in its advisory opinion concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the ICJ had found that it was for each State party to assess the validity of a given reservation, with the result that, if that reservation was held invalid, no contractual relationship existed between the State that made the reservation and the State that objected to it. If that was the regime established by the 1969 Vienna Convention, it was essential that it should be reflected in the draft guidelines. If, on the other hand, it was the provisions of article 20 that should be applied in assessing the validity of reservations, that should also be spelled out in a draft guideline. That normative gap in the wording of article 19 needed to be filled. While the approach he advocated could give the regime of reservations greater coherence, it should also be borne in mind that, in practice, contracting States often relied on article 20 when objecting to a reservation that they considered incompatible with the object and purpose of the treaty, while explicitly stating that contractual relations nevertheless existed between themselves and the State that had made the reservation. That State practice should be accorded fuller consideration in what set out to be a guide to practice. It was too important to be overlooked. If the Commission wished that practice to change—thereby ruling out the possibility of regarding as valid a reservation considered incompatible with the object and purpose of the treaty—it should draw States’ attention to the fact that it was not in line with the 1969 Vienna Convention and should be abandoned.

28. Turning to the role of the monitoring bodies, he said that the basic problem to be addressed with regard to the assessment of the validity of a reservation by a monitoring body was—apart from the effect of its deliberations, which clearly depended on the treaty in question—whether such a body should take account of the positions adopted by the contracting States in respect of the validity of a reservation. According to paragraph 165 of the tenth report, it should indeed do so. Such an approach was perfectly tenable, but it ran counter to that taken by the human rights treaty monitoring bodies themselves, which had never set out to assess objections or the absence thereof by States parties with regard either to article 19 or to article 20 of the 1969 Vienna Convention. They considered the question of the validity of a reservation as if the contracting State in question had waived its prerogative and allowed the monitoring body to settle the matter.
29. Lastly, Mr. GAJA wished to support two concerns raised by Mr. Matheson. First, it seemed premature to say, in draft guideline 3.3.2 (Nullity of invalid reservations), that “[a] reservation that does not fulfil the conditions for validity laid down in guideline 3.1 is null and void”. Such a guideline could give the impression that the Commission considered that reservations not in conformity with article 19 of the 1969 Vienna Convention had no consequence for the participation in the treaty of the State making the reservation; in other words, that invalid reservations should be considered not to exist. The question should be considered further with a view to eliminating any ambiguities. Second, with regard to draft guideline 3.3.4 (Effect of collective acceptance of an invalid reservation), he believed that, in the absence of relevant State practice, the draft guidelines should not countenance the possibility that States might derogate from the reservations regime of a treaty. It was nevertheless tacitly understood that a unanimous agreement could affect the reservations regime. It was important to spell out in the report or commentary that such agreement should be reached by the competent authorities of each State.

The meeting rose at 11.15 a.m.

2890th MEETING
Friday, 7 July 2006, at 10 a.m.
Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA
Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Montaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.


[Agenda item 7]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Ms. ESCARAMEIA thanked the Special Rapporteur for his very detailed study on reservations to treaties. She was sorry that the Commission had allotted so little time for the consideration of such a complex topic, which was of considerable interest to the entire international community.

2. With regard to reservations that were incompatible with the object and purpose of a treaty, she said that there was an additional category of reservations that merited study, namely reservations to provisions concerning the implementation of treaties through domestic law. Many treaties, particularly human rights treaties, were non-self-executing and thus became inoperable if a reservation was formulated to the provision by which they were incorporated into national legislation.

3. As for the definition of the object and purpose of the treaty, discussed in the Special Rapporteur’s note (A/CN.4/572), she believed that the threshold of raison d’être was too high. Both versions of draft guideline 3.1.5 set far too many conditions. A reservation was made to a specific rule and not to the object and purpose of the treaty, which could only be discerned from the treaty as a whole. Yet a treaty often had more than one object, and if a particular provision concerned one of the objects without affecting the raison d’être of the treaty it might nevertheless affect a significant part by going against the object and purpose of the treaty. Such a reservation must therefore be excluded. As for the determination of the object and purpose of the treaty (draft guideline 3.1.6), she was in favour of keeping the bracketed reference to subsequent practice for the reasons given by Mr. Montaz at the preceding meeting.

4. In draft guideline 3.2 as proposed in the tenth report (para. 167), which dealt with competence to assess the validity of reservations, the reference to domestic courts should be retained. It was important to distinguish between bodies whose assessments were merely recommendations and those whose assessments had binding consequences, such as courts, including domestic courts. In discussing dispute settlement bodies, she thought that special reference should be made to judicial bodies because their decisions could have different consequences from those emanating from the decisions of other bodies.

5. Draft guideline 3.2.1, on competence of the monitoring bodies established by the treaty, stipulated that the findings made by such bodies in the exercise of such competence should have the same legal force as that deriving from the performance of their general monitoring role. However, several of those bodies had quasi-judicial functions in addition to their general monitoring role. Acting like courts, they could rule on complaints not only from States but also from associations and individuals. Although their decisions did not have the force of a sentence, they had often been enforced by States, including in cases where compensation had been ordered. It was also unclear whether such bodies with quasi-judicial functions were covered by the second sentence of draft guideline 3.2.3 (Cooperation of States and international organizations with monitoring bodies), or whether that sentence referred only to courts. As for draft guideline 3.2.4, she felt that when there was a plurality of bodies competent to assess the validity of a reservation, an indication should be given that some assessments were more binding than others. All such bodies should not be lumped together as if they were identical; instead, it should be determined what the effect would be on the reservation if the assessment was made by a judicial or a quasi-judicial body.

6. While she supported draft guideline 3.3, on the consequences of the non-validity of a reservation, she did not agree entirely with draft guideline 3.3.1, which stipulated that the formulation of an invalid reservation did not engage the responsibility of the State or international
organization that had formulated it, and which was perhaps too general. A reservation that went against *jus cogens* would probably go against article 12 of the draft articles on State responsibility for internationally wrongful acts\(^\text{205}\) and ought therefore to engage the responsibility of the body that formulated it. Lastly, she believed that draft guideline 3.3.4, on the effect of collective acceptance of an invalid reservation, should be deleted, for the term “collective” merely referred to a series of bilateral consultations between the depositary and the other contracting parties. The result amounted to a revision of the treaty, making the draft guideline incompatible with articles 39 to 41 of the 1969 Vienna Convention, which stipulated that a treaty could be modified only through a process of negotiation.

7. Mr. FOMBA welcomed the fact that the Special Rapporteur had reviewed the definition of the object and purpose of the treaty, which in his view was barely functional insofar as the Guide to Practice was concerned. The two versions proposed for draft guideline 3.1.5 in the Special Rapporteur’s note (A/CN.4/572) were more workable than the text initially proposed, and offered a good basis for the work of the Drafting Committee. The first version was preferable because it was more in keeping with the general spirit of the definitions adopted in the Guide to Practice thus far, even if the concern for harmonization did not rule out other approaches. However, the meaning of the expression “the balance of the treaty” should be clarified in the commentary. Also, Mr. Gaja had said that a distinction had been drawn in article 60, paragraph 3 (b), of the 1969 Vienna Convention between the object and purpose of the treaty on the one hand and the rules on the other, yet what that paragraph actually said was that when a provision essential to the accomplishment of the object or purpose of the treaty was violated, there was a substantial violation of the treaty; there was thus a functional link between the two elements.

8. Draft guideline 3.2 was relevant to the extent that it was a general provision that recalled the many different ways in which a reservation could be assessed and highlighted the complementarity that existed among them. It did not call for any particular observation, except to say that the bracketed words in the first subparagraph would be better placed in the commentary. Draft guidelines 3.2.2 and 3.2.3 likewise did not merit any particular observations, although the bracketed phrase at the end of the latter could in fact be deleted, given that the idea it expressed seemed already to have been taken into consideration. Draft guideline 3.2.4 presented no problem.

9. As the Special Rapporteur had felt it was premature to take up the question of the consequences of an assessment of the validity of a reservation, which must be preceded by an in-depth study of the effects of the acceptance of and objections to reservations, the draft guidelines of the non-validity of a reservation ought to be considered on a provisional basis. Draft guideline 3.3 was based on a convincing substantive argument, and its wording did not pose any particular problem. Draft guideline 3.3.1 sought to dispel any remaining ambiguity surrounding the question of the non-validity of reservations and the question of responsibility for an internationally wrongful act. It had been suggested that the second sentence should be deleted, but he thought that the idea that the formulation of an invalid reservation did not necessarily engage the responsibility of the State or international organization formulating it should be retained, since all the necessary conditions must be met, a fact that was not immediately obvious.

10. Draft guideline 3.3.2 (Nullity of invalid reservations), which was based on the doctrine and practice of human rights treaty monitoring bodies, defined when a reservation was null and void, even if the Commission had yet to express itself on the consequences of such nullity. That was a coherent way to proceed and one that could hardly be argued with. Draft guideline 3.3.3 (Effect of unilateral acceptance of an invalid reservation) was just as logical and had a relatively clear and limited scope, given that a distinction was made between the actual effect, which was the intrinsic nullity, and the possibility that other effects could be produced, an issue that could in fact be dealt with in the commentary. Draft guideline 3.3.4, meanwhile, dealt with a question that required further study, as did a number of others; however, it also had a certain logic in that it was based on a comparison with the late formulation of reservations, which was of interest both in theory and in practice. The Commission could therefore provisionally accept those guidelines, taking into account the pertinent observations that had been made, particularly by Mr. Momtaz.

11. In conclusion, Mr. FOMBA considered that, on the whole, the proposed draft guidelines went in the right direction. With regard to the question of whether the Commission should deal with the consequences of the nullity of reservations, he was of the view that the Guide to Practice should be as complete as possible, and that it should fill the gaps of the 1969 and 1986 Vienna Conventions and help decision-makers and practitioners decode the process of formulating and implementing reservations. Such a guide would therefore be incomplete if it did not deal with the effects of the nullity of reservations. In conclusion, Mr. Fomba proposed referring to the Drafting Committee draft guidelines 3.1.5, 3.2 and 3.2.1 to 3.2.4, and continuing the study of draft guidelines 3.3 and 3.3.1 to 3.3.4.

12. Mr. KEMICHA said he was pleased that the Special Rapporteur had modified the definition of the object and purpose of the treaty with a view to making it more concrete. He preferred the first of the two versions proposed for draft guideline 3.1.5 but found the title of the second, “Incompatibility of a reservation with the object and purpose of the treaty”, to be more explicit. The Drafting Committee ought to be able to combine the two versions in a satisfactory manner.

13. The draft guidelines relating to assessments of the validity of a reservation and their effects were, like the tenth report as a whole, models of their kind. Draft guideline 3.2 was entirely acceptable, provided that the phrase in square brackets in the first subparagraph was deleted, since, as the Special Rapporteur recalled in paragraph 168 of the report, domestic courts were an integral part of the State from the standpoint of international law.
guideline 3.2.1, on the competence of monitoring bodies, was sufficient in and of itself, and there was no need to supplement it with draft guidelines 3.2.2 and 3.2.3, which were actually just recommendations. Draft guideline 3.3 was based on highly convincing arguments. Draft guideline 3.3.1 was perhaps not indispensable, given that the question of engaging State responsibility should not even be raised, but it could be retained if the Special Rapporteur felt it was useful in a guide to practice. Draft guidelines 3.3.2 to 3.3.4 were also useful, again from the standpoint of a guide to practice. Consequently, he believed that the whole set of new draft guidelines should be referred to the Drafting Committee, subject to the comments he had made.

14. Mr. ECONOMIDES shared the highly positive views of his colleagues with regard to the section of the tenth report of the Special Rapporteur on the determination of the validity of reservations and consequences thereof. With regard to draft guideline 3.1.5, which he had supported at the fifty-seventh session in 2005, he welcomed the effort by the Special Rapporteur to provide a better definition of a key notion in the law of treaties. Although he did not find the two new variants proposed by the Special Rapporteur in his note (A/CN.4/572) to be entirely satisfactory, particularly the expression “the balance of the treaty” and the word “serious”, which appeared in both variants, he believed that they must be referred, along with the texts initially submitted, to the Drafting Committee in the hope that the Drafting Committee would find the “magic formula” that would define the object and purpose of the treaty.

15. The phrase in square brackets in the first subparagraph of draft guideline 3.2 should be placed in the commentary. National authorities other than courts could, given their competence, find themselves considering the validity of certain reservations formulated by other States. Moreover, nothing prevented other contracting States or organizations from acting jointly or individually in such cases, something that might be spelled out in the draft guideline or at least in the commentary. The final phrase in square brackets in draft guideline 3.2.3 should be deleted, as it was superfluous and could be misinterpreted. It would be advisable to add the words “in principle” after the phrase “the competence of that body” in the first sentence of draft guideline 3.2.4, for it was not certain under what circumstances such bodies might have competence to hear a case.

16. The final phrase of draft guideline 3.3—“without there being any need to distinguish between these two grounds for invalidity”—was highly relevant and should be retained. Of course, reservations implicitly or expressly prohibited by the treaty were immediately identifiable, which was not the case with reservations that were incompatible with the object and purpose of the treaty. However, it must be recalled that the legal regime of invalid reservations was the same in all cases. As at the previous session, he strongly objected to draft guideline 3.3.1, for no rule of international law prohibited a State from invoking, if it so chose, the responsibility of another State for having violated treaty provisions having to do with reservations, and the Commission was far from being a legislative body that could address such injunctions by States. The draft guideline was also open to criticism on other grounds, and he referred in particular to the statements made in that connection by Mr. Montaz and Ms. Escaramea. He supported draft guidelines 3.3.2, 3.3.3 and, to a lesser extent, 3.3.4, which seemed to him unnecessary, given that States were always free to make radical changes to the regime of reservations if they so desired.

17. In conclusion, he agreed that all the draft guidelines with the exception of guideline 3.3.1 should be referred to the Drafting Committee.

18. Mr. CHEE commended the Special Rapporteur, who had once again produced an excellent report.

19. The 1969 Vienna Convention was silent with regard to “validity”, perhaps because it was the acceptance or rejection of a reservation that was most important; it would therefore seem that the issue of validity was irrelevant. He agreed with Mr. Candioti that it would be preferable to speak of permissibility or impermissibility rather than validity.

20. With regard to draft guideline 3.1 (Freedom to formulate reservations), he hoped that the Special Rapporteur would explain why he had departed from the wording of article 19 of the 1969 Vienna Convention and used the word “freedom”. He endorsed draft guideline 3.1.1 (Reservations expressly prohibited by the treaty), which reflected subparagraph (b) of article 19 of the 1969 Vienna Convention, and draft guidelines 3.1.2 (Definition of specified reservations) and 3.1.4 (Compatibility of reservations authorized by the treaty with its object and purpose), which provided a useful explanation. However, he did not accept draft guideline 3.1.3 (Reservations implicitly permitted by the treaty), for even if it was not prohibited by the treaty, a reservation that went against the treaty could not be implicitly formulated.

21. He also did not think that it was accurate to say in draft guideline 3.1.5 that the raison d’être was the basic element of the object and purpose of the treaty, as they could be expressed in the preamble or other important parts of the treaty. As for draft guideline 3.1.6, it would be preferable to use the word “interpretation” rather than “determination”. He was opposed to draft guideline 3.1.7 (Vague, general reservations) because even if a treaty provision was vague or general, the binding nature of the instrument meant that it was still valid. He supported draft guidelines 3.1.8 (Reservations to a provision that sets forth a customary norm), 3.1.9 (Reservations to provisions setting forth a rule of jus cogens) and 3.1.13 (Reservations to treaty clauses concerning dispute settlement or the monitoring of the implementation of the treaty).

22. With regard to draft guideline 3.2, he would prefer that competence to assess the validity of a reservation should be vested in the dispute settlement bodies having competence to interpret or apply the treaty, such as the ICJ or an arbitral tribunal. He did not support draft guidelines 3.2.1, 3.2.2, 3.2.3 and 3.2.4 because he did not agree that the bodies responsible for monitoring the implementation of a treaty should have competence to determine the permissibility of a reservation to the treaty,
an idea that was set out in the Commission’s preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.  

23. While he supported draft guideline 3.3, he doubted whether it was actually necessary. He also supported draft guidelines 3.3.1 to 3.3.4.

24. Mr. PELLET (Special Rapporteur) said that it was unacceptable to revert to draft guidelines that had been sent to the Drafting Committee at the previous session and adopted by the Drafting Committee and, subsequently, by the Commission. He had also been quite shocked at the previous meeting when Mr. Candioti had questioned the terms “validity” and “permissibility”, issues that had already been settled, rightly or wrongly, but settled nonetheless. Members would be able to return to decisions taken when the Commission undertook its second reading.

25. Mr. CANDIOTI said that he had not sought to reopen the discussion on decisions taken by the Drafting Committee, but had merely wished to express his disagreement with the use of terms “validity”, “nullity” and “responsibility” in the current context.

26. The CHAIRPERSON said that it was indeed inappropriate to reopen a debate at the current session on draft guidelines that had already been adopted.

27. Mr. YAMADA commended the Special Rapporteur on his tenth report and said that he endorsed the draft guidelines from guideline 3.1.5 onward; nevertheless, he wished to offer some comments from the standpoint of a practitioner.

28. In draft guideline 3.1.5 it would be difficult to go further than the new definition of the object and purpose of the treaty proposed by the Special Rapporteur in his note (A/CN.4/572). He had no preference for either alternative. He did wish to note, however, that when a treaty prohibited any reservation, that did not necessarily mean that all the provisions of the treaty were essential and constituted its raison d’être. Likewise, when a treaty allowed specific reservations, that did not necessarily mean that the specific provisions to which reservations could be made were not essential provisions. Decisions concerning reservation clauses were made during the negotiation of the treaty on the basis of the prevailing political atmosphere. When a treaty was silent on reservations, that did not necessarily mean that the political, economic or social context of the treaty regime could be neglected. Accordingly, it should be understood that in applying draft guideline 3.1.5 to a particular treaty, that context must be taken fully into account.

29. From that point of view he welcomed draft guideline 3.1.6, paragraph 1 of which reproduced article 4, paragraph 1, of the 1969 Vienna Convention. The Special Rapporteur had taken care to omit the last phrase—“in the light of its object and purpose”—to avoid a tautology. The Commission was thus faced with a dilemma: in order to interpret a treaty, it was necessary to know what the object

and purpose of the treaty was. Unfortunately, he had no answer to offer.

30. He had no problem with draft guideline 3.1.7, so long as it was read in the context of paragraphs 107 to 114 of the tenth report. By virtue of the reservation it had entered to article 4, subparagraphs (a) and (b), of the International Convention on the Elimination of All Forms of Racial Discrimination, Japan had indicated that it would fulfill its obligations under those provisions to the extent that doing so was compatible with the guarantee of the rights to freedom of assembly, association and expression and other rights under its Constitution. That reservation had not been contested, and it was his understanding that such a reservation was not covered by the draft guideline.

31. He understood draft guideline 3.1.8 to mean that a State could opt out of a provision setting forth a customary norm in its relations with States that accepted the reservation but that it continued to be bound by the norm vis-à-vis other States. If that was so, he supported that formulation. He had no comment on draft guidelines 3.1.9 to 3.1.13.

32. With regard to draft guidelines 3.2 and 3.2.1, he stressed that the competence of treaty monitoring bodies to assess the validity of reservations must be clearly conferred on such bodies by the treaty itself, and he supported draft guideline 3.2.2 (Clauses specifying the competence of monitoring bodies to assess the validity of reservations) on the basis of the same reasoning. He had no particular comment to make on draft guidelines 3.2.3 to 3.3.1.

33. Although he had no objection to the content of draft guidelines 3.3.2, 3.3.3 and 3.3.4, he, like Mr. Matheson, would prefer to defer their consideration, as he thought it should be noted that a State might object to a reservation not only when it considered the reservation to be incompatible with the object and purpose of the treaty, but also when it acknowledged that it was compatible.

34. Having said that, he agreed that the Commission should refer draft guidelines 3.1.5 to 3.3.1 to the Drafting Committee.

35. Mr. PELLET (Special Rapporteur) said he wished to know why Mr. Yamada thought that draft guideline 3.1.7 did not cover reservations of the type formulated by Japan with regard to article 4, subparagraphs (a) and (b), of the International Convention on the Elimination of All Forms of Racial Discrimination. He added that he did not know the exact content of that reservation.

36. Mr. YAMADA said that he would transmit the text of the reservation in question to the Secretariat so that Mr. Pellet could see it.

37. Ms. XUE said that the example provided by Mr. Yamada seemed particularly relevant, and she pointed out that the United Kingdom had made a reservation to the International Convention on the Elimination of All Forms of Discrimination against Women. In its reservation the United Kingdom had stated that it would discharge its obligations under the instrument to the extent that they were consistent with the country’s internal legislation,
while indicating clearly that that legislation could be amended in the future. However, one could never tell just how legislation might evolve, so that such a scope of a reservation could be considered very vague and challenged on the grounds that it was incompatible with the object and purpose of the treaty. Such reservations, which were often formulated by States in practice, might thus be considered invalid under draft guideline 3.1.7, and that posed a problem.

38. Mr. PELLET (Special Rapporteur), addressing Mr. Yamada’s remark first of all, said that he was not certain that the reservation entered by Japan was sufficiently precise to permit a true assessment of its validity. As for Ms. Xue’s observation, he emphasized that the key issue at hand was determining whether States, when formulating reservations, provided elements that made it possible to assess the validity of those reservations. When States accepted a treaty on condition that it was in conformity with their domestic legislation while reserving to themselves the possibility of amending their legislation as they sought fit, it seemed clear that such a reservation was not in keeping with the rules governing the regime of treaties. That being said, a State could formulate a reservation with regard to a particular provision of a treaty that might not be in conformity with its domestic legislation at a given moment, while stipulating that as its legislation was brought into line with the treaty the reservation would change. The State could then withdraw it, as the Commission had already agreed. It was obvious, however, that a State could not formulate a reservation having a limited objective while keeping open the possibility that that it could be subsequently expanded as the State’s legislation evolved, for that would completely distort the entire treaty system.

39. Mr. KOLODKIN noted first of all that in its work on reservations to treaties the Commission was trying to define a number of principles with a view to providing practical guidance. The objective was not to establish rules of law but to draw on the practice of States and international organizations in the context of the 1969 and 1986 Vienna Conventions in order to formulate recommendations intended for all those who applied international law so that they could find their way in an area that was particularly complex, insofar as the implementation of such treaties had given rise to a number of unanswered questions. That was why the content of the draft guidelines proposed by the Special Rapporteur did not appear in the 1969 and 1986 Vienna Conventions or differed from the language of those instruments in several cases, and it was therefore important to move cautiously. That being said, most of the draft guidelines reflected problems that did indeed arise in the context of treaty relations and that the Commission must try to solve one way or another in the absence of corresponding provisions in the 1969 and 1986 Vienna Conventions.

40. Reviewing the various draft guidelines proposed by the Special Rapporteur, he suggested that several of them needed to be looked at in greater depth. For example, the first version of draft guideline 3.1.5 proposed in paragraph 7 of the Special Rapporteur’s note (A/CN.4/572) fell far from the desired mark. Technical terms such as the “architecture of the treaty” or the “balance of the treaty” did not provide the necessary clarifications where the definition of the object and purpose of the treaty was concerned, even if they did help in determining the incompatibility of a reservation with the object and purpose of the treaty. Meanwhile, the second version proposed in paragraph 8 of the same document was not really a definition. If the Commission wished to define the concepts of the object and purpose of a treaty, it would be better to retain the text proposed by the Special Rapporteur in his tenth report, which could serve as a basis for the work of the Drafting Committee. He supported draft guidelines 3.1.6 to 3.1.13, for they clearly reflected needs that had been identified in practice, and he believed that they could be referred to the Drafting Committee.

41. As for draft guidelines 3.2 and 3.3, he shared Mr. Candidti’s views regarding the appropriateness of using the notion of validity of reservations, a notion that did not exist in the 1969 and 1986 Vienna Conventions, even if the Commission was already using it and he himself had operated on the basis of that notion as Chairperson of the Drafting Committee for the topic of reservations to treaties. If one was going to talk about the validity of reservations, then it was entirely logical to speak also of their invalidity. And yet he continued to have doubts on the matter. To a certain extent, a reservation was a proposal to include an agreement in a treaty, and the 1969 and 1986 Vienna Conventions specified the cases in which that could or could not be done, without going any further; thus the question of the invalidity of reservations arose only when there was a contradiction between the reservation and the imperative norms of international law. As the Special Rapporteur presented it, however, the notion of the invalidity of reservations applied not only to reservations to specific provisions of a treaty setting forth an imperative norm of international law but also to many other reservations. He therefore questioned whether it was right to follow that approach, and wondered whether the notions of permissibility and impermissibility, on which the 1969 and 1986 Vienna Conventions were based, might not be more appropriate. When it was a competent international body that assessed the invalidity of a reservation there was no problem, for the decision relating to the invalidity of the reservation could be challenged by all the parties to the treaty. However, when it was a State party to the treaty that ruled on the invalidity of a reservation, the reservation in question could then be invalid for some States but valid for others. In his view, that was somewhat contradictory, and draft guidelines 3.3.3 and especially 3.3.4 were imprecise.

42. Draft guideline 3.2.3 (Cooperation of States and international organizations with monitoring bodies) stressed the need to take fully into account the monitoring body’s assessment of the validity of the reservation. Yet the decisions of such bodies were seldom binding, and he did not see why the decisions they took on the basis of their competence for determining the validity of reservations should be considered to be implicitly binding. If the draft guideline was transmitted to the Drafting Committee, he hoped that the word “fully” would be deleted.

43. He also failed to see why draft guideline 3.3 should contain a reference to the “implicit” prohibition of a reservation; he would like to see the text split in two, with the
first part explaining when a reservation was invalid and the second emphasizing that there was no need to distinguish between various grounds of invalidity. He likewise did not see why draft guidelines 3.1.1 and 3.3.2 addressed the issue of substantiating invalidity in a different manner. Moreover, the statement that the formulation of an invalid reservation produced its effects within the framework of the law of treaties should not be included in draft guideline 3.1.1; the issue should be dealt with in the commentary. Lastly, he wished to point out that draft guideline 3.3.4 referred to the competence of the depositary, even though the Commission had decided not to address that issue.

44. Mr. PELLET (Special Rapporteur) said he was most surprised that Mr. Kolodkin, who was Chairperson of the Drafting Committee for the topic of reservations to treaties, should go back on what had clearly been decided in the Drafting Committee and accepted by the Commission. According to him, the discussion of the notion of validity could only be a source of confusion. In fact, the 1969 and 1986 Vienna Conventions clearly set out the conditions under which reservations could or could not be formulated, which was precisely what was meant by the notions of validity or invalidity.

45. Mr. MANSFIELD thanked the Special Rapporteur for his detailed analysis. With regard to the revised version of draft guideline 3.1.5, he said that he remained somewhat sceptical as to the value of trying to define the object and purpose of a treaty. The discussion of the history and meaning of the term in paragraphs 72 to 89 of the Special Rapporteur’s tenth report were probably more helpful than any effort to reduce that discussion to a few short phrases. That said, he had no strong objection to either of the two new versions proposed by the Special Rapporteur, which the Drafting Committee might be able to improve; in the end, however, he doubted that any wording would significantly help in defining the object and purpose of a treaty. As to the method to be employed in determining the object and purpose of a treaty, the Special Rapporteur had noted in paragraph 86 of the tenth report that it was not possible to devise a single method and that a certain amount of subjectivity was inevitable. Nevertheless, draft guideline 3.1.6 provided a useful starting point by elaborating what was meant by the term “context” in paragraph 2, although the last part of that paragraph, which said that the context included the articles that determined its basic structure and thus excluded other articles of the treaty, was hard to reconcile with the first paragraph, which said that to find the object and purpose of the treaty it was necessary to read the treaty as a whole. He therefore agreed with other members that it would be best to delete that last phrase.

46. He fully endorsed the underlying ideas in draft guidelines 3.1.7 and 3.1.9 but thought that the guidelines should be modified to reflect the fact that vague and general reservations and reservations to a provision setting out a rule of *jus cogens* were not inevitably contrary to the object and purpose the treaty. He could support the thrust of the other draft guidelines in that set, although he thought that in several cases some refinement of the text by the Drafting Committee might be needed.

47. He supported the thrust of draft guidelines 3.2 to 3.2.4, relating to competence to assess the validity of reservations. However, the phrase “Competence to assess” in the title of draft guideline 3.2 was rendered “competent to rule” in the body of the text. The former phrase was preferable in his view because it was more accurate and consistent with the Commission’s earlier preliminary conclusions. Perhaps the guideline should also spell out that that competence was dependent upon the terms of the treaty. He did not think that the reference to domestic courts, which was included in square brackets, was necessary. The same was true for the second sentence of draft guideline 3.2.2.

48. He supported the thrust of draft guidelines 3.3 and 3.3.1 but thought that the last phrase in the former was unnecessary, while in the latter the text needed to be clearer. While he tended to agree with the Special Rapporteur’s analysis that had led him to propose guidelines 3.3.2 and 3.2.3, he believed that until the consequences of nullity had been studied it was premature to specify that a reservation that did not fulfil the conditions of validity set out in article 19 of the 1969 Vienna Convention was null and void. More generally, he thought that the Commission would need to take a position on the relationship between articles 19 and 20 of the 1969 Vienna Convention; accordingly, he was not very much in favour of draft guideline 3.3.4. That issue would be best dealt with in the context of the right of parties to amend a treaty by general agreement at any time.

49. Mr. RODRÍGUEZ CEDEÑO thanked the Special Rapporteur for the quality and thoroughness of his report and commended him for having sought to define the term “object and purpose of the treaty”, the meaning of which was difficult to grasp and which was subject to numerous interpretations. The definition proposed was acceptable, even if, as Ms. Escarameia in particular had noted, the phrase “the essential provisions of the treaty” referred back to a certain number of elements that might not be accessible to the person interpreting the treaty. The Special Rapporteur’s indication in draft guideline 3.1.6 as to how the object and purpose of the treaty was to be determined was therefore to be welcomed.

50. The reference in draft guideline 3.2 to domestic courts, which appeared in square brackets, was not necessary, as domestic courts were an integral part of the State under international law. It would also be important to indicate that the decisions of bodies monitoring the implementation of the treaty as to the validity of a reservation were binding. Draft guideline 3.2.1 was acceptable, even if the text could be improved somewhat by the Drafting Committee: in the first paragraph, the phrase “for the purpose of discharging the functions entrusted to it” did not appear very useful, while in the second paragraph the word “findings” should be replaced by a stronger term that denoted the obligatory character of the assessment by the bodies in question. The second sentence of draft guideline 3.2.2, on the adoption of protocols, conveyed an interesting idea which States ought to pursue.

51. As for draft guideline 3.2.3, the second sentence could in fact constitute a separate guideline or be incorporated in guideline 3.2.1. Implementation of
the decision of a monitoring body was not a matter of cooperation but had to do with the decision’s binding nature. Draft guideline 3.2.4 was acceptable, but could also be incorporated in draft guideline 3.2.1. Draft guideline 3.3 should be adopted, as should draft guideline 3.3.1, although the second sentence should be deleted. Lastly, he endorsed draft guidelines 3.3.2, 3.3.3 and 3.3.4, although he shared Mr. Kolodkin’s views on the latter insofar as the role of the depositary was concerned. All the draft guidelines could be transmitted to the Drafting Committee.

52. Ms. XUE said that, like other members of the Commission, she would have liked to have had more time to consider the tenth report of the Special Rapporteur, which dealt with what was probably the most important aspect of the topic. She recalled that she had made observations at the previous session with regard to the first chapters of the report; accordingly, she would limit her remarks to the part which dealt with assessment of the validity of reservations and the consequences thereof. In that connection, whether one looked at competence to assess the validity of reservations or at the consequences of the invalidity of a reservation, it must be acknowledged that the Special Rapporteur had strayed significantly from positive treaty law and State practice. In the case of competence, for example, draft guideline 3.2.1 began with the words: “The following are competent to rule on the validity of reservations”. In practice, however, contracting parties could assess reservations and decide whether or not to accept them or to formulate an objection; bodies created by the treaty could also have the power to assess reservations, but there was a distinct difference between assessing and “ruling on”. She thus had serious reservations on the matter.

53. In deciding who was competent to assess the validity of reservations, she believed that where dispute settlement bodies were concerned, the current wording of draft guideline 3.2 was too general, since such bodies could rule on the validity of reservations only if they were expressly mandated to do so. The Special Rapporteur did use the word “may”, but that was not sufficient to eliminate any ambiguity. Moreover, competence to interpret or apply the treaty was not the same as competence to rule on the validity of reservations. In the case of monitoring bodies, the situation was more complex, and the draft guideline should clearly indicate that unless such bodies had a mandate to rule on the validity of reservations and acted within the framework of that mandate, they were not competent to rule on validity.

54. Draft guideline 3.2.1 was not sufficiently clear to be useful to States; the term “same legal force” in particular should be clarified. More generally, she felt that draft guidelines 3.2.1 to 3.2.4 were not always based on State practice, and some of them, which were based on assumptions, ran the risk of being misunderstood. The guidelines must be compatible with State practice and clarify it. They also had to be able to answer any questions States might raise. Thus draft guideline 3.2.4, which contemplated a case in which several bodies were competent to assess the validity of reservations, was unclear. It did not answer any questions that States might raise, such as what would happen if the various bodies disagreed or if the parties to the treaty and the monitoring body had different ideas as to the validity of a reservation.

55. With regard to the consequences of the non-validity of a reservation, she said she would like to come back to the term “permissibility”, at the risk of upsetting the Special Rapporteur. While the Commission had indeed focused its attention on the terms “permissibility” and “validity” at the previous session, the differences between those two terms had not been very obvious at the time. In fact, when one read the draft guidelines on consequences of non-validity which the Special Rapporteur had proposed, it became clear why he had tried so hard to distinguish between the two terms. Thus one found in the draft guidelines the terms “validity”, “null and void” and “nullity”. That was not a question of terminology but rather one of substance: under the law of treaties, and particularly in the context of the 1969 Vienna Convention, States parties could only decide whether or not to accept a reservation in order to define their relationship with the reserving State, but they had no authority to rule on the validity or nullity of a reservation, because the law of treaties was based on the principle of free consent.

56. In draft guideline 3.3.1, the first sentence was not precise enough for a guideline. One might well ask what was meant by the phrase “within the framework of the law of treaties”. Moreover, the draft guideline gave no indication of the consequences of non-validity. The second sentence, on the other hand, reflected a basic principle in the matter. The term “null and void” in draft guideline 3.3.2 was not acceptable, for such a reservation could have effects in certain situations.

57. As for the last two draft guidelines proposed, 3.3.3 and 3.3.4, she agreed with the view expressed by several members of the Commission that they appeared to suggest a contradiction. The first draft guideline said that acceptance of a reservation by a State did not change the nullity of the reservation. In practice, if a State accepted a reservation the treaty was applied with that reservation in the State’s treaty relations with the reserving State. One might ask how many States had to accept the reservation before that acceptance could be taken into consideration. That seemed to be in contradiction with the underlying idea of the first paragraph of draft guideline 3.3.4. As for the second paragraph of that guideline, the depositary should not act as an arbitrator in the context of reservations.

58. Mr. OPERTTI BADAN said that owing to the shortage of time he would limit his remarks on the excellent tenth report on reservations to treaties to two draft guidelines.

59. Draft guideline 3.1.7, on vague, general reservations, was extremely important, for it often happened that a reservation was vague in form or content or both, which prevented the parties to the treaty from assessing its scope. A reservation could also be general, which was different; a reservation containing references to constitutional provisions was a good example of such a reservation. It could be said that a general reservation fell into the grey area separating reservations from interpretative declarations. Nevertheless, he doubted that the Commission should attach such a radical consequence as the one the
Special Rapporteur was proposing to the vague or general character of a reservation, namely that it became incompatible with the object and purpose of the treaty.

60. As for draft guideline 3.3.1, a text that had elicited very distinct views, he felt that the second sentence enunciated a widely recognized principle, but that it should be emphasized that the formulation of an invalid reservation might be an indicator that a State might take a potentially unlawful position in the future.

The meeting rose at 1.05 p.m.

2891st MEETING

Tuesday, 11 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameea, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Montaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.


[Agenda item 7]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on reservations to treaties.

2. Mr. PELLET (Special Rapporteur) said that the debate had been rich and had afforded him a number of insights. The length of his tenth report on reservations to treaties and the late submission of parts thereof accounted for the Commission’s failure to complete its discussion of the report at its fifty-seventh session in 2005.207 Of the 24 draft guidelines proposed, only 5 had been referred to the Drafting Committee and had subsequently been adopted on first reading.208 In his remarks, he would take account of comments made at both the previous and the current sessions on draft guidelines 3.1.5 to 3.1.13, contained in the third section of the report. Draft guidelines 3.2 to 3.3.4, contained in the last section of the report had been discussed only at the current session.

3. He was grateful to all those members who had spoken and disappointed that some had not. The task of a Special Rapporteur was often a thankless one, and the best recompense he could hope to receive was for members to show an interest in the reports submitted. If that interest was expressed in the form of criticism, all well and good, especially if the criticism was constructive. When special rapporteurs and other members of the Commission engaged in real dialogue, leading to rapid and often vigorous exchanges of views within the Drafting Committee, the Commission did its best work; the resulting drafts were the fruit of collective efforts that must be respected. Hence his annoyance with recent statements that had again raised what was in his view the purely terminological question of the “validity” of reservations. The Commission had resolved that question and he hoped that those who had already had an opportunity to express their views on the matter would not revert to it.

4. He had been surprised to hear some members complain of not having had enough time to consider the tenth report. True, it was voluminous and covered some thorny issues, but it had been distributed a year previously, which seemed to allow sufficient time for reading, reflection and reaction. It had also been alleged that insufficient time had been set aside for discussion of the report, yet that time had not been used to best advantage, as most speakers had chosen to delay making their statements until the last meeting devoted to the topic. While most statements had been constructive, others had given the impression that speakers had read the draft guidelines without consulting the report that introduced and explained them. He would confine his remarks to questions not answered in the report.

5. Turning to the draft guidelines proposed in the tenth report, which were also grouped in its annex, he noted that draft guidelines 3.1.5 and 3.1.6 formed a whole. The first, also addressed in the Special Rapporteur’s note on it (A/CN.4/572), in which he proposed two new alternative wordings that were more precise than the formulation proposed at the previous session, aimed at defining the concept of object and purpose of the treaty. The second sought to indicate, albeit very concisely, how the object and purpose were to be determined in respect of a specific reservation in a given situation. Despite the lingering doubts expressed by some members, a substantial majority now seemed to favour referring the two draft guidelines to the Drafting Committee. Most members acknowledged that the two draft guidelines were complementary, even though some considered that draft guideline 3.1.5 was unworkable and of no obvious usefulness, while others had found it necessary and indeed essential, and one member had somewhat optimistically suggested that a so-called “magic formula” might be found by combining the three alternative versions. In all honesty he was not convinced, since the very concept of object and purpose of the treaty conserved, not some element of mystery, as in practical terms it was not as enigmatic as had been claimed, but an element of subjectivity that was inherent in such concepts, extremely frequent in law and by no means exceptional, as had been suggested. Many speakers seemed to agree that it might be useful to try to capture that subjectivity. That did not mean, however, that there was agreement as to the best wording. A majority had expressed a preference for the first of the two new alternatives in the note, at least one member had opted for

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207 See footnote 197 above.

208 For the study of the report of the Drafting Committee (A/CN.4/L.685 and Corr.1), see the 2883rd meeting above.
the second, one had chosen the version proposed in the
tenth report, and one wanted a mix of all three. The Com-
mission should leave it to the Drafting Committee to look
into the matter, bearing in mind that the discussion had
been fairly general. The three versions did not actually
differ substantially in spirit.

6. While a majority of members wanted something
along the lines of draft guideline 3.1.5 to be included in
the Guide to Practice, few clear-cut proposals for substan-
tive changes had been made. Four, however, did deserve
mention, either because other members had supported
them or because they offered food for thought for the
Drafting Committee, even though he himself did not nec-
essarily endorse them.

7. First, he agreed, at least on an analytical plane, with
the view expressed at the previous session that States
could hold differing opinions on what was essential in a
treaty. That was precisely why an effort should be made to
identify the point of equilibrium, which he had expressed
in the idea of the “general architecture of the treaty” or
“balance of the treaty”. He was aware that that idea had
not commanded popular support, especially as not all
treaties, particularly human rights treaties, were grounded
in a balance between the rights and duties of parties. He
would not press for the use of the expression “general
architecture of the treaty”, although the idea behind it
had been viewed as generally acceptable. A reference to
“rules, rights or obligations”—rather than “and obliga-
tions”—had been seen as preferable to the phrase “essen-
tial provisions”, a central feature of the proposal he had
made at the previous session.

8. Secondly, some speakers had wrongly interpreted his
position as opposed to the idea that a treaty represented
a balance among the sum total of the reciprocal conces-
sions made by the negotiators. He by no means opposed
that idea. Moreover, he agreed on the need to acknowl-
edge that a reservation could not disappoint the legitimate
expectations of other parties, that what mattered was the
underlying purpose of the treaty, and that the context in
which the treaty was adopted had to be taken into account.
However, he rather doubted whether those ideas could or
should be expressed in the body of the Guide to Practice,
and thought it might be more realistic to develop them in
the commentary, although he would have no objection if
the Drafting Committee managed to include them in the
text of the Guide itself.

9. The third noteworthy point was that some speakers
considered that the first alternative wording of draft guide-
line 3.1.5, preferred by the majority, indeed by themselves
in some cases, was too rigid and offered too much scope
for the formulation of reservations. The phrase “raison
d’être” had been viewed as misleading, because a treaty
could have a number of raisons d’être. He was not unsym-
pathetic to that argument. He was less convinced by the
suggestion that the word “seriously” in the second alter-
native wording should be deleted, because the essence of
a reservation was that it affected the integrity of the treaty;
if the effect was innocuous, the object and purpose of
the treaty were not threatened. Thus, if “seriously” was to
be deleted, a way must be found of making it clear that the
essential elements must be preserved, whereas secondary
elements could be set aside by a reservation.

10. Fourthly, and lastly, he was in favour of the sug-
gestions to amend the title of draft guideline 3.1.5, for
instance by adopting the title of the second alternative,
“Incompatibility of a reservation with the object and pur-
pose of the treaty”, even if the Drafting Committee based
its discussion on the text of the first alternative.

11. Turning to draft guideline 3.1.6, he noted that it had
given rise to no objections overall, but that some impor-
tant comments had been made on its wording. Concern had
been expressed that it did not include all the elements con-
tained in articles 31 and 32 of the 1969 and 1986 Vienna
Conventions, and in particular, that there were no refer-
ces to agreements concluded subsequently. That idea
raised the same type of problem as did the reference to sub-
sequent practice, which he had placed in square brackets.
Although a majority of members had advocated deletion of
the square brackets, and hence the inclusion of such a refer-
ence, he remained in two minds. He agreed that a reference
to practice should be retained in the body of the Guide, that
a treaty was not graven in stone, and that the interpreta-
tion of its provisions evolved over time. However, he was
also sympathetic to the argument that a reservation was
made upon accession to a treaty and thus usually, although
not always, at the start of the treaty’s life, and that prac-
tice therefore had little relevance. While the scope of some
treaty obligations could evolve over time, it was not clear
whether the same was true of the object and purpose of the

treaty. The object and purpose were what the negotiators
had been aiming at, but the means of achieving them could
evolve significantly. Still, he was not sure that that evolu-
tionary perspective was entirely appropriate to the concept
of object and purpose. Having listened to other members,
he still thought it would be better not to mention practice in
the Guide itself, and instead to refer to various possibilities
in the commentary; that, however, was a matter on which
the Drafting Committee could decide.

12. One member had questioned the use of the phrase
“basic structure” in paragraph 2 of draft guideline 3.1.6.
He continued to think it was a useful idea. In any event,
none of the remarks he had just outlined would militate
against the referral of the pair of draft guidelines 3.1.5
and 3.1.6 to the Drafting Committee, which was the out-
come he ardently desired.

13. The same should be true, on the whole, for draft
guidelines 3.1.7 to 3.1.13. Some speakers had simply
expressed their support for those draft guidelines, which
were merely illustrations of draft guideline 3.1.5. Oth-
ers had been more critical but, with one notable excep-
tion, had not called into question the general, pragmatic
approach he had adopted. One member, Ms. Escarameria,
had proposed the addition of a category of reservations,
on the basis of the Special Rapporteur’s entirely empirical
observation that it was in those areas that the main diffi-
culties arose. The new category was to be reservations on
the application of treaties in domestic law. While he had
no objection in principle to that proposal, he was unsure
precisely what reservations were meant and how they
differed in practice from those addressed in draft guide-
line 3.1.11. Furthermore, he could not see what specific
problems such reservations might raise. While any number of draft guidelines could be proposed on any number of subjects, the point was to develop general guidelines in response to problems that actually arose. Nevertheless, the Commission should not rule out the possibility that, on the basis of a note to be prepared by the author of the proposal, and if it became convinced that there was a specific problem to be resolved, the Drafting Committee might propose an additional draft guideline. Such an approach would not set a precedent, as the plenary would have the last word, and in any case the new draft guideline would only be yet another illustration of draft guideline 3.1.5.

14. Between them, draft guidelines 3.1.7 to 3.1.13 had elicited a number of comments that he would now review. With one exception, no member had objected to those draft guidelines as a whole. A single member had objected to draft guidelines 3.1.7 and 3.1.8, and another to draft guidelines 3.1.12 and 3.1.13, deeming them to be unnecessary. But no other member had opposed their referral to the Drafting Committee.

15. On draft guideline 3.1.7, many speakers had expressed satisfaction with the text proposed. One had merely pointed out that it was drafted in very general terms, and another had stated that “vague” and “general” were not synonymous. While he agreed, he thought that the matter could be discussed in the commentary. Many speakers had said that the vague and general nature of a reservation could cause it to be invalid, but not necessarily on grounds of being incompatible with the object and purpose of the treaty. That remark, which he entirely agreed, he again thought that such a reservation should not be considered invalid. Its invalidity arose, however, not from its being contrary to the object and purpose of the treaty, but instead, as indicated in the draft guideline’s wording and perhaps to a change in its location and numbering. The Drafting Committee would have to look into the matter, which would probably be the most complicated problem it would have to resolve. Further, some speakers said that a vague reservation to a subsidiary provision did not bring the reservation into conflict with the object and purpose of the treaty. While he agreed, he again thought that such a reservation should nevertheless be considered invalid. Its invalidity arose, however, not from its being contrary to the object and purpose of the treaty, but instead, as indicated in the Belilos case by the European Court of Human Rights, because it was drafted in a way that prevented other States from identifying its scope, thus enabling its author to modify arbitrarily the scope of the obligations undertaken, with no control by other parties or, where applicable, by treaty monitoring bodies.

16. One speaker had opposed draft guideline 3.1.8 on the grounds that a reservation must always be in writing. He failed to see the relevance of that remark. Another speaker had proposed reversing the order of paragraphs 1 and 2. That proposal had not been taken up, although one or two other speakers had wished it to be more clearly indicated that a customary norm set forth in the treaty but set aside by the reservation continued to apply. The current wording had been explicitly endorsed by a good many speakers, although nothing prevented the Drafting Committee from returning to it.

17. On draft guideline 3.1.9, opinions had been more divided. While many speakers had endorsed the text, others had echoed the doubts he himself had expressed at the previous session, namely that a reservation to treaty provisions setting forth a rule of jus cogens raised the same problems as a reservation to a provision setting forth a customary norm and was invalid only if, in modifying the legal effect of the provision in question, the reserving State intended to leave open the possibility of conducting itself in a manner that violated jus cogens. That was quite logical and in no way impaired the non-derogable and peremptory nature of the norms in question, since those peremptory norms were not breached. What might happen, however, was that where, for example, the jus cogens provision covered the competence of the ICJ to interpret and apply the treaty, the Court would no longer have such competence. Nevertheless, the jus cogens norm would continue to apply to the reserving State in the most indubitable, non-derogable and peremptory manner possible.

18. He agreed with the comment that draft guideline 3.1.9, however it was worded, was grounded in article 53 of the 1969 Vienna Convention, not in article 19 (c).

19. On draft guideline 3.1.10, no one had opposed the underlying principle, which differed from the principle underlying draft guidelines 3.1.9 and 3.1.10, but several members had expressed concern that it was fairly permissive, whereas reservations to provisions on non-derogable rights should constitute exceptions and be rigorously circumscribed. He was not insensitive to that concern and wondered whether a negative formulation might be used, along the lines of “A State or an international organization may formulate a reservation to a treaty provision relating to non-derogable rights only when …”, in order to underline how dangerous such reservations were. One member had suggested that, in order to assess whether such reservations were compatible with the object and purpose of the treaty, it was the treaty as a whole, rather than the provision regarding which the reservation was formulated, that should be analysed. He had no firm views on that point, for which no reasons had been adduced by the speaker, but the Drafting Committee might usefully discuss it.

20. On draft guideline 3.1.11, the fundamental principle had not been disputed, even though some members had had difficulty distinguishing it from the principle underlying draft guideline 3.1.7. In fact, there were very few clear-cut cases: often a single reservation raised issues covered in draft guidelines 3.1.7, 3.1.8 and 3.1.11, for example. In practice, all one could do was to propose general solutions which the interpreters of the law, be they judges, diplomats or academics, would have to combine as best they could. Certainly, a vague, general reservation was not at all the same thing as a reservation relating to domestic law, even though reservations justified by domestic law were often also vague and general, something that doubly justified considering them to be invalid.
21. One member had proposed that the Commission should revert to the text of the amendment submitted by Peru at the Vienna Conference, the text of which was reproduced in paragraph 109 of the tenth report. It was debatable whether the Guide to Practice could incorporate an amendment that had been rejected, and the Commission generally sought not to go back to the wording of the Vienna Convention. Nevertheless, it might be useful to look into the reasons for the amendment’s rejection. If the Vienna Conference had merely considered that the point made was self-evident or that the wording was too detailed for inclusion in the Convention, as had often been the case during the travaux préparatoires, nothing would prevent the Commission from reproducing it. It certainly had the merit of being extremely clear.

22. In a similar attempt to make the text more exacting, another member had considered that States should be required to cite a specific provision of their domestic law in their reservation. He had no firm views on that suggestion, but having re-read the proposed provision, he had to concede that it was indeed fairly “soft”; the Drafting Committee could perhaps give it more muscle. A secondary question was whether the phrase “domestic law” could also refer to the internal rules of international organizations. Personally he thought that went without saying and that a paragraph in the commentary would suffice to make the point; there again, the Drafting Committee could decide.

23. Turning to draft guideline 3.1.12, he said that, as was usual when human rights were at issue, the draft guideline had been the subject of many comments and considerable criticism. The criticism had focused mainly on drafting, although one or two members had found the draft guideline pointless, which to his mind was odd, given the countless problems which reservations to general human rights treaties continued to pose—and his stress on the word “general” was intentional. Some of the comments suggested a hasty reading of his tenth report, and even of draft guideline 3.1.12. As he had sought to explain in paragraph 100 of the report, the draft guidelines were not about human rights treaties in general, still less about human rights provisions which might be included in broader treaties. Instead, they were about general human rights treaties only. He noted, and the Drafting Committee would no doubt do so as well, that some members had criticized the proposed wording as being somewhat too general, and that there had been a number of more specific proposals, for example to replace the phrase “the right which is the subject of the reservation” by “the provision which is the subject of the reservation”, a proposal which seemed harmless enough, but which could well be important and should be given some thought. There had also been a proposal to refer more specifically to the interrelationship between the various rights set out in the treaties, although that was precisely what he had in mind in using the words “the basic structure of the treaty”. According to one member, it was important to proceed on the assumption that reservations to general human rights treaties were not valid, although he personally had serious doubts about that position, which seemed even more radical than the one taken by the Human Rights Committee in its extremely exacting General Comment No. 24.\(^{209}\) 210

24. Aside from the isolated opinion of one member who had raised a general objection to the entire group of draft guidelines, draft guideline 3.1.13 had given rise to conflicting comments, because, of the few members who had commented on it, one or two had found it too rigorous or restrictive, whereas one or two others had considered it to be too broad. He felt that he must have found the golden mean, especially since, as he had pointed out when introducing his report, the February 2006 judgment of the ICJ in the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda) case confirmed the draft guideline’s main thrust. He was not in favour of the proposal by one member to divide the draft guideline into two separate guidelines, one on the provisions relating to dispute settlement, and the other on treaty implementation monitoring mechanisms, because the problem was the same in both cases.

25. In sum, with a very few exceptions, draft guidelines 3.1.7 to 3.1.13 had not prompted any objection in principle, and it should be possible to refer them to the Drafting Committee.

26. The same conclusion could be drawn with regard to draft guidelines 3.2 to 3.2.4, on which he wished to make a number of general remarks before considering them one by one. As with draft guidelines 3.3 to 3.3.4, the criticisms voiced on a number of points were mutually incompatible: he had been taken to task, on the one hand, for brushing aside the 1969 and 1986 Vienna Conventions and existing law, and on the other, for being overcautious and excessively faithful to that same law. Be that as it might, he drew the line at contradicting the provisions of the Vienna Conventions. That said, he also sought to encourage the Commission, within those limits, not to lag behind the evolution of ideas or cling to conservative positions. If those States most attached to the notion of State sovereignty criticized the Commission in the Sixth Committee and convinced a majority that it was wrong to propose new ideas, then so be it, but it was not for members of the Commission, as independent experts, to anticipate the decisions of States, just as members must not systematically espouse every exotic theory that surfaced in non-governmental organizations or universities. The Commission’s job was to try to find the golden mean, which would result in coherent drafts that served the international community as a whole.

27. With regard to the competence to assess the validity of reservations and the consequences of the non-validity of a reservation, he had had the impression that old, pointless discussions had re-emerged between the proponents of the absolute integrity of treaties, for whom reservations were an absolute evil, and those who advocated total freedom for States with regard to reservations, who considered that States could do whatever they saw fit, because a State could always be found that did not object to a reservation. He did not identify with either of those two extreme positions, which, fortunately, were not supported by many members. Reservations were not necessarily an evil, regardless of what some thought. They made it possible to increase participation in multilateral treaties. They should not, however, render treaties devoid of substance. For example, it would be disastrous if the treaty regime were to be broken up and replaced by a multitude of...
bilateral relations modulated by States, acting unilaterally without regard for others. As provided under the 1969 and 1986 Vienna Conventions, account must be taken of the object and purpose of the treaty, a notion that the Commission was struggling to pin down. With particular regard to the competence to assess the validity of reservations, no member contested that contracting States and international organizations had competence to do so, in keeping with the principle referred to in the first indent of draft guideline 3.2. He had listened with interest to the comments of a number of members on the relation between that very general principle and article 20 of the 1969 and 1986 Vienna Conventions. He would not dwell on those stimulating comments, which should be taken up when the Commission addressed the question of the effect of reactions to reservations, i.e. acceptance and objections. Likewise, it was when it came to discuss the substance of article 20 that the Commission should consider the legal significance of an objection based expressly on the incompatibility of a reservation with the object and purpose of the treaty, even though the objecting State agreed to enter into a treaty relationship with the reserving State. The practice of States in that respect was most disturbing. The Commission had put the question to the Sixth Committee the previous year, but he was not sure that the very vague responses received were of much use in resolving the problem.

28. The comments of members on draft guideline 3.2 had focused mainly on the second and third indents. Leaving aside drafting questions, he thought that the basic problems posed by the two indents could be addressed together, since the main problem also had to do with the three draft guidelines which followed. A number of members had been concerned about the competence of which he supposedly conferred—or refused to confer—on those dispute settlement or monitoring bodies. He stressed that he neither conferred nor refused to confer anything, and that it was neither his role nor that of the Commission, at any rate in the framework of the draft guidelines, to confer or to refuse to confer any competence whatsoever on the bodies in question to assess the validity of reservations. All that the Commission could do, in the light of practice and the general competence conferred on those bodies by the treaties that established them, was to note, first, that those bodies could assess such validity, as stated in the second and third indents of draft guideline 3.2 and the first paragraph of draft guideline 3.2.1: that was the practice, as the Commission had clearly stated in 1997 in its preliminary conclusions. Secondly, it could also note that, in any case, that assessment did not in any way bind States if the bodies in question did not have competence under their statute to take mandatory decisions. That clearly emerged from the second paragraph of draft guideline 3.2.1 and the last sentence of draft guideline 3.2.3, and he did not understand why some members accused him of asserting the contrary, especially since, thirdly, even if a monitoring body was not vested with decision-making power, States must consider in good faith the position which that monitoring body took on the validity of the reservation to the treaty in respect of which it was competent and which conferred its competence on it. That did not mean that this assessment was binding, as made clear in the first sentence of draft guideline 3.2.3. Fourthly and lastly, draft guideline 3.2.4 took the precaution to spell out that in any case, the existence of parallel mechanisms did not in any way exclude the competence of States to assess the validity of reservations. That clearly emerged from the text of the draft guideline, and also in the report, which made the point more forcefully still. The content of the draft guidelines was not only strictly in conformity with the Commission’s preliminary conclusions of 1997, with one slight nuance, which he had discussed at length at the outset of the debate, but was based on the competence—existing by virtue of the treaties which conferred that competence—of dispute settlement bodies or monitoring bodies, a competence which he did not propose to expand. If some members had the opposite impression, then either they had misread the text or he had not made himself clear.

29. On draft guideline 3.2, he agreed with the proposal by a number of members to bring the chapeau into line with the title by replacing the words “competent to rule on” with “competent to assess”. That would be a useful clarification. On the other hand, he was not persuaded that the same should be done in the second indent, as one member had proposed. The dispute settlement bodies referred to were those which could, if they had competence, settle disputes on the interpretation and application of the treaty. He had in mind bodies such as the ICJ or an arbitration tribunal. Clearly, in the framework of that competence to settle disputes, if it existed (and it was not a question of conferring it), such bodies could assess the validity of the reservation, but it was important not to confuse their general competence and their competence to assess, even if in a given case their general competence gave them competence to assess. Likewise, notwithstanding a number of suggestions, he did not think that it would be desirable for the second and third indents to specify the limits of the competence of those bodies, as those limits were set out in the three draft guidelines that followed. On another proposal, he saw only merit in replacing the phrase “that may be established by the treaty”, in the third indent, by “that may be established within the framework of the treaty”, if only with reference to the Committee on Economic, Social and Cultural Rights, which had not been established by the International Covenant on Economic, Social and Cultural Rights, but had been a subsequent creation.

30. The great majority of members who had spoken on the bracketed reference to domestic courts had been in favour of its deletion, several suggesting that the question should be taken up in the commentary. He saw no problem with that, but thought that domestic courts might, after all, be called upon to assess the validity of a reservation formulated by their own State, as the precedent of the Swiss Federal Supreme Court in F. v. R. and the Council of State of Thurgau Canton had shown. Accordingly, it would be preferable to delete the word “other” before “contracting States” and “contracting organizations”, to cover the case of an assessment of validity by the courts of the reserving State. He was not in favour of including a reference to the competence of the depositary, as at least one member had suggested, because, as he had pointed out in connection with draft guideline 3.3.4, depositaries did not have competence in that area. Needless to say, his general comments also applied to the individual draft guidelines.

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31. Only two members had commented on draft guideline 3.2.1. One member, who presumably had had the Human Rights Committee in mind, had asked about quasi-jurisdictional bodies. As with jurisdictional bodies, the positions which quasi-jurisdictional bodies could take on the validity of reservations had the same legal value as the other positions which they took on the merits of questions which they considered. If one believed—and he did not—that they had mandatory competence, then their conclusions on the validity of reservations would be binding, whereas if one felt—as he did—that such was not the case, then they merely made recommendations. At any rate, it was not for the Commission to express an opinion on the matter in the present context: it was sufficient to conclude that such bodies did not have more competence to assess the validity of reservations than they had in general. He had no objection to the proposal of another member to specify that the competence of such bodies was limited by the treaty that established them, although that seemed to go without saying and he saw no need to repeat it ad infinitum.

32. Although two members had considered draft guideline 3.2.2 unnecessary, it had been criticized by only two other members, one of whom had suggested relegating the last sentence to the commentary, whereas the other had been more fundamentally opposed to it, arguing that a reference to protocols to existing treaties might constitute an excuse to criticize the past or current behaviour of monitoring bodies. While that might be true, monitoring bodies were not above criticism. The proponents of “human rightsism” might think so, but that was certainly not his own view.

33. On draft guideline 3.2.3, he wondered whether, as had been suggested, it was necessary once again to spell out that monitoring bodies must act within the limits of their competence. He did not see the need, since that went without saying, and such a reference would be very repetitive. If the Commission insisted, he would not object, but it should be noted that the idea was already implicit in the phrase in square brackets “provided that it is acting within the limits of its competence”, at the end of the paragraph. Only one member had commented on the phrase in square brackets, suggesting that it be consigned to the commentary. Another member had proposed that the word “fully” should be deleted. That was reasonable, and in any case he was not certain that such adverbs added anything of value. On the other hand, he did not think that there was any need for two separate draft guidelines covering the differing cases in which the body in question was and was not vested with decision-making power. The solution was different in each case, but the underlying principle was the same: the competence of monitoring bodies to assess the validity of reservations could not differ from their general competence. Perhaps that might be spelled out in a general guideline, in order to avoid repeating the point ad nauseam.

34. There had been little comment on draft guideline 3.2.4. One member had, however, proposed specifying that the draft guideline applied only “in principle”. He wondered why, since the rule was very clear and well established in both theory and practice. However, it had rightly been pointed out that divergent assessments might result from the coexistence of bodies competent to decide on the validity of reservations. That also posed another problem, to which another member had alluded, noting that, in practice, monitoring bodies did not take into account the assessments made by States. Those two comments led him to think that there was a gap in the draft guideline and that, just as draft guideline 3.2.3 provided in principle that States must take into account the assessment of the monitoring bodies, in the same way the monitoring bodies must take into account—and that did not mean that they were bound thereby—any assessment by States of the validity of a reservation formulated by another State. He would have liked to have heard members’ reactions on that point, but it was too late to reopen the discussion. Perhaps the Drafting Committee could address the question and consider whether the Guide to Practice should include a draft guideline parallel to draft guideline 3.2.3 which specified that monitoring bodies should take into account the assessment of States. With that proviso, it should be possible to refer draft guideline 3.2.4, together with draft guidelines 3.2, 3.2.1, 3.2.2 and 3.2.3, to the Drafting Committee.

35. On draft guidelines 3.3 to 3.3.4, which he had hoped to propose in 2005, Mr. Matheson had drawn a distinction between draft guidelines 3.3 and 3.3.1, which he had proposed referring to the Drafting Committee, and draft guidelines 3.3.2, 3.3.3 and 3.3.4, on which he had suggested deferring a decision. Other members had supported that proposal, arguing that although they could endorse the main thrust of the draft guidelines (with the exception, for some members, of draft guideline 3.3.4), it would be preferable to consider those draft guidelines in the light of the positions which would be taken on the effect of objections to and acceptance of reservations. He agreed, and he would not ask the Commission to refer draft guidelines 3.3.2, 3.3.3 and 3.3.4 to the Drafting Committee.

36. Draft guideline 3.3 had attracted broad support, except from one member, who thought that it was unclear, although he was not opposed to it. Another member had proposed deleting the last part of the sentence. Personally, he endorsed the suggestion that the words “express” and “implicit” should be deleted to bring the draft guideline into line with the ones just adopted, which did not make such a distinction.

37. One member had been strongly opposed to draft guideline 3.3.1, arguing that the formulation of an invalid reservation was tantamount to violating the treaty and thus would engage the responsibility of its author. That was not the case, for the reasons set out in paragraphs 189 to 194 of the report, but also because, if an invalid reservation violated anything, it was not the treaty to which the reservation referred, but rather, article 19 of the 1969 and 1986 Vienna Conventions. The problem posed by article 19 was posed not in terms of permissibility but in terms of validity of—as so as not to aggrieve those members who still contested the word “validity”—in terms of the establishment of the reservation, as indicated in article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions, a very important provision pursuant to which a reservation was not established unless it was in conformity with article 19. That was the whole point. It could be the case
that acts which were null and void in domestic law did not engage the responsibility of their authors, and that was the case with regard to reservations to treaties. An invalid reservation would be null, but did not engage responsibility. As to whether or not, as another member had said with regard to draft guideline 3.3.1, it was for the Commission to bridge the gaps in the 1969 and 1986 Vienna Conventions, he continued to think that that was a curious conception of the Commission’s role. In any case, those opinions had not been shared, although one member had suggested retaining only the first sentence of draft guideline 3.3.1, whereas another wanted the Commission to retain only the second sentence. As he saw it, those two sentences clarified each other, although drafting improvements were of course possible. He had been interested by one criticism of the current wording, which had been deemed too categorical, in particular because, it was argued, a reservation contrary to jus cogens would engage the responsibility of its author. That was undoubtedly true, and the Commission could reflect on the matter in connection with draft guideline 3.1.9, but he wondered whether that comment was really relevant to draft guideline 3.3.1, and in any case he had had difficulty finding even a theoretical example. However, the question could be discussed further, and the Drafting Committee might consider whether any drafting changes were needed.

38. In sum, it would be preferable to defer a decision on draft guidelines 3.3.2, 3.3.3 and 3.3.4, even though draft guidelines 3.3.2 and 3.3.3 had not given rise to any major opposition in the Commission. It would nevertheless be a deferral, rather than an abandonment or a consignment to oblivion. For their part, draft guidelines 3.1.5 to 3.3.1 could be referred to the Drafting Committee.

39. Mr. ECONOMIDES said that the quality of the Special Rapporteur’s clear and detailed conclusions was such as to serve as a model for all future conclusions of that type. He felt, however, that the Special Rapporteur had not paid due regard to the complexity of the question of the non-validity of reservations and responsibility of the State. The Commission needed more time to consider the effects of reservations in relation to international law. He therefore proposed that, since draft guidelines 3.3 to 3.3.4 formed a single unit, the Commission should defer consideration of those five draft guidelines, rather than referring draft guidelines 3.3 and 3.3.1 to the Drafting Committee, as the Special Rapporteur proposed.

40. Mr. PELLET (Special Rapporteur) said that, while superficially attractive, the proposal was not logical. Draft guidelines 3.3 and 3.3.1 concerned only the interpretation of article 19 of the 1969 and 1986 Vienna Conventions, whereas draft guidelines 3.3.2 to 3.3.4 needed to be considered in the light of the subsequent reactions of States. He was strongly opposed to reverting at a future session to proposals that had already been considered at great length and that had gained no support.

41. Mr. ECONOMIDES said he found the Special Rapporteur’s arguments unconvincing. Even though there had been no objection to draft guidelines 3.3 and 3.3.1, there seemed no point in considering them in isolation from draft guidelines 3.3.2 to 3.3.4, since the five draft guidelines together formed an indivisible whole. Moreover, even if only one member called for the consideration of one or more draft guidelines to be deferred, the Commission should accede to that request. He therefore requested that a vote be taken on his proposal.

42. Mr. PELLET (Special Rapporteur) said it was not true that the five draft guidelines all posed the same problems: draft guidelines 3.3 and 3.3.1 would not be further amended as to their substance. Furthermore, it was not true to say that the Commission must accede to a request by one member to delay its work. The more positive reason why he wished to see draft guidelines 3.3 and 3.3.1 referred to the Drafting Committee at the present session was that his work would be greatly facilitated if the Commission were to confirm its acceptance of the spirit of those guidelines. He needed to know whether he could take it for granted that subparagraphs (a), (b) and (c) of article 19 of the 1969 and 1986 Vienna Conventions were all to be accorded equal weight when it came to assessing the validity of reservations. That fundamental principle was posed in draft guideline 3.3, and its acceptance could not be postponed indefinitely merely because it was not to the liking of one member. He would not stand in the way of a vote on the matter.

43. Mr. ECONOMIDES said he still had serious difficulty with one of the provisions to be referred to the Drafting Committee. To suggest that the question of responsibility would be governed, not by the rules of international responsibility, but by the provisions of the treaty concerned, would be to call into question the whole corpus of rules on international responsibility. The Commission needed more time to consider that fundamental question of principle. He therefore requested an indicative vote on his proposal that the referral of draft guidelines 3.3 and 3.3.1 to the Drafting Committee should be postponed.

Following an indicative vote, the proposal by Mr. Economides was rejected.

44. The CHAIRPERSON said he would take it that the Commission wished to refer draft guidelines 3.1.5 to 3.1.13, 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee.

It was so decided.


[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

45. The CHAIRPERSON invited the Special Rapporteur to introduce the remainder of his fourth report, as contained in documents A/CN.4/564 and Add.1–2.

46. Mr. GAJA (Special Rapporteur) said that, during the first part of the current session, the Commission had

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* Resumed from the 2884th meeting.
** Resumed from the 2879th meeting.
adopted eight draft articles on responsibility of international organizations, constituting the chapter on circumstances precluding wrongfulness. The commentaries to the draft articles would be available for consideration before the end of the present session. Unlike its predecessors, the section on responsibility of a State in connection with the act of an international organization did not have a parallel in the draft articles on responsibility of States for internationally wrongful acts, and was intended to fill a significant gap in those draft articles. As was well known, article 57 of those draft articles was a “without prejudice” provision which left out the question of the responsibility “of any State for the conduct of an international organization”. The intention that the question should be considered in the present study was expressed by article 1, paragraph 2, of the current draft on responsibility of international organizations, which stated: “The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.” While the issue was controversial, it was now time for it to be addressed.

47. The section on responsibility of a State in connection with the act of an international organization comprised four sections. Section A consisted of some general remarks. The subject of section B was relatively simple. The draft articles on responsibility of States contained a chapter on the responsibility of a State in connection with the act of another State, but said nothing about the responsibility of a State in connection with the act of an international organization. For instance, they considered the case of a State aiding or assisting another State in the commission of an internationally wrongful act (draft article 16), but did not address the question of a State similarly aiding or assisting an international organization in the commission of such an act. It seemed clear that there could not be any difference between a rule concerning a State aiding or assisting another State and that concerning a State aiding or assisting an international organization in the commission of an internationally wrongful act. That was so evident that it could be held that there was no need to restate the rule. Articles 25 to 27 of the present draft articles had, however, been included because the vast majority of States that had responded to the specific question posed by the Commission in paragraph 26 of its report on its fifty-seventh session had expressed a clear preference for the inclusion of such provisions. Moreover, it would seem odd to omit them from a chapter concerned with the responsibility of States in connection with the act of an international organization. He noted that, as stated in paragraph 62 of his report, a State that aided or assisted an international organization might or might not be a member of that organization. If it was, any aid or assistance, direction and control or coercion would have to consist in conduct by the State as a separate legal entity, not as a member of the organization.

48. Section C addressed questions that were to some extent similar to those covered by draft article 15, which related to the case in which an international organization, in order to circumvent an international obligation, influenced a member State through its decisions or recommendations. It would be unusual for a State to be in a position to use similar methods with regard to an organization of which it was a member, but it was possible for States to take advantage of their separate legal personality in order to avoid compliance with one of their international obligations. The organization might or might not be bound by similar obligations. In practice, the most significant cases were those in which the organization was not bound. In those circumstances, one or more States could exploit the fact that the organization would not then be in breach of its obligations.

49. The most likely scenario was that of member States transferring certain functions to an international organization without limiting the exercise of those functions by the organization in order to ensure compliance with member States’ obligations in respect of those functions. One example which sprang to mind was that of commitments under human rights treaties or the Rome Statute of the International Criminal Court. International organizations could not yet accede to any of those instruments. The question which then arose was whether a State that had transferred powers to an international organization could still be held responsible if, for some reason, the organization engaged in action which, if it had been taken by the member State, would have been a breach of its obligations. The European Court of Human Rights in the Waite and Kennedy v. Germany case had found that member States were not “absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution” (para. 67 of the judgement).

50. According to draft article 28, responsibility would arise for a member State if the organization committed an act that, if taken by that State, would have implied non-compliance with that obligation. In view of criticism voiced in the Sixth Committee with regard to the use of the term “circumvent” in draft article 15, different language had been employed in draft article 28. In his opinion, that difference could be justified, even from the point of view of coherency, because the situation covered by draft article 28 was not completely analogous with that envisaged in draft article 15. Draft article 28 referred to the use of a separate legal personality, but in opposite circumstances to those covered in draft article 15. The wording might be improved, but a provision on the subject was certainly needed, as the scenario contemplated in draft article 28 was more likely to arise than that addressed in draft article 15.

51. The final part of the chapter, section D, focused on the controversial issue of the responsibility that member States might incur in consequence of an internationally wrongful act of the organization to which they belonged. The first part of the section was devoted to an analysis of practice and doctrine, in particular the decisions in the Westland Helicopters Ltd. v. Arab Organization for Industrialization case and in proceedings involving the International Tin Council. While those decisions had not primarily considered the issue of member States’

21 See the 2884th meeting, above. Draft articles 17 to 24 are reproduced in Yearbook ..., 2006, vol. II (Part Two), para. 90.
22 Yearbook ..., 2001, vol. II (Part Two) and corrigendum, p. 26, para. 76.
23 Ibid., p. 30.
24 Ibid., p. 27, chap. IV, draft articles 16–19.
responsibility under international law, they contained interesting views on that matter, which he had tried to collate. Most of those views and also the opinions expressed by States in other contexts appeared to suggest that member States were responsible only in exceptional cases for an internationally wrongful act of the organization to which they belonged. The Institute of International Law had reached the same conclusion in its resolution II that it had adopted in Lisbon in 1995 (hereinafter “resolution II/1995”), from which he had quoted at length (para. 89), since it was part of doctrine and reference was frequently made to it. Some logical arguments existed in support of that conclusion, which was endorsed by the majority of legal writers who had dealt with the question of responsibility under international law in the two aforementioned cases.

52. Since the Commission was confining its attention to those cases in which an international organization had a legal personality, once it was admitted that an international organization had a legal personality separate from that of its members, the latter could not be deemed to share a common identity with the organization. If an organization assumed an obligation, it rested only with the organization and a breach thereof entailed only the responsibility of the organization. The organization could not generally be regarded as a common organ or agent of its member States, although it might occasionally act as such. In principle, member States were not therefore responsible for the act of a separate legal entity. That was the logical argument underlying the position that prevailed in practice.

53. Various policy reasons set forth in the report likewise supported that conclusion. For instance, if it were held that member States incurred responsibility if they had voted in favour of a decision entailing a wrongful act of the international organization, consensus would be more difficult to achieve, because member States would wish to distinguish their position in an attempt to avoid that responsibility. A second policy reason was that, if States thought they would incur responsibility when the international organization committed a wrongful act, they would then be prompted to intervene in the process of making any decisions which might possibly involve wrongdoing, thereby depriving the organization of the independence it was granted by its constituent instrument.

54. There were, however, some exceptions to the rule. Practice hinted at the existence and the Institute of International Law had enumerated several in its resolution II/1995. The first exception he had suggested in draft article 29 would apply if a member State had accepted that it could be held responsible with regard to an injured third party. Such acceptance would have to encompass that it could be held responsible with regard to an injured article of a legal personality, once it was admitted that an international organization had a legal personality separate from that of its members, although it might occasionally act as such. In principle, member States were not therefore responsible for the act of a separate legal entity. That was the logical argument underlying the position that prevailed in practice.

55. On the other hand, responsible members of an international organization could be entities other than member States; the Commission’s definition of members had allowed for that possibility. The draft articles were intended to cover international organizations which were members of other international organizations. Although it would therefore seem logical that the draft articles should include a reference to the responsibility of an international organization as a member of another international organization in the event of either of those two exceptional situations arising, he was unsure where such a provision should be placed in the draft text. Perhaps the best course would be to add one or two provisions to chapter IV (Responsibility of an international organization in connection with the act of a State or another international organization).

56. Draft article 29 did not make it clear whether, when the exceptions applied, the responsibility of member States should be regarded as subsidiary. That would normally be the case, but member States could also accept joint and several responsibility. The same would apply when their responsibility was based on reliance.

57. In his report, he had tried to summarize the copious references in the legal literature to some of the most controversial issues raised by the responsibility of international organizations, in the hope that this would provide the Commission with a reasonable basis for its debate.

58. Mr. Sreenivasa RAO, stressing that his comments on the fourth report on responsibility of international organizations must be regarded as preliminary, commended the Special Rapporteur’s succinct, precise and logical presentation of the important issues it covered. The report treated two distinct sets of questions: the responsibility of States in connection with the acts of international organizations and the responsibility of members of an international organization. Since those were two sides of the same coin, he asked the Special Rapporteur to explain how the responsibility of an organization would be affected if a member was acting as a State, as opposed to the situation in which a State was acting as a member.

59. Recalling the opinion of Oliver Wendell Holmes, Jr., that the life of the law was not logic but experience, he personally believed that, in the absence of practice, logic could help to move the debate forward and might even lead to the creation of practice. Yet while much of the Commission’s work in the area of the responsibility of international organizations was premised on logic,


60. He endorsed the order in which concerns were discussed in this section of the report. Paragraph 62 dealt with an important criterion, namely that of whether the aid or assistance, direction and control, or coercion came from a State which was a legal entity separate from the organization. It was logical to take draft articles 16 to 18 on responsibility of States for internationally wrongful acts as the basis for constructing articles on the responsibility of international organizations. In that light, articles 25, 26 and 27 of the present draft were well crafted.

61. A number of views had been expressed in the Sixth Committee with respect to the use by States as members of an international organization of the separate legal personality of that organization. The inclusion of a brief summary of those views in the report would have been useful. Turning to the reference in paragraph 67 of the report to the Treaty on the Non-Proliferation of Nuclear Weapons, he wondered how the provisions of that treaty would affect the responsibility of non-nuclear States which were both parties to the Treaty and members of NATO, if those States availed themselves of the nuclear umbrella provided by other States which possessed atomic weapons. Would such States be infringing the Treaty on the Non-Proliferation of Nuclear Weapons?

62. In his opinion it would be wrongful for a State to transfer certain sovereign functions to an international organization if “the alternative means of legal process” of which mention was made in paragraph 69 were unavailable. Although the test of equivalence had been discussed in paragraph 70, it had not been included in draft article 28, nor had that article mentioned alternative means of legal process as a possible way of circumventing a potentially wrongful act. He supposed that the phrase “would have implied non-compliance”, in draft article 28, paragraph 1 (b), would also apply to the test of equivalence and alternative means of legal process. If that were so, it should be made clear in the commentary.

63. The last section of the chapter was thought-provoking, in that it contained a wealth of views and material and discussed two instances of practice in a very helpful manner. In his opinion, however, the references to the judgements concerning the International Tin Council were not entirely apposite (para. 79), since members’ responsibility had been incurred only because the Council itself had become bankrupt. The courts’ decisions did not provide any basis for concluding that member States should incur responsibility for a wrongful act of the organization to which they belonged.

64. In the Sixth Committee, the delegation of China had raised the very important question of the extent of member States’ responsibility when an organization adopted a wrongful decision. The Special Rapporteur had rightly concurred with a number of authoritative positions taken by bodies such as the International Institute of Law in its resolution II/1995 in contending that, because an international organization possessed independent legal personality and decision-making was open to all member States, and because once decisions had been taken, they were attributable only to the organization and not to the individual member States, the question of subsidiary, independent or several responsibility did not arise. The Special Rapporteur provided cogent policy reasons in support of that proposition in paragraph 94 of his report. Nevertheless the real policy reason why the Commission was debating that issue was that wrongful decisions were sometimes pushed through by a group of members of an organization despite fierce opposition from other members. Should the latter really be held responsible for decisions which were subsequently found to be wrongful? That was the crucial issue which had doubtless prompted China to state that only members that voted in favour of a decision should incur international responsibility for its consequences.

65. While most of the propositions put forward in the report applied in the vast majority of cases, very careful thought would have to be given to the wording of draft article 29. Nevertheless, he was in favour of referring the text of the draft articles contained in the fourth report on responsibility of international organizations to the Drafting Committee.

66. Mr. GAJA (Special Rapporteur) explained that the comments by States in the Sixth Committee to which he had referred in paragraph 64 of his report had no bearing on the question currently being considered by the Commission. Those observations, which had been made in relation to draft article 15, had been listed in a footnote and would be examined at a later stage. The only comments directly relating to the question under examination had been quoted in extenso in paragraph 65 of the report.

The meeting rose at 1 p.m.

2892nd MEETING

Wednesday, 12 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicia, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

218 See footnote 8 above.

220 Ibid., p. 10, para. 53.

[Agenda item 4]

FOURTH report of the SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the Commission to continue its consideration of the final part of the fourth report of the Special Rapporteur on responsibility of international organizations (A/CN.4/564 and Add.1–2).

2. Ms. ESCARAMEIA said that draft articles 25, 26 and 27 proposed in paragraph 63 of the report gave rise to two problems. The first, which the Special Rapporteur had raised at the previous meeting, concerned the relationship that existed between the State and the international organization. In paragraph 62 of his report, the Special Rapporteur had written that the “State that aids or assists, or directs or controls, or coerces an international organization may or may not be a member State”.

3. With regard to draft article 28, which contemplated a realistic scenario that was in fact the opposite of that provided for in draft article 15, she endorsed the explanation provided by the Special Rapporteur and said that the draft article should be approved.

4. As to the responsibility of members of an international organization when that organization was responsible (paras. 75–96 of the report), she drew attention to paragraph 83 which dealt with the question as to whether there were cases in which a State could be held responsible for an internationally wrongful act of an international organization of which it was a member, it could be concluded that although there was no general responsibility, several different types of exceptions existed. For example, Belarus had raised the issue of limited resources and the small number of members of the organization as well as the high level of control exercised by some of those members, Austria had mentioned negligent supervision, Italy had mentioned exceptional circumstances and China had cited the fact that the member State in question had voted in favour of or had implemented the wrongful decision (see paragraph 85 of the report). The comments of INTERPOL regarding the organization’s constituent instrument were also interesting (A/CN.4/568, sect. F), and the fact that the instrument did or did not contemplate the responsibility of member States towards third parties was certainly relevant.

5. From the comments which the Commission had requested from States and international organizations on the question as to whether there were cases in which

6. In drafting article 29, the Special Rapporteur seemed to have been inspired by resolution II/1995 adopted by the Institute of International Law at its Lisbon session. However, more precision was perhaps necessary: for example, subparagraph (a) might mention how the State had accepted responsibility by inserting the words “under its constituent instrument or by any other means”. Subparagraph (b) did not pose any problems. Furthermore, a new subparagraph (c) could be added, which would list criteria for the responsibility or non-responsibility of member States and make it possible to take into account such arguments as that it would be unfair for a member State that had done everything in its power to prevent the international organization from committing a wrongful act to risk incurring responsibility once such an act had been committed. Such criteria might include the number of members, the level of control exercised by some member States and the position of the State in question at the time the decision that had led to the wrongful act was taken.

7. Despite the explanations provided by the Special Rapporteur, she failed to see why the same rules would not apply to international organizations that were also members of the organization. She also felt that it would be useful to look into the nature of the responsibility of the States or international organizations that were members.

8. Mr. PELLET, referring to paragraphs 53 to 57 of the fourth report, said that he agreed with the arrangements proposed by the Special Rapporteur and, with regard to the problems implicitly raised in paragraph 57, said that he did not find it useful for the draft to address the question of the possible responsibility of entities other than States or international organizations for the wrongful act of an international organization of which those entities might be members. He acknowledged that the problem, albeit unlikely, could arise in practice; however, mentioning it in the commentary would suffice. On the other hand, like Ms. Escarameia, he did not see why the Special Rapporteur had omitted international organizations when drafting the articles, especially since he seemed to have had the opposite intention when writing paragraph 57 of the report. There were several possible solutions to that problem: for example, the draft articles in question could be amended using the words “a State or international

221 See footnote 215 above.
organization which is a member”, or it could be indicated in a separate provision that articles x to y applied, mutatis mutandis, to international organizations that were members.

9. Turning to paragraphs 58 to 63, he noted that the Special Rapporteur had often been reproached for following the provisions of the draft articles on State responsibility for internationally wrongful acts too closely. However, as long as the problem remained, which seemed to be the case in the situations covered by draft articles 25 to 27 proposed by the Special Rapporteur, he could only be commended for doing so. The only comment he wished to make with regard to those articles was that he was not completely sure that a provision equivalent to draft article 19 on State responsibility had to be omitted, as the Special Rapporteur stated in paragraph 63 of his fourth report, without, however, explaining why, even though the problem arose in the context of international organizations just as it did for States.

10. Things became serious with the section on use by a State that is a member of an international organization of the separate personality of that organization (paras. 64–74) and draft article 28 (para. 74), which dealt with an interesting scenario. The provision proposed, while convincing, could be read as a very general illustration of the prohibition of the abuse of rights, and he suggested that it should be clarified in the future commentary on that provision. Continuing with the notion of abuse of rights, he wondered whether the Special Rapporteur did not go a bit too far by writing, in paragraph 72 of his report, that in the cases he had mentioned involving Waite and Kennedy v. Germany, Matthews or Senator Lines functions had been transferred by States to an international organization in order to avoid compliance with their international obligations. In his view, such avoidance had been the result, not the aim, which was altogether different: the States in question had had no intention of avoiding their responsibility, and it was unfair to assert the contrary. However, that complicated the drafting of article 28: should the element of intent be included, as the Special Rapporteur seemed to favour doing? If so, the current wording was appropriate. However, if, as he believed, the problem did not lie in knowing whether the State had intended to evade its international obligation but simply in asserting that its participation in the organization had allowed it to circumvent its responsibility, then the wording of paragraph 1 (a) should be revised, because the words “by transferring” clearly implied the existence of such an intent, which was irrelevant. In fact, in most cases the transfer of functions was not designed to absolve the State of its responsibility, even if that was the result in practice.

11. Draft article 28 called for two comments of minor significance. First, he did not understand why the text related only to States. Whereas it seemed reasonable not to include non-State actors, it was nevertheless unclear why international organizations were not mentioned there in the same way as States. Secondly, he was not convinced that the terminology used in draft article 28 should differ from that used in draft article 15, since the two referred to identical situations; likewise, he failed to see what was “not very clear”, as some Commission members had said, about the word “circumvent”, for even if that was the case, the text could always be amended in second reading. However, the coherence of the draft in first reading was more important than the considerations highlighted by the Special Rapporteur in paragraph 73 of the report.

12. Clearly, the most interesting and difficult problems were addressed in the section of the report on the question of the responsibility of members of an international organization when that organization is responsible, and had to do with draft article 29 which it contained (para. 96). The fact of the matter was that the “cut and paste” method no longer did the job. He would go even further and say that, if the problem addressed in that section did not arise, the topic of responsibility of international organizations would be of no particular interest, for all one needed to do was to apply the rules of State responsibility by analogy. The whole topic revolved around the question of the responsibility of members of an international organization when that organization was responsible. For that reason he believed that the Commission’s deliberations should focus on this section. He had read that document not only with great interest but also with relief: the Special Rapporteur’s previous reports had led him to fear that he believed in the “transparency” of international organizations and chose to ignore the fundamental and incontestable principle which dated back at least to 1949, when the ICJ had issued its advisory opinion in the Reparation for Injuries case, finding that international organizations were subjects of international law vested with legal personality and responsible for their own internationally wrongful acts. He had often wondered about the Special Rapporteur’s doctrinal approach, which he believed to be erroneous, during the consideration of his previous reports and, in particular, his third report, submitted in 2005. In fact, the fourth report was entirely unambiguous in that regard, and he wholeheartedly endorsed the conclusions drawn in paragraphs 90 and 96 as well as the principle reflected in the chapeau to draft article 29, namely that “a State member”—rather than “a State that is a member”—of an international organization was “not responsible for an internationally wrongful act of that organization”. The reasoning based on logic, doctrine and jurisprudence that lay behind that principle, which the Special Rapporteur had set out clearly in this section, seemed fully convincing. On the other hand, it was once again unclear why that fundamental principle was limited only to member States since, as the Special Rapporteur openly acknowledged in paragraph 95, there was no reason why it should not apply to international organizations that were members.

13. The two exceptions to that principle, set forth in subparagraphs (a) and (b) of draft article 29, did not pose any problem, although he had some doubts concerning the use of the phrase “to rely on its responsibility” in subparagraph (b). However, it would be up to the Drafting Committee to decide whether that wording was justified. In any case, those were the only exceptions he could accept, and he was more convinced than ever that

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222 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 26, para. 76.
223 Ibid., p. 27.
some of the wording used in the report was ambiguous. For example, the beginning of paragraph 93 of the report read “[t]he two exceptions mentioned in the preceding paragraphs”, which seemed to imply that there were more than two exceptions to the principle. At the same time, he concurred with Ms. Escaramiea, who had rightly noted that international organizations could find it difficult to deal with the specific consequences of their responsibility. However, that remained a factual problem, and it was important from a legal standpoint for that principle to be firmly maintained. At the same time, if it was felt that the consequences of that principle must be mitigated, the Special Rapporteur could, in the context of the progressive development of law, suggest arrangements or modalities for the implementation of responsibility in the second part of his report. In any event, where responsibility per se or the immediate consequences of an internationally wrongful act were concerned, the principle set out in draft article 29 should have no exceptions other than the ones mentioned. He noted also that, according to paragraph 93, “[a] distinction between States which vote in favour and the other States would not always be warranted”. Yet such a distinction was never pertinent where responsibility was concerned; there was no call for it, and relying on it would be tantamount to denying that the organization existed. He was thus completely opposed to Ms. Escaramiea’s suggestion to add a subparagraph (c) to draft article 29. The attitude of States to a particular question was of little importance, since by joining an international organization they had accepted its existence and were thus bound by its acts. He strongly objected to any consideration by the Drafting Committee of a solution that even slightly resembled that suggestion.

14. As to the highly sensitive question of the subsidiary, several or joint nature of State responsibility, which the Special Rapporteur had raised the previous day without actually addressing it, he recalled that member States and international organizations could not incur responsibility unless they had expressly or implicitly accepted such responsibility through their conduct. It was all a question of what States had actually agreed to; the nature of responsibility would differ depending on the content and the circumstances of what had been agreed, on the assumption that if the State had not clearly said or done anything, it could incur only subsidiary responsibility. That should be clearly indicated either in draft article 29 or, preferably, in the second part of the draft on the implementation of responsibility, but it would be up to the Special Rapporteur to decide on that. The problem of the nature of any responsibility incurred by a State in connection with an internationally wrongful act of an international organization arose also with regard to draft article 28 and even draft articles 25, 26, 27 and the missing draft article 27 bis, which was equivalent to article 19 of the draft articles on State responsibility. The Special Rapporteur ought to be able to find in practice some arguments in support of the principle of subsidiary responsibility unless the State itself admitted joint or several responsibility.

15. Mr. GAJA (Special Rapporteur) drew the attention of those Commission members using the French version of his report to two translation problems. The first related to paragraph 72, in which the penultimate sentence did not entirely conform to the English original. In particular, the use of the expression “dans le but” placed too much emphasis on the element of intent. In addition, the beginning of the first sentence of paragraph 93 should be amended to read: “Les deux exceptions mentionnées”.  

16. Mr. BROWNIE said that he was not in a position to endorse draft article 29 and did not share the arguments advanced by Mr. Pellet to justify the principle set out in that article, namely the general principle of the non-responsibility of States members of an international organization in connection with an internationally wrongful act of that organization. Furthermore, the two exceptions provided for in subparagraphs (a) and (b) of that draft article were not genuine exceptions because they could actually be applied in all situations. He therefore believed that the principle set out in that article was not only imprecise, but also contrary to existing general international law and to all the principles of the law of treaties and the law of State responsibility, because its application could allow States to circumvent their obligations by concluding a multilateral treaty establishing an international organization.

17. Mr. PELLET said that, first of all, it seemed that Mr. Brownlie was confusing responsibility for an internationally wrongful act with absolute liability. Yet even in cases of absolute liability States expressly provided that their responsibility should replace or supplement the responsibility of international organizations, which in fact showed that in the absence of provisions to the opposite effect the international organization would be responsible a priori. Secondly, Mr. Brownlie cited the law of treaties in order to claim that the State could not invoke the conclusion of a treaty to circumvent its responsibility. Under draft article 28, however, if States circumvented their existing obligations, they were responsible. Draft article 29 must not be read separately, and combining it with draft article 28 would make it possible to address Mr. Brownlie’s concern. Lastly, the main argument in support of draft article 29 proposed by the Special Rapporteur was one of legal logic. International organizations existed and had their own legal personality; they could not shift their responsibility on to their member States.

18. The CHAIRPERSON, speaking as a member of the Commission, said that the Drafting Committee should focus on draft article 29 with a view to ensuring that its title was consistent with the content of its provisions. The Drafting Committee should also look at the wording of paragraph 1 (a) of draft article 28 with a view to specifying the types of conduct implied by the phrase “avoids compliance with an international obligation”. He wondered whether the words “certain functions” in the same paragraph referred to particular functions of the member State or the functions of the international organization, and he sought clarification on the matter. He fully endorsed Mr. Pellet’s comments regarding draft articles 25, 26 and 27, and urged the Special Rapporteur and the Drafting Committee to ensure that both the States that assisted an international organization in committing an internationally wrongful act and the international organizations that did the same were treated fairly.
19. Mr. CANDIOTI asked the Special Rapporteur whether it might not be advisable to mention the rules of the organization in the context of exceptions to the principle set out in draft article 29 because it was possible that those rules might establish the responsibility of a State for an act committed by the international organization.

20. Mr. ECONOMIDES said that Mr. Candiotti’s question was an important one, especially since that principle had been enshrined in resolution II/1995 of the Institute of International Law. ²²³ It could be applied through lex specialis. The constituent instruments of organizations could provide for various systems of joint, subsidiary or residual responsibility. The question at hand was the residual responsibility of a member State, but if the Special Rapporteur had a different view of the matter, then the exception proposed by Mr. Candiotti should be included in the text of draft article 29 as soon as possible.

21. Mr. GAJA said that some of the questions posed by Commission members merited further consideration, and he therefore preferred to wait before answering them. However, on the question of lex specialis, he recalled that the Commission had to state a general rule. He was aware that there could be different points of view as far as its content was concerned. The proposal to include a reference to the rules of the international organization in draft article 29 would be relevant, if those rules provided for acceptance of responsibility with regard to third States. Lastly, the place of articles 28 and 29 in the draft articles on responsibility of international organizations had yet to be determined. The Commission could choose from several solutions, but, as he had noted in his report, he believed that the Drafting Committee should deal with that issue.

22. Mr. BROWNLIE reiterated that since subparagraphs (a) and (b) of draft article 29 did not list genuine exceptions, but set out elements of law that would be applicable in any case, the draft article was both redundant and jarring. On the other hand, draft article 27, which illustrated perfectly the application of general principles of international law relating to responsibility in specific situations, supported his view that an international organization could not be exempt from the application of general principles of international law. He wondered whether the Special Rapporteur would also extend that idea of non-responsibility to international crimes. In treaty law, a third State could not be bound against its will. A State could not be requested to bear the damage caused by an organization without having any possibility of recourse against member States of the organization if the necessary measures had not been taken.

23. Mr. Sreenivasa RAO said that it was clear from draft article 29 that international organizations were responsible for all their decisions and that member States did not incur responsibility unless they had explicitly accepted such responsibility or had led the injured third party to rely on it. However, it could happen that an international organization was unable to fulfil its own responsibilities, for example because it did not have the means to do so or because its payments had been suspended. In that case, responsibility inevitably fell on member States.

24. The general principle of the draft articles was that an organization was responsible for its own actions as long as the decisions had been taken legitimately and in accordance with the applicable rules. The draft articles were clear on that point and did not give rise to any controversy. However, some members were concerned that nothing had been said about specific situations. For example, large international organizations, such as the United Nations, were often called upon to take decisions that had serious repercussions, and with regard to which member States could have very different opinions. Such decisions could be taken even if member States questioned their lawfulness. In such cases, it was open to question who would be responsible if harm was caused as a result of the decision. In a small organization, a State that disapproved of the decision could leave, but a State could not leave an organization like the United Nations. In large organizations, States had no choice but to stay and bear responsibility for everything that happened.

25. He concluded by noting that the Commission must realize that the draft articles did not envisage all possible situations and that some issues had not been addressed.

26. Mr. GAJA (Special Rapporteur), replying to the question of whether the responsibility of a State member of an international organization was residual in nature or otherwise, said that he would have spelled that out in draft article 29 had he been drafting from the perspective of Mr. Brownlie, who seemed to think that States were always responsible. The draft article said nothing on that point because that was not the case: everything depended on the circumstances. As to Mr. Sreenivasa Rao’s concern regarding the consequences of a decision taken by a majority of an organization’s member States for a State that had voted against the decision, the question was relevant only if seen from Mr. Brownlie’s perspective. In his own view, there was no cause for concern, since States were not responsible.

27. Mr. BROWNLIE pointed out that he had not said that States were always responsible. What disturbed him was the fact that draft article 29 spoke of the absence of State responsibility as if it was a general principle.

28. The CHAIRPERSON observed that Mr. Brownlie and Mr. Gaja seemed to be saying the same thing in different ways.

29. Mr. PELLET said that he did not believe that they were saying the same thing. Mr. Brownlie tended to view the international organization as transparent, whereas Mr. Gaja, like he himself, favoured non-transparency and attached importance to the protection afforded by the organization’s legal personality.

30. He endorsed the Special Rapporteur’s last comments. Responding to Mr. Brownlie, he emphasized that the point was absolutely not that international organizations were exempt from the principles of general international law, but that in some cases their responsibility could be combined with that of States. He was not sure that he understood Mr. Sreenivasa Rao’s concern correctly, but it was unthinkable that a State member of an international organization could be exempted from any sharing of the

²²³ See footnote 216 above.
organization’s responsibility by saying that it disagreed with the decision in question. Mr. Sreenivasa Rao was mistaken not only as to principles, but also as to practice. However, there was no cause for concern, since what draft article 29 was saying was that States were not responsible.

31. He thought that the problem underlying the discussion between Mr. Candioti and Mr. Economides had already been resolved by the two exceptions provided for in draft article 29. The State could have accepted responsibility with regard to the injured third party under the constituent instrument, a situation covered by subparagraph (a), or under the rules of the organization, a situation covered by subparagraph (b). That being said, constituent instruments could in fact set out special rules, and that would be covered by the principle of lex specialis, which the Commission would no doubt ultimately adopt.

32. Mr. DUGARD commended the Special Rapporteur for the quality of his work and said that he, too, thought that the draft articles under consideration would make a necessary addition to chapter IV (Responsibility of an international organization in connection with the act of a State or another international organization). Some States, in particular powerful ones, did in fact try to manipulate international organizations, and the Commission must take that into account. As far as he understood, the term “internationally wrongful act” referred to acts that were wrongful under general international law and that constituted a serious violation of the organization’s constituent instrument. With regard to draft articles 25 to 27, paragraph 62 of the fourth report set out the guiding principle, which was that influence that could be considered as aid or assistance, direction and control or coercion must be exercised by the member State as a legal entity separate from the organization, and the member State could not be held responsible simply for having participated in the decision-making process of the organization. He supported draft articles 25, 26 and 27; however, subparagraph (b) of draft articles 25 and 26, which stipulated that a State was not internationally responsible unless the act was internationally wrongful if committed by that State, posed a problem. There might be circumstances in which the act committed by the international organization with the aid or assistance or under the direction or control of a State was an internationally wrongful act, even though the State itself did not commit an internationally wrongful act. For example, if a State called Utopia helped the United Nations to use force, knowing full well that the use of force was wrongful, then Utopia would be internationally responsible because the act would be internationally wrongful if committed by Utopia itself. In that case, subparagraphs (a) and (b) would apply. However, if Utopia helped the United Nations exert economic pressure on another State and the United Nations did so in an unlawful manner, by failing to respect the relevant provisions of the Charter of the United Nations for example, then the United Nations would have committed an internationally wrongful act, but Utopia would not have. He therefore suggested that the Special Rapporteur should consider deleting subparagraph (b) from draft articles 25 and 26.

33. With regard to draft article 29, it was widely known that, as article 34 of its Statute clearly stated, the ICJ did not have competence in respect of international organizations where contentious proceedings were concerned. On the other hand, if an international organization wished to take action against a State for failure to respect a decision of that organization, it could designate a State to initiate proceedings before the Court. For example, in 1960 in the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) case, Ethiopia and Liberia had submitted an application to the Court against South Africa regarding Namibia. That attempt had failed because the Court had decided that the two States had not demonstrated that they had any legal interest in the object of their application (para. 99 of the opinion). However, it was clear that the decision had not been well-founded, and draft article 48 of the articles on responsibility of States for internationally wrongful acts had not been formulated along the lines of that decision. Moreover, developments in the law with regard to erga omnes obligations meant that at present States would be considered to have the right to initiate such proceedings. In other words, an international organization could designate a member State to bring a case before the ICJ. However, it was important to know whether the opposite was also true, i.e. whether an injured State could initiate proceedings against an international organization before the Court. Clearly, it could not. In that case, perhaps it could bring an action against a State member of the organization in order to express its dissatisfaction with an action of the organization: for example, because the organization had imposed economic sanctions on the State in an unlawful manner and the State wished to request compensation. It seemed that draft article 29 did not authorize such a step, since it made the conduct of the member State and not its membership of the organization a condition of responsibility. It was very difficult to link responsibility to membership in such cases, but if the international organization had committed an internationally wrongful act with regard to a State, the latter must have a possibility of recourse against the organization or its member States. The problem lay in identifying which States were responsible. China had suggested considering the way in which a given State had voted within the organization, but he did not consider that solution to be satisfactory. One could try to determine which State had been behind the organization’s wrongful act or had consistently supported it. He thought that the Special Rapporteur had been unduly influenced by resolution II/1995 adopted by the Institute of International Law at its Lisbon session and mentioned in paragraph 89 of his report. However, the Institute had been guided by the decision of the House of Lords in the case of the International Tin Council and had not considered the question from the broader perspective of manipulation of an international organization by States. In any event, the Institute’s resolution went even further than the Special Rapporteur’s proposal because it stipulated, in article 5, subparagraph (b), that in particular circumstances, members of an international organization might be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence or abuse of rights. He suggested that a provision similar to the one contained in article 5, subparagraph (b), of the Institute’s resolution should be added to draft article 29, or even that draft article 29 should say that a State that
was at the origin of, and had consistently supported the wrongful act of, the organization, even though it was aware of the consequences, could incur responsibility for it. Other Commission members had already suggested that the Special Rapporteur should broaden the scope of draft article 29 to cover more situations.

34. Mr. PELLET said that the problem raised by Mr. Dugard was important but not relevant to the case at hand. The fact that international organizations did not have jus standi before the ICJ had absolutely no bearing on their responsibility. If anything was to be changed, it was the Statute of the Court that should be amended, for it was by and large outdated in the light of the increased importance of international organizations. Yet it was hard to see why that should lead the Commission to change its position on the responsibility of international organizations. Procedural problems and matters related to remedies should not be confused with issues of substance and responsibility.

35. Mr. MATHESON said that there was no need to comment on draft articles 25 to 27 because they had been directly adapted from the equivalent provisions of the draft articles on State responsibility for internationally wrongful acts; in fact, a single clause applying those provisions mutatis mutandis to international organizations would be sufficient, although the Special Rapporteur’s decision to deal with the question in more detail was equally acceptable. However, it was important to emphasize clearly, in the commentary for example, that the State, as noted in paragraph 62 of the report, did not incur responsibility simply by participating in the decision-making process of the international organization, but only if it acted as a legal entity separate from that organization. Otherwise, the internal decision-making process of international organizations could be seriously undermined and States might be reluctant to settle international problems through them.

36. On the other hand, draft article 28 had no equivalents among the draft articles on State responsibility. It was useful because a State would certainly incur responsibility if it deliberately attempted to circumvent its international obligations by acting through the intermediary of the organization it controlled. However, as currently worded, the draft article could be interpreted as holding States responsible for actions that were not wrongful or could be attributed to the organization a fortiori. If a State transferred certain functions to an organization, it was not necessarily responsible for the way in which the organization carried out those functions. That would be incompatible with the separate legal personality of the organization. Furthermore, a State could easily transfer to an international organization functions which, in some circumstances, would be wrongful if carried out by the State. The States Members of the United Nations did so when they requested the Security Council to resort to force, and the States members of a regional organization did so when they requested the organization to impose on one of the members sanctions that they could not impose individually. It would be inappropriate to suggest that such arrangements “implied non-respect” of the individual international obligations of those States. Thus if draft article 28 was to be kept, it should be modified to prevent it from applying only to cases in which one or more States used an international organization as a front for circumventing their own obligations. In that connection, he thought that the verb “circumvent”, although much debated, was still appropriate—if properly explained—for drawing a distinction between an ordinary transfer of powers and the deliberate circumvention of obligations. In any case, that was a problem for the Drafting Committee.

37. Draft article 29 judiciously stated that a State member of an organization was responsible for an internationally wrongful act of that organization only in very specific circumstances, namely when it had accepted responsibility with regard to the injured party and when it had led the injured party to rely on its responsibility. In the latter case, he believed that it should be clearly indicated that in any circumstances the third party could rely on the responsibility of the State only within reasonable limits.

38. Mr. MANSFIELD said that he agreed with the Special Rapporteur’s decision to incorporate the provisions of the draft articles on State responsibility relating to cases of States helping another State to commit an internationally wrongful act rather than simply to refer to them. It was self-evident that if a State could aid or assist another State in committing an internationally wrongful act or direct or control it in the commission of that act, it could do the same with regard to an international organization, and it would be inappropriate not to address that issue in a chapter dealing with the responsibility of States in connection with the act of an international organization. Accordingly, draft articles 25 to 27 were satisfactory and could be sent to the Drafting Committee. The Drafting Committee could, as Mr. Dugard had suggested, consider whether subparagraph (b) of draft articles 25 and 26 was really necessary, but he believed that the question required further consideration.

39. The use by a State that was member of an international organization of the organization’s separate personality was a more complicated question that nevertheless led to a clear conclusion. If an international organization should not be able to evade an international obligation by using the separate legal personality of its members and by making the members commit an act that would be wrongful if the organization committed the act itself, the opposite was also true. The example of States that bought or developed nuclear weapons through the intermediary of an organization in order to circumvent their obligations under the Treaty on the Non-Proliferation of Nuclear Weapons was particularly convincing, even though under the terms of the Treaty it was likely that those actions would actually constitute a direct violation of their own obligations.

40. Draft article 28 constituted a good basis for work and could thus also be transmitted to the Drafting Committee, which should nevertheless consider, as the Special Rapporteur had suggested, whether the draft articles ought to indicate that the international organization was not bound by the obligation in question. The Drafting Committee should also consider whether it was possible, without applying any subjective criteria, to emphasize

227 Ibid., p. 27, articles 16–19.
that it was unacceptable for a State to use an international organization as a device for circumventing its own international obligations.

41. The issue covered by draft article 29 undeniably gave rise to controversy, but it seemed inevitably to lead to the conclusion that States were usually not responsible for the wrongful acts of an international organization of which they were members. Otherwise the established principle according to which an international organization had a legal personality separate from that of its members would not be respected, and that in turn would have serious consequences for the organization’s management and decision-making and, above all, for its capacity to account for its actions in a transparent manner, which was essential. At the same time, there were obviously circumstances in which the State should be held responsible: the circumstances covered by subparagraphs (a) and (b). Draft article 29 was very clear in setting out the main points raised, which were largely in keeping with practice. He therefore recommended that draft article 29 should be forwarded to the Drafting Committee.

The meeting rose at 12.30 p.m.

2893rd MEETING

Thursday, 13 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Añonso, Mr. Dugard, Ms. Escaramiea, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemincha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Montaz, Mr. Niehaus, Mr. Opetti Badan, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.


[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. KOSKENNIELI thanked the Special Rapporteur for his carefully nuanced but clear analysis of the key problems posed by the relationship between international organizations and their member States. Draft articles 25 to 29 raised the question of the image of international organizations on the world stage, and the earlier exchange of views between Mr. Brownlie and Mr. Pellet had illustrated how widely perceptions could differ. Mr. Brownlie had conjured up an image of international organizations as transparent bodies, and had denied the existence of any analogy with domestic limited liability companies. On that view, States that were in a powerful position vis-à-vis the international organizations of which they were members would be unable to shelter themselves behind a corporate veil. Mr. Pellet had taken the contrasting view that attempts had been made over a number of decades to develop a law of international organizations that would enable States to combine forces in organizations possessing a separate legal personality, and that that law would give those organizations the status of legal subjects and allow them to assume obligations and the concomitant responsibility. Which of those images of international organizations the Commission chose to retain would determine its attitude towards draft articles 25 to 29.

2. Draft articles 25 to 28 formed a continuum. When a State aided or assisted, directed and controlled or coerced an international organization, or when it tried to use that organization as a facade in order to achieve its own ends and, in so doing, violated its obligations, that matched the image suggested by Mr. Brownlie, in that the main actors were States which were manipulating the organization in some way. In that case, notwithstanding the fact that, formally speaking, the means and procedures of an international organization had been brought into play, responsibility should be attributed to the States in question and not to the organization. Although he agreed with that view, he felt that, in paragraphs 62 and 67 of the report, inordinate stress had been placed on the assumption that it was relatively easy to differentiate between a situation in which a State participated in the normal decision-making process in good faith as a member of the organization in accordance with the latter’s rules, and other cases in which a State directed and controlled or coerced the organization. In point of fact, however, it was hard to draw such a distinction, for while a State might pretend to be acting in good faith as a member of the organization and to be following its rules of procedure, it might be obvious to any outside observer that the State concerned was actually directing and controlling or coercing the organization.

3. The Commission was therefore faced with a pair of contrasting concepts: those put forward by the Special Rapporteur in draft articles 25 to 28, which described conduct for which member States, rather than the organization, should incur responsibility and, on the other hand, the situation in which a State acted in good faith as a member of an organization in accordance with its decision-making process. Yet very often a State suspected of having directed and controlled or coerced the organization would deny that it had done so and plead that it had merely followed the rules of procedure. There was no general rule for determining which of the two situations really obtained. Nevertheless he would have liked to see the Special Rapporteur examine more closely the criteria for assessing when a State was no longer acting in good faith as a member of an organization and was instead using its exceptional position of strength and bending the rules of procedure so as to direct, control or coerce the organization.

4. He had no specific objection to draft article 29. Draft articles 25 to 28 corresponded to Mr. Brownlie’s realistic conception of a world where States actually controlled international organizations, whereas draft article 29 mirrored Mr. Pellet’s image of an international organization capable of independent action, which could...
be regarded in the same light as a domestic limited liability corporation. From the latter perspective, member States’ responsibility was necessarily deemed to be strictly limited. He applauded the way in which the Special Rapporteur had been able to spell out exceptions to such responsibility, in cases where a member State accepted responsibility for the action of the organization or where a third State had relied on the member State doing so. On the other hand, the arguments advanced by Mr. Sreenivasa Rao and Ms. Escarameia had been persuasive, and some of the considerations underlying draft articles 25 to 28, which led to responsibility being attributed to States, might also apply to draft article 29. Situations might arise in which the disparities between member States’ powers were so great as to make it inequitable to hold all member States responsible for an outcome which was the product of a single powerful State’s efforts.

5. Although it was very difficult to formulate wording to cover the aforementioned situations, he had endeavoured to draw up a subparagraph (c) to draft article 29, which would enable member States to escape responsibility if they had expressly objected to the conduct that led to the wrongful act. That wording would exempt member States which were powerless within the organization from responsibility for wrongful action pushed through by the dominant members. While he was not entirely happy with the wording he had suggested, something along those lines would nevertheless address the concerns expressed by Mr. Sreenivasa Rao.

6. He doubted whether the Commission would ever be able to draw a clear distinction between what constituted action in good faith by a member State within the confines of the international organization and situations in which a State was acting on its own account under the cloak of the independent personality of the organization.

7. Ms. XUE said that the fourth report on responsibility of international organizations constituted a succinct analysis of a complex topic regarding which established State practice was relatively scarce. It would have been hard not to accept in principle the draft articles 25 to 29 presented in the fourth report and to reject the analogy the Special Rapporteur had drawn, in respect of the rules governing aid or assistance, direction and control or coercion by a State, between the responsibility of States for internationally wrongful acts,228 since a State could bring similar influence to bear on an international organization. Some members had held that the participation of a member State in the activities of the international organization, especially in the decision-making process, should not lead to it being singled out irrespective of its voting position and that the action of an international organization should be deemed to be that of the organization as a whole. That might well be true: States should not incur responsibility merely by virtue of their membership of the organization.

9. The criterion of separate legal entity was, however, rather weak and hard to apply in practice, particularly given the terms of draft article 15 in chapter IV. In fact, unless the rules and practice of the international organization were clear on that point, the dividing line between an act of an international organization and an act of a member State often tended to be blurred. When commenting on draft article 15 in the Sixth Committee, the Chinese delegation had pointed out that, to the extent that the decisions and actions of an international organization were under the control or reliant on the support of member States, member States that played an active role in the commission of an internationally wrongful act by an international organization should incur corresponding international responsibility.229 While that might be true from a policy perspective, it would not be wise to take account of the voting position of each member State, as to do so would discourage members from participating in the decision-making process. Moreover, decisions were often based on political rather than legal considerations.

10. The report did not offer a criterion for determining the issue of separate entity. Suppose, for example, that some Member States of the United Nations were to push through a decision by the Security Council to conduct air operations in part of a country in order to enhance regional security, despite strong opposition from other Member States on the grounds that such operations would not have the desired effect. If, as a result of those operations, the civilian population and hospitals outside the target areas were accidentally bombed, would draft article 15, draft articles 25 and 26, or draft article 29 apply?

11. If draft article 15 applied, it could be argued that, even if the decision was binding on Member States, it did not authorize them to bomb areas outside the target zone or civilians since, although the terms of the decision were very general, the United Nations would clearly never have intended to circumvent its obligations under international humanitarian law. (The issues of excess of authority and contravention of instructions dealt with in draft article 6 should be left aside for the sake of the argument).

12. If it were maintained that draft article 25 or 26 applied, was it possible to say with certainty that Member States were acting in a legal capacity separate to that of the United Nations? In that connection, she cited an

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228 Ibid.
article by Mr. Brownlie on the responsibility of States for the acts of international organizations, in which he had stated that “[i]n approaching the question of the incidence of the responsibility of member States in relation to third States, the existence or not of separate legal personality would appear to be inconclusive or, on another view, irrelevant.” The military operations might be under the direct control of the Member States, but they had been authorized by a decision of the United Nations Security Council. Was it really possible to draw a distinction between those two situations on the grounds that Member States and the Organization had separate legal personalities?

13. It could further be argued that the intention of the Member States which had carried out the operation was so clear to the injured parties that they were certainly led to believe that those States should be held responsible for the action. Therefore, under draft article 29, those Member States should be held responsible for the injuries caused. If those arguments could be upheld, they would help to solve practical issues. What remained unresolved was the question of how to apply those rules in different situations. The Drafting Committee should examine those considerations in detail and come up with more specific language.

14. Her second difficulty lay with the proposition that a State might not circumvent its responsibility by transferring certain functions to an international organization. She remained unconvinced by the arguments set out in paragraphs 64 to 74 of the report. It was right to assume that an international organization might incur international responsibility on account of the action it required its members to take. It was also true that some acts of a member State, if carried out on behalf of an international organization, would not entail that State’s international responsibility, the typical example being the use of force, but in practice it would be hard, if not impossible, to prove that the transfer had been precisely designed to avoid the member State’s responsibility.

15. Generally speaking, a transfer of functions could result in two types of situation. First, if the relevant treaty obligations became part of the general rules of the organization, they would bind not only the latter, but also all its members. In that case, the member States would be bound by the treaty provisions and by the rules of the organization, but the provisions and rules would nevertheless remain separate, and no transfer would necessarily occur.

16. Second, if treaty obligations did not become part of the organization’s rules, the treaty would operate as it stood and States would remain bound by their treaty obligations regardless of their membership in the organization. In those circumstances, it would be hard to claim that a transfer of obligations had taken place. The three European cases mentioned in paragraphs 69 to 71 of the report largely reflected the integration process of the European Community, where certain governmental functions operated on two levels, and they did not therefore necessarily represent the normal practice of international organizations. In fact they tended merely to confirm that treaty obligations and the obligations of international organizations were two quite separate matters. The term “transfer of functions” was relevant to the situation in the European Community, but misleading when applied generally to the responsibility of international organizations. Draft article 28 should therefore be revised to address the case in which a State breached its international obligations under a treaty through an act carried out under the rules of the international organization of which it was a member. As the Special Rapporteur had explained in paragraph 73 of his report, “no ‘specific intention of circumventing’ was required” and so no subjective element needed to be included.

17. The examples of the *Westland Helicopters Ltd. v. Arab Organization for Industrialization* case and the cases involving the International Tin Council both related to economic issues of liability rather than responsibility. The particular facts of each case had been crucial for the determination of liability. The passage cited in the letter of the Government of Canada concerning its claim for injuries caused by a helicopter crash was a standard clause for the final settlement of liability claims; it was a saving clause designed to rule out the possibility of any future claims in domestic or international courts and did not necessarily mean that all the parties mentioned might be responsible under international law. The German claim to which reference was made in paragraph 84 was not determinative; on the contrary, the United States had answered for its action in bombing the Chinese embassy in the Federal Republic of Yugoslavia, even though the action had been undertaken in the name of NATO.

18. She trusted that those policy considerations would be taken up by the Drafting Committee.

19. Mr. MOMTAZ, responding to Ms. Xue’s comments regarding the use of force by the member States of an international organization, said that a distinction must be drawn between cases in which military operations were conducted after authorization had been given by the international organization, and those in which the use of force was based on a binding decision of the international organization. To date, every instance of the use of force by Member States of the United Nations had been authorized by the Security Council; in other words, Member States had been free to use force in response to the relevant resolution containing the authorization. In those circumstances, if a breach of international law or international humanitarian law occurred, the full responsibility would lie with the State which, on the basis of the authorization, had used force. That had been the practice followed in the first Gulf War between Iraq and the United States, when violations of international law following inspections of vessels had been attributed to States that had resorted to force on the basis of the aforementioned authorization.

20. On the other hand, if the use of force was based on a binding decision of the Security Council under Chapter VII of the Charter and if there was then a breach of international humanitarian law or international law,
22. Mr. GAJA (Special Rapporteur) said that some of the problems raised by Ms. Xue and Mr. Montaz related to attribution. The question was whether action taken on the basis of a decision or authorization was attributable to the State or to the international organization. He would endorse unhesitatingly Mr. Montaz’s assessment of the importance of that distinction. In the case of authorization, it was a State that acted, the only problem being to decide whether the international organization could also incur responsibility. The question was addressed in draft article 15, which the Commission had considered at its previous session.

23. One of the difficulties was that the Commission was not considering a particular situation in which authorization had been given or a decision made, but rather, how to attribute responsibility to an international organization. Attribution to States had already been analysed in connection with State responsibility. That was where he and Mr. Pellet disagreed, since Mr. Pellet tended to shift towards international organizations what should in fact be attributed to States, or to States and international organizations together.

24. The CHAIRPERSON, speaking as a member of the Commission, noted a distinction between, on the one hand, the practice of international cooperation organizations, whose functions were determined by their constituent acts, so that member States’ sovereignty was preserved, and, on the other, that of international integration organizations, whose member States seemed readier to transfer some of their functions to the organization. The differing practice of the European Court of Human Rights and the European Community illustrated that distinction and the differing consequences with respect to the responsibility of member States. The Special Rapporteur should explore the option, referred to in paragraph 72 of the report, of drafting an article addressing the avoidance of compliance with international obligations, taking into account the functional distinction between international cooperation organizations and international integration organizations.

25. Mr. GAJA (Special Rapporteur) said that paragraph 69 concerned not the European Community but the European Space Agency, which was a typical example of organizations to which States attributed functions. Perhaps the phrase “transfer of functions” was not entirely accurate and its wording might be improved, either in plenary or in the Drafting Committee. Waite and Kennedy v. Germany was the key case, and existing practice was not confined to the European Community.

26. Mr. KOLODKIN, referring to the examples discussed by Ms. Xue and Mr. Montaz, said that to draw a distinction between a decision and an authorization was useful but did not always help to resolve the question of responsibility. Both could be of a very general nature, and the problem was how to interpret them. A decision could be lawful, while the means of implementing it might be wrongful. Hence the need to determine what was wrongful: the decision or authorization, the manner of their implementation, or both. The question of attribution must also be addressed. Only then could the situation with regard to responsibility be determined.

27. Mr. FOMBA congratulated the Special Rapporteur on the part of his fourth report on responsibility of a State in connection with the act of an international organization. The general remarks on the scope of the study and the methodology to be used (paras. 53–56) were on the whole acceptable. In paragraph 57 of the report, the Special Rapporteur rightly raised the questions whether the draft articles should also cover entities other than States or international organizations, and if so, how. However, his reasoning was, if not contradictory, at any rate learnedly subtle, and in the end, the fate to be reserved for entities other than States or international organizations was not specified. Yet if the responsibility of such entities was not to be regarded simply as a theoretical construct, mention should be made of it somewhere in the draft.

28. On paragraphs 58 to 63, he endorsed the argument developed in paragraph 58, namely, that the same rules should apply when a State assisted an international organization in the commission of an internationally wrongful act as applied when it assisted another State in the commission of such an act. The same should be true in the case of coercion by a State of an international organization. He therefore endorsed the Special Rapporteur’s conclusion, in paragraph 63, that the present draft articles should closely follow the text of articles 16 to 18 of the draft articles on State responsibility. Accordingly, proposed draft articles 25 to 27 posed no problems.

29. Paragraphs 64 to 74 of the report dealt with the questions of whether and to what extent a State could incur international responsibility for requiring an international organization to act in its stead in order to avoid compliance with one of its international obligations. Clearly, the functional and dialectic link between the legal personality of an international organization and that of its member States was the crux of the matter. While it was by no means easy to grasp the functioning of that complex relationship, the Special Rapporteur had exhaustively analysed the views expressed by States in the Sixth Committee, together with the literature and international case law. The conclusions drawn by the Special Rapporteur in paragraphs 64 to 72

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251 See footnote 8 above.
of the report were coherent and apposite. In paragraph 73, acknowledging that the use of the verb “circumvent” in draft article 15 had been criticized, the Special Rapporteur suggested that it would be preferable to use a different wording. He himself did not think that was necessary, since the meaning was sufficiently clear.

30. The wording of the proposed draft article 28 raised no real difficulties, and its paragraph 2 added an important qualification. Mr. Pellet had rightly drawn attention to the fact that intention was at the heart of the debate and was not always manifest in the behaviour of States. He himself had no firm views on that point, although he was of the opinion that the scope of the text should be extended to cover international organizations that were members of other international organizations.

31. Turning to paragraphs 75 to 88 of the report, he welcomed the review of international and national case law, reactions of States in the Sixth Committee and positions taken by international organizations and the literature. In general, he agreed with the Special Rapporteur’s conclusions. In paragraph 87, for example, he indicated that it would be difficult to suggest a conclusion for resolving the question of responsibility of member States owing to the variety of treaty provisions envisaging, limiting or ruling out such responsibility. On the basis of his analysis of the literature, the Special Rapporteur indicated in paragraph 88 that member States of an international organization could incur responsibility in exceptional cases. Accordingly, the Special Rapporteur was right to emphasize the position taken by the Institute of International Law in its resolution II/1995 adopted at Lisbon.323 Interesting ideas were set out in articles 5 (b) and 6 (a) of that resolution, reproduced in paragraph 89 of the report.

32. He agreed with the conclusions set out in paragraph 94 that had led the Special Rapporteur to propose draft article 29, a provision which nevertheless raised a number of important questions. It envisaged two exceptions, but others should perhaps also be included. Was it to be seen as an illustration of abuse of rights? What sort of responsibility was to be incurred by the State: subsidiary, or joint and several? Mr. Pellet had made some stimulating remarks on that subject which must certainly be taken into account. Lastly, referring to paragraph 95, he said it might be advisable to include a reference to the responsibility of an international organization that was a member of another international organization.

33. In conclusion, he said he was in favour of referring draft articles 25 to 29 to the Drafting Committee.

34. Mr. MOMTAZ said that, in paragraphs 53 to 96 of his fourth report, the Special Rapporteur touched on some highly topical issues faced by international organizations. As the debate so far had shown, there were no easy solutions and controversy persisted. The solutions favoured by the Special Rapporteur, which he himself endorsed, were fully in accord with the practice of international organizations. That practice was generally concordant with the theory that international organizations were subjects of international law and, like all such subjects, endowed with their own legal personality, independent of that of their members. Accordingly, they had rights and corresponding obligations vis-à-vis other subjects of international law.

35. The general remarks contained in paragraphs 53 to 57 of the report, on attribution of a wrongful act to an international organization, prompted him to wonder whether criteria for the attribution of a wrongful act of an international organization to one of its officials might also be considered. The question arose in the context of draft article 29, pursuant to which an international organization could be absolved of responsibility insofar as the wrongful act was attributed to an agent or official of the organization, in other words insofar as it was based on the personal fault of that individual.

36. A second question was raised by paragraph 57 of the report, which stated that the current draft could not deal also with the question of responsibility of entities other than States or international organizations. As Mr. Fomba had noted, that was not merely a theoretical construct, and while he agreed entirely with the affirmation, the question remained whether the responsibility of an international organization might be engaged in respect of a non-State entity such as a national liberation movement. Certainly, such entities had no international legal personality and, accordingly, could not take any action on the international plane against an international organization. Nevertheless, the question was worthy of consideration, especially as a certain—albeit limited—number of treaties conferred rights on non-State entities, so that if an international organization with obligations towards such entities failed to fulfill those obligations, then there would be a breach of international law, the victim of which would be the non-State entity.

37. He endorsed the suggestion in paragraph 55 of the report that questions concerning State responsibility in connection with the act of an international organization should be dealt with in a new chapter to be placed in Part One of the draft articles.

38. He was grateful to the Special Rapporteur for having devoted several draft provisions to the fundamental question discussed in paragraphs 58 to 63, namely, aid or assistance, direction and control, and coercion by a State in the commission of an internationally wrongful act of an international organization. As the experience of recent years had shown, that was a very topical subject. Unfortunately, there had been many cases in which an international or regional organization had been manipulated by a member State with a dominant position in the organization which used that position to prevail upon the organization to commit an internationally wrongful act. The draft articles proposed by the Special Rapporteur were modelled on the corresponding provisions in the draft articles on responsibility of States.324 He wondered, however, why it should be necessary for such cases to be confined to States alone. As rightly pointed out at the previous meeting, an international organization that was a member of

233 See footnote 216 above.

234 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 27, draft articles 16–19.
an international organization could very well find itself in a dominant position and prevail upon that organization to commit a wrongful act. With that proviso, however, it should be possible to refer draft articles 25 to 27 to the Drafting Committee.

39. Turning to the section on use by a State that is a member of an international organization of the separate personality of that organization, he said he could readily support draft article 28, with the drafting changes to which reference had been made at the previous meeting. The same held for the arguments in support of that provision which the Special Rapporteur provided in paragraphs 64 to 74. However, he wondered whether draft article 28 covered all the possible cases that might arise.

40. Draft article 28, paragraph 1 (a), concerned cases in which a State avoided compliance with or refused to comply with an international obligation relating to certain functions by transferring them to an international organization. Such a case involved a choice on the part of the State concerned, which remained free to comply with those obligations if the international organization to which it had transferred its obligations failed to meet them. He had in mind the case in which a member State was no longer able to comply with its international obligations because it had definitively delegated their implementation to an international organization; an example was the obligations which the States parties to the United Nations Convention on the Law of the Sea had contracted with regard to landlocked States in connection with the exploitation of the biological resources of their exclusive economic zone. As was well known, the member States of the European Union had transferred the rights and obligations in the exclusive economic zone conferred on them by that Convention to the European Union, which was a classic example of an integration organization. If the European Union refused to comply with the rights and obligations which the landlocked States had in the exclusive economic zone by virtue of the Convention, the question arose whether the responsibility of the European Union could be engaged, given that the member States of the European Union would no longer have any way of implementing their obligations under the Convention.

41. The question of the responsibility of members of an international organization when that organization was responsible was treated with great sensitivity in paragraphs 75 to 96 and did not pose any problems. The Special Rapporteur, drawing on the general theory of international organizations, had rightly dismissed all the arguments adduced and solutions proposed by a number of States in the Sixth Committee (para. 85). The Commission should confine itself to the two exceptions contained in draft article 29, subparagraphs (a) and (b). Needless to say, the provision covered not only member States but also non-member States of an international organization. It would be useful to make that point in the commentary. It should also be specified that the provision concerned only those injurious acts of international organizations which resulted from non-compliance with international law.

42. Needless to say, that provision of draft article 29 did not cover damage resulting, for example, from inspections of nuclear facilities or chemical plants conducted by the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons, unless the damage resulted from a breach of international law. Such damage could be very considerable and have extremely serious consequences.

43. Ms. XUE said that Mr. Momtaz had given an excellent example. She also noted that the Special Rapporteur had referred to several cases based on the practice of European countries. From the standpoint of practice, one problem which often arose for third States concerned the extent to which member States of the European Union that had transferred their competence or functions to the organization could still be held responsible for their own actions. The matter was clear-cut in theory, but complicated in practice. Mr. Momtaz had noted the transfer by member States to the European Union of their rights and obligations in the exclusive economic zone conferred on them by the United Nations Convention on the Law of the Sea. Thus, European Union rules and directives now regulated port operations in the member States. In practice, however, each member State implemented those rules and directives in its own manner. Take the example of customs controls: at the port of one member State, goods which did not meet European Union criteria might be held back, at the port of another they might be returned to the country of origin, and at the port of a third they might be destroyed! When asked for clarification, officials always replied that they were acting in compliance with European Union law. Thus, identical situations could lead to different action, which meant that the consequences were also different. Thus, the factual circumstances of implementation often played an important role in determining responsibility.

44. Her second point had to do with the rule of attribution. An official of a member State was clearly its representative, and the same applied, mutatis mutandis, to an official of an international organization. Accordingly, their actions were attributed to the member State or international organization that they represented. In practice, however, despite the attribution rule, there could be a case where neither the member State nor the organization would be held responsible for the action taken. That was the deficient aspect of the rule of attribution under State responsibility when applied to international organizations.

45. Thirdly, it could be argued that the act concerned had been ultra vires and that the party had acted without authorization. It was difficult to say whether that was so, either because the directives or instructions were not clear, or because the party had been given considerable leeway. Thus it was not easy to decide who should be held responsible.

46. Mr. CHEE cited the proceedings of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, in which he had participated in 1994, as a further example of the type of situation to which Ms. Xue had alluded.

47. Mr. MOMTAZ said he was in full agreement with Ms. Xue. However, the example he had given was very specific and concerned the obligations which the member
States of the European Union had contracted by ratifying the United Nations Convention on the Law of the Sea, with regard to the exclusive economic zone. As was well known, the member States had waived the right to establish national exclusive economic zones and had transferred their rights and obligations in that regard to the European Union. The case to which he had referred concerned the obligations contracted vis-à-vis third States, and he had cited the example of landlocked States. It was incumbent upon the European Union to comply with those States’ obligations. If it did not, he did not see how member States could comply with them, given that they had no exclusive economic zone or any attributions in that regard. In that particular case it could be claimed that the European Union was responsible if it failed to comply with the obligations which its member States had contracted under the United Nations Convention on the Law of the Sea. However, the question of the management of port activities was not so clear-cut.

48. Mr. GAJA (Special Rapporteur), said that the example given was dealt with in Annex IX to the United Nations Convention on the Law of the Sea, which made it clear that an international organization had obligations to the extent that it had competence in accordance with the declarations made to that effect (art. 2). The European Union had made such a declaration, and thus there was no doubt that it had the corresponding obligations. He was not sure that it could be asserted that there was no national exclusive economic zone, even though some of its functions had been transferred to the European Union. Mr. Momtaz had no doubt raised that particular example because he felt that, having transferred those functions to the European Union, member States no longer had any scope for action. Although the wording was perhaps not sufficiently clear, draft article 28 was intended to cover such a case.

49. The CHAIRPERSON, speaking as a member of the Commission, said that the renunciation by the member States of the European Union of the competence which coastal States had with respect to the exclusive economic zone and the transfer of that competence to the European Union could be seen as indicating the emergence of a common European Union policy for all member States. If that were so, in the event of non-compliance, it would be the European Union that was responsible, since the exclusive economic zone fell within the competence of that body’s common policy.

50. Mr. BROWNIE commended the part of the report on responsibility of a State in connection with the act of an international organization and the careful discussion of the doctrinal and other research materials contained therein. He had no special difficulties with draft articles 25 to 28, apart from a few drafting questions. His main concern was with draft article 29, which retained the general principle that an international organization did not have responsibility vis-à-vis third States.

51. In the first place, there was a contradiction between draft article 29 and the other draft articles, which the words “Except as provided in the preceding articles” did not dispel. The preceding articles showed that the principle retained in draft article 29 was flawed. Nor did he think that draft article 29 reflected the content of the sections preceding it, and of paragraph 72 in particular. Moreover, the discussion of the relation between draft article 29 and existing international law was inadequate. That was a major problem with this last section. It was not as though there was no general international law: the Commission had completed the draft articles on responsibility of States for internationally wrongful acts, and even if that had not been the case, most of the principles drafted reflected pre-existing, generally accepted principles of international law. He did not subscribe to the view that a multilateral treaty could be adopted which presented an international legal person to the world and by so doing could completely circumvent the principle that international agreements could not affect third States. Surely it could not be denied that the creation of serious risks for third States, affected those States, because it was assumed that the multilateral treaty, namely the organization’s constituent instrument, did not cover the risks which its activities might entail for third States, and no remedies might be available. That aspect of the subject should have been considered at greater length.

52. At the previous meeting, one member had asserted that if a legal personality was created which was recognized in international law, it created a principle of immunity. He personally did not understand that line of reasoning, and when he had raised the difficulty, his objection had not been dealt with by that member, nor had it been addressed by Mr. Fomba or other speakers at the present meeting who agreed with Mr. Pellet’s general position.

53. The work of the Institute of International Law had been taken into account, but he had problems with the balance of opinion as set out in the sections being discussed. The fact of the matter was that the content of the Institute’s II/1995 resolution was very contradictory, and that much of it involved accepting that there might be responsibility towards third States. He was aware that the general position of the Institute was conservative and that it had adopted the principle of no responsibility. Some of its members had represented NATO in a famous case (Legality of Use of Force), just as he had represented the Federal Republic of Yugoslavia. Thus there were vested political and other interests concerning that apparently doctrinal question. The doctrine on the question was summarized in paragraph 88 of the report, and it was very divided. There was no equivalent to Article 38 of the Statute of the ICJ, there was no consensus, and no attempt was made to relate the materials which were marshalled to the criteria for the formation or removal of principles of general international law. The practice, which was summarized in paragraph 90, was very messy, and it did not represent a consensus. It was not at all clear that the bodies cited in paragraph 90 and the preceding paragraphs had been applying public international law. In some instances they had been doing so, but the practice did not represent the sort of consensus that should divert the Commission from taking its own view on matters of principle and policy. The Commission was, after all, allowed to engage in the progressive development of the subjects it had chosen to deal with.
54. The structure of draft article 29 was very odd. It began with the phrase “Except as provided in the preceding articles of this chapter”, in other words, except as provided in most of the report. It then set out two exceptions in subparagraphs (a) and (b), but those exceptions would have existed even if draft article 29 had never been formulated, and were principles that could be derived from existing general international law. Even if draft article 29 was retained because most members seemed to favour it, it would be greatly improved if the words “as such” were inserted after “a State that is a member of an international organisation is not responsible”. The exceptions in draft article 29 were not genuine exceptions, and the principle which draft article 29 somewhat gratuitously incorporated was not justified by existing practice.

55. In his opinion, draft article 29 did not add very much and should be treated as redundant. Its elimination would not do any damage to the rest of the report, which on the whole was very good.

56. He conceded that one element of his own position was weak and had not been properly thought through: he insisted that there could not be a rule whereby international organizations had no responsibility vis-à-vis third States, and he was reluctant to accept a generalization which embodied such a principle. His position was that, with or without draft article 29, existing principles of State responsibility could be applied in certain situations to identify a residual responsibility of member States of an international organization whose activities created clear risks and damage to non-member States and which had not made any arrangements of their own for the recognition of such responsibility or provided for any remedies if such damage should occur. However—and that was the weakness of his position—no readily identifiable principle existed for establishing attribution in those difficult factual situations. Nevertheless, he did not think that a case had been made for setting forth a flawed and unnecessary generalization in draft article 29.

57. The CHAIRPERSON reiterated his appeal to Mr. Brownlie to consult with the Special Rapporteur with a view to addressing the question he had just raised, in his own view rightly so, on a matter that had perhaps not been well rendered in draft article 29.

The meeting rose at 11.50 a.m.

2894th MEETING

Friday, 14 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-THIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chec, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melissen, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pellet, Mr. Seenivasar Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.


[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. NIEHAUS commended the Special Rapporteur for his thorough analysis of a complex and timely topic of growing importance. Indeed, in order to serve their own interests, some States, particularly the most powerful ones, were increasingly seeking to manipulate international organizations to get them to commit internationally wrongful acts, and a legal response to that phenomenon was called for.

2. Turning first to paragraphs 53 to 74 of the Special Rapporteur’s fourth report, he made the general observation that it had its basis in the principle of international law that held that international organizations had their own legal personality, which gave them rights but also imposed obligations that, if violated, could incur their international responsibility. It was therefore entirely logical for him to have aligned the draft articles on responsibility of international organizations against the draft articles governing State responsibility. He endorsed the general remarks contained in section A. With regard to section B he noted with interest that, according to paragraph 62, “the influence which may amount to aid or assistance, direction and control, or coercion, has to be used by the State as a legal entity that is separate from the organization”. Without that distinction, the freedom of States to act within and as members of an organization would be seriously compromised. As the Special Rapporteur himself noted, there was no reason to draw a distinction between the relationship between a State and an international organization on the one hand and between States on the other, and he thus accepted draft articles 25, 26 and 27 and had no objection to their being referred to the Drafting Committee.

3. The section of the report on use by a State that is a member of an international organization of the separate personality of that organization and article 28 proposed therein were more problematical. He fully subscribed to the Special Rapporteur’s reasoning in paragraphs 64 to 74. In particular, as the representative of Switzerland had noted in the Sixth Committee, “States should not be able to hide behind the conduct of the international organization” and “States should be prevented from creating an artifice with the intention of avoiding consequences which they would have to bear were they to carry out the activity, which they have assigned to the international organization, individually.” An equally important consideration was the criterion of good faith, which was in fact essential to establishing international responsibility, as Mr. Koskenniemi had pointed out at the preceding meeting. While he was not opposed to draft article 28, he thought that in its current form it did


not really succeed in achieving the desired objective. The wording should certainly be revised to avoid any confusion or misinterpretation, but in addition to the drafting problems mentioned by a number of speakers, there was a problem with the actual content of the article. The cases mentioned in the text in which a State’s international responsibility in connection with an act of an international organization could be invoked were too restricted.

4. With regard to paragraphs 75 to 96 on the responsibility of members of an international organization when that organization is responsible, he agreed with the Special Rapporteur that a State member of an international organization could not be held responsible for an internationally wrongful act of the organization unless it accepted its own responsibility, as stipulated in draft article 29. That being said, subparagraph (a) of that article should perhaps indicate whether such acceptance had to be explicit or whether it could be tacit. Subparagraph (b), meanwhile, would be clearer if some indication was given of what was meant by the term “led”. Lastly, it would be useful to indicate the kind of responsibility contemplated (joint and several, subsidiary, etc.).

5. Mr. YAMADA said that he had no problem with the contents of paragraphs 53 to 96 of the fourth report on responsibility of international organizations. With regard to the responsibility of States in connection with an act of an international organization, he supported the basic approach taken by the Special Rapporteur, which was to avoid duplicating the draft articles on State responsibility for internationally wrongful acts, to formulate draft articles that covered only those cases not dealt with in those articles and to apply to those cases the same rules as those governing State responsibility. Accordingly, he supported draft articles 25, 26 and 27 as proposed by the Special Rapporteur and had some reservations regarding the suggestion made by Mr. Dugard to delete subparagraph (b) from draft articles 25 and 26. If the act was not internationally wrongful if committed by a State, he did not see why that State would have to aid or assist, or direct or control, an international organization in the commission of the act: it could do so by itself. The State might nevertheless choose to go through an international organization, but in the example cited by Mr. Dugard, in which the act of an international organization was internationally wrongful owing to a violation of the organization’s internal rules of procedure, the international organization should be solely responsible. In that connection, he wished to stress once again the importance of preserving the integrity of the draft articles on State responsibility, particularly as the General Assembly was scheduled to review them quite soon. Anything that might alter the substance of the draft articles on State responsibility would destabilize the balance that had been achieved in the codification of State responsibility. It was thus important to follow the structure of those draft articles closely.

6. In the cases covered by draft articles 25, 26 and 27, the act was attributable to the State singularly or jointly with the international organization.

7. In the most difficult cases, an act of an international organization could not be attributable *prima facie* to a State. As there was not sufficient evidence to warrant the existence or non-existence of rules of customary international law in that area, rules would have to be formulated as progressive development, using common sense. Draft article 28 concerned a case in which a State used an international organization to shield itself from the consequences of an act that would be internationally wrongful if committed by that State. If no physical or mental force was applied and if the act by the international organization was not normally internationally wrongful, any attempt to attribute responsibility for the act to the State would be useless. However, justice dictated that the Commission should seek a formula for attributing responsibility to the State. The Special Rapporteur had found a brilliant solution by adopting, in paragraph 1 of draft article 28, a fiction that the international organization did not exist, so that the organization’s act was directly attributable to the State, and if the act was internationally wrongful when committed by the State, then the State incurred the responsibility. The fact that the international organization’s act was not internationally wrongful was the very reason why the State sought to circumvent its obligation; he therefore saw no need for paragraph 2, although he had no problem with its retention.

8. The two exceptions to the principle of the non-responsibility of a State member of an international organization set out in draft article 29 were inadequate and did not do justice to the States that suffered damage as a result of an international organization’s wrongful act. It was obvious, as some members of the Commission had noted, that the regime of limited liability could not apply to the States members of an international organization and that the international community would not accept such a regime even if the organization’s constituent instrument explicitly provided for such a system. By way of example, he cited the case of a State that had suffered damage from the wrongful act of an international organization and could not obtain compensation from the organization because the organization did not have the necessary financial resources as its members had not approved its budget, which was based on their contributions. The only recourse left to that State was to go directly to the member States. He hoped that the Special Rapporteur would give further thought to that question and come back to the Commission with some proposals. Meanwhile, he supported the referral of draft articles 25 to 28 to the Drafting Committee.

9. Mr. DUGARD said that he could understand Mr. Yamada’s doubts regarding his proposal to delete subparagraph (b) from draft articles 25 and 26. He reminded him that his proposal had been made in the context of the existing general situation, in which States, especially the most powerful States, sought to manipulate international organizations to serve their own purposes, a situation that ought to lead the Commission to define their responsibility in stricter terms.

10. Mr. KEMICHA said that insofar as the responsibility of a State in connection with an act of an international organization was concerned, the Commission was
endeavouring, as the Special Rapporteur had said and article 57 of the draft articles on State responsibility confirmed, to fill a gap that had been deliberately left in the earlier set of draft articles. It was therefore logical that the Special Rapporteur should proceed in an analogous fashion, as he had explained in paragraph 59 of his fourth report, in formulating draft articles 25, 26 and 27, which he was introducing in that report. All members who had already spoken on the topic had in fact endorsed that approach and had rightly recommended, almost unanimously, that the draft articles in question should be transmitted to the Drafting Committee. It remained to be seen whether the analogy should be extended to cover the escape clause contained in article 19 of the draft articles on State responsibility, and as he had no clear-cut views on that point, he would leave the matter in the hands of the Special Rapporteur.

11. Draft article 28 was likewise acceptable. The situation it contemplated, in which a State made improper use of the separate personality of an international organization of which it was a member in order to commit wrongful acts or evade its international obligations, had actually become quite common. Without wishing to pre-judge the work of the Drafting Committee, he endorsed the reservations expressed by some members regarding the wording of draft article 28, and he was not convinced by the reasons given by the Special Rapporteur in paragraph 73 for dropping the verb “to circumvent”, which actually reflected the situation quite well and was far more explicit and consistent with legal terminology than the phrase “if it avoids compliance with an … obligation”, proposed in paragraph 1 (a) of draft article 28. More generally, he thought that Mr. Pellet’s suggestion to use the language of draft article 15 there seemed sensible.

12. As for the critical question of the responsibility of members of an international organization when that organization was responsible, which was covered in paragraphs 75 to 96 of the report, no one disagreed that international organizations had come to be considered as subjects of international law having their own legal personality separate from that of their members. On the other hand, there was a substantive disagreement within the Commission as to whether States incurred responsibility when an organization of which they were members committed an internationally wrongful act, although a clear majority of members supported the approach taken by the Special Rapporteur. He himself had been partial to the arguments, largely those of a minority thus far, set out by Mr. Brownlie at a previous meeting and in an article he had circulated to members of the Commission. How in fact was it possible that the States members of an international organization be given immunity protecting them from any remedy awarded in connection with wrongful acts they might have committed collectively while they were simultaneously members of a single organization?

The constituent instrument of the organization in question could not, according to Mr. Brownlie, be used to delimit the scope of the responsibility of member States or do away with it entirely because it could not be enforced in respect of third parties. Mr. Brownlie had concluded that the principle of the non-responsibility of States members of an organization was, to say the least, inconsistent with international law and contrary to the principle of equity.

13. It was certainly hard to generalize about a principle whose application varied from one organization to another, depending on an individual organization’s constituent act and whether the organization had a universal or regional character. The Chairperson of the Commission had been quite right to have recalled the fundamental distinction that existed between an integration organization and a cooperation organization. Mr. Momtaz, meanwhile, had rightly drawn the Commission’s attention to the difference between assessing the responsibility of the organization and that of its members in situations involving the use of force, depending on whether the act was based on an authorization conferring capacity to act or on a binding decision of the organization in question.

14. Having followed the debate on the topic with interest, and after having read paragraphs 75 to 96 of the Special Rapporteur’s report, he was convinced that draft article 29 as proposed by the Special Rapporteur was, all in all, a clever compromise. It established a general principle whereby States members of an international organization were exempted from any responsibility for an internationally wrongful act and made that principle less general and rigid by attaching two exceptions. Accordingly, referring the draft article back to the Drafting Committee posed no problem. The text did, however, need serious reworking, and it might be helpful if Mr. Brownlie participated in that effort, since notwithstanding his principled reluctance, he could help to limit the scope of a principle that was fairly permissive where the States members of an international organization were concerned.

15. Mr. BROWNIE pointed out that, to his way of thinking, draft article 29 suffered from two basic flaws. First, it was superfluous, particularly as no explanation was given for its presence in the draft articles, and, secondly, it contradicted the fundamental principles of general international law and thus modified the law. Such a modification required many more justifications than had been given.

16. Mr. KOLODKIN noted that in paragraph 54 of his report the Special Rapporteur said that not all the questions that might affect the responsibility of a State in connection with the conduct of an international organization should be examined in the context of articles on responsibility of international organizations; for instance, questions relating to attribution of conduct to a State had already been covered in the draft articles on State responsibility. Thus, neither the draft articles under consideration nor draft article 57 of the articles on State responsibility precluded the application of the draft articles on State responsibility to questions relating to the responsibility of a State for an internationally wrongful act by an international organization. Moreover, the draft articles on State responsibility were a major part of the context in which the draft articles on the responsibility of States

237 Ibid., p. 27.

238 Ibid., p. 30.
for an internationally wrongful act of an international organization would be applied. Consequently the provisions of draft articles 5, 7 and 8 on the responsibility of States with regard to the conduct of a person or entity exercising the prerogatives of public power and conduct under the direction or control of a State were applicable also to relations between a State and an international organization.

17. He agreed with the Special Rapporteur when he stated in paragraph 58 of his report that it would be difficult to find reasons for ruling out that a State might direct, control or coerce an international organization in the same way that it might another State. Accordingly, the draft articles should contain articles similar to those contained in chapter IV of the draft articles on State responsibility. In that regard, Mr. Pellet had already called attention to the absence, in the draft articles, of any requirements the organization might have, one number of problems, even if draft article 28 was no less important. In any event, draft article 29 had to be considered in the context of the draft articles before the Commission, the articles on State responsibility for internationally wrongful acts and other provisions of general international law, particularly questions of international organizations law. The Special Rapporteur’s general policy considerations underlying the article were set out in paragraphs 93 and 94 of the report. However, they did not fully reflect the balance of interests that must underlie draft article 29 in that they sought only to protect the organization’s integrity and its internal decision-making process, thereby exempting its members from any responsibility, at least in many cases. There was no balance there. It seemed to him that the balance of interests discussed by Mrs. Higgins in her statement prior to the adoption of resolution II/1995 of the Institute of International Law was much more objective and adequate:

18. As had already been pointed out, paragraph 62 of the report was important to an understanding of draft articles 25 to 27. One had to agree that the conduct in question could not consist merely of participation in an organization’s decision-making process and that the State that coerced an organization might or might not be a member of that organization. That was a fact. It was extremely difficult, however, to distinguish between the conduct of a State member of the organization in its capacity as a member in one case and its conduct as a separate legal entity in another. If, for example, a State that was a member of an organization proposed taking a certain decision and then said that if the decision was adopted it would not participate in the financing of any requirements the organization might have, one would have to ask whether the State was acting as a member of the organization or as a separate legal entity. In other words, it must be determined whether draft article 27 applied if the decision proposed by the State, once adopted, made it possible to invoke that State’s responsibility.

19. That being said, he believed that draft articles 25 to 27 had to be sent back to the Drafting Committee. However, the advisability of the condition stipulated in subparagraph (b) shared by draft articles 25 and 26 had been questioned by the Sixth Committee. Those provisions had already, in the case of other draft articles, given rise to a number of doubts in his own mind, and he would be grateful if the Special Rapporteur could provide him with some explanations, which might also be of value to States.

20. He endorsed the idea of draft article 28. However, he was not convinced that the argument developed in paragraphs 66 to 68—that draft article 28 was the reverse of the case contemplated in article 15—was correct. The two cases bore only a slight resemblance to each other. Like other Commission members, he felt that the proposed wording in draft article 28 gave rise to some doubts. In paragraph 1 (a), it was hard to see the need for any mention of a case of a State that avoided compliance with an international obligation relating to certain functions by transferring those functions to that organization. In his view, when the State transferred those functions to the organization, and even afterwards, it could be acting in good faith without intentionally seeking to avoid compliance with an international obligation. The problem of non-compliance with the obligation arose later. It would seem that in order to resolve the question of responsibility in that particular case, there would have to be an intent to avoid compliance with obligations at the time a function was delegated to an international organization. As for paragraph 1 (b), it was difficult to see how it was a question of an act that “would have implied” non-compliance with the obligation. As he saw it, paragraph 1 of draft article 28 must be interpreted in the following manner: the State member of an international organization bore international responsibility if it transferred to the international organization a function (power) required for compliance with an international obligation, and the international organization committed an act that, had it been committed by that State, would have constituted a violation of the international obligation in question. In that connection, he agreed with Mr. Matheson, who had pointed out that States could endow an international organization with functions that they themselves did not have. Moreover, they could do so in good faith, with no intention of avoiding compliance with international obligations.

21. Draft article 29 undoubtedly raised the greatest number of problems, even if draft article 28 was no less important. In any event, draft article 29 had to be considered in the context of the draft articles before the Commission, the articles on State responsibility for internationally wrongful acts and other provisions of general international law, particularly questions of international organizations law. The Special Rapporteur’s general policy considerations underlying the article were set out in paragraphs 93 and 94 of the report. However, they did not fully reflect the balance of interests that must underlie draft article 29 in that they sought only to protect the organization’s integrity and its internal decision-making process, thereby exempting its members from any responsibility, at least in many cases. There was no balance there. It seemed to him that the balance of interests discussed by Mrs. Higgins in her statement prior to the adoption of resolution II/1995 of the Institute of International Law was much more objective and adequate:

22. “The relevant policy factors are, on the one hand, the efficient and independent functioning of international organizations, and second, the protection of third parties from undue exposure to loss and damage, not of their own cause, in relationships with such organizations.”240 It was precisely that balance that draft article 29 ought to reflect.

239 Ibid., p. 27, draft articles 16–19.

22. In paragraphs 75 to 82, the Special Rapporteur offered a detailed analysis of two well-known examples in which the question of the material responsibility of international organizations and their members had been submitted to arbitration (*Westland Helicopters Ltd. v. Arab Organization for Industrialization* and *International Tin Council*). Those examples did not greatly impress him. In both cases, the question of material responsibility arose as a result of a violation of contractual obligations. In both cases, the contracts had been subject to domestic law and had been considered chiefly from that perspective. In both cases, the international organizations had acted as subjects of private civil law and not of public international law. According to legal theory in the area of responsibility of international organizations, a distinction should be drawn as a general rule between situations in which international organizations acted as private entities and those in which they acted as public-law entities. In other words, a distinction must be drawn between situations in which the international organization was financially responsible—for failure to meet financial obligations—and other cases.

23. Naturally, attention should be paid to the position taken by States in both cases. In paragraph 90 of his report, the Special Rapporteur stated that over 25 States that had been sued in the two cases had shared the view that no presumption could be made to the effect that the States members of an international organization incurred responsibility. The position of those States in those cases was understandable. Again in paragraph 90, the Special Rapporteur drew the more general conclusion that the same view was shared by the great majority of States. However, that statement seemed too categorical. The 25 States in question, the few other States that had commented on the topic in the Sixth Committee and still others that had expressed themselves in the ICJ during consideration of the *Legality of Use of Force* cases could hardly be considered to constitute an absolute majority, even if they did form the majority of those who had spoken on the question.

24. He wished to challenge the view that draft article 29 was unnecessary and that reliance on general international law on State responsibility was sufficient. That approach did not reflect the interests of third parties in their relations with international organizations. If one confined oneself to the principle of State responsibility, one still had to solve the problem of attributing the wrongful conduct. That was not easy to do in situations where not only States but also international organizations acted. However, draft article 29—and that was very important—solved the problem of the responsibility of a State that was a member of an organization without any need to attribute the conduct in question to that State.

25. Furthermore, the draft did not contain just two exceptions but many more. He wondered why everyone always spoke only of those two exceptions, i.e. the ones set out in subparagraphs (a) and (b). Draft article 29 began by stating that a State that was a member of an international organization was responsible in the cases covered by the preceding articles and only then did it add the two exceptions set out in subparagraphs (a) and (b).

26. He did not subscribe to the notion that draft article 29 created a situation of non-responsibility. The fact that international organizations enjoyed immunity from prosecution or that they could not participate in the consideration of cases heard by the ICJ was a problem relating to the implementation of responsibility but not a question of the existence or non-existence of responsibility per se. In addition, it was often difficult to implement responsibility in relations between States, especially if a judicial settlement was not possible. The problem was not merely one of responsibility in terms of the conduct of international organizations or of States that were members of international organizations.

27. In legal theory, views on the applicability of an organization’s international legal personality to third parties diverged widely. Still, it seemed that the logic of the draft text under consideration ultimately recognized that applicability, thereby solving the problem of responsibility of member States for acts committed by the organization. Draft article 2 provided a definition of international organization for the purposes of the draft articles which stipulated that the organization must have international legal personality. The draft articles did not apply to other organizations. What was more, the international legal personality of organizations, to judge by draft article 2, did not depend on the recognition of third parties.

28. At first glance, draft article 29 was fundamentally unlike articles 5 and 6 of resolution II/1995 of the Institute of International Law.241 However, if one considered it in conjunction with the articles that preceded it, particularly draft article 28, and if one did not exclude the possibility that the rules for attribution of State conduct could also apply to such situations, the differences did not seem so great. That was why he thought that the Commission should, as Mr. Dugard had proposed, base itself on the articles of resolution II/1995 when finalizing article 29, an article he considered to be necessary. Mr. Brownlie’s proposal to add the words “as such” at the beginning of the article was interesting.

29. Thus while draft article 29 was far from crystal clear, he did not in principle object to its being referred to the Drafting Committee. In any event, the draft articles under consideration did not completely cover all the questions they addressed. Rather, they provided a framework about which a legal settlement of the question of the responsibility of an organization or of its members, or the organization and its members, could be articulated, taking into account other legal norms and the facts of each individual case.

30. Mr. MOMTAZ said that he had been struck by the distinction drawn by Mr. Kolodkin between the activities of the international organization when it acted as a subject of domestic law and when it acted as a subject of international law. He would like Mr. Kolodkin to develop that distinction and tell what consequences it might have in terms of responsibility, bearing in mind the immunity international organizations enjoyed on the

31. Mr. KOLODKIN said that the distinction existed in practice and that international organizations that were solely subjects of domestic law were not covered by the draft articles. That distinction could, however, be of significance for the applicable law and the responsibility of international organizations and their member States.

32. Mr. PELLET said that he found the position taken by Mr. Kolodkin disturbing; the position was not a new one, since it dated back to the Soviet era: the Soviet authorities had hotly defended it during the 1940s in the Reparation for Injuries case. He was amazed that anyone should refuse to accept that international organizations had international legal personality that was not only subjective but also objective. While the ICJ had based itself on rather unconvincing logic to establish the objective character of the United Nations, Judge Krylov had, in his dissenting opinion, explained the objective character of the legal personality of the United Nations correctly: the Organization existed because it existed. The premise cited by Mr. Kolodkin was unacceptable, and while the Commission did not have to solve the problem within the specific context of the draft articles on responsibility of international organizations, it was still necessary to be very clear on that point. If one followed Mr. Kolodkin’s thinking, things would change radically, not only with regard to draft article 29 but with regard to other aspects of the draft as well.

33. Mr. KOLODKIN said that the opinion he had mentioned was not held exclusively by legal scholars from the former Soviet Union or the Russian Federation, for other authors from other countries also defended it.

34. Moreover, article 2 of the current draft gave the definition of an international organization for the purposes of the draft articles, and he was basing himself on that definition.

35. The CHAIRPERSON, speaking as a member of the Commission, said that, like Mr. Pellet, he was disturbed by Mr. Kolodkin’s statement regarding the legal personality of an organization. He was reminded in that connection of something Professor Reuter had said: States created international organizations to serve them, but when international organizations began to work, the States that created them were the first to try to stop them from acting in the direction they themselves had wanted to go. That was one of the paradoxical aspects of the international legal personality of international organizations.

36. International organizations, equipped by their international legal personality, concluded agreements, particularly headquarters agreements, the implementation of which resulted in the conclusion of other legal acts that did not always fall within the purview of international law insofar as any disputes to which they might give rise were concerned but rather of domestic law. He wondered whether that aspect of the question should be considered in the context of the current topic.

37. Mr. BROWNLEE said that the Chairperson’s mention of headquarters agreements had reminded him of something obvious: the immunities of international organizations were always explicitly spelled out, either in headquarters agreements or in the constituent act or bilateral agreements. What was striking about the responsibility of international organizations vis-à-vis third States was in fact the absence of any immunity, yet the Commission was trying with draft article 29 as currently worded to create an immunity for States that were members of international organizations. Such automatic immunity did not exist in general international law, and it was for that reason that the words “as such” should be added after the word “responsible” in draft article 29.

38. Mr. GAJA (Special Rapporteur) pointed out that the question of the immunity of international organizations in all its aspects was not part of the topic under consideration. He, too, had been somewhat disconcerted by Mr. Kolodkin’s statement that the case law cited in his report was irrelevant because it concerned domestic law. The cases in question, which were the only ones he knew that dealt with the topic and which he had analysed in paragraphs 76 to 82 of his report, did not, of course, provide a solution as to what constituted international customary law, but they at least gave an indication and could not be ignored.

39. Mr. ECONOMIDES said that he endorsed draft articles 25, 26 and 27 proposed by the Special Rapporteur, which were modelled on the corresponding provisions of the draft articles on State responsibility for internationally wrongful acts.\(^\text{32}\) It had been necessary to proceed that way in the present case, whereas it had been neither necessary nor desirable for certain circumstances excluding the wrongfulness of situations that were in fact no longer under study. Nevertheless, it would be useful to hear the Special Rapporteur’s response to Mr. Dugard’s suggestions regarding those articles, which were fairly interesting.

40. He also fully endorsed the substance of draft article 28, for he agreed with the view held by legal scholars, cited in paragraph 72 of the Special Rapporteur’s report, that the responsibility of member States should be invoked when they made improper use of the organization’s separate personality to commit wrongful acts or evade their legal obligations. In such cases the State was clearly acting in bad faith or fraudulently, an aspect that had not been sufficiently emphasized and which was an aggravating factor where responsibility was concerned. Still, the wording of draft article 28 was unusual, not to say surprisingly sophisticated, for a text dealing with responsibility that ought to be worded somewhat like a criminal text, in as clear and direct a manner as possible. The word “avoids” in paragraph 1 (a) seemed to punish an intention and not a specific unlawful act. On that point he agreed with Mr. Pellet and other members of the Commission. Secondly, one might well ask, as Mr. Kolodkin had, whether the phrase “would have implied non-compliance with that obligation” in paragraph 1 (b) was sufficient to engage a State’s international responsibility. The link

\(^{32}\) See footnote 233 above.
between paragraphs 1 (a) and 1 (b) should be considerably strengthened, and it would surely be preferable to say “if it does not comply with an international obligation it has assumed” in paragraph 1 (a) rather than “if it avoids compliance with an international obligation”. In fact, the entire article needed to be completely reworded.

41. Draft article 29, meanwhile, was a tricky provision. Practice in that area was inconsistent and controversial, and the only authoritative text available was resolution II/1995 of the Institute of International Law, which, as Mr. Kolodkin had said, ought to have inspired the Special Rapporteur more. He accepted in principle the notion of the sole responsibility of an international organization for its internationally unlawful act, unless the rules or even the practice of the organization provided for another system of responsibility. States could be forbidden to set up a different system of responsibility, such as a system of joint, subsidiary or other responsibility, for example. That exception was a critical one, but provision also had to be made for two others, as the Special Rapporteur had proposed; those were specific exceptions that would apply to injured third parties. Under the first exception, a State member of an international organization would incur international responsibility if it had expressly accepted such responsibility, while under the second, it would do so if it had accepted such responsibility implicitly but unambiguously. Both cases involved acceptance of responsibility.

42. Lastly, after hearing Mr. Yamada’s statement, he wondered whether provision ought not to be made for a third exception, for cases in which an international organization was insolvent and could not make compensation to injured third parties. Perhaps in such cases third parties could be given an opportunity to apply to the member States. In any event, the question should be considered.

43. Draft articles 25 to 29 could be sent to the Drafting Committee, but draft article 29 required considerable revision insofar as substance was concerned.

44. Mr. PELLET said that the question raised by Mr. Yamada and again by Mr. Economides was extremely interesting: if international organizations caused significant damage, they often lacked the means to provide compensation. That was a fact. However, the solution did not lie in making that situation into another exception. Draft article 29 must set out the principle of responsibility of an organization because the organization existed. The only solution was to solve the problem in terms of reparation. If the organization’s responsibility was incurred and if the organization did not have the means to address the consequences of its responsibility, it was reasonable, in the context of the progressive development of international law, to stipulate that the member States would assist the organization by bearing the consequences of the responsibility themselves. One might logically suppose that by joining the organization they felt themselves to be implicitly responsible in the sense of being “liable” or “accountable”, rather than “responsible”. The responsibility incurred, however, was that of the organization. At the reparation stage, the normal consequences of responsibility would certainly have to be made more flexible. It would be unfortunate, however, to confuse problems of compensation with problems of incurring responsibility.

45. The CHAIRPERSON, speaking as a member of the Commission, said that he supported the idea of solving the problem at the compensation level. He himself had considered two possibilities. The first involved making the situation into a third exception, but that was the solution that Mr. Pellet had ruled out. The second involved making the existing text into a “paragraph 1 followed by a paragraph 2” devoted to the situation of an international organization that was unable to address its responsibility vis-à-vis third parties, supplementing that idea by the fact that such responsibility would be borne jointly by the member States. It might be the right moment to set out the principle underlying that situation, even if it meant spelling out at the level of consequences, as Mr. Pellet had suggested, the joint and residual responsibility of all the member States.

46. Mr. PELLET said that he disagreed with that way of describing things. The structure of the draft articles consisted of a first part, which included draft article 29, on how responsibility was incurred for an internationally wrongful act of the organization. The Commission would subsequently see what the consequences of the act were, chief among which was reparation. To add something to draft article 29 would amount to confusing the question of how responsibility was incurred with the question of consequences. If it was really necessary, the Commission could consider a “without prejudice” clause, a second paragraph that would establish that the principle set out in the first paragraph applied without prejudice to the modalities of reparation. That, however, would be a big step, and it would be better to hold that option in reserve until the Commission debated the question. It was important that the problem had been raised, but it would be premature to solve it at the present stage.

47. The CHAIRPERSON welcomed the idea of a “without prejudice” clause but said that he would leave it to the Special Rapporteur to deal with the various proposals put forward.

48. Mr. CHEE noted that, in paragraph 57 of his report, the Special Rapporteur contemplated expanding his work to cover members of an international organization that were not States but other international organizations and to include the relevant provisions in chapter IV, entitled “Responsibility of an international organization in connection with the act of a State or another international organization”. 

49. Paragraphs 58 to 63 of the report dealt with “aid or assistance, direction or control, and coercion by a State in the commission of an internationally wrongful act of an international organization”. It was thus logical that a State that acted in that manner should incur responsibility. Draft article 26 brought to mind a powerful State that might direct or control an international organization for its own political ends. However, an international organization that committed an act with prior knowledge of the circumstances was still responsible.
50. Paragraphs 64 to 74 dealt with the use by a State member of an international organization of the separate personality of that organization. In paragraph 66 the Special Rapporteur described the case of a State that was a party to a treaty that forbade the development of certain weapons and that indirectly acquired control of such weapons by making use of an international organization that was not bound by the treaty. An example of that situation would be welcome.

51. He endorsed draft article 28 proposed by the Special Rapporteur.

52. Lastly, paragraphs 75 to 96 dealt with the negative side of the responsibility of international organizations, i.e. cases in which organizations were actually responsible. The Special Rapporteur concluded that only in exceptional cases could a State that was a member of an international organization incur responsibility for the internationally wrongful act of the organization. That notion was reflected in draft article 29. In that context it might be relevant to note that international law granted certain immunity to the acts of international organizations, exempting them from the application of both domestic and international law. However, as C. F. Amerasinghe had stated, the United Nations generally accepted responsibility for any illegal acts committed by the armed forces of Member States acting under the aegis of the Organization.

53. He endorsed draft articles 25 to 29 and suggested that they should be referred to the Drafting Committee.

54. Mr. MELESCANU said that his year-long absence had enabled him to take a particularly objective look at the considerable progress made in the Commission’s work on the responsibility of international organizations. He had been struck by the divergence of views expressed during the debate but he did not think that meant that consideration of the topic had reached an impasse.

55. If one proceeded from the fundamental principle that an international organization had a separate legal personality from that of its members, one had to accept that that meant that the organization bore international responsibility for wrongful acts, as responsibility was one element of its legal personality. The cases in which responsibility for acts committed by an international organization could be attributed to a State still had to be determined. He thought that the solution was to be found not in draft article 29 but in chapter II, on attribution of conduct to an international organization. It was thus in that chapter that the Commission could, if necessary, address that question.

56. One of the Commission’s main concerns was to prevent States from using an international organization for their own ends. The idea was an interesting one from a political and practical standpoint, for many current examples justifying that concern could be cited, but it was not workable from a legal standpoint. Since rules governing the attribution of an act to an international organization—those set out in chapter II—did exist, it was extremely difficult to define special rules. To whom should the act be attributed if not the organization? It could be attributed to a State that had taken the initiative of a draft resolution, for example. Most frequently, however, the States in question were above suspicion and put forward a resolution without any hidden motives. It was therefore quite difficult from a legal standpoint to create a system that would prevent certain States from using international organizations for their own ends.

57. The capacity of international organizations to make reparation for damage caused by their activities was another area of concern. In reality, it was in no one’s interest for international organizations to be responsible, for their responsibility was somewhat similar to that of limited liability companies, which responded to their acts only within the limits of their budgets. Like Mr. Pellet, he believed that it was necessary to distinguish between the question of incurring responsibility and the question of consequences, which would be dealt with in another chapter. That chapter would be all the more difficult to draft in that consequences often took the form of reparation, and financial reparation at that.

58. He concluded by endorsing the referral of draft articles 25 to 28 to the Drafting Committee. Draft article 29 had a definite place in the draft, subject to a number of improvements. In that connection, Mr. Matheson’s proposal to say that a State was not responsible “as such” was welcome, as was Mr. Koskenniemi’s proposal to add a subparagraph (c) to cover cases in which a State denounced the act of the international organization, the proposal of Mr. Economides to specify that a State accepted its responsibility “implicitly but unambiguously” and that of Mr. Pellet to add a “without prejudice” clause.

Organization of the work of the session (continued)\[Agenda item 1]\n
59. Mr. OPERTTI BADAN drew attention to the programme of work and said that he would have liked to introduce the preliminary document he had prepared on the right to asylum, but that he had been informed by the Secretariat to the Commission that he could not. He wished to express his deep displeasure at that situation, which only served to confirm that there were different categories of countries, representatives and influences within the Commission. The Commission could decide whether it wished to include the right to asylum in its work, but the fact of the matter was that there were refugees and asylum-seekers in all parts of the world.

60. Mr. MIKULKA (Secretary to the Commission) explained that the Secretariat was bound by the programme of work drawn up by the Bureau.

61. The CHAIRPERSON noted that a great many parameters came into play in the organization of the Commission’s work, and he assured Mr. Opertti Badan that neither the Bureau nor he himself had ever dreamed of discriminating against him or the group of countries he represented in any way.

The meeting rose at 12.05 p.m.

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* Resumed from the 2885th meeting.

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2895th MEETING

Tuesday, 18 July 2006, at 10.05 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabtsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momen, Mr. Niehaus, Mr. Operti Badan, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

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

1. The CHAIRPERSON invited Mr. Nicolas Michel, Under-Secretary-General for Legal Affairs, Legal Counsel, to brief the Commission on the latest legal developments in the United Nations.

2. Mr. MICHEL (Under-Secretary-General for Legal Affairs, Legal Counsel), after congratulating the new member of the Commission, Mr. Valencia-Ospina, on his election, said that the General Assembly, in its resolution 60/22 of 23 November 2005, had expressed its appreciation to the International Law Commission for the work accomplished at its fifty-seventh session and encouraged it to complete its work, at the current session, on the topics that were nearing completion. He understood that considerable progress had been made during the current session, in particular, on the topics “Diplomatic protection”, “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)” and “Shared natural resources”. That progress led him to hope that the Commission would be in a position to complete its second reading of the draft articles and draft principles on the first two topics and its first reading of the draft articles on the third topic in the coming weeks. He also congratulated the Commission on its progress on all the other topics in its programme of work.

3. In the same resolution, the General Assembly encouraged the Commission to continue taking cost-saving measures. He was aware that the Commission had taken the General Assembly’s oft-repeated request to heart; it would doubtless heed that request again when planning its next session. In particular, he noted with satisfaction that, according to statistics issued by the Conference Services Division, the Commission was using an extremely high percentage (98 per cent) of the conference servicing resources made available to it.

4. Still on the administrative and budgetary theme, he drew attention to the strategic framework that the United Nations was currently establishing for the period 2008–2009. The section relating to the codification and progressive development of international law, especially in relation to the Commission, had been drawn up on the assumption that the length of the Commission’s sessions would be in conformity with the general approach indicated in paragraph 735 of the Commission’s report on its fifty-second session. In that connection, he urged members of the Commission to continue to cooperate with the Secretariat in the effort to cope with the large volume of documentation by doing their utmost to abide by the dates indicated for the submission of reports by special rapporteurs. Meanwhile, the Codification Division of the Office of Legal Affairs, in its capacity as the Commission’s Secretariat, would continue to make every effort to assist it in its work, a recent instance being its lengthy memorandum on expulsion of aliens (A/CN.4/565 and Corr.1).

5. A considerable part of the Codification Division’s work was devoted to the preparation of publications, of which the Commission was a prime beneficiary. Thus the sixth edition of The Work of the International Law Commission had already appeared in five of the official languages of the United Nations and would shortly be followed by the Chinese version. Plans were already in hand for the preparation of the seventh edition, which would reflect recent developments. As for the Commission Yearbook, the Codification Division had completed the digitization of all volumes in English and French from 1949 onwards, and had posted them on the Internet. Internet access was also provided to recent documents that had not yet been included in a Yearbook but were available on the United Nations optical disk system. The Secretariat was currently looking into the possibility of having the Yearbook further disseminated through some of the existing commercial electronic databases, such as LexisNexis, and also of establishing a print-on-demand service in order to make out-of-print volumes—or entire sets of the Yearbook—available for special order. The Codification Division continued to expand its digitization efforts, and would shortly complete the digitization of the official records and proceedings of the various diplomatic conferences that had been held on the basis of the Commission’s work and that led to the adoption of major multilateral treaties. Efforts were also under way to digitize some of the other publications of the Division, particularly the United Nations Juridical Yearbook and the Reports of International Arbitral Awards, which currently numbered 25 volumes.

6. He wished to draw the Commission’s attention to three recent developments in the field of international law within the United Nations. First, in the field of elaboration of new international legal instruments on the recommendation of the Sixth Committee, the General Assembly had, in its resolution 60/42 of 8 December 2005, adopted the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, thus completing four years of negotiations conducted by the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel and the Working Group of the Sixth

244 Yearbook ... 2000, vol. II (Part Two), document A/55/10, p. 132.
245 Mimeographed, available on the Commission’s website.
246 United Nations publication (Sales No.: 04.V.6), New York, 2005.
Committee. The Optional Protocol expanded the scope of protection under the 1994 Convention on the Safety of United Nations and Associated Personnel to cover United Nations and associated personnel involved in delivering humanitarian, political or development assistance in peacebuilding, or in the delivery of emergency humanitarian assistance. It was an important instrument for those United Nations and other personnel who remained involved in dangerous missions all over the world in the service of humanity, and it was to be hoped that more and more States would become parties to the Optional Protocol.

7. Secondly, work had continued on a draft comprehensive convention on international terrorism, both within the Ad Hoc Committee established pursuant to General Assembly resolution 51/210 of 17 December 1996 and in the Working Group of the Sixth Committee. The Working Group had met during the sixtieth session of the General Assembly and the Ad Hoc Committee had convened in February 2006 in order to make further attempts to resolve outstanding issues, and in particular the question of the scope of application of the convention. Despite new proposals aimed at overcoming differences among the various viewpoints, a breakthrough in negotiations continued to remain elusive.

8. Thirdly, there had been significant developments in the field of transitional justice, with hybrid courts set up in Sierra Leone and Cambodia, and other courts in preparation, for Lebanon and, possibly, for Burundi. A number of trials were in progress before the Special Court for Sierra Leone, in Freetown. Charles Taylor, the former President of Liberia, had been transferred to the Special Court on 29 March 2006. Security Council resolution 1688 (2006) of 16 June 2006 had subsequently made it possible for Mr. Taylor to be transferred to The Hague for trial there by a chamber of the Special Court, after the Government of the United Kingdom had announced that, subject to the passage of the necessary legislation through Parliament, it would allow Mr. Taylor to serve his sentence in the United Kingdom, should he be convicted by the Special Court. Mr. Taylor’s trial was expected to begin in The Hague early in 2007.

9. As for Cambodia, the Cambodian and international judges of the Extraordinary Chambers in the Courts of Cambodia had been sworn in at a formal ceremony in Phnom Penh on 3 July 2006. The Cambodian and international co-prosecutors and co-investigating judges had been sworn in at the same time. The two co-prosecutors had started work in the second week of July 2006. It was expected that they would open their first investigations at the end of the summer and, all being well, would refer the first case to the two co-investigating judges towards the end of 2006. One of the biggest challenges facing the Extraordinary Chambers was the advanced age of many of the likely targets for investigation and prosecution: only a fortnight earlier, a former Khmer Rouge leader, who had been held in detention by the Cambodian authorities for several years, had been hospitalized. A further major challenge was to reach out to the Cambodian public in order to explain the work of the Extraordinary Chambers. The work of the Extraordinary Chambers would be monitored closely to ensure that international standards of justice, fairness and due process of law were observed.

10. With regard to Burundi, a United Nations delegation had visited that country from 27 to 31 March 2006, in accordance with Security Council resolution 1606 (2005) of 20 June 2005, to commence negotiations with the Government on the legal framework for the establishment of a truth and reconciliation commission and a special tribunal for Burundi. The discussions had focused on three issues, namely the nature of the national consultation process leading to the establishment of the truth commission, the non-applicability of amnesty for crimes of genocide, crimes against humanity and war crimes, and the relationship between the truth commission and the special tribunal. The second round of negotiations on a general framework agreement and the founding instruments of each mechanism could take place in the near future, if the Burundian authorities could provide some clarification on a limited number of key issues that had already been discussed.

11. As for Lebanon, the Secretary-General had been requested, pursuant to Security Council resolution 1664 (2006) of 29 March 2006, to enter into negotiations with the Lebanese authorities on “the establishment of a tribunal of an international character” to prosecute persons responsible for the assassination of the former Prime Minister, Rafiq Hariri, and others. Two draft instruments were currently under negotiation: an agreement between the United Nations and the Government of Lebanon on the establishment of a special tribunal for Lebanon and the statute annexed thereto. Significant progress had been achieved between the parties at a technical level. The drafts awaited formal negotiation with the Government of Lebanon and, subsequently, review by the Security Council before the signature of the agreement.

12. The establishment of transitional courts illustrated a major shift in the international legal culture over the past 10 to 15 years: the creation of such courts could not be viewed as isolated events, but instead formed part of a broader new culture. Although that culture was still emerging, it was not premature to draw a few provisional conclusions. First, whereas it had been thought, in the past, that peace should take precedence over justice, and those responsible for atrocities had not been prosecuted because it was thought that their cooperation was crucial to peace, it had now been understood that peace would not be achieved without justice, and vice versa. Both were essential, the question being how to achieve a balance between the two. Secondly, it had become clear that it was essential to insist on the impermissibility of amnesty for international crimes. Thirdly, in any consideration of the relationship between truth and reconciliation, on the one hand, and justice, on the other, there must be an absolute insistence on the independence of the criminal prosecutor, who alone must be in a position to decide whether to prosecute those implicated.

13. The CHAIRPERSON thanked the Legal Counsel for his statement, which had reminded the Commission of the close link between the codification and the implementation of international law. It was time for
humankind to rediscover some of its lost values for the sake of future generations. He invited members to make comments and ask questions.

14. Mr. GALICKI said he wished to commend the Codification Division’s efforts to make the work of the Commission and other bodies easily accessible on the Internet. He believed that the Commission had reason to congratulate itself on the successful adoption of the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel. As one who had been involved in the travaux préparatoires for the Convention itself, beginning in 1984, he well recalled the difficulties encountered in ensuring that the Convention had the widest possible scope, and the Protocol took that process a step further. The situation with regard to transitional justice was less satisfactory. While he acknowledged the work of the transitional bodies, he wondered whether the Legal Counsel thought that a proliferation of ad hoc international courts was preferable to a fully functioning International Criminal Court.

15. Mr. DUGARD said he wished to comment on the Legal Counsel’s reference to amnesty. As the Legal Counsel had said, justice had, in recent years, been placed above peace, and every effort was made to exclude amnesty, despite its long history of acceptance in international relations. He wondered whether it was realistic to pursue the aim of prohibiting amnesty in all situations. In Uganda, where the International Criminal Court was active, amnesty might be required as part of the peace negotiations currently under way. Insufficient attention was being paid to the possibility of qualified or conditional amnesty and, speaking from his own South African perspective, he would say that qualified amnesty had been successful in reconciling peace and justice. If the Rome Statute of the International Criminal Court had dealt with the issue, a total prohibition of amnesty might have been justified; however, the Statute studiously ignored the question. In his view, it would be wiser to pursue the goal of qualified amnesty than the pipe dream of a prohibition of all forms of amnesty.

16. Ms. ESCARAMEIA said that, like Mr. Galicki, she was concerned about the relationship between the International Criminal Court and the special courts. She wondered whether the United Nations had any strategy in place governing the establishment of special courts. It was true that the special courts dealt with cases over which, for one reason or another, the International Criminal Court did not have jurisdiction, but she wondered whether any policy had been developed to encourage or discourage the establishment of such courts, where the crimes involved were the same as those brought before the International Criminal Court. Her concern was that the use of special courts might discourage the activity of the International Criminal Court.

17. In a number of countries, including Timor-Leste, truth and reconciliation commissions had examined cases relating to lesser crimes, whereas special courts had been set up in those countries to hear and try persons accused of very serious international crimes. She wondered whether any criteria existed for deciding whether to allocate cases to truth and reconciliation commissions or to special courts. If so, what were those criteria?

18. Mr. MICHEL (Under-Secretary-General for Legal Affairs, Legal Counsel) said his own personal view was that, even with an international system of criminal justice becoming more and more universally accepted, States would nevertheless continue to bear primary responsibility for prosecuting and punishing the most serious crimes. Only if States were unable or unwilling to accomplish that task should the International Criminal Court exercise jurisdiction over those crimes by virtue of the principle of complementarity.

19. Nevertheless that statement required some qualification. First, it was necessary to bear in mind that, even though the Rome Statute of the International Criminal Court had currently been ratified by 100 States, the Statute was not yet universally accepted. That obstacle could, however, be circumvented, as the Security Council could refer to the Prosecutor of the Court situations which would otherwise not fall within its jurisdiction owing to the fact that, for instance, the States concerned were not parties to the Rome Statute.

20. Secondly, it was clear that some States did not yet possess legal systems capable of fully addressing the question of individual criminal responsibility. Indeed, in some cases State systems had completely collapsed and it was therefore illusory to hope that those States would be able to fulfil their duty of prosecuting the perpetrators of serious crimes of concern to the international community. Two developments were therefore needed. First, more States must become parties to the Rome Statute of the International Criminal Court; secondly, it was essential to build the capacity of States’ internal legal systems. To that end, the international community must devise a more substantial and effective programme of assistance to those States which would welcome the provision of training opportunities for the members of their legal services.

21. The questions put by members of the Commission seemed to imply that the international community should refrain from establishing ad hoc or mixed tribunals where the case fell within the jurisdiction of the International Criminal Court. If the system of international justice was to function, however, it was necessary to engage in creative thinking whenever a country’s domestic courts were deemed capable in principle of exercising criminal jurisdiction but needed international assistance, not necessarily in the form of the participation of international judges or of the establishment of a mixed tribunal, but rather in the conducting of their day-to-day business.

22. On the vexed question of amnesty for international crimes such as war crimes, genocide and crimes against humanity, or other crimes that might be regarded as international crimes in the future, he was of the view that it was vital to learn lessons from the past and he was therefore grateful to Mr. Dugard for mentioning his country’s experience. Before deciding whether it was realistic to seek a total ban on amnesty for such crimes, it was essential to ascertain what was meant by...
“conditional” or “qualified” amnesty. Unfortunately, negotiations to secure peace agreements sometimes had to be conducted with persons who might be responsible for international crimes. The question could then arise whether it might be advisable to suspend prosecution, or not to initiate prosecution, in the phase leading up to the conclusion of a peace agreement and the establishment of the most vital State functions.

23. The state of affairs in certain countries where amnesty had been granted, or where the perpetrators of the worst crimes had not borne criminal responsibility for them, showed that, even after many years, those countries were still haunted by memories of the role which had been played by those persons, who, on occasion, had even returned to positions of power. It was plain that those countries were finding it extremely hard to lay the foundations for lasting peace.

24. Some flexibility therefore had to be allowed, in the light of what was understood by “qualified” or “conditional” amnesty. On the other hand, it would be difficult to compromise on the actual principle involved. The purpose of transitional justice processes was, of course, to punish the chief perpetrators of international crimes and to give the victims a sense that justice was being done. Over and above that, their purpose was to have an effect on society as a whole and to create conditions for lasting peace. In that context, it was essential to give thought to the whole issue of prosecuting and sentencing the chief culprits by way of redress. In Sierra Leone some tens of millions of dollars annually had been invested in the Special Court, but only 11 persons had ultimately been brought to trial. While he was convinced of the need for the process, there was a need to assess, for other similar situations, the best way to address the consequences to be faced by those perpetrators of major crimes who were not brought to justice before the Special Court. Mixed courts were so costly that there was probably a grey area between what could be achieved by a truth and reconciliation commission and the limited scope of activity of an international criminal tribunal or a mixed tribunal. Some thought should be given to the question how best to deal with criminals who ought to appear before a body other than a truth and reconciliation commission, but whose misdeeds did not come within the limited jurisdiction of an international criminal court. Creative thinking was needed to ensure that justice was done in such circumstances. Nevertheless, the hope that the national legal system might in due course be developed, reformed and reinvigorated so that it could itself handle cases which could not be heard by the International Criminal Court or by a mixed court, might not always be realistic.

25. Hence the solution must be an appropriate mix of measures and a diversification of those measures. Efforts should focus on putting an end to the old culture of impunity. When new truth and reconciliation commissions were created, the possibility of subsequently bringing to trial persons who had appeared before them should certainly not be automatically ruled out.

26. The Secretariat and the Security Council were currently going through a learning phase with regard to the relationship between truth and reconciliation commissions and special tribunals. It was necessary to learn from past successes and mistakes and to think creatively, since no two situations were ever exactly the same. As for the relationship between truth and reconciliation commissions and tribunals, in Burundi, for example, account would have to be taken of the fact that the country had suffered from 40 years of repeated cycles of violence. Naturally it would be unrealistic to expect the tribunal to try all those who, over all those years, might have been responsible for war crimes or other international crimes. For that reason, appropriate mechanisms would have to be found for those persons who could not be allowed to pass solely through a truth and reconciliation process, but who were unlikely to be tried by an international court.

27. Mr. MOMTAZ said that one of the greatest obstacles to the determination of the United Nations to end the culture of impunity was the fact that persons suspected of having committed international crimes were still on the run. When the United Nations was present on the ground, it could play a very important role in locating and apprehending those persons. On 11 November 2005, the Security Council had taken the very important step of adopting resolution 1638 (2005) under Chapter VII of the Charter of the United Nations, which had broadened the mandate of the United Nations Mission in Liberia to include the apprehension and detention of former President Charles Taylor for transfer to Sierra Leone for prosecution.

28. Did the Legal Counsel consider that such a policy could be contemplated in the future? What were the dangers of such a policy? It had to be borne in mind that United Nations forces had to respect the principle of impartiality and neutrality, although frequently they alone were in a position to apprehend persons alleged to have committed international crimes.

29. Mr. BROWNLE, referring to the various Security Council resolutions concerning the presence of the multinational force in Iraq, and especially Security Council resolution 1546 (2004) of 8 June 2004, said he would be interested to know how the Legal Counsel and his colleagues assessed the legal character of the regime created by that series of resolutions. There were several possibilities. The regime could be one of belligerent occupation within the meaning of the term in classical international law. In his own opinion, however, that possibility could probably be set aside: that position seemed not to be reflected in the resolutions; the regime had not been applied on the ground; nor, as far as he knew, had the States most directly involved recognized the existence of a belligerent occupation. The other two possibilities were, first, that the Security Council resolutions created a regime of military occupation sui generis; or, secondly, that the State of Iraq was independent, with visiting forces present on the basis of the consent of a lawful Government of Iraq.

30. Mr. KAMTO said he had some concerns with regard to the question of transitional justice. In developing countries, especially those in Africa, there was a lingering sense of unease because that justice was perceived as applying dual standards, or as being meted out only to the
weak and the poor. That explained the attitude of Senegal and the members of the African Union with respect to the case of former Chadian Head of State Hissène Habré. There was a feeling, even among developing countries, that nationals of those countries lacking sufficient support in the international community or in the Security Council were more likely to be arraigned before a court of justice. Was the United Nations aware of that perception, and did it have a strategy for mitigating it?

31. He also wished to know why the Legal Counsel had failed to mention the crime of aggression among those falling within the jurisdiction of the International Criminal Court. That crime was expressly mentioned in article 5 of the Rome Statute of the International Criminal Court and although it had not been defined there, it was deemed to be one of the four most serious crimes of concern to the international community. It could also be regarded as the mother of all crimes, since there could be no war without an initial act which, in all probability, would consist of an act of aggression. What progress had been made with endeavours to define that crime? Had they been abandoned? Had the time not come to make a more strenuous effort with a view to facilitating application of the Statute? Moreover, a definition of aggression might help to limit the conflicts which gave rise to the other crimes listed in article 5.

32. Mr. DAOUDE, endorsing the Legal Counsel’s views with regard to the importance of the relationship between peace and justice, said that, although the United Nations had adopted numerous resolutions on problems, often of a regional nature, which had led to chronic conflicts in the course of which international crimes had been committed, the Organization had been unable to enforce those resolutions. As a result, over the past 10 to 15 years, the emphasis appeared to have been on the prosecution and punishment of those crimes, rather than on prevention. A system existed within the United Nations for protecting international peace and security, yet that system could be jeopardized by the absence of a regime of preventive diplomacy. Did the Legal Counsel agree on the need for a reform of the system in order to secure peace and, through peace, justice?

33. The CHAIRPERSON, speaking as a member of the Commission, noted that the United Nations was omnipresent in world affairs and that it was impossible to separate the law from people’s perception of political or other action to uphold it. He asked what place the universal presence of the United Nations had in the broad process of reform launched by the Secretary-General. Would the attempt by the United Nations to deal with each and every conflict that arose help to expedite the reform process or would it, as was to be feared, act as a brake on it?

34. Mr. MICHEL (Under-Secretary-General for Legal Affairs, Legal Counsel) concurred with Mr. Momtaz’s concern that, all too frequently, persons suspected of having committed international crimes were still at large. The question of trials in absentia had been discussed during the drafting of the Statutes of the International Tribunal for the Former Yugoslavia and of the International Tribunal for Rwanda. There had been several reasons for the decision not to admit such trials. First, they had been regarded as inconsistent with the common law tradition. It had also been held that, if such tribunals were to achieve the aims set for them, those accused had to be present in person at their trial. The question was still open, however. As for the proposed tribunal for Lebanon, it was the first time that such a tribunal had been envisaged in a civil law tradition, since the Lebanese system was relatively close to the French system, in which trials in absentia were permissible.

35. At the same time, the European Court of Human Rights had held that criminal trials in absentia in which the accused was not entitled to defence counsel violated the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), even if the person convicted had the right to request a retrial and appear before the Court. While neither the United Nations nor States that were not parties to the Convention were bound by the Court’s case law, the international community obviously had to take account of the case law of a court of such importance. In other words, if, in the future, new judicial systems were to permit trials in absentia, it would be necessary to ensure that suspects not present at their trial had access to defence counsel during the proceedings. It would also be necessary to consider what consequences the fact that a person convicted had been briefed and had been represented by defence counsel would have on that person’s right to demand a retrial.

36. However, Mr. Momtaz’s question related principally to the mandate of United Nations forces with regard to locating and apprehending persons being investigated or prosecuted by international tribunals. The mandate of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) could be interpreted, within certain limits and under certain conditions, as a mandate to locate and apprehend individuals wanted by the International Criminal Court. The evolving practice in that area was encountering challenges, chief among which was assigning priorities. If the priority in a given region was peacemaking, then when United Nations forces engaged in a determined effort to track down persons accused, they would almost certainly be perceived as enemies by the combatants and their main mission compromised. Hence the circumspect approach adopted by the Security Council in assigning such mandates. Opportunities for cooperation between the United Nations and the International Criminal Court had been arising more frequently of late, under various special cooperation arrangements, from which useful lessons were being learned.

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247 See, in this regard, the “Letter dated 20 February 2006 from the Permanent Representative of the Congo to the United Nations addressed to the President of the General Assembly”, A/60/603, annex 1, Decisions, declarations and recommendation adopted by the Assembly of the African Union at its sixth ordinary session, and “Decision on the Hissène Habré Case and the African Union (Assembly/AU/Dec.103 (VI)), p. 16.

248 Report of the Secretary-General pursuant to paragraph 2 of resolution 808 (1993) of the Security Council (S/25704), annex.

37. With regard to Mr. Brownlie’s questions about the legal regime created by the resolutions on Iraq, he said that while one of the main missions of the Office of Legal Affairs was to give legal advice to the Secretary-General, the Secretariat and other principal organs of the United Nations, he did not recall, during his two years as Legal Counsel, his Office having been formally consulted by the Security Council on the substantive aspects of resolutions, except on limited technical issues. The fact of the matter was that his Office did not have a consolidated position on the legal regime created by such resolutions. Indeed, he found Mr. Brownlie’s analysis of the various possible interpretations of the regime most helpful.

38. In connection with Mr. Kamto’s questions, and by way of a preliminary observation, he welcomed the signing, on 12 June 2006, of the agreement between Cameroon and Nigeria on the implementation of the judgment handed down by the ICJ in the Land and Maritime Boundary between Cameroon and Nigeria case.250 Years of negotiation, the determination of the Secretary-General and the good will and personal involvement of the Heads of States had been needed for agreement to be reached. It was essential that States involved in proceedings before the Court should comply with their obligation to give practical effect to the judgments handed down. It was to be hoped that the provisions of the agreement would be faithfully implemented within the time frame envisaged.

39. Mr. Kamto had referred to a lingering sense of unease in some African countries over what seemed to be dual standards of justice. He was, of course, sensitive to such perceptions, since his role, and that of the Office of Legal Affairs, was to ensure that the needs of all countries were taken into account without any discrimination. Any strategy for overcoming such perceptions would require a major effort, not only by the United Nations, but also by the World Bank and other international donors, to respond to requests by countries for assistance in judicial reform. The best international legal system, one that would obviate the need for ad hoc tribunals, would be one in which, in principle, States had jurisdiction, with jurisdiction falling to the International Criminal Court only where necessary. Under such a system, States that had ratified the Rome Statute of the International Criminal Court, as so many in Africa had already done, would be unlikely to consider it an expression of dual standards in justice if a case that fell within the jurisdiction of the International Criminal Court was handed over to that Court for trial.

40. His allusion, when responding to the question by Mr. Dugard on amnesty, to “other crimes that might be regarded as international crimes in the future” had of course referred to the crime of aggression, although he would not wish to exclude the possibility that other crimes currently considered as national crimes might also in due course be deemed to be international crimes. The definition of aggression as a crime committed by an individual was being studied by the Assembly of States Parties to the Rome Statute of the International Criminal Court, whose deliberations fell outside the competence of the United Nations as such. As he understood it, however, they had proceeded fairly slowly, although some progress had been made in 2005 in the context of informal discussions. He did not know whether the deliberations would result in a generally acceptable solution, but the forthcoming Review Conference would possibly provide new impetus, facilitating the adoption of rules giving the Court jurisdiction to prosecute individuals accused of the crime of aggression.

41. Mr. Daoudi had referred to the need to strike a proper balance between punishment and prevention. He agreed on the need to devote sufficient attention, energy and resources to prevention and to the effective implementation of Security Council resolutions. However, prosecution and punishment of crimes could also have a preventive dimension and some dissuasive effect. Recent experience showed that some warlords were not indifferent to the threat of prosecution before a criminal court. The more deeply the refusal to tolerate impunity took root, the more likely potential criminals would be to have second thoughts. Punishment and prevention should therefore be carefully balanced and neither approach excluded.

42. Replying to the Chairperson’s question, he said that the United Nations must remain aware that law and justice were the very basis for its legitimacy. If it did not continue to take sufficient account of that fact, its very existence could be jeopardized. Accordingly, concern for the law must be integrated into the daily process of decision-making. That could best be achieved by ensuring that decision makers were aware of the legal dimension of issues and involved legal counsels in the decision-making process at an early stage. Legal counsels, on the other hand, while tirelessly promoting respect for the law, must also recognize that they were advisers rather than decision makers.

43. The United Nations was seeking to integrate the legal dimension more fully into its activities, inter alia, in post-conflict situations. One of the successes of the 2005 World Summit Outcome251 was the establishment, by resolution 60/180 of 20 December 2005, of the Peace-building Commission whose support structures were to be given the resources to promote the rule of law in countries whose State infrastructure needed reconstructing. Concern for the rule of law should likewise prevail in all other areas at the national and international levels. The Secretariat and its relations with the principal and subsidiary bodies of the United Nations must be organized to take account of that need.

44. The Secretary-General had announced in 2004 that the rule of law was to be a priority until the end of his term, and he himself hoped that the next Secretary-General would be equally committed to that principle at both the national and international levels.

45. The CHAIRPERSON thanked the Legal Counsel for his comments and clarifications. His closing sentiments had been particularly stimulating and optimistic and all members of the Commission would undoubtedly share them.


251 See resolution 60/1 of 16 September 2005 in which the General Assembly adopted the 2005 World Outcome Summit.

Fourth report of the Special Rapporteur (concluded)

46. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on his fourth report, contained in documents A/CN.4/564 and Add. 1–2.

47. Mr. GAJA (Special Rapporteur), summing up the debate, said that although time constraints would prevent him from making a comprehensive analysis of all the remarks made during the course of the debate, they had been noted, and the Drafting Committee would consider them in due course. The subject was complex and not always easy to place in context. The five draft articles complemented one another. They attempted to give balanced protection both to those who suffered injury from a wrongful act of an international organization and to those who, as members of an international organization, could be exposed to international responsibility for an unlawful act committed by an international organization. The context, however, was wider, comprising the rules on attribution of conduct to States found in chapter II of Part One of the draft articles on responsibility of States for internationally wrongful acts.

48. In his second report,252 which had dealt with attribution, he had referred to the controversy surrounding certain cases involving States alongside international organizations, one of which was the bombing of the territory of the Federal Republic of Yugoslavia in 1999. He had suggested that in such cases conduct should be attributed only to the member States concerned or to both the organization and one or more of its member States. He still disagreed with Mr. Pellet on that point. He had also held that the act of an organ of a State that was not placed under the effective control of an international organization had to be attributed to that State, irrespective of the involvement of an international organization, for instance by way of a decision binding the State. Those points must be kept in mind in considering the provisions on responsibility of States in general (arts. 25 to 27) and of Member States only (arts. 28 and 29) in relation to wrongful acts committed by international organizations.

49. Articles 25 to 27 replicated articles 16 to 18 on responsibility of States in order to cover the case of a State aiding or assisting, controlling and directing, or coercing an international organization in the commission of an internationally wrongful act. In his report he had given the basic reason for that replication, and that choice had been widely endorsed. Suggestions had been made for modifications to the wording of the articles on responsibility of States, but adopting them would mean modifying the text applicable in the relations between States, which had already been incorporated in articles 12 to 14 of the current draft. One provision would then consider aid or assistance by an international organization, and a slightly different text would apply to aid or assistance on the part of a State. The reason adduced by Mr. Dugard for making such a distinction was that it was more likely that a State would control, direct or coerce an international organization than vice versa. While that might well be so, it did not seem to justify applying different standards to relations between a State and an international organization, on the one hand, and to relations between States, on the other. In addition, draft article 28 alleviated the need for special rules.

50. Several members had stressed the importance of the statement in paragraph 62 of the report, that influence amounting to aid or assistance, direction and control, or coercion, had to be used by the State as a legal entity that was separate from the organization: it could not consist in participation in the ordinary decision-making process of the organization in accordance with its pertinent rules. As Mr. Koskenniemi and Ms. Xue had pointed out, it would not always be easy to decide whether a State was acting only within the rules or was abusing its position as a member. However, the practical difficulty in applying a criterion to borderline cases should not necessarily lead to the abandonment of that criterion. An attempt to provide supplementary elements might be made in the commentary.

51. In his report he had noted that it was not necessary to replicate the saving clause in article 19 of the draft articles on responsibility of States for internationally wrongful acts.253 Since Mr. Pellet and others had requested an explanation of that assertion, he would cite the “without prejudice” clause in draft article 19. That provision concerned relations between among States and was intended to make it clear that the State that committed the wrongful act, even when assisted by another State, was not exonerated from responsibility in the case of aid or assistance, direction and control, or coercion. Paragraph (4) of the commentary added that the saving clause was also intended “to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance or from acts otherwise attributable to any State under chapter II”.254 Such might be the case under the Treaty on the Non-Proliferation of Nuclear Weapons with respect to assistance to a State in acquiring nuclear weapons, which was prohibited by a primary rule. Insofar as a State incurred responsibility, that situation was covered by the draft articles on responsibility of States and nothing needed to be said about it in the current draft.

52. One solution would be to transpose the wording of draft article 19 to the case of an international organization, so that the provision would read, for example: “This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the international organization which commits the act in question, or of any other international organization.” That was not strictly necessary, however, because the suggested title of the chapter was “Responsibility of a State in connection

254 Ibid., p. 71.
with an act of an international organization,” and there was no need to specify that when a State aided or assisted, directed and controlled or coerced an international organization in the commission of an internationally wrongful act, the responsibility of the organization that committed the act was not prejudiced. The chapter did not as such deal with the responsibility of international organizations. Moreover, in the current draft, article 16 already specified that when an international organization aided or assisted another international organization in the commission of an internationally wrongful act, the responsibility of the latter international organization was not prejudiced. The same clearly applied when the aiding or assisting entity was not an international organization as provided for in draft article 16, but a State.

53. Thus, while he believed that a general saving clause was unnecessary, what was unnecessary could still be spelled out. Should the Drafting Committee feel that a “without prejudice” provision would contribute to clarity, one could be added, along the lines of the text he had just proposed. The provision would have to be placed at the end of the chapter, after draft article 29.

54. Turning to questions that had been the subject of intense debate at the current session, he noted that the idea of including a provision such as draft article 28 had been widely accepted. Various drafting suggestions had been made, some of them relating to the French version, which did not entirely render the meaning of the original English text. Other comments and suggestions related to the substance of the provision.

55. As was explained in paragraph 72 of the report, the reference to obligations relating to functions which had been transferred to an international organization by its member States had not been intended to be exhaustive, but to reflect existing practice. Such practice did not relate only to integration organizations (the European Space Agency, for example, was not an integration organization), nor did the transfer of functions necessarily refer to such organizations. Since the problem might also arise with regard to functions which had not been transferred, in the sense that there might be functions which the organization had but which the State did not have, it might be preferable to look for different wording.

56. Several members had expressed a preference for the word “circumvention”, which was employed in draft article 15, relating to the case in which an international organization used the separate legal personality of its member States to avoid complying with one of its obligations.

57. It had been held, especially by Mr. Matheson, that draft article 28 should not cover all cases in which an international organization might commit an act that, if committed by a member State, would infringe one of its obligations. According to that view, draft article 28 should cover only abuse of the separate legal personality, although a specific intention of abuse should not be required—an intention which in any case would be very difficult to prove. While the instances of practice to which he had referred in his fourth report went further in establishing the responsibility of member States, such practice was limited and related to one particular geographical area, and it might seem reasonable, as a matter of policy, to limit responsibility in the draft to the case in which a member State circumvented one of its obligations by causing an international organization to commit an act that, if committed by the State, would be in breach of that obligation. The most likely scenario was that several member States, using the international organization, would together circumvent a shared obligation. One example would be the circumvention by member States of an obligation not to use force, which they could do by establishing an international organization and causing it to use force. As was specified in paragraph 2, member States would incur responsibility whether or not the act in question was internationally wrongful. If different wording could be found which made it clear that the assistance or aid of the international organization would give protection to third parties. States could not create an organization for the purpose of circumventing an obligation.

58. Draft article 29 had been at the centre of debate in the Commission. It was clear that such a provision was needed; the problem was how to word it. The general question of responsibility of member States for the internationally wrongful act of an international organization had given rise to conflicting views, although no member had argued in favour of responsibility of member States in all cases. Prevailing State practice and judicial or arbitral precedents pointed to limiting the responsibility of member States. As he had noted in paragraph 89 of the report, resolution II/1995 of the Institute of International Law stated that “there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members.” He would have no difficulty in subscribing to that statement. The wording “no general rule” had been accepted by the Institute on the basis of the proposal which he himself had made in Lisbon. The original text had read “there is no rule of general international law ...,”, and he had suggested that it read “general rule” and that cases should then be established in which, on the contrary, such responsibility applied. There had been support for that view, which had led to the current text of the resolution as set out in paragraph 89. The Drafting Committee might consider whether there was really a need to spell out such a general proposition, albeit only in order to identify cases in which, in addition to those listed in the previous draft articles, member States could be held responsible. If different wording could be found which made it clear that those were not the only cases in which member States were responsible, then it would be possible to dispense with the general statement that there was no responsibility on the part of member States.

59. Even if the view was held that the cases listed in subparagraphs (a) and (b) resulted from the application of general principles of international law, it was an essential part of the Commission’s work to specify what those general principles were.

255 Institute of International Law, Yearbook, vol. 66, Part II (see footnote 222 above), p. 449.
60. Resolution II/1995 of the Institute of International Law had referred to “abuse of rights”, which was arguably covered by draft article 28. It also referred to “acquiescence” and “undertakings by the State”. Both cases were covered in the draft article, which indeed gave further protection to third parties, in that it also envisaged the case in which a State had “led the injured third party to rely on its responsibility”. That might go beyond acquiescence. The wording suggested could include a reference to the circumstances which might have induced such reliance. This would cover some of the cases that troubled Ms. Escaramiela, Mr. Economides and Mr. Yamada, especially those in which member States, after having led a third State to rely on their subsidiary responsibility, caused the organization to go bankrupt and then refused to stand in for it.

61. He had explained both in the report and during the debate why he had made no mention in draft article 29 of the nature of the responsibility which member States would incur. That was because member States could accept any type of responsibility, either subsidiary or concurrent, and the same would apply to the case of reliance—they could lead the injured third party to rely on their subsidiary or concurrent responsibility. However, he would not object if members wanted draft article 29 to state a presumption, which clearly should be that of subsidiary, and not concurrent, responsibility.

62. Several members had requested an examination of the responsibility of international organizations as members of other international organizations. As he had pointed out in paragraph 57 of his report, the problem was not whether the matter should be considered in the draft, but where. The appropriate place was not the present chapter, but chapter IV, the current title of which was “Responsibility of an international organization in connection with the act of a State or another international organization”. However, that chapter already contained provisions on aid or assistance, direction and control or coercion by an international organization, and it also had a circumvention provision. What would be required would be to introduce in that chapter two new draft articles, 15 bis and 15 ter, corresponding to draft articles 28 and 29, and to modify draft article 16 accordingly. Given the time constraints, it would be best to introduce those changes in the report to be submitted at the next session.

63. Lastly, some members would have preferred the draft articles to deal also with the responsibility of entities other than States and international organizations when those entities were members of international organizations. That seemed to go beyond the scope of the current mandate, as defined in draft article 1. The draft articles on responsibility of States did not rule out the possibility that a State could incur responsibility towards an entity other than a State. Indeed, that possibility was expressly set out in article 33 and was implicitly referred to in article 48 of those draft articles. However, those draft articles did not lay down any rule about the content of the responsibility which the State would incur in that case, nor the means of implementation that the entity might have for such responsibility. It seemed reasonable for the current draft, which was addressing questions relating to international organizations, not to go any further in dealing with entities other than States and international organizations. Thus, it should not specify the rights which those entities had when an international organization was responsible or what those entities could do with regard to implementation, and it certainly should not state what kind of obligations and responsibility the entities might have.

64. The time might come for a general project on international responsibility which encompassed the responsibility of all possible actors: States, international organizations and other entities which were subjects of international law. For the time being, it seemed wise for the Commission to limit its ambitions and confine itself to the task of adding the draft articles on the responsibility of international organizations to those adopted on the responsibility of States adopted in 2001.

65. He proposed that draft articles 25, 26, 27, 28 and 29 should be referred to the Drafting Committee, which should also consider whether to include a saving clause in the current chapter along the lines of article 19 of the draft articles on responsibility of States.

66. The CHAIRPERSON said he took it that the Commission wished to refer draft articles 25 to 29 to the Drafting Committee, which should also be requested to consider whether a saving clause should be included in the chapter, as suggested by the Special Rapporteur, taking into account suggestions made to that effect by members during the general debate.

It was so decided.

Effects of armed conflicts on treaties
[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

67. Mr. BROWNLIE (Special Rapporteur), introducing his second report on the effects of armed conflicts on treaties (A/CN.4/570), recalled that his lengthy first report had been presented in lieu of a preliminary report. That had been deliberate: he had found it more practical and more technically satisfying to attempt to produce a report that was essentially complete. The second report reviewed the debate in the Commission at its fifty-seventh session and the comments made by Governments in the Sixth Committee, and sought to implement the first report by asking the Commission to consider the first seven draft articles with a view, either to referring them to the Drafting Committee, or else to setting up a working group. During the debate at the previous session, there had been some mention of the desirability of establishing

such a working group. That was not his preferred option, but was a possible way forward.

68. He had come to the conclusion that draft article 6 was not feasible and should be omitted. It had been pointed out in the debate that, strictly speaking, draft article 6 was unnecessary in the light of draft article 3.\(^{262}\)

69. Draft articles 1 and 2 concerned the scope and the use of the terms “treaty” and “armed conflict”. Draft articles 3 to 7 were meant to be complementary and interactive. Draft article 3 was in a sense the key provision, because it was based on the most important element in the work of the Institute of International Law on that subject,\(^{263}\) namely the proposition that the outbreak of an armed conflict did not \textit{ipso facto} terminate or suspend the operation of treaties (art. 2 of resolution II/1985). The policy substratum of that exercise had been to improve the stability of treaty relations.

70. There were a number of general issues which he hoped that the Commission would resolve, although, as Special Rapporteur, he did not have a strong personal commitment to any of the solutions. One such preliminary issue was that several delegations, listed in paragraph 3 of the second report, had favoured the inclusion of treaties concluded by international organizations. During the debate in the Commission, a number of members had also supported their inclusion. However, there had been no general agreement on the issue, and some members had made reference to article 74, paragraph 1, of the 1986 Vienna Convention. He had no enthusiasm for their automatic inclusion either on technical or on policy grounds. He was never very happy with the idea that the Commission should borrow heavily from a draft devoted to a different subject merely because of a superficial similarity of subject matter. That said, if members felt otherwise, he would include such treaties in his draft.

71. General support had been expressed in the Sixth Committee for his view that the topic should form part of the law of treaties and not part of the law relating to the use of force (A/CN.4/560, para. 46). At the same time, it had been observed that the subject was also closely related to other domains of international law, such as international humanitarian law, self-defence and State responsibility (\textit{Ibid.}, para. 47).

72. With regard to draft article 1, the view had been expressed in the Sixth Committee that, since article 25 of the 1969 Vienna Convention allowed for the provisional application of treaties, it seemed advisable that the draft articles should apply to treaties that were being provisionally applied (\textit{Ibid.}, para. 49). Similar views had been expressed in the Commission, where members had suggested that a distinction should be made between States which were contracting parties under article 2, paragraph (1) (\textit{f}), of the 1969 Vienna Convention, and those which were not. While some members favoured including treaties which had not yet entered into force, others considered that only treaties in force at the time of the conflict should be covered by the draft articles.

73. In draft article 2, the problematical element was the term “armed conflict”, the definition of which had been examined extensively in the first report. The draft articles deliberately included the effect on treaties of internal conflicts. At the same time, a proportion of the doctrine regarded the distinction between international and non-international armed conflict as basic in character. The policy considerations appeared to point in different directions, and the question had provoked marked differences of opinion in the Sixth Committee. Five delegations had been opposed to the inclusion of internal armed conflicts, while six had been in favour of their inclusion (see A/CN.4/570, para. 9). If the principle of continuity were to be adopted, then the inclusion of non-international armed conflicts would militate in favour of stability. However, the principle of continuity was in many ways conditional, and widening the definition of armed conflict would simply increase the scope of the problem.

74. In paragraph 10 of his report, he had referred to a number of sources relating to the task of definition. In paragraph 11, he took note of the view of the delegation of the Netherlands with regard to military occupation. Other special concerns were referred to in paragraph 12. His own view was that the definition of armed conflict should be dealt with on a pragmatic basis and that it was the task, not of the Special Rapporteur but of the Commission, to provide a general indication of whether or not the inclusion of non-international armed conflicts was desirable. He strongly believed that it would be inappropriate for the Commission to seek to frame a definition of “armed conflict” for all areas of public international law. That would impede its work and would in some ways distort the focus of the topic as placed on the agenda by the General Assembly.

75. Draft article 4 focused on the intention of the parties. There had been considerable opposition to and scepticism about the use of the criterion of intention, scepticism that he shared. The trouble was that if the concept of intention was discarded, the Commission would be abandoning the only lifeboat it had, leaky though it might be. It had repeatedly been necessary, for example in the \textit{Gabčíkovo–Nagymaros Project case}, for decision makers and senior tribunals to “make up”, so to speak, the intention of the parties. While that was artificial, it was nonetheless a necessary operation in the decision-making process. Thus, he found it unhelpful that the Commission should want to do without the concept of intention.

76. Draft article 7, which was meant to complement draft article 4, had been the subject of vigorous debate. Persuasive comments had been made in the Sixth Committee, not least by the United States (see paragraph 35 (c) of the report), which argued that draft article 7 was laborious and clumsy and that to base it on special categories of treaties was a mistaken approach. However, several members of the Commission had made constructive comments, stressing that some of those factors should be taken seriously, possibly as guiding principles or as policy elements, in the interpretation, discernment or determination of the elements of intention in relation to particular subjects.

\(^{262}\) \textit{Ibid.}, p. 28, para. 127.

77. The other problem which he had experienced with draft article 7 was that, whether or not the *modus operandi* of adopting categories was a good one, the fact of the matter was that there was quite a lot of customary law or nascent customary law supporting perhaps not all those categories, but certainly some of them.

78. In view of the late hour, he would complete the introduction of his second report at the next plenary meeting.

79. The CHAIRPERSON noted that the Special Rapporteur had mentioned the possibility of establishing a working group. For his own part, he believed that the second report, like the first one, posed a number of problems, and he would welcome the opportunity to participate in such a working group.

*The meeting rose at 1 p.m.*

**2896th MEETING**

Wednesday, 19 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Mamtaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

**Effects of armed conflicts on treaties (continued)**


[Agenda item 9]

**SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. The CHAIRPERSON invited the Special Rapporteur to introduce the final part of his second report on the effects of armed conflicts on treaties.

2. Mr. BROWNLINE (Special Rapporteur), after reminding the members of the Commission of the importance which he attached to the agenda item, said that consideration of the topic of the effects of armed conflicts on treaties had three main goals: to clarify the legal situation; to promote the security of legal relations between States, given in particular the erosion of the idea that an armed conflict immediately ruptured treaty relations; and to increase access to State practice, especially with regard to draft article 7.

3. He was not entirely convinced by the method of expanding the categories of treaties, the object and purpose of which necessarily implied that they remained applicable, and he could easily be persuaded to revise draft article 7 to make a set of relatively flexible guiding principles. The problem was that parts of draft article 7 reflected important areas of State and judicial practice. If the Commission did away with that list of formal categories, it would have to find another vehicle for presenting State practice.

4. One possibility open to the Commission was not to refer the draft articles to the Drafting Committee and to establish a working group to consider certain issues in greater detail. Although he was not generally in favour of creating working groups, he admitted that several issues needed further consideration. However, it would be a pity if a number of substantive questions were not resolved in plenary. In some cases the Commission might take a vote—for example, to decide whether or not to include the effects of armed conflicts on treaties involving international organizations.

5. Draft articles 3, 4 and 7, which were the driving force behind the draft articles as a whole, were conceived to be applied together.

6. Draft article 3 (*Ipso facto* termination or suspension) was mysterious in a way because the Commission could do without it. However, the doctrinal material which he had examined—some of which went back to the early nineteenth century—showed that there was a prevailing conception, especially among French authors, that the question of the effects of armed conflicts on treaties was almost beyond the scope of law, because armed conflicts automatically terminated treaty relations. It was not until the middle of the twentieth century that the doctrine had begun to change. It was against that background that draft article 3, the formulation of which was based on that of article 2 of resolution II/1985 of the Institute of International Law, was not superfluous. In the Commission’s report on the work of its fifty-seventh session, it was stated that while support had been expressed for his proposal, some members had pointed out that there existed examples of instances of practice, referred to both in the Special Rapporteur’s first report and the Secretariat’s memorandum, that appeared to suggest that armed conflicts caused the automatic suspension of various categories of treaty relations, in whole or in part. Indeed, it had been suggested that the articles should not rule out the possibility of automatic suspension or termination in some cases. In terms of another suggestion, the provision could simply state that the outbreak of armed conflict did not necessarily terminate or suspend the operation of any treaty. He reminded the members of the Commission that there had been considerable support for the idea of replacing the words “*ipso facto*” with the word “necessarily”.

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264 Ibid., pp. 278–282.
265 See footnote 259 above.
268 Ibid., p. 31, para. 146.
7. Draft article 4 (The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict) represented the method of practical implementation of the principle set out in draft article 3. The majority of responses accepted the principle underlying draft article 4; however, reservations had been expressed about the problem of proving intention. The reservations of Commission members (and of some delegations in the Sixth Committee) regarding the role of intention called for close examination. In the first place, given the context of the subject matter, which was part of the law of treaties, it was unrealistic to assert that the role of intention should be marginalized. He recognized that it was also necessary to consider other factors, including the object and purpose of the treaty and the specific circumstances of the conflict. The content of draft article 4 as it currently stood was certainly not incompatible with the attention given to those other factors. No doubt the formulation could be improved. However, it was important to avoid the idea that draft article 4 should cover all possible issues in the same text. Draft article 4 was a founding provision which prefigured the provisions that followed it, in particular draft article 7 in the first report, which referred to abundant State practice relating to the contextual bases on which intention might be ascertained. Further materials were cited in the memorandum prepared by the Secretariat. In addition, several decisions in municipal case law indicated the significance of implications that could be drawn from the object and purpose of a treaty. A number of decisions were set out in paragraph 22 of the report. The reactions of several delegations to the first draft had raised a particular question. The United States delegation, for example, had observed that the Special Rapporteur considered “that the intention of the parties at the time of conclusion of the treaty should be determinative. [The Government of the United States] felt that approach was problematic, since parties negotiating a treaty generally did not consider how its provisions might apply during armed conflict.” The observation introduced a false dilemma. It was a common experience in the interpretation of treaties (and of legislation) that the intention of the parties or other actors must be reconstructed, so to speak, as a practical hypothesis (para. 25 of the report). In that context, he agreed with the further observation by the United States delegation that other factors must also be considered, including the object and purpose of the treaty. Similar proposals had emerged during the debate in the Commission.

8. Several structural problems remained, including the relationship between draft article 4 and draft article 7. Those provisions were applicable on a basis of coordination. It could be argued that if draft article 4 was redrafted to refer to other factors, including object and purpose, then draft article 7 would become redundant, although the current content of draft article 7 could then be placed in the commentary. However, that way of proceeding might entail a loss of substance. Much, if not all, of draft article 7 reflected State practice and fairly uniform judicial standards. An additional structural problem was that the wording of draft article 4 contained a reference to articles 31 and 32 of the 1969 Vienna Convention. That was somewhat mechanical, but there could be no question of fashioning “designer principles” of interpretation for exclusive use in the current context.

9. Draft article 5 (Express provisions on the operation of treaties) had enjoyed general support. It had been pointed out that it spoke for itself and could even be said to be superfluous, but that it should be included for the sake of clarity. Draft article 6 (Treaties relating to the occasion for resort to armed conflict) had been deleted for reasons which he had explained at the previous session. Draft article 7 (The operation of treaties on the basis of necessary implication from their object and purpose) was meant to implement the principle set out in draft article 4. It had given rise to considerable criticism, in particular from Mr. Matheson, but he believed that it was justified in that it explained and applied the principle set out in draft article 4 to State practice and the decisions of municipal courts. From a drafting standpoint, it was, strictly speaking, superfluous. It was merely indicative, but it was useful in that it referred to the materials which he had employed in his research. In any event, a number of Commission members as well as Governments had argued that the use of categories as an analytical tool was inherently flawed, as had been clearly pointed out by the representative of the United States in the Sixth Committee, whose statement was reproduced in paragraph 35 of the report. In his own view, a distinction must be drawn. On the one hand, it might be accepted that the use of categories of the type set forth in draft article 7 was heavy-handed and unsuitable for drafting purposes. On the other hand, as indicated in his first report, most of the categories enumerated were derived precisely from the policy and legal assessments of leading authorities as well as from a significant amount of case law and practice. In other words, those materials enumerated factors—to which the representative of the United States had alluded in her statement—that might lead to the conclusion that a treaty should continue (or be suspended or terminated) in the event of armed conflict. Ultimately the solution might lie in the realm of presentation. On that basis, draft article 7 could be deleted. As had already been pointed out, its purpose was indicatory and expository. The question, then, was to find an appropriate container, and to that end an annex containing an analysis of State practice and case law might be prepared by the Secretariat with his assistance.

11. The “system” problem which emerged from the overall discussion concerned the operation of lex specialis in time of armed conflict, such operation ruling out any principle of general continuity. That affected the sphere of human rights, for example. Although there was a good basis there for continuity, the protection of human rights must be related to the law of armed conflict. The same analysis held for the application of principles of environmental protection in time of armed conflict. In the light of such considerations, it was clear that the formulation of specific principles of continuity was problematical. The indicative list might reflect the policies adopted by municipal courts and advice to courts,
but it was not possible to argue that the list was supported by State practice in the conventional sense.

12. He hoped that the Commission would take decisions at the current session on a number of points, such as whether or not to include treaties concluded by international organizations, how to define “armed conflict” and, in particular, whether that definition should also cover internal armed conflict.

13. Mr. ECONOMIDES said that the Special Rapporteur’s second report was somewhat odd, because it repeated the first seven draft articles introduced in the first report word for word, together with a few additional comments.

14. Two fundamental preliminary questions must be posed if the topic was to be properly addressed. The Commission must decide, first, whether it could consider the topic in disregard of the great principles embodied in the Charter of the United Nations, which, given its content, its crucial importance and the legal significance of its provisions, was by far the primary legal text of the international community, and, secondly, whether it could address the topic without taking account of certain peremptory norms of international law (jus cogens), in particular the prohibition of aggression. After all, the legal consequences of aggression had direct bearing on the effects of armed conflicts on treaties.

15. In his first report the Special Rapporteur had taken neither the Charter of the United Nations nor norms of jus cogens into account, and in the second he seemed to be following the same tack, albeit perhaps more cautiously. Yet it was clear that any draft articles on international armed conflicts and their effects on treaties must, pursuant to the Charter, proceed from the fact that armed conflicts were illegal, at least for one of the parties: the one that resorted unlawfully to the use of force, i.e. that committed the crime of aggression. It followed that, in accordance with the Charter, the aggressor State could not be placed on an equal footing with the State which was exercising its natural right of individual or collective self-defence. In its resolution II/1985, the Institute of International Law, whose experience and authority were well known, had wisely respected that pertinent distinction. Article 7 of that resolution provided that “[a] State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right”,272 in other words, in such a case it could act unilaterally. Article 9 of the resolution provided that “[a] State committing aggression within the meaning of the Charter of the United Nations and Resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty if the effect would be to benefit that State”.273 In his view, it was perfectly clear that the draft articles on the effects of armed conflicts on treaties should be based on those provisions, which could probably be improved upon. It might also be possible to use the text of article 8 of the resolution, which provided that “[a] State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace or acts of aggression shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution”.274 That provision was in accordance with the Charter and would strengthen the system of collective security of the United Nations.

16. Given that the Commission had always taken the Charter of the United Nations and the peremptory norms of international law into account, as could be seen from the draft articles on responsibility of States for internationally wrongful acts275 and the conclusions of the Study Group on fragmentation of international law,276 he failed to understand why, where the topic of the effects of armed conflicts on treaties, a topic closely linked to the Charter and peremptory norms, was concerned, the Special Rapporteur had not followed the long-established path of the prohibition and condemnation of war of aggression. Nor did he see why the Special Rapporteur had chosen to ignore war of aggression and had in a sense tried to conceal it or to include it in a “without prejudice” clause. In his view, that was a dangerous step backwards.

17. Draft article 4, which formed the basis of the second report, made the intention of the parties at the time the treaty was concluded the criterion par excellence for its termination or the suspension of its application in case of armed conflict. However, the influence of that criterion, which had peaked before the First World War and had remained predominant between the First and Second World Wars, had begun to fade with the adoption of general principles of international law,277 and from several specific treaties, namely those relating to international humanitarian law, the criterion of the intention of the parties had disappeared entirely from international treaties and thus was no longer relevant.

18. The Special Rapporteur was right to suggest the deletion of draft article 6 because the provision could not be applied.

19. Draft article 7 was a useful provision but required clarification, which would entail considerable work. He supported the Special Rapporteur’s proposal to replace it by an annex containing State practice and case law on treaties which continued to apply in the event of armed conflict.

20. It was to be hoped that the Special Rapporteur would bring the draft articles more closely into line with the great principles embodied in the Charter of the United Nations. For the moment, they could not be referred to the Drafting Committee.

21. Mr. BROWNlie (Special Rapporteur) said that it was simply incorrect to say that his first report ignored those questions. They had been raised in draft article 10

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272 Institute of International Law, Yearbook, vol. 61, Part II (see footnote 271 above), p. 281.
273 Ibid., p. 282.
274 Ibid.
275 See footnote 8 above.
(Legality of the conduct of the parties).\textsuperscript{277} He had already said that he would recast draft article 10 to take account of the criticisms formulated by other members of the Commission, and he would also allow for those voiced by Mr. Economides. It was a bit absurd to say that he was unaware of those problems. After all, he had published a book on international law and the use of force by States more than 40 years previously.\textsuperscript{278} Moreover, he was only introducing the first seven draft articles.

22. Ms. ESCARAMEIA said she was glad that the Special Rapporteur had introduced all the draft articles at the previous session, as that made it possible to have an overview when considering those he was submitting at the current session, although one could ask why he had confined himself to the first seven. She also appreciated the flexibility he had shown in remaining open to all changes. However, the draft articles presented several problems of a structural nature.

23. First of all, a number of issues merited greater thought, such as the distinctions between the effects of treaties on the parties to an armed conflict and the effects on third States; between different provisions of the same treaty, some of which might continue to be applicable; between situations of suspension and situations of termination of treaties; between the effects of international conflicts and internal conflicts, assuming that both cases were covered; and between the rights of an aggressor State, those of a State that exercised its right of self-defence and those of a State that was complying with a resolution of the Security Council on the use of force (resolution II/1985 of the Institute of International Law, arts. 7–9, cited above).

24. Secondly, she did not see why the Special Rapporteur insisted on including the draft articles in the law of treaties and not in other areas of international law. Article 73 of the 1969 Vienna Convention gave the impression that, on the contrary, the effects of armed conflicts on treaties did not fall under treaty law. In fact, the draft articles were related to several areas of international law. For example, the law of war was relevant when deciding which State was the aggressor and which State had been the victim of an aggression, just as the law of State responsibility was relevant in assessing the consequences of non-compliance with treaties.

25. Lastly, the main structural problem had to do with the criteria. The criterion in draft article 4 was not the intention of the parties but their presumed or “reconstructed” intention. The presumed intention of the parties was taken to be the essence of the treaty, and it was on the basis of the determination of such intention that it was to be decided whether or not the treaty would remain in force in the case of armed conflict. Thus, the whole meaning of the treaty was subsumed under the presumed intention of the parties. In her view, intention was only one factor in assessing the meaning of the treaty. The draft articles were based on the following line of reasoning: the intention of the parties (art. 4, para. 1) must be ascertained by interpreting the treaty as a function of articles 31 and 32 of the 1969 Vienna Convention (art. 4, para. 2 (a)) and by analysing the nature of the conflict (art. 4, para. 2 (b)). That would appear to lead to an assessment of the object and purpose of the treaty and to a determination of which treaties remained in force during an armed conflict, which was the object and purpose of article 7. That was a very complicated way, and one that combined many criteria, to ascertain the meaning of the treaty and determine whether or not it remained in force. Moreover, the intention of the parties was not a crucial aspect of such a determination. It would be preferable to adopt a general criterion such as the viability of the continued operation of all or some of the provisions of the treaty. Some treaties simply could not remain in force in case of armed conflict, regardless of the intention of the parties.

26. Turning to the articles themselves, she said that the definition in draft article 2 (b) (Use of terms), which covered conflicts “which by their nature or extent are likely to affect the operation of treaties”, was in contradiction with the general principle set out in draft article 3, namely that armed conflicts did not affect the operation of treaties. It would be preferable to use the definition given in the Tadić decision in order to include armed conflicts in which none of the parties was a State, while expanding it to cover military occupation based on article 18 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. That would take into account the point of view of the Netherlands (para. 11 of the report), which was shared by a number of members of the Commission. Draft article 2 might then read:

“For the purposes of the present draft articles, ‘armed conflict’ means:

(a) the resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State;

(b) situations of military occupation even if there is no organized armed resistance.”

That definition also answered the question raised by the Special Rapporteur in paragraph 13 as to whether or not to include non-international conflicts, which should definitely be included, given that their number continued to grow.

27. She agreed that draft article 3 was primarily expository in nature, and she was thus a bit surprised at the Special Rapporteur’s suggestion to delete it. She also had doubts about replacing “ipso facto” by “necessarily” and wondered whether that replacement would also be made in the title of draft article 3, since doing so would convey exactly the opposite of what was in the article.

28. With regard to draft article 4, which was very important, she continued to disagree that the termination or suspension of treaties should be determined in accordance with the intention of the parties, especially at the time the treaty was concluded. Paragraph 2 (b) referred to articles 31 and 32 of the 1969 Vienna Convention, which expressly included subsequent agreements and practice. In order to determine the meaning of a treaty, its whole history and not just the intention of the parties should be taken into account. The proposal by Guatemala reproduced in paragraph 20 of the report clarified the problem but did not resolve it because it retained the

\textsuperscript{277} See the preliminary report of the Special Rapporteur (A/ CN.4/552), paras. 122–123, in Yearbook ... 2005, vol. II (Part One).

29. With regard to draft article 7, she noted that the category of treaties referred to in paragraph 2 (a), namely treaties expressly applicable in case of an armed conflict, such as the 1949 Geneva Conventions, should be the subject of a separate article. There should also be an article on treaties whose parties had expressly provided that they would be applicable in case of armed conflict, provided that the relevant provisions were in conformity with jus cogens. A list of other categories would still be useful, but merely as an indication, after a list of factors; a list of other categories could also appear in the commentary. Due attention should also be given to the question of whether it was the whole treaty or only some of its provisions that remained applicable.

30. She suggested that, given the divergent views expressed, the draft articles should be referred not to the Drafting Committee but to a working group, so that discussion of the various points raised could continue.

31. Mr. PELLET said that the topic clearly came under the law of treaties, but that it was necessary to raise the question of the relationship between that law and the law of responsibility, particularly as it related to circumstances precluding wrongfulness, notably force majeure. It was unfortunate that the Special Rapporteur had not relied more heavily on the excellent study by the Secretariat, which analysed those questions in depth.279

32. Mr. GALICKI commended the Special Rapporteur on the quality of the second report on the effects of armed conflicts on treaties but wondered why he had confined himself to the first seven draft articles. A full set of draft articles together with comments and proposed modifications would have given the Commission a comprehensive picture of the topic. Moreover, the lack of proposed modifications gave the impression that the Special Rapporteur had ignored the comments made by members of the Commission and States. Apart from a few minor corrections, the only real change the Special Rapporteur suggested to the text contained in his first report was the deletion of draft article 6, which had been heavily criticized and would be better placed in the commentary.

33. The tendency to “conserve” the initial text was particularly visible in the case of draft article 3; for example, the Special Rapporteur had not made any changes to the initial text. He continued to reject the possibility that the outbreak of an armed conflict could lead to ipso facto termination or suspension of a treaty by the parties to the conflict, even though many members of the Commission and representatives in the Sixth Committee had stressed that this did indeed happen in certain situations, as in the case of a bilateral political or military alliance treaty, for example. The Special Rapporteur suggested replacing the words “ipso facto” with “necessarily”, but it was not clear whether he supported that suggestion or whether he was in favour of deleting the provision entirely if the Commission so desired.

34. Similarly, the Special Rapporteur did not take a position on the definition of “armed conflict” in draft article 2 (b). The proposed definition, which was based on resolution II/1985 of the Institute of International Law, retained the text contained in his first report and failed to resolve the question of whether it ought to include non-international conflicts, although he had indicated in paragraph 13 of his second report that an answer should be obtained from the plenary Commission, whereas at the previous session he had seemed to favour the exclusion of non-international conflicts. The report gave the impression that the Special Rapporteur was reluctant to introduce by himself any changes that might improve the text while also reflecting the suggestions made by the Commission and States. That could be seen, for example, in draft article 4, on the indicia of susceptibility to termination or suspension of treaties in case of an armed conflict. While the Special Rapporteur agreed that it was necessary to consider other factors, such as the object and purpose of the treaty and the specific circumstances of the conflict, he did not make any concrete proposal to reflect that.

35. Another open question related to draft article 7, concerning the operation of treaties on the basis of necessary implication from their object and purpose. First of all, it must be determined whether a list of treaties that continued to operate during an armed conflict was exhaustive. Secondly, certain categories in the list, such as “multilateral law-making treaties”, must be made more explicit. In any event, a number of members of the Commission as well as several delegations in the Sixth Committee had expressed doubts as to the inclusion of an indicative list of treaties, arguing that treaties did not automatically fall within one of the categories and that it would be preferable to enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue or be suspended or terminated in the event of armed conflict. Once again, the Special Rapporteur did not say whether he proposed to delete draft article 7, to retain it as it stood or to modify it.

36. It would be premature to refer the draft articles to the Drafting Committee. They did not take into account the many comments formulated, and it was not the role of the Drafting Committee to make such changes. Instead, a working group should be established which, together with the Special Rapporteur, could thoroughly analyse and resolve all the questions raised in the second report and produce a generally acceptable version of the draft articles. An analysis of State practice and case law with the assistance of the Secretariat, as the Special Rapporteur himself had suggested, would also be welcome.

37. Mr. BROWNIE (Special Rapporteur) explained that the series of categories of treaties included in draft article 7 was not intended to be a list, whether exhaustive or otherwise, but was simply meant to provide guidance in discovering the intention of parties. The report had made it clear that draft articles 4 to 7 should be taken together. The Commission was not in the business of cataloguing treaties.

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279 See footnote 266 above.
38. Mr. GALICKI said that he had certainly not questioned the exhaustive nature of the list. He had merely wished to point out that when an article contained a list, the question of whether it was exhaustive arose automatically. To avoid any problems, it would be preferable to list not treaties but rather the factors or characteristics that enabled them to be classified.

39. The CHAIRPERSON, speaking in his capacity as member of the Commission, drew attention to draft article 7 and questioned how a treaty of friendship could continue in operation in the event of armed conflict between its two parties.

40. Mr. BROWNlie (Special Rapporteur) noted that in the Military and Paramilitary Activities in and against Nicaragua case, the ICJ had had no problem in applying a 1956 treaty of friendship, commerce and navigation to relations between the United States and Nicaragua. Although those relations might not have amounted to armed conflict, they had nonetheless contained elements of conflict.

41. Mr. MOMTAZ said that many treaties of friendship, commerce and navigation contained dispute settlement provisions that could remain in operation even during an armed conflict.

42. Mr. PELLET said that the Commission must determine whether the study it was undertaking was about the effects of armed conflicts on treaties, on treaty provisions or on treaty obligations. The Commission needed to give some thought to that question and decide whether it was concerned with the instrument or with the obligation arising from the instrument.

43. Mr. GAJA said that at first sight, and given that the Special Rapporteur’s second report reproduced without change the text of draft articles 1 to 7 as they appeared in his first report, it might seem that he intended to stick to the positions set out in the first report. However, one gained a different impression after reading the second report and listening to the Special Rapporteur’s oral presentation. The Special Rapporteur had elaborated on his views concerning a number of points and shown flexibility, although that had not yet been reflected in a new set of draft articles. More generally, it was to be hoped that the Special Rapporteur would find time to provide an analysis of practice that would support his conclusions and to develop more fully the ideas which he wanted the Commission to endorse. That should be the desired outcome, and the Commission should also attempt to answer the questions raised by the Special Rapporteur in order to give him some guidance for continuing his work.

44. One of the questions to which the Special Rapporteur had specifically drawn the Commission’s attention concerned the possible inclusion of internal conflicts in the study. According to article 73 of the 1969 Vienna Convention, “[t]he provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from … the outbreak of hostilities between States”. That was one of the major gaps in the codification of the law of treaties, which the current work sought to fill by addressing the question of whether the relevant treaties between States in conflict continued to apply or whether their operation was terminated or suspended. Internal conflicts, like conflicts between a State party to a treaty and a third State, did not directly affect relations between States parties to the treaty, but they might give rise to circumstances which affected the application of the treaty indirectly, and those circumstances had not been excluded from the 1969 Vienna Convention. For example, an internal conflict might constitute an impossibility of application or a change of circumstances and therefore lead to the suspension or termination of a treaty to which the State involved in the internal conflict was a party. That did not mean that internal conflicts should necessarily be excluded from the study; questions concerning such conflicts should, however, be considered separately from those relating to the effects of hostilities between States parties to the treaty. The effects of internal conflicts should be analysed within the framework of the pertinent provisions of the Vienna Conventions.

45. Mr. BROWNlie (Special Rapporteur), replying to a question raised by Mr. Pellet, said that, as he saw it, the Commission’s task was to define the effects of armed conflicts on the operation of treaties and not on the obligations stemming from the treaties. He referred in that connection to draft article 13, which he had introduced in his first report, and in particular to its paragraphs (c) and (d). A study of the effects of armed conflicts on the obligations stemming from treaties would unduly enlarge the topic which the Commission had been mandated to consider.

46. The CHAIRPERSON, speaking in his capacity as member of the Commission, wondered whether the wish to redefine the subject might not lead the Special Rapporteur to reconsider his proposed draft article 1.

47. Mr. DUGARD said that the book International Law and the Use of Force by States, written and mentioned by the Special Rapporteur, had greatly influenced his own thinking on the subject, and he was therefore surprised that Mr. Brownlie had failed to pay sufficient attention to jus ad bellum and had concerned himself more with jus in bello.

48. He doubted whether the definition of the term “armed conflict” in draft article 2 (b) was adequate. Most of the authority invoked by the Special Rapporteur belonged to an era in which inter-State armed conflicts had dominated, whereas the situation had changed dramatically, and now non-international armed conflicts had become more common than international armed conflicts. The difference between the two was no longer fundamental, and recent doctrine clearly showed that it had to a large extent disappeared. The report of the High-level Panel on Threats, Challenges and Change, to which the Special Rapporteur referred in paragraph 10 of his report, although without explaining how it might be relevant to the definition of armed conflict, did in fact consider non-international armed conflicts. Thus, the Special Rapporteur should expressly indicate in draft article 2 that the

280 See footnote 259 above.

281 Brownlie, op. cit. (footnote 278 above).

term “armed conflict” included non-international armed conflicts. It was also necessary to refer clearly to the case of occupation in the proposed definition, and in that connection it was odd that the Special Rapporteur made no reference to the advisory opinion of the ICJ on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, in which the Court had applied not only treaties on international humanitarian law, but also human rights treaties. The case of territories administered by the United Nations, such as Kosovo, should also be considered.

49. The Commission should ask itself, then, whether it wished to examine the topic solely in the context of old international law or whether it should also have regard to contemporary needs and expectations and whether in that connection it should relax the definition of treaty in order to cover agreements between an occupying Power and the Administration of an occupied territory, of which the Oslo Agreement (Declaration of Principles In Interim Self-Government Arrangements) was an example.283

50. The previous year he had expressed surprise that the definition of the term “armed conflict” had not taken account of the definition given by the International Tribunal for the Former Yugoslavia in the Tadić case (para. 70 of the decision) and subsequent developments in international law, as expressed, for example, in the Rome Statute of the International Criminal Court, and he was pleased that the Tadić decision was in fact mentioned in the report (para. 10 (a)). He suggested that, as in article 8, paragraph 2 (d), of the Rome Statute, the definition of armed conflict in draft article 2 should exclude “riots, isolated and sporadic acts of violence or other acts of a similar nature”.

51. Treaties concluded between international organizations or between States and international organizations should be included in the definition of the term “treaty” in draft article 2 (a). In draft article 4, paragraph 2 (b), no explanation had been given of the meaning of the phrase “nature and extent of the armed conflict”, and he saw in that reference an additional reason to expand upon the definition set out in draft article 2, paragraph (b).

52. He was not sure what draft article 5, paragraph 1, meant. The Government of the Netherlands had interpreted it as indicating that international humanitarian law should be seen as lex specialis, but once again account should be taken of the advisory opinion of the ICJ on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, in which the Court had held that the fact that international humanitarian law was lex specialis did not exclude the application of human rights conventions. In that regard, he was pleased that in draft article 7, paragraph 2 (d), the Special Rapporteur had referred to treaties for the protection of human rights.

53. The draft articles should take account of contemporary needs and expectations. Since the Commission was at the end of a quinquennium, it would be premature to establish a working group on the subject. A report reflecting the current debate, together with the Special Rapporteur’s first two reports, should be submitted to the Commission at its fifty-ninth session, when it would meet in its new composition, and the Commission could then decide whether or not to establish a working group on the subject.

54. Mr. BROWNLIE (Special Rapporteur) said that there was a big difference between defining the term “armed conflict” for the purposes of the draft articles in the context of the law of treaties and defining it for all purposes of international law, which the Commission had not received a mandate to do. He supported the suggestion to draft a third report that took greater account of contemporary developments, and he explained to Mr. Dugard that it had been owing to a lack of time that he had not taken a more innovative approach in his second report.

55. Mr. PELLET said that, like Mr. Gaja, he had initially thought that the Special Rapporteur had not taken any account of the comments made during the debate at the fifty-seventh session because the draft articles were identical to those introduced in the first report, but that a careful reading of the second report showed that the Special Rapporteur had in fact been sensitive to the criticism formulated both by members of the Commission and in the Sixth Committee of the General Assembly. Two points of criticism were worth mentioning, however. First of all, the Special Rapporteur had confined himself to pointing the way where each draft article was concerned but had not himself proposed more appropriate texts which, without binding the Drafting Committee, would have facilitated its task had the Commission decided to refer the draft articles to it. Incidentally, he did not share Mr. Galicki’s opinion that the Special Rapporteur should have proposed a whole new set of draft articles. On the contrary, two or three draft articles would have been largely sufficient if they had been analysed in greater depth. Secondly, it was unfortunate that, on several important points, the Special Rapporteur, although receptive to criticism, had not reopened the discussion but had limited himself at best to agreeing or disagreeing with suggestions, in most cases without explaining his position; this had not facilitated the discussion and might lead Commission members to repeat their comments from the previous year.

56. Draft article 1 and draft article 2 (a) were both confined, as in the previous year, to treaties between States and, if he understood correctly, the Special Rapporteur did not intend to expand the draft articles to encompass treaties concluded by international organizations. In his view, the argument put forward by the Special Rapporteur on that point in paragraph 3 was not a sufficient justification, and he continued to believe that it was preferable to kill two birds with one stone. If the problem arose in the case of international organizations, then it would arise in the same way for States, and he failed to see how the effects of armed conflicts on treaties concluded by international organizations could constitute a separate subject of study for the Commission.

57. He remained convinced of the need to clarify whether draft article 1 (Scope) covered only treaties in force or whether it also concerned treaties that had been concluded but had not yet entered into force. Personally, he was strongly in favour of the latter solution, and it would in fact be interesting to know what the effects of armed conflicts might be on treaties that had not yet been ratified. He also wondered whether the subject under consideration was really the effects of armed conflicts on treaties—and he wished to stress in that connection that the Commission should not sidestep the question of the divisibility of the provisions of a treaty, or the effects of armed conflicts on the resulting obligations, which seemed to him to be the case. Far from being extraneous, as the Special Rapporteur had stated, that was a key issue and a question of principle that should be discussed in a working group.

58. With regard to draft article 2 (b), he said that to state, without any further explanation, that “armed conflict” meant “a state of war” did not really define the term. Secondly, while he agreed that the aim of the draft articles was not to define armed conflicts in general, he had difficulty understanding what the Special Rapporteur had in mind when he wrote in paragraph 8 of his report that draft article 2 included the effect on treaties of internal conflicts, whereas the actual wording of the draft article seemed implicitly to exclude it, the word “State” being in the plural in the phrase “between States parties to the armed conflict and third States”. He continued to be a fervent supporter of including internal conflicts, and he hoped that the concept would be expressly incorporated in draft article 2 and perhaps even in draft article 1. Thirdly, he did not see what the Special Rapporteur meant by the words “principle of continuity” in paragraph 9 of the report. Fourthly, the reference to chapter IV of the report of the High-level Panel on Threats, Challenges and Change did not seem useful, as that document contained only general observations from which the Special Rapporteur did not draw any conclusions. Fifthly, it was unfortunate that the Special Rapporteur had not responded to the important point on military occupation made by the Netherlands (para. 11 of the report). Paragraph 19 of the first report on the effects of armed conflicts on treaties had contained an element of a response because it had referred to article 18 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, whose procedure should be used. Personally, he was convinced that cases of occupation were covered by the term “armed conflict”, but he had reservations as to whether Mr. Dugard’s suggestion to add situations of international administration, such as the one in Kosovo, was well founded. On the contrary, the Commission should make it very clear in the commentary that this situation was not one of armed conflict within the meaning of the draft article. Sixthly, it would not be superfluous to ask whether the war against terrorism ought to be included in the draft articles, because once it was accepted that the law of war was applicable to that type of conflict, the Commission could not remain silent. Lastly, it was most unfortunate that the Special Rapporteur had not taken any account of the criticism formulated at the fifty-seventh session, in 2005, and had still not addressed the question of the legality of the use of force. In that connection, he fully supported the view expressed by Mr. Economides that this question was of vital importance, although he personally did not have a firm opinion on it. Contrary to what Mr. Brownlie appeared to contemplate, he did not think that it was possible to wait until the Commission considered a reworded draft article 10 to take a position on the problem, which would automatically have an impact on the draft articles as a whole, because the point was not to codify rules of jus cogens but to specify the consequences of peremptory norms for the draft articles.

59. Draft article 3 should be retained because it dealt with a matter of key importance. The Special Rapporteur did not draw any conclusions from the criticisms expressed in 2005 by several members of the Commission, reflected in paragraph 16 of the report, concerning the wording of the draft article. Yet those criticisms were fully justified, and at the very least the words “ipso facto” should be replaced by “necessarily”, because those terms meant very different things. “Ipso facto” implied that the existence of an armed conflict was not sufficient for the conflict to have effects on treaties, whereas “necessarily” suggested that armed conflicts could lead to the suspension or termination of the treaty in some cases but not in others. Thus, draft article 3 was acceptable only if the word “necessarily” was used.

60. With regard to draft article 4, he thought that the wording could indeed be improved, as the Special Rapporteur acknowledged in paragraph 19 of the report; however, the problems posed by the draft article were not solely of a drafting nature. The question was not how to determine the intention of States but whether it was relevant to make use of that concept. On no account could the intention of the parties constitute the sole or even the main criterion, because, as explained in paragraph 24 of the report, States simply did not envisage the outbreak of armed conflicts and had accepted the principle of the prohibition of the use of force. As to the case law cited by the Special Rapporteur in paragraph 22 of the report, it was, apart from one or two cases, quite old, which confirmed the outdated nature of the criterion of intention. It would be useful for the Special Rapporteur, who cited the excellent memorandum by the Secretariat entitled “The effect of armed conflict on treaties: an examination of practice and doctrine” in paragraph 21 of his report, to incorporate in the draft articles the outstanding material that that compilation contained. Thus, he was not in favour of referring draft article 4 in its current form to the Drafting Committee, because the text ought to give at least as much attention to such factors as the object and purpose of the treaty and the nature, extent and circumstances of the conflict as it had to the criterion of intention.

284 See footnote 259 above.
285 See footnote 266 above.
61. Turning to draft article 5, he said he had the impression that the two paragraphs concerned completely different questions which ought to be the subject of separate provisions. He also thought that paragraph 1 should be replaced by article 35 (a) of the Harvard Research Draft,286 cited in paragraph 55 of the first report, which had much clearer wording and seemed to cover the same question. He had trouble understanding the meaning of paragraph 30 of the report and supported the Special Rapporteur’s proposal to replace the word “competence” by “capacity” in draft article 5, paragraph 2. He fully agreed with the Special Rapporteur that draft article 6 was unnecessary and that the matter should be dealt with in the commentary.

62. With regard to draft article 7, he endorsed the position of the United States set out in paragraph 35 (c) of the report, according to which it would be more productive if the Commission could enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict. Those were the factors that must be taken into consideration, a situation that presupposed a radical revision of draft article 4, the current version of which was unsatisfactory because it focused almost exclusively on the criterion of intention. As to the various categories of treaties listed in draft article 7, they should be carefully analysed in the commentary in the light of practice, as suggested by the Special Rapporteur in paragraph 37 of his report.

63. He wished to thank the Special Rapporteur for showing a willingness to review in depth some of the draft articles introduced in 2005, but as he saw it, draft articles 1, 2 (b) and 4 still posed serious problems of principle, and it would be difficult, if not impossible, to refer them to the Drafting Committee at the current stage so long as the Commission was unable to take a decision on a number of the basic problems raised. It would therefore be wise to establish a working group, chaired by the Special Rapporteur if he so agreed, to define the guiding principles on the basis of which a new version of the draft articles would be prepared. If that proposal was rejected by the Commission, it would be up to the Special Rapporteur himself to propose new texts for those articles so that the Commission could take an informed decision on them.

64. Mr. CHEE pointed out with regard to Mr. Pellet’s comments on draft article 3 that paragraph 14 of the report had clearly indicated that there was considerable support for the view that the formulation “ipso facto” should be replaced by “necessarily”.

65. Mr. BROWNIE (Special Rapporteur) said that, in view of the comments made, there was certainly no case for referring the draft articles to the Drafting Committee; however, it would also be very premature to establish a working group to consider them, and if that was the Commission’s decision, he would not accept the role of Special Rapporteur. It would be preferable for the Commission to entrust him with the preparation of a third report, which would then provide a basis for a working group.

66. Mr. DUGARD supported the Special Rapporteur’s proposal that he should prepare a third report. The advantage of that solution would be to enable the newly elected members of the Commission, who would be unfamiliar with the subject, to debate it before the question was taken up in a working group.

67. The CHAIRPERSON, speaking in his capacity as member of the Commission, said that two substantive questions should be considered in greater depth in connection with draft article 1. First of all, the very notion of the effects of armed conflicts on treaties had not been addressed anywhere; such effects were assumed to exist without further discussion. Secondly, the question of the nature of the weapons used must be taken into account in defining the concept of armed conflict. In defining the term “treaty”, it was important to include treaties concluded by international organizations. Draft article 2 (b) should be clarified because its current wording was ambiguous. The Special Rapporteur had employed the phrase “outbreak of an armed conflict” twice, in draft articles 3 and 5, but whereas the outbreak had an effect on treaties, what happened, a contrario, when an armed conflict ended? The Commission should consider whether that question, which had not been raised in the second report, should be covered. Draft article 5, paragraph 2, also posed a substantive problem. Whereas the question of whether to replace the word “competence” by “capacity” was of minor importance, the Commission did need to decide whether the competence to conclude (or the capacity to conclude) treaties in the context of an armed conflict was not likely to affect the validity of those treaties, regardless of whether they had been concluded by both parties to the conflict or by one of the two with a third party.

The meeting rose at 1.05 p.m.

2897th MEETING
Thursday, 20 July 2006, at 10 a.m.
Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Montaz, Mr. Niehaus, Mr. Sreenivas Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. KOSKENIEMI said that he supported the Special Rapporteur’s proposal on how to proceed with the topic. He agreed with those members who had argued that, given all the questions of principle and formulation that

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arose concerning the draft articles, it would be pointless to refer them to the Drafting Committee at the current stage. Like a smaller number of members, he was sceptical about the usefulness of setting up a working group, especially at the current session. The newly constituted Commission could make a fresh start at the next session.

2. The wisest course was the one proposed by the Special Rapporteur, namely, that he should produce a third report. Such a document would need to address, concisely but in greater depth than in the second report, the various issues that had arisen in the General Assembly and especially in the Commission in the course of the past two sessions. He would try to help the Special Rapporteur by singling out a number of problems of principle, and in so doing, would closely follow the comments by Ms. Escarameia at the previous meeting. While he himself did not have ready solutions to those problems, the Special Rapporteur might consider the relevant arguments for and against and then perhaps make concrete proposals, either in terms of positions of principle or of draft articles.

3. As he saw it, six matters needed to be clarified in the third report. First, the Special Rapporteur should examine the seemingly perplexing issue of the differing effects of armed conflicts on treaties for the parties to the conflict and for third States—it seemed obvious that the effects could not be identical. The problems related, for instance, to limited multilateral or regional treaties in the case of an armed conflict between two members of the region, and were potentially of great complexity.

4. Second was the question of the differing effects of armed conflicts on the treaty as a whole and on parts thereof. Was it feasible to consider that some parts of the treaty were in force while other parts were not? Many members had also asked to what extent a war of aggression might affect the legal status of the parties. That, too, raised a complex and bewildering set of problems and configurations.

5. A third matter, also raised by Ms. Escarameia and others, was the distinction between suspension and termination. Surely the two had very different legal effects. It would be interesting to learn from the Special Rapporteur what those differences were and how they might be treated in the draft articles.

6. Fourth, most members had referred to the distinction between internal and international armed conflicts. Like a majority of members, he supported the idea that the draft articles should also cover internal armed conflicts. As many had pointed out, most contemporary armed conflicts were hybrid in nature, containing both international and internal aspects. It would be a mistake to exclude the great majority of contemporary conflicts from the scope of the draft articles. However, as had been noted by Mr. Gaja, the effects of an internal and of an international armed conflict on a treaty, for example on third States, could not be identical.

7. Fifth, he supported Mr. Pellet’s intriguing distinction between effects on the treaty, effects on the treaty provisions and effects on the obligations in the treaty. Admittedly, that distinction might have merely been the fruit of a Cartesian mindset which was not always helpful for the drafting of practical directives, but if the effects of armed conflicts were considered with reference to obligations in a treaty, that suggested a different approach from the one suggested when the treaty was thought of as an instrument and the armed conflict as doing away with the instrument and its obligations altogether. That was clearly a matter on which some elaboration would be helpful.

8. Sixth, he wished to return to the Special Rapporteur’s often reiterated view that some approaches to the topic were inappropriate because they went beyond the Commission’s mandate, for example, issues having to do with the law relating to the use of force and the law of war. He understood the Special Rapporteur’s desire to confine the topic to the law of treaties and not to let it spill over into other areas on which it might be difficult to produce specific draft articles. That said, the procedural argument that the Commission did not have a mandate to elaborate on aspects of the use of force or State responsibility presupposed a particular understanding of the topic which not all members shared. Thus, there was a disagreement in the Commission as to the very scope of the topic. He could not imagine that the General Assembly had already decided that the topic should be considered in the narrow sense proposed by the Special Rapporteur. It might be useful for the Special Rapporteur to address the issue in his third report so that the Commission could decide whether it agreed with that understanding.

9. He would welcome enlightenment on those six points. On the structure of the draft articles themselves, he noted that the key to the structure lay in the relationship between draft articles 3, 7 and 4. It was unclear how they were interlinked. Draft article 3 seemed to set the scene, being based on the presumption that the outbreak of an armed conflict did not terminate or suspend the operation of treaties. That was clearly a starting point, but, if that was so, he was puzzled about the meaning of draft article 4 and 7. It was not apparent why draft article 4 needed to produce indicia of susceptibility to termination or suspension of treaties, given that draft article 3 already established that treaties remained in force. All that was needed was a set of exceptions to that rule. Draft article 7 also seemed to be oddly parallel to draft article 3. The types of treaties it listed which would remain in force, would in any case remain in force pursuant to draft article 3. As currently drafted, draft article 7 thus created the odd presumption that categories of treaties not listed therein were important exceptions to the main rule in draft article 3, although nowhere was such a set of exceptions to the main rule identified. The exceptions thus formed a very broad category, and the implication was that any treaty not included in draft article 7 would automatically lapse. He did not think that anyone held that view, or that the Special Rapporteur was making such a suggestion.

10. He did not understand what the Special Rapporteur had in mind when he described some of the draft articles as being “expository in nature”. Draft articles were above all normative, helping legal practitioners to decide particular issues. Draft article 7 was perhaps expository in the sense that it provided, almost as an afterthought, a list of examples illustrating the rule set forth in draft
article 3, but as the illustrative list was not exhaustive, it undermined the force of the rule in draft article 3. He suggested that the Commission should adopt a provision along the lines of draft article 3 as the main rule and then take up exceptions to the rule one by one, on the clear understanding that, as exceptions, they had to be interpreted in a limited manner. That way, all conceivable situations were covered: either the presumption or the exception applied; tertium non datur.

11. His final point had to do with draft article 4 and the question of consent. Many members had pointed out the relative ineffectiveness of consent as a criterion of anything at all. Nevertheless, as the Special Rapporteur noted in paragraph 19 of his second report, it was unrealistic to marginalize the role of intention. While States themselves were eager to think of that part of the law of treaties in terms of the consent of the parties, such an approach was irrelevant and unhelpful: the question was never about consent, but about where consent was found. It might be found in the text of a treaty, in the context of its object and purpose, or elsewhere. He had already stated his opinion on how the draft should be structured, and he did not believe that the issue of consent entered into it. The Commission should proceed either on the basis of the general rule, namely the presumption that treaties continued to operate, or else on the basis of some of the exceptions listed. It should never be necessary to revert to the issue of consent, unless it proved impossible to enumerate the exceptions exhaustively and necessary to move instead from individualized categories to some characterization of categories. If the Commission found itself in that position, the Special Rapporteur should resist the temptation to identify the remaining categories in terms of consent, but should instead resort to a contextual appreciation of the situation that had arisen, drawing on indicia such as whether the armed conflict was of an internal or international nature, whether the treaty should be seen to lapse in part or as a whole, or whether the treaty was susceptible to suspension or to termination.

12. Mr. FOMBA commended the quality of the Special Rapporteur’s report, which bore the mark of a great scholar and practitioner, although it might at times seem unduly concise.

13. On the second report’s conceptual framework and method, he said that, in order for one to have a clear idea of all aspects of the subject, the key concepts contained in the title of the topic, namely “treaty”, “armed conflict” and “effect”, needed to be identified, being that war or armed conflict was considered by the Special Rapporteur to be a juridical event. It was necessary to pinpoint their contours and interconnections and, above all, to draw conclusions for the codification or progressive development of international law. That was not an easy exercise. The most important and difficult task was to identify and analyse the practice with regard to the effects of both international and non-international armed conflicts on treaties.

14. On the scope ratione materiae of the study, the question was whether treaties concluded by international organizations should or should not be included. In paragraph 3 of the report, the Special Rapporteur refrained from giving his own point of view, instead noting that there was no general agreement on the question and that States had referred to article 74, paragraph 1, of the 1986 Vienna Convention. International organizations were subjects of international law; they had an international legal personality, in particular the capacity to conclude treaties, which was laid down in the 1986 Vienna Convention and international case law; they played an important role in international relations; they were not indifferent to armed conflicts, subject to the question whether and to what extent they could be actively involved in them; and article 74, paragraph 1, reserved the question of the possible effects of armed conflicts on treaties to which international organizations were parties. Accordingly, it was only logical that treaties to which international organizations were parties should be included, on the understanding that it should first be decided whether any relevant practice existed or whether the question was one of de lege ferenda.

15. There had been general support for the Special Rapporteur’s view that the topic should form part of the law of treaties and not part of the law relating to the use of force. Although there was a causal relationship between the two aspects of the question, the emphasis was on the scope ratione temporis of treaties. Consequently, he could endorse the Special Rapporteur’s position, although the fact remained that there was a link between the topic and other basic issues, such as the law of responsibility and jus cogens, in particular the principle of the prohibition of the use of force. Account should be taken of the pertinent comments made in that regard by Mr. Economides and Mr. Pellet, in particular on the possible benefit to be derived from resolution II/1985 of the Institute of International Law.

16. Three questions had been posed in connection with draft article 1, although the Special Rapporteur did not express a view on them. First, the Netherlands delegation had suggested taking into account the case of treaties which were provisionally applicable, pending their entry into force. Given that such a case was expressly provided for in the 1969 Vienna Convention, that the scope ratione temporis of the treaty was limited and that an armed conflict could occur in that period of time, and where provisional application had not been terminated in accordance with article 25, paragraph 2, of the 1969 Vienna Convention, it could be argued on the face of it that there was a logical and valid reason to cover such a case. That said, it would be preferable to give the matter further consideration.

17. The second question concerned the proposal to make a distinction between States that were contracting parties under article 2, paragraph 1 (f), of the 1969 Vienna Convention and others which were not. It should be borne in mind that the term “contracting parties” was an ambiguous concept used to express either the notion of “contracting State” or that of “party”, in accordance with the specific but different meanings of those terms in the 1969 Vienna Convention. The meaning of “contracting parties” thus depended on the context. Subject to that reservation, if the Commission confined itself to the strict application of the principle of the relative effect of treaties, the problem would not arise, given that a treaty could create obligations or rights for third States,
provided that this was done in accordance with articles 34 to 38 of the 1969 Vienna Convention. If that proved to be the case, those States would then be concerned by the question of the continuity or non-continuity of the life of those treaties.

18. A third question that should also be given careful consideration was whether only treaties in force at the time of the conflict should be covered by the draft articles or whether treaties that had not yet entered into force should also be included.

19. On the text of draft article 1, he noted that if the words “in respect of treaties between States” were retained, that would leave open the question of the fate of the treaties concluded by international organizations.

20. On draft article 2, he noted that, in the French version of the text, the words “effets des traités sur les conflits internes” should read “effets des conflits internes sur les traités”. He agreed with the Special Rapporteur that draft article 2 included the effects of internal conflicts on treaties. However, the Special Rapporteur did not provide any reasons in support of his point of view. The question was whether and to what extent an internal armed conflict could have effects on the treaty obligations of the State party, in particular with regard to a third State which had recognized and supported the rebel party.

21. The Special Rapporteur referred to the differences of opinion among legal authorities and in the Sixth Committee as to the definition of the term “armed conflict”, invoking a number of sources of relevance to the question, in particular the Tadić case of the International Tribunal for the Former Yugoslavia (para. 10), and discussing a point raised by the Netherlands (para. 11).

22. He fully supported the Special Rapporteur’s conclusion in paragraph 13.

23. On the title and chapeau of draft article 3, he was inclined to think that the effects should be listed in ascending order of significance, referring to “suspension or termination” rather than “termination or suspension”—although admittedly that was not the order used in the 1969 Vienna Convention. As for the suggestion, noted in paragraph 14 of the report, that the term “ipso facto” might be replaced by the word “necessarily”, the former expression was, in his view, preferable, in that it emphasized the factual causal link between the conflict and the treaty, though he conceded that Mr. Pellet’s subtle argumentation might cause him to have second thoughts. With regard to the possibility of deleting the draft article, he concurred with the reasoning set out in paragraphs 15 and 16 of the report but not with the conclusion drawn, namely that the provision was not strictly necessary. On the contrary, it was crucial, in that it formed the basis for the following articles and itself was founded on an important and relevant reversal of the traditional doctrine.

24. With regard to draft article 4, he endorsed the views expressed in paragraph 19 of the report and agreed that the wording of the provision could be improved. In that regard, the proposal by Guatemala, cited in paragraph 20, might well be useful. As for the structural problems, relating principally to the relationship between draft articles 4 and 7 and discussed in paragraphs 26 to 28, no definite conclusion could be reached until it was clearly established that draft 7 article accurately reflected practice and case law. If it did, there would be a valid reason to retain it. That would be the point at which the issue of the other factors to be taken into account should be settled, either in the text of article 4 or in the commentary. As for the other structural problem—the incorporation of a reference to articles 31 and 32 of the 1969 Vienna Convention—he concurred with the Special Rapporteur’s view that such a reference was necessarily mechanical, but the technique was, after all, standard practice in international law.

25. Turning to draft article 5, he noted the reference made to the principle which had been enunciated in the advisory opinion of the ICJ concerning the Legality of the Threat or Use of Nuclear Weapons that the application of certain human rights and environmental principles was determined, in time of armed conflict, by the applicable lex specialis (para. 25 of the opinion), and endorsed the Special Rapporteur’s view that the principle should be reflected in the draft articles. As for the suggestion that the term “competence” in paragraph 2 of the draft article should be replaced by the term “capacity”, he noted that the latter was the terminology used in article 6 of the 1969 Vienna Convention.

26. With regard to draft article 6, the Special Rapporteur had concluded, following criticism from members of the Commission and the Sixth Committee, that the draft article should be deleted and that the issue should be referred to, if at all, only in the commentary to draft article 3. He had no objection to that course of action, although there would be no harm in retaining the draft article for the additional clarity and precision it offered.

27. On draft article 7, in view of the Special Rapporteur’s reasoning, he supported the solution proposed in paragraph 37 of the report, that the draft article should be deleted and that an analysis of State practice and case law should be annexed to the draft articles. More fundamentally, he shared the view expressed by the United States and cited in paragraph 35 of the report, that the emphasis should be placed on factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict.

28. As to what action should be taken on the draft articles, opinions had varied greatly. Some members thought that they should be referred, in whole or in part, to the Drafting Committee, while others thought that premature. It had been suggested that a working group should be set up to consider the more difficult issues, while others had recalled that the composition of the Commission was due to change. Still others believed that the Special Rapporteur should be given time to digest what had been said and to produce a third report in 2007. The choice was wide. Ultimately, in his view, priority should be given to the opinion of the Special Rapporteur himself. He was, however, prepared to go along with any compromise that the Commission might reach.
29. Mr. MOMTAZ said that Mr. Fomba had, like a number of other speakers, referred to the proposal by the Netherlands delegation that military occupations should be included in the definition of armed conflict. To do so, however, was mistakenly to equate the two. Armed conflict might sometimes involve the occupation of territory belonging to one or other of the parties, but, in that case occupation should be considered a consequence of such conflict. The regime of occupation was in any case governed by the 1949 Geneva Convention relative to the protection of civilian persons in time of war (Convention IV), article 6 of which drew a clear distinction between armed conflict and occupation.

30. Mr. KAMTO said that contemporary situations were rarely as clear-cut as they had been at the time of the drafting of the fourth Geneva Convention. Although certain kinds of occupation—such as that of Germany after the Second World War—were exclusively concerned with post-conflict situations, they could also coincide with situations of armed conflict.

31. Mr. MOMTAZ said that, although the draft articles should undoubtedly deal with the consequences of military occupation on treaties, his point was that military occupation had no place in the definition of the term “armed conflict”.

32. Mr. COMISSÁRIO AFONSO, after commending the clarity and conciseness of the report on the topic, one that deserved the Commission’s closest attention, said that, by defining the scope of the topic, draft article 1, together with draft article 2 (α), helped to provide the basis for a cautious approach to the thorny concept of “armed conflict”, which should be restrictively defined for the purposes of the draft articles. In other words, the definition should, as far as possible, in the interests of logic and consistency, be confined to States that were involved in armed conflicts and had the capacity to conclude treaties. The possibility of including non-international armed conflicts should be considered only on an exceptional basis and with due caution. The inclusion of non-State actors, as would be implied by a broader definition of armed conflict, could, he believed, militate against the stability and security of the treaty system as a whole, although he conceded that his views differed from those of some other members in that respect. Armed conflicts between States could be, and usually were, symmetrical in nature: although they might differ in size, in power and in their capabilities, States were homogeneous and offered similar legal and political frameworks for analysis.

33. Draft article 3 was also important, since it was indeed, as the Austrian delegation had said, “the point of departure of the whole set of draft articles”. It expressed a fundamental principle, namely that the life or death of a treaty should not be held hostage to the existence or non-existence of armed conflict. The use of the term “ipso facto”, however, was unfortunate, because the long-held view that a treaty ended ipso facto with the outbreak of war was outmoded. He therefore suggested that the article should be redrafted in plain English.

34. Much had already been said by previous speakers concerning draft article 4. As stated in the Commission’s report on the work of its fifty-seventh session, “the Special Rapporteur noted that the question of the criterion of intention had been the subject of much debate” and it was gratifying to note that, in paragraph 19 of his second report, the Special Rapporteur recognized that other factors should be considered, including the object and purpose of the treaty and the specific circumstances of the conflict. That position would be welcomed by those members of the Commission who had from the outset defended the inclusion of the criterion of the object and purpose of the treaty. Several other aspects of the draft article, however, remained to be settled, some of which were more substantive than others. First, as Mr. Koskenniemi had said, the text would, as it stood, serve only to weaken draft article 3. Secondly, the title of the draft article seemed less than clear and might give rise to problems of interpretation. The third point of difficulty related to the circular logic of paragraph 2 (α), which suggested that, in order to establish the intention of the parties, one needed to base oneself on the intention of the parties. Doubtless the working group and, later, the Drafting Committee would take the matter into consideration in due course. What was important for the time being was the acknowledgment that the criterion of intention alone was not paramount. At the previous meeting, Ms. Escaramiea had spoken of the possibility of using the criterion of viability as a test for the survival of a treaty. While agreeing that this was a possible test, he also wished to draw the Commission’s attention to the categorization theory admirably expounded in chapter III of the memorandum prepared by the Secretariat entitled “The effect of armed conflict on treaties: an examination of practice and doctrine”, according to which the relevant test was the degree of likelihood of applicability of a treaty. He urged the Special Rapporteur to take the memorandum into account in preparing his third report.

35. He fully endorsed the content of draft article 5, and the Special Rapporteur’s comments in paragraphs 29 to 31 of the report. As for draft article 6, he supported its deletion.

36. Draft article 7 contained valuable aspects of doctrine and State practice that should be safeguarded independently or by combining them with other articles.

289 Ibid., para. 154.
Once that principle was agreed, there would remain only the task of redrafting. In particular, draft article 7, paragraph 1, could be merged with draft article 4. As for draft article 7, paragraph 2, he concurred with the position of the United States, cited in paragraph 35 of the report, which represented the most sensible approach for the purposes of the draft article.

37. He had expressed his views with regard to the use of force at the previous session. In a nutshell, he believed that, in an era when the United Nations had assumed ever-increasing importance, the Commission should give due account to Article 2, paragraph 4, of the Charter of the United Nations and articles 7 to 9 of resolution II/1985 of the Institute of International Law in 1985. It would be pointless to consider the topic without addressing such crucial issues.

38. The CHAIRPERSON, speaking as a member of the Commission, wondered whether treaties such as the recent agreement between the Government of Angola and the separatist faction in the Cabinda enclave\textsuperscript{291} merited consideration as a specific category within the topic under discussion.

39. Mr. MOMTAZ said that if the draft articles were intended to encompass internal armed conflicts, it was self-evident that they would then likewise cover agreements between States and non-State entities. His plainly stated that the outbreak of an armed conflict did not affect the competence of the parties to the armed conflict to conclude treaties in accordance with the 1969 Vienna Convention, was that those parties could include non-State entities.

40. Mr. RODRÍGUEZ CEDEÑO said that further study of the topic would necessarily entail the examination of other legal regimes in addition to the law of treaties, namely the law of war or the law of armed conflicts, because it was in that context that the question of the application, suspension or termination of a treaty or treaty relationship arose. He agreed with other speakers that it was necessary to distinguish between an aggressor State and a State which was the victim of aggression. The Commission should also direct its attention to aggression as an international crime even though it had not been defined and should likewise look into the question of the application of treaties when a State was militarily occupied or under the administration of an entity other than its own Government, although that was a more complex issue. Other important questions were, first, whether the draft articles should encompass treaties to which international organizations were parties, and secondly, whether they should apply only to treaties which had already entered into force at the time of the conflict.

41. He believed that the draft articles could include treaties concluded between international organizations and one or more States engaged in an armed conflict, because a conflict could have repercussions on the application of treaties to which international organizations were parties, just as it could on treaties between States. Hence, if it were decided that the scope of the draft should be extended, draft article 1, paragraph (a), should be amended accordingly.

42. The draft text should further include treaties which had been signed but not yet ratified, because such treaties gave rise to obligations for parties and, in the event of an armed conflict, States might, in certain conditions, be released from the obligations stemming from a treaty that had not been ratified. That eventuality had been contemplated by the 1969 Vienna Convention. It was also vital to examine the situation carefully with regard to third parties.

43. The term “armed conflict” should embrace non-international armed conflicts, for such conflicts undoubtedly had an effect on the application of treaties. He was not, however, personally convinced that the draft articles should cover situations arising as a result of the military occupation or administration of territories. In that connection, the observations made by Mr. Montaz and Mr. Kamto on the subject of occupation had been most pertinent. Although occupation was a situation which certainly affected, or could affect, the application of treaties, it should not be included in the definition of armed conflict. The inclusion of occupation in the draft articles would alter their scope and a more general title would then have to be found to encompass all the situations covered.

44. Draft article 3 was a constitutional provision and, as such, central to the text. It was essential to make it clear that the outbreak of a conflict did not inexorably lead to the suspension or termination of a treaty. That was plainly the message the Special Rapporteur had wished to convey by his use of the term “ipso facto”. Draft article 3 was of course closely linked to draft articles 4 and 7.

45. Draft article 4 was a very important provision in that it referred to intention as a factor for determining the susceptibility to termination or suspension of a treaty. Intention could not, however, be the sole or even the main factor since, despite its significance in the treaty relationship, intention to assume obligations in the event of an armed conflict would not be easy to prove. In most cases, it was indeed probable that no such intention existed. Other factors, such as the object and purpose of the treaty or the nature and specific circumstances of the conflict, should likewise be borne in mind.

46. Given the intricacy of the subject matter some clarification was required, not only of notions and principles, but also of the scope of the draft text. Decisions would have to be taken on what types of armed conflict were envisaged and on whether the text should be extended to cover other situations, such as occupation, administration or general instability in the territory of a State, which could equally well have a bearing on the application of treaties. For that reason, it was essential to set up a working group before referring the text to the Drafting Committee. The working group should look at all those ideas, arrive at a definition of “armed conflict”, and take any other decisions necessary to make further progress and facilitate the preparation of the third report.

\textsuperscript{291} “The Memorandum of Understanding for Peace and Reconciliation in the Province of Cabinda, signed on August 1, 2006 and approved by the Angolan parliament on August 16, 2006”, \textit{Diário da República}, 16 August 2006, 1st series, No. 99, resolution No. 27-B/06.
47. Mr. MELESCANU, having explained that his statement would refer to both the first and the second reports on the effects of armed conflicts on treaties, thanked the Special Rapporteur for proposing the addition of the topic to the Commission’s programme of work. The Secretariat memorandum on the topic had also been most helpful.292

48. The Commission’s debates had shown that the stage at which the draft articles could be referred to the Drafting Committee had not yet been reached. The setting up of a working group would, however, have two major disadvantages. The first was that the Special Rapporteur had not evinced any enthusiasm for the idea. The second was that, were the Commission to create a working group, it could only reiterate the arguments already rehearsed in plenary meetings. Perhaps the best solution would be for the Special Rapporteur to prepare a third report, bearing in mind the comments made in plenary meetings, on the basis of which the Commission could move on to a stage at which it would be possible to formulate draft articles.

49. The debate on the draft articles had likewise shown that the Commission was still facing some serious issues of principle, even with regard to the approach to be adopted to the topic, a matter on which there were fundamental divergences of opinion. It was first necessary to ask what aim the Commission had in mind in considering the topic. That aim could only be to endeavour to draw up articles which would reflect all the developments which had taken place in the international community’s conception of war and armed conflicts between Clausewitz’s definition of war as “the continuation of policy by other means”293 and the adoption of the Charter of the United Nations. Those articles should buttress the principle that wars of aggression and the use of force should be prohibited. At the same time, it would be necessary to find a strategy for studying collateral issues, such as military occupation and its effects on treaties, terrorism and other questions not encompassed by the classical notion of war. Although it would be quite feasible to include the question of internal conflicts, he did not believe that they came within the ambit of the topic as approved by the General Assembly, as the term “international treaties” could refer only to those concluded between States. At the same time, the Commission should not let slip the opportunity of considering non-international agreements and internal conflicts.

50. The Commission’s aim should not be to engage in a theoretical study or to draw up a few articles on very general questions touching on the possible effects of armed conflicts on treaties; it should be to ascertain what kind of general questions touching on the possible effects of armed conflicts on treaties; it should be to ascertain what kind of questions not encompassed by the classical notion of war. If war was seen as an exceptional situation, the second question was the fate of treaties after the end of a conflict. If war was seen as an exceptional situation, the second question was the fate of treaties after the end of a conflict. It was first necessary to define what the parties’ intentions had been at the moment of concluding the treaty, but also on account of the principle that wars of aggression and the use of force should be prohibited. At the same time, it would be necessary to find a strategy for studying collateral issues, such as military occupation and its effects on treaties, terrorism and other questions not encompassed by the classical notion of war. Although it would be quite feasible to include the question of internal conflicts, he did not believe that they came within the ambit of the topic as approved by the General Assembly, as the term “international treaties” could refer only to those concluded between States. At the same time, the Commission should not let slip the opportunity of considering non-international agreements and internal conflicts.

51. For that reason, he was in favour of Mr. Pellet’s idea of focusing on the effects of conflicts on obligations flowing from international treaties. While that might require much research and pose administrative problems, given the mandate that had been approved by the General Assembly, it was an idea that merited further consideration. The issue of real interest was the extent to which certain obligations remained valid and continued to produce effects during conflicts. It would be worth investigating that question in greater depth if it were possible to find satisfactory answers to it without destroying the whole structure of the Special Rapporteur’s report.

52. One point which had triggered a spirited debate between Mr. Economides and the Special Rapporteur was that of the relationship between the topic itself and the provisions of the Charter of the United Nations. The effect of an act of aggression on an international treaty could not be treated in the same manner as the effect of the exercise of self-defence on that treaty. The proof was that article 75 of the 1969 Vienna Convention was a “without prejudice” clause concerning the case of an aggressor State. The International Law Commission of the United Nations could not, in all honesty, consider the effects of armed conflicts on treaties without taking account of the provisions of the Charter. Such a discussion might assist the Commission in finding the right approach, because if, from the outset, it was clearly accepted that war was prohibited as a means of international action, and that military action was permissible only in exceptional circumstances under Chapter VII of the Charter, that might help it to solve certain other questions.

53. One such question was the termination or suspension of international treaties. If the view was taken that war was an exceptional circumstance, it would not be possible to hold that a treaty was terminated; instead, it would be suspended for the duration of the armed conflict. A second question was the fate of treaties after the end of a conflict. If war was seen as an exceptional situation, once normality was restored, treaties should obviously continue to produce their effects.

54. Another question of principle which had prompted intense debate was that of the criteria to be applied when analysing the legal effects of armed conflicts on treaties. He disagreed with the Special Rapporteur as to the advisability of using intention as the basic criterion, not only on account of the practical difficulty of ascertaining what the parties’ intentions had been at the moment of concluding the treaty, but also on account of the principle that war was not a lawful activity, except in a few exceptional cases. Mr. Pellet had therefore been right to maintain that, when signing an international agreement, the parties could not have intended to consider the potential

292 See footnote 266 above.
impact of an impermissible war on the provisions of that agreement. Multiple objective criteria, rather than a single subjective yardstick, were needed. They could include, for example, the object and purpose of the treaty, the nature and scope of the treaty, the special circumstances of the conflict and the viability of certain obligations even during a conflict.

55. Notwithstanding the great disparity between internal and international conflicts, he would prefer the former to be included in the scope of the draft articles since, although they affected States indirectly, they nonetheless tended to render the application of an international treaty impossible. Moreover, it should be borne in mind that internal conflicts were currently more numerous than international conflicts. He would likewise be in favour of including international organizations in the scope of the draft articles. While he agreed with Mr. Montaz that it might be hard to imagine the United Nations becoming embroiled in an international conflict unless it was striving to restore peace in accordance with the provisions of the Charter, the position with regard to many other organizations—above all regional organizations such as NATO—might be less clear-cut and they ought therefore to be covered by the draft articles.

56. He wondered whether it would be possible for the Special Rapporteur, in his third report, to draw a distinction between two categories of international agreements: those not affected by conflicts, and those in respect of which it was unclear whether, ipso facto, international conflicts would have any effects on them. The first category would include those agreements which were intended to operate in wartime, such as the 1949 Geneva Conventions and the Protocols additional thereto, human rights treaties, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide, as well as other treaties and agreements concluded with a view to securing the respect of certain fundamental human rights in peacetime and wartime, which was more or less the idea underlying draft article 7. Such a distinction might be of practical assistance.

57. He had confined his statement to general observations, rather than making specific comments on each draft article, because he believed that if agreement could first be reached on a broad line of approach, it would then be possible to make more rapid progress towards the adoption of draft articles.

58. Mr. CHEE said that any discussion concerning the wisdom of including internal conflicts within the scope of the draft articles ought to take due account of the fact that the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) had received far fewer ratifications than the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

59. Mr. KAMTO said that Mr. Brownlie was ideally qualified to serve as Special Rapporteur on the complex topic under consideration in view of his impressive experience as a practitioner of international law and his involvement in the work of the Institute of International Law on the effects of armed conflict on treaties. It was doubtless his mastery of the topic that had led the Special Rapporteur to submit to the Commission a full set of draft articles reflecting his overall conception of the issue.

60. He himself wished to address five points regarding the topic, the first of which related to terminology. The terms used occurred so commonly that the need to define them for the purposes of the topic could easily be overlooked. The Special Rapporteur had defined the terms “treaty” and “armed conflict”, and the former definition was acceptable, corresponding as it did to the 1969 Vienna Convention. While, on the face of it, there might seem to be a case for considering non-international agreements or treaties, the Commission must, pursuant to its primary task, concern itself with such treaties only insofar as they were concluded under the auspices of international law.

61. However, the definition of armed conflict left something to be desired. As Mr. Pellet had pointed out, the definition was circular, in that the term “conflict” was defined by itself, and the references to the concept of “war” added nothing, as that too required definition. He himself would propose defining “armed conflict” thus: “Armed conflict means a breach of the peace due to recourse to force by use of the means of warfare.” That definition included both the causal and the instrumental elements bringing about a situation of armed conflict.

62. Another concept contained in the title of the topic, which, as Mr. Fomba had pointed out, also required definition, was “effects”. The term might be defined as “the consequences of the armed conflict for the life of a treaty, whether for its entry into force, for its application as a whole or in part, or for compliance with the obligations arising therefrom”.

63. A second point that arose was whether the topic’s scope and the definitions of its key terms should relate only to the treaty’s provisions (instrumentum), or also to the obligations it set out (negotium). His own view was emphatically that both of those aspects needed to be considered: the treaty must be viewed as a legal instrument, but also as a set of rules, provisions and obligations. While seeking to clearly delimit the scope of all the topics it considered, the Commission generally tried to establish the most comprehensive legal regime possible. The draft articles contained in the first report showed that it was possible to go beyond resolution II/1985 of the Institute of International Law, which nevertheless constituted a good basis for the Commission’s work.

64. Should treaties that had not yet entered into force be included, as had been suggested? His first reaction was to say that they should, because as Mr. Rodríguez Cedeño had pointed out, they too created obligations for States parties. That did not, however, preclude the Commission from exploring the question more fully, to enable the Special Rapporteur to determine whether expanding the scope in that way would unduly complicate the topic and prevent it from being covered comprehensively.
65. He was also inclined to agree with those who had proposed extending the scope to include treaties concluded by international organizations, since at first glance their legal regime did not seem to be substantially different from that of treaties concluded by States. When the United Nations was involved in a military operation for the purpose of restoring peace, it was nevertheless involved in an armed conflict, and the regime to be established under the topic could well apply.

66. His third point related to the Special Rapporteur’s conscious choice to address armed conflicts generally, without singling out aggression or the use of force as envisaged by the Charter of the United Nations. As Mr. Economides had rightly emphasized, the Charter did indeed distinguish between aggression and self-defence. In its resolution II/1985, the Institute of International Law had also taken that essential distinction into account. Certainly, the Special Rapporteur could not be accused of inadvertently overlooking the issue: he had addressed it in his first report. But the Special Rapporteur’s decision had the unfortunate effect of suggesting that all wars were alike and that a war of aggression or other unlawful recourse to force had the same effects on a treaty as did the exercise of the right of self-defence. However, aggression and unlawful recourse to force could not have effects on treaties: articles 7 and 9 of the Institute’s resolution II/1985 expressed that point very well. That text had been adopted almost unanimously, although Professor Herbert Briggs had argued, unconvincingly, that the resolution sought to establish separate rules on the basis of the different legal consequences of aggression and self-defence in the absence of any international tribunal or institution competent to determine whether a State was guilty of aggression or acting in self-defence.

In fact, however, not only did the Security Council have such competence under the Charter, but a State that rejected the accusation that it was an aggressor was also entitled to take the dispute to a tribunal. The fact that such disputes might arise in respect of countermeasures had not prevented the Commission from codifying rules on countermeasures.

67. The definition of aggression by a State had been established in international law by General Assembly resolution 3314 (XXIX) of 14 December 1974. The 1986 decision by the ICJ in the Military and Paramilitary Activities in and against Nicaragua case, with which the Special Rapporteur was well acquainted since he had served as counsel in that case, had described that resolution as expressing customary law. The “without prejudice” clauses in draft articles 10 and 11 submitted by the Special Rapporteur simply shrugged off the problem.

68. His fourth point related to the question whether the scope of the topic should be expanded to include internal or non-international armed conflicts and what, in non-judicial parlance, was referred to as “the war on terrorism”. As the Special Rapporteur had rightly indicated in paragraph 17 of his first report, contemporary armed conflicts had blurred the distinction between international and internal armed conflicts, with many “civil wars” involving “external elements”. On the basis of that observation, the Special Rapporteur had proposed a draft article that would cover both types of armed conflict. However, a number of different situations needed to be distinguished.

69. The first situation was when an armed conflict was purely internal: in such cases it should be examined from the standpoint of force majeure, which could be invoked as a circumstance impeding or rendering impossible the application of the treaty by the State concerned. The second situation was when an internal armed conflict had external elements. In that second case there were three possible outcomes: first, a State could invoke the conflict as a cause for suspending or terminating the treaty if it could prove that another State party to the treaty was involved in it, even indirectly as an organizer. Second, a multilateral treaty could remain in force between a State faced with an internal armed conflict and third States, which would preserve perfectly normal legal relations with that State, unless the treaty provided otherwise. And third, a treaty might be suspended with third States for reasons of force majeure yet suspended with a State party involved in an internal armed conflict precisely because of its involvement. Such cases must be studied carefully in order to determine whether or not to include them.

70. On the question whether the scope should be broadened, to cover “the war on terrorism”, he enjoined extreme caution. The Commission must not commit the Special Rapporteur to the perilous path of elaborating primary rules on a question that gave rise to such intense controversy within the international community. If he were to do so, the Special Rapporteur and the Commission would have to formulate a definition of terrorism, albeit one tailored to the topic, and he did not think the General Assembly was looking to the Commission to perform that task. To broaden the topic to include terrorism would be to open a Pandora’s box, giving many States a convenient pretext to suspend whole treaties or some of their provisions by invoking the war on terrorism.

71. On the individual draft articles, as indicated earlier, he endorsed the definition of “treaty” in draft article 2 (a), but would like to see the definition of “armed conflict” in subparagraph (b) improved. He further suggested the inclusion of a definition of the term “effects”.

72. Draft article 3 was not only useful, but in his view central, and the Special Rapporteur should not yield to those who proposed deleting it. It set the scene for the remainder of the draft, and if combined with draft article 7, would set out a general rule, followed by possible derogations. However, the enumeration of various types of treaty in draft article 7, paragraph 2, was not the ideal approach. It might be better to try to enunciate general criteria in the article, with a list of categories of treaty incorporated in the commentary, as one member had suggested.

73. On draft article 4, he favoured a position that would reconcile the criterion of intention with that of external factors. Intention should be taken into account,
because nothing prohibited a State party to a treaty from expressly stating, or allowing it to be inferred from its intention, that a treaty or one of its provisions would or would not apply in the event of its lawful involvement in an armed conflict in which it might have to suffer the consequences of the use of force. Nothing precluded the Commission from envisaging such a hypothesis. The Special Rapporteur should explore the criterion of intention in greater depth. However, the other criterion, that of external factors, should also be included in draft article 4. Perhaps that was what the Special Rapporteur had in mind in paragraph 2 (b) of the draft article, with the formulation the “nature and extent” of the armed conflict, a formulation which could well refer to the external factors that would help to determine whether the treaty should or should not be applied.

74. While draft article 5 was acceptable in substance, it would be more logical to reverse the order of the two paragraphs: paragraph 2 set out the general rule, and should therefore precede paragraph 1. Lastly, he supported the Special Rapporteur’s proposal to delete draft article 6.

75. In conclusion, he agreed with the suggestion by Mr. Dugard that the Special Rapporteur should be given time to prepare his third report, with a working group on the topic to be set up in the coming quinquennium only if that proved absolutely necessary. However, if the third report met the desiderata expressed by the Commission, there would be no need to establish a working group.

76. Mr. BROWNLIE (Special Rapporteur), responding to the comments made by Mr. Melescanu, said that when the General Assembly had approved the agenda item, it had done so with certain expectations based on the Commission’s proposal for the item. That proposal had related to the specific question of the effect of armed conflicts on the operation of treaties. To include the general question of jus ad bellum would completely change the focus of the topic, creating a dilemma, studiously avoided by the Commission so far, about the interpretation of the Charter. To apply the distinction between aggression and self-defence, and between lawful and unlawful use of forces, would mean reverting to the definition of aggression adopted by the General Assembly in 1974 after many years of effort, a definition that itself was full of provisos as to its effect on the interpretation of the Charter. It was one thing to have a “without prejudice” article acknowledging that problems existed, but quite another to carry out a study on the legality of the use of force, but merely to point out that, even if that proved absolutely necessary. However, if the third report met the desiderata expressed by the Commission, there would be no need to establish a working group.

77. Mr. ECONOMIDES said he supported Mr. Kamto’s very apposite remarks about the question of terrorism. In the first place, to attempt to tackle the question was outside the Commission’s mandate. Secondly, in the case of terrorism, there was no readily identifiable opposing party; in international or domestic conflicts, there always was. Thirdly, as Mr. Kamto had pointed out, addressing the issue would open a Pandora’s box, with incalculable consequences.

78. Moreover, it was not being suggested that the Commission should define aggression or self-defence; its provisions should be similar to those of resolution II/1985 of the Institute of International Law, referring to the exercise by a State of the right of self-defence in accordance with the Charter. The Special Rapporteur should take account of the current exchange of views to decide how the majority of members wanted the question to be handled.

The meeting rose at 1.05 p.m.

2898th meeting—21 July 2006

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Cautiosti, Mr. Choe, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemiča, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Montaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.


SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. MELESCANU, referring to the earlier debate, said that he had not intended to call for a study on the legality of the use of force, but merely to point out that, when discussing the effects of armed conflict, a distinction should be made, to the extent possible, between different categories of conflicts—jus ad bellum, self-defence, aggression, just and unjust wars, and so on—as set out in the Charter of the United Nations.

2. Mr. NIEHAUS welcomed the second report on the effects of armed conflicts on treaties. The Special Rapporteur’s goal of attracting the interest and participation of Member States had been largely attained and, although some criticism had been expressed, it showed how complex the topic was. Several members of the Commission had taken the Special Rapporteur to task for submitting a text that was virtually identical with the one from 2005, but it was clear that that was in keeping with the Special Rapporteur’s analytical method. He had also been criticized for not treating the whole set of draft articles in the second report, but such an approach was not unusual in the Commission and, far from preventing the topic from being considered coherently, it allowed it to be examined in greater depth.

3. Turning to the draft articles themselves, he said that draft article 1 on scope did not pose any problem, although it should be specified whether it applied solely
to treaties in force or also to those awaiting ratification. Draft article 2, on the other hand, had given rise to a lively controversy over the definition of armed conflict in paragraph 2 (b). The Commission should not try to come up with a very exhaustive definition because that would complicate its work, but it should at least include internal armed conflicts, which today were more numerous and could have identical or even greater effects on treaties than international armed conflicts. Mr. Pellet's proposal to include the fight against terrorism was innovative and interesting, provided that special care was taken with the wording and content of such a provision so as to avoid the dangers to which a number of members had referred the previous day.

4. Although it might be redundant, draft article 3 should be retained because, together with draft articles 4 and 7, it was the driving force behind the draft articles. It was not advisable to replace the words "ipso facto" by "necessarily", which did not mean the same thing and was much less categorical. Draft article 4 dealt with the intention of the parties, an essential but controversial concept. He asked the Special Rapporteur to clarify the interpretation of the concept on the basis not only of articles 31 and 32 of the 1969 Vienna Convention, but also of relevant doctrine. The intention of the parties was very difficult to define and some thought that it was an archaic criterion that had lost all relevance in international law, but the Special Rapporteur maintained that it would be unrealistic to give it a secondary role. Instead of abandoning the criterion completely, other factors might be added to it, such as the object and purpose of the treaty and the specific circumstances of the conflict.

5. The Special Rapporteur had described draft articles 5 as useful, albeit redundant, but, as Mr. Pellet had rightly pointed out, it dealt with two separate and completely unrelated issues. Draft article 7 was probably the most complex and most heavily criticized of all. The Special Rapporteur stressed its indicative and expository nature and even contemplated its deletion, but, in his own opinion, it was useful, provided that it was reworked.

6. Most of the members of the Commission thought it would be premature to refer the draft articles to the Drafting Committee, given the many questions which they still raised, and suggested sending it to a working group. In his view, it would be preferable to follow the Special Rapporteur's own proposal and to have him produce a third report to serve as a basis for the future working group. That would be the best solution, especially given the changes that the end of the quinquennium would bring.

7. Mr. MOMTAZ said that the question of the effects of armed conflicts on treaties was closely linked to other areas of international law, such as the law on the use of force, international humanitarian law and the law on the responsibility of States; hence the importance of bearing in mind the fundamental rules that those areas of law set forth.

8. With regard to the scope of the draft articles, he was opposed to the inclusion of the so-called "war" against terrorism; if the objective was to protect persons suspected of terrorism, then international human rights law could deal with it. He was, however, in favour of the inclusion of treaties which had been signed or ratified, but had not yet entered into force, for the reasons given by Mr. Rodríguez Cedeño, as well as treaties concluded with international organizations, with the reservation that those bodies, and in particular the United Nations, had always stressed that they were not parties to conflicts. The inclusion of non-international armed conflicts was more complex and, in that connection, he endorsed Mr. Kamto's proposal that a distinction should be drawn between internal armed conflicts according to their scale and the involvement of foreign Powers. A similar distinction was contained in article 1, paragraph 4, of Protocol I to the Geneva Conventions, which considered international armed conflicts to be "armed conflicts in which peoples [were] fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination". The draft articles should include those three categories of internal armed conflicts, which had international implications. Internal armed conflicts which did not have international repercussions could be dealt with under the law of the responsibility of States and, more specifically, the provisions on circumstances excluding wrongfulness, as suggested by Mr. Gaja.

9. There remained the difficult question of the definition of such internal armed conflicts. He did not at all think that the definition from the Tadić case could be used. The purpose of that definition, which was based on a criterion of time (prolonged armed conflict), was to improve the protection of victims of war, whereas the Commission needed to know to what extent the control of part of the territory of a State torn by an internal armed conflict could have effects on the operation of treaties. A State whose territory was occupied by rebels had serious difficulties in complying with its treaty obligations. A definition based on the territorial criterion, as in Protocol II to the Geneva Conventions, was thus preferable.

10. As to the question of which criteria to use to identify treaties and provisions that would remain in force in case of an armed conflict, he cautioned against applying the principle of the indivisibility of treaties because it might well compromise the stability of treaty relations in a situation of conflict. Draft article 4 was very useful. It was true, as Mr. Economides had pointed out, that States which were negotiating a treaty cared little at that stage whether it would be applicable in a situation of conflict. However, many treaties contained safeguard clauses or clauses referring to lex specialis, and that might reflect an intention to apply, for example, international humanitarian law in case of a conflict. That intention could exist even in the absence of such clauses. Thus, the fact that the negotiators of the United Nations Convention on the Law of the Sea had not prohibited hostilities on the high seas could indicate that they had intended to apply international humanitarian law in case of an armed conflict or, in other words, not to apply a number of provisions of the Convention. For example, the principle of freedom of the high seas embodied in the Convention would not be fully applied in case of a conflict on account...
of the applications of rules of international humanitarian law, which required, inter alia, the inspection of neutral vessels.

11. The list given in draft article 7 was very useful, although the article itself should be changed. In the case of the war between Iran and Iraq, for example, the treaties contained in the list had, on the whole, been honoured. In particular, diplomatic relations had been maintained until the last year of the conflict. The smallest common denominator of those treaties was that most contained a set of erga omnes obligations. It could therefore be said that erga omnes obligations must continue to apply in case of armed conflict, at least in respect of relations between the belligerents and third parties.

12. He stressed the need to take account of the main provisions of international law on the use of force and hoped that the Special Rapporteur would give the necessary attention to resolution II/1985 of the Institute of International Law when he took up draft article 10 (Legality of the conduct of the parties) again.

13. Mr. Sreenivasa RAO commended the Special Rapporteur on his second report, which took a very flexible approach to the topic. On the definition of armed conflict, he thought that the Commission should not try to find a complete definition which covered all aspects of the question. Attempts to define war or armed conflicts had always failed and the provisions of international humanitarian law had never needed a strict definition in order to be applicable.

14. In his view, the effects of armed conflicts on treaties came under the law of treaties, although the subject was also related to other major areas of international law, such as the law of responsibility and international humanitarian law. It seemed reasonable to limit the scope to treaties concluded between States because it was difficult to imagine an armed conflict between a State and an international organization. In the case of sanctions imposed by the United Nations, the obligations of States were governed more by Articles 25 and 103 of the Charter than by any other principle. Treaties between States and international organizations should be governed mutatis mutandis by the same principles as those applicable to the obligations of States parties to a conflict vis-à-vis third parties.

15. He shared Mr. Gaja’s opinion on the inclusion of non-international armed conflicts. Questions were more likely to come into play on suspension or termination resulting from the impossibility of performance or a fundamental change of circumstances, which would be discussed in greater detail during the consideration of draft article 13 (Cases of termination or suspension). With regard to the “war against terrorism”, he agreed with Mr. Economides that the Commission could not do much and should approach the question with great caution.

16. The relevance of the concept of intention in assessing the effects of armed conflicts on treaties had given rise to a lively debate. Some thought that intention played a very limited role. That point was well taken and the Special Rapporteur would do well to reconsider the matter. After having analysed it in detail in his first report, he had focused on the concept of intention rather than the other indicia of susceptibility. It went without saying that a clearly expressed intention could not be ignored, but the question remained which criteria would serve to ascertain intention when it was not apparent, as in many recent treaties. Articles 31 and 32 of the 1969 Vienna Convention were useful, but their application was not simple and could bring other legal questions into play. In any event, each armed conflict and each particular treaty in question would have to be considered in their context to arrive at a proper conclusion. The Special Rapporteur was fully aware of that possibility, as shown by his comments in paragraph 19 of the second report and the reference in paragraph 25 to the opinion of the United States delegation, according to which it was necessary to consider other factors, including the object and purpose of the treaty, the character of the specific provisions in question and the circumstances relating to the conflict. What was at issue was thus more a matter of presentation and emphasis than of a difference of opinion. Such a broad approach for enumerating relevant factors or presumptions for determining the effect of armed conflict on treaties was consistent with other policy decisions the Commission must take in the context of the topic. For example, it was not a question of studying the law relating to the use of force, but simply the effects which a decision concerning the right of self-defence might have on a treaty. Even more pertinent was the decision to establish a presumption that an armed conflict per se did not terminate treaty obligations, subject to other considerations provided for in the draft articles.

17. The various categories of treaties referred to in draft article 7 might be reformulated either by citing them as examples in the commentary to one of the draft articles or by deducing useful indicia, factors or presumptions on which to focus.

18. Given the general recognition today of the importance of the environment for the well-being and survival of mankind in the short term and in the long term, it must be stressed that the environment must never be deliberately targeted. If civilians and civilian objects could not be regarded as legitimate targets, he did not see why it should be any different for the environment, on which civilians depended so heavily. In that connection, the international community should go beyond the current threshold of “widespread, long-term and severe damage” set out in Protocol I to the Geneva Conventions. Aware that his comment was not directly related to the topic under discussion, he nevertheless took the opportunity to urge the Commission not to appear to lend support inadvertently to the idea that treaties on environmental protection could be dispensed with in the case of armed conflict.

19. The Commission should not take any decision on the continuation of work on the subject before the Special Rapporteur had submitted his third report.

20. Mr. ADDO, thanking the Special Rapporteur for his second report on the effects of armed conflicts on
treaties, said that, in paragraph 17 of his first report, the Special Rapporteur had stressed that contemporary armed conflicts had blurred the distinction between international and internal armed conflicts, that the number of civil wars had increased and that, in addition, they included external elements, such as support and involvement by other States in varying degrees, supplying arms, providing training facilities and funds, and so forth. Internal armed conflicts could affect the operation of treaties as much as, if not more than, international armed conflicts. The draft articles proposed by the Special Rapporteur therefore included the effect on treaties of internal armed conflicts. In his second report, however, the Special Rapporteur seemed to have abandoned that idea. In paragraph 8, he said that “a proportion of the doctrine regard[ed] the distinction between international armed conflict and non-international armed conflict as basic in character, and would exclude the latter [from draft article 2 (b)]” and, in paragraph 9, he pointed out that the question had provoked marked differences of opinion in the Sixth Committee, five delegations having been opposed to the inclusion of internal armed conflicts, whereas six delegations had been in favour of including non-international armed conflicts. Then, in paragraph 13, the Special Rapporteur asked whether “a general indication on the inclusion or not of non-international armed conflicts could be obtained from the [Commission]” and added that “[i]t must be clear that it would be inappropriate to seek to frame a definition of “armed conflict” for all departments of public international law”.

21. He personally would like to see non-international armed conflicts included in the draft articles for the reasons given by the Special Rapporteur in his first report, as well as those set out in paragraphs 146 to 149 of the memorandum by the Secretariat, namely, that internal armed conflicts could affect treaties in the same way as international armed conflicts. He gave the example of the civil war in Guinea-Bissau, which had caused the United States to suspend its bilateral treaty on the Peace Corps aid programme in 1998 as a result of fighting in the capital between Government troops and rebel soldiers. Similarly, in 1982, the Government of the Netherlands had suspended bilateral treaties with Suriname because of civil strife in the country, in accordance with the principle of rebus sic stantibus. Domestic hostilities in the former Yugoslavia had affected many treaties between Yugoslavia and several European Union countries. As pointed out in paragraph 392 of the third report on State responsibility, by Mr. Crawford, Special Rapporteur, in justifying the suspension of the 1983 cooperation agreement with Yugoslavia, the member States of the European Community had explicitly mentioned the threat to peace and security in the region, but they had relied on fundamental change of circumstances rather than asserting a right to take countermeasures. With regard to the internal armed conflict in Kosovo, which had begun in February 1996, the same report noted that:

In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban. For a number of countries, such as Germany, France and the United Kingdom, the latter measure implied the breach of bilateral aviation agreements. Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect.

The two latter cases showed that internal armed conflicts could have an effect on treaties with third parties. Consequently, there should be no doubt that at all internal conflicts could have a significant effect on inter-State treaty relations and attention must be given to such cases. He agreed with Mr. Dugard on that point.

22. He had no problems with the rest of the draft articles and endorsed the deletion of draft article 6, but was opposed to the establishment of a working group because the Special Rapporteur must be allowed sufficient time to prepare his third report, taking account of all the concerns which had been expressed during the debate that had followed the introduction of his second report. At the next session, the new members of the Commission would also have contributions to make and a decision could then be taken on how to proceed. The Special Rapporteur did not need the assistance of a working group at the current stage because he was the right man for the job in that difficult and uncertain area of international law. He must be encouraged with constructive comments, not subjected to scathing criticism. He should be commended on the quality of his second report, which he had prepared despite his tight schedule.

23. Mr. CHEE paid tribute to the Special Rapporteur for his outstanding work on the effects of armed conflicts on treaties. He appreciated the wealth of sources of international law which the Special Rapporteur had consulted. Article 35 (a) of the Harvard Research in International Law Draft Convention on the Law of Treaties, according to which “[a] treaty which expressly provides that the obligations stipulated are to be performed in time of war between two or more of the parties, or which by reason of its nature and purpose was manifestly intended by the parties to be operative in time of war between two or more of them, is not terminated or suspended by the beginning of a war between two or more of the parties” accurately reflected the nature of the topic.

24. He had no difficulty with draft article 1 (Scope), whose wording was based on that of article 1 (a) of the 1969 Vienna Convention.

25. In draft article 2, the Special Rapporteur excluded conflicts of a non-international nature from the scope of the topic. That seemed appropriate, given that the word “treaty” was taken to mean an agreement between States pursuant to article 2, paragraph 1, of the 1969 Vienna Convention and not between a State and a non-State actor. He noted that article 35 of the Harvard Research Draft Convention was hardly more categorical than draft article 3 because it stated that all writers currently held that:

297 Ibid.
298 See footnote 266 above.
302 Ibid., p. 103, para. 391(f).
303 See footnote 286 above.
Given the complexity of the topic, it was important to consider, the Charter of the United Nations and the 1969 Vienna Convention, which dealt with the general rules on the interpretation of treaties. Paragraph 2 (b) was right to provide that the intention of the parties could be determined on the basis of the nature and extent of the armed conflict in question, a position supported by Sir Gerald Fitzmaurice in his Hague Academy of International Law lectures in 1948, as noted by the Special Rapporteur in paragraph 34 of his first report.

He shared the Special Rapporteur’s view that draft article 5 (Express provisions on the operation of treaties) was needed for the sake of clarity. He was in favour of the deletion of draft article 4 and he endorsed draft article 7, which listed the categories of treaties whose object and purpose implied that they were applicable in case of an armed conflict, on the understanding that the list was not exhaustive.

The second report did not include modalities for settling disputes which might arise in respect of the effects of armed conflicts on treaties and, in that context, he referred the Special Rapporteur to article 36 of the Harvard Research Draft Convention, which provided that “if the dispute cannot be settled by diplomacy, it ... shall be referred to the Permanent Court of International Justice ... under a special agreement between the parties”. That classical mode of settling disputes was still practised by States.

He was in favour of referring the seven draft articles, apart from draft article 6, to the Drafting Committee or a working group.

Mr. AL-MARRI commended the Special Rapporteur on the quality of his report and said that, although the title of the topic was the effects of armed conflicts on treaties, the pyramid seemed to have been turned upside down, as though treaties influenced armed conflicts. As pointed out by several members of the Commission, States often tried to shirk their responsibilities with regard to armed conflicts. The relationship between the topic under consideration, the Charter of the United Nations and the 1969 Vienna Convention must always be borne in mind. Given the complexity of the topic, it was important to proceed on the basis of the opinion of the majority of the members of the Commission.

Mr. BROWNLE (Special Rapporteur) said he was pleased that the presentation of his second report on the effects of armed conflicts on treaties had given rise to a lively and useful debate and he had taken due note of the various points of view expressed by the members of the Commission. He had originally thought that it would be sensible to refer his first two reports to a working group, which would be more suitable than a drafting committee for dealing with matters that had not yet been resolved. However, such a step would be very premature, since the debate in the Commission had revealed the existence of substantial differences of opinion on some important aspects of the topic. Hence his proposal to draft a third report, for which there was some degree of support among the members of the Commission.

He continued to think that the second report, with all its limitations, was a fair record of the views expressed by members in 2005. Instead of replying to comments on the individual articles, he would like to look at questions of methodology. First, with regard to Mr. Koskenniemi’s reservations about the expository nature of the draft articles, he said that, in his view, a special rapporteur should, at least in his early reports, set down what was available on the topic. He had no particular objection to articles 3, 4 and 7 being drafted in a single short text, but he doubted whether that would be helpful and it seemed to him that the draft articles, as formulated, reflected the shape and historical development of the topic. Secondly, some members had complained that he had not taken their comments into account; that was not the case at all. He had often given consideration to views, but decided that he did not agree with them, something that was legitimate for a special rapporteur, who could not be expected to accept all comments expressed. Thirdly, he recognized that the first report had not provoked all the reactions expected from States, although some States had taken useful positions in the Sixth Committee. However, it would be difficult to attract the attention of Governments as long as the Commission had not submitted a set of draft articles adopted on first reading. Fourthly, the comments on questions of intention and the relevance of rules of jus cogens were somewhat selective. On the question of intention, Mr. Pellet’s tenth report on reservations to treaties dealt with a considerable amount of material, including the concept of intention or consent and, in paragraph 3 of his report, Mr. Pellet referred to the definition of reservations in the 1969 and 1986 Vienna Conventions. Thus, he did not see why the question of intention should be such a problem in one case and not in another. The same remark applied to the question of jus cogens. He wondered whether, when it considered a new agenda item, the Commission was always going to decide on the relevance of the rules of jus cogens to the topic. He did not believe that that had been the usual approach thus far in the work of the Commission.

He had shown great flexibility in drafting his report. The conditions under which he had produced it had been such that there was considerable latitude for defining the term “armed conflict”. His position on the definition was not fixed and he was open to proposals. Once he had determined which approach to take in his third report,
With regard to the important question of the scope of the draft articles, he accepted that he would need to deal with the matter more thoroughly in the third report in the light of comments by Mr. Pellet and others, even if he had his own views on the matter. On treaties concluded by international organizations, he was personally reluctant to bring in material from other drafts by analogy. He was not convinced by that approach and did not believe that it was very useful in the context of the responsibility of international organizations. However, Mr. Pellet had made the important practical point that it would not be feasible to study treaties of international organizations as a separate matter. As to the important question of internal armed conflicts, he thought he had made it clear that they should be included in the scope of the draft articles and the memorandum by the Secretariat on “The effect of armed conflict on treaties: an examination of practice and doctrine”307 contained strong arguments in favour of so doing. The only problem was that a number of members, for example, Mr. Momtaz, had discussed the question of armed conflict in general terms. The words “[f]or the purposes of the present draft articles” at the beginning of draft article 2 indicated, however, that the question of the inclusion of armed conflicts was governed by the intention of the parties, as referred to in draft article 4 and, in a different manner, in draft article 7. One of the criteria for discerning the intention of the parties was the nature and extent of the armed conflict in question. It was thus not enough to consider whether or not to include internal conflicts because, even if they were included, they remained subject to the modalities of draft article 4, just as international armed conflicts did. Hence the need to be careful because the question of armed conflicts, including internal armed conflicts, had to be contextual, that context being the meaning and effect of the particular treaty.

In his third report, he would consider the effects of armed conflicts on treaty obligations, which had been raised by Mr. Pellet and others. While he could understand the point being made, he did not think that, when the Commission had proposed a study of the effects of armed conflicts on treaties and the Sixth Committee of the General Assembly had approved it, they had expected the Commission to deal with such questions as force majeure or supervening impossibility. If the Commission were to embark on that path, it would violate the principle that its new work should not replicate subjects already covered to a great extent by the 1969 Vienna Convention.

Draft article 10, which dealt with the question of the relevance of the legality of the use of force, would be carefully recast in the light of resolution II/1985 of the Institute of International Law308 and whose text had been included in his first report. The question of intention should be given closer consideration and he could not subscribe to the view that it was no longer an integral part of international law; every document that he had seen referred to the concept, whether it was the intention of the parties to a treaty or the intention of the lawmaker. The problem was to find evidence of intention and he would look into that question in the light of the debate.

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

AGENDA ITEM 1

The CHAIRPERSON announced that the Commission would suspend the meeting in order to proceed with the official closing of the International Law Seminar.

The meeting was suspended at 11.30 a.m. and resumed at 11.50 a.m.

### Cooperation with other bodies

AGENDA ITEM 13

STATEMENT BY THE REPRESENTATIVE OF THE ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

38. Mr. KAMIL (Secretary-General of the Asian-African Legal Consultative Organization (AALCO)) said that 2006 had been a milestone in the history of AALCO, marking its fiftieth anniversary. Established in 1956 at the conclusion of the Bandung Conference, it now had 47 members. At its forty-fifth session, held in New Delhi from 3 to 8 April 2006, many delegations had commented in detail on the main thrust of the Commission’s work on a number of topics and had set out their countries’ views on various sets of draft articles.

39. The member States of AALCO had welcomed the progress made on the topic of diplomatic protection and were pleased to note that the draft articles adopted by the Commission on first reading309 reflected the customary rules of international law on the subject. They had hoped that the Commission would continue its efforts to improve the draft articles and their commentaries, taking into account comments from States, so that the second reading could be completed on schedule. A number of delegations had welcomed the Special Rapporteur’s conclusion that the clean hands doctrine should not be included in the draft articles310 so that the Commission could focus more on matters of a practical nature that needed further elaboration.

40. Delegations had appreciated the comprehensive nature of the tenth report on reservations to treaties and had welcomed the preparation of a guide to practice. They had expressed the view that, once adopted, the guidelines and commentaries would reduce uncertainty and assist States and international organizations in their treaty practice. They had noted that the approach adopted for definitions should ensure uniformity in the formulation and admissibility of reservations. It had been pointed out that defining core terms would alleviate interpretation problems and thereby reduce subjectivity and the Special

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307 See footnote 266 above.
308 See footnote 263 above.
Rapporteur’s efforts to define complex concepts such as “object and purpose” of a treaty had been welcomed. One representative had stressed that a reservation formulated by a State party to a treaty must not be incompatible with the object and purpose of the treaty. That would enhance customary international law and reaffirm the incontrovertible fact that, within the framework of unilateral acts, States could still refrain from committing themselves to a treaty that they might not agree with. The view had been expressed that the whole range of instruments on reservations, beginning with the 1969 and 1986 Vienna Conventions, had met the needs of the international community. The rules established by those conventions had acquired the status of customary norms and it would not be wise to call them into question.

41. In respect of unilateral acts of States, the member States of AALCO had welcomed the efforts of the Working Group and the Special Rapporteur to finalize the 10 draft guiding principles applicable to unilateral declarations of States capable of creating legal obligations and had expressed the hope that the Commission would adopt them in the near future.

42. It had been pointed out that the formulation of draft articles on the topic of responsibility of international organizations was timely in view of the increasing range of activities that international organizations had come to regulate in international affairs. Delegations had agreed with the Special Rapporteur that a wrongful act of an international organization could consist of an action or an omission\(^{311}\) and they had been pleased to note that the draft articles covered both possibilities. It had also been observed that, in developing principles applicable to international organizations, the Commission should not go beyond the extent to which it would be appropriate in drawing analogies with regard to States.

43. Delegations had also appreciated the results achieved by the Study Group on fragmentation of international law. They had expressed the hope that the study would facilitate an international consensus on the issue, in addition to establishing the basic principles in the area and standardizing international practice. The study should help achieve the objective of promoting the rule of law throughout the international community.

44. The member States had expressed their deep appreciation for the considerable work carried out by the Special Rapporteur on shared natural resources and had emphasized that the draft articles should be aimed at formulating basic principles and should leave the drafting of specific rules to bilateral and regional arrangements. They had also recognized the need to prepare an international legal instrument to guide the use, allocation, preservation and management of transboundary aquifers or aquifer systems and expressed the hope that the framework would later be expanded to include other shared natural resources, such as oil and gas. They had expressed the view that it would be inappropriate to apply the principle of “equitable utilization” embodied in the 1997 Watercourses Convention for the purpose of establishing a regime on groundwater, where the role of riparian rights in the utilization of water was less pronounced.

45. Representatives had emphasized that the study on the effects of armed conflicts on treaties should also cover treaties concluded by international organizations and that the scope of the expression “armed conflicts” in the draft articles should be strictly confined to international armed conflicts. The Commission might in future include the question of non-international conflicts, provided that that was done within the confines of principles of customary international law. Delegations had also stressed that a more in-depth study was needed on the issue of the legality of the use of force, since it had a bearing on treaty relations. Moreover, the subject was not limited to the law of treaties and was closely related to other areas of international law, such as international humanitarian law and, in particular, the law of self-defence and the law of the responsibility of States.

46. On the expulsion of aliens, the Commission should attempt to strike a balance between the right of a State to expel aliens and the human rights of those expelled, despite the fact that the decision to expel was the sovereign right of a State. States should exercise that right in accordance with established rules and principles of international law, particularly fundamental principles of human rights. Any expulsion should be based on legitimate grounds, as defined in domestic law, taking into account issues such as public order and security and other essential national interests. The topic of the expulsion of aliens was particularly relevant in the contemporary world, where globalization had intensified transboundary movements of people. Moreover, a State’s right to expel aliens was inherent in its sovereignty, but it could not be considered absolute. The Commission should therefore undertake a detailed consideration of existing customary international law and treaty law, including a comparative study of international case law at the global and regional levels, as well as of national legislation and practice.

47. Those were, in brief, the opinions expressed by the member States of AALCO at its forty-fifth session and they would be published in volume IV of the AALCO Yearbook (2006). With a view to enabling the Commission to be informed of the law and State practice of Asian and African States, AALCO had adopted a resolution at the same session urging member States to communicate their comments and observations to the Commission on the topics on the current agenda. The resolution also welcomed the fruitful exchange of views on a number of topics during the joint AALCO–International Law Commission meeting held in conjunction with the AALCO legal advisers’ meeting in New York in October 2005.\(^{312}\) The member States of AALCO had requested him to continue to organize such meetings and he looked forward to receiving suggestions from the members of the Commission on topics which might be taken up at the next meeting, to be held at the end of October 2006 in New York.

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\(^{311}\) Ibid., para. 206, general commentary to chapter III of the draft articles, para. (2).

48. As to future cooperation between AALCO and the Commission, the AALCO Secretariat would continue to draw up notes and comments on the topics under consideration in the Commission so as to assist the representatives of the member States of AALCO in preparing their deliberations on the Commission’s report in the Sixth Committee.

49. An item entitled “Report on matters relating to the work of the International Law Commission at its fifty-eighth session” would be considered at the forty-sixth session of AALCO. The session would be held in Khartoum in 2007 and he invited members who so wished to attend.

50. Noting that the quinquennium was drawing to a close, he congratulated all the members for their outstanding contributions to the Commission’s work over the past five years. The Commission had made considerable progress on all the topics on its agenda. It had completed much of its work on some of them, and the new topics which it had taken up were of immense significance. It was to be hoped that in its new composition, the Commission would continue its work with the same energy and enthusiasm.

51. The CHAIRPERSON said that the Commission had greatly benefited from its relations with AALCO for two reasons: first, because many of the representatives of its member States were distinguished legal specialists whose publications enriched legal research the world over; and, second, because most of the representatives of its member States were legal counsellors of Governments whose daily work related to the “State practice” which the Commission must take into account in its work of the codification and progressive development of international law.

52. Mr. DAOUDI, noting that the representatives of the AALCO member States had spoken at length on the topics on the Commission’s programme of work, expressed surprise that, despite the resolution adopted by AALCO at its forty-fifth session and referred to by Mr. Kamil, most of the comments and observations addressed in writing to the Commission had come from industrialized countries. He asked whether AALCO had institutionalized mechanisms to help better familiarize the Commission with the views of its member States on the topics under consideration.

53. Mr. Sreenivasa RAO asked whether it might not be time for AALCO, which was celebrating its fiftieth anniversary and was moving into its new headquarters, to consider new fields of activity. He had five suggestions to make in that regard: establish working groups to study aspects of international law of relevance to the region; organize regional fellowship programmes; provide legal assistance to African and Asian States; organize exchanges of legal experts within and between those regions; and conduct a lecture series on subjects of interest to Africa and Asia.

54. Mr. KAMIL (Secretary-General of the Asian–African Legal Consultative Organization), replying to Mr. Daoudi, said that interaction between AALCO and the Commission had grown over the years and that the views of the member States were communicated to the latter in various ways. First, the Commission was represented at AALCO sessions. Secondly, its member States expressed their views to him on topics under consideration in the Commission, which he then forwarded to it, as he had done at the current session.

55. AALCO and the Commission also held a joint meeting in the framework of the meeting of legal counsellors of Governments which took place every year in New York. The records of the debates at the annual session of AALCO and at the joint meeting with the Commission were published in the AALCO Yearbook, a copy of which was sent to the Commission every year.

56. With regard to Mr. Sreenivasa Rao’s suggestions, he said that he could not himself enlarge the mandate of AALCO and that any innovation must be approved by its member States. The suggestions were interesting and some of them were already being considered. For example, a training programme was to be started as soon as the organization had moved into its new headquarters.

57. Mr. KATEKA asked whether the AALCO secretariat could put a summary of the views expressed by its members on the various topics under consideration in the Commission on the AALCO website. AALCO should also update its website more often and flesh out the information offered.

58. Mr. GALICKI said that the relationship between AALCO and the Commission was very valuable for the latter, and especially for the special rapporteurs, and they enabled the Commission to be more closely in touch with the views of African and Asian legal experts.

59. Mr. KAMIL (Secretary-General of the Asia–African Legal Consultative Organization) said that the organization was in a transition period because of its move to new headquarters. As soon as it was settled in, the centre for research and training which was to be established there would start functioning and the website would be completely reworked and expanded with much new information.

The meeting rose at 1.05 p.m.

2899th MEETING

Tuesday, 25 July 2006, at 10.05 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kembali, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Mottaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.
Cooperation with other bodies (continued)

[Agenda item 13]

DECLARATION BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON welcomed Judge Rosalyn Higgins, President of the International Court of Justice. A renowned teacher and practitioner of international law, Judge Higgins had been a judge at the Court since 1995 and its President since February 2006. Among her countless accomplishments was the masterly general course she had given in 1991 at the Hague Academy of International Law on “International law and the avoidance, containment and resolution of disputes”, published in volume 230 (1991) of the Collected Courses of the Hague Academy of International Law,313 in which she had referred to the nature and function of international law as “a normative system”. With the emergence of peremptory norms of international law and rules of jus cogens, it was to be hoped that one day the ICJ would give concrete form to the theoretical normative system conceived by Kelsen.314

2. The Court, at the Peace Palace in The Hague, and the Commission, at the Palais des Nations in Geneva, enjoyed long-established, harmonious and mutually beneficial relations in promoting international law in the service of States and the international community. The order of the Court of 13 July 2006 in the Pulp Mills on the River Uruguay case contained many elements that would be readily recognizable to members of the Commission, in the light of its own contributions to the elaboration of rules and principles through texts such as the 1997 Watercourses Convention and the draft articles on prevention of transboundary harm from hazardous activities.315 Conversely, the Statute of the Commission mandated it to make use of the work done by the Court in its own task of codification and progressive development of international law. The annual visit by the President of the Court offered a regular and timely reminder of that symbiotic relationship. The Commission would undoubtedly derive the greatest benefit from the information to be provided by Judge Higgins, whom he accordingly invited to address the Commission.

3. Judge HIGGINS (President of the International Court of Justice) thanked the Chairperson for the warmest of welcomes and said she was delighted to address the Commission, whose work she so much admired. The Court greatly appreciated such exchanges between the two bodies, and the fact that they had become an annual event. She planned, as was traditional, to report on the judgments rendered by the Court over the past year, with particular reference to aspects of recent case law that had special relevance for the work of the Commission.

4. She would begin with the Frontier Dispute (Benin/Niger) case. Territorial disputes invariably involved many similar elements: an analysis of colonial instruments, the study of acts claimed to be legal effectivités and the question of uti possidetis, which often had a critical date function to play in the long road to independence and the subsequent history. Yet each dispute over title to territory or the fixing of a boundary had its own special elements that provided instruction in history and challenges in law. And so it had been in the Frontier Dispute Chamber case, decided on 12 July 2005, the very day after her predecessor had addressed the previous session of the Commission.

5. To understand who at the time had had the authority to determine or change a frontier of international law had required reliance on and understanding of the national law of the time. But it had also become important for the Court to be able to identify which colonial acts were purely intra-colonial and determine whether they could have had the effect of altering a frontier for purposes of international law.

6. The Chamber of the Court, created at the request of the parties, had been charged with determining the course of the entire boundary between Benin and Niger and specifying which State owned the islands in the River Niger sector, with particular emphasis being placed by the parties on the island of Lété, the largest of them all. The parties had asked the Court to use the principle of uti possidetis for its decision. The challenge had been to have that doctrine play its important role without ignoring all that had occurred in real life subsequently. The Court had confirmed that it would look at maps and other data subsequent to the critical date, for the purpose of seeing if they evidenced any agreement to alter the uti possidetis line.

7. Beginning with the Niger River sector, the Chamber had found that the boundary between Benin and Niger followed the “main navigable channel of the river”. Having determined the exact course of that main navigable channel by reference to the deeper soundings at the time of independence of the two countries, the Chamber had then found that the islands lying east of that channel—Lété and 15 others—belonged to Niger, while the nine islands located west of the channel belonged to Benin.

8. In the Mekrou River sector, the Chamber had had to decide whether, as Benin argued, the Mekrou River itself formed the border, or, as Niger claimed, the boundary was a straight line running between the Atakora mountain range and the confluence of the Mekrou and Niger rivers. Relying in particular on a 1927 decree of the French colonial authorities, the Chamber had ruled that the Mekrou River had formed the common border when both countries had gained independence and, consistent with uti possidetis, still formed the current border. The Chamber had then found that the Mekrou River was not navigable, and consequently that the median line of the river would constitute the appropriate boundary.

9. The case represented an interesting example—although not the first—of a dispute between African States being brought to the Court by special agreement. The option chosen by the parties to submit the case to the Court in that manner had proved of particular significance for the organization of the proceedings. Not only had the parties agreed to have the case heard by a Chamber of

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315 See footnote 56 above.
five judges, but also, interestingly, they themselves had fixed relatively short time limits for the filing of their respective written pleadings and had agreed to use solely the French language in their written and oral pleadings, thereby simplifying their own work as well as that of the Court and limiting their expenses.

10. The case had also presented the Court with an interesting small delimitation question that had never been addressed by an international court or tribunal until then: that of the delimitation of the boundary on bridges over international watercourses in the absence of any bilateral agreement between the two neighbouring States. That question had not been addressed by the Commission during its important work on watercourses, which, had not, in any event, been directed at boundary matters. The Court had found that in the absence of a bilateral agreement, the solution was to extend vertically the line of the boundary on the watercourse. It had noted in paragraph 124 of its judgment that

[...] this solution accords with the general theory that a boundary represents the line of separation between areas of State sovereignty, not only on the earth's surface but also in the subsoil and in the superjacent column of air. Moreover, the solution consisting of the vertical extension of the boundary line on the watercourse avoids the difficulties which could be engendered by having two different boundaries on geometrical planes situated in close proximity to one another.

11. In the past year, the Court had had to deal with a very different type of inter-African case, raising issues of a wholly grimmer character. She was referring to the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda). It had involved very grave allegations relating, inter alia, to the unlawful use of force, violation of territorial sovereignty, occupation, human rights and humanitarian law violations, as well as to the illegal exploitation of natural resources. It had by no means been an easy or routine case for the Court, if only because when deliberations on the merits had started, the armed conflict had not been entirely settled on the ground. Indeed, according to news reports at the time, it had been threatening to flare up again. The Commission needed no reminding, either, of the complex history of that conflict in the Great Lakes Region and of the difficulty of untangling the sequence of events and identifying the numerous actors involved. The number of specific violations alleged by the parties and the amount and variety of material submitted in support of those allegations had been unprecedented.

12. In its judgment of 19 December 2005, the Court had ruled essentially in favour of the Democratic Republic of the Congo, although it had followed Uganda on one of its counter-claims. The outcome of the case was that the Court had found

that the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law. (para. 345 (3) of the judgment)

It had also found

that the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law. (para. 345 (4))

13. Regarding Uganda’s claim, the Court had then found

that the Democratic Republic of the Congo, by the conduct of its armed forces, which attacked the Ugandan Embassy in Kinshasa, maltreated Ugandan diplomats and other individuals on the Embassy premises, maltreated Ugandan diplomats at Ndjili International Airport, as well as by its failure to provide the Ugandan Embassy and Ugandan diplomats with effective protection and by its failure to prevent archives and Ugandan property from being seized from the premises of the Ugandan Embassy, violated obligations owed to the Republic of Uganda under the Vienna Convention on Diplomatic Relations of 1961. (para. 345 (12))

14. The Court had decided consequently that both countries were under an obligation to make reparation for those specified injuries.

15. The questions, legal and factual, that the Court had had to answer to reach those findings were too numerous, albeit important, to be recounted even in summary form. She would simply mention a few points of particular interest, as well as those parts of the Court’s reasoning that had a direct bearing on the International Law Commission’s work.

16. The Court had dealt extensively with important issues relating to the principles of non-use of force and non-intervention, consent to the presence of foreign troops and claims by Uganda that certain actions were to be articulated as self-defence. Detailed findings of fact had preceded findings of law. It was noteworthy that the Court had stated that, as in the Military and Paramilitary Activities in and against Nicaragua case, the facts did not warrant any pronouncement on whether self-defence would be available in the light of an imminent attack from across the border. Uganda had told the Court that it was not responding to any imminent attack and that in its view a series of small attacks constituted an attack that had already occurred.

17. The Court had then turned its attention to the legal definition of belligerent occupation. The Democratic Republic of the Congo had contended that Ugandan troops had set up a very large occupation zone, which Uganda administered both directly and indirectly. The defining criterion for establishing a situation of occupation, according to the Democratic Republic of the Congo, was not whether Ugandan troops were or were not present in specific locations in that zone, but rather Uganda’s ability to assert its authority over the territory concerned. Uganda, on the other hand, claimed that with a maximum of 10,000 troops on the entire territory of the Democratic Republic of the Congo, it simply could not have occupied such an extensive swathe of territory. It had further maintained that most of the territories alleged to be occupied were controlled and administered by
Congolese rebel groups not under the control of Uganda. The question whether those groups were or were not subservient, in the State responsibility sense, had been an important issue for the Court.

18. In paragraph 172 of its judgment, the Court recalled that according to article 42 of the Hague Convention 1907 (IV) respecting the Laws and Customs of War on Land, which reflected customary law on the matter, “[t]erritory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised”. The Court had gone on to examine whether there was sufficient evidence to demonstrate that the said authority had in fact been established and exercised by Uganda. It had specified that it would not be enough simply to show that there were armed forces in a particular location: it had to be proved that the armed forces had substituted their own authority for that of the Government of the Democratic Republic of the Congo in that location. The Court had had no difficulty in concluding that Uganda had established and exercised authority in Ituri as an occupying Power. It had found, however, that the Democratic Republic of the Congo had not provided specific evidence to show that that authority was exercised by Ugandan armed forces in other areas. As a consequence, the Court had had to deal with two separate areas to which different legal regimes applied. In Ituri, article 43 of the Hague Convention 1907 imposed on Uganda a duty to restore and ensure public order and safety while respecting the laws of the Democratic Republic of the Congo. Uganda could thus be held responsible not only for its own acts and omissions in that region but also for any lack of vigilance in preventing violations of human rights and humanitarian law by other actors in that territory, and more specifically, by rebel groups. On the rest of the Congolese territory invaded by Uganda, but not qualified as “occupied” in the international law sense, that specific duty of vigilance did not apply and Uganda there could only be held responsible for the acts and omissions of its own forces.

19. Difficult questions had arisen of whether, when a State agreed to a ceasefire and a phased withdrawal of foreign troops, it had given a consent pro tempore for the presence of those troops. Looking at the series of such agreements, the Court had found that they did not constitute consent by the Democratic Republic of the Congo to the presence of Ugandan troops on its territory “in the sense of validating that presence by law” (para. 105 of the judgment). That was a finding that would, she imagined, have a wider interest.

20. Turning to aspects of the case connected to the work of the International Law Commission, she noted that the Court had had occasion to rely in its reasoning on the Commission’s draft articles on responsibility of States for internationally wrongful acts. The Democratic Republic of the Congo had claimed that Uganda had created the Mouvement de Libération du Congo and should thus be held responsible for the violations of international law committed by that rebel movement. Basing itself on articles 4, 5 and 8 of the draft articles on responsibility of States to address that claim, the Court had decided that the conduct of the rebel movement was not that of an organ of Uganda or of an entity exercising elements of governmental authority on its behalf and that there was no evidence that the Mouvement was acting under the instructions of Uganda or under its direction or control.

21. In its pleadings, the Democratic Republic of the Congo had also raised an objection to the admissibility of a part of Uganda’s counter-claim which concerned events that had allegedly taken place under the Mobutu regime, i.e. prior to May 1997. It had argued that Uganda’s conduct following those events had amounted to an implied waiver of whatever claims it might have had against the Democratic Republic of the Congo at the time. In its reasoning, the Court had referred to paragraph (5) of the commentary to article 45 of the draft articles, which pointed out that “[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal”. The Court had held in casu that nothing in the conduct of Uganda in the period after May 1997 could be considered as implying an unequivocal waiver of its right to bring a counter-claim.

22. Another interesting point raised in relation with the counter-claim concerned the difference between the invocation of the Vienna Convention on Diplomatic Relations to protect diplomats and diplomatic premises and the invocation of a right to exercise diplomatic protection for nationals—another topic currently under consideration by the Commission. Uganda had claimed that some of its diplomats and nationals residing in the Democratic Republic of the Congo had been maltreated by Congolese soldiers in the days leading to the opening of hostilities. The Democratic Republic of the Congo had argued that those claims were inadmissible, as Uganda had not fulfilled the conditions for the exercise of diplomatic protection. The Court had recalled first that the Vienna Convention on Diplomatic Relations continued to apply notwithstanding the existence of an armed conflict. It had then explained that claims based on violations of the Convention had been brought by Uganda in its own right, and not in the exercise of diplomatic protection. Only those claims of Uganda relating to nationals not enjoying diplomatic status and not present on the premises of the diplomatic mission had been brought in the exercise of diplomatic protection, and in respect of those alone had Uganda had to demonstrate that the conditions for such actions had been fulfilled.

23. The judgment in the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) case had also been noteworthy for its very specific and fact-based findings. Although time constraints did not permit her to give any examples, the Court had not hesitated to specify which types of evidentiary materials it would or would not regard as reliable, and it had done so in the context of each and every finding. Thus, it was possible to see the factual finding on which each legal finding was based and the particular evidence which had been deemed to be sufficiently credible to lead to

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

317 Ibid., p. 122.
that conclusion. Interestingly, the case also showed what evidence, including some provided by the United Nations, the Court had not been prepared to regard as reliable.

24. The Court’s docket increasingly included fact-intensive cases in which it must carefully examine and weigh the evidence. No longer could it focus solely or even largely on legal questions. Such cases had raised a whole range of new procedural issues. In the run-up to the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, the Court had anticipated many issues likely to arise with regard to witness evidence and examination. It had made preparatory proposals, *inter alia* on whether witness examination should be preceded by affidavits, how to organize the cross-examination, how to secure the confidentiality of the testimony during the hearings, and on what type of translation to provide for the witnesses and for the Court. Very particular arrangements had had to be made with the press, which, she was pleased to say, had been fully honoured. The Court had put in place plans to deal with the huge but unequal number of witnesses originally listed without totally blocking progress on the rest of its docket. In the event, the number of witnesses called had dwindled to entirely manageable dimensions.

25. The challenges raised by cases such as *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* and Application of the Convention on the Prevention and Punishment of the Crime of Genocide were not only procedural, however. Those cases constituted exemplary material for the Commission’s topic “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”.

26. The new International Criminal Court was currently investigating crimes allegedly committed in the Democratic Republic of the Congo and in Uganda. Arrest warrants had been issued, and a first prisoner had been transferred to that Court in March 2006 in relation to events in the Democratic Republic of the Congo. The International Criminal Court would certainly want to use the ICJ findings of international law in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* case as a framework within which to accomplish its work with regard to international criminal law. As President, she was engaged in contact with International Criminal Court President Kirsch to that end. While the International Criminal Court currently had a particular focus on events arising from the activities of the Lord’s Resistance Army, which had not been one of the groups within the ambit of the Court’s judgment, there were nonetheless findings of law and facts in that judgment which would probably be of use to the International Criminal Court. Conversely, the written and oral pleadings of Bosnia and Herzegovina in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case currently under deliberation relied very much on the case law of the International Tribunal for the Former Yugoslavia for both evidence as to facts and claims as to law. That Tribunal had undoubtedly had occasion to go into those matters very deeply and carefully. An interesting legal question for the Court would be to ascertain what categories of findings made by the Tribunal seemed to fall within the Court’s notion of “safe evidence” for purposes of determinations of particular facts. Certainly, it could only be helpful for the Court, when wrestling with the ample legal issues relating to the Convention on the Prevention and Punishment of the Crime of Genocide, to be able to study the various findings of law of the different Chambers of the Tribunal.

27. A further case decided by the Court over the past year had again entailed litigation between two African States. On 3 February 2006, the Court had concluded the proceedings between the Democratic Republic of the Congo and Rwanda in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)* by finding that it had no jurisdiction to entertain the application filed by the Democratic Republic of the Congo. However, the case had proved to be rather absorbing from the legal standpoint. The Democratic Republic of the Congo had invoked no fewer than 11 bases of jurisdiction. The Court’s deliberations had turned mainly on the interpretation of particular jurisdictional provisions and on the analysis of requirements contained therein. The case had appeared at first sight to be rather straightforward: after all, the Court had already pronounced *prima facie* on most of those jurisdictional provisions in its order on provisional measures in 2002. A series of very interesting questions had, however, arisen during the oral proceedings. She would address just two of them in relation to the line of reasoning developed by the Democratic Republic of the Congo apropos the Rwandan reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide conferring jurisdiction upon the ICJ. The Congolese strategy had been two-pronged: it had argued, first, that Rwanda had withdrawn its reservation—a new argument introduced during the oral stage—and, second, that Rwanda’s reservation had been invalid.

28. With regard to the withdrawal of the reservation, the Democratic Republic of the Congo had claimed that Rwanda had undertaken on various occasions to withdraw all reservations made by it when it had become party to treaty instruments on human rights. It had invoked in particular the Arusha Peace Agreement of 1993 (Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front), a Rwandan décret-loi of 1995 and a statement made by Rwanda’s Minister of Justice in 2005 in the United Nations Commission on Human Rights. For its part, Rwanda had contended that it had never taken any measure to withdraw its reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide.

29. Taking all those elements into consideration, the Court had explained, in paragraph 41 of its judgment, that “a clear distinction has to be drawn between a decision to withdraw a reservation to a treaty taken within a State’s domestic legal order and the implementation of that decision by the competent national authorities within the international legal order, which can be effected only by notification of withdrawal of the reservation to the other

States parties to the treaty in question”. In the Court’s view, the question of the validity and effect of the décret-loi, in particular, was different from that of its effect within the international legal order. Recalling the provisions of article 22, paragraph 3, and article 23, paragraph 4, of the 1969 Vienna Convention, the Court stated that “[i]t is a rule of international law, deriving from the principle of legal security and well established in practice, that, subject to agreement to the contrary, the withdrawal by a contracting State of a reservation to a multilateral treaty takes effect in relation to the other contracting States only when they have received notification thereof”. The Court had further observed, in paragraph 43, that the Secretary-General of the United Nations was the depositary of the Genocide Convention and that it was “through the medium of the Secretary-General that [States parties] must be informed both of the making of a reservation to the Convention and of its withdrawal”. The Court did not have any evidence that Rwanda had notified the Secretary-General of the withdrawal of its reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide.

30. At the same time, the Court had been prepared to accept that a statement made by a minister of justice to the Commission on Human Rights could bind a State ( paras. 46–48 of the judgment). However, the statement that all reservations to human rights treaties would be withdrawn had given no time frame, and the international acts for that commitment to withdrawal had not been put in place ( paras. 50–52).

31. The Democratic Republic of the Congo had also argued that, in accordance with the spirit of article 53 of the 1969 Vienna Convention, Rwanda’s reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide should be considered null and void because it sought to “prevent the … Court from fulfilling its noble mission of safeguarding peremptory norms” (para. 56). It had added that the reservation was incompatible with the object and purpose of the Convention since its effect was “to exclude Rwanda from any mechanism for the monitoring and prosecution of genocide, whereas the object and purpose of the Convention are precisely the elimination of impunity for this serious violation of international law” (para. 57).

32. The Court had not accepted the argument of the Democratic Republic of the Congo. It had explained, as it had had occasion to do in the past, that the jus cogens character of a norm and the rule of consent to jurisdiction were two different things and that the fact that a dispute related to a norm of jus cogens could not in itself provide a basis for the jurisdiction of the Court to entertain that dispute (para. 64). Jurisdiction was always based on the consent of the parties. In the case of a treaty containing a compromissory clause, jurisdiction existed only in respect of the parties to the treaty that were bound by that clause (para. 65). The Court had recalled next that, in 1950, it had already found, at least by implication, that reservations were not prohibited under the Convention on the Prevention and Punishment of the Crime of Genocide (para. 66). The Court had not simply looked at the question whether the Democratic Republic of the Congo had protested Rwanda’s reservation at the time; rather, the question of the validity of a reservation to the Convention on the Prevention and Punishment of the Crime of Genocide depended on the compatibility of that reservation with the object and purpose of the Convention, which the Court itself had proceeded to assess. In that regard, the Court had found that:

Rwanda’s reservation to article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention. (para. 67)

That was not to be read as a statement by the Court that procedural obligations could in no circumstances be contrary to the object and purpose of a convention.

33. The paragraphs of the judgment on the reservation issues might also be of some interest to the Commission in the context of the work of its Special Rapporteur on that topic. That part of the Court’s judgment also contained the first explicit and direct recognition by the Court of the existence of rules of jus cogens, with the specification that the prohibition of genocide was such a rule. That development had already attracted some attention.

34. Less than two weeks previously, the Court had handed down its order for the indication of provisional measures in the Pulp Mills on the River Uruguay case. In May 2006, Argentina had initiated proceedings against Uruguay with regard to alleged violations of the Statute of the River Uruguay, a treaty signed by the two States on 26 February 1975. Argentina had argued in particular that Uruguay had not respected the procedures organized by the 1975 Statute when authorizing the construction of two pulp mills and that the construction and the commissioning of those mills would result in pollution and damage to the environment of the River Uruguay. In its order of 13 July 2006, the Court had found that the circumstances of the case, as they presented themselves at that moment, were not such as to require the exercise of its power under article 41 of the 1975 Statute to indicate provisional measures.

35. Although the content of the Court’s order was restricted to an analysis of the conditions required for the indication of provisional measures, it contained some matters of interest. The case between Argentina and Uruguay raised important questions relating both to environmental law and to the right to economic development. The Statute of the River Uruguay, whose provisions were at the centre of the dispute, would be of particular interest to the Commission. That treaty, concluded in 1975, had been considerably in advance of its time in terms of watercourse law and environmental law. It had even been ahead of the Convention on the Law of the Non-navigational Uses of International Watercourses adopted in 1997 following the Commission’s pioneering work. In addition to the usual notification and consultation mechanisms provided for in the 1997 Convention and in most international watercourse treaties, the 1975 Statute had already addressed the issue of what happened when

such mechanisms failed, by giving jurisdiction to the ICJ. Moreover, it established a monitoring body and had very detailed requirements as to information exchanges.

36. As to the arguments made by the parties during the proceedings, counsel for Uruguay had relied heavily on the definition of “grave and imminent peril” given by the Commission in the commentary to article 25 (Necessity) of the draft articles on responsibility of States for internationally wrongful acts,\(^2\) and on the use which the Court had made thereof in its judgment in the Gabčíkovo–Nagymaros Project case to seek to prove that the conditions of imminent threat of irreparable prejudice required for the indication of provisional measures had not been fulfilled. For its part, Argentina had contested that the said conditions had been virtually the same.

37. In the Gabčíkovo–Nagymaros Project case, the parties had debated whether the grounds for suspension and termination of treaties established by the 1969 Vienna Convention were exclusive or whether the notion of state of necessity as developed by the Commission in its draft articles on responsibility of States\(^3\) could provide an extra basis for such suspension and termination. Although different, Uruguay’s argument in the present case relied on the same logic. There the suggestion was that the state of necessity was interchangeable with the condition of imminence belonging to provisional measures proceedings. In the Gabčíkovo–Nagymaros Project case, the Court had noted that suspension and termination of treaties were regulated by the law of treaties. However, the evaluation of the extent to which the suspension or termination of a convention involved the responsibility of the State which proceeded thereto was seen as incompatible with the law of treaties. Such evaluation was therefore to be made under the law of State responsibility. The Court had not dwelt further on the question of the relationship between the law of treaties and the law of State responsibility. Similarly, in its order of July 2006 in Pulp Mills on the River Uruguay, it had not found it necessary to resolve the issue of the relationship between the law of State responsibility and the requirements for the indication of provisional measures. However, such arguments were made with increasing frequency, and it might be that, before too long, the Court would have to state how it saw such relationships as a matter of principle.

38. The Court still had a heavy docket and was being used more widely than ever before. Some 59 States had come before it in the past 10 years. Its regular clientele was comprised of States from Latin America, Africa, Asia, Western Europe and America, from what had formerly been referred to as Eastern Europe, and from the Middle East. Of the 12 cases on the docket, four were between European States, four between Latin American States, two between African States, one between Asian States and one of an intercontinental nature. That regional diversity reflected the Court’s universality. The subject matter of those cases was also very diverse. Side by side with “classic” territorial and maritime delimitation disputes and disputes relating to the treatment of nationals by other States, the Court was seized of cases concerning “cutting edge” issues, such as allegations of massive human rights violations, including genocide, the use of force, and the management of shared natural resources.

39. The Court recognized that the quality of its decisions and the global confidence in its conclusions came from the collegiate way in which its members worked and the fact that every judge was involved throughout the life of a case. The Court had benefited from having members of the Commission sit as ad hoc judges or appear as counsel in a number of cases.

40. At the same time, the Court must strive, within those parameters, to meet the expectations of those States which placed their trust in it to find a solution in a timely fashion. It was currently deliberating in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case and would be holding other hearings in the autumn of 2006. Following a meeting with the agents of the parties in the Pulp Mills on the River Uruguay case, directly after the issuance of its order, the Court had indicated relatively short time limits for the filing of the memorial and the counter-memorial in that case.

41. Many of the topics being examined by the Commission were of the highest relevance for the Court, which would continue to follow the work of the former body with great interest.

42. The CHAIRPERSON, after thanking the President of the International Court of Justice for the wealth of information provided in her statement, said that, in keeping with past tradition, Judge Higgins had agreed to reply to questions or comments by members of the Commission on the activities of the Court.

43. Mr. KABATSI said that, on occasions, albeit not very often, some international lawyers and States had felt that a given decision of the Court had not been wholly just and legally correct, most particularly with regard to the facts, which had not always been proved. Moreover, such decisions had sometimes been closely contested within the Court, again in particular relation to the facts. Yet the Court’s decision was final. He therefore wondered whether, as part of the reform process, there was any possibility that the Court might contemplate the establishment of an appeal chamber.

44. Judge HIGGINS (President of the International Court of Justice) said that facts, and their proof, were to an extent in the eye of the beholder; what was a fact for one person was not a fact for another. It was a main function of a court of law to try to ascertain what could be considered reliable evidence. The ICJ had come to realize that, increasingly, cases brought before it hinged on the reliability of the evidence. It had therefore systematically set about establishing the soundness of such evidence. The question of the standard of proof to be attained was so far unresolved in the Court’s jurisprudence. As a common law lawyer, she would prefer the standard to be articulated, whereas her civil law colleagues believed profoundly in l’intime conviction du juge. It

\(^2\) Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 28.

\(^3\) In its judgment, the Court referred to the draft articles adopted on first reading, reproduced in Yearbook ... 1980, vol. II (Part Two), p. 30, and in particular to draft article 33 (State of necessity) and to the commentary thereto, p. 33.
might not be possible to continue the stand-off between the two approaches indefinitely, given the way that the issues presented themselves in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case. In any event, the Court had adopted the course of meticulously identifying every fact and assessing whether it had or had not been proved. It even identified pieces of evidence that had been rejected. She hoped that the Court’s approach would give the international community greater confidence. The Court did not envisage the establishment of an appeal chamber: it did not believe that such a chamber could perform the task better than or differently from the Court. Moreover, the task of appeal chambers around the world was to deal with appeals relating to points of law rather than to facts.

Mr. DUGARD said he was pleased that Judge Higgins had raised the problem of fact-finding, which, although a relatively new phenomenon—starting, perhaps, with the Military and Paramilitary Activities in and against Nicaragua case and continuing with the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) case and the advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory—had assumed particular importance for the work of the Court. He also noted that different tribunals might on occasion sit in judgement on the same factual situation; for example, the International Tribunal for the Former Yugoslavia and the ICTY were examining identical issues in the dispute between Bosnia and Herzegovina and Serbia and Montenegro. In view of the importance of evidence, he wished to put a question about witnesses. His impression was that parties appearing before the ICTY were reluctant to call witnesses. Judge Higgins had stated, for example, that, in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide dispute, the parties had ultimately failed to call as many witnesses as had initially been expected. He wondered whether that might be due to the fact that the Court itself had discouraged the use of witnesses. In view of the growing number of cases involving fact-finding, it would seem important to encourage rather than discourage the use of witnesses. He therefore asked whether wider provision could be made for the calling of witnesses to testify before the Court on matters of fact.

His second question concerned the use of reports, especially those emanating from the United Nations. In the dispute between the Democratic Republic of the Congo and Uganda, the Court had been able to benefit not only from a report by a Ugandan judge, on which, understandably, it had relied heavily, but also from reports by United Nations special rapporteurs. He wondered whether it might not be desirable, in situations where a special rapporteur had produced a report, as in the case of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, for the Special Rapporteur in question to be called to give evidence. In that case, several judges had had difficulty in accepting that certain facts had been proved, in effect calling into question the validity of the report. Understandable though that was, the difficulty might be obviated by calling the Special Rapporteur to testify.

47. Judge HIGGINS (President of the International Court of Justice) said she would hesitate to accept, as a general proposition, that in cases in which establishing the facts was paramount, the parties should be encouraged to call witnesses. In the first place, it was for each party to decide how best to present its case. The Court was neutral as to the calling of witnesses, although clearly it would not be desirable for a very large number to be called, as the Court had a duty to cases other than the case at hand. She would have more to say on the subject at the fifty-ninth session, if the Commission invited her to address it again. As for the use of United Nations reports, she said that, as part of the United Nations system, the Court started from the assumption that all United Nations materials would be useful. The truth was, however, that some were more useful than others. The reports that Mr. Dugard had provided as Special Rapporteur in the context of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case contained reliable information, unlike some other reports that had tried to cover incidents occurring over a vast swathe of territory, in which a United Nations team relied on hearsay from non-governmental organizations on the ground. In the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) case, one or two reports submitted by Special Rapporteurs on the issue had turned out not to have been fully accurate, through no fault of their own, for the reasons she had mentioned. She was, however, taken with the idea that a special rapporteur whose report could be helpful might be called as a witness. If a party did not wish to do so, one possibility was that the Court could call the special rapporteur as its own witness.

48. Mr. MANSFIELD said that many inter-State disputes were a complex mix of elements, comprising the political, economic and social as well as the legal, and the Court had responded in various ways, in some cases making findings on principles that the parties must implement or follow through in subsequent negotiations, or, in some recent cases, making very detailed and comprehensive findings. He therefore wondered whether the Court used particular techniques to ensure that its legal findings contributed to the resolution of the broader or other elements of a given dispute, or whether it proceeded on a case-by-case basis.

49. Judge HIGGINS (President of the International Court of Justice) said that, broadly speaking, the Court acted on a case-by-case basis. What it could do and say in its dispositif was greatly constrained by what the parties requested in their final submissions, which provided them—after their initial submissions and submissions during the course of the argument—with the opportunity to look back and decide what they wanted from the Court. Technically, it was not for the Court to go beyond what the parties asked for, although, once in a while, it might do so. The wider point, however, was that the Court played no role in the compliance phase, and that it could not formally ask the United Nations whether a particular ruling was or was not being complied with. If necessary, the Security Council could take the matter up, as had happened, for example, when it had taken it upon itself to ensure that the judgment in the Territorial Dispute (Libyan Arab Jamahiriya/Chad) case was complied with by overseeing the withdrawal of Libyan troops from the territory in...
question. More recently, the Secretary-General had taken it upon himself to play a very active role in putting into effect, phase by phase, the Court’s judgment in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria. Judgments were followed up only when the Court required the parties to conduct further negotiations, as part of the judgment, in which case the Court would wish to know what the parties had decided. It was in that context that Slovakia and Hungary periodically returned to the Court with information on the progress they were making in the context of the Gabčíkovo–Nagyamaros Project case.

50. Ms. ESCARAMEIA noted that the Court had taken cognizance of various topics covered by the Commission, such as responsibility of States for internationally wrongful acts and reservations to treaties. She therefore wondered whether there were any topics that Judge Higgins thought the Commission might take up that would be useful to the Court in its work.

51. Her second question related to the acceptance of the Court’s jurisdiction. Even though the Court had no shortage of work, she wondered whether it was at all concerned at the relatively low number of States accepting its jurisdiction. There was, after all, a real difference between a State accepting the Court’s jurisdiction in a general declaration and accepting it by means of a special agreement. She also wondered whether there had been any activity to promote the Court’s work, so as to encourage more States to accept its compulsory jurisdiction through a general declaration. Lastly, she asked whether Judge Higgins was at all concerned about the politicization of elections to the Court, and whether, as a role model for women lawyers everywhere, she favoured the idea that provision should be made for female judges to be fairly represented at the ICJ, as was the case at the International Criminal Court.

52. Judge HIGGINS (President of the International Court of Justice) said that, although she could reply only in her own personal capacity, she welcomed Ms. Escaramiea’s idea about the interplay between the work of the Court and that of the Commission. One topic on which she personally would warmly welcome a study by the Commission was the relationship between the global push for measures to combat impunity, on the one hand, and international law on immunity, on the other.

53. The Court was, of course, concerned about the question of jurisdiction. On the other hand, it had heard important cases from all over the world. Indeed, it had been pleased to discover, as it prepared for its sixtieth anniversary, that precisely 59 States had appeared before it. The anniversary celebrations had been preceded by a colloquium to which the legal advisers of all the States that had come before the Court in the past 10 years had been invited, together with a handful of the leading counsel that they used. One of the major themes at the colloquium had been the issue of jurisdiction. Attempts were being made within the European Union to see whether its expansion might lead to a wider acceptance of compulsory jurisdiction among its member States. The Court would welcome such an outcome, although if that were to entail a stream of reservations, it might be felt that that was too high a price to pay. Moreover, she doubted whether spending time on jurisdictional matters that were heavily contested was the best use of the Court’s resources. More and more cases now came before the Court by way of special agreements and multilateral treaties containing jurisdictional clauses whereby disputes could be referred to the Court. States’ previous reluctance to agree to such clauses seemed largely to have fallen away. More generally, she intended to take every opportunity to raise the Court’s profile and to explain how it could be useful to States.

54. Mr. PELLET, referring to the comments by Mr. Dugard, said that in his experience as one who had been involved in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, the use of witnesses had been totally disastrous; the only benefit that he could see was that the Court had obtained a number of admissions against interest. Calling witnesses to testify was not an appropriate source of evidence for the ICJ, at least in cases of that type. States would be well advised to avoid such abuses in the future. On the question of intime conviction, he considered that the Court should continue to adopt an empirical approach to evidence rather trying to set standards of proof that would inevitably be very common law-oriented.

55. Further to Mr. Mansfield’s comments, he was inclined to assign a special role to the Court. In addition to settling disputes in accordance with international law, the Court was the body best placed to fill the gap left by the absence of a world legislature and, as such, to try to adapt the law to developments in international relations. That was a task that had been performed admirably by the PCIJ, which had managed to crystalize the modern legal framework. The ICJ had also had its successes, such as the 1951 advisory opinion on Reservations to the Convention on Genocide, and its failures, such as the 1969 North Sea Continental Shelf judgment, and the—to his mind—disastrous judgment in the Arrest Warrant case; nevertheless, his impression was that the Court had gradually been abandoning its role of adapting the law to the realities of international life over the past 10 years. He wondered whether Judge Higgins envisaged any change in the Court’s approach.

56. Judge HIGGINS (President of the International Court of Justice) said that over the past 10 years, the Court had undeniably failed to play its part in the East Timor case. In the case of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court had, however, done what it could in awkward circumstances, since the party that might have provided the most information had chosen not to appear, as it had been entitled to do. In that case, however, the Court had been trying to adapt an existing old law to deal with the contemporary phenomenon of prolonged occupation, for which, frankly, it had never been envisaged. She took Mr. Pellet’s point, however. When an opportunity arose, the Court should, to use a sporting expression, “step up to the plate”: it should not shirk its duty to use, adapt and

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develop existing law to deal with contemporary problems. She hoped that Mr. Pellet would shortly feel that progress had been made in that respect.

57. The CHAIRPERSON again thanked Judge Higgins, on behalf of the Commission, for her valuable statement, and also for her thoughtful replies to members’ questions.

The obligation to extradite or prosecute (aut dedere aut judicare) (A/CN.4/571)

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

58. Mr. GALICKI (Special Rapporteur) said that the text before the Commission comprised a very preliminary set of initial observations concerning the substance of the topic, identifying the most important issues requiring further consideration and suggesting a general road map for the Commission’s future work in that field. That work should result in the identification of legal rules governing the obligation to extradite or prosecute, by which the international community would be ready to abide, either in the form of binding norms or of a “soft law” instrument. It would, however, be premature to decide whether the final product should take the form of draft articles, guidelines or recommendations. Similarly, it was too early to formulate any draft rules relating to the concept, structure or operation of the principle aut dedere aut judicare and obligations deriving from it. It was therefore essential that members of the Commission apprise the Special Rapporteur of their views with regard to the form that the final product should take.

59. The preliminary report consisted of eight parts accompanied by an annex containing an introductory bibliography. The preface briefly summarized the background to the Commission’s inclusion of the topic in its current programme of work. The introduction traced the origins of the obligation to extradite or prosecute back to the initial principle aut dedere aut punire enunciated by Grotius. In his report, he had tried to stress that the obligations deriving from the more modern principle aut dedere aut judicare took the form of alternatives, although authors had described the particular elements of those alternatives in a variety of ways. The formulas most frequently used were listed in paragraph 7 of the report.

60. In paragraph 6, he had drawn attention to a question of paramount importance for the future work of codification, namely whether the obligation in question derived exclusively from the relevant treaties, or whether it also reflected a general obligation under customary international law, at least with respect to specific international offences. In paragraph 8, he pointed out that a full analysis of the link between the principle of universal jurisdiction in criminal matters and the principle aut dedere aut judicare should undoubtedly have an important place in the Commission’s work on the topic. Lastly, it was noted that the Commission had elucidated the principle and the rationale behind it in some detail when incorporating the aut dedere aut judicare rule in the 1996 draft code of crimes against the peace and security of mankind. Paragraph (3) of the Commission’s commentary to article 9 of the draft Code was cited in full in paragraph 10 of the report.

61. The various problems which might arise in practice from the interrelationship between the principle of universal jurisdiction in criminal matters and the obligation aut dedere aut judicare had been outlined in chapters I (Universality of suppression and universality of jurisdiction) and II (Universal jurisdiction and the obligation to extradite or prosecute) of the report. The list was not exhaustive and merely offered a number of illustrative examples. He would be especially interested to hear other members’ opinions regarding the extent to which the question of universal jurisdiction should be considered in the context of the Commission’s general work on the obligation to extradite or prosecute, since legal writers took widely differing views on the relationship between those two matters. Some evidence of the linkage between the two concepts could be found in the Commission’s earlier work on the draft code of crimes against the peace and security of mankind, as described in paragraphs 24 to 30 of the report.

62. Chapter III of the report was devoted to the sources of the obligation to extradite or prosecute, which were discussed under the three subheadings of “International treaties”, “International custom and general principles of law” and “National legislation and practice of States”. As was noted in paragraph 35, one of the preliminary tasks in the future work of codification would be to draw up a comparative list of the relevant treaties and the formulations used therein to reflect that obligation. Although attempts had been made in the literature to identify treaties of that nature, a more detailed and up-to-date list was required, along with a classification of treaty provisions laying down the obligation to extradite or prosecute. The criteria for that classification should take into account both the substantive and the procedural elements of the obligation.

63. As stated in paragraph 40 of the report, one of the crucial problems the Commission would have to solve when elaborating possible principles concerning the obligation to extradite or prosecute was that of ascertaining whether the legal source of the obligation should be limited to treaties that were binding on the States concerned, or extended to include appropriate customary norms or general principles of law. While there was no consensus among scholars on that question, a large and growing body of writers maintained that an international legal obligation aut dedere aut judicare was a general duty based not only on the provisions of particular international treaties but also on generally binding customary norms, at least in respect of certain categories of crimes. A thorough evaluation of possible customary grounds for the obligation was an essential prerequisite for the final definition of its legal nature. The extent to which that definition would be an exercise in the codification or in the progressive development of international law would depend largely on whether it

324 Reproduced in Yearbook ... 2006, vol. II (Part One).

326 Yearbook ... 1996, vol. II (Part Two), draft article 9, p. 30.
would be possible to find a solid foundation in generally accepted customary norms. Some promising examples stemming from States’ legislative, executive and judicial practice were cited in paragraphs 44 to 46 of the report, together with the celebrated statement of the Government of Belgium that “Belgium recalls that it is bound by the general legal principle aut dedere aut judicare, pursuant to the rules governing competence of its courts”\(^{326}\). A more extensive collation of such practice would first be necessary if the Commission were to codify the principle effectively.

64. Chapter IV of the report dealt with the scope of the obligation to extradite or prosecute which, in general, could be seen as allowing a State a choice between which of the two parts of the obligation it was going to fulfil. It was presumed that after fulfilling one part of that composite obligation—either *dedere* or *judicare*—the State was free not to fulfil the other part. It was, however, possible, that a State might wish to fulfil both parts of the obligation. For example, after establishing its jurisdiction, prosecuting, putting on trial and sentencing an offender, a State might decide to extradite or surrender that person to another State, also entitled to establish its jurisdiction, for the purpose of enforcing the sentence.

65. As paragraph 50 of the report showed, the description of the obligation in question differed significantly in detail from one convention to another. Its development could be traced from the Convention for the suppression of unlawful seizure of aircraft, opened for signature at The Hague on 16 December 1970, through to later conventions dealing with terrorist offences and other crimes of international concern. Although the traditional possibility offered was that of either extraditing or prosecuting, in the draft code of crimes against the peace and security of mankind, the Commission had introduced a third, *sui generis* possibility, a “triple alternative” allowing for parallel jurisdictional competence to be exercised not only by interested States but also by international criminal courts.\(^{327}\) That constituted a significant step in the development of the principle *aut dedere aut judicare*, although an even earlier example of such a threefold choice was to be found in the convention for the creation of an international criminal court, which had been opened for signature at Geneva on 16 November 1937 but which, unfortunately, had never entered into force.\(^{327}\)

66. Chapter V of the report discussed some vital methodological questions. Without prejudice to the final form of the Commission’s work on the topic, it would be useful to formulate some rules concerning the concept, structure and operation of the principle *aut dedere aut judicare*, to take account of the views of members of the Commission and of information and suggestions from Member States in the Sixth Committee. As stated in paragraph 60 of the report, the Commission could address a written request for information to States concerning their recent practice with regard to the topic. Any further information that Governments considered to be of relevance would be gratefully received by the Commission and the Special Rapporteur. That paragraph went on to list five areas that would be of particular interest.

67. The last part of the report contained a preliminary plan of action which should be treated as a very general road map for the Commission’s future work in that field. As the driver, he—the Special Rapporteur—would be pleased to receive any suggestions for corrections, changes and improvements, including suggestions for short cuts along the way. Paragraph 61 of the report contained a set of detailed suggestions regarding the 10 main tasks which would have to be completed under that plan. While he was aware that the plan was far from perfect, he trusted that, with the assistance of the Commission, he would be able to proceed satisfactorily on that basis.

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

[Agenda item 1]

68. Mr. GAJA (Chairperson of the Planning Group) announced that the Planning Group would be composed of Mr. Addo, Mr. Candioti, Mr. Comissário Afonso, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Melescanu, Mr. Montaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Valencia-Ospina and Mr. Yamada, with Ms. Xue, *ex officio*.

*The meeting rose at 1 p.m.*

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### 2900th MEETING

Wednesday, 26 July 2006, at 10 a.m.

**Chairperson:** Mr. Guillaume PAMBOU-TCHIVOUNDA

**Present:** Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Montaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.

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### The obligation to extradite or prosecute (*aut dedere aut judicare*) (continued) (A/CN.4/571)

[Agenda item 10]

**Preliminary report of the Special Rapporteur (continued)**

1. The **CHAIRPERSON** invited the members of the Commission to consider the preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/571) introduced the previous day by the Special Rapporteur, Mr. Galicki.
2. Ms. ESCARAMEIA said that she had several comments to make on the preliminary report.

3. First of all, with regard to the title, the Special Rapporteur, after reviewing a number of possibilities, asked in paragraph 30 whether it would be preferable to retain the most common translation of *aud dedere aut judicare*, namely, to prosecute, or whether it should be replaced by “try” or “adjudicate”. In her view, it would be best to use the word which covered the largest number of situations, in particular those prior to the commencement of prosecution, for example, the start of an investigation. If “try” or “adjudicate” did not have a broader meaning than “prosecute”, then the latter should be retained.

4. One problem which had arisen concerned the relationship between the principle *aut dedere aut judicare* and universal jurisdiction, including that of the International Criminal Court. The Special Rapporteur took up the question in the introduction and in chapters II, III and IV. It was important to make it clear that the concepts were quite distinct. The Special Rapporteur gave a definition of *aut dedere aut judicare* in paragraph 10 and of universal jurisdiction in paragraph 19. The problem stemmed in part from the fact that a number of treaties dealt with both concepts at the same time and sometimes even provided for referral to the International Criminal Court. The Special Rapporteur cited articles 8 and 9 of the draft code of crimes against the peace and security of mankind, which also addressed the two concepts at the same time. The 1935 Harvard Research Draft Convention had done so as well. Although, in the case of universal jurisdiction, it was possible to prosecute the perpetrators of a much larger number of offences and, conversely, a country which established its universal jurisdiction could request extradition in many more cases, the two concepts were still different and it should be made clear that universal jurisdiction was not part of the topic.

5. Another practical problem related to the sufficiency of the evidence on which the obligation *aut dedere aut judicare* was based. The Special Rapporteur indicated that difficulties had been encountered in practice with the actual application of the principle, which was often found in outdated bilateral or multilateral conventions or treaties or national laws that did not take new developments into account. In that connection, she endorsed the resolution which had been adopted on 1 September 1983 by the Institute of International Law and which provided in part I, paragraph 2, that States should be encouraged to agree on a system of extradition and in part IV, paragraph 1, cited in paragraph 12 of the report, that the rule *aut judicare aut dedere* should be strengthened and amplified and it should provide for detailed methods of legal assistance. Problems arose when outdated laws still in force allowed many obsolete grounds for refusing to extradite which it should not be possible to invoke in connection with international crimes, such as the immunity of State officials. Moreover, some of those laws did not provide for the safeguards which persons who were extradited should enjoy, although it was important for them to do so, the contemporary view being that extradition must be refused if there was a risk that the extradited person might be tortured or executed or might not receive a fair trial.

6. In paragraph 20 of his preliminary report, the Special Rapporteur referred to three categories of crimes. She thought that, for the first category at least (crimes under international law), special rules were needed because very few grounds should be allowed for refusing extradition and almost none at all in the case of very serious offences. In the latter case, if a State did not extradite, it had to prosecute.

7. The Special Rapporteur considered the question whether the principle *aut dedere aut judicare* came only under treaty law or whether it was also a part of customary international law. In her view, for certain crimes, it clearly came under customary law. That was the conclusion reached in the two main studies carried out on the topic since the adoption of the draft code of crimes against the peace and security of mankind, one in 2005 by the International Committee of the Red Cross on war crimes in customary international humanitarian law and the other, a very comprehensive 2001 study by Amnesty International on the practice of 125 States. The Special Rapporteur noted that most of the doctrine also took that position, the many treaties to which States were parties having demonstrated the existence of a general intention (*opinio juris*), which, together with the considerable practice of States in the area, demonstrated the existence of a custom. Moreover, the study of practice suggested that there was a tendency to consider that there was even an obligation to extradite or prosecute in the case of crimes under international law.

8. With regard to the sources of the obligation, it was vital to look at the current practice of States, which was evolving very rapidly. She therefore endorsed the Special Rapporteur’s intention to examine not only international treaties, international custom and general principles of law, but also national legislation and State practice. However, account must also be taken of the practical experience of entities and individuals involved in extradition procedures, such as national courts, lawyers who had pleaded extradition cases in the courts, and non-governmental organizations.

9. On the relationship between the obligation to extradite or prosecute and other areas of international law, it might be necessary to give more attention to human rights. That was particularly important in referring to the grounds for refusing to extradite or prosecute, such as immunity or safeguards which the accused individuals must be afforded, as well as situations in which there was an obligation to extradite under customary international law. Consideration should also be given to the protection provided under a number of international instruments.

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328 Yearbook ... 1996, vol. II (Part Two), pp. 27–32.
and customary international law with regard to the various aspects of the practical application of aut dedere aut judicare. The Special Rapporteur touched on the question briefly in point (10) of his preliminary plan of action, but the relation between that principle and human rights should be taken up separately and in greater depth.

10. In paragraph 59 of the report, the Special Rapporteur stated that it would be premature to take a decision on the final form of the work on the topic and that it would be useful to hear the opinions of the other members of the Commission. She was in favour of draft articles, since the abundance of practice would be conducive to an exercise of codification and progressive development.

11. The issues raised under points (8) to (10) of the preliminary plan of action had not been discussed in the report; the Special Rapporteur should clarify them later. The question raised in point (10) must be dealt with in a very practical manner, and not abstractly.

12. Mr. MOMTAZ said that the topic under consideration was very much a matter of current concern. There was clearly a great deal of interest in international crimes and international methods for trying and punishing offenders, as shown not only by the abundant and interesting production of doctrine, but also and above all by the work on universal jurisdiction which had been carried out since 2000 by prestigious institutions and which also touched on the topic, particularly that of the International Committee of the Red Cross referred to by Ms. Escarameia, that of the International Law Association in 2000,333 that of Princeton University under Mr. Cherif Bassiouni, which had led to the Princeton Principles, adopted in 2001,334 and especially that of the Institute of International Law, including the resolution it had adopted in Krakow in 2005.335 That material was useful to the Commission in that it lay the groundwork, but it also meant that the Commission had to raise the bar even higher. He was convinced that the Special Rapporteur would be up to the task, as his preliminary report had so strikingly shown.

13. Turning to the report itself, he welcomed the Special Rapporteur's proposal in paragraph 61 for a "preliminary plan of action", which would undoubtedly help the Commission to clarify the various aspects of what was a very complex topic. Points (4) and (5) of the plan addressed the crucial and interdependent questions whether the obligation aut dedere aut judicare was rooted in customary norms and, if so, how it could be reconciled with the at times contradictory requirements of the institution of universal jurisdiction, which clearly had a foundation in customary law.

14. With regard to the first question, the Special Rapporteur rightly asked in paragraph 6 whether the obligation aut dedere aut judicare could have a basis in customary law, "at least with respect to specific international offences". That raised the issue of what distinction should be drawn between the various crimes. In his own view, it was necessary to distinguish between crimes under international law, i.e. crimes defined by treaty instruments, and international crimes, which had a foundation in customary law. The latter—war crimes, the crime of genocide and crimes against humanity—were special on account of their extremely serious nature and were usually regarded as being prejudicial to the international community as a whole. They were sometimes defined in treaty instruments ratified by virtually all States and had sometimes been codified in customary law; the International Criminal Court and ad hoc tribunals had jurisdiction to deal with them. It was in the case of such crimes that the question raised by the Special Rapporteur took on particular importance. In other words, the issue was whether, above and beyond any treaty framework, States were required by customary law to extradite or prosecute persons present in their territory who had been accused of having committed such crimes. Clearly, the question deserved to be considered in greater depth; a systematic study of State practice was needed.

15. The second question related to the practice of States whose legislation permitted the courts to exercise universal jurisdiction with regard to persons suspected of having committed such international crimes who were present in their territory. More specifically, assuming that the obligation aut dedere aut judicare had a foundation in customary law, could the State in whose territory the person accused of an international crime was present invoke its universal jurisdiction to refuse to extradite? In such a case, was it possible to reverse the order of priority that the alternative obligation established and to allow the State to refuse extradition so that it could try the accused offender in its courts? In view of practice, it seemed that extradition could be refused in certain cases, for example, as noted by Ms. Escarameia, on the basis of international human rights law. Also of relevance were bilateral extradition treaties and, in particular, the Model Treaty on Extradition adopted by the General Assembly in resolution 45/116 of 14 December 1990, which made express provision for cases in which the consequence of extradition might be the impunity of the person who was the subject of a request for extradition. According to article 3 of the Model Treaty, extradition was not granted "[i]f the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty". One such reason should be the immunity of political leaders. The Second Additional Protocol of 17 March 1978 to the European Convention on Extradition of 13 December 1957 also provided for such an exception. It might also be worth considering whether extradition could be refused on the ground that the accused risked being deprived of a fair trial and whether such a refusal could be invoked independently of any treaty relation between the States concerned. An answer to that question likewise required a detailed examination of State practice.

16. Recent practice showed that States which permitted their criminal courts to exercise universal jurisdiction usually preferred to give priority to the courts of the State in whose territory the crime had been committed; in other words, they preferred that their courts did not exercise the universal jurisdiction which they had been granted. The obligation aut dedere aut judicare therefore appeared to take precedence over universal jurisdiction. In a decision along those lines taken on 10 February 2005, Germany’s Federal Prosecutor’s Office had preferred not to apply, in Center for Constitutional Rights et al. v. Donald Rumsfeld et al., the German Code of International Criminal Law adopted on 26 June 2002 which granted German courts universal jurisdiction, referring to the subsidiary nature of universal jurisdiction. A study of State practice should enable the Commission to determine whether or not that was an isolated case and whether the obligation aut dedere aut judicare did in fact take precedence over universal jurisdiction.

17. With regard to point (10) of the preliminary plan of action, which dealt with the relationship between the obligation aut dedere aut judicare and principles such as the sovereignty of States, human rights protection and the universal suppression of certain crimes, recent practice had demonstrated that the importance which the international community now attached to the international protection of human rights and action to combat impunity for international crimes was likely to encourage the exercise of universal jurisdiction in cases where respect for the sovereignty of States would probably favour impunity.

18. The CHAIRPERSON, speaking as a member of the Commission, said he was certain that the Special Rapporteur would take account of the problem Mr. Momtaz had raised of the subsidiary nature of universal jurisdiction in relation to the principle aut dedere aut judicare.

19. Mr. MELESCANU said that the question of the obligation to extradite or prosecute was very old, but it had recently become a matter of enormous practical importance as a result of globalization. One of the consequences of which was the free movement of goods and persons, including criminals. The Commission should not seek to control that phenomenon, but should nevertheless attempt to adopt rules to prevent the principle of immunity or universal jurisdiction from being used to ensure the impunity of persons responsible for acts with a bearing on the foundations of international law. Just the day before, the President of the ICJ had expressed the view that the international community should give priority attention to the relationship between immunity and impunity.

20. The Commission should first analyse the evolution of the principle aut dedere aut judicare at the international level, but without focusing on the background, with a view not only to the codification of the principle based on State practice, but also to its progressive development. He agreed with the course of action proposed by the Special Rapporteur in chapters V and VI of the report (“Methodological questions” and “Preliminary plan of action”), but the Commission should adopt a broader approach that took account of recent developments. It could not be restricted to the aut dedere aut judicare alternative because that principle now included a third pillar at the international level, namely, the possibility and indeed the obligation for States to use international courts. That shift to international courts was not a new aspect of the principle aut dedere aut judicare, but, rather, an exception whose impact should be looked into. The jurisdiction of international courts had itself changed fundamentally. Created in the past by victorious countries to try the war crimes of defeated countries, such bodies now dealt with international crimes.

21. In his opinion, the title of the topic should not refer to an obligation because at issue was the right of a State to choose between two possibilities: extradition or prosecution. It would be better to refer to a principle and to decide how it was applicable in State practice. It was possible to speak of the obligation to extradite for certain categories of crimes, such as non-compliance with international obligations, but then that obligation would have to be expressly accepted by States in bilateral or multilateral agreements. It could not derive from a principle of customary law.

22. One question that had not been raised in the report or by other members of the Commission was that of dual nationality and the customary principle in accordance with which States did not extradite their own nationals except in cases expressly provided for in bilateral or multilateral agreements. He had been involved in the case of a Romanian who had also had the nationality of another country in whose territory he had committed very serious offences and which had thus requested his extradition. The Romanian judicial authorities had considered that, in the absence of a bilateral extradition agreement, they could not extradite. The question was interesting from the theoretical point of view, but also from a practical one, given the current growing tendency of countries—in Europe, at any rate—to tolerate dual or even triple nationality. Perhaps the Special Rapporteur should be asked to consider the question of European nationality.

23. The debate in the Commission on the obligation to extradite or prosecute was at a preliminary stage and now was an excellent time to express ideas and make comments. The Commission should then analyse State practice, particularly contemporary examples. He supported the Special Rapporteur’s proposal in paragraph 60 to ask States for information on the subject. On the basis of such practice, the Commission could then begin analysing matters requiring its attention.

24. Mr. PELLET said that Mr. Melescanu’s comments were very interesting, but it would be a bad idea to take up the question of European nationality, which did not exist, as he had already pointed out in connection with diplomatic protection. European citizenship had nothing to do with the topic under consideration.

25. Mr. Sreenivasa RAO said that, in his view, the question of dual nationality was important in connection with extradition because it was a fact that many States did not extradite their nationals. However, most of the problems which arose in that regard could be resolved because States which refused to extradite their nationals had extraterritorial jurisdiction and could therefore prosecute the person concerned themselves. There was thus no impunity.
26. The CHAIRPERSON suggested that Mr. Sreenivasa Rao should make his preliminary study on the question of extraterritoriality available to the Special Rapporteur.

27. Mr. KAMTO said that, although the distinction Mr. Melescanu had drawn between obligation and principle was important, he wondered what the purpose of the rule would be if aut dedere aut judicare was regarded as a principle. The stating of a rule implied the existence of an obligation. Without an obligation, it was difficult to see the purpose of the rule or the point of the study.

28. Mr. CANDIOTI said that he had also found Mr. Melescanu’s comments to be relevant. In particular, the title raised the problem of the delimitation of a broad topic which covered international criminal law, international procedural law, extradition and international crimes, among other things. The aut dedere aut judicare alternative had been referred to as a single obligation, but in reality there were two obligations: to extradite and, if a State did not do so, to prosecute. However, Mr. Momtaz had referred to the right to extradite or prosecute and Mr. Melescanu had spoken of a principle. That raised a number of questions which needed to be clarified.

29. Mr. PELLET said that he did not see why the topic would be less important if the “extradite or prosecute” alternative was regarded as a right rather than as an obligation. On the contrary, it would be useful to consider what the consequences would be of the choice of a State which had the option of exercising that right or not. Diplomatic protection was a right, too, not an obligation, and, yet, as everyone knew, it had been the subject of important work.

30. Mr. ECONOMIDES said that he agreed with Mr. Sreenivasa Rao’s comment on dual nationality: the problem did not arise because a State which did not extradite would itself try the person concerned. What was of interest was that there were two obligations—to extradite or to prosecute—which were neither equally strong nor of the same nature. One—the obligation to extradite—was weak because exceptions were permitted (for example, if there was a risk that human rights would not be respected or in the case of dual nationality), whereas the other—the obligation to prosecute—was strong because it did not allow any exceptions. The problem was that, when a court tried a national, it usually imposed a less severe or even token penalty. Hence, the Commission should give preference to the third option, which was to surrender the person concerned to an international court such as the International Criminal Court.

31. Mr. MOMTAZ said that it would be better not to speak of two obligations, but only of one: the obligation of the State to reduce impunity, a goal which could be achieved through either extradition or trial. A State might choose the latter to avoid the problems to which the former gave rise. The Commission should not lose sight of the purpose of the institution, which was to reduce impunity for international crimes.

32. Mr. CHEE thanked the Special Rapporteur for taking on the topic of the obligation to extradite or prosecute and commended him on the excellent work he had carried out in his preliminary report. He noted with interest the comments concerning the evolution of the principle “extradite or prosecute” from the phrase used by Grotius—aut dedere aut punire (“either extradite or punish”—to aut dedere aut judicare, which appeared in article 7 of the draft Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, adopted by the General Assembly on 14 December 1973 in its resolution 3166 (XXVIII).

33. In his view, the third category of crimes listed in paragraph 20 of the Special Rapporteur’s preliminary report, namely, ordinary crimes under national law, should not be subject to universal jurisdiction; such crimes were primarily a matter for the State concerned.

34. Noting that, in paragraph 23 of his report, the Special Rapporteur distinguished between the right and the obligation of a State to extradite or prosecute, he referred to the sources of that obligation and said that, with regard to international treaties, some of the items on the list in paragraph 36 should be explained in greater detail if they were to be included in the category of international crimes. For example, the expression “environmental protection” was very vague and did not make him think of the concept of crime at all. It would also be better to refer to “international trafficking in drugs” rather than to “drug offences”. “Mercenarism”, i.e. the use of paid soldiers, according to the original meaning of the term, had not always been considered a crime and was not necessarily a crime today, as the example of the Swiss Guards at the Vatican showed.

35. The two lists of international treaties establishing universal jurisdiction or the obligation to extradite or prosecute, one drawn up by the Special Rapporteur and the other by Amnesty International, constituted a sufficient corpus of international criminal law. He agreed with the Special Rapporteur’s comment that a careful and thorough evaluation of possible customary grounds for the obligation aut dedere aut judicare was necessary for a definition of the legal nature of that obligation. He also agreed with the idea of extending the analysis of the sources of the obligation to extradite or prosecute to national legislation and the practice of States.

36. The question whether the final result of the Commission’s work should take the form of a binding or soft law instrument would depend on how much time and energy the Special Rapporteur was prepared to spend on it. It would also need to be borne in mind that the principle aut dedere aut judicare was embodied not only in many international treaties, but also in international customary norms, the ICJ having noted in the Military and Paramilitary Activities in and against Nicaragua case of 1986 that the two could coexist.

37. He drew the attention of the members of the Commission to the valuable contribution INTERPOL had made to activities relating to the extradition or prosecution of international criminals.
38. Mr. DUGARD, thanking the Special Rapporteur for his excellent preliminary report, which paved the way for an interesting examination of the topic, said that, in view of its importance, the Commission should from the start set itself the goal of drawing up draft articles for a convention. The Special Rapporteur had been very ambitious in going beyond the obligation aut dedere aut judicicare to deal with questions such as extraterritorial criminal jurisdiction, especially universal jurisdiction, the relationship between aut dedere aut judicicare and the International Criminal Court, and complex issues of international criminal law. Noting that the Special Rapporteur referred frequently to the draft code of crimes against the peace and security of mankind, which had been adopted by the Commission in 1996 and had since been overtaken by the Rome Statute of the International Criminal Court and other texts, he said that the Special Rapporteur should not feel bound by the earlier work of the Commission on those subjects.

39. As he saw it, the main problem with the topic was its breadth and he feared that the Special Rapporteur had been a bit too ambitious. For example, he raised the question of the application of the principle aut dedere aut judicicare to international criminal courts and, in particular, the International Criminal Court. He then addressed the question of the bases for the exercise of universal jurisdiction in a very broad manner. That was most relevant because it related to both the “dedere” aspect, i.e. the jurisdiction of the requesting State, and the “judicicare” aspect, i.e. the jurisdiction of the custodial State. Personally, he was afraid that that might result in the Commission examining such questions as territoriality, active and passive personality and the principle of protection as the bases for jurisdiction, in addition to universal jurisdiction. The aim was, however, not to conduct a study of extraterritorial criminal jurisdiction. The Special Rapporteur also took up the question of defences against extradition, for example, by raising exceptions to the dedere obligation, such as non-extradition by the State of its nationals and the political offence exception, to which the principle of double incrimination could also be added, and referred to the sufficiency of evidence, i.e. the level of evidence required to institute criminal proceedings or grant a request for extradition. All those questions were very interesting for scholars of international criminal law, but the Special Rapporteur would do well to narrow his study by limiting it to international crimes and should exclude the third category of crimes referred to in paragraph 20 of his report, namely, “ordinary crimes under national law, such as murder, abduction, assault and rape”. In that way, the Commission would not have to deal with exceptions for political offences, nationality or the bases for the exercise of extraterritorial criminal jurisdiction, apart from universal jurisdiction. Nor should the Special Rapporteur consider such technical questions as the sufficiency of evidence or the surrender of a suspect to international courts such as the International Criminal Court, contrary to what he stated in paragraphs 52 and 61 of his report.

40. Referring to a number of points which he regarded as essential, he said that the Special Rapporteur should consider the question whether aut dedere aut judicicare was a general rule of customary international law, given that, as noted in paragraph 40 of the report, there was no consensus on the question in the doctrine. It should also be made clear that there were limits on the principle aut dedere aut judicicare. Grotius had taken the position that there was a general obligation to extradite or to punish because he had placed himself in the context of civitas maxima, but, in the modern day view, it was important to know which international crimes were being taken into account. A careful distinction should also be made, as the Special Rapporteur had done, between the application of the principle in the case of treaties and in the case of core crimes. Further, it should be specified that the obligation aut dedere aut judicicare was not applicable when the requesting State did not respect human rights. Then there was the question of immunity. Many thought that the ICJ had been wrong when, in the Arrest Warrant case, it had rejected Belgium’s argument that the principle of immunity should not be applicable to the alleged perpetrators of core crimes—crimes of genocide or crimes against humanity. At the time, the Court had not been prepared to accept the principle of jus cogens, but, when it had subsequently ruled on the dispute between the Democratic Republic of the Congo and Rwanda (Armed Activities on the Territory of the Congo (New Application: 2002)), it had to a large extent retracted its earlier position, and he hoped that the Commission would follow suit. It was also necessary to decide whether the political offence exception should be applicable in cases of crimes covered by treaties; in his opinion, it should not be. In the Pinochet case, the British House of Lords had held that extradition could be granted only in respect of a crime which was recognized as such in domestic law at the time it had been committed. The decision had been wrong from the point of view of international law, although it might be explicable in terms of British law. That important issue must also be addressed. Noting that the Special Rapporteur planned to examine universal jurisdiction in detail, he suggested that he should look at the different kinds of universal jurisdiction, including the question whether it was “permissive” or binding. Lastly, as pointed out by several members of the Commission, it would be necessary to determine whether the obligation aut dedere aut judicicare was applicable to crimes of terrorism. He called on the Special Rapporteur to exercise caution, given the very sensitive nature of the question. Until an international convention against terrorism had been adopted, it was worth bearing in mind that one country’s terrorist might be another country’s freedom fighter.

41. In view of the abundance and wealth of sources of relevance to the topic, he hoped that the Secretariat would provide the Special Rapporteur with all the necessary assistance, just as it had done in the past with the preparation of its very useful studies. The preliminary bibliography which appeared at the end of the Special Rapporteur’s report was very interesting, but it should also include the most prestigious journals of international law, such as the International Criminal Law Review, the International Criminal Justice Journal and the International Legal Forum.

42. Mr. KAMTO, commending the Special Rapporteur on the caution he had shown in choosing to prepare a preliminary report on the obligation to extradite or prosecute in order to outline his idea of the topic, said that his comments were designed to help the Special Rapporteur consider a number of questions in greater depth. To begin with, he noted that the principle aut dedere aut judicicare, a
classic institution of cooperation in international criminal justice, was so well established that some scholars did not hesitate to conclude that it was an international customary norm, although there did not seem to be unanimity in that regard. The Special Rapporteur himself was prudent when he acknowledged in paragraph 42 of his report that “[a] careful and thorough evaluation of possible customary grounds for the obligation” was necessary. One of the most important questions which the Commission would have to answer was to which international crimes the principle aut dedere aut judicare was, or should be, applicable. That was not a simple question because the scope of the rule could vary depending on whether a customary rule or a principle stemming from purely progressive development was involved and on whether the crimes in question were breaches of obligations of jus cogens, such as the crime of genocide, torture or crimes against humanity, or ordinary international crimes. At the current stage, he wondered whether it might not be necessary to improve on the distinction referred to by Mr. Montaz between international crimes and crimes under international law by distinguishing between the most serious crimes and the many ordinary crimes listed in various international conventions. In that connection, he agreed with the opinion of a number of members of the Commission that the crimes referred to in the Rome Statute of the International Criminal Court could now constitute a core of crimes for which the principle aut dedere aut judicare would have a basis in customary law. The idea of improving on the distinction between the various crimes had arisen because crimes that did not fall within the category of those provided for by the Rome Statute, such as torture in the Furundžija and Al-Adasi cases, had subsequently been regarded as constituting a violation of norms of jus cogens.

43. With regard to the relationship between universal jurisdiction and the obligation to extradite or prosecute, he noted that the Special Rapporteur stressed in paragraphs 16 to 34 of his report that, during the consideration of the draft code of crimes against the peace and security of mankind, adopted in 1996, doctrine and the Commission itself had supported the idea of a close link between universal jurisdiction and the obligation to extradite or prosecute. However, the nature of that relationship was not yet clear at the current stage of work and future reports should probably specify whether it was a relationship of dependence, in the sense that the obligation aut dedere aut judicare was determined by universal jurisdiction. A link unquestionably existed between the two principles; that said, universal jurisdiction was not a precondition for invoking the aut dedere aut judicare rule, but merely the legal basis of the right to request that a given State should fulfil that duty. That said, universal jurisdiction and the obligation to extradite or prosecute clearly constituted two distinct and independent principles.

44. Within the context of the topic, it should be possible to apply the principle aut dedere aut judicare not only on the basis of the rule of universal jurisdiction, but also as a function of the nature of the crime in question. In that case, extradition or prosecution would become an obligation which would be enforceable not only as between States able to try a given case (jurisdiction) under their domestic legislation, but also under international law, which gave a State jurisdiction to try the case. In other words, according to that line of reasoning, it was not jurisdiction that was the basis for the principle; rather, it was the type of crime which determined jurisdiction and justified the invocation of the principle. That made it possible to provide indirectly for the problem of a conflict between the principle aut dedere aut judicare and sovereignty of States. The Hissène Habré case was very instructive in that regard and should be given close attention.

45. The principle aut dedere aut judicare involved a dual obligation, namely, the obligation to extradite and the obligation to prosecute. He wondered whether they were alternative or cumulative. If they were alternative, the application of one of the obligations would depend on the other and prosecution would then depend on the choice not to extradite. The order in which the obligations were set out in the expression aut dedere aut judicare was perhaps not immaterial. In the case of obligations that could give rise to a cumulative application, it seemed that such application had been envisaged at the time, but had fortunately not survived because it would have been contrary to a number of fundamental principles of international law, such as the principle of non bis in idem, and international law had ultimately adopted the principle of the residual jurisdiction of the ICJ in relation to national courts.

46. The question of qualitative criteria to be taken into account in the application of the principle aut dedere aut judicare was closely linked to the previous one in that the qualitative criterion could determine what priority to be given to one obligation in relation to another. The principle aut dedere aut judicare must be applied taking into account fundamental obligations for the protection of human rights. As stressed by a number of speakers, and Mr. Dugard in particular, it was important to ensure that extradition was not carried out towards a country in which human rights violations might be committed. The case law of the ICJ also showed that a criminal must be prosecuted and tried according to a fair procedure. In other words, it was not sufficient for a State to promise to prosecute and try or for it to have jurisdiction to do so: it must also be able to guarantee that the exercise of its jurisdiction was effective and beyond reproach. In the Lockerbie case, it was because the Libyan Arab Jamahiriya, the United States and the United Kingdom had each argued that it alone was able to guarantee a fair trial for the persons responsible for carrying out the bombing of the Pan Am aircraft that the three countries had eventually agreed that the trial would be held in The Hague before a special military court which had applied Scottish law. That was an interesting precedent, although the case did not answer the question whether a State had priority for choosing to try and refusing to extradite or whether the States that requested extradition would have priority on the grounds that the other State was not able to guarantee a fair trial, i.e. which of the two obligations contained in the principle aut dedere aut judicare took precedence. The Special Rapporteur should explore that area in his future reports.

47. Mr. MOMTAZ thanked Mr. Kamto for accepting the distinction between crimes under international law based on treaties and international crimes. However, Mr. Kamto had gone beyond that distinction when he had said that international crimes could be linked to the concept of jus cogens and that acts classified as crimes, such as

See footnote 247 above.
torture, were acts which violated the rules of *jus cogens*. The idea that torture was a violation of a rule of *jus cogens* might find justification in the decision of the International Tribunal for the Former Yugoslavia in the *Furundžija* case or in the decision of the European Court of Human Rights in the *Al-Adsani* case. However, if account was taken of practice, an isolated act of torture had never led to the exercise of universal jurisdiction. Only an act of torture committed in the framework of a deliberate, systematic policy could be considered to be a crime against humanity and to give rise to universal jurisdiction, as in the *Hissène Habré* case. He drew Mr. Kamto’s attention in that regard to a communication of the Committee against Torture dated 19 May 2006, in which the Committee had taken the position that the absence of an extradition treaty between Senegal and Belgium and shortcomings in Senegal’s criminal law and criminal procedure should not prevent Hissène Habré’s extradition to Belgium.

48. Mr. MELESCANU said that Mr. Kamto’s idea that it might be possible to try a person and then extradite him to an international court was dangerous and contrary to the fundamental principle of criminal law of *non bis in idem*, pursuant to which no one could be tried twice for the same crime.

49. Mr. KAMTO said that there was some misunderstanding because the point he had made was precisely that such a possibility, which had been considered at an earlier time, was contrary to the principle of *non bis in idem*.

The meeting rose at 12.55 p.m.

2901st MEETING

Thursday, 27 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBON-TCHIVOUNDA

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Montaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (continued) (A/CN.4/571)

[Agenda item 10]

Preliminary report of the Special Rapporteur (continued)

1. Mr. KOLODKIN said that, as the preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*) comprised a set of initial observations on issues to which the Commission should turn its attention in the course of its work on the topic, he would confine his remarks to just a few comments.

2. Paragraph 40 of the report touched on the crucial question whether the legal source of the obligation to extradite or prosecute should be limited to the treaties binding the States concerned or should be extended to appropriate customary norms or general principles of law. The operative term was “obligation”, because if the point at issue were merely the right or possibility to extradite or prosecute, it would hardly be appropriate for the Commission to address the matter, given that its mandate consisted in the progressive development and codification of international law. In fact, the question of the nature or status of the obligation to extradite or prosecute was decisive, because on it would depend, to a significant extent, the answer to the question raised in paragraph 59 of the report, namely the form that the final product of the Commission’s work on the topic should take. If the Commission’s analysis revealed that the obligation to extradite or prosecute, even if only in respect of certain crimes, derived from a customary norm of general international law, it would have ample grounds for codification, together with possible elements of progressive development of international law, in the form, for instance, of draft articles. If, however, the Commission were to conclude that such an obligation stemmed exclusively from international treaties, then it would be possible to envisage only some sort of draft recommendatory instrument, along the lines, for instance, of guiding principles. Accordingly, it scarcely seemed possible at the current stage to decide on the form that the final product would take.

3. Turning to the chapter of the report on sources of the obligation to extradite or prosecute, he said he was not convinced of the justification for two separate sections B (International custom and general principles of law) and C (National legislation and practice of States); nor did he share the conviction expressed by the Special Rapporteur in paragraph 48 of the report that the sources of the obligation should include general principles of customary law, national legislation and judicial decisions, and not just treaties and customary rules. While national legislation and State practice were extremely important, they should be regarded not as independent sources of the obligation, but as evidence of the existence (or absence) of the corresponding customary norms of international law or general principles of law. Moreover, general principles of law could presumably also take the form of customary norms of international law. He would not therefore regard national legislation and State practice as an independent source of the obligation in question and consequently would not make them the subject of a separate section of that chapter. Furthermore, section B provided virtually no evidence that general principles of law could be a source of the obligation to extradite or prosecute. In point of fact, it merely considered custom. Similarly, section C did not mention national judicial decisions or provide any examples thereof, and the sole reference to non-legislative practice was that made in paragraph 46 to the Belgian reservation to the 1999 International Convention for the Suppression of the Financing of Terrorism. He therefore had serious doubts about the contents of paragraph 48 and would appreciate further clarification from the Special Rapporteur.
4. Although an investigation of the relationship between universal jurisdiction and the obligation to extradite or prosecute was important and was indeed included in the preliminary plan of action, he was not sure that the description of universal jurisdiction put forward by an authoritative non-governmental organization and quoted in paragraph 19 should form the basis of the Commission’s work. The recent debate surrounding questions such as the amendment of the Belgian legislation in that sphere ought to be borne in mind. Moreover, the existence of the principle of the universality of suppression and its interrelationship with the principle of the universality of jurisdiction seemed to require further elucidation. Even if the principle of the universality of suppression existed in international law (the Special Rapporteur neither defined it nor provided any examples of doctrine or practice in support of its existence), it was far from clear what place that principle should have in the consideration of the topic and it was mentioned only in passing in item (10) of the preliminary plan of action.

5. In the last sentence of paragraph 14 of the report, the Special Rapporteur had listed numerous obstacles to the effectiveness of prosecution systems which, in his opinion, were not appropriate to crimes under international law. They included statutes of limitation, immunities and prohibitions of retroactive criminal prosecution of conduct that had been deemed criminal under international law at the time that it occurred. Caution should be exercised when lumping together such disparate phenomena. The offences to which they applied were not enumerated and he was not convinced that all the so-called “obstacles” mentioned in that sentence would in fact be inappropriate when it came to the prosecution of all the crimes not specified in the report. Further analysis would help to shed light on that question.

6. In that context, he could not pass over the statement made at the previous meeting by Mr. Dugard, who had said, *inter alia*, that the decision of the ICJ in the *Armed Activities on the Territory of the Congo (New Application: 2002)* case undermined the Court’s decision in the *Arrest Warrant* case in that the Court, in its more recent decision, had at last recognized the existence of rules of *jus cogens*. Although Mr. Dugard was more familiar than most with the *Armed Activities on the Territory of the Congo (New Application: 2002)* case, his assertion seemed too bold. The interrelationship between peremptory norms and norms regarding immunity was not so simple. For example, in the *Al-Adsani* case, the European Court of Human Rights had recognized that the prohibition of torture was a peremptory norm, but that had not prevented it from affirming the availability of immunity in its decision. Similarly, in June 2006, the Lords of Appeal of the United Kingdom House of Lords, in the *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and Another* case, had upheld the reasoning of the decision of the ICJ in the *Arrest Warrant* case in favour of immunity. The forthcoming decision of the European Court of Human Rights in the *Association S.O.S Attentats and de Boéry v. France* case should represent a landmark in that respect.

7. When considering the relationship between universal jurisdiction and the obligation to extradite or prosecute, it would also be desirable to examine whether the range of crimes subject to universal jurisdiction coincided with the range of crimes to which the obligation to extradite or to prosecute applied. On the one hand, some treaties which laid down that obligation did not necessarily provide for the implementation of universal jurisdiction. On the other hand, if the obligation *aut dedere aut judicare* existed under customary international law, in that case it would hardly cover all the crimes to which that obligation extended under international treaties. As had already been suggested, further work on the topic ought to be confined to certain crimes, such as the first two categories listed in paragraph 20 of the report.

8. The issues of international criminal jurisdiction and the so-called “triple alternative”, namely extradition, prosecution or surrender to an international court, should be excluded from the Commission’s field of study. The Rome Statute of the International Criminal Court did not distinguish between extradition and surrender; a suspect was not extradited but surrendered to the International Criminal Court. That distinction was of great significance for many States. Moreover, suspects were likewise surrendered to the special courts set up by the United Nations Security Council, not extradited to them.

9. A more important point was that the various international or mixed international/domestic courts varied widely, each being based on a *lex specialis*. It was therefore not possible to speak of the existence of a general international legal obligation *vis-à-vis* such bodies.

10. The preliminary plan of action seemed acceptable, but would need to be revised as the work progressed. For example, the issues to be considered under item (9) (b) could scarcely be examined in isolation from those referred to in item (10). He looked forward to the next report on the subject.

11. Mr. MELESCANU said he wished to underscore the importance of the impeccable logic behind Mr. Kolodkin’s argument. If the source of the rule was to be found in treaties, the Commission should not set about codifying something which had already been codified, but if the source was customary law, the drafting of a set of articles could be contemplated. Not wishing to discourage the Special Rapporteur, he noted that the Commission could, however, adopt the less rigid position that the obligation to extradite or prosecute had its source in some international treaties which were not universally applicable; if that were so, the customary effect of those treaties on States’ conduct could be studied. State practice ought to be investigated further, because it would be quite feasible to draw up a set of draft articles, even if the principal source of the rule consisted of certain treaty provisions.

12. Mr. Sreenivasa RAO said that the preliminary report presented a broader spectrum of issues than would normally have been regarded as relevant for the purpose of considering the obligation to extradite or prosecute as a principle of international law. The broader picture was perhaps needed because extradition was no longer based solely on bilateral treaties, with international criminal jurisdiction also becoming a basis for the obligation. The report referred to a variety of sources offering most
interesting possibilities for further work on the subject. As the Special Rapporteur was also intending to request information with regard to State practice and national legislation, the Commission would have to be careful not to lose its way amidst the wealth of material. At the same time, it should likewise pay due heed to human rights and humanitarian considerations.

13. The obligation to extradite or prosecute was a general principle or broad policy guideline, the aim of which was to avoid the development and maintenance of safe havens for criminals. Nevertheless, States’ criminal jurisdiction was primarily based on the principles of territoriality and nationality, and those principles in turn conditioned the execution of the scheme of extradition. But there were other important factors which had customarily conditioned compliance with any request for extradition, the first of them being the fact that there was no obligation to consider extradition in the absence of an agreement on that subject. Secondly, there was a need to make a prima facie case for the involvement of the accused in the commission of a crime. The type of evidence deemed sufficient or adequate was an issue of enormous practical significance and could vary from one jurisdiction to another, from case to case and over a period of time. Furthermore, the crime in question should meet the test of double criminality; in other words, the broad set of facts and the conduct in question must be regarded, at the time that conduct had taken place, as a crime not only according to the law of the requesting State, but also according to that of the requested State.

14. Extradition was conditional upon the requested State receiving assurances and being satisfied that the accused would receive a fair trial and would not be discriminated against or persecuted on account of his race, religion or political opinion. In other words, human rights safeguards must be respected.

15. After the preliminary legal hurdles had been cleared in the national courts of the requested State, the fate of a request for extradition was ultimately subject to a political test, in that it depended on a final decision taken at the discretion of the attorney-general, the minister for foreign affairs or the Head of State. That decision could not be challenged. Those features of extradition treaties were universally recognized in the national laws of all countries. Extradition had always been considered to be a legal matter with a political aspect. In the final analysis, considerations of reciprocity, an appreciation of the political circumstances affecting the requesting and requested States and the promotion of human rights all came into play.

16. In the past, refusal of a request for extradition had not automatically resulted in the requested State being placed under any further obligation to prosecute the accused, as most States had based their criminal jurisdiction on the principle of the territoriality of the crime or the nationality of the offender. More recently, the requested State was generally under an obligation to exercise extraterritorial jurisdiction in order to prosecute the accused, where such exercise had been provided for in treaties of extradition and made subject to limitations or conditions. At all events, the effective exercise of extraterritorial jurisdiction was dependent upon equally effective judicial assistance and cooperation between the States concerned. Hence, extradition treaties were often accompanied by treaties of mutual judicial assistance.

17. The duty to prosecute when extradition was refused amounted to no more than a duty to submit the case to the competent authorities, without undue delay, for the purpose of prosecution. To that end, the prosecutor had to determine the suitability of the case for prosecution. If, in the opinion of the prosecutor’s office, the case was not worth submitting to the court, no further action could be taken.

18. Once the accused had been brought before the court either in the requesting or in the requested State, all the principles of normal criminal law would apply, namely that the accused was innocent unless proven guilty, that he had the right to cross-examination, the right to counsel and the right to remain silent. Another important principle was that of double jeopardy: a person who had been tried and sentenced could not be tried again for the same offence in any other jurisdiction as long as the prosecution had been genuine and not of dubious judicial propriety. That being so, he requested clarification of the statement in paragraph 49 of the report which indicated that a State might prosecute and sentence an offender on its territory and then extradite or surrender that person to the territory of another State for enforcement of the judgement. Once a person had been tried and sentenced, he would normally serve his sentence in the State in which he had been prosecuted; if, however, another State wished to prosecute him for another offence, he could be extradited, subject to the agreement of both States, and would then be expected to return to the former State after serving his sentence in the latter, in order to serve the remainder of his sentence. The Special Rapporteur should be aware that he was venturing into a field where there was already an abundance of State practice and court rulings, and that he would have to tread carefully in order to identify the appropriate principles.

19. There would be no point in considering whether the obligation to extradite or prosecute was a principle of customary international law unless the Commission examined the question in greater detail in order to ascertain whether there were conflicting practices, with a view to subsequently endeavouring to promote uniformity of practice.

20. The final question was that of the “triple alternative”. He personally believed that the obligation to extradite or prosecute was a principle operating within the realm of national law and bilateral relations, whereas international criminal jurisdiction was evolving in the context of universal criminal jurisdiction and was subject to the principle of complementarity. Recourse to international criminal jurisdiction was permissible only when States were unable or unwilling to prosecute. He therefore did not consider that three alternative tiers were automatically available. Furthermore, when the Commission had considered the issue of international criminal jurisdiction, the question of which jurisdiction should have priority in the event of State A and the prosecutor of the International Criminal Court submitting concurrent requests for
extradition had been the subject of serious disagreement in the Drafting Committee. All that only went to show that the Special Rapporteur would need to adopt a flexible approach, focusing on practice rather than on theory. The Commission should develop general principles and harmonize the subject as far as possible. The preliminary plan of action contained in the report was excellent, and the debate had already pointed to some promising lines of investigation, as well as some pitfalls which should be avoided.

21. Mr. KABATSI, responding to Mr. Sreenivasa Rao’s comment regarding paragraph 49 of the report, said that paragraph 49 raised another issue. If a State had tried, convicted and sentenced an individual and then extradited him to another State to serve his sentence, that was a case neither of *dedere* nor of *judicium* and was outside the scope of the topic. It concerned the treatment of convicted persons, but the topic’s centre of gravity was the holding of a trial in the country where the offender was present, in another country or at an international tribunal. Once the trial had ended, the problem was no longer one of extradition.

22. Mr. Sreenivasa RAO said that was entirely correct. If, for example, a French national was tried and sentenced in another country, agreements could exist between that country and France whereby, after the sentence was pronounced, he could return to France to serve his sentence. That was a separate matter altogether and did not fall within the scope of the topic.

23. Mr. RODRÍGUEZ CEDEÑO said that just as the Special Rapporteur’s well-reasoned and interesting report was preliminary in nature, so too, would be his own remarks. The topic was without doubt an important one, closely related as it was to the commission of international crimes, their punishment, the elimination of impunity and international peace and security. The report revealed the topic’s complexity and difficulty as well as the need for its scope to be strictly delimited. The work of codification would not be easy, and it would be premature to decide what final form the work on which the Commission was embarking would take. Careful consideration should be given to State practice, reflected not only in specific cases but also in domestic legislation, treaties and other bilateral and multilateral agreements.

24. The Commission’s first task, a difficult one, would be to define the obligation and determine its nature and scope. That would call for the consideration of essential related subjects such as extradition as an institution of international law, international criminal jurisdiction and universal jurisdiction. He personally thought that one should speak, not of a principle, but rather of an obligation to extradite or prosecute, a legal obligation that was fundamentally treaty-based, although that did not exclude the possibility that, in relation to certain crimes, it might have its sources in custom. It was a single legal obligation that took the form of alternatives, options available to the State apprehending or detaining a person alleged to have committed an international crime.

25. The obligation was quite clear when a State committed itself through an international treaty to extraditing or prosecuting such a person. Important and well-known instruments containing such obligations included the 1970 Convention for the suppression of unlawful seizure of aircraft, the 1971 Convention for the suppression of unlawful acts against the safety of civil aviation, the 1979 International Convention against the taking of hostages and the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents. Regional instruments setting out the obligation, although not always in the same manner, included the European Convention on the suppression of terrorism, concluded at Strasbourg in January 1977 and the 1971 Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance.

26. If the treaty-based source of the obligation was quite evident, its source in custom was less apparent. It was not easy to conclude that there was a general rule of customary international law to that effect. But that led to a question that was part of the delimitation of the topic, namely, to which crimes the obligation might apply. In his view, the definition of the obligation must be restricted to a specific category of international crimes, those of major international concern, such as crimes of extreme gravity, crimes against humanity or those affecting the interests of the international community. While the obligation could undoubtedly relate to other offences, including non-international crimes that also had an international impact, the strict definition that the Commission should be seeking must be limited to the aforementioned category of crimes. The Rome Statute of the International Criminal Court listed as crimes over which the Court had jurisdiction genocide, crimes against humanity, war crimes and aggression, subject to the latter crime being defined by the States parties. That Court’s jurisdiction would evolve, however, since the Review Conferences provided for in the Statute would permit the future inclusion of other crimes such as terrorism, drug trafficking and crimes against United Nations personnel. Those were the crimes of greatest international concern and those to which the obligation should refer.

27. While the obligation was single, it comprised two alternatives. The question was whether the State could fulfil the obligation in all cases, including for offences other than those of international concern. Extradition was subject to certain prerequisites, including the provision of guarantees that the human rights and physical integrity of the person accused would be respected, and evidence of his or her criminal involvement. An interesting recent Latin American case that he commended to the Special Rapporteur’s attention involved the extradition of an alleged terrorist Luis Posada Carriles, accused of downing a Cuban airliner in 1976. The accused was currently under detention in the United States, but Cuba and the Bolivarian Republic of Venezuela had requested his extradition. Interestingly enough, the United States was charging him not with involvement in terrorism but with immigration offences.

28. Additional aspects of the question had also to be taken into account in identifying the obligation, such as dual nationality and the prohibition on extradition of
nationals of the extraditing State. The obligation to prosecute a suspect raised equally complex questions. It must be borne in mind that a court exercised jurisdiction based on its material, personal, territorial and temporal competence. If the offence in question was not an international crime, it might not be characterized in the domestic legislation of the State that had arrested or detained the individual. It might also happen that the individual alleged to have committed the offence was not subject to its domestic law; and temporal issues might also arise.

29. If a State was unable to extradite because it could not meet the necessary prerequisites, and was likewise unable to prosecute the person, would it be violating the obligation to extradite or prosecute? That question also entailed careful consideration of the nature of the obligation. Was it an obligation of result, that must inexorably be fulfilled by the State, or an obligation of conduct, requiring the State to do everything possible to extradite or prosecute the individual concerned?

30. A third alternative had likewise been mooted, namely handing the individual over to an international criminal jurisdiction such as the International Criminal Court. That, however, constituted surrender, rather than extradition in the strict sense of the term. As was indicated in paragraph 54 of the report, the jurisdiction of the International Criminal Court was complementary to national jurisdiction, not an alternative to it. That complementarity was a fundamental aspect of the Court’s competence, enabling it to exercise its jurisdiction when a State would not or could not do so.

31. In conclusion, he reiterated that the topic was extremely complex and that its scope should be strictly delimited. The Special Rapporteur seemed to be heading in the right direction. The Commission should not venture too far into the field of international criminal law; its first task must be to define the obligation, its scope, object and nature, together with the exceptions thereto. He wished the Special Rapporteur every success in that endeavour.

32. Mr. GAJA said that the Special Rapporteur’s very useful preliminary report served as an excellent starting point for the examination of the topic, laying out a number of questions that were directly or indirectly related to the obligation to extradite or prosecute. The preliminary plan of action in the report outlined 10 points that covered a great deal of ground. Among the various issues raised in the report, he would attempt at the present stage to identify only those that would have to be dealt with by the Commission in its consideration of the topic.

33. He endorsed the Special Rapporteur’s proposal to carry out a comprehensive comparative analysis of the treaty-based sources of the obligations to extradite or prosecute, even though the conditions and elements of those obligations were to a large extent similar. The Convention for the suppression of unlawful acts against the safety of civil aviation could be taken as an example for considering problems relating to the treaty-based obligations to extradite or prosecute. In article 5, paragraph 1, the Convention required certain States to “take such measures as may be necessary to establish” their jurisdiction over the offences, including the State in whose territory the offence had been committed and the State in which the aircraft was registered. In the Lockerbie case, for example, those States had been, respectively, the United Kingdom and the United States. The Convention then identified another State that had the obligation to exercise jurisdiction: the State in whose territory the alleged offender was present if “it does not extradite him … to any of the States mentioned” in the previous paragraph. Thus, a State which was not among those listed in article 5, paragraph 1, but in whose territory the alleged offender was present, was under only a subsidiary obligation that was conditional on the absence of extradition towards one of the States enjoying priority jurisdiction.

34. An obligation to extradite might arise under the combined provisions of the treaty concerning the crime in question—in the case of the example the Montreal Convention—and other treaty obligations relating to extradition between the States concerned. Extradition could also take place in the absence of a treaty. Whether there was an obligation to extradite depended mainly on the treaties existing between the parties and on the relevant circumstances.

35. A number of important questions regarding extradition had been raised, for example, what kind of evidence was required for granting extradition and what effect the risk of infringement of human rights in the State of destination might have. They were questions of a more general nature, however, which also arose in situations where there was no obligation to exercise jurisdiction on the basis of a treaty clause providing for extradition or prosecution. If those questions were addressed, the scope of the topic would be widened to encompass many issues relating to extradition, whether or not they affected the obligation of prosecution.

36. What was specific to the topic was that, failing extradition, an obligation to prosecute arose. That brought in a first set of questions relating to the condition triggering the obligation. Extradition presupposed that a State requested it or, more rarely, accepted that the alleged offender should be sent to its territory. If none of the States having priority jurisdiction requested extradition or accepted the offer thereof, the question arose whether the obligation to prosecute was triggered. One might answer in the affirmative, since otherwise the crime would go unpunished. But that was a matter of interpretation of the individual treaty. The Commission could only provide some general guidelines for the interpretation of treaty provisions pertaining to international criminal law.

37. Assuming that the obligation to prosecute was triggered and that the State on whose territory the alleged offender was present was under an obligation to prosecute, that obligation necessarily involved the exercise of criminal jurisdiction on the part of the territorial State, which might or might not already have jurisdiction over the crime under general international law. It would certainly have jurisdiction under the treaty, and would even have an obligation to exercise it. If the only link with the crime consisted in the presence of
the alleged offender, one could speak of an exercise of universal jurisdiction. Clearly, such exercise would be lawful with regard to the other parties to the treaty, but one might query whether it would be lawful with regard to States not parties to the treaty. That was the point at which the topic under consideration confronted the question of the existence under general international law of universal jurisdiction over the crime. There again, however, a question of a general nature arose, one which would be more appropriately studied in another context, that of universality of criminal jurisdiction—an option discussed, and subsequently dismissed, by the Planning Group at the previous session.

38. Turning to the content of the obligation, he noted that treaties generally described what the obligation to prosecute comprised. Various issues could nevertheless arise, for instance in relation to the possible lack of evidence for prosecution in the hands of the State in the territory of which the alleged offender was present. There again, the Commission could provide guidelines for the interpretation of individual treaties. If, for example, as the Libyan Arab Jamahiriya had maintained in the Lockerbie case, the State had not been given the necessary evidence, how could it be expected to prosecute the alleged offenders?

39. Treaties providing an obligation to extradite or prosecute suffered from some gaps that the Commission should consider. One related to the execution of penalties that the State had inflicted: the treaties in question went no further than the prosecution and possibly sentencing stages. Another gap was the lack of a system for monitoring the way in which the obligation to prosecute was fulfilled. Needless to say, additional obligations in those areas would make the obligation to prosecute or extradite more meaningful, and some proposals could be made to that end.

40. So far, he had considered the obligations to extradite or prosecute that arose under several specific treaties. It would certainly be part of the scope of the topic also to examine whether similar obligations existed under general international law, and, if so, for which crimes. The question would not be whether there was an obligation for States to prosecute a certain crime, an obligation to exercise criminal jurisdiction that might or might not be universal. An obligation to extradite or prosecute under a customary rule would have to be based on a two-tier system similar to that established in treaties: in other words, a system whereby certain States were given priority jurisdiction and others had an obligation to exercise jurisdiction if the alleged offender was not extradited to a State having priority jurisdiction.

41. Whether or not such a system already existed according to general international law, it would be interesting to examine whether it could be outlined as a matter of progressive development. Paragraph 3(d) of the resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, adopted in 2005 at its Krakow session by the Institute of International Law, contained a suggestion which the Commission should take into consideration, to the effect that [any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender.337

42. In sum, the Commission should concentrate only on the issues that specifically concerned the obligation to extradite or prosecute. It could provide a series of guidelines relating to the interpretation of treaties on international criminal law which set forth the obligation to extradite or prosecute, make some suggestions concerning the major gaps in treaties containing such clauses—particularly with regard to enforcement—and consider the question of an obligation to extradite or prosecute beyond the application of existing treaties as a matter of progressive development. Should the Commission prefer to extend the study to areas that were not specifically related to the obligation to extradite or prosecute, such as matters of extradition or of universal jurisdiction, the title of the topic should be modified accordingly.

43. Mr. Sreenivasa RAO said that, while Mr. Gaja’s assertion that treaties did not regulate all matters relating to extradition and prosecution was correct, any apparent gaps were, in his view, regulated in national law and practice: hence the importance of harmonizing national laws.

44. Mr. YAMADA commended the Special Rapporteur’s excellent preliminary report. His perception of the development of the obligation to extradite or prosecute as reflected in treaty law since 1970 was that the international community had decided to suppress, through international cooperation, certain categories of grave offences by obliging States to make such offences punishable by severe penalties. In order to deprive an offender of a safe haven, it had established a network that made it possible to try to punish offenders wherever they might be. The procedural backup for that network was the obligation to extradite or prosecute.

45. It followed from the above that the scope of the offences or crimes concerned must be limited to those which in the view of the international community needed to be suppressed through international cooperation. Accordingly, he had some reservations about widening the scope to include ordinary crimes under national law. Such crimes could be included if the Commission were dealing solely with extradition, but not if, as was the case, it was considering a regime for which extradition and prosecution formed a whole.

46. The Special Rapporteur sought advice on the link between universal jurisdiction and the obligation to extradite or prosecute. His own initial reaction was that a State would be required to establish its universal jurisdiction in cases both of extradition and of prosecution. Thus, further study on the link was needed.

337 See footnote 335 above.
47. Draft article 9 of the draft code of crimes against the peace and security of mankind, adopted by the Commission in 1996, provided that “the State Party … shall extradite or prosecute”. Thus, there clearly existed an obligation to prosecute. On the other hand, as the Special Rapporteur pointed out in paragraph 16 of his report, the first of the sectoral conventions against terrorism which incorporated the obligation to extradite or prosecute had a more guarded formulation in respect of prosecution. Article 7 of the Convention for the suppression of unlawful seizure of aircraft provided that “[t]he Contracting State … shall … be obliged … to submit the case to its competent authorities for the purpose of prosecution”. The obligation was to submit the case for the purpose of prosecution, but there was no obligation to prosecute. That formulation had been adopted in a great many conventions concluded subsequently.

48. Having taken part in the negotiation of the Convention for the suppression of unlawful seizure of aircraft, which had been a follow-up to the 1963 Convention on offences and certain other acts committed on board aircraft, he wished to recall the legislative history of that formulation. On 31 March 1970, while the drafts for the Convention for the suppression of unlawful seizure of aircraft were being prepared, a Japan Airlines domestic flight had been hijacked and diverted to Pyongyang by nine members of the so-called Japan Red Army. The Democratic People’s Republic of Korea had immediately returned the crew and the aircraft, but had accorded the offenders asylum. Four of them were still in that country; three had since died. Two had been arrested and tried in Japan, to which they had secretly returned, and were now serving their sentences. Owing to that incident, preparations for the new convention had been accelerated and a diplomatic conference hurriedly convened in The Hague, chaired by Mr. Willem Riphagen, subsequently a member of the Commission and one of its Special Rapporteurs on State responsibility.

49. Article 7 had been negotiated in The Hague. Many Governments had had difficulty in accepting the obligation to prosecute because independence of the prosecution was a cardinal principle embodied in their domestic criminal procedures. The United States Administration could accept the obligation to bring the offence of hijacking before a grand jury, but it was the grand jury that decided whether to prosecute an offender. In Japan, where criminal procedures were based on the continental system of law, the Administration could only commit the police to submitting the case to a district prosecutor’s office, which had the final say on whether to prosecute an offender. While procedural systems might differ, common law countries and other European countries had had the same problem. That was the reason for the rather weak language of article 7 in respect of prosecution. While it was his understanding that this basic principle remained unchanged in the domestic legislation of major legal systems, it would be useful for the Special Rapporteur to look into that matter.

50. Extradition required the exhaustion of elaborate procedures. In practice, offenders were often handed over to the requesting State through the less cumbersome procedure of deportation. A study of that practice might also be relevant to the Commission’s work. It might indicate that the obligation to extradite or prosecute played only a relative role in the suppression of international crimes.

51. With those comments, he supported the preliminary plan proposed by the Special Rapporteur in paragraph 61 of his report.

52. Mr. DAOUDI said that the preliminary report on the obligation to extradite or prosecute dealt cautiously but thoroughly with a difficult and sensitive subject. He fully agreed with Mr. Montaz and Mr. Sreenvasa Rao that it was vital to concentrate on the purpose of the study, which was to reduce cases of impunity to a minimum. The “extradite or prosecute” rule was connected with other rules of international treaty law or of customary international law. It could not be a customary rule, for in that case States would be under an obligation to extradite any individual who was accused of having committed a crime of any kind, irrespective of the existence of an extradition treaty. But that was far from being the case in international practice. Nor was it a general principle of law within the meaning of Article 38 of the Statute of the International Court of Justice, because it was not recognized in the national legislation of all or even a majority of States.

53. In reality, the existence of such an obligation was always associated with the existence of a treaty norm or a customary international norm characterizing certain offences as, for instance, crimes against peace, crimes under international law or war crimes. It was in that light that the reference to customary international law in the dissenting opinions of five judges of the ICJ in the two Lockerbie cases, cited in paragraph 55 of the report, should be construed. The customary rule in those cases was that set forth in the 1971 Convention for the suppression of unlawful acts against the safety of civil aviation, which defined any act endangering the safety of civil aviation as an offence.

54. Those crimes should therefore be classified and a distinction drawn between those with which the principle of extradition or prosecution was associated and those which had been made subject to universal jurisdiction so that the accused could be tried by international courts, or by the State under whose authority the alleged perpetrators of the crime in question fell.

55. He concurred with Ms. Escarameia that human rights must also be borne in mind when studying the topic, since it was essential to ensure that the choice between extradition and prosecution was predicated on the ability of a State to guarantee its courts’ respect for the fundamental right of the accused to a fair trial.

56. As a number of other members had pointed out, the current trend was to transfer senior Government officials accused of international crimes to special courts for trial. That raised the question of the immunity of Heads of State or Government, ministers for foreign affairs and other Government officials. In 2002, the ICJ had found
that the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo was immune from criminal jurisdiction (Arrest Warrant case). It would therefore be wise to ponder whether senior Government officials also enjoyed such immunity when faced with prosecution pursuant to Security Council resolutions under Chapter VII of the Charter of the United Nations. The Special Rapporteur should look into that sensitive issue.

57. The Special Rapporteur should also investigate modern international practice in order to determine what rules the international community would be ready to follow and approve either in the form of binding norms or as a “soft law” instrument. It was, however, indeed too early to decide what form the final product of the Commission’s study should take.

58. Mr. PELETT said he was somewhat hesitant to take the floor on the Special Rapporteur’s preliminary report, not because it concerned an important and stimulating subject with which he was not very familiar, but because it was difficult to formulate general or substantive observations on a report that was indeed very preliminary and addressed only some of the problems, and perhaps not even the most important ones, posed by that difficult topic.

59. The Special Rapporteur’s preliminary remarks on the subject, delivered in the Working Group on the long-term programme of work and annexed to the Commission’s report on the work of its fifty-sixth session,339 was the basis of the preliminary report, even though the Special Rapporteur’s thoughts did not seem to have progressed very far from what had been a very promising starting point. The report posed the same questions without seeking to resolve them—although admittedly that had not been the Special Rapporteur’s intention—and suffered from the same omissions.

60. One of the major differences between the two documents was the importance the Special Rapporteur attached in his report to universal jurisdiction and its relation to the principle aut dedere aut judicare. While he had no doubt that the two concepts were related, he agreed with Mr. Kamto that that relationship was not very close, and that it was difficult to formulate a definition of that relationship.

61. It was unfortunate that the Commission had chosen (a choice to which he would return) to place the principle or obligation of aut dedere aut judicare on its agenda, rather than that of universal jurisdiction, a subject which was easier to define, more topical and probably more important. That, however, was no reason for the Commission to muddle the two subjects. The decision had been taken to take up the one rather than the other, and it was important to stick to that choice. Ultimately, it would be wiser to consider that universal jurisdiction, which was only one possible basis for State jurisdiction in criminal matters, had no greater claim to be part of the subject than all the other bases for that jurisdiction, be they treaties or customary rules.

62. More generally, he considered that the topic under consideration posed tremendous risks, and that if the Commission was not careful it might find itself saddled with a catch-all topic which would compel it to codify or, even worse, to progressively develop all the fashionable subjects raised in the context of international criminal law. It was essential not to yield to that temptation, because otherwise the Special Rapporteur would become the Mr. Francisco García Amador340 of the topic of criminal responsibility for individuals in international law. Like that other Special Rapporteur, Mr. Galicki was in danger of bringing his courage and talents to bear on very diverse and controversial problems which would lead nowhere; the Commission would eventually find itself in a cul-de-sac and would have to abandon the idea of codification. To cite one example, at the previous meeting Mr. Dugard had alerted the Special Rapporteur to the transgressions of the ICJ with regard to terrorism and the immunity of Government leaders and had urged him to rectify the shortcomings of the Yerodia judgment in the Arrest Warrant case. By and large, he agreed with Mr. Dugard, although personally he drew completely different conclusions for the subject under study. Unlike Mr. Dugard, he considered it essential not to use the codification of aut dedere aut judicare as an excuse for a quixotic attack on substantive norms applicable to terrorism, torture or the immunity of senior Government officials. He did not think that the title of the topic needed to be altered, as had been suggested earlier. On the contrary, the Commission should confine itself strictly to the topic, subject to a decision on whether the notion of “obligation” or of “principle” was more appropriate.

63. One of the first things that the Special Rapporteur should do would be to make it abundantly clear what issues he would not be covering. Candidates for exclusion were extremely numerous. In particular, he should not focus on the origin of international offences which might give rise to the principle of aut dedere aut judicare. Just

as the codification of the law of responsibility had got off the ground thanks only to Roberto Ago’s brilliant intuition that the Commission should limit itself to secondary rules relating to internationally wrongful acts of States, without addressing the content of those acts.\(^1\) In the same way, the Special Rapporteur should reinvent a theory of secondary or general rules or adapt for the purposes of his own topic those on which the Commission had based itself to codify the law of responsibility. That was perhaps what the Special Rapporteur had had in mind when, in item 9 (e) of his preliminary plan, set out in paragraph 61 of the report, he envisaged paying special attention to the position of the obligation in question in the hierarchy of norms of international law by distinguishing between secondary and primary rules.

64. He had three comments in that regard. First, he did not see why it should be a question of hierarchy: secondary rules were not hierarchically superior or inferior to primary rules, they were of different nature. Second, the questions should not be tackled at the end of a study, as the Special Rapporteur seemed to intend. On the contrary, it was an initial question of the highest priority. Third, for the reasons he had just cited, it was perfectly clear that the focus should be placed exclusively on codifying secondary rules, not primary ones. That did not mean that the material on which the Special Rapporteur and the Commission would have to draw should remain abstract, and he approved the choice of information that the Special Rapporteur proposed to request, as enumerated in paragraph 60, apart from the reference to universal jurisdiction in subparagraph (e). Once that information had been collected and analysed, the Commission must derive from it general principles applicable in all circumstances, taking care not to be unduly specific by defining the origin and scope of the obligation to extradite or prosecute offence by offence or crime by crime. He disagreed with Mr. Rodriguez Cedeño on that point. That said, the Commission might have to distinguish, for particular purposes, between the various crimes in question at one or the other of the two main levels of the study—which were the existence or non-existence of an obligation—and, once it had been determined whether there was or was not an obligation to extradite or prosecute, the modalities for the application of the principle, on which Mr. Sreenivasa Rao and Mr. Daoudi had made a number of interesting remarks, although he was not 100 per cent in agreement with them.

65. At the previous meeting, Mr. Melescanu had initiated a useful and interesting debate on the question whether the Commission should speak of a principle or of an obligation to extradite or prosecute. There was no unambiguous answer to that question. It was incontestable that when a treaty contained such a provision, it was necessary to refer to “obligation”, but there was no reason why that might not perhaps also apply in the absence of a treaty, for example in the case of universal jurisdiction or crimes against the peace and security of mankind—which strangely enough, no one had spoken of in those terms—or of crimes committed in the context of serious violations by States of obligations stemming from peremptory norms of general international law. Many members had very set ideas on the question. He envied them their certainty, which he did not share. As he saw it, the Commission did not have the necessary data to take a decision on that fundamental question at the current stage. The Special Rapporteur would no doubt provide such information in a later report.

66. Unlike Mr. Melescanu, he was not convinced of the impeccable logic of Mr. Kolodkin’s line of reasoning regarding the relation between treaties and customary law. Clearly, some treaties included the obligation for the parties to extradite or prosecute, but no treaty codified or specified the general conditions for the implementation of that obligation. The Commission found itself in a situation not unlike the one with which it had had to deal in connection with the most-favoured-nation clause. Many treaties had such a clause. Using that basic material, the Commission had sought, in draft articles to which it would be well advised to refer, to derive a general framework for the principle itself. Similarly, in paragraph 41 of the report, the Special Rapporteur seemed to endorse the view of authors who considered that the fact that many treaties included the _aut dedere aut judicare_ clause was proof that the latter was a customary norm. However, such clauses were very diverse, and it was therefore difficult to take that line of reasoning. Indeed, it could just as easily be argued that since States included such a clause in treaties, the principle was not a customary norm. In any case, he insisted on the parallel with the draft articles on the most-favoured-nation clause,\(^1\) the exercise closest to the current study—which, admittedly, was not necessarily a very auspicious precedent, given their fate until now.\(^1\)

67. Once the Commission determined what the general principles were that permitted it to speak either of an obligation or of a non-obligatory principle, the question would arise of the modalities for implementing the principle. However, irrespective of whether there was an obligation to extradite or punish, some problems would present themselves in the same way. If a State was not under such an obligation but needed to decide whether it could extradite or punish, were there any legal impediments, in particular with regard to nationality? That question had been left virtually untouched in the report, although fortunately it had been raised by a number of members.

68. In that regard, he disagreed with the methodological approach taken by Mr. Melescanu, who at the previous meeting had focused on the problems that dual or multiple nationality might pose. While such problems did arise, they were of secondary importance compared to the far more important question of whether a rule of general international law existed which forbade a State to extradite one of its nationals, or another rule that allowed a State to refuse to do so. In the context of the present topic, it would be sufficient to reply to that fundamental question, and it would be preferable, for the case of dual or multiple nationality, to refer to the general rules

\(^1\) See General Assembly decision 46/416 of 9 December 1991.


\(^3\) Yearbook ... 1978, vol. II (Part Two), p. 16.
applicable in that area. It was important not to yield to the temptation to address the numerous collateral rules which were related to the topic in one form or another but were not necessarily part of it. The Commission had to go to the heart of the matter, or else it would share the fate of Mr. García Amador.

69. Another question which needed to be addressed but on which the preliminary report maintained a surprising or perhaps cautious silence, although the 2004 study had invoked it, was the impact of the proliferation of international criminal jurisdictions on the obligation or principle aut dedere aut judicare, on which Mr. Melescanu and Mr. Kamto had raised interesting points. Mr. Melescanu had argued that the possibility of transferring the alleged perpetrator of an international crime to an international criminal jurisdiction constituted an exception to the aut dedere aut judicare principle rather than a new aspect of that alternative. He personally thought that a more nuanced reply was needed. If, as was the case with the International Criminal Court, international criminal jurisdiction was only subsidiary, then that was not an exception, but an alternative. If, on the other hand, international jurisdiction took precedence, as in the case of the international tribunals for the former Yugoslavia and for Rwanda, it was an exception, or a circumstance excluding the application of the rule, at least when certain conditions were met.

70. The issues which he had just touched upon, and to which others had already alluded, were at least as important as, if not more important than, those set out in the preliminary plan of action in paragraph 61 of the report. In conclusion, he wished the Special Rapporteur good luck with a useful but difficult topic and warned him to guard against the malady to which Mr. García Amador had succumbed.

71. Mr. CANDIOTI endorsed Mr. Pellet’s warning against that malady, which should perhaps be referred to as the García Amador virus or syndrome: the Commission, increasingly infected by it, had been speaking of extradition, impunity, immunity and universal jurisdiction, but seldom about the obligation to extradite or prosecute, which was a very simple obligation. It was not that there was one obligation to extradite and another to prosecute. The obligation aut dedere aut judicare contained in treaties in the classic sense was the obligation to prosecute when extradition had not taken place. It was not an alternative but a conditional obligation. If the Commission did not take that as its starting point, there was a real danger of falling into the García Amador trap. The Commission must first define the obligation in the traditional sense, namely that if a State that was obligated to extradite failed to do so, it must prosecute certain, although not all, crimes. The second important limitation concerned what crimes should be included, and he agreed with those who argued that the first chapter should cover crimes which affected the international community as a whole, namely the serious breaches covered by the 2001 draft articles on responsibility of States for internationally wrongful acts.


[Agenda item 11]

REPORT OF THE STUDY GROUP

72. Mr. KOSKENNIELI (Chairperson of the Study Group), introducing the report of the Study Group of the International Law Commission contained in document A/CN.4/L.702, said that he would begin by saying a few words about the structure of the study and its various parts, their relationship to each other and the standpoint from which the Study Group had decided to deal with the topic. He would then briefly summarize the contents of the bulky background document (A/CN.4/L.682 and Corr.1). The third part of his introduction would cover document A/CN.4/L.702, which contained the 42 conclusions which the Study Group had adopted in the course of its discussions, and which were based on document A/CN.4/L.682/Add.1 which had been submitted to it for this purpose. Lastly, he would say a few words about what action the Study Group advised the Commission to take, bearing in mind that the Commission had not dealt with the topic of fragmentation in its usual fashion and that some discussion on how to proceed would be useful.

73. The aspect of the work which had been most puzzling to outside observers had been the relationship between the two outcome documents produced by the Study Group. The fact that there were two documents had been discussed during the fifty-seventh session, and the Commission had endorsed the Study Group’s suggestion that two documents—one a “relatively large analytical study”, the other “a condensed set of conclusions”—should be produced, as was explained in paragraph 2 of document A/CN.4/L.702.

74. The shorter document was in a sense an executive summary of the larger one. It had been adopted word for word by the Study Group, whereas he himself had compiled the larger document, which was a background study, produced with the help of individual reports by members of the Study Group. The background study had served as the basis for the shorter document, and should be regarded as an annex thereto.

75. The section presenting the background of the report showed that the Study Group had taken as its starting point the view that fragmentation was a natural development of long-standing tendencies in international law. It saw fragmentation as dealing with the functional differentiation of various aspects of international cooperation and the growing autonomy, and greater professionalization and institutionalization, of such fields as human rights law, trade law, the law of the sea and international criminal law. Fragmentation was thus to be regarded not as a technical problem but as one feature of the expansion and diversification of international law—it’s penetration into

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345 See footnote 339 above.
346 See footnote 8 above.

Mimeographed; available on the Commission’s website. The final text will be reproduced in an annex to Yearbook ... 2006, vol. II (Part One).
new areas of international life—reflecting developments at the domestic level. Although fragmentation was a largely positive phenomenon, the Study Group recognized that it occasionally gave rise to problems in legal practice. Indeed, it was for that reason that the topic had been taken up by the General Assembly and, subsequently, by the Commission. The Study Group’s task had been to see how those problems could be alleviated. At the same time, the problems were not crucial to the international order and, as the Study Group had been at pains to establish, they could be dealt with by means of techniques, mechanisms, arguments and practice that had long existed in international law.

76. It should be emphasized that the Study Group had concerned itself not with institutional but with substantive fragmentation. It had not sought to determine which institutions should have competence to deal with which kinds of problems, nor had it considered the question of institutional proliferation or the possible problems arising from duplication. It had thus been able to look at fragmentation from the perspective of normative conflicts. The question underlying both documents before the Commission was what approach should be taken to normative conflicts—including conflicts between individual rules, between rules and principles, among treaties, between treaties and customary rules, among regimes or among aspects of international law, such as human rights law or trade law—when they arose. In that connection, the Study Group had taken care always to bear in mind the 1969 Vienna Convention, which was, as it were, a toolbox containing the tools, in the form of existing practices, for dealing with normative conflicts.

77. The bulk of the Study Group’s work was contained in document A/CN.4/L.682 and Corr.1, which had been compiled on the basis of five individual studies written by members of the Group. The studies, all on topics determined by the Commission itself, related to the application of the lex specialis rule and the notion of self-contained regimes; the issue of successive treaties, which was governed by article 30 of the 1969 Vienna Convention; the issue of inter se agreements (governed by article 41 of the 1969 Vienna Convention); the use of other obligations in the interpretation of a treaty (art. 31, para. 3 (c), of the 1969 Vienna Convention); and the question of hierarchies: jus cogens and obligations erga omnes in the light of Article 103 of the Charter of the United Nations.

78. Briefly, the studies had considered a number of existing problems in the field of legal practice and made interesting proposals on how they could be tackled. He would consider the problems under four headings. The first concerned lex specialis and self-contained regimes. The 1969 Vienna Convention viewed normative conflicts from the perspective of the speciality in relation to the generality of the conflicting rules, in accordance with the phrase lex specialis derogat legi generali, which was a widely accepted and widely used principle of interpretation and conflict resolution in international law. The study, after considering a broad range of cases illustrating how the lex specialis rule had been used, had reached two main conclusions: first, the application of lex specialis did not permanently invalidate the more general rule but almost always took for granted that the lex generalis provided the background for the interpretation of the lex specialis. Second, there was a wide variety of ways in which the lex specialis could relate to the lex generalis. The general rule might simply be set aside; alternatively, the special rule might merely provide for implementation of the general rule, or else it might update or interpret it. The variety was such that the relationships could not be condensed into a general theory of lex specialis. The study provided a number of examples of how lex specialis functioned, as in the Gabčíkovo–Nagymaros Project case, with regard to which the ICJ had stated directly that the 1977 Treaty concerning the construction and operation of the Gabčíkovo–Nagymaros system of locks between the parties continued to cover the matter as a whole. The Court had found no need to look into the relationship between the parties because it was “governed, above all, by the applicable rules of the 1977 Treaty as a lex specialis” (para. 132 of the judgment). In that case, the relationship between lex specialis and lex generalis had been left unclear: the general international law on navigable waterways was not extinguished but was overshadowed by the lex specialis. Another case (Brannigan and McBride), from the European Court of Human Rights, illustrated the relationship between the right, under article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to an effective remedy and the special right to have one’s detention speedily dealt with under article 5, paragraph 4, of the same Convention. It was, however, clear that the special rule did not extinguish the general rule and that whatever practice the Court had developed under article 13 applied against the background of article 5.

79. The second set of problems related to the much-discussed question of self-contained regimes. Following a meticulous analysis of practice, the Study Group felt it was in a position to state bluntly that the term “self-contained regime” was a misnomer: no regime existed in a void. All legal rules, of whatever nature, were linked to the normative world around them in innumerable ways. The study illustrated three ways in which every self-contained regime was a part of general international law. First, any such regime derived its binding force and validity from general international law, even when its specific substance derogated from the provisions of the general law; the specific substance became meaningful only by reference to the general law. Thus the Montreal Protocol on Substances that Deplete the Ozone Layer contained a type of dispute settlement, a so-called “non-compliance system”, which was specific to the Protocol. To that extent, it was self-contained. Any consideration of where its roots lay and what its limits were, however, showed that the Protocol was a treaty governed by the 1969 Vienna Convention; its binding force received its validity only by reference to that Convention.

80. Secondly, since a self-contained regime—such as the WTO regime, a human rights regime or a specific river regime—was, by definition, limited to its own subject matter, any problems outside the ambit of the regime had to be resolved through general international law. For example, in 2000, the Appellate Body of WTO had heard a case (Korea—Measures Affecting Government Procurement) in which the issue of the application of customary
international law within the WTO system had arisen. Faced with a question not regulated by the covered treaties of WTO, the Appellate Body, far from taking refuge in the fact that the WTO regime contained no rule on the matter, had specifically stated that “[c]ustomary international law applies generally to the economic relations between WTO members” (para. 7.65 of the WTO report). Self-contained regimes constantly had to refer to such general rules. No regime had a rule on what constituted a State, for example, and had to rely on the definition of a State accepted in general international law and perhaps, the Convention on Rights and Duties of States adopted by the Seventh International Conference of American States.

81. Thirdly, if a special regime failed, general international law immediately became applicable. That assumption lay behind every regime. For example, a State responsibility regime might contain a particular system of countermeasures; if they failed to work, a situation might be reached in which it became clear that general rules on responsibility of States for internationally wrongful acts and liability would become applicable.

82. The third set of problems related to the *lex posterior* rule and *inter se* agreements, in relation to conflicts between successive treaty norms, which were largely regulated by articles 30 and 41 of the 1969 Vienna Convention. No problem generally arose where the conflict in question was between successive treaties concluded by the same parties, since in that case *lex posterior* applied, the reasonable assumption being that the parties had intended to abrogate the earlier treaty through the later one. The only significant problem arose in relation to article 30, paragraph 4, of the 1969 Vienna Convention, which provided for a situation in which a State had concluded agreements with different parties. In that case, *lex posterior* was not automatically applicable. He drew attention to the concern felt by Special Rapporteurs for the 1969 Vienna Convention, especially Sir Gerald Fitzmaurice and Sir Humphrey Waldock, at the fact that, ultimately, a State that had concluded two incompatible agreements apparently had the power to choose which treaty to fulfil. There was no general solution to the dilemma, which Fitzmaurice had termed the “right of election”. States sometimes tried to deal with the difficulty by including conflict clauses in treaties, a number of examples of which were given in the study. Unfortunately, such clauses were not necessarily effective, since they themselves were often not clear as to what they provided. As for *inter se* agreements—agreements between a limited number of parties—the provisions of article 41 of the 1969 Vienna Convention were entirely appropriate, since they encouraged the parties to make agreements that furthered the object and purpose of the treaty but limited their scope so that the treaty was not undermined.

83. The third topic concerned hierarchies and the relative importance of Article 103 of the Charter of the United Nations, *jus cogens* and obligations *erga omnes*. The study contained many examples of practice in relation to Article 103, particularly the statement in the *Lockerbie* case, which had expanded the scope of Article 103 to include also Security Council resolutions. A more recent example had been the case concerning *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, in which the Court of First Instance of the European Communities had set out the relationship between Security Council resolutions and *jus cogens* norms. The study contained an interesting treatment of the topic, but, naturally, no position was taken. The study also dealt briefly with *jus cogens*, with particular reference to how the Commission had previously tackled it, in the context of responsibility of States for internationally wrongful acts and obligations *erga omnes*. The Study Group had, as far as possible, followed the Commission’s own understanding and language.

84. The final topic studied in the report of the Study Group concerned article 31, paragraph 3 (c), of the 1969 Vienna Convention. The theme had become a popular one and the two cases highlighted and discussed in the study were the *Oil Platforms* case heard by the ICJ and the recent *European Communities—Biotechnical Products* case in the WTO Panel, which involved two very different treatments of article 31, paragraph 3 (c). The Study Group’s report concluded with a number of suggestions—for which he alone was responsible—as to how the Commission might deal with the various problems, discrepancies and innovations that emerged from the practice.

85. Document A/CN.4/L.702 contained the Study Group’s conclusions formulated on the basis of the study. The Study Group did not suggest that the Commission should adopt those conclusions as its own; rather, the Commission should take note of the report and endorse the Study Group’s conclusions in a general way. In chapters corresponding to those of document A/CN.4/L.682 and Corr.1, the Study Group set out a number of propositions. Conclusion (1) stated, with a clarity in which he took some pleasure, that there was a meaningful relationship between the various rules and principles of international law, which formed a legal system and came into play when normative conflicts arose. Conclusion (2) set out the relationships concerned: that contained in the situation in which two rules applied simultaneously, with one assisting in the interpretation of the other; and that contained in the situation of straightforward conflict where one overruled the other. The most obvious significant example of the latter was *jus cogens*, where the subsidiary rule was not only overruled but invalidated. Conclusion (3) made the point that the 1969 Vienna Convention covered that area exhaustively. Conclusion (4) referred to a predominant feature of international case law, namely the principle of harmonization. Whenever courts or tribunals came up against a problem that appeared to be one of normative conflict, they attempted, first of all, to read the provisions as being compatible with each other; and the Study Group endorsed that process.

86. Conclusion (5) stated and expanded on the principle *lex specialis derogat legi generali*. Conclusion (6) noted that the presumption expressed by the maxim did not apply automatically, but depended on the context.
Conclusion (7) explained why the presumption existed in the first place, the answer being that special law was more concrete and thus gave easier access to the intention of the parties. It also took better account of the features of the situation in which it was to be applied. Conclusion (9) set out the principle that general law was not automatically extinguished by the application of the special law but remained in the background. The example given was that of the Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*, in which human rights law remained in the background to the application of the law of armed conflict, the *lex specialis* in that case. Conclusion (10) listed four situations in which *lex specialis* might be inappropriate.

87. Conclusions 11 to 16 covered special (self-contained) regimes, emphasizing the fact that, however “self-contained” a regime was, it was always linked with general international law in various ways. He drew particular attention to conclusion (12), which had a didactic purpose: it pointed out that international lawyers gave the term “self-contained regime” three different meanings. The first was its definition *stricto sensu*, used by the Commission in the draft articles on responsibility of States for internationally wrongful acts.351 The non-compliance mechanism under the Montreal Protocol on Substances that Deplete the Ozone Layer, referred to earlier, was an example of such a regime. The term was, however, also often used in a wider sense, meaning a set of rules dealing with a particular subject matter. In the very first case heard by the PCIJ, the *SS “Wimbledon”* case, the Court had characterized the regime of the Kiel Canal as being a self-contained regime in respect both of its primary and of its secondary rules: in other words, by reference both to the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) and to the general law on navigable waterways. Thirdly, the term might denominate all the rules and principles regulating certain problem areas, such as “law of the sea”, “humanitarian law”, “human rights law”, “environmental law” or “trade law”.

88. Conclusion 17 to 23 dealt with article 31, paragraph (c), of the 1969 Vienna Convention, which required the interpreter of a treaty to integrate it into the system of international law, as defined in the Study Group’s conclusion (1). Conclusion (18) defined interpretation as integration in the system. Conclusions (19) to (21) dealt with different aspects of such systemic integration. Conclusion (19) drew attention to two presumptions: first, that, in interpreting a treaty, the parties always referred to customary international law and general principles of law when they had not specifically opted out from that position. The presumption in question was based on the *Georges Pinson* case and the practice of the WTO Appellate Body, as well as on legal reasoning. The second presumption was based on the *Right of passage over Indian Territory*, in which the ICJ had held that, when States entered into treaty obligations, they did not intend to act inconsistently with the generally recognized principles of international law. Both assumptions were merely reformulations of the idea of systemic integration. Conclusion (20) concerned the way in which treaty obligations were integrated with custom and general principles of law. Conclusion (21) dealt with the application of other treaty rules under article 31, paragraph (c). Conclusions (22) and (23) dealt with inter-temporality, which had been most exhaustively dealt with by the Special Rapporteurs during the *travaux préparatoires* of the 1969 Vienna Convention, in the course of which the idea of systemic integration had never been questioned by the Commission, although different formulations of the provision had been put forward. Conclusions (22) and (23) related to the classic approach to dealing with the problem.

89. In view of the late hour, the Chairperson of the Study Group would complete his presentation at the Commission’s next meeting.

*The meeting rose at 1.05 p.m.*

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**2902nd MEETING**

*Friday, 28 July 2006, at 10 a.m.*

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabutsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Mottaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.


[Agenda item 11]

**REPOR**

**REPORT OF THE STUDY GROUP (concluded)**

1. Mr. KOSKENNIEMI (Chairperson of the Study Group on fragmentation of international law), continuing with his introduction of the report of the Study Group (A/CN.4/L.702), outlined conclusions 24 to 30, which dealt with conflicts between successive norms. Conclusion (24) reproduced the principle laid down in article 30 of the 1969 Vienna Convention, according to which, in the event of a conflict between successive norms, the later law superseded the earlier law. Conclusion (25) identified the limits of that principle and indicated that there was no general rule that could resolve conflicts when a State was a party to two incompatible treaties. It referred the reader to conclusions (26) and (27), which contained some innovative components and cited in general terms cases when the *lex posterior* principle did not automatically apply. Conclusion (26) started out by saying that the *lex posterior* principle was at its strongest with respect to conflicts between successive norms that formed part of the

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351 See footnote 8 above.
same regime. On the other hand, it could not be deemed to apply when successive treaties were in different regimes. In such cases, States bound by the treaty obligations should try instead to implement them in accordance with the principle of harmonization. The most important part of conclusion (26) was the final sentence, which stated that the substantive rights of treaty parties or third party beneficiaries should not be undermined by States in applying the lex posterior principle. Conclusion (27) indicated that, like the lex specialis presumption in conclusion (10), the lex posterior presumption did not always apply with respect to certain treaty provisions.

2. Conclusion (28) dealt with the settlement of disputes within and across regimes and emphasized the need for appropriate means of dispute settlement to be available. Its most significant contribution was that when the conflict concerned provisions in treaties that were not part of the same regime, the parties should pay special attention to the independence of the means of dispute settlement chosen. Conclusion (29) concerning inter se agreements, which were also covered by article 41 of the 1969 Vienna Convention, stated that such agreements were acceptable if they facilitated the more effective implementation of the treaty. Conclusion (30) emphasized the need for conflict clauses to be as specific as possible, something that was all the more important since practice showed that such clauses were often obscure.

3. Referring to conclusions 31 to 42 concerning hierarchy in international law: jus cogens, obligations erga omnes and Article 103 of the Charter of the United Nations, he noted, with regard to conclusion (31), that the norms of international law were not exactly in a formal hierarchical relationship; the ICJ sometimes used fairly informal language when referring to that relationship. Conclusion (32) reproduced the provisions of article 53 of the 1969 Vienna Convention relating to jus cogens and conclusion (33) outlined the content of jus cogens by reproducing the commentary to articles 26 and 40 of the draft articles on State responsibility. Conclusion (34) elucidated the meaning of Article 103 of the Charter of the United Nations and conclusion (35) emphasized that the scope of that article extended to binding decisions made by United Nations organs such as the Security Council. Conclusion (36) simply recalled that the Charter of the United Nations itself enjoyed a special character—on which it had not been deemed necessary to elaborate.

4. As to conclusion (37), he said the Study Group had clearly indicated that obligations erga omnes, strictly speaking, were characterized, not by a hierarchical relationship, but by the scope of their applicability: the Commission had decided that the Study Group should view obligations erga omnes in that light. When conclusions (37) to (39) were read together, they showed that obligations erga omnes took two forms in international practice. Conclusion (37) set out the definition of obligations erga omnes adopted by the Commission, namely, obligations whose breach concerned the international community as a whole, with every State being able to invoke the responsibility of the State violating such obligations. However, that conception of the obligations emerged very rarely in international practice, doctrine and case law. That was why conclusion (39) outlined other approaches to the concept of obligations erga omnes, namely obligations erga omnes partes. The conclusion also explained that issues of territorial status had frequently been addressed in erga omnes terms. Conclusion (38) indicated that while all obligations established by jus cogens norms had the character of obligations erga omnes, the reverse was not necessarily true. The category of obligations erga omnes was broader than that of jus cogens norms, hence the reference in conclusion (38) to the existence of two categories of obligations erga omnes that could not be included among jus cogens norms, namely, obligations under the principles and rules concerning the basic rights of the human person and obligations relating to the global commons.

5. The wording of conclusion (40) was a compromise among a number of viewpoints expressed by members of the Commission on the relationship between jus cogens and obligations under the Charter of the United Nations. Conclusion (41) stated that a rule conflicting with a norm of jus cogens became ipso facto void, while a rule conflicting with Article 103 of the Charter of the United Nations became inapplicable as a result of such conflict. Lastly, conclusion (42) reproduced the principle of harmonization laid out in conclusion (4), reformulating it to apply to the case of conflict between norms of international law, one of which was hierarchically superior to another. In such a case, the inferior norm should be interpreted in a manner consistent with the superior norm.

6. The conclusions reached by the Study Group concerned fundamental aspects of international law and were not in the nature of norms. They were intended to fuel the thinking on international law of academics, diplomats and, more generally, the United Nations community. The members of the Study Group suggested that the Commission should take note of the work it had done and endorse the conclusions it had reached. As to what should be done with the study contained in document A/CN.4/L.682 and Corr.1, on the one hand, and the conclusions, on the other, the members of the Study Group had put forward two ideas. The Sixth Committee could adopt a short resolution to which either the 42 conclusions or the report of the Study Group could be annexed, or else, in the general resolution on the work of the International Law Commission, it could take note of the work done by the Study Group, stressing the need to disseminate it broadly in academic and diplomatic circles.

7. Mr. ECONOMIDES explained that, as a member of the Study Group on fragmentation of international law, he obviously endorsed its work as a whole, even though he found some of its conclusions to be somewhat unsatisfactory. He drew the Commission’s attention to a written proposal on the distinction between positive fragmentation and negative fragmentation which he had submitted to the Study Group on 11 July 2006, but which had not been given sufficient consideration owing to lack of time. He thought it would be unfortunate for the Study Group not to take account of the distinction,
which was made quite frequently in the literature and had proved quite useful in practice. Before defining the difference between positive and negative fragmentation, it was necessary to define fragmentation of international law. That phenomenon must not be confused with the simple development of a treaty rule. Instead it constituted the modification of an initial treaty rule by a new and quite different rule that applied in parallel to the first, but in a restrictive fashion. Fragmentation thus gave rise to specific derogations that were positive or negative in nature.

8. Positive fragmentation generally contributed to the strengthening of the international rule and, consequently, of international law. The same was true of modifications that confirmed or clarified the rule, made it more specific or developed it through the addition of new, and in principle enriching, elements. Positive fragmentation facilitated application of the treaty rule and ultimately served the purpose of the treaty better and more effectively. For example, when a simple international obligation of means in connection with environmental protection was elevated to the status of an obligation of result, that was obviously a case of positive fragmentation. In contrast, negative fragmentation generally weakened the treaty rule by excluding its application in certain cases, by limiting its scope or by lowering the level of protection it provided. While positive fragmentation gave a “plus” to the treaty rule and worked in the right direction, namely, in the sense of the object and purpose of the treaty, negative fragmentation went in the opposite sense, as it aimed to exclude the application of, limit or weaken the rule or one of its elements. In such a case, it was a “minus” that predominated. The PCIJ, in its 1928 judgment in the Rights of Minorities in Upper Silesia (Minority Schools) case, had made a clear distinction between positive and negative derogations.

9. Of the legal techniques within the law of treaties that had the effect of creating derogations, agreements inter se and lex specialis could work both ways and result in positive or negative fragmentation depending on their content, whereas reservations to treaties and the European Union’s “disconnection clauses” operated exclusively in the direction of negative fragmentation. One point that all the techniques had in common was that they were based on special regimes that were by definition derogable and in principle took priority over the treaty provisions that they modified.

10. In a document specifically on fragmentation of international law, the Study Group and the Commission behind it could not ignore or fail to take sufficiently into account the distinction between positive and negative fragmentation, a distinction that was indisputably of practical interest and applicability. In order to be of some practical use and also to reflect the role played by the Commission, the Study Group’s document must contain a recommendation on the distinction between positive and negative fragmentation that might be worded to read: “It is clear that States should encourage positive fragmentation, which is generally beneficial to international law, and discourage, as far as is possible, negative fragmentation, which has the opposite effect. In order to achieve this, States must examine the compatibility with the object and purpose of the treaty concerned of any derogation proposed that has a negative effect”. That text or similar wording could be inserted, following a short introduction of the subject, after paragraph 9 of the report of the Study Group.

11. The CHAIRPERSON drew attention to paragraph 9 of document A/CN.4/L.702 and asked Mr. Economides whether the first sentence of the paragraph did not meet his concerns.

12. Mr. ECONOMIDES said that paragraph 9 contained a few scattered references to the positive and negative aspects of fragmentation of international law, but did not systematically or clearly explicate the problem, hence his proposal to add a paragraph 9 bis to follow paragraph 9.

13. Mr. MANSFIELD, supported by Mr. GALICKI, said the concerns expressed by Mr. Economides were understandable, but the viewpoint he had outlined had been discussed at length in the Study Group, including during its preparation of document A/CN.4/L.702. No member of the Study Group was completely satisfied with all aspects of that document, but it expressed a consensus. It would therefore be gratifying if Mr. Economides would not press for the inclusion of the addition he had proposed.

14. Mr. KATEKA, referring to what was to be done with document A/CN.4/L.702, said that it would be difficult for the Commission to endorse the conclusions contained therein before it had given substantive consideration to the report itself (A/CN.4/L.682 and Corr.1), which was not available in all languages. It should therefore simply take note of the document.

15. Mr. MOMTAZ, expressing his admiration for the Chairperson of the Study Group, all the Study Group’s members and the remarkable work they had done, said that the 42 conclusions contained in the report would be of enormous value to diplomats, as well as to academics. On a minor point, it seemed to him that the reference in the first footnote to conclusion (38) to the prohibition of torture as an erga omnes obligation in the Furundzija case was wrong: as he recalled it, the judgement in that case referred to jus cogens.

16. As to the procedure to be followed, he endorsed the proposals made by the Chairperson of the Study Group.

17. Mr. KOSKENNIELMI (Chairperson of the Study Group on Fragmentation of International Law) said it was entirely possible that the judgement cited referred both to an erga omnes obligation and to jus cogens. He would do the necessary checking in consultation with Mr. Montaz and correct the footnote accordingly.

18. Ms. ESCARAMEIA, referring to the proposal by Mr. Economides, said that his concerns could perhaps be allayed by the inclusion of a footnote to paragraph 9 citing the 1928 judgment of the PCIJ in the case concerning Rights of Minorities in Upper Silesia (Minority Schools) and indicating that, in that case, the Court had made a distinction between the positive and negative aspects of fragmentation of international law.
19. With regard to the report under consideration, she shared the admiration already expressed and commended the Chairperson of the Study Group on the work done. In order to do justice to that work, the Commission should recommend that the General Assembly adopt a brief resolution to which the report of the Study Group would be annexed.

20. Mr. ECONOMIDES said that, in a spirit of compromise, he would be satisfied with a footnote citing the judgment of the PCIJ and briefly summarizing his proposal.

21. Mr. KOSKENNIEMI (Chairperson of the Study Group on fragmentation of international law), referring to the proposal by Mr. Economides, said that the report of the Study Group had been adopted by consensus, a consensus joined by Mr. Economides himself in exchange for an amendment to paragraph 9. He was therefore surprised that, at the present stage, Mr. Economides was proposing that the report should be amended.

22. Mr. PELLET said that, except where a factual error had been made, the report of the Study Group should be left as it was.

23. Mr. ECONOMIDES, speaking on a point of order, said that he withdrew his proposal.

24. Mr. PELLET said that the results of the work of the Study Group on fragmentation of international law were truly impressive, but he was chagrined by the translation into French of the report (A/CN.4/L.702), which contained a number of egregious errors that must be corrected. For example, in conclusions (9) and (10), the word “law” was translated as “loi”. On substance, he welcomed the fact that the Study Group had adopted a truly comprehensive approach, while being pragmatic and remaining neutral. It had been right to position itself “beyond good and evil” and to consider the fragmentation of international law as a fact of contemporary international law, without passing judgement. Any distinction between positive and negative aspects of that fragmentation was necessarily subjective and essentially political. The conclusions adopted by the Study Group and reproduced in document A/CN.4/L.702 were extremely interesting, even if some of them stated the obvious—but it could hardly have been otherwise.

25. Nevertheless, he disagreed with the Study Group on some points. For example, conclusion (10) on particular types of general law seemed to be missing a major point, since the Study Group failed to mention the law specific to international organizations. He found the last sentence in conclusion (28) to be incomprehensible and the explanation given by the Chairperson of the Study Group had only increased his confusion. Did the sentence refer to the situation that had arisen in the Southern Bluefin Tuna Cases? The first footnote to conclusion (31) was badly placed. The problem was not one of hierarchy and the means for the determination of rules of law were not the same as the means for the formation of rules of law.

26. The first sentence in conclusion (34) was worded strangely: the problem was one of sources and not of rules. The Charter of the United Nations placed itself in a superior position to other treaties. That confusion between rules and sources was also to be found in other conclusions, whereas it would have been extremely useful to distinguish between the two.

27. The explanations in conclusions (37) to (39) were very welcome, as it was important to eliminate the confusion between erga omnes rules and rules of jus cogens that had originated in the Barcelona Traction case, doctrine having wrongly followed the lead of the ICJ. The explanations were in the wrong place, however. Jus cogens involved a problem of hierarchy, whereas obligations erga omnes gave rise to a problem of the scope of the rule. Moreover, the two examples given at the end of conclusion (38) were not very illuminating, since the norms in question could claim to form part of jus cogens. The Study Group could, for example, have referred to the right of innocent passage, which was without doubt an obligation erga omnes and not one of jus cogens.

28. As to what should be done next with the report of the Study Group, the Commission could either endorse it or take note of it, the latter solution having the advantage of not polarizing the members of the Commission. He was prepared to endorse it and believed it would be illogical for the Commission not to do so while requesting the General Assembly to annex it to one of its resolutions. In any event, the outstanding work done by the Study Group seemed to him to be the start of what he had always ardently desired, namely, a restatement of public international law by the International Law Commission. In addition to its usual work, the Commission must embark on a long-term undertaking and the document under consideration seemed to be a perfect example of the first chapter of a future restatement.

29. Mr. MELESCANU said that the Study Group’s conclusions were exceptionally important from the practical and theoretical standpoints. Its work was entirely based on the philosophy of the harmonization of the various systems and regimes of public international law. Without making any value judgement, the Study Group had endeavoured to understand the problem of fragmentation and how it should be dealt with to ensure that international law truly served its purpose.

30. He encouraged the members of the Commission to look closely at the conclusions he saw as crucial: (4) and (42), on hierarchy of norms and the principle of harmonization. The Commission should endorse the whole set of conclusions or at least take note of them with satisfaction, if some of its members had reservations. The General Assembly should do the same, in a separate resolution rather than in the general one in which it took note of the work of the Commission. Document A/CN.4/L.682 and Corr.1 deserved to be mentioned in the report of the Commission to the General Assembly and disseminated, for example, on the Commission’s website.

31. Mr. DAOUDI pointed out that the reference in the second footnote to conclusion (38) to common article 1 of the 1949 Geneva Conventions should appear in one of the two footnotes to conclusion (37). That example had been cited in the context of obligations erga omnes which
gave all States the right to ensure respect for the rule. He requested that the mistake be corrected.

32. Mr. KAMTO, referring to Mr. Pellet’s insistence on leaving the report as it stood, said that, when the Commission entrusted a study to a study group, it had to leave itself room to assess the resulting document before adopting it. In the footnote to paragraph 7 of its report, the Study Group cited a number of “particularly useful” works in the literature, suggesting that others were less useful, although many shed just as much light on the question of fragmentation. For example, under conclusion (1) (International law as a legal system), a major work on the issue had escaped mention: the article by Jean Combacau entitled “Droit international: bric-à-brac ou système?” 354 At the end of that conclusion, it was stated that the validity of norms could “date back to earlier or later moments in time”. He wondered whether such a temporal distinction was necessary and, indeed, whether there was such a thing in international law as validity ne varietur. The concept of validity should be viewed in relation to jus cogens, since the emergence of a norm of jus cogens could invalidate a norm previously considered valid.

33. Lastly, he suspected that many of the questions raised were the result of the fact that the Study Group had neither defined the concept of fragmentation, if only in intellectual terms and in relation to the literature, nor explained what the Commission meant by fragmentation for the purposes of its work.

34. Mr. KEMICHA said he welcomed the fact that the Commission’s work on fragmentation of international law had yielded tangible results, something which had not been a foregone conclusion given the fairly abstract nature of the topic. He thought the Commission should not only take note of the report, but also state that it was of excellent quality, in the hopes that the General Assembly would do the same. Mr. Pellet’s suggestion about viewing the work as the cornerstone of a restatement of international law, an ambitious but stimulating project, was certainly worth considering.

35. The CHAIRPERSON suggested that, based on the general tendency of the comments made, the Commission should take note of the conclusions set out in the report of the Study Group and leave it to the Sixth Committee to decide how to handle the report.

It was so decided.

The obligation to extradite or prosecute (aut dedere aut judicare) (continued) (A/CN.4/571)

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (continued)

36. Mr. FOMBA said that three basic concepts lay at the heart of the topic: obligation, extradition and prosecution. Mr. Melescanu had suggested that a principle was involved, not an obligation, but the very title of the topic contradicted that view. Mr. Pellet had brought in the concept of “right”, as in diplomatic protection, but those were two entirely different matters: the law relating to diplomatic protection and criminal law, which required a more rigorous approach. Everything depended on what was meant by the concepts he had mentioned: hence, they must be defined, all the more so as their interpretation might give rise to a number of questions. For example, one might ask whether the obligation was absolute or relative, whether it was an obligation of result or of means and whether its legal nature was conventional or customary. He wholeheartedly endorsed the analysis of that point by Mr. Momtaz and Mr. Kamto. It also had to be determined in what way extradition differed from transfer and punishment to an international court according to the principle of complementarity (as with the International Criminal Court) or primacy (as with the international tribunals for the former Yugoslavia and Rwanda). In addition, mention should be made of the transfer of criminal prosecution in the interests of the smooth administration of justice from a requesting State to a requested State under article 21, paragraph 1 of the 1992 ECOWAS Convention on Mutual Assistance in Criminal Matters. One might also ask what the difference was between extradition and transfer of location in which a sentence was served. With regard to prosecution, one could ask what the foundations of jurisdiction to prosecute were or would be and what the links between universal jurisdiction and the obligation to extradite were or would be.

37. The basic premise was that punishment should be imposed for the commission of the most serious acts affecting the international community. The most effective means of doing so was to transfer and punish those responsible for such acts, wherever they might be. It would therefore seem logical to formulate and impose on States a general obligation to prevent impunity: a State that harboured an alleged perpetrator in its territory must prosecute that individual or extradite him if it could not or would not prosecute. But what legal reading should be given to the position of a territorial State: was it obliged to act or simply authorized or invited to do so? In order to answer that question, the following factors should be taken into account: the principle of State sovereignty, to be interpreted in the strict, absolute or relative sense; the constituent elements and degree of gravity of the criminal acts involved; the relevant legal regime, from the point of view of both international law and the domestic law of States; the current status of doctrine, State practice and jurisprudence; and the teleological reasoning criterion and the consequences to be drawn therefrom for the purposes of the codification and progressive development of international law. A thorough analysis of State practice and jurisprudence, both national and international, would enable the Commission better to answer those questions and to determine what final direction the work on the topic should take.

38. Mr. ECONOMIDES said that the Special Rapporteur should take maximum advantage of the draft code of crimes against the peace and security of mankind355 and a number of other documents, such as the very recent reso-


lution of the Institute of International Law on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes. It would be useful for the Secretariat to prepare a document containing such texts and essential information on State practice on the topic under consideration.

39. Contrary to the view expressed in paragraph 55 of the report, he did not see a rule of jus cogens in the principle of aut dedere aut judicare, which was essentially a procedural rule. For the most serious crimes affecting the international community as a whole, it might even be a customary rule — that was a question the Special Rapporteur would have to look into carefully — but for other offences, it was simply a treaty norm.

40. As he had already indicated, he thought the Commission should give precedence to the third option aside from extradition and prosecution, namely, handing over an alleged perpetrator of a serious international crime to an international court such as the International Criminal Court. In his view, that was the best course to follow.

41. Unlike some members, he did not see as unduly ambitious the preliminary plan of action outlined by the Special Rapporteur. Nevertheless, the work should be done in stages, starting with a comprehensive comparative analysis of the relevant provisions, as suggested in paragraph (1) of the plan. The subject of paragraph (7) (content of the obligation) should likewise be given priority. As to the final product (para. 59), it was indeed premature to decide that now, but it would seem useful to work on the basis of draft articles, in line with the Commission’s usual methods. The draft articles should seek to codify and develop constructively State practice concerning the principle of aut dedere aut judicare.

42. Mr. MANSFIELD thanked the Special Rapporteur for his highly stimulating and informative preliminary report, which provided an excellent basis for analysing the topic. He agreed with the idea that the focus of work should be sharply narrowed, but thought that the main point to be kept in mind was that the topic had a direct bearing on domestic criminal law. That was important for two reasons. First, because criminal law, which had direct implications for the liberty of the individual, was in most countries extremely precise as to both substance and procedure and it was interpreted by courts in a very strict manner. Second, because criminal law was primarily based on territorial jurisdiction and the extension of jurisdiction to crimes committed elsewhere usually required a precise modification of existing criminal law. Anyone who had been involved in the negotiation of an extradition treaty knew only too well the enormous amount of time and effort that had to be spent in ensuring that the offences for which extradition could be sought were also offences in the domestic criminal law of the countries concerned. Thus, the essential question could never be simply whether there was a general obligation to extradite or prosecute, but rather whether there was an obligation to extradite or prosecute for a precisely defined crime in precisely defined circumstances. In other words, unless a country’s criminal law allowed extradition or prosecution for a particular international crime, no official of the executive branch, however well intentioned or highly ranked, was likely to have the power to secure that result.

43. Thus, if the Commission decided to examine the question whether there should be an obligation to extradite or prosecute for international crimes not already covered by existing multilateral treaties, including the Rome Statute of the International Criminal Court, it would have to define such crimes very precisely, so that, if they agreed, States could decide what specific modifications they needed to make to their criminal law. The same would be true, however, if the Commission decided to focus on whether there was a customary law obligation on States that were not parties to such treaties to extradite or prosecute for certain international crimes. There again, it would be necessary to define the crimes and circumstances reasonably precisely so that States could modify their criminal law accordingly if they acknowledged that such a customary law obligation existed.

44. For those reasons, he thought that the end product of the Commission’s work would almost certainly need to be cast in the form of draft articles, since it was hard to see that guidelines of a general kind could provide a basis for effective and concerted State action in relation to extradition or prosecution of the alleged perpetrators of particular international crimes. Guidelines could perhaps be helpful in the interpretation of particular terms in existing treaties that were less than clear. It was possible that domestic courts might refer to them if the domestic legislation they were interpreting was unclear and they were seeking the legislative intent. But that was a relatively unlikely situation because considerable efforts would have been made to ensure that the domestic criminal law was clear, even if the international treaty to which it gave effect was less than clear. If there was found to be a real need to clarify some aspects of a treaty, the most effective way forward would be a precisely developed proposal for amendment to the relevant treaty for consideration by the parties.

45. Those comments were perhaps of particular relevance in respect of common law countries in which treaties were not self-executing, but he hoped they would nevertheless be useful for the direction of future work on the topic.


REPORT OF THE DRAFTING COMMITTEE

46. Mr. KOLODKIN (Chairperson of the Drafting Committee), introducing the fifth and final report of the Drafting Committee on responsibility of international organizations, noted that the Drafting Committee had already reported to the plenary Commission during the first part of the session on its work on draft articles 17

356 See footnote 335 above.
to 24. During the second part of the session (2895th meeting, above, para. 66), the plenary had referred to it the remaining draft articles proposed by the Special Rapporteur in the second chapter of his fourth report (A/CN.4/564 and Add.1–2), namely, draft articles 25 to 29 dealing with the responsibility of a State in connection with the act of an international organization. The Drafting Committee had considered the draft articles during two meetings, on 18 and 19 July 2006. He wished to thank the Special Rapporteur, Mr. Gaja, for his helpful explanations and suggestions and the members of the Drafting Committee and other members of the Commission who had participated in the Drafting Committee’s work for their cooperation and valuable contributions.

47. Chapter IV of Part One of the draft articles on responsibility of States for internationally wrongful acts dealt with aid or assistance, direction or control and coercion by one State in the commission by another State of an internationally wrongful act. It did not address such relationships between a State and an international organization, a gap now to be covered by draft articles 25 to 27 on responsibility of international organizations, which generally corresponded to articles 16 to 18 of the draft articles on State responsibility. Draft articles 28 and 29 were unique to the present topic and had no equivalent in the draft on State responsibility. New draft article 30, which had emerged from the Drafting Committee, corresponded to article 19 of the draft articles on State responsibility.

48. Draft article 25 (Aid or assistance by a State in the commission of an internationally wrongful act by an international organization) corresponded to article 16 of the draft articles on State responsibility. The text proposed in the Special Rapporteur’s fourth report had been favourably received in the plenary and the Drafting Committee had therefore retained it without change. Two issues in particular had been raised in plenary. The first concerned the possible deletion of subparagraph (b) on the grounds that the draft article should also cover situations in which a State aided or assisted an international organization in breach of an obligation which bound only the organization. The Drafting Committee had been of the view that subparagraph (b) should be maintained in order to ensure consistency with the corresponding provision in the draft articles on State responsibility, as well as the text of draft article 12 dealing with aid or assistance by an international organization to a State or another international organization in the commission of an internationally wrongful act. The second issue raised in plenary was the need to differentiate between the notions of “aid” and “assistance” in the commission of an internationally wrongful act and the ordinary participation of a member State in the decision-making process of an international organization. Questions had also been raised as to whether aid or assistance could include conduct prior to as well as subsequent to the making of a decision. It had been agreed that the commentary was the proper place to make those clarifications. The Drafting Committee was of course aware that those questions could only be answered definitively by taking into account the relevant context. It had also been agreed that the commentary should make it clear that draft article 25 applied to States whether or not they were members of an international organization.

49. Draft article 26 (Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization) corresponded to article 17 of the draft articles on State responsibility. There had been general agreement in plenary on the text proposed in the Special Rapporteur’s fourth report and the Drafting Committee had therefore retained it without change. The observations made with respect to draft article 25, including the indications concerning the issues that should be addressed in the commentary, applied mutatis mutandis to draft article 26.

50. Draft article 27 (Coercion of an international organization by a State) corresponded to article 18 of the draft articles on State responsibility. The text proposed in the fourth report of the Special Rapporteur had been favourably received in plenary and the Drafting Committee had therefore retained the text without change. Some observations made with respect to draft article 25, including the indications concerning the issues that should be addressed in the commentary, applied mutatis mutandis to draft article 27.

51. Draft article 28 (International responsibility in case of provision of competence to an international organization) had no equivalent in the draft articles on State responsibility. The text proposed by the Special Rapporteur in his fourth report had raised a number of questions in plenary. Most of the concerns had related to paragraph 1, which the Drafting Committee had therefore decided to redraft. Some concerns had related to the scope of the draft article. Some members would have preferred a narrower scope, limiting it to situations in which a State acted in bad faith or committed an abuse of rights. Other speakers, both in plenary and in the Drafting Committee, considered that the requirement of establishing intention on the part of a State was too high and not always possible to meet. Fairness to injured parties would require a formulation that would not condition the application of the draft article to the proof of intention and bad faith. The Drafting Committee had favoured that approach. It had also followed the suggestion made in plenary to use the term “circumvents” instead of the phrase “avoids compliance” that appeared in draft article 28, paragraph 1 (a) proposed by the Special Rapporteur. The commentary would clarify the point that the notion of “circumvention” did not necessarily imply a specific intention or bad faith on the part of the State concerned. There had been other comments in plenary that, while the notion of “transfer” of functions was appropriate for certain types of organizations, namely, integration organizations, it was misleading if applied to international organizations in general. The Drafting Committee had accordingly replaced the word “transferring” with “providing” in order to cover also cases in which an organization was entrusted with competences that had not been “transferred” to it by member States, which themselves did not possess them, but had empowered the organization with them. The commentary should adequately reflect that point.

52. Paragraph 1, as redrafted, contained three new elements. First, a State member of an international organization must circumvent an international obligation. Secondly, the circumvention must be the result of that organization having been empowered with, or having had transferred to it, a certain competence. Thirdly, if the act that had been committed by the international organization had been committed by that State, it would have constituted a breach of an international obligation of that State. The third element related back to the first, but that had been necessary in order to make the paragraph, the sequence of events and the causal relationship clear. Thus, an act committed by an international organization might not constitute a wrongful act for that organization, even when it was a wrongful act of that State member of the organization, a point that had been further clarified in paragraph 2.

53. The text of paragraph 2 was the same as proposed by the Special Rapporteur. The Drafting Committee had considered the view expressed by some members in plenary that the paragraph should be deleted because only the State, and not the international organization, would be responsible in the situations dealt with in the draft article. The Drafting Committee had recognized that draft article 28 was mainly intended to cover situations in which the act might not be wrongful for the international organization, for example, because the latter was not bound by the obligation in question. It had nevertheless considered that paragraph 2 should be retained in order to make it clear that the State concerned was responsible whether or not the act was internationally wrongful for the organization.

54. Lastly, in view of the specificities of that draft article and of the new wording adopted, the Committee had changed the title, which now read “International responsibility in case of provision of competence to an international organization”.

55. The Committee had redrafted draft article 29 (Responsibility of a State member of an international organization for the internationally wrongful act of that organization) to take account of the comments and suggestions made in plenary. The new text comprised two paragraphs.

56. In plenary, some members of the Commission had questioned the soundness of the negative formulation of the text proposed by the Special Rapporteur. The Drafting Committee had discussed at length the possible implications of the choice between a negative and a positive formulation and had finally decided to retain the positive formulation, which had been favoured by several members in plenary and was in line with the general approach taken in the draft articles on State responsibility. The majority of members of the Drafting Committee had considered that the choice between the two formulations was only a question of emphasis and that the positive formulation of the chapeau was more appropriate. Under the circumstances, it had also been suggested that the introductory words of paragraph 1 should be modified by introducing a “without prejudice” clause referring explicitly to draft articles 25 to 28. The Drafting Committee had decided to retain subparagraphs (a) and (b) of the text proposed by the Special Rapporteur, which dealt, respectively, with the acceptance by a State of international responsibility and with the situation in which a State had led the injured party to rely on its responsibility. The wording of subparagraph (a) had been shortened and simplified. The commentary would indicate that the acceptance of responsibility by a member State could occur prior or subsequently to the commission of the internationally wrongful act by the international organization and that, while such acceptance could be explicit or implicit, it needed to have effect vis-à-vis a third party and not only vis-à-vis the international organization. As to subparagraph (b), the Drafting Committee had been of the view that the conduct on the part of the State that had led to reliance by the injured party on its responsibility was not necessarily equivalent to implicit acceptance. Although the expression “injured party” might be perceived—at least in French—as giving the impression that an agreement existed, the Drafting Committee had in the end retained that wording, on the understanding that the commentary would clarify that it could refer to a State, an international organization or another person or entity. Based on comments made in plenary, the Drafting Committee had added a second paragraph that dealt with the character of the responsibility of a State under the draft article and provided that the responsibility of a State in accordance with paragraph 1 was presumed to be subsidiary. The commentary would explain that the State concerned could incur joint and several responsibility, depending on the nature and content of its acceptance or on the circumstances surrounding the conduct by which the State had led the injured party to rely on its responsibility. The title of the draft article had been retained with a minor drafting change.

57. Draft article 30 (Effect of this chapter) was the same as proposed by the Special Rapporteur, the “without prejudice” clause that the Commission had requested the Drafting Committee to draft if it deemed it necessary or useful. The text followed, mutatis mutandis, the wording of draft article 19 on State responsibility. However, the reference to the responsibility of “any other State” had been deleted, since the topic did not deal with State responsibility and the question of a State being responsible for an act of an international organization was addressed only in the chapter concerned. The draft article’s function was to make it clear that the chapter dealt with the responsibility of a State for an act of an international organization and was without prejudice to the responsibility of the international organization that committed the act in question or to the responsibility of any other international organization, which might be addressed in other provisions on the topic.

58. The CHAIRPERSON invited the Commission to consider chapter (x) (Responsibility of a State in connection with the act of an international organization) of the draft articles on responsibility of international organizations (A/CN.4/L.687/Add.1 and Corr.1) article by article.

Article 25 (Aid or assistance by a State in the commission of an internationally wrongful act by an international organization)

Draft article 25 was adopted.

538 Ibid., p. 27.
Article 26  (Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization)

Draft article 26 was adopted.

Article 27  (Coercion of an international organization by a State)

Draft article 27 was adopted.

Article 28  (International responsibility in case of provision of competence to an international organization)

59. The CHAIRPERSON, speaking as a member of the Commission, said that the word “attribution” ("provision") seemed inappropriate, as it failed to correspond to the idea of "transfer of competence" referred to during the consideration of the draft article.

60. Mr. KOLODKIN (Chairperson of the Drafting Committee) recalled the explanations he had given during his introduction of the report of the Drafting Committee with regard to the replacement of the word “transfer” by the word "provision".

Draft article 28 was adopted.

Article 29  (Responsibility of a State member of an international organization for the internationally wrongful act of that organization)

61. Mr. PELLET said that he had participated in the work of the Drafting Committee on draft article 29 and, although he did not oppose its adoption, he wished his reservations to be duly recorded. He was extremely pleased with the addition of paragraph 2, but thought that the commentary should state that the presumption in question was rebuttable, since there were cases when State responsibility could be joint or several. He found the wording of paragraph 1 to be dangerous, as it left the impression that there could be other cases in which a member State could be held responsible for an internationally wrongful act and it posed a grave threat to the security of legal relations. He would have greatly preferred either that the Commission should retain the initial negative formulation found in paragraph 96 of the Special Rapporteur’s fourth report or that paragraph 96 should read: “A member State … is responsible … only in the case when …”.

The meeting rose at 1 p.m.

2903rd MEETING

Wednesday, 2 August 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Montaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

The obligation to extradite or prosecute (aut dedere aut judicare) (concluded) (A/CN.4/571)

[Agenda item 10]

Preliminary report of the Special Rapporteur (concluded)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on the preliminary report on the obligation to extradite or prosecute (aut dedere aut judicare).

2. Mr. GALICKI (Special Rapporteur) expressed his gratitude to members for their constructive and friendly criticism of his report, which, as previously noted, amounted to no more than a very preliminary set of initial observations concerning the substance of the topic, drawing attention to the most important points requiring further consideration, and including a general road map for the Commission’s future work. He had deliberately raised a large number of potential areas of difficulty, with a view to obtaining suggestions for solutions both from the Commission and from the Sixth Committee. The members of the Commission had duly taken into account the preliminary nature of the report and their opinions would be of great value in the preparation of his next report, in which draft rules on the concept, structure and operation of the obligation aut dedere aut judicare would be gradually formulated.

3. A great variety of opinions had been expressed during the debate, relating to both substance and form. Some speakers had suggested that the title of the topic should be amended—by, for example, replacing the word “obligation” by the word “principle”—but, at least for the time being, the existing title should, in his view, be retained. The concept of an “obligation” aut dedere aut judicare seemed to provide a safer starting point for further analysis than would the concept of a “principle”. That did not, of course, exclude the possibility—even perhaps the necessity, as suggested by some members—of considering the parallel question of a countervailing right of States to extradite or prosecute.

4. There had been fairly wide agreement that the scope of the work on the topic should be restricted, as far as possible, to the main issues directly relating to the obligation to extradite or prosecute and to the principal elements of that obligation, namely “dedere” and “judicare”. He shared that view, especially with regard to the need for a very careful treatment of the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction, the distinction between which should be clearly drawn. In that connection, the definitions of universal jurisdiction and of the aut dedere aut judicare rule cited in the report should be treated as illustrative of one possible approach, and did not
necessarily reflect his own preferences. More detailed analysis of the obligation seemed necessary, especially with regard to the “judicare” component, where the extent of the obligation of States to prosecute could be understood in different ways, even on the basis of existing treaties. It would need to be established how far international and domestic legislation and practice extended the application of that obligation. The “dedere” component of the obligation might also cause difficulty in relation to a possibility, mentioned by him although questioned by one member, of extending the substantive scope of extradition to include the enforcement of foreign sentences. Such possibilities and procedures did, however, exist under some internal and international legislation.

5. He concurred with the observation that, on the question of the crimes covered by the obligation aut dedere aut judicare, some traditional limitations on extradition might make the process difficult, or even impossible, to apply. The question would require careful consideration. He shared the view, however, that the Commission should not consider the technical aspects of extradition law but should concentrate on the conditions for triggering the obligation. The so-called “triple alternative” that he had posited in connection with the competence of international criminal tribunals should, as noted by some members, be treated very carefully and considered only within limited parameters. The distinction between extradition and surrender of suspects to the International Criminal Court should be clearly emphasized.

6. As for the final form that the Commission’s work should take, a majority of members had been of the view that the most suitable format would probably be draft articles, although it was still too soon to take a decision on the matter. On the basis of that view, however, he would, in subsequent reports, gradually move in the direction of drafting rules on the concept, structure and operation of the obligation aut dedere aut judicare.

7. Another important problem, which had been raised by practically every speaker and was crucial to the outcome of the Commission’s work, related to the legal background of the obligation. Members had been cautious in their response to the question raised in the report as to whether the legal source of the obligation should be restricted to the treaties that bound the States concerned or whether it should be extended to appropriate customary norms or general principles of law. While members had generally recognized the treaty basis for such an obligation, some doubts had been expressed as to whether the obligation also existed under customary law.

8. One member had been critical of the separate treatment in the text of international custom and general principles of law, on the one hand, and national legislation and practice of States, on the other, in connection with the sources of the obligation to extradite and prosecute. That approach had been adopted with the aim of stressing the importance of the legislative, executive and judicial practice of States in formulating the obligation in question. Moreover, as another speaker had mentioned, national laws and practice filled some gaps left by international legislation. Another speaker had recalled that the topic was directly linked with domestic criminal law systems. He fully concurred with the latter two observations, which did not in any way conflict with the fact that domestic practice was essential to the existence of customary rules of international law, in accordance with Article 38 of the Statute of the International Court of Justice. It had been impossible to establish a full range of examples of State practice in the preliminary report, but it would undoubtedly be necessary to do so later. He fully agreed that a thorough analysis of the topic should take far more account of international and national judicial decisions than the report had done. He assured the Commission that the limited number of examples of such decisions in the report was owing to its preliminary nature and was not intended to play down their importance. The same applied to certain shortcomings in the bibliography; he had not, at that preliminary stage, sought to make an exhaustive compilation of sources. The next report, however, would be based on a wider review of both jurisprudence and doctrine.

9. As for recognizing, at least for the time being, the existence of a generally binding customary obligation to extradite or prosecute that would be applicable to all offences under criminal law, an overwhelming majority of members of the Commission had expressed reservations on that score. Most were, however, supportive of a more selective approach, namely of identifying certain categories of crime, for which the idea of universal jurisdiction, as well as the principle aut dedere aut judicare, had already received more general recognition by States. A number of terms were used for such crimes in international practice, such as “international crimes”, “grave international crimes”, “crimes under international law”, “crimes of international concern” or “crimes against humanity”. In view of that diversification of crimes and offences, he agreed that it would be useful to identify categories of crime that could, through treaty or custom, be considered as a basis for the possible application of the obligation to extradite or prosecute. It would seem easier and more effective to formulate legal rules relating to such selected crimes by way of codification or progressive development of international law than to apply the obligation to all crimes and offences. That would not, of course, preclude the possibility of developing more general rules or principles at a later stage.

10. A majority of speakers had agreed with the suggestion in paragraph 61, item (10) of the preliminary plan of action in the report that the Commission should also analyse the relationship between the obligation to extradite or prosecute and other principles of international law. There had, however, been significant differences of opinion as to the substantive scope of the principles to be taken into account. It seemed to be generally agreed that the principle of human rights protection should be borne in mind throughout the Commission’s work on the topic and that more attention should be paid to human rights law. He concurred with those suggestions and with the more general suggestion that the elaboration of possible rules should be restricted to those of a secondary nature. He was grateful for the many friendly warnings on possible pitfalls awaiting him and hoped to be able to avoid them with the help of other members of the Commission. He also welcomed the support expressed for his proposal that he should address a written request to Governments for
information concerning their practice with regard to the obligation aut dedere aut judicare, especially in respect of more recent practice. The questions raised in paragraph 59 of the report could be included in chapter III of the Commission’s report on its fifty-eighth session, which traditionally dealt with specific issues on which comments would be of particular interest to the Commission.

Draft report of the International Law Commission on the work of its fifty-eighth session

11. The CHAIRPERSON invited the Rapporteur to introduce the draft report of the Commission on the work of its fifty-eighth session.

12. Ms. XUE (Rapporteur) said that the draft report comprised 13 chapters, the first three of which were introductory while the remainder addressed substantive matters. The report on the work of the fifty-eighth session would be considerably longer than was usual, owing to the fact that the Commission had completed its consideration of a number of topics on its agenda.

13. The CHAIRPERSON invited the Commission to consider chapter VI of the draft report.

Chapter VI. Shared natural resources (A/CN.4/L.694 and Add.1 and Corr.1)

A. Introduction (A/CN.4/L.694)

B. Consideration of the topic at the present session

C. Text of the draft articles on the law of transboundary aquifers adopted by the Commission on first reading

1. Text of the draft articles

2. Text of the draft articles with commentaries thereto

14. Mr. YAMADA (Special Rapporteur) said that document A/CN.4/L.694/Add.1/Corr.1 contained linguistic and technical corrections to document A/CN.4/L.694/Add.1. Two further amendments, however, should be made to that corrected text. First, in paragraph (2) of the general commentary, the proposed new version of the fifth sentence should be amended by deleting the final phrase “if such work were to be undertaken”. The sentence would thus end with the words “on oil and natural gas”. Second, an additional phrase should be inserted at the beginning of the sentence to be added at the end of the same paragraph; the sentence would thus read: “One member held the view that, when that second reading is completed, the decision would be taken whether to proceed further with respect to oil and natural gas.”

15. The CHAIRPERSON, referring to paragraph 1 of section C in document A/CN.4/L.694/Add.1, noted that the text of the draft articles had already been adopted on first reading.

16. Mr. PELLET said that, in the French text of the opening sentence of paragraph 1, the phrase “le texte du projet d’articles adopté” implied that the draft was complete. If, as was his understanding, that was not the case, the phrase should read “le texte des projets d’article adoptés jusqu’à présent” [the text of those draft articles adopted so far].

17. The CHAIRPERSON, supported by Mr. CANDIOTI, said it was his understanding that there would be no further additions to draft articles 1 to 19, as adopted by the Commission on first reading.

18. Mr. YAMADA (Special Rapporteur) explained that, when the Commission had been requested to include the topic of shared natural resources in its programme of work, it had been widely supposed—although there had been no consensus on the matter—that the topic would cover three categories of natural resources, namely groundwaters, oil and gas. On being appointed Special Rapporteur he had suggested that the Commission should confine its attention to groundwaters. That approach had been approved and the Commission had completed its first reading of draft articles on the law of transboundary aquifers. The commentaries to the draft articles were designed to facilitate Governments’ task of submitting comments and observations, which should then guide the Commission when it proceeded to a second reading of the text.

19. Although any future work on oil and gas would lie within the framework of the topic of shared natural resources, the existence of divergent views within both the Commission and the Sixth Committee made it inadvisable, at the current stage, to debate those aspects of the topic, since any such discussion might hamper the completion of the second reading of the draft articles on the law of transboundary aquifers.

20. Mr. KEMICHA said that, on the one hand the Special Rapporteur was correct in stating that he was presenting a set of draft articles which had been adopted on first reading and that, as such, they constituted a finished product. On the other hand, Mr. Pellet was also correct in pointing out that the Commission had not completed its consideration of the wider topic of shared natural resources. The Special Rapporteur had therefore been right to make it clear in the most recent version of paragraph (2) of the general commentary that one member wished a decision on whether to include oil and natural gas to be taken upon completion of the second reading. In paragraph 1 of section C it might be wise to add the words “on the law of transboundary aquifers” after the words “draft articles”, to underline the fact that the draft articles in question were part of a larger project.

21. Mr. PELLET said he had merely wished to know whether the Commission had finished its work on the draft articles on transboundary aquifers. Since it would appear that it had done so, it would be wise not only to include the wording proposed by Mr. Kemicha, but also to add, in paragraph 2 of section A of the chapter, in document A/CN.4/L.694, the explanation which had just been supplied by the Special Rapporteur. That paragraph should record the fact that the Commission had decided to begin its work on the topic with a study of confined groundwaters, and paragraph 5 of section B should explain that the 19 draft articles adopted on first reading were a complete set of draft articles on the law of transboundary aquifers. It was not immediately obvious to someone who had not been a member of the Drafting Committee or Working Group that the draft articles did not represent a complete set of articles on the whole topic of shared natural resources,
and it would therefore be useful to remind readers that the Commission had split the topic into several parts.

22. The CHAIRPERSON asked Mr. Pellet whether his concerns would be partially allayed if the contents of footnote 1 were incorporated in the main body of the text of section A.

23. Mr. PELLET said that the Commission’s practice with regard to explaining the background to its consideration of a topic varied greatly from one topic to another; sometimes the background was recapitulated in great detail, while at others it was mentioned only cursorily. In the present case, the background was very important and should not merely be consigned to a footnote. Paragraph 5 of section B needed to be recast in order to make it clear that the 19 draft articles constituted a complete set of draft articles on the law on transboundary aquifers.

24. Mr. KEMICHA said it was important to underscore the idea that the draft articles were no more than a first stage and that the Commission’s work on shared natural resources should continue. It should be clearly stated somewhere in the introduction that the Commission had adopted on first reading a first set of draft articles, on the law of transboundary aquifers, so as to allow for the possibility of further work in the future on other kinds of shared natural resources. As it stood, the text suggested that the Commission had completed its consideration of the entire topic.

25. Ms. XUE (Rapporteur) said that a debate over a simple matter was becoming very complicated. Mr. Pellet had suggested that more background information should be included in sections A and B of chapter VI. However, anyone who read the entire text would understand what the position was. As to the question of whether the draft text before the Commission contained a complete set of articles on groundwaters, the answer was in the affirmative as to the substance, but it should also be borne in mind that the Commission had not yet decided whether the draft articles should ultimately take the form of a convention, a set of principles or some other form. If the Commission were to opt for a convention, the draft articles would not be complete, as they would require the addition of final clauses. If the Commission were to choose another form they might already be complete. The reference in paragraph 5 of section B to a set of 19 draft articles made it plain that the Commission had finished the substantive part of its work.

26. Sections A and B of chapter VI clearly reflected the Commission’s work over the previous five years. In paragraph 1 of section C, it might, however, be possible to add, after the words “draft articles” the phrase “on the law of transboundary aquifers”. Mr. Kemicha’s proposal to refer to “a first set” of draft articles would, however, be misleading, as it would imply that a second set of draft articles on transboundary aquifers was to be prepared. The Special Rapporteur had already orally amended document A/CN.4/L.694/Add.1/Corr.1 to make it clear that only one member had expressed the view that, when the second reading was completed, a decision would be taken whether to proceed further with respect to oil and natural gas. The Commission was still waiting for a decision from the Sixth Committee on that question.

27. Mr. KEMICHA, supported by Mr. MOMTAZ, said that paragraphs (1) and (2) of the general commentary to the law of transboundary aquifers, currently contained in document A/CN.4/L.694/Add.1 and Corr.1, should be moved to section A of chapter VI.

28. Ms. ESCARAMEIA said she was in favour of the Special Rapporteur’s amendments to paragraph (2) of the general commentary, but opposed to moving paragraphs (1) and (2) of the general commentary to the introduction. It would be wrong to affirm in the introduction to chapter VI that the Commission had debated whether to proceed further with respect to oil and natural gas. On the contrary, the Working Group had met and had decided unanimously that the Commission had a mandate from the General Assembly to cover all three issues, and that any decision to alter that mandate lay with the General Assembly and not with the Commission.

29. Mr. BAENA SOARES said he endorsed paragraph (2) of the general commentary as amended and corrected by the Special Rapporteur. In his view, the Commission had completed its first reading of the first part of its task. He had been concerned about the conditionality implicit in the original amendment to paragraph (2), which had, however, been eliminated by the Special Rapporteur’s deletion of the words “if such work were to be undertaken”. The addition of the words “One member held the view that” reflected the Working Group’s views much more closely. He personally believed that the Commission should deal with all three aspects of the topic.

30. Mr. KEMICHA said that his original proposal, which had been intended to convey the idea that the Commission should be given a possibility to reflect on the advisability of dealing with oil and natural gas, had been motivated, not by ideological considerations, but by respect for the freedom of decision of the Commission that were shortly to be elected. His present proposal was merely that, in a report which was to be submitted to the General Assembly of the United Nations, it would be logical to place the two paragraphs describing the context of and background to the Commission’s work in the introductory section.

31. Mr. PELLET said that his concern was to ensure that readers of the report would understand the background to the Commission’s deliberations. He had no ulterior motive and no position on the substance of the report. Matters had been straightforward until the Rapporteur had taken the floor. After that they had become extraordinarily complicated. They had been straightforward because all he had been asking was that it should be made plain in the report that the draft text had received only a first reading. For that reason it naturally had no final clauses. There was no basis for asserting that a draft text was incomplete because it lacked final clauses, which were of course a matter for a diplomatic conference. A draft text was complete once the Commission had reached the end of its deliberations on the topic. He therefore insisted that it should be made clear to the reader that the Commission had completed its first reading of the draft articles on transboundary aquifers.
32. Mr. Kemicha’s position was reasonable. It was not clear from a reading of paragraphs 1 and 2 of section A how, having been entrusted with the topic of shared natural resources, the Commission had arrived at the subject of aquifers. The statement in the last sentence of paragraph 2 that “[t]he 2005 Working Group did not complete its work” was completely misleading. It was absolutely essential to add wording along the lines of that contained in footnote 1 explaining that a decision had been taken first to focus on aquifers.

33. Mr. KOLODKin (Chairperson of the Drafting Committee) proposed that the second sentence of paragraph (1) of the general commentary in document A/CN.4/L.694/Add.1, starting with the words “It was generally understood”, should be moved to paragraph 1 of section A, of which it would become the second sentence.

34. The CHAIRPERSON, speaking as a member of the Commission, said that, after the last sentence in paragraph 2 of section A, which read “The 2005 Working Group did not complete its work”, there might be a case for inserting the words “In particular, the Working Group will resume its deliberations on the related questions of oil and natural gas after the adoption of the present draft articles”.

35. Mr. KEMICHA reiterated that he was simply proposing the insertion, after paragraph 1 of section A, of paragraphs (1) and (2) of the general commentary to the draft articles, which explained how the shift of focus from shared natural resources to aquifers had come about.

36. Mr. YAMADA (Special Rapporteur) pointed out that section A, which he had not drafted, was intended only as a very brief account of his appointment as Special Rapporteur and the subsequent proceedings in the plenary, the Drafting Committee and the working groups. To understand what had happened in the Commission, it was necessary to read its reports on the work of its previous sessions. As he had briefly explained in the general commentary, the Commission had started from the understanding that there were three categories of natural resources but that it would focus initially on groundwater as a follow-up to the 1997 Watercourses Convention. That explanation, however, was perhaps rather too lengthy for inclusion in the introduction.

37. Mr. ECONOMIDES proposed that the Secretariat, with the assistance of the Special Rapporteur, should add wording to paragraph 1 explaining that the Commission’s starting point had been the topic of shared natural resources and that it had now completed its work on the subject of aquifers.

38. Ms. XUE (Rapporteur) said that the substance of her remarks was fully reflected in paragraphs (1) to (3) of the general commentary to be found in document A/CN.4/L.694/Add.1, and that she had introduced no new element to complicate the debate. The draft report followed the general pattern of the Commission’s reports: the introductory sections A and B were a simple account of the proceedings, while the background material was readily accessible in document A/CN.4/L.694/Add.1. She urged the Commission to respect the usual format of the report, which should remain unchanged.

39. The CHAIRPERSON said that while it was true that the questions raised were elucidated in the commentary, a single additional sentence simply stating that the topic of aquifers had a number of ramifications would make the point even clearer and fully dispel the concerns expressed by some members. If he heard no objection, he would take it that the Commission wished to request the Secretariat to draft such a sentence for inclusion at the end of paragraph 1 of section A.

It was so decided.

On that understanding, paragraph 1 of document A/CN.4/L.694, as amended, was adopted.

Paragraphs 2 to 4

Paragraphs 2 to 4 were adopted.

Paragraph 5

Subject to the insertion of the relevant date and meeting number, paragraph 5 was adopted.

Paragraph 6

40. The CHAIRPERSON said that the opening phrase should read: “At its 2903rd meeting, on 2 August 2006”.

Paragraph 6, as amended, was adopted.

Sections A, B and C.1 of chapter VI, as amended, were adopted.

C. Text of the draft articles on the law of transboundary aquifers adopted by the Commission on first reading (A/CN.4/L.694/Add.1 and Corr.1)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERE TO

General commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

41. Mr. PELLET pointed out that, as orally corrected by the Special Rapporteur, the sentence to be added gave the impression that all members of the Commission but one were opposed to proceeding further with respect to oil and natural gas, whereas as he understood it the opposite was the case. The sentence should therefore read: “One member thought that it was only when that second reading is completed that the decision would be taken whether to proceed further with respect to oil and natural gas.”

Paragraph (2), as amended by document A/CN.4/L.694/Add.1/Corr.1, by the Special Rapporteur, and by Mr. Pellet, was adopted.

Paragraph (3)

42. Mr. GAJA said he was concerned about the second sentence, which suggested that the draft articles should impose obligations on “third States”. The third sentence made it clear that the reference to the third States concerned States that did not share the transboundary aquifer in question. He accordingly proposed that the two sentences should be combined, to read: “It was decided that, in order to be effective, some draft articles would have to impose obligations on States which do not share the transboundary aquifer in question and, in certain cases, give rights to the latter States towards the States of that aquifer.”

43. Mr. KEMICHA said he greatly preferred the original version of the last sentence of paragraph (4) to the amended version proposed in document A/CN.4/L.694/Add.1/Corr.1.

44. Mr. YAMADA said the original version had given the impression that protection of the transboundary aquifer or aquifer system was a goal to be pursued above all other considerations. The proposed amendment was intended to dispel that erroneous impression.

45. The CHAIRPERSON suggested the formulation “In reaching those conclusions, the Commission dealt in particular with the protection of the transboundary aquifer or aquifer system.”

46. Ms. ESCARAMEIA said that the Chairperson’s compromise proposal merely stated the obvious. It went without saying that the Commission had dealt with the protection of transboundary aquifers, but it had also taken into account policy considerations such as situations of emergency when vital human needs were at stake. She supported the wording proposed by the Special Rapporteur in the corrigendum.

47. Mr. MANSFIELD endorsed Ms. Escarameia’s remarks. The original formulation suggested that protection of transboundary aquifers was the paramount consideration in absolutely all circumstances, which was not necessarily the case. The wording proposed in the corrigendum was a more balanced text.

Paragraph (4), as amended by document A/CN.4/L.694/Add.1/Corr.1 and by Mr. Gaja, was adopted.

Paragraph (5)

48. Mr. GAJA said that the English text of the first three sentences should be brought into line with the French version, which made the same point more clearly.

49. Mr. KATEKA said he did not agree with the assertion contained in the sentence “However it was the codification convention mainly reflecting the customary law and as such it has a certain authority.” The 1997 Watercourses Convention, and in particular its article 3, had been very controversial, as could be deduced from the fact that only 14 States had ratified it to date. He therefore proposed that the sentence should be amended to read: “However it was a framework convention reflecting a certain authority.”

Paragraph (5), as amended, was adopted.

Paragraph (6)

50. Mr. MOMTAZ said that the reference to “island States” in the third sentence was inappropriate. By definition, an island State did not have land borders. The phrase should be amended to read “islands shared by two or more States”.

51. Mr. KABATSI pointed out that it was not impossible for an island State to have land borders. Two or more States could share borders on a single island or on a number of islands.

52. Mr. MANSFIELD said that one way of overcoming the problem would be to amend the phrase to read “even island States whose land closely borders that of other States”. There might be cases in which an island State whose land closely bordered another State had an underground aquifer which shifted to the territory of the other State.

53. Mr. PELLET said that while what Mr. Mansfield had proposed was possible, he would welcome an example. As he saw it, the text sought to cover a situation such as that of Ireland, which was an island composed of two States, or of Borneo, an island shared by three States, which, he supposed, also had shared aquifers. Although Mr. Kabatsi had been right to point out that some islands were shared by several States, which was what the text was trying to say, he endorsed the proposal by Mr. Momtaz.

54. Mr. MOMTAZ said that the wording he had suggested covered the case referred to by Mr. Kabatsi.

55. Mr. PELLET said that the acronyms at the end of the paragraph should be spelled out on their first occurrence. It would also be useful to indicate, in the related footnote, in which paragraphs of the Special Rapporteur’s third report the relevant instruments had been cited. While not contesting the Special Rapporteur’s right to quote himself in the commentary, he did not think it was good practice, even though it seemed to have become a frequent one.

56. Mr. YAMADA (Special Rapporteur), referring to the point made by Mr. Momtaz, noted that there were about 10 identified transboundary groundwaters in the Caribbean islands alone.

57. Ms. ESCARAMEIA said she saw no reason to amend the reference in the text to “island States with land borders”. Many States occupied only part of an island. Clearly, Haiti and the Dominican Republic were island States which shared one island. Indonesia was an island State that shared land borders with several other States. Such States often had transboundary aquifers. The situation ingeniously envisaged by Mr. Mansfield was not what the Commission had had in mind. The point was to deal with the case in which two or more States occupied the same island and might have transboundary aquifers. While she did not understand why Mr. Momtaz objected to the text as it stood, she would not, however, oppose his proposal.

58. Mr. CANDIOTI said that, like Ms. Escarameia, he found the phrase as it stood perfectly clear. If the sentence were to take account of the proposal by Mr. Momtaz, it would have to be reworded to read: “It has been ascertained that almost all States on the continents and States sharing certain islands also have transboundary groundwaters with their neighbours.”
59. Mr. ECONOMIDES said there was no reason to make a distinction between States on the continents and island States. What mattered was that almost all States with land borders, whether States on the continents or island States, had transboundary groundwaters. He therefore proposed that the phrase “on the continents and even island States” should be deleted.

60. Mr. KABATSI and Mr. MOMTAZ endorsed the proposal by Mr. Economides.

61. The CHAIRPERSON said that the sentence would then read “It has been ascertained that almost all States with land borders may also have transboundary groundwaters with their neighbours.”

Paragraph (6), as amended, was adopted.

The general commentary to the law of transboundary aquifers as a whole, as amended, was adopted.

Commentary to draft article 1 (Scope)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

62. Mr. PELLET said that paragraph (7), and in particular the sentence “The decision on the threshold will be left to later substantive draft articles”, was worded so as to imply that the text had not been completed. It would be preferable to specify the draft articles in question.

63. Mr. GAJA said that the last five sentences seemed to suggest that measurements should be taken both prior to and after the impact in order to ascertain whether an impact had occurred. In a way, that contradicted the idea of an obligation of prevention set forth in draft article 6. In his view, an impact could be asserted even before the event took place. The last three sentences should therefore be deleted, in order not to void the obligation of prevention by stating that the event first had to take place before it could be ascertained whether there had been any impact.

64. Mr. PELLET, agreeing with Mr. Gaja, said that if his own proposal was endorsed, it would be possible to see clearly what was involved from the draft articles to which reference would be made; it was unwise to try to anticipate events in a manner which, after all, was vague and questionable.

65. Mr. YAMADA (Special Rapporteur) said he had no objection to the proposals by Mr. Gaja and Mr. Pellet.

Paragraph (7), as amended, was adopted.

The commentary to draft article 1, as amended, was adopted.

The meeting rose at 1.10 p.m.
Human Rights should become the institution to which the European Union, like all the Council of Europe’s member States, could refer all human rights problems that were not covered by the existing community machinery. The two institutions should establish a joint platform for the assessment of legal and judicial standards and, when appropriate, adopt each other’s standards. The European Union’s European Neighbourhood Policy should focus on the Council of Europe’s member States and Belarus by increasing the number of joint programmes planned together. Lastly, States must ensure that the Council of Europe, as a major partner of the European Union, had the resources it required. To achieve those objectives, a memorandum of understanding was to be signed between the Council of Europe and the European Union in order to define relations between the two organizations.

3. In the Warsaw Declaration, the Heads of State and Government had also undertaken to foster cooperation between the Council of Europe and the United Nations and to achieve the Millennium Development Goals on the European continent. The texts adopted at the third Summit had alluded to the European Convention on Human Rights and the most appropriate means of guaranteeing its long-term effectiveness. To that end, a “group of wise persons” had been established to consider the issue of the long-term effectiveness of the Convention’s monitoring mechanism, including the effects of Protocol No. 14 to the Convention. That group had submitted additional proposals going beyond the measures already taken, “while preserving the basic philosophy underlying the Convention”. An interim report on the group’s work had been submitted to the most recent session of the Committee of Ministers of the Council of Europe, held in May 2006. Protocol No. 14 to the European Convention on Human Rights, amending the monitoring system of the European Court of Human Rights with a view to reducing the Court’s backlog of cases, had now been ratified by 42 States and should enter into force by the end of 2006.

4. Following the referendum organized in Montenegro on 21 May 2006 and the declaration of independence of the Republic of Montenegro on 3 June 2006, the Committee of Ministers of the Council of Europe had taken note with satisfaction of the request for accession of the Republic of Montenegro to the Council of Europe and had transmitted it, in accordance with the usual procedure, to the Parliamentary Assembly for opinion. The Committee of Ministers had welcomed the intention expressed by the authorities of the Republic of Montenegro to respect and implement the obligations and commitments contracted by the State Union of Serbia and Montenegro as a member State of the Council of Europe and expressed its determination to intensify cooperation with the Republic of Montenegro to that end.

5. During the past year, the legal efforts of the Council of Europe had been largely devoted to measures to counter terrorism. The Council of Europe had striven, on the one hand, to strengthen legal action against terrorism and its sources of financing and, on the other, to safeguard fundamental European values, in other words, to ensure effective implementation of the standards adopted and to strengthen the capacity of States to take effective measures to combat terrorism while respecting human rights. The Council of Europe Convention on the Prevention of Terrorism, adopted in May 2005, had been followed in September of the same year by the adoption by United Nations Security Council resolution 1624 (2005) of 14 September 2005, which was based on the Convention. The Convention, which had been signed by 35 countries and would enter into force once it had been ratified by six of them, was designed to bridge gaps in legislation and secure international action to combat terrorism by a variety of means. It classified as criminal offences various types of conduct likely to lead to the commission of acts of terrorism, such as public provocation and recruitment and training for terrorism. Cooperation to prevent terrorism had been strengthened both at the national level, through the definition of national policies, and at the international level. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism had been signed by 22 countries and would also enter into force once it had been ratified by six of them. Two States had announced their intention to ratify it soon. The two Conventions were open to signature, subject to certain conditions, by States not members of the Council of Europe. The process of signature and ratification was also continuing with regard to the other Council of Europe instruments to combat terrorism. For example, six States intended to ratify the Protocol amending the European Convention on the Suppression of Terrorism, which had been signed by 44 States and ratified by 22.

6. The Council of Europe’s Committee of Experts on Terrorism (CODEXTER) was continuing with the elaboration of country profiles on legislative and institutional counter-terrorism capacity, 20 of which had already been issued and were being widely used by States, academic institutions and the Counter-Terrorism Committee of the United Nations Security Council as part of the evaluation of follow-up to Security Council resolution 1373 (2001). Cooperation between the Council of Europe and the United Nations with a view to the implementation of Security Council resolutions 1373 (2001) and 1624 (2005) could be observed at the operational level: experts from the Council of Europe took part in the evaluation visits of the Counter-Terrorism Committee to States Members of the United Nations that were also members of the Council of Europe. At the same time, CODEXTER was working to identify existing gaps in international law and anti-terrorism activities. In that connection, the questions of Internet use for terrorist purposes and cyberterrorism were being viewed with special interest.

7. The Council of Europe’s legal arsenal had been supplemented in June 2006 by a new recommendation from the Committee of Ministers to member States on assistance to crime victims, adding to the three recommendations adopted in 2005 on special investigation techniques, the protection of witnesses and collaborators of justice, and identity and travel documents.

8. Lastly, mention must be made of recent developments following the allegations brought to light in 2005 by the

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Washington Post and the non-governmental organization Human Rights Watch concerning the existence of secret CIA detention centres in member States of the Council of Europe. An inquiry had been opened up on 1 November 2005 by the Parliamentary Assembly and the Secretary General of the Council of Europe had taken action under article 52 of the European Convention on Human Rights. The initial result of those efforts was the publication of a report by the Secretary General based on an analysis of official replies received from 46 States members of the Council of Europe. The analysis of the replies revealed that the procedures in place for determining who and what transited through European airports and air space did not provide adequate safeguards against abuse. It appeared that no member State had set up any procedures to verify whether civil aircraft was used for purposes incompatible with internationally recognized human rights standards.

9. The Secretary General of the Council of Europe had further stated that existing rules on State immunity often seriously hampered the effective prosecution of foreign officials, that immunity was not synonymous with impunity and that the exceptions to State immunity already allowed for, where torture was concerned, should be extended to serious human rights abuses such as enforced disappearance. In 2006, the Secretary General would submit proposals to the Committee of Ministers on specific steps to overcome failings identified in three specific areas: the introduction of mechanisms to monitor the activities of foreign intelligence services in Europe; the regulation of international air traffic; and exceptions to State immunity, areas which should be of particular interest to the Commission.

10. The Council of Europe Convention on Action against Trafficking in Human Beings had already been signed by 30 States and ratified by one, and would enter into force after six ratifications. Its purpose was to prevent and combat trafficking in human beings, whether national or transnational and whether or not connected with organized crime, while paying particular attention to the protection of victims.

11. Turning to action to combat corruption, he said that, in the Group of States against Corruption (GRECO), the Council of Europe possessed an integrated and fully operational monitoring system which might serve as a model for worldwide action. A number of bodies were examining the idea of a follow-up to the United Nations Convention against Corruption. If that idea was accepted, it would be necessary to examine how to coordinate that follow-up with other monitoring processes and systems in order to avoid duplication and the overlapping of activities and guarantee that the various monitoring procedures reinforced one another. That was all the more important since follow-up was often a heavy burden on the countries concerned and there were signs of monitoring fatigue which should not be treated lightly. GRECO was continuing the evaluation of its 41 members, using methods that had proved their worth. It was on the point of completing its second round of evaluations on the proceeds of corruption, corruption in public administration and the use of legal persons to shield corruption offences. The third round of GRECO evaluations, to be launched in early 2007, would be devoted to transparency in the funding of political parties and to the incrimination of offences provided for in the Council of Europe’s Criminal Law Convention on Corruption and its Additional Protocol of 2003.

12. Fighting cybercrime was another key area of the Council of Europe’s action. It was energetically pushing for the widest possible ratification of the Convention on cybercrime, which had entered into force on 1 July 2004, and its Additional Protocol concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems, which had entered into force on 1 March 2006.

13. The Council of Europe Convention on the avoidance of statelessness in relation to State succession had been opened for signature on 19 May 2006 and signed that very day by Ukraine. In order to enter into force, it had to be ratified by three States. Drafted in response to a Committee of Ministers recommendation to member States on the avoidance and reduction of statelessness (1999), it was based on a number of countries’ recent practical experience. It also took account of the Convention on the reduction of statelessness, the Venice Commission’s Declaration on the Consequences of State Succession for the Nationality of Natural Persons and the International Law Commission’s draft articles on nationality of natural persons in relation to the succession of States.

14. The revision of the European Convention on the adoption of children, a key activity in the area of family law and the law of the child, had been entrusted to the Working Party on Adoption. The revised Convention was to be adopted in 2007.

15. The Council of Europe had launched a programme to combat counterfeit medicines and pharmaceutical crime which had begun with a seminar in September 2005 and was now being pursued through, inter alia, the preparation by a Council of Europe expert of a feasibility study on the drafting of a legal instrument, to be finalized by the end of 2007.

16. Over the years, the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI) had become a particularly close associate of the Commission. A new publication entitled State Practice Regarding State Immunities had been issued. It was the outgrowth of a pilot project of the Council of Europe on State practice regarding the immunities of States and their property and contained an analytical report compiled by three research institutes at the request of CAHDI. New databases on State practice regarding State immunities and the organization and functions of the Office of the Legal Adviser in the Ministry for Foreign Affairs had been brought online.

17. A major portion of the work of CAHDI was devoted to its role as European observatory for reservations to international treaties, its activities in that respect having broadened over the years and extended into the

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360 Council of Europe, Strasbourg, 10 February 1997, doc. CDL-INF(97)1, pp. 3–6.
361 See footnote 156 above.
field of reservations to international treaties against terrorism, regardless of whether an objection could be entered to such reservations. CAHDI had made a list of “possibly problematic” reservations of that nature and, at its recommendation, the Committee of Ministers of the Council of Europe, through the good offices of the Council’s Secretary General, had initiated a collective démarchedespite the approach to individual States with a view to persuading them to withdraw those reservations. A dialogue had thus been established between CAHDI and reserving States, regardless of whether they were members of the Council of Europe.

18. Another area on which CAHDI had been focusing since 2005 and which had aroused much public interest of late was United Nations sanctions. CAHDI was studying their implementation at the national level and the repercussions they could have on respect for human rights. A database on the situation in member States had been created and a report drawn up by Professor Iain Cameron and published recently364 now supplemented the one that the United Nations Office of Legal Affairs had asked Professor Bardo Fassbender to prepare.365

19. The next meeting of CAHDI, to be held in September 2006 in Athens, would be followed by the fourth multilateral consultation meeting on the International Criminal Court. Since 2000, the Council of Europe had organized three consultation meetings open to member States and to observer States and international organizations aimed at facilitating the exchange of views on legal problems faced in the ratification process and the models drawn up in certain countries to cope with those problems. The conclusions adopted during those meetings had been sent to Governments. The fourth consultation meeting would address interaction between the International Criminal Court and national courts and agreements on witnesses and on the execution of the decisions of the Court.

20. With regard to the Council of Europe’s activities in the field of constitutional and electoral law, the Venice Commission had recently adopted some important opinions on constitutional reform in Armenia and Ukraine, on draft amendments to the electoral codes of Armenia and Georgia, and on draft legislation on churches and religious organizations in Serbia. It had also adopted a report on the participation of political parties in elections and a declaration on the participation of women in elections. The extension of its activities beyond the confines of the European continent could be observed in its cooperation with South Africa.

21. The Council of Europe was also cooperating with the United Nations Interim Administration Mission in Kosovo on the application in Kosovo of the Framework Convention for the Protection of National Minorities and the European Convention for the prevention of torture and inhuman or degrading treatment or punishment. Two agreements had been signed with United Nations Interim Administration Mission in Kosovo to that end in 2004.

22. Lastly, two high-level conferences were planned towards the end of 2006. The twenty-seventh Conference of European Ministers of Justice was to be held from 12 to 13 October 2006 in Yerevan on the topic of “Victims: place, rights and assistance” and the Ministers of Justice and the Interior were to meet in Moscow in November 2006 to discuss improving European cooperation in the criminal justice field.

23. In conclusion, he said that the Council of Europe was engaging in intensive action aimed at promoting the building of a Europe without dividing lines, based on the common values embodied in the Statute of the Council of Europe: democracy, human rights and the rule of law.

24. Mr. MELESCANU said that the most important development of late had been the creation of a certain “division of labour” between the European Union and the Council of Europe. The Council would probably be called on to play a key role in ensuring respect for some of the fundamental values on which Europe had been built. With regard to very serious problems such as terrorism, money laundering, transboundary crime and cybercrime, some countries had a tendency to create a hierarchy of priorities and to place respect for human rights in second place; the Council of Europe’s main task must accordingly be to ensure that the struggle of its member States and of the entire international community to overcome those scourges was waged with the greatest possible respect for human rights and fundamental freedoms.

25. Referring to the question of allegations about the existence of secret CIA detention centres in member States of the Council of Europe, he endorsed the idea that one of the main problems was the regulation of international air traffic. As a member of the Romanian Senate commission responsible for verifying such allegations, he had observed that, even though the identities of the pilot and of passengers were communicated to the authorities of the country of transit, they had no means of requesting additional information if the individual had not deplaned or boarded in their national territory. The authorities of transit countries, at least within Europe, should be given the means to fulfil the responsibilities that were to be entrusted to them. The Council of Europe might also request or recommend that national intelligence services should be placed under the control of parliament and not of the executive, since parliamentary control was the best means of guaranteeing respect for democracy and human rights.

26. Lastly, he requested Mr. De Vel to get in touch with the Commission’s Secretariat to enable the members of the Commission to consult the documentation on State immunity prepared by the Council of Europe.

27. Mr. GALICKI said Mr. De Vel’s remarks clearly showed that the Council of Europe’s activities in recent years had been largely focused on terrorism. He welcomed the adoption in 2005 of the first convention to be aimed not at combating the phenomenon, but rather at preventing it, and asked whether the Council planned soon to draft

other legal instruments designed to prevent and combat terrorism. He welcomed the adoption of the Council of Europe Convention on the avoidance of statelessness in relation to State succession, but regretted the fact that the Committee of Experts on Nationality had suddenly and unexpectedly disappeared. As a result, the many recommendations formulated for that Committee by the third European Conference on Nationality in 2004 had been left without effect, particularly the recommendations on the nationality of children, a matter that deserved further consideration. It was regrettable that the website of the Committee of Experts on Nationality had also been abolished; the extensive documentation it had contained should have been saved. The third Summit of Heads of State and Government of the Council of Europe, held in Warsaw in 2005, had confirmed the importance of issues relating to nationality and recommended that the Council of Europe should give them further consideration. In that connection, he asked whether consideration had also been given to solutions to fill the gap left by the disappearance of the Committee of Experts on Nationality.

28. Mr. GAJA said that he welcomed the useful information Mr. De Vel had provided to the members of the Commission on the Council of Europe’s recent work. Given that, in 2005, the General Assembly had adopted the United Nations Convention on Jurisdictional Immunities of States and their Property, he wondered whether that could have or had had consequences for regional instruments, specifically the 1972 European Convention on State Immunity, known as the Basel Convention. In many cases, the Council of Europe, like other international organizations, adopted new conventions to face new problems, but States should consider whether to resort to universal texts when they were adopted. He would like to hear the position of the Council of Europe and CAHDI on that matter. Mr. De Vel had referred to a statement by the Council’s Secretary General that existing rules on State immunity could hamper action to combat the risks involved in extraordinary rendition and the establishment of secret detention centres. In that connection, he drew attention to the fact that the Commission had recently included the topic of jurisdictional immunity of State officials in its long-term programme of work.

29. Mr. MOMTAZ said he welcomed the fact that the question of compatibility with international human rights law of the sanctions imposed by various United Nations bodies, particularly the Security Council, was now on the CAHDI agenda. He wished to know whether CAHDI was simply going to identify and take note of cases of incompatibility or whether it planned to adopt the necessary measures in such cases.

30. Mr. ECONOMIDES thanked Mr. De Vel for his remarks and reminded him of the extreme gravity of the events now occurring in Lebanon, the theatre of a shocking humanitarian crisis and gross human rights violations. He asked whether the Council of Europe, whose main concern was to protect human rights, had already reacted to that situation or intended to do so.

31. Mr. De VEL (Director-General of Legal Affairs, Council of Europe), replying to the questions raised by the members of the Commission, said that he welcomed Mr. Melescanu’s comments on the division of labour between the European Union and the Council of Europe and that, in his report on the relations between those two institutions, Mr. Jean-Claude Juncker, Prime Minister of Luxembourg, had found that it was in the legal field that the two organizations cooperated the best. With regard to the need to respect human rights in the context of action to combat crime in general and terrorism in particular, he recalled that, since the 1950s, the Council of Europe had been taking that principle into account and that that concern was reflected, inter alia, in the 1957 European Convention on Extradition and the 1959 European Convention on Mutual Assistance in Criminal Matters. In more recent texts such as the 2001 Convention on cybercrime, the need to reconcile freedom of expression and action against computer crime was duly taken into account. In combating terrorism in general, States must never lose sight of the fact that the primary human right was the right to life.

32. He acknowledged that the recent problems of secret flights and the construction of secret detention centres imperilled democracy and human rights. Those issues would be given in-depth consideration by the Council of Europe, but the results of the work of experts on the subject must not be prejudged. In his view, the particular case of the problem of the identification of passengers on secret flights should be taken up by the Council of Europe: the Secretary General would make a proposal in that regard in September 2006. On the surveillance of intelligence services, he said that a committee set up several years before to study the issue at the express request of the five principal member States of the Council of Europe had suggested that the Committee of Ministers should adopt a recommendation on the subject, but that had unfortunately not been deemed a priority. The question would nevertheless be addressed by the Secretary General of the Council of Europe in September 2006.

33. With regard to the preparation of new instruments on action to combat terrorism, he said that there was some reticence on the part of member States, and enthusiasm for the proposal to draft an instrument on the prevention of terrorism now seemed to be lacking. A number of States were nevertheless in favour of preparing a cyberterrorism convention focusing primarily on terrorist attacks on essential infrastructure. When taken together with the Convention on cybercrime, the 2005 Council of Europe Convention on the Prevention of Terrorism, which covered incitement to terrorism, was already helping to combat certain types of computer crime. In any event, the matter would be discussed and he hoped it would be possible to arrive at an instrument that would fill the existing gaps in international law.

34. Referring to the abolition of the Committee of Experts on Nationality, he explained that recent budget cuts had made its re-establishment or replacement by a similar body highly unlikely. Issues relating to nationality would nevertheless continue to be discussed by the European Committee on Legal Co-operation, which had called for a number of reports to be drawn up, including on the nationality of children. He had been unaware that the web pages on nationality had been removed and that seemed unjustified, especially as a number of instruments
on nationality such as the Council of Europe Convention on the avoidance of statelessness in relation to State succession had not yet been ratified by all member States. With regard to the question on State immunity raised by Mr. Gaja, he said that the member States of the Council of Europe were aware of the existence of the United Nations Convention on Jurisdictional Immunities of States and their Property. In his view, some measures could be adopted at the regional level, for example, to deal with secret flights or detention centres, without making the Convention obsolete. The adoption of a binding instrument was not yet under consideration, however, since the experts would begin their work only towards the end of 2006. The question of immunity of national officials was on the agenda of CAHDI and would be discussed both by CAHDI and by the experts responsible for follow-up to the report of the Secretary General on the use of his powers under article 52 of the European Convention on Human Rights.

35. In response to Mr. Momtaz’s question about compatibility between international human rights law and the sanctions imposed by various United Nations bodies, including the Security Council, he said that CAHDI had ordered a study on the subject and that was being done in parallel with the one being carried out by the United Nations. CAHDI would consider the report of the issue in September 2006. He was not in a position to say what approach it would adopt if it found the list of sanctions proposed by the United Nations to be incompatible with the obligations of States in respect of human rights. Without ruling out the possibility that directives might be adopted, he did not wish to prejudge the response of CAHDI to those questions, the sensitive nature of which had been rightly emphasized by Mr. Momtaz.

36. Replying to the question by Mr. Economides on the current situation in Lebanon, he said that the Council of Europe was following events in the Middle East very closely and that its highest officials had taken a position on the matter. At its next session, the Parliamentary Assembly would discuss the crisis, which, in view of its extreme gravity, could certainly not be ignored.

37. Mr. BENÍTEZ (Secretary, Committee of Legal Advisers on Public International Law (CAHDI)), providing further replies to the questions raised by the members of the Commission, said that CAHDI had set up a database that was accessible on the Internet and contained updated information on legislation and practice in respect of State immunity. It had been working on the topic of the immunity of State officials since 2004, but had decided to bring that work to an end, since some of the issues being considered had been resolved by the ICJ. With regard to the possible or actual implications of the recent United Nations Convention on Jurisdictional Immunities of States and their Property for the 1972 European Convention on State Immunity, he said that, at its March 2006 session, CAHDI had organized an informal meeting of the States parties to the European Convention on State Immunity, the results of which could be viewed on its website. Some delegations had expressed doubts about the usefulness of that Convention, while others thought it remained useful and that the interaction between the two texts should be looked at in greater depth. A second informal meeting was to be organized in Athens in September 2006 with a view to concluding an agreement between the States parties to the European Convention on State Immunity to deal in a concerted manner with the question of the interaction between the two instruments. As to the compatibility with human rights of sanctions adopted by the United Nations, the members of CAHDI had concluded that it was for the United Nations to make a determination and that CAHDI itself was competent only to consider the implications of the sanctions imposed under Chapter VII of the Charter of the United Nations for the obligations undertaken by the member States of the Council of Europe in ratifying the European Convention on Human Rights. A database had been set up in order to enable member States to exchange information on problems arising out of the need to comply with Security Council decisions while respecting the human rights obligations they had assumed.

38. The report by Professor Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, which had been prepared independently and reflected solely the views of its author, had been intended to fuel the thinking of CAHDI on the subject and was a contribution by the Council of Europe to the ongoing discussions in the United Nations. That was why it had been published almost simultaneously with the report by Professor Fassbender, *Targeted Sanctions and Due Process*. CAHDI in no way wished to set itself up as an adjudicating body—and, in any event, there was an institution, the European Court of Human Rights, that was responsible for monitoring the implementation of the European Convention on Human Rights. It saw itself rather as a forum where countries could share their experiences and discuss their problems, collect information on the difficulties they faced domestically and identify best practices.

39. In his comments on the Council of Europe’s activities in the field of terrorism, Mr. Galicki appeared to be thinking of the well-known challenges encountered by the United Nations, particularly with regard to the drafting of a comprehensive convention on international terrorism, a matter that was not on the Council of Europe’s agenda because of its sensitive nature. The Council of Europe’s plan was, rather, to progress in technical areas and to continue to identify gaps in international practice and legislation, for example, regarding large-scale terrorist-motivated attacks against critical infrastructure, as mentioned by Mr. Galicki. That question was to be taken up by CODEXTER of the Council of Europe, which was also to pursue activities to ensure the full implementation of the standards already adopted and the exchange of best practices through country profiles.

**STATEMENT OF THE REPRESENTATIVE OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

40. The CHAIRPERSON welcomed Mr. Hubert, Vice-Chairperson of the Inter-American Juridical Committee, and invited him to address the Committee.

41. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said that the role and functions of the Commission and the Inter-American Juridical Committee
were both similar and dissimilar: the Commission had a mandate for the progressive development and codification of international law at the universal level, whereas the Inter-American Juridical Committee pursued the same objectives, but in relation to the specific problems, legal tradition and interests and priorities of the region of the Americas. Serving as the legal advisory body of the OAS, it was tasked under the Charter of the Organization of American States with studying and analysing legal obstacles to the integration of the developing countries of the Americas, as well as options for the harmonization of legislation. Those differences in competence and approach could only help enhance the importance of dialogue between the Inter-American Juridical Committee and the Commission.

42. Describing the history of the Inter-American Juridical Committee, which was celebrating its centennial in 2006, and basing his remarks on a statement made by the Committee’s Chairperson, Mr. Herdocia Sacasa, at a special session of the OAS Permanent Council held in Washington, D.C., in March 2006, he said that the significant contributions the Inter-American Juridical Committee had made to international law throughout its existence included the system of peace in the Americas, which had resulted in the adoption in 1948 of the American Treaty on Pacific Settlement (Pact of Bogota), and the Committee’s work in such areas as non-intervention and legal equality among States; fundamental rights, with the adoption of the American Convention on Human Rights or “Pact of San José”; the law of the sea, with the concept of the exclusive economic zone; and the “democratic architecture” of the inter-American system, as reflected in the Inter-American Democratic Charter, which had been adopted in 2001 and proclaimed the existence in the Americas of a “right to democracy”.

43. Turning to the topics considered recently by the Inter-American Juridical Committee, he said that, at its sixty-seventh regular session, held in Rio de Janeiro, Brazil, in August 2005, the Committee had endorsed the inclusion in its agenda of a topic relating to the promotion of the International Criminal Court following a resolution in which the OAS General Assembly had requested it to draw up a questionnaire to be submitted to all OAS member States on how their laws allowed for cooperation with the International Criminal Court. Of the 139 signatories of the Rome Statute of the International Criminal Court, 25 belonged to the inter-American system and, of those 25, 22 had ratified or acceded to the Statute. The questionnaire, which had been approved by the Inter-American Juridical Committee and sent to all member States, whether or not they were parties to the Rome Statute of the International Criminal Court, covered such issues as whether the national legislation of States provided for the crimes of genocide, war crimes and crimes against humanity covered by the Statute and, if so, what their definitions and elements were; whether States had found any obligations in the Statute to be inconsistent with the provisions of their constitution and, if so, which obligations and in what respect; and whether their legislation provided for procedures applicable to all the forms of cooperation referred to in part 9 (International Cooperation and Judicial Assistance) and part 10 (Enforcement) of the Statute. States parties to the Rome Statute of the International Criminal Court that did not have such cooperation procedures were asked to indicate whether they were prepared to amend their legislation so as to allow for that type of cooperation with the International Criminal Court. States that were not parties to the Statute were asked whether they had taken or intended to take domestic legal steps to allow them to ratify or accede to the Statute and whether there were any impediments of a legal nature to their cooperation with the International Criminal Court in the cases provided for in the Statute relating to a State that was not a party.

44. By the time the Inter-American Juridical Committee had held its most recent session in March 2006, 17 countries, of which 11 were parties to the Rome Statute of the International Criminal Court, had answered the questionnaire. Four of the conclusions arrived at by the Rapporteur after having analysed the replies were: the OAS member States had shown a strong interest in cooperation with the International Criminal Court; not all the countries had incorporated the crimes provided for in the Rome Statute of the International Criminal Court in their national legislation, but their replies showed that most were working to integrate the Statute’s definitions into such legislation; a number of States parties to the Statute had answered the questionnaire and had regulations to enable them to cooperate with the Court and, for some, the lack of specific laws did not necessarily seem to prevent them from complying with the Court’s requests for cooperation; to settle problems of a constitutional clash caused by the Statute, some States had recourse to mechanisms that were worth consideration by those States that were not yet parties to the Statute. As suggested by the Rapporteur, the Inter-American Juridical Committee had adopted a resolution (CJI/RES.105(LXVIII)), which, among other things, requested member States that had not yet done so to complete the questionnaire; asked those States parties to the Rome Statute of the International Criminal Court that had undertaken legislative approval processes to implement parts 9 and 10 of the Statute on cooperation with the Court to include the types of crime covered by the Statute in their national legislation or to modify their legislation in that effect and to provide the Inter-American Juridical Committee with updated information; and requested States parties to the Statute to inform the Committee of any other reform that enabled them to cooperate with the International Criminal Court. The Inter-American Juridical Committee remained seized of that topic.

45. At its thirty-fourth regular session held in 2004, the OAS General Assembly had, in its resolution 2042 (XXXIV-O/04), requested the Inter-American Juridical Committee to analyse, in the light of the provisions of chapter III of the Inter-American Democratic Charter, legal aspects of the interdependence between democracy and economic and social development, specifying that the Committee was to carry out that study in the context of its agenda item “Application of the Inter-American Democratic Charter”.

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Committee had considered the matter at its four subsequent sessions and had adopted a resolution on it in March 2006 after having considered and approved a substantive study by the Rapporteur on many issues underlying the mandate of the OAS General Assembly. Those included the exact legal nature and purview of the Inter-American Democratic Charter, adopted as a “declaration”, viewed from the angle of the progressive development of international law; whether or not reference could be made to the existence of a “right to democracy” and/or a “right to development” in international law generally and in the international law of the Americas in particular and, if so, who exactly the beneficiaries of such rights were and what obligations they created; what the relationship was between democracy and social and economic development, on the one hand, and human rights, on the other; and what the order of priorities between democracy and development was: could one be seen as a precondition for the other?

46. While acknowledging that democracy and socio-economic development were interdependent, the Inter-American Juridical Committee had felt that the legal aspects that might be attached to such interdependence were not immediately discernible. It was also aware that the question was not devoid of political considerations. The Rapporteur had arrived at the following conclusions, largely reproduced by the Inter-American Juridical Committee in its resolution of March 2006: the Inter-American Democratic Charter clearly established that peoples had a right to democracy and that the OAS member States were required to promote and defend that right; those States must also counteract all causes capable of undermining democracy, such as lack of development, the absence or lack of development could imperil democracy, but could not serve as a justification for suppressing or limiting it; and the OAS member States had an obligation to collaborate with one another to promote and achieve development. An analysis of the possible legal aspects of the interdependence between democracy and economic and social development nevertheless revealed fundamental differences, at least as far as the inter-American system was concerned. The members of OAS had assumed an “obligation of democracy”, the breach of which carried immediate political and legal consequences. In other words, they could be sanctioned for not being democratic. But they did not have a similar “obligation of development”. Under OAS instruments, they were called upon to cooperate for development, but could incur no sanctions for a breach of that obligation. The Rapporteur had concluded that existing OAS instruments, specifically its Charter and the Inter-American Democratic Charter, already established the rights and obligations of member States, as well as of the OAS itself and its bodies, with regard to democracy, on the one hand, and development, on the other. He had nevertheless suggested that the adoption of a new instrument that better addressed the interdependence between democracy and development might contribute to better understanding, implementation and effective application of those rights and obligations.

47. For lack of time, he would refer only very briefly to the other topics considered by the Inter-American Juridical Committee. He invited members who wished to learn more to read the relevant report. The first topic, and by far not the easiest, was the codification and standardization of international law in the Americas. The Committee had, for example, tried to find out why so many conventions within the inter-American system had not been ratified by the member States. Another topic under consideration for many years was the Inter-American Specialized Conference on Private International Law. Six such conferences had already been held; they played a key role in the development of international law in the region. The Inter-American Juridical Committee had considered whether, instead of working on new conventions, the Conference would not do better to try to adopt model legislation that member States could then use for changing their legal systems. Such laws were likely better to promote the harmonization of private international law in the Americas. Another topic, recently included in the Inter-American Juridical Committee’s agenda, was the preparation of a draft inter-American convention against racism and any kind of discrimination and intolerance. OAS saw the need to have an instrument of that nature in the light of current trends at the international level. Lastly, the list of the Committee’s activities would not be complete without reference to the Course on International Law which was organized every year in Rio de Janeiro, Brazil, and, in 2006, had been on the topic of “Democracy and Social and Economic Development in the Americas”.

48. Mr. CANDIOTTI, speaking on behalf of the members of the Commission from the Americas, thanked the Vice-Chairperson of the Inter-American Juridical Committee for his statement. He hoped that the Inter-American Juridical Committee and the Commission would continue their dialogue with a view to exchanging not only information on their respective work, but also comments and ideas.

49. The CHAIRPERSON, speaking as a member of the Commission, said that OAS and the United Nations had similar approaches to the interdependence of democracy and social and economic development. Mr. Boutros Boutros-Ghali had attached particular importance to that issue, first when he had been Secretary-General of the United Nations and then as Secretary General of the International Organization of la Francophonie. Those approaches were based on the premises that States bore primary responsibility for handling the relationship between development and democracy and that they must cooperate in such a way that the weakest benefited from the assistance of the strongest.

50. Because it was located between two oceans, OAS was open both to Africa and to Asia, two continents grappling with the relationship between democracy and development. He wondered whether it took account of the African and Asian approaches in its thinking on that two-pronged issue.

51. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said that OAS did not take account of specifically African or Asian problems in its discussions of the issue, but rather viewed it as a universal problem.

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52. The inter-American system had gone a very long way in proclaiming the right to democracy. The countries of the Americas had made signal efforts to institute democracy where it had not existed previously and to preserve it where it did exist, not always without difficulty. When democracy was under threat, OAS acted immediately, something which in the past would have been considered interference. In practice, however, it was not easy for a country in the grips of poverty to remain democratic. Democracy and development were interdependent. Hence the dilemma referred to by some OAS members: the Charter of the Organization of American States obligated States to be democratic, but it also called on them to cooperate for development. The problem was to determine to what extent a State could be obligated to cooperate for development and what sanctions could be imposed on it for not respecting that obligation. That was the question being considered by the Inter-American Juridical Committee. Even if the question was resolved through legal measures, such as the adoption of an inter-American social charter, however, the true response would, as always, be fundamentally political.

53. Mr. PELLET, referring to cooperation between the members of OAS and the International Criminal Court, asked whether the Inter-American Juridical Committee had tried to find ways of resisting the pressure brought to bear by the United States for the conclusion of bilateral agreements to enable its nationals to escape the Court’s jurisdiction.

54. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said that the question had been raised, but only very discretely. Members of the Inter-American Juridical Committee were elected in their personal capacity and so—theoretically—they did not represent their countries. The Committee considered that such bilateral agreements were contrary to the development of international law and the universal will that had been the basis for the establishment of the International Criminal Court, but its position on the matter had not yet been definitively stated.

55. Mr. Sreenivasa RAO paid a tribute to the Inter-American Juridical Committee for the work it had done during a century of existence. The legal traditions of the countries of the Americas were a source of inspiration and encouragement for the countries of Africa and Asia, which were confronted with the same problems of poverty and the struggle for democracy. It was to be hoped that, together, those countries would be able to give the relationship between democracy and development a specific colour and content which would promote a more just world order.

56. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said it was gratifying to learn that the Inter-American Juridical Committee’s efforts were appreciated. In an increasingly smaller world, whatever each isolated individual did affected all others and, when those effects were positive—something that was unfortunately not always the case—then that was very much to be welcomed.

57. Mr. CHEE, referring to the interdependence between democracy and development, said it must be kept in mind that democracy was weakened by economic crises and war and that the rule of law was needed to back up democracy. Often, it was the weakest Governments that had the longest constitutional texts, whereas one of the greatest democracies in the world, Great Britain, had no written constitution at all.

58. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said it was indeed true that democracy lay not in a constitution or a set of laws, but in the constant interrelationship between a people and its leaders, who must serve the people, and not themselves. Nor was there one single model of democracy. It was not enough for a State to proclaim itself democratic and, conversely, some countries that might be considered totalitarian might argue that their populations enjoyed a certain well-being and standard of development. The basic principle was nevertheless that the people must decide and be able to change the Government if it was unsuitable.

The meeting rose at 1.05 p.m.

2905th MEETING
Thursday, 3 August 2006, at 3 p.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUND

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candidoti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabati, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Draft report of the International Law Commission on the work of its fifty-eighth session (continued)*

CHAPTER VI. Shared natural resources (continued)

C. Text of the draft articles on the law of transboundary aquifers adopted by the Commission on first reading (continued) (A/CN.4/L.694/Add.1 and Corr.1)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (continued)

Commentary to draft article 2 (Use of terms)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted with a minor editing amendment suggested by Mr. Brownlie.

* Resumed from the 2903rd meeting.
Paragraphs (3) to (6)

Paragraphs (3) to (6) were adopted.

Paragraph (7)

1. Mr. GAJA said that, in the penultimate sentence, the statement that “[a]n absolute criterion for negligibility does not exist since it would depend on the size of aquifers” did not follow logically, because the criterion could be expressed in the form of a percentage, so that size would be immaterial. More troubling were the references to the population relying on such aquifers and to alternative sources of waters. Those criteria were relevant to problems of utilization, but should not be addressed when defining the term “recharging aquifer”. He suggested deleting the last two sentences.

Paragraph (7), as amended, was adopted.

Paragraph (8)

2. Mr. BROWNLIE drew attention to a grammatical error in the English version.

3. After a procedural discussion in which Mr. YAMADA (Special Rapporteur), Ms. ESCARAMEIA, Mr. KATEKA, Mr. CANDIOTI, Mr. GAJA, Mr. MANSFIELD, Mr. DAOUDI and Mr. MIKULKA (Secretary to the Commission) took part, the CHAIRPERSON reminded members that all corrections of a purely linguistic or technical nature should be submitted in writing to the Secretariat.

Paragraph (8) was adopted.

Paragraph (9)

Paragraph (9), as amended by document A/CN.4/L.694/Add.1/Corr.1, was adopted.

The commentary to draft article 3, as amended, was adopted.

Commentary to draft article 4 (Equitable and reasonable utilization)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

7. Mr. GAJA said he was unhappy with the wording of the last sentence. It seemed strange to imply that depletion was a benefit. Perhaps it would be sufficient for the sentence to read: “A controlled and planned depletion could be considered.”

8. Mr. MANSFIELD suggested the formulation: “In some circumstances, a controlled and planned depletion could be considered.”

9. Mr. PELLET said that the words “over a specific period of time”, in the fourth sentence, should read “over a long period of time”. On a more fundamental point, he noted that the last sentence of paragraph (2) of the commentary to article 7 stated that “the general principle of ‘sustainable development’ … should be distinguished from the concept of ‘sustainable utilization’ which might be alluded to in the context of draft article 4”. However, the commentary to article 4 made no reference to sustainable utilization. Thus, a sentence should be inserted at the end of paragraph (5) of the commentary to article 4 to explain the idea of sustainable utilization, so as to make the reference in paragraph (2) of the commentary to article 7 more meaningful.

10. Mr. GAJA pointed out that paragraph (4) of the commentary to article 4 already contained references to sustainable utilization. The intended reference was to paragraph (4), not to paragraph (5).

11. Ms. ESCARAMEIA asked for clarification of the relation between the words “specific period”, in the fourth sentence, and “specified period”, in the fifth. The answer to her question might have a bearing on Mr. Pellet’s proposal to amend the words “specific period” to “long period”.

12. Mr. YAMADA (Special Rapporteur) said that, in the case of aquifers, a more appropriate concept than “sustainability” was “maximization of long-term benefits”. Those benefits could be maximized for a specific period of time, but not indefinitely. On that understanding, he could go along with Mr. Pellet’s proposal to change the phrase “over a specific period of time” to “over a long period of time”.
13. Mr. PELLET suggested that, in the light of the Special Rapporteur’s explanation, the sentence should be reworded to read: “... over a long period of time, it being understood that utilization can be only for a specified period”. Such a formulation would also meet Ms. Escarameia’s concern, in that it provided a link between the two sentences.

14. Mr. MANSFIELD said that, as explained earlier in the text, the problem was that, in many cases, even if there was a recharge level, it might be insufficient for an aquifer to be maintained indefinitely. In those circumstances, it would be necessary to try to maximize the long-term benefits. He therefore suggested that the sentence should be reformulated to read: “... over a long period of time, in circumstances where recharge levels are such that the resource cannot be maintained indefinitely”.

15. The CHAIRPERSON said that a reference to recharge levels might be out of place in the commentary to a draft article relating to equitable and reasonable utilization.

16. Following a discussion in which Mr. MANSFIELD and Mr. CHÉE took part, Mr. YAMADA (Special Rapporteur) proposed the formulation “over a long period of time, it being understood that utilization cannot be maintained indefinitely”.

Paragraph (5), as amended, was adopted.

Paragraph (6) was adopted.

Paragraph (7) was adopted.

The commentary to draft article 4, as amended, was adopted.

Commentary to draft article 5 (Factors relevant to equitable and reasonable utilization)

Paragraph (1) was adopted.

Paragraph (2) was adopted.

17. Mr. PELLET said that the words “to be” should be deleted from the phrase “to be formulated in later draft articles”, and that the draft articles in question should be specified in a footnote.

Paragraph (7), as amended, was adopted.

Paragraph (5), as amended, was adopted.

Paragraphs (3) and (4) were adopted.

Paragraphs (5) and (6) were adopted.

18. Mr. KATEKA said that, as a non-scientist, he found the technical language in paragraph (2) and other paragraphs of the commentary difficult to understand. He therefore wondered whether the wording could be simplified for the layperson. Perhaps the technical terms could be explained in a footnote.

Paragraph (1) to (4) were adopted.

Paragraph (5) was adopted.

19. Mr. YAMADA (Special Rapporteur) said that the success of the draft articles depended on cooperation between lawyers and scientists. He appreciated that the parts of the commentary aimed at scientists and administrators were difficult for lawyers to understand. In response to comments from Mr. DAOUDI, Mr. PELLET, Mr. Sreenivasa RAO and Mr. MANSFIELD, he said he would do his best, with the Secretariat’s assistance, to produce a glossary of technical terms in the form of a separate document.

On that understanding, paragraph (2) was adopted.

Paragraphs (3) and (4) were adopted.

Paragraphs (5) and (6) were adopted.

20. Mr. GAJA said that the first few words of the fourth sentence of paragraph (5) (“There was also a strong request that”) and the whole of paragraph (6) were concerned solely with the history of the Commission’s discussions of the topic. They thus had no place in the commentary and should be deleted.

Paragraph (5), as amended, was adopted.

Paragraph (6) was deleted.

The commentary to draft article 5, as amended, was adopted.

Commentary to draft article 6 (Obligation not to cause significant harm to other aquifer States)

Paragraphs (1) to (4) were adopted.

Paragraph (5) was adopted.

21. Mr. GAJA said that the first sentence of the paragraph dealt with the history of the text, which should have no place in the commentary.

22. Mr. YAMADA (Special Rapporteur) explained that his original proposal to the Working Group had included the limiting qualifier “in their territories”. The Working Group had, however, taken the view that there might be some very rare cases in which a State might engage in an activity outside its territory on the basis of an agreement with another State. The limiting phrase “in their territories” had therefore been deleted. The main purpose of paragraph 2 was to cover activities undertaken within the aquifer State. The meaning might be clarified by the insertion in the last sentence of paragraph (5) of the word “mainly” before “intended”.

Paragraph (5), as amended, was adopted.

23. After a drafting discussion in which Mr. GAJA, Mr. CANDIOTI, Mr. MELESANU, Mr. Sreenivasa RAO, Mr. PELLET and Ms. ESCARAMEIA took part, Mr. MANSFIELD proposed that the first sentence of paragraph (5) should be deleted and that the remainder of the paragraph should read, “This draft article is mainly intended to cover activities undertaken in a State’s own territory. The scenario where an aquifer State would cause harm to another State through an aquifer by engaging in activities outside its territory is considered unlikely, but is not excluded.”
Paragraph (6)

Paragraph (6) was adopted.

The commentary to draft article 6, as amended, was adopted.

Commentary to draft article 7 (General obligation to cooperate)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

24. Mr. PELLET said that, at the end of the paragraph, the reader was directed to draft article 4; yet, in paragraph (4) of the commentary to draft article 4, it was stated that sustainable utilization did not apply to aquifers. The inconsistency between the two paragraphs would need to be cleared up.

25. Mr. YAMADA (Special Rapporteur) said that the reference to sustainable development in paragraph (2) had the aim of ensuring that there was no confusion in the reader’s mind between the concepts of “sustainable development” and “sustainable utilization”, the latter of which might be alluded to in the context of draft article 4.

26. Mr. PELLET said there was no need to refer to the context of draft article 4. If a reference were needed, it should be to the 1997 Watercourses Convention and should take the form of a footnote.

27. Mr. YAMADA (Special Rapporteur) proposed the deletion of the phrase “which might be alluded to in the context of draft article 4” and the addition of a footnote referring the reader to paragraph (4) of the commentary to article 4.

Paragraph (3), as amended, was adopted.

Paragraph (4)

28. Mr. MOMTAZ asked on what basis the assertion had been made that, in a few years, the commissions for delineation and monitoring would become responsible for transboundary aquifer management. Was it really certain that those commissions would carry out those duties? He also noted that all the “water commissions” mentioned in the first sentence were in fact “river commissions”.

29. Mr. YAMADA (Special Rapporteur) said that the source of an assertion with such serious implications for the future should be identified in a footnote, as should the source of the affirmation that comparable regional organizations would soon play a role in promoting the establishment of similar joint mechanisms.

30. Mr. KATEKA proposed that the phrase “in a few years” should be replaced with “in the future”.

31. Mr. CANDIOTI asked whether “delineation” was the correct term. “Demarcation” seemed more appropriate.

32. Mr. YAMADA (Special Rapporteur) said he had taken the term from the European Union Water Framework Directive.

33. Ms. ESCARAMEIA said that the descriptor “river” applied only to the commissions mentioned in the first sentence of paragraph (4), and that some of the commissions referred to elsewhere in the paragraph were concerned with the management of waters other than rivers.

34. Mr. YAMADA proposed amending the words “existing water commissions”, in the third sentence, to read “existing commissions”.

35. Mr. ECONOMIDES pointed out that the term “river commissions” was appropriate only when the watercourses in question were navigable. In all other cases, the correct term was “water management”.

Paragraph (4), as amended, was adopted.

The commentary to draft article 7, as amended, was adopted.

Commentary to draft article 8 (Regular exchange of data and information)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to draft article 8 was adopted.

Commentary to draft article 9 (Protection and preservation of ecosystems)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

37. Mr. GAJA said that the first sentence should be amended to read: “The obligation of States to the taking of ‘all appropriate measures’ is limited to the protection of relevant ecosystems.”

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to draft article 9, as amended, was adopted.
Commentary to draft article 10 (Recharge and discharge zones)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

38. Mr. GAJA said that the paragraph should end after the fourth sentence in order to eliminate the long account of the history of the formulation of paragraph 2.

39. Mr. CANDIOTI said that, in the second sentence, the words “could be located in an aquifer State” should be amended to read “could be located in a State”.

40. Mr. ECONOMIDES said that if Mr. Candiotti’s amendment were adopted, the second and third sentences would then appear to be identical in meaning.

41. Ms. XUE, speaking as a member of the Commission, said that, while paragraph (3) did indeed touch on the history of the Commission’s debate, it also enabled the reader to understand the rationale behind the Commission’s decision to include an obligation on all States in whose territory a recharge or discharge zone was located to cooperate with the aquifer States to protect the aquifer or aquifer system. She was therefore in favour of retaining the last four sentences.

42. Mr. CANDIOTI agreed with Ms. Xue as to the usefulness of outlining the Commission’s thinking in the commentary to draft articles adopted on first reading.

43. Mr. GAJA said that the point had already been made in paragraph (4) of the general commentary. There was no need to repeat the argument or to say that the obligation had not been mentioned in the Special Rapporteur’s original proposal and that the Commission had subsequently inserted it.

44. Ms. ESCARAMEIA agreed with Ms. Xue and Mr. Candiotti that the last four sentences ought not to be deleted. The Commission had debated the matter at great length and had taken a fundamental decision in including the obligation in question. At the stage of a first reading, she could see no reason why it should not be possible to refer to the history of the text and to divergences of opinion with regard to it. The commentary ought to reflect the differing views and the fact that no consensus had been reached.

45. Mr. CANDIOTI said that although it was true that the idea was already reflected in paragraph (4) of the general commentary, it was usefully fleshed out in the paragraph now under discussion. The explanation that the obligation to cooperate was opposable only to third States that might become parties to a future convention, but not to third States in general, was an important point and should be retained. While he would not go against a decision to delete that wording, he thought that such explanations were useful in a text adopted on first reading.

46. Mr. GAJA, responding to Ms. Escarameia’s comments, said he was not suggesting that divergences of views should not be mentioned. There had been no divergence of views, however—in fact, there had been consensus in the Working Group. Anyone wishing to learn the history of the Commission’s deliberations could do so by consulting the summary records. Moreover, a convention on transboundary aquifers was only one possible outcome of the Commission’s work. The draft articles might instead be regarded as reflecting what might one day be regarded as general international law, in which case it would be unnecessary to explain why they were binding even on States that did not become parties to such a convention. If the Commission wished to retain much of the text, it could perhaps consider deleting the reference to the Special Rapporteur’s original formulation.

47. Mr. YAMADA (Special Rapporteur) said the issue revolved around the Commission’s policy for drafting commentaries to texts adopted on first reading. Commentaries to texts adopted on second reading primarily explained the content, but in the case of a first reading, the purpose was also to solicit observations and comments from Governments. Nevertheless, in view of the point raised by Mr. Gaja, he could agree to delete the reference to his original proposal.

48. The CHAIRPERSON, speaking as a member of the Commission, suggested a simplified version of the lengthy general explanation which, as he understood it, was aimed at facilitating protection of the aquifer system.

49. Mr. VALENCIA-OSPINA said that another alternative would be simply to delete the phrase “as originally formulated by the Special Rapporteur”.

50. Ms. XUE (Special Rapporteur) said that while she was sympathetic to Mr. Gaja’s concerns, she felt that the final three sentences of the paragraph contained substantive elements that should be conveyed to the reader. Having heard all the viewpoints expressed, she wished to propose deleting the portion of the text beginning with the words “it is necessary”, in the fourth sentence, and ending with the word “Accordingly”, at the start of the penultimate sentence. The fourth sentence would thus read: “Considering the importance of the recharge and discharge mechanism for the proper function of aquifers, it was decided to include an obligation on all States in whose territory a recharge or discharge zone is located to cooperate with aquifer States to protect the aquifer.” The final sentence would remain unchanged.

Paragraph (3), as amended, was adopted.

The commentary to draft article 10, as amended, was adopted.

Draft article 11 (Prevention, reduction and control of pollution)

51. Mr. PELLET said that while he was aware that the text of the article itself was not under discussion, he wished to draw attention to a major problem with the French and also, apparently, the Spanish language version. The expression “a precautionary approach”, in the English text of draft article 11, was rendered as “une approche de précaution” in the text of the draft article as reproduced in Section C, paragraph 1 of document A/CN.4/L.694/Add.1 (page 6 of the French version) but as “une attitude prudente” in the text of the draft article
as reproduced in section C, paragraph 2 (page 42 of the French version). That was an inexcusable discrepancy. Comparably serious problems of translation had arisen on a number of occasions during the current session, to the extent that it was no longer possible for the Commission to take it for granted that its documentation had been properly translated. He wished to lodge the strongest possible formal protest at that state of affairs, which led to confusion in the plenary and totally undermined the credibility of the Commission’s work.

52. The CHAIRPERSON said that the article’s wording in paragraph 2, “Text of the draft articles with commentaries thereto”, would be aligned with that in paragraph 1, “Text of the draft articles”, in all language versions in which it was necessary.

Commentary to draft article 11 (Prevention, reduction and control of pollution)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

53. Mr. KATEKA pointed out that the ninth sentence, which read “This practice indicates general willingness to tolerate even significant pollution harm, provided that an aquifer State of pollution origin is making its best efforts to reduce the pollution to a mutually acceptable level”, gave the impression that the Commission was condoning or encouraging pollution. It should be deleted.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

54. Ms. ESCARAMEIA said that the fifth sentence implied that all members of the Commission thought “it would be better to avoid conceptual and difficult discussions concerning the expression ‘precautionary principle’”. Some, however, had wanted an article on the precautionary principle to be included, even though the Commission had ultimately decided against it. She therefore proposed that the words “The majority of members of the Commission considered that” should be inserted at the beginning of the sentence, before “it would be better”.

Paragraph (6), as amended, was adopted.

The commentary to draft article 11, as amended, was adopted.

Commentary to draft article 12 (Monitoring)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

55. Mr. KATEKA proposed that the year of adoption of each of the instruments cited should be inserted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (9)

Paragraphs (4) to (9) were adopted.

The commentary to draft article 12, as amended, was adopted.

Commentary to draft article 13 (Management)

Paragraph (1)

Paragraph (1), as amended by document A/CN.4/L.694/Add.1/Corr.1, was adopted.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were adopted.

The commentary to draft article 13, as amended, was adopted.

Commentary to draft article 14 (Planned activities)

Paragraph (1)

56. Mr. PELLET said that the final sentence involved a non-sequitur, which could be eliminated by inserting the words “,” whether or not an aquifer State” at the end of the penultimate sentence.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (7)

Paragraphs (2) to (7) were adopted.

Paragraph (8)

57. The CHAIRPERSON drew attention to a new text proposed in document A/CN.4/L.694/Add.1/Corr.1 as a replacement for the final three sentences of the paragraph.

58. Mr. GAJA said the new text suggested that draft article 6, which concerned an obligation of prevention, did not cover activities that “may” have harmful effects. Yet the obligation of prevention related also to activities that might entail risk. He therefore proposed that, instead of adopting the amendment, which placed an unacceptable interpretation on article 6, the Commission should simply delete the final three sentences of paragraph (8).

59. Ms. ESCARAMEIA said that the second sentence of paragraph (8) should be retained, because it explained that the threshold of “significant adverse effect” was lower than that of “significant harm”. Only the last two sentences should be deleted.

Paragraph (8), as amended, was adopted.

The commentary to draft article 14, as amended, was adopted.

Commentary to draft article 15 (Scientific and technical cooperation with developing States)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.
Paragraph (8)

Paragraph (8) was adopted with an editing amendment to the English version.

The commentary to draft article 15 was adopted.

The meeting rose at 6.05 p.m.

2906th MEETING

Friday, 4 August 2006, at 10.15 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Draft report of the Commission on the work of its fifty-eighth session (continued)

CHAPTER VI. Shared natural resources (concluded) (A/CN.4/L.694 and Add.1 and Corr.1)

1. The CHAIRPERSON invited the members of the Commission to resume consideration of chapter VI, section C, of the draft report on shared natural resources. The text of the provisions had already been adopted; the Commission had only to concern itself with the commentaries thereto.

C. Text of the draft articles on the law of transboundary aquifers adopted by the Commission on first reading (concluded) (A/CN.4/L.694/Add.1 and Corr.1)

2. Text of the draft articles with commentaries thereto (concluded)

Commentary to article 16 (Protection in time of armed conflict)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

2. Mr. PELLET drew attention to an error in the last sentence: the correct reference was to subparagraphs (a) and (b) of article 16, paragraph 2, not paragraph 3.

3. The CHAIRPERSON requested the Secretariat to correct that error.

Paragraph (3) was adopted subject to that correction.

Paragraphs (4) to (8)

Paragraphs (4) to (8) were adopted.

4. Mr. PELLET said that he found the fifth sentence, which read "In the case of watercourses, the States could meet such requirement without derogation from the obligations as the recharge of the water to the watercourses would be likely to be sufficient", to be unclear. Was the recharge truly sufficient to meet requirements or in order for the aquifer to be self-sustaining?

5. Mr. YAMADA (Special Rapporteur) said that the sentence referred to satisfying the “need of their population for drinking water” mentioned in the previous sentence.

Paragraph (9) was adopted.

Commentary to article 17 (Protection in time of armed conflict)

Paragraph (1)

Paragraph (1) was adopted.

Paragraphs (2) and (3)

6. Mr. PELLET said that the last sentence of paragraph (2) gave the impression that, if an important matter was not involved, the law of armed conflict would not apply. It also showed that the provision, to which he had always been opposed, was superfluous. It would be better to delete most of the sentence, leaving only: “The article’s function is, in any event, merely to serve as a reminder to all the States of the applicability of the law of armed conflict to transboundary aquifers.”

7. Mr. MOMTAZ said that the sentence conveyed the idea that the provisions of international humanitarian law relating to the protection of property in time of armed conflict were treaty-based. Such had been the conclusion of the ICJ in its 1996 advisory opinion on the Legality of the Threat or Use of Nuclear Weapons. Among other things, the Court had found that article 54 of Protocol I additional to the Geneva Conventions of 1949, as referred to in paragraph (3) of the commentary, had a basis in treaty and not in custom. The Commission thus had to decide whether it wanted to follow the Court’s line of reasoning. He thought it would be better to retain only the end of the problematic sentence, as Mr. Pellet had suggested. The “Martens clause”, set out in the preamble of the Hague Convention 1907 (IV) respecting the Laws and Customs of War on Land and mentioned in paragraph (3), related only to civilians and combatants, whereas draft article 17 referred to aquifers as military objectives. The last sentence of paragraph (3) also said that “The same general principle”, namely, the “Martens clause”, was expressed in paragraph 2 of draft article 5; that was not true, since the paragraph referred to the necessity of taking account of vital human needs. The best approach would be to delete all references to the “Martens clause” and draft article 5.

8. Mr. YAMADA (Special Rapporteur) said that draft article 17 was identical to article 29 of the 1997 Watercourses Convention. It had therefore seemed logical for its commentary to be identical to the commentary to article 29,\(^{367}\) which contained the problematic wording

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flagged by Mr. Pellet and Mr. Momtaz. He had considered that to amend the commentary would be to create inconsistency and admit that the Commission had made a mistake in the past. It was for the Commission, however, to decide whether the advisory opinion adopted by the ICJ in 1996 required it to revise its position or not.

9. Ms. ESCARAMEIA said that, unlike Mr. Momtaz, she did not see draft article 17 as applying solely to aquifers. It provided that aquifers must not be used in violation of the principles and rules of protection, but such protection extended to the populations that depended on the aquifer, particularly in emergency situations, and thus to civilians and combatants. The reference in paragraph (3) of the commentary to the “Martens clause”, and the last sentence of the paragraph, should therefore be retained.

10. Mr. MOMTAZ said that the “Martens clause” came into play in cases covered by no rule of international humanitarian law, but that was not the case in the present instance, since the commentary listed all the applicable rules. Moreover, the clause applied only to civilians and combatants. The reference in the last sentence of paragraph (3) of the commentary to draft article 5, paragraph 2, was certainly incorrect, since paragraph 2 had nothing to do with the “Martens clause”.

11. The CHAIRPERSON, speaking as a member of the Commission, pointed out that the Special Rapporteur had proposed the inclusion at the end of the third sentence of paragraph (3) of the following text: “including various provisions of conventions on international humanitarian law to the extent that the States in question are bound by them” (see A/CN.4/L.694/Add.1/Corr.1). Perhaps that set of references to relevant instruments could replace the reference to the “Martens clause”.

12. Ms. ESCARAMEIA said it was true that the words “The same general principle” in the last sentence of paragraph (3) of the commentary wrongly suggested that the “Martens clause” was reflected in draft article 5, paragraph 2. She would, however, like a reference to paragraph 2 to be retained, since the requirement it mentioned—taking account of vital human needs—was particularly crucial in the event of armed conflict. A reference to the “Martens clause” could do no harm and would cover unforeseen situations, which was precisely the purpose of that clause.

13. Mr. BROWNIE said that, as he saw it, draft article 17 was a “without prejudice” clause, even though it was not drafted as such. Its purpose was to recall that the draft articles were subject to the application of international humanitarian law and other related provisions. It would be inappropriate, and even dangerous, for the Commission to present, in only a few paragraphs, provisions. It would be inappropriate, and even dangerous, for the Commission to present, in only a few paragraphs, the principles and rules of protection, but such protection extended to the populations that depended on the aquifer, particularly in emergency situations, and thus to civilians and combatants. The reference in paragraph (3) of the commentary to the “Martens clause”, and the last sentence of the paragraph, should therefore be retained.

14. Mr. PELLET said that he fully agreed with Mr. Brownlie’s comments, but thought they also showed that draft article 17 itself was problematic, precisely because of the dangers it involved. Nevertheless, he was not indifferent to the explanation given by the Special Rapporteur and, since the Commission had made a mistake once, it might as well go the whole way and fully reproduce the commentary to article 29 of the 1997 Watercourses Convention, however absurd that might be.

15. Mr. CHEE asked whether there had ever been instances when groundwaters had actually been used by civilians or combatants. If not, then draft article 17 did not cover any realistic situation.

16. Mr. MANSFIELD said that, given the explanations by the Special Rapporteur, it would be best to leave the text as it was, since, on second reading, the Commission would have to reconsider whether or not to retain the provision. It would be difficult to rewrite the commentary at the present stage.

17. Mr. GAJA said he agreed that the text should generally be left as it stood, but a few changes were in order, since draft article 5, paragraph 2, was not in fact about the “Martens clause”. Deleting one portion while the entire text was based on the 1997 Watercourses Convention would give the impression that the Commission had changed its mind.

18. At the request of Mr. Candioti, the CHAIRPERSON read out the changes agreed on for paragraphs (2) and (3) of the commentary to draft article 17. The second sentence of paragraph (2) was to be replaced by: “The article’s function is, in any event, merely to serve as a reminder to all the States of the applicability of the law of armed conflict to transboundary aquifers.” The third sentence of paragraph (3) should be amended to read: “In such cases, draft article 17 makes it clear that the rules and principles governing armed conflict apply, including various provisions of conventions on international humanitarian law, to the extent that the States in question are bound by them.” The last sentence would read: “Paragraph 2 of draft article 5 of the present draft articles provides that, in reconciling a conflict between utilizations of transboundary aquifers, special attention is to be paid to the requirement of vital human needs.”

Paragraphs (2) and (3), as amended, were adopted.

Commentary to article 18 (Data and information concerning national defence or security)

Paragraph (1) was adopted.

Paragraph (2) was adopted, subject to the replacement of the third sentence by the text contained in document A/CN.4/L.694/Add.1/Corr.1.

Commentary to article 19 (Bilateral and regional agreements and arrangements)

Paragraph (1) was adopted.

Paragraph (2) as amended, was adopted.

Section C as a whole, as amended, was adopted.
A. Introduction (concluded) (A/CN.4/L.694)

Paragraph 1

20. Mr. YAMADA recalled that consideration had been given to adding two sentences at the end of paragraph 1, to read: “A Working Group was also established to assist the Special Rapporteur in sketching out the general orientation of the topic in the light of the syllabus prepared in 2000.” The Special Rapporteur indicated his intention to deal with confined transboundary groundwaters, oil and gas in the context of the topic and proposed a step-by-step approach beginning with groundwaters.” He also proposed that, in the footnote to the first paragraph in document A/CN.4/L.694, the sentence that began “A Working Group” should be deleted.

21. Mr. KATEKA said that, in the first sentence proposed for addition to paragraph 1, the word “also” should be deleted.

Paragraph 1, as amended, was adopted.

Paragraph 2

Paragraph 2 was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (concluded)

Paragraphs 3 to 6

Paragraphs 3 to 6 were adopted.

22. The CHAIRPERSON proposed that, at the end of section B of chapter VI of the Commission’s report, the following text should be inserted:

“At its 2906th meeting, on 4 August 2006, the Commission expressed its deep appreciation for the outstanding contribution that the Special Rapporteur, Mr. Chusei Yamada, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the law of transboundary aquifers. It also acknowledged the untiring efforts and contribution of the Working Group on Shared Natural Resources under the Chairmanship of Mr. Enrique Candioti, as well as the various briefings during the development of the topic by experts on groundwaters from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization (FAO), the Economic Commission for Europe (UNECE) and the International Association of Hydrogeologists (IAH).”

It was so decided.

Section B, as amended, was adopted.

Documents A/CN.4/L.694 and Add.1, as amended, were adopted.

Chapter VI of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter IV. Diplomatic protection (A/CN.4/L.692 and Add.1)

A. Introduction (A/CN.4/L.692)

* Resumed from the 2903rd meeting.

in the context of diplomatic protection, a State could assist any of its nationals, regardless of whether they were salaried workers, civil servants, high-level officials or ordinary citizens.

29. Mr. GAJA said that the problem was perhaps that the French term "agent" was not a good translation for the English word "agent", which was perfectly acceptable in the context.

30. Mr. PELLET said that he would prefer Mr. Gaja’s idea to be expressed not by the inclusion of references to the State in the body of the commentary, but by the insertion of a footnote, to read: “The fact that the words ‘functional protection’ generally refer to the protection of one of its agents by an international organization does not prevent a State from protecting its agents in the exercise of their functions.”

31. Mr. ECONOMIDES said that he agreed with Mr. Pellet, but thought that the proposed footnote would create as much confusion as would the proposal by Mr. Gaja. He would prefer the text to be left as it stood.

32. Mr. CANDIOTI said that he was in favour of retaining the text proposed by the Special Rapporteur for paragraph (3) of the general commentary. Dealing with “functional protection” in that commentary would create confusion.

33. Mr. GAJA said that he would withdraw his proposal, since it did not seem to be acceptable to other members, but he still thought that paragraph (3) as currently worded created confusion. The articles under consideration did not cover, for example, the case where a consular official of a State did not have the nationality of that State, which would then be entitled to exercise functional protection.

Paragraph (3) was adopted.

The general commentary was adopted.

Commentary to article 1 (Definition and scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

34. Mr. DUGARD (Special Rapporteur) said that Mr. Matheson had proposed that the words “is sometimes” in the first sentence should be replaced by “has traditionally”.

35. Mr. Sreenivasa RAO proposed that, in the same sentence, the words “few remedies” should be replaced by “few opportunities for exercising them in the event of difficulties”, which he thought would better express the idea that the Special Rapporteur wanted to convey, namely, that, while the individual had rights under international law, it was difficult for him to defend them when they were challenged.

41. The CHAIRPERSON informed the members that the Special Rapporteur had to leave the meeting and that the Commission would have to come back to the paragraph and resume its consideration of chapter IV at a later meeting.


[Agenda item 6]

REPORT OF THE WORKING GROUP

42. Mr. PELLET (Chairperson of the Working Group on unilateral acts of States), introducing the report of the Working Group on unilateral acts of States, said it consisted of draft conclusions divided into two sections. The first took the form of an introductory note describing the background of the topic and defining the concept of the unilateral act of States; the second set out the guiding principles applicable to unilateral declarations of States capable of creating legal obligations. The Working Group had given priority to unilateral acts taking the form of an express manifestation of a will to be bound on the part of the author State, while bearing in mind that a State could be bound by behaviours other than formal declarations. The draft principles, which the Commission was invited to adopt in the form of conclusions on the topic of unilateral acts of States, consisted of a preamble on unilateral acts in a very broad sense followed by principles which related only to unilateral acts stricto sensu and were accompanied by brief commentaries that could more accurately be described as explanatory notes. The notes had been

Paragraph (4)

38. Mr. PELLET said that he had many problems with the paragraph. First of all, the reference to “the prohibition of slavery” in the second sentence seemed a bit too categorical. Secondly, he could not go along with the idea expressed in the sixth sentence that the individual was not yet a full subject of international law. Lastly, in the penultimate sentence, the words “may have” were especially problematic for him. He would therefore like the paragraph to be deleted. Failing that, he suggested that a working group should be formed to redraft it.

39. Mr. GAJA proposed that the phrase “Although not yet a full subject of international law” in the sixth sentence and the entire tenth sentence, namely, “This does not mean that the fiction provided by Mavrommatis can be dispensed with”, should be deleted. The penultimate sentence could be amended to read: “However, the individual has rights under international law, but few remedies.”

40. Mr. Sreenivasa RAO proposed that, in the same sentence, the words “few remedies” should be replaced by “few opportunities for exercising them in the event of difficulties”, which he thought would better express the idea that the Special Rapporteur wanted to convey, namely, that, while the individual had rights under international law, it was difficult for him to defend them when they were challenged.

41. The CHAIRPERSON informed the members that the Special Rapporteur had to leave the meeting and that the Commission would have to come back to the paragraph and resume its consideration of chapter IV at a later meeting.
prepared by the Special Rapporteur and the Chairperson of the Working Group, with the Working Group’s consent, but without its having been called on to endorse them. For the sake of brevity and for lack of time, the explanatory notes referred exclusively to the jurisprudence of the ICJ and case studies prepared in 2004 by several members of the Working Group and summarized by the Special Rapporteur in his eighth report.369

43. The preamble to the guiding principles incorporated a number of general considerations. It recalled first that States could find themselves bound by their unilateral behaviour on the international plane and that behaviours capable of legally binding States could take the form of formal declarations or mere informal conduct, including silence, on which other States could reasonably rely. It then referred to the role of circumstances in determining whether a unilateral behaviour by a State bound it. It noted that, in practice, it was often difficult to establish whether the legal effects stemming from the unilateral behaviour of a State were the consequence of the intent that it had expressed or depended on the expectations to which its conduct had given rise among other subjects of international law. Lastly, it explained that the guiding principles related only to unilateral acts "stricto sensu", in other words, to those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law.

44. Turning to each of the 10 guiding principles contained in the report (A/CN.4/L.703), he said that guiding principle 1 was directly inspired by the "dictum" of the ICJ in its 1974 judgments in the Nuclear Tests case. Guiding principle 2 stated that any State possessed capacity to undertake legal obligations through unilateral declarations. Guiding principle 3 related to the determination of the legal effects of unilateral declarations. Guiding principle 4 concerned the powers of the official authorities that made the declaration and was inspired by the consistent jurisprudence of the ICJ, including its most recent decisions. Guiding principle 5 stated the manner in which unilateral declarations could be formulated, namely, orally or in writing. Guiding principle 6 concerned the addressees of unilateral declarations. Guiding principle 7 dealt with how obligations were created for the State formulating a unilateral declaration; it, too, was inspired by the jurisprudence of the ICJ and laid down certain guidelines for interpreting the content of such obligations. Guiding principle 8 stated that a unilateral declaration that was in conflict with a peremptory norm of international law was void; it was inspired by article 53 of the 1969 Vienna Convention. Guiding principle 9 dealt with obligations for other States that were created by a unilateral declaration of a State. It merely stated a principle well established in international law whereby, absent any authorizing provision, obligations could not be imposed on a State without its consent. Guiding principle 10, on revoking a unilateral declaration, indicated that this could not be done arbitrarily and was also inspired by the jurisprudence of the ICJ. A fundamental change in circumstances was understood to be governed by the rules embodied in article 62 of the 1969 Vienna Convention.

45. In conclusion, he said that the Working Group recommended that the Commission should adopt the 10 guiding principles together with their commentaries. He thanked not only the Special Rapporteur for his excellent spirit of cooperation and constructive suggestions, but also all the members of the Working Group for their contributions and their spirit of compromise.

46. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) emphasized that the guiding principles submitted by the Chairperson of the Working Group on unilateral acts of States were the culmination of 10 years of hard work and, together with their commentaries, should be of great use to States in their international relations for determining the scope and effects of their unilateral declarations.

47. Mr. KATEKA welcomed the fact that the Working Group had made the effort to accompany the guiding principles by commentaries that would clarify their meaning and scope. The reference to silence in the second preambular paragraph of the guiding principles was not really necessary, however.

48. Mr. GAJA said that the English text of the guiding principles needed to be amended: in guiding principle 1, the words “interested States” should be replaced by “States concerned” and, in guiding principle 4, the words “have the capacity” should be replaced by “are competent”; lastly, at the end of the first sentence of guiding principle 7, the words “clear and specific terms” should be aligned with the French version.

49. Mr. BAENA SOARES said that he endorsed the guiding principles, the Spanish version of which posed no problems, and looked forward with interest to receiving the text of the commentaries.

50. Mr. MELESCANU, referring to the second sentence of guiding principle 9, said that, once a unilateral declaration had been clearly accepted, it was no longer a unilateral declaration, but rather an international agreement concluded in simplified form, for example, orally. With that reservation, he thought that the principles, accompanied by their commentaries, constituted a major contribution by the Commission to the codification of international law.

51. Mr. ECONOMIDES said that three preliminary observations were called for by the guiding principles put forward by the Working Group. First, regarding the title, it should be made clear that the legal obligations in question were created “on the international plane”. Secondly, the preamble to the guiding principle seemed too ambitious: only the first and final paragraphs were really necessary and the remaining three, particularly the second of those, could be deleted without any harm. Lastly, guiding principles 1, 3 and 9 called for comments that would be made at an appropriate moment.

52. Mr. Sreenivasa RAO said he welcomed the fact that the Working Group had been able to complete its work in such a satisfactory manner and expressed the hope that the commentaries to be submitted would be as clear as the guiding principles themselves and would make a
contribution to the literature. The Commission should take note of the results of the work on the topic, namely, the guiding principles and the commentaries thereto, as it had for the topic of fragmentation of international law.

53. Mr. KABATSI said that he shared Mr. Kateka’s reservations about the reference to silence in the second preambular paragraph and Mr. Melescanu’s reservations about the second sentence of guiding principle 9, even though he could see that, in some situations, the States concerned might incur obligations without having strictly speaking entered into treaty relations.

54. Mr. MANSFIELD said that the report of the Working Group, including the guiding principles contained therein, was a text that had been the subject of arduous negotiations and must be taken as a package. The preamble to the principles in its entirety and each of the principles themselves had had to be retained, for without each and every one of them there would have been no consensus. He hoped that, like the Working Group, the Commission could adopt them as a whole by consensus.

55. Mr. PELLET (Chairperson of the Working Group on unilateral acts of States) appealed to the Commission to heed Mr. Mansfield. Reaching a consensus within the Working Group had been extremely difficult and, if the Commission began trying to make changes, it might become embroiled in an interminable debate. It could very well adopt the guiding principles with the reservations of certain members. Moreover, the comments of members could be reflected in the commentaries, to be submitted to the Commission the following week.

56. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Working Group on unilateral acts of States (A/CN.4/L.703) by consensus.

It was so decided.

The meeting rose at 1.10 p.m.

2907th MEETING

Monday, 7 August 2006, 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Mottaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue.

Draft report of the International Law Commission on the work of its fifty-eighth session (continued)

Chapter IV. Diplomatic protection (continued) (A/CN.4/L.692 and Add.1)

E. Text of the draft articles on diplomatic protection (continued) (A/CN.4/L.692/Add.1)
7. Mr. DUGARD (Special Rapporteur) said he could agree to the deletion of the second sentence for the reasons invoked by Mr. Pellet. He was not wedded to the antepenultimate sentence either and could agree to its deletion if the Commission so desired. Nevertheless, the Mavrommatis fiction had not yet been disposed of completely: there was still some tension between the rights of the individual and the fiction that an injury to a national was an injury to the State itself.

Paragraph (4), as amended by Mr. Gaja and the Special Rapporteur, was adopted.

Paragraph (5)

8. Mr. DUGARD (Special Rapporteur), responding to a question from Mr. GAJA, read out a written proposal from Mr. Matheson to amend the first sentence to read: “Article 1 is formulated in such a way as to acknowledge that a State, in exercising diplomatic protection, acts on behalf of its national as well as on its own behalf.” He would be happy to accept that proposal.

9. Mr. PELLET said the proposal completely altered the meaning of the paragraph and he strongly opposed it. It suggested that a State, in exercising diplomatic protection, acted simultaneously on its own behalf and on behalf of its national, whereas the original text was much more nuanced, acknowledging that one or the other scenario, or both, could obtain.

Paragraph (5) was adopted without amendment.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

10. Mr. PELLET pointed out that the second sentence of paragraph (9) implied that ambassadors and diplomats were political representatives, which was not the case; he suggested that the words “diplomatic or” should be inserted before the word “political”.

11. Mr. GAJA endorsed that proposal. He drew attention to a written proposal by Mr. Matheson, which had been endorsed by the Special Rapporteur, for the insertion of a new second sentence in paragraph (9), to read: “Diplomatic protection does not include démarches or other diplomatic action that do not involve the invocation of the legal responsibility of another State, such as informal requests for corrective action.”

12. Mr. PELLET, supported by Mr. MANSFIELD, endorsed the text but suggested that it should be inserted at the end of paragraph (8), which dealt with the means of exercising diplomatic protection, rather than in paragraph (9), which related to the distinction between consular assistance and diplomatic protection.

13. Mr. ECONOMIDES said that another possibility would be to replace the phrase “by the political representatives” with the phrase “on behalf of the political representatives”. Diplomatic protection always had an official character: it was a request by a State, not simply by one of its consulates. However, he was prepared to accept Mr. Matheson’s proposal.

Paragraph (8), as amended, was adopted.

14. Ms. XUE (Rapporteur of the Commission) pointed out that in the second sentence of paragraph (9), the entire phrase “—ambassador, diplomat, foreign minister or minister of justice—” was superfluous and could be deleted, together with the adjective “political”. As to the final sentence, the discussion in plenary had clearly established that consular assistance was not only preventive but also remedial, mainly through recourse to domestic legal processes to achieve redress. The final sentence should reflect that fact.

15. Mr. CHEE cited article 3, paragraph 1, of the Vienna Convention on Diplomatic Relations and article 5 of the Vienna Convention on Consular Relations as illustrating the overlapping of the functions of diplomatic protection and consular assistance. To make a clear-cut distinction went against the recent trend towards integration of consular and diplomatic functions. Accordingly, the final sentence should be retained unchanged.

16. Mr. DUGARD (Special Rapporteur) said that the use of the word “largely” had been intended to cover the point made by Ms. Xue. If that was not sufficient, however, the words “by recourse to domestic remedies” could be added at the end of the sentence.

17. Mr. KATEKA proposed replacing the words “largely preventive” with “both preventive and remedial”.

18. Mr. DUGARD (Special Rapporteur) said that Mr. Kateka’s proposed amendment would imply that the remedial aspect was one of the main functions of consular assistance. The Commission had been agreed, however, that the consular function was largely preventive, although it did have a remedial element. He therefore suggested that the word “mainly” might be inserted before the words “aims at”.

19. Mr. PELLET said that a sentence could not simultaneously say one thing and its opposite: if the aim was largely preventive, then the preventive and the remedial aspects could not be placed on an equal footing. The Commission was in agreement that consular assistance was in part remedial but mainly preventive. He fully endorsed the Special Rapporteur’s proposal to insert the word “mainly” before “aims” in the last sentence. Other solutions might be either to replace the words “while consular assistance is largely preventive” by “while consular assistance has both preventive and remedial aspects”, or to insert at the end of the sentence the words: “; it also has a remedial function”. All those alternatives made sense, whereas the formulation “both preventive and remedial” did not.

20. Mr. ECONOMIDES said he agreed with Mr. Chee that the sentence should be adopted as it stood; however, he could also go along with the Special Rapporteur’s proposal to insert the word “mainly”.

21. Ms. ESCARAMEIA said she also endorsed the Special Rapporteur’s proposal to insert “mainly” before “aims”. However, that left out the question of recourse to
domestic measures to which Ms. Xue had referred. Taking up Mr. Pellet’s suggestion, Ms. Escarameia proposed the insertion of the phrase “it also has a remedial function by recourse to domestic measures”. That would cover all concerns, namely that consular assistance was largely preventive, but it was also remedial, and that when it was remedial, it mainly took the form of domestic measures.

22. Mr. KATEKA said that the consular assistance he had had personally to provide to his nationals in a number of countries had not been preventive: it had been provided after the damage had been done. He did not see how it could be asserted that consular assistance was preventive.

23. Mr. PELLET said that the task currently before the Commission was not to restate old positions, but to decide how to reflect them in the report. That said, he was not happy with Ms. Escarameia’s proposal to add the words “by recourse to domestic measures” to the end of his own proposal. The consular function did not consist mainly in referring matters to the courts, but in assisting persons brought before the courts. If the text became too detailed, it ran the risk of making vague, inaccurate assertions.

24. Mr. Sreenivasa RAO said that Mr. Kateka’s point was well taken and did not reopen the debate. That particular language had arisen in connection with wrongful acts, and was acceptable in the context of consular functions. He agreed with the Special Rapporteur’s proposal to insert the word “mainly” and with Mr. Pellet’s suggestion, but it would be helpful if at some point the Special Rapporteur could add a footnote indicating what were traditionally regarded as consular functions outside the context of wrongful acts.

25. Mr. MELESCANU said that the text should not be radically altered. Inclusion of the word “mainly” would address the concerns of those who were thinking of a remedial function of consular protection. To try to achieve more would simply be to reopen a debate which would lead nowhere. He therefore endorsed the Special Rapporteur’s proposal to insert the word “mainly”, which clearly rendered the idea that there was a preventive function, but that a remedial function was not excluded. The remainder of the paragraph should stand.

Thus amended, paragraph (9) was adopted.

Paragraph (10)

26. Mr. GAJA said that the first part of the footnote seeking to clarify the undefined zone between diplomatic protection and consular assistance seemed to imply that the ICJ had been confused in its reasoning. That was not a fair comment or something which the Commission should presume to say. The reference to the Avena and LaGrand cases was also not clear. The text could simply mention the Treaty establishing a Constitution for Europe, which referred to something which was in fact probably consular assistance, although it related to diplomatic assistance. He proposed deleting the first two sentences and, in the third sentence, replacing the words “the confusion surrounding the distinction” by “the grey area”, and deleting the words “still further”. Moreover, in the penultimate sentence, the words “and consular assistance” should be inserted after “the exercise of diplomatic protection”: while it was true that, with regard to consular assistance, a State might not object so easily, he did not see how it could be asserted that the consent of the State against which consular assistance was exercised was not necessary when it was a question of a national of a third country.

27. Mr. ECONOMIDES said that the reference to “the protection of the diplomatic and consular authorities” in the text of the European Union had been misinterpreted, because it was not a reference to diplomatic protection. Instead, its intention was to cover the protection of nationals by the diplomatic or consular authorities—an area which still constituted consular assistance. As it stood, the text seemed to suggest that the European Union had made an egregious error, which was untrue. Consequently, he proposed deleting the reference to the European Union text. The protection offered by the diplomatic authorities was always consular protection, even when it was provided by embassy staff. It was not diplomatic protection in the strict sense.

28. Mr. PELLET said that the phrase “as this assistance takes place before the commission of an internationally wrongful act”, at the end of the third sentence of paragraph (10), was incorrect. That was not always the case, and the word generally should therefore be inserted before “takes place”.

29. Mr. CANDIOTI said he agreed with Mr. Economides on the need to delete the reference to the Treaty establishing a Constitution for Europe from the footnote. He was concerned that the commentaries to article 1 would lead the reader to conclude that diplomatic protection was a concept imbued with grey areas. There was no grey area between diplomatic protection as defined in article 1 and the activities of diplomats and consuls who defended their nationals; they were two quite different matters. Diplomatic protection as defined in article 1 was a way of invoking the responsibility of a State for an injury caused by an internationally wrongful act to a national of another State, whereas diplomatic and consular activities were clearly defined in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. The commentary should not lead the General Assembly to conclude that a grey area existed. The Commission was in danger of reintroducing a lack of clarity into the notion of diplomatic protection. It must not confuse the invocation and implementation of responsibility with the activities of ambassadors, diplomats and consuls, who protected their nationals and whose functions were clearly defined. Thus, it would be sufficient for the footnote to refer only to the 1961 and 1963 Vienna Conventions.

30. Mr. VALENCIA-OSPINA, referring to the proposal to delete the first two sentences of the footnote to the penultimate sentence of paragraph (10), said it would be odd for the Commission to ignore the two recent cases heard by the ICJ in which both consular assistance and diplomatic protection had been invoked by the claimants. The Commission was not asserting that the Court had taken a decision on the matter, but only that the claimants had invoked both. By including that reference, it would show that it was aware of the work of the Court; such
a reference would not be discourteous, because the Commission was not commenting on what the Court had said, but only on what the claimants had said. It would be sufficient to say that in the LaGrand and Avena cases, the claimants had invoked both consular assistance and diplomatic protection.

31. The CHAIRPERSON said that that proposal reflected more accurately what had actually taken place.

32. Mr. PELLET begged to differ. The States concerned, Germany and Mexico, had complained that they had been unable to exercise consular assistance. That had been the subject of the dispute. The grey area was not between diplomatic protection and consular assistance. The uncertainty arose because it was not clear from a reading of the decisions of the ICJ in LaGrand and Avena whether the Court had accepted that the United States or Mexico had exercised both diplomatic protection and their right to invoke the provisions of the Vienna Convention on Consular Relations. Those were two completely different matters. It was not a question of consular assistance being invoked before the Court: that made no sense. Mr. Gaja was right that there was a problem with grey areas, but there was no grey area in the Court's decisions or between consular assistance and diplomatic protection. Diplomatic protection was perhaps at issue, but that did not emerge from the Court's decisions. It might be at issue at the level of the referral of the case to the ICJ. The subject of the referral was the refusal of consular assistance. The grey area existed, but did not relate to paragraph (10).

33. Ms. XUE (Rapporteur) proposed deleting the footnote in question and the last sentence of paragraph (10). No additional elements needed to be added.

34. Mr. DUGARD (Special Rapporteur) said that in his seventh report (A/CN.4/567), he had suggested that the Commission should include a provision in article 1 dealing with consular assistance; however, it had been decided that the whole question was too confusing and should not be addressed. Mr. Valencia-Ospina was absolutely right: the Commission could not fail to refer to the two decisions of the ICJ, because although the situation might be clear to Mr. Pellet, the fact of the matter was that many commentators on the two decisions had shown considerable confusion, and if the Commission failed to refer to the decisions, the inference would be that it was simply unaware of the debate surrounding them. Similarly, while it might well be that he had misinterpreted the Treaty Establishing a Constitution for Europe, as Mr. Economides had claimed, there was nevertheless considerable debate in the literature on those provisions. Perhaps the issue could be avoided by referring in the footnote to articles on the subject in academic journals. The Commission could not simply pretend that it was not aware of the two decisions. The same applied to the last sentence: the distinction between diplomatic and consular functions had disappeared in many embassies, and he did not see why the text should make no mention of that fact.

35. Mr. PELLET said that a number of commentators had rightly pointed out that the ICJ had been unable to decide whether an exercise of diplomatic protection or a direct recourse had been involved. If the Special Rapporteur could cite commentators who had placed consular protection on an equal footing with diplomatic protection in the two cases, then those commentators, who had introduced confusion in the literature, should be cited as having done so. Just because there was confusion in the literature did not mean that the Commission should make a grave error.

36. Ms. XUE (Rapporteur) noted that the conventions on consular relations and on diplomatic relations made virtually no distinction between diplomatic and consular functions. That was the practice. The sentence simply created more confusion, because even when an embassy exercised consular protection, that was still not diplomatic protection. There was no need to mention consular protection, because only diplomatic protection and international law were at issue. The grey area between diplomatic protection and consular assistance was irrelevant, and the sentence should be deleted.

37. Mr. DUGARD (Special Rapporteur) said he was happy to go along with Ms. Xue's proposal. He suggested that the footnote might simply refer to the Avena and LaGrand cases, without any discussion.

38. Mr. ECONOMIDES said that paragraph (10) contained a number of imprecisions. For example, the third sentence stated that "Clearly there is no need to exhaust local remedies in the case of consular assistance as this assistance takes place before the commission of an internationally wrongful act". That was very strange, for, as Mr. Kateka had noted, consular assistance was generally exercised after the commission of the act. He proposed reducing the paragraph to a bare minimum. The first two sentences would remain unchanged. The third and final sentence would then read: "Clearly there is no need to exhaust local remedies in the case of consular assistance, whereas this condition is required for the exercise of diplomatic protection, subject to the exceptions described in article 15". The rest of the paragraph would be deleted. What had to be retained was the distinction between the two areas with regard to the criteria for the exhaustion of local remedies. Everything else was dangerous and not entirely accurate.

39. The CHAIRPERSON, responding to a request for clarification by Mr. GAJA, confirmed that a written proposal submitted by Mr. Matheson had not been taken up and that two footnotes in the paragraph were to be deleted.

40. Mr. DUGARD (Special Rapporteur) said that the proposal by Mr. Economides failed to take into account the fact that, in its debates, the Commission had expressed doubts about the Avena and LaGrand cases and had had a long discussion about the Treaty Establishing a Constitution for Europe. He found it very strange that all references to those two matters should simply be deleted. However, if that was what the Commission wished, he would go along with it, albeit under protest.

Paragraph (10), as amended, was adopted.

Paragraph (11) was adopted.
Paragraph (12)

41. Mr. PELLET, referring to the phrase “and not with the protection afforded by an international organization to its agents, recognized by the International Court of Justice”, said that it was not the protection that had been recognized, but the capacity of international organizations to protect their agents. He suggested replacing that phrase by “and not with the protection afforded to its agents by international organizations, whose capacity in that regard has been recognized by the International Court of Justice”.

Paragraph (12), as amended, was adopted.

Paragraphs (13) and (14) were adopted.

Paragraphs (13) and (14) were adopted.

The commentary to draft article 1, as amended, was adopted.

Commentary to draft article 2 (Right to exercise diplomatic protection)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

42. Mr. DUGARD (Special Rapporteur), drawing on a written proposal submitted by Mr. Matheson, suggested that the last sentence should read “The discretionary right of a State to exercise diplomatic protection should therefore be read with article 19 which recommends to States that they should exercise that right in appropriate cases”.

43. Mr. PELLET said that, just as the Special Rapporteur had given examples of case law in the footnote on judicial decisions, he should cite examples of legislation in the preceding footnote, rather than simply referring to his own first report.370

44. Mr. DUGARD (Special Rapporteur) said that, in that footnote, he had referred to his first report for convenience’s sake, since it contained a detailed discussion on the complexities of the existing legislation. He would, however, be happy to add more information to the footnote on domestic legislation so that it corresponded to the footnote on judicial decisions.

Paragraph (3), as amended, was adopted.

Paragraph (4) was adopted.

Paragraph (4) was adopted.

The commentary to draft article 2, as amended, was adopted.

Commentary to draft article 3 (Protection by the State of nationality)

Paragraph (1) was adopted.

Paragraph (2)

45. Mr. PELLET said that, as currently worded, the commentary could give rise to a broad interpretation whereby the circumstances in which diplomatic protection might be exercised in respect of non-nationals was only one set of circumstances among others. The wording should make it clear that article 8 constituted a limitation on the exception in question. He therefore suggested that the paragraph should be reformulated to read: “Paragraph 2 refers to the exception provided for under article 8”.

Paragraph (2), as amended, was adopted.

The commentary to draft article 3, as amended, was adopted.

Commentary to draft article 4 (State of nationality of a natural person)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

46. Mr. PELLET asked whether the Special Rapporteur would be willing to delete the footnote at the end of the paragraph.

The footnote was deleted.

Paragraph (5), as amended, was adopted with, in addition, an editing amendment to the English version.

Paragraphs (6) and (7) were adopted.

Paragraph (8)

47. Mr. PELLET said that the paragraph belonged in the commentary to article 5 rather than in that to article 4, since it dealt with the question of the change of nationality rather than the right to nationality.

48. Ms. ESCARAMEIA said that the paragraph belonged in the commentary to article 4. It related not to article 5 and continuous nationality but to the fact that a married woman might acquire her husband’s nationality by virtue of a given domestic law, even though such acquisition might be inconsistent with international law.

49. Mr. DUGARD (Special Rapporteur) said that the issue had been discussed at considerable length in the Drafting Committee and it had been decided to locate the paragraph in the commentary to article 4.

Paragraph (8) was adopted.

The commentary to draft article 4, as amended, was adopted.

Commentary to draft article 5 (Continuous nationality of a natural person)

Paragraph (1)

Paragraph (1) was adopted.

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Paragraph (2)

50. Mr. DUGARD (Special Rapporteur) read out a written proposal by Mr. Matheson that the last sentence should be reworded to read: “Continuity is presumed if that nationality existed at both these dates, but this presumption is, of course, rebuttable.” He himself was happy to accept the amendment.

51. Mr. GAJA said that, in the interest of clarity, the proposed amendment should be preceded by the following phrase: “Given the difficulty of providing evidence of continuity,”.

52. In response to a concern raised by Mr. KATEKA, Mr. DUGARD (Special Rapporteur) confirmed that the amendment proposed by Mr. Matheson merely clarified the point that there could be no break in nationality between the two dates discussed in the paragraph.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (9) were adopted.

Paragraph (10) was adopted without amendment.

Paragraphs (11) to (14) were adopted.

The commentary to draft article 5, as amended, was adopted.

Commentary to draft article 6 (Multiple nationality and claim against a third State)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 6 was adopted.

Commentary to draft article 7 (Multiple nationality and claim against a State of nationality)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

55. Mr. MOMTAZ said that the paragraph laid too much emphasis on the issue of dominant nationality, given that the article itself concerned multiple nationality and claim against a State of nationality. All that was necessary was to stress that the jurisprudence of the United Nations Compensation Commission was in conformity with article 7. By the same token, there was no need for the references to the third report on State responsibility372 or to Mr. Orrego Vicuña’s report to the International Law Association.372 Neither was relevant to the provisions of article 7.

56. Mr. GAJA said that, for his part, he was unhappy with the inclusion of the reference to the United Nations Compensation Commission, which also concerned multiple rather than dominant nationality. Accordingly, the two sentences referring to the United Nations Compensation Commission should be deleted.

57. Mr. DUGARD (Special Rapporteur) said that the commentary claimed only that the references in question gave support to the dominant nationality principle.

58. Mr. GAJA said that the principle applied by the United Nations Compensation Commission was merely that a person with dual nationality could avail himself or herself of a bona fide nationality of another State.

59. Mr. DUGARD (Special Rapporteur) said that he would not oppose the deletion of the two sentences relating to the United Nations Compensation Commission. He had serious misgivings, however, about deleting the references to the third report on State responsibility and on the report of Mr. Orrego Vicuña in the footnotes, which had, for the first time, discussed at some length the problem of effective nationality. He conceded, however, that the word “dominant” had not been used in either case.

60. Mr. MOMTAZ said that he was not opposed to the reference to the United Nations Compensation Commission, inasmuch as it concerned a claim against another State of nationality, namely Iraq. The Special Rapporteur, however, seemed to think that the issue before the United Nations Compensation Commission had been dominant nationality, and that was not the case. The reference to Mr. García Amador’s third report on State responsibility, on the other hand, concerned only the issue of dominant nationality.

Paragraph (3), as amended by Mr. Gaja, was adopted.

Paragraphs (4) and (5)

61. Mr. PELLET said that the first sentence of paragraph (5) implied that the words “effective” and “dominant”, used in relation to nationality, were identical in meaning, whereas they were clearly different, the word “dominant” having comparative force.

62. The CHAIRPERSON suggested that an explanation of the distinction might be inserted in paragraph (4).

63. Mr. DUGARD (Special Rapporteur) said that the authorities did indeed use the terms interchangeably, despite the difference in their meanings. That was why he had used the word “predominant”, in order to emphasize the element of relativity.

64. Mr. PELLET suggested that the phrase “Although the two concepts differ, the authorities use the terms ‘effective’ and ‘dominant’ interchangeably” should be inserted at the beginning of paragraph (5).

65. Mr. GAJA said that paragraph (4) was inconsistent with the new wording of paragraph (5) and should therefore be deleted.

Paragraph (4) was deleted.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were adopted.

The commentary to draft article 7, as amended, was adopted.

Commentary to draft article 8 (Stateless persons and refugees)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Paragraph (8)

66. Mr. DUGARD (Special Rapporteur) read out a proposal by Mr. Matheson that the last sentence should be deleted. He concurred with that proposal.

67. Ms. ESCARAMEIA said that the paragraph had been the subject of much debate, in the course of which it had been agreed that the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto no longer reflected common practice. That was the reason why the last sentence had been included in the commentary. If it were deleted, the commentary would fail to explain what constituted “internationally accepted standards”. The danger would then arise that this phrase would be understood to refer to the 1951 Convention, whereas many members of the Commission held that the numerous subsequent conventions on the subject had introduced more advanced standards. She was therefore against deletion of the last sentence.

68. After a drafting discussion in which Mr. RODRIGUEZ CEDEÑO, Mr. KATEKA, Mr. MANSFIELD, Ms. XUE (Rapporteur), the CHAIRPERSON and Mr. CHEE took part, it was proposed that the last sentence should read: “This term emphasizes that the standards expounded in different conventions are applicable, as well as the legal rules contained in the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and other international instruments.”

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (12)

Paragraphs (9) to (12) were adopted.

The commentary to draft article 8, as amended, was adopted.

Commentary to draft article 9 (State of nationality of a corporation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

69. Ms. ESCARAMEIA said that, in many national jurisdictions, the capital of corporations that were profit-making enterprises with limited liability was not always represented by shares. She therefore proposed the insertion of the word “generally” before the word “represented”, for the sake of consistency with paragraph (1) of the commentary to draft article 13.

Paragraph (2), as amended, was adopted.

Paragraph (3)

70. Mr. PELLET proposed that in the first sentence in the French version, the adjective “anonymes” should be deleted, because the article applied to other forms of corporations as well. In the same sentence in the French version the word “représenté” should be replaced with “constitué”.

Paragraph (3)

71. Mr. GAJA, referring to the second citation of the Barcelona Traction case in that paragraph, noted that the Court had stated (in an obiter dictum), rather than “decided”, that international law attributed the right of diplomatic protection of a corporate entity to the State under the laws of which it was incorporated and in whose territory it had its registered office. A footnote should be added to indicate that the Court had said that other elements could also be of relevance. In the sentence citing the Nottebohm case, the phrase “it refused to require” was too strong; it would be more appropriate to say “did not reiterate the requirement of a genuine connection”, since the Court had examined elements akin to a genuine connection.

Paragraph (4)

72. After a drafting discussion in which Mr. DUGARD (Special Rapporteur), Mr. GAJA, the CHAIRPERSON and Mr. PELLET took part, it was proposed that that sentence should read “Although it had not reiterated the requirement of a ‘genuine connection’ as applied in the Nottebohm case …”. In the sentence commencing “As the laws of most States require”, it was suggested that the word “sham” should be replaced with the word “fiction”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

73. Mr. PELLET endorsed Mr. Gaja’s proposal to include a footnote after the second reference to the Barcelona Traction case and said that the phrase after the words “Barcelona Traction” should read “when it stated inter alia …”, since the Court had also adopted a stance on a number of other factors.

Paragraph (6)

74. Mr. DUGARD, (Special Rapporteur) read out a proposal by Mr. Matheson that the second sentence of paragraph (4) should be amended to read: “However,
it provides an exception in a particular situation where there is no other significant link or connection between the State of incorporation and the corporation itself, and where certain significant connections exist with another State, in which case that other State is to be regarded as the State of nationality for the purpose of diplomatic protection.” He was happy to accept that proposal.

75. Mr. GAJA supported Mr. Matheson’s proposal and also suggested the deletion of the last sentence of the paragraph.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

The commentary to draft article 9, as amended, was adopted.

Commentary to draft article 10 (Continuous nationality of a corporation)

Paragraph (1)

76. Mr. GAJA proposed that the third sentence should be amended to state that “… corporations generally change their nationality only by being re-formed …”, and that the last sentence should be modified to read: “The most frequent instance in which a corporation changes nationality without changing legal personality is that of State succession”, in order to allow for the possibility, which existed in private international law, of a corporation changing nationality without necessarily being reincorporated.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were adopted.

The commentary to draft article 10, as amended, was adopted.


[Agenda item 12]

REPORT OF THE PLANNING GROUP

77. Mr. GAJA (Chairperson of the Planning Group), presenting the report of the Planning Group (A/CN.4/L.704), said that the Planning Group had held three meetings. Its agenda had included the consideration of the proposed strategic framework concerning Sub-programme 3, Progressive development and codification of international law; the consideration of the report of the Working Group on the Long-term Programme of Work; the question of the Commission’s documentation; the holding of a meeting with United Nations human rights experts; and the date and place of the fifty-ninth session of the Commission.

78. With regard to the proposed strategic framework for the period 2008–2009, the Planning Group recommended that the Commission take note of Sub-programme 3 concerning the progressive development and codification of international law.

79. The Chairperson of the Working Group on the Long-term Programme of Work had presented a report to the Planning Group. After thoroughly debating that report, the Planning Group recommended that the Commission include in its long-term programme of work the five topics enumerated in paragraph 4 of the report. The consolidated list of topics recommended over the last three quinquennia was to be found in paragraph 7 of the report. Paragraph 8 acknowledged the assistance rendered by the Secretariat in the preparation of some of the papers considered by the Working Group on the Long-term Programme of Work.

80. The Planning Group’s views and recommendations on the Commission’s documentation were set out in paragraphs 9 to 14. The Planning Group had also examined the question of convening a meeting with United Nations experts in the field of human rights, including those from human rights monitoring bodies, in order to discuss issues concerning reservations to human rights treaties. An appropriate recommendation was contained in paragraph 15.

81. Lastly the Planning Group recommended that the Commission’s fifty-ninth session should be held in Geneva from 7 May to 8 June and from 9 July to 10 August 2007. Should the recommendations of the Planning Group be accepted by the Commission, they would be reproduced as chapter XIII of the Commission’s report on the work of its fifty-eighth session, subject to any necessary adjustments.

82. Mr. DUGARD said it had been past practice to refer to the question of honoraria in the Planning Group’s report. While he realized that there was little possibility of honoraria being reinstated, he felt that the Commission should place on record its dissatisfaction with the current situation.

83. Mr. VALENCIA-OSPINA drew attention to a typographical error in paragraph 2 of the English version of the report, which should refer to “paragraphs 6, 7, 8, 13 and 16 on the Report of the International Law Commission”.

84. Mr. GAJA (Chairperson of the Planning Group), supported by Mr. PELLET, said that it would not be possible to incorporate Mr. Dugard’s proposal in the report as the Planning Group had not dealt with the matter of honoraria. It was open to the Commission to raise that question when it came to adopt chapter XIII of its report.

The Commission took note of the report of the Planning Group, and of the drafting amendments recommended thereto.

The meeting rose at 1 p.m.
**2908th MEETING**

*Monday, 7 August 2006, at 3 p.m.***

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Montaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue.

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**Draft report of the Commission on the work of its fifty-eighth session (continued)**

1. The Chairperson invited the members of the Commission to continue consideration of chapter IV of the draft report of the Commission.

**Chapter IV. Diplomatic protection (continued) (A/CN.4/L.692 and Add.1)**

**E. Text of the draft articles on diplomatic protection (continued) (A/CN.4/L.692/Add.1)**

2. Text of the draft articles with commentaries thereto (continued)

Commentary to draft article II (Protection of shareholders)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

2. Mr. Pellet said that the words “et c’est ce qu’ils devraient faire” in the last sentence of the French version were clumsy. He would submit wording to the Secretariat that was closer to the English version.

*Paragraph (3) was adopted subject to the amendment proposed by Mr. Pellet for the French text.*

Paragraph (4)

3. Mr. Dugard (Special Rapporteur) indicated that Mr. Matheson had suggested that the last sentence of paragraph (4) should be deleted and that he himself proposed that the first sentence of the footnote should be replaced by the following: “Practice rules of the United Kingdom include such investors.”

Paragraph (5)

4. Mr. Pellet said that the last sentence of paragraph (4) was a useful clarification and should be retained.

*Paragraph (4) was adopted with the amendment to the footnote.*

Paragraphs (5) to (11)

*Paragraphs (5) to (11) were adopted.*

Paragraph (12)

5. Mr. Dugard (Special Rapporteur) said that Mr. Matheson had made a proposal relating to paragraphs (9) to (12) and that it might be possible to accommodate his concerns by inserting a new footnote after the word “customary” at the end of the second sentence, which would read: “See the submission of the United States to this effect in document A/CN.4/561 and Add.1–2”.

6. Mr. Pellet said that, in the absence of an illustration, the last two sentences of paragraph (12) were unclear. He wondered whether the Special Rapporteur might not find one or two examples.

7. Mr. Galicki said that the meaning of the last sentence would be clearer if the word “compulsion” in the English version were properly rendered in the French version, namely, by “contrainte”, not “obligation”.

*Paragraph (12) was adopted with the amendments proposed by Mr. Dugard on behalf of Mr. Matheson and by Mr. Galicki.*

The commentary to draft article II, as amended, was adopted.

Commentary to draft article 12 (Direct injury to shareholders)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

The commentary to draft article 12 was adopted.

Commentary to draft article 13 (Other legal persons)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

8. Mr. Pellet said that the assertion in the fifth sentence was valid for court proceedings, but not for diplomatic proceedings. He proposed that the first part of the sentence should be amended to read: “This will require the competent authorities or a court to examine”.

*Paragraph (5), as amended, was adopted.*

The commentary to draft article 13 was adopted.

Commentary to draft article 14 (Exhaustion of local remedies)

Paragraph (1)

9. Mr. Candioti said that the statement in the first sentence of paragraph (1) was much too general and that the end of the sentence should be amended to read: “as a prerequisite for the exercise of diplomatic protection”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

10. Mr. Galicki said that, in the second sentence, the words “where it engages in acta jure gestionis” referred more to immunities than to diplomatic protection and seemed to suggest something whose existence most members of the Commission did not accept, namely, functional protection by States. He therefore suggested that they should be deleted.

*Paragraph (2), as amended, was adopted.*

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373 Reproduced in *Yearbook ... 2006*, vol. II (Part One).
Paragraph (3)

11. Mr. GAJA said that, of the “two reasons” given in the third and fourth sentences, the first was not a reason at all and the second related to the burden of proof, a very sensitive question which the Commission had decided not to consider. It was also indicated that the burden of proof was on the respondent State to show that local remedies were available, but, pursuant to draft article 15 (a), local remedies did not need to be exhausted where there were no reasonably “available” local remedies and, in such a case, the burden of proof was on the applicant State. He therefore suggested that only the first sentence of paragraph (3) should be retained.

12. Mr. PELLET said that he fully endorsed Mr. Gaja’s suggestion, but for a much simpler reason: on second reading, the Commission was not required to indicate in a commentary the reasons for its hesitations or preoccupations.

Paragraph (3), as amended, was adopted.

Paragraph (4)

13. Mr. CANDIOTI said that, as in paragraph (1) and for the same reason, the words “before an international claim is brought” in the first sentence should be replaced by “before diplomatic protection is exercised”.

14. Mr. PELLET said that the footnote whose reference was placed at the end of the paragraph, and others, such as the footnote whose reference was placed in the penultimate sentence of paragraph (5), should specify whether the decisions referred to were those of the European Commission of Human Rights or the European Court of Human Rights.

15. The CHAIRPERSON said that the Secretariat would attend to the matter.

Paragraph (4) was adopted with the amendments proposed by Mr. Candioti and Mr. Pellet.

Paragraph (5)

16. Mr. PELLET said that the statement at the beginning of the third sentence that local remedies did not include remedies as of grace gave rise to a problem because, in some countries, the request for clemency was a prerequisite for a claim to be brought. He therefore suggested that the sentence should be amended to read: “Local remedies do not include those whose purpose is to obtain a favour and not to vindicate a right” or requests for clemency, except where the latter are a prerequisite for the admissibility of subsequent claims.”

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

17. Mr. GAJA said that, contrary to the wording of the first sentence, it was not the “foreign litigant”, but the claimant State which must produce the evidence available to it to support its claim in the process of exhausting local remedies. He therefore suggested that the words “The foreign litigant” should be replaced by “The claimant State”. The second sentence would then read: “The international remedy afforded by diplomatic protection cannot be used to overcome faulty preparation or presentation of the claim at the municipal level.”

Paragraph (7), as amended, was adopted.

Paragraph (8)

18. Mr. PELLET proposed that the following words should be added at the end of the paragraph: “objections to the validity of the ‘Calvo clause’ in respect of general international law are certainly less convincing once it is accepted that the rights protected in the framework of diplomatic protection are those of the protected person and not those of the protecting State”. He also suggested that a footnote that referred back to paragraph (5) of the commentary to draft article 1 should be added to make it clear that diplomatic protection was not necessarily exercised in the context of the Mavrommatis fiction.

19. Mr. GAJA said that he supported Mr. Pellet’s proposal and suggested that the last two sentences should be merged into one, to read: “The ‘Calvo clause’ is difficult to reconcile with international law if it is to be interpreted as a complete waiver of recourse to international protection in respect of an action by the host State constituting an internationally wrongful act (such as denial of justice) or where the injury to the alien was of direct concern to the State of nationality of the alien.” The reference in the deleted phrase to the North American Dredging Company case could be moved to a footnote.

20. Mr. ECONOMIDES said that he was not sure whether draft articles adopted on second reading should include a reference such as the one contained in the footnote whose reference was placed at the end of the paragraph, which stated that a proposal by the Special Rapporteur had not been adopted by the Commission.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

21. Mr. PELLET said that the footnote in the beginning of the third sentence should refer only to the United States Diplomatic and Consular Staff in Tehran case. A new footnote should then be added at the end of the paragraph with a reference to the Avena case and with the deleted sentence from the aforementioned footnote related to the United States Diplomatic and Consular Staff in Tehran case. That would show where the words “interdependence of the rights of the State and individual rights” came from.

22. Mr. DUGARD (Special Rapporteur) said that, to meet Mr. Pellet’s request for greater clarity, the reference in the footnote to the Avena case could be deleted.
23. Mr. PELLET thanked the Special Rapporteur, but said that it was still necessary to cite the paragraph of the *Avena* decision from which the words “interdependence of the rights of the State and individual rights” had been taken.

24. Mr. DUGARD (Special Rapporteur) said that he would explain where those words came from in the footnote.

*Paragraph (10), as amended, was adopted.*

*Paragraph (11) was adopted.*

**Paragraph (12)**

25. Mr. PELLET suggested that the words “or Government” should be added in the last sentence after the word “diplomatic” and that a new footnote should be added to refer to the *Arrest Warrant* case. He also proposed that the words “as a private individual” should be added after “on behalf of its national” in the same sentence.

26. Mr. MELESCANU said that it might be preferable to place the words “a Government” before “or diplomatic official” in order to better respect the order of priorities.

*Paragraph (12), as amended, was adopted.*

**Paragraph (13)**

27. Mr. GAJA suggested that the wording of the second sentence should be amended to read: “This does not preclude the possibility that exhaustion of local remedies may result from the fact that another person has submitted the substance of the same claim before a court of the respondent State.”

*Paragraph (14), as amended, was adopted.*

*The commentary to draft article 14, as amended, was adopted.*

**Commentary to draft article 15 (Exceptions to the local remedies rule)**

*Paragraphs (1) and (2) were adopted.*

**Paragraph (3)**

28. Mr. FOMBA proposed that the words “of the case” should be inserted after “circumstances” in the first sentence to bring it into line with the first sentence of paragraph (11).

*Paragraph (4), as amended, was adopted.*

**Paragraphs (5) and (6)**

*Paragraphs (5) and (6) were adopted.*

**Paragraph (7)**

29. Mr. DUGARD (Special Rapporteur) said that Mr. Matheson had proposed that, in the last part of the penultimate sentence, the words “whose airspace has been accidentally violated” should be replaced by “while in normal or accidental overflight of its territory”.

30. Mr. GAJA said that he endorsed that proposal. If a plane was shot down by mistake, the exhaustion of local remedies could not be required. It would therefore be better not to refer to the violation of airspace.

31. Mr. ECONOMIDES said that the example cited in that part of the sentence should be deleted entirely because, even in the case of the violation of airspace, no State had the right to shoot down an aircraft. The text should not give the impression that it was permissible to shoot down an aircraft if there was a violation of airspace.

32. Mr. DUGARD (Special Rapporteur) said that the intention of the phrase had been to take account of the example of the aerial incident referred to in paragraph (8), which was always cited in support of the principle embodied in paragraph (c). Such accidents were regrettable, but they were an unfortunate fact of life and could not be ignored.

33. Mr. CHEE said he agreed with Mr. Economides and noted that the Convention on International Civil Aviation prohibited a State from shooting down an aircraft that accidentally violated its airspace.

34. Mr. DUGARD (Special Rapporteur) said he was aware that such a prohibition existed in international law, but wondered what happened to the right of the State of nationality of passengers killed in such circumstances to exercise diplomatic protection on their behalf.

35. Mr. MANSFIELD suggested that the text proposed by the Special Rapporteur should be retained, but worded more concisely to read: “where he is on board an aircraft that is shot down by a State while overflying its territory”.

36. Mr. MELESCANU said it should perhaps be specified that reference was being made to civil aircraft; he did not think that the principle was applicable to all aircraft.

37. Mr. PELLET said that he disagreed with Mr. Melescanu. The problem arose in the same way for military aircraft and Mr. Mansfield’s proposal was thus very sensible.

38. Mr. CHEE said that he disagreed with Mr. Pellet. A distinction should be drawn between civil aircraft and military aircraft and the new article 3 bis of the Convention on International Civil Aviation expressly prohibited States from shooting down civil aircraft which flew above their territory without authority.
39. Mr. DUGARD (Special Rapporteur) said that the wording proposed by Mr. Mansfield would probably meet all the concerns raised by the members of the Commission.

40. Mr. KABATSI said that he had no objection to the substance of Mr. Mansfield’s proposal, but the reference to a State shooting down an aircraft was inappropriate. A State did not commit such an act, but did bear responsibility for it.

41. Mr. PELLET said that it would be sufficient to say “shot down by the armed forces of a State”.

42. Mr. MANSFIELD suggested that, to take account of Mr. Kabatsi’s concern, the last part of the sentence should read: “where he is on board an aircraft that is shot down while in overflight of another State’s territory”.

Paragraph (7) was adopted with the amendment proposed by Mr. Mansfield.

Paragraph (8)

43. Mr. GAJA proposed that, in the last sentence, the words “can be expected” should be changed to read “would be expected” to indicate that the Commission did not take a position, particularly as the idea was criticized in the following paragraph.

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (11)

Paragraphs (9) to (11) were adopted.

Paragraph (12)

44. Mr. GAJA said that the paragraph was superfluous and should be deleted.

Paragraph (12) was deleted.

Paragraphs (13) to (18)

Paragraphs (13) to (18) were adopted.

The commentary to draft article 15, as amended, was adopted.

Commentary to draft article 16 (Actions or procedures other than diplomatic protection)

Paragraph (1)

45. Mr. PELLET suggested the deletion of the first sentence, which stated that the rules on diplomatic protection and the principles governing the protection of human rights served a common goal. That contradicted paragraph (4), according to which “[i]ndividual rights under international law may also arise outside the framework of human rights”; nor did he see how that sentence could be combined with draft article 17 (Special rules of international law). If the first sentence was deleted, paragraph (1) would then begin with the words: “Article 16 is not intended”.

46. Mr. MOMTAZ said that the reference to human rights was justified, since draft article 18 on protection of ships’ crews emphasized the protection of crew members.

47. Ms. ESCARAMEIA said that, to meet Mr. Pellet’s concern, the first sentence could be shortened to read: “The customary international law rules on diplomatic protection have evolved over several centuries and the more recent principles governing the protection of human rights complement them.”

48. Ms. XUE said that she was also in favour of deleting the first sentence, but for another reason: it did not reflect the actual history of the law.

49. Mr. ECONOMIDES said that, in that context, the link between diplomatic protection and the protection of human rights was not without justification. However, it could be stated more neutrally in the following manner: “The customary international law rules on diplomatic protection and the principles governing the protection of human rights complement each other. The present articles are therefore not intended …”.

50. Mr. PELLET said that he supported the proposal by Mr. Economides.

51. Mr. CANDIOTI pointed out that, in the third sentence of the French version, the words “les organisations non gouvernementales” should be replaced by “engagées dans la protection des droits de l’homme”.

52. Mr. MELESCANU, also referring to the French version, said that the words “ou morales” should be inserted after “personnes physiques”.

Paragraph (1) was adopted with the amendments proposed by Mr. Economides, Mr. Candioti and Mr. Melescanu.

Paragraph (2)

53. Mr. PELLET said that, in the penultimate sentence, it was going too far to say that the decision of the ICJ in the South West Africa cases holding that a State might not bring legal proceedings to protect the rights of non-nationals had been expressly repudiated by the Commission in its draft articles on responsibility of States. He did not see how such an absolute assertion could be reconciled with draft article 3, paragraph 1, pursuant to which a State was only entitled to exercise diplomatic protection on behalf of its nationals.

54. Mr. DUGARD (Special Rapporteur), referring to footnote 725 of the draft articles on responsibility of States, said that the Commission had debated for two days whether it should repudiate the South West Africa decision in its draft articles and it was now accepted that it had done so. It was important to refer to article 48, paragraph 1 (b), because the Commission had been criticized for not having made it clear on first reading that the draft articles on diplomatic protection did not contradict that provision.

574 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 26, para. 76.
575 Ibid., p. 127.
55. Mr. PELLET said that he agreed in principle on repudiating the Court’s decision, but thought that it was not possible to draw the a contrario conclusion that a State could protect the rights of non-nationals. He proposed saying that, today, it was not acceptable that a State might not bring legal proceedings under any circumstances to protect the rights of non-nationals, that the decision to that effect by the ICJ in the South West Africa cases had been expressly repudiated by the Commission in its draft articles on responsibility of States and that the possibility of instituting proceedings to protect the rights of non-nationals was open to a State if a text so provided or pursuant to article 48, paragraph 1 (b), of the draft articles on responsibility of States, which permitted a State other than the injured State to invoke the responsibility of another State if the obligation breached was owed to the international community as a whole. ⁷⁷

56. Mr. DUGARD (Special Rapporteur) suggested that the penultimate sentence should be replaced by: “The view taken by the International Court of Justice in the 1966 South West Africa cases holding that a State may not bring legal proceedings to protect the rights of non-nationals has to be qualified by the articles on responsibility of States for internationally wrongful acts.”

57. Mr. VALENCIA-OSPINA said that the words “qualified by” should be replaced by “qualified in the light of”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

58. Ms. ESCARAMEIA said that the footnote at the end of the paragraph, which dealt with the right to petition an international human rights monitoring body, should also refer to the Committee on the Elimination of Discrimination against Women.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

59. Mr. PELLET said that he had serious problems with paragraphs (4), (5) and (6). Although individual rights under international law might arise outside the framework of human rights, as indicated in paragraph (4), paragraph (5) referred to “treaties on the protection of investment” and paragraph (6) to “subjects other than human rights, such as the protection of foreign investment”. Given that investment was taken up in draft article 17, paragraphs (4), (5) and (6) were out of place in the commentary to draft article 16. The distinction between draft articles 16 and 17 was already rather vague and that would only add to the confusion.

60. The CHAIRPERSON suggested that paragraphs (4), (5) and (6) be moved to the commentary to draft article 17.

61. Mr. GAJA said he was aware that paragraphs (5) and (6) could cause confusion, although they were not entirely unjustified. He suggested deleting them and explaining in the commentary to draft article 17 why the protection of investment was the subject of a separate provision.

62. The CHAIRPERSON, speaking as member of the Commission, said that he supported Mr. Gaja’s suggestion.

63. Mr. ECONOMIDES said it was clear that draft article 16 covered all treaties, basically those relating to human rights, apart from those on the protection of investment, which were the subject of draft article 17. In his opinion, paragraph (4) should be retained and paragraphs (5) and (6) should be merged to create the following sentence: “The actions or procedures referred to in article 16 include those available under both universal and regional human rights treaties, as well as any other relevant treaty, apart from a number of treaties on the protection of investment, which are referred to in article 17.”

64. Mr. PELLET said that he was not very convinced by Mr. Economides’ interpretation of the distinction between draft articles 16 and 17, but was prepared to go along with his proposal, provided that the second sentence in paragraph (6) was also deleted. An introductory paragraph should also be added to draft article 17 to explain why it dealt with the protection of investment.

65. Mr. DUGARD (Special Rapporteur) suggested deleting the words “for example, in a number of treaties on the protection of investment” in the first sentence of paragraph (5), deleting paragraph (6) and adding an introductory paragraph to draft article 17, as suggested by Mr. Pellet.

Paragraph (4) was adopted.

Paragraph (5) was adopted subject to the amendment proposed by the Special Rapporteur.

Paragraph (6) was deleted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

66. Mr. PELLET said that the last sentence in the footnote at the end of the paragraph should be deleted because it was not at all demonstrated that, in the Selmouni case, the Netherlands could have both intervened before the European Court of Human Rights and exercised diplomatic protection. He had often urged the Commission to consider the question whether diplomatic protection could be exercised in the case of an individual claim. Having failed to do so, the Commission could not now give the question short shrift in a footnote.

67. Mr. ECONOMIDES said he supported that suggestion: the last sentence in the footnote was a mere supposition.

68. Mr. DUGARD (Special Rapporteur) said that he had simply wanted to give an illustration, but he was prepared to delete the sentence if members felt that it was speculative.

⁷⁷ Ibid., p 126.
69. Mr. GAJA suggested that the footnote should be deleted because the illustration was unnecessary and made no sense without the last sentence.

70. Mr. PELLET, referring to the second sentence, said it would be wise to make it clear that: “Where, however, a State resorts to such procedures, it does not necessarily abandon its right to exercise diplomatic protection …”.

Paragraph (8) was adopted with the amendments proposed by Mr. Gaja and Mr. Pellet.

The commentary to draft article 16, as amended, was adopted.

Commentary to draft article 17 (Special rules of international law)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

71. The CHAIRPERSON said that, in keeping with the earlier suggestion, the Special Rapporteur would propose an introductory paragraph to precede paragraph (1). Since the new paragraph was linked to paragraph (2), its consideration would be postponed until the next meeting.

It was so decided.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Commentary to draft article 18 (Protection of ships’ crews)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

72. Mr. FOMBA suggested that the last sentence should be deleted because the idea it expressed was better explained in paragraph (7).

73. Ms. ESCARAMEIA said that, on the contrary, it should be retained because the paragraph referred to a number of matters, including not only policy considerations, but also the practice of States, judicial decisions and writings of publicists, all of which were taken up individually in the following paragraphs.

74. Mr. ECONOMIDES said he also thought that the sentence should be retained and suggested the insertion of a cross-reference in parentheses to paragraph (7). Moreover, the words “dans une certaine mesure” in the first sentence of the French text were too weak.

75. Mr. MOMTAZ said that that wording was actually well chosen because the practice of States, judicial decisions and the writings of publicists with regard to the protection of ships’ crews were not clear-cut.

Paragraph (2) was adopted as it stood.

Paragraph (3)

76. Mr. MOMTAZ said that there was a contradiction between paragraph (3) and the communication from the United States to the Commission in May 2003. It would be better to delete the paragraph because the United States had repudiated the practice to which it referred.

77. Mr. DUGARD (Special Rapporteur) said that this raised the interesting question of what was to be done when a State that had consistently pursued a particular line in its practice and judicial decisions then repudiated its own practice. As the rule under consideration relied heavily on the practice of the United States, he did not think it was appropriate to ignore that practice just because a particular Administration had made a certain comment for reasons of political convenience at a particular time. At most, the Commission might refer to the communication from the United States in a footnote.

78. Mr. MOMTAZ said that paragraph (3) was very affirmative and gave the impression that the United States pursued that practice, although that had not been the case for quite some time.

79. Mr. CANDIOTI said that the Commission should be careful about referring in a footnote to a recent opinion of the United States, which might change its position in a year’s time. It would be sufficient to describe that State’s past practice and to delete the word “traditionally” in the second line.

80. Mr. PELLET said he agreed with that deletion, but stressed the need to indicate that the United States seemed to have repudiated its practice, something it had every right to do. He suggested that a footnote should be added to the first sentence with a reference to the communication.

81. Mr. CHEE noted that crew members at sea did not carry a passport, but a registration card. Once on board, they were regarded as a group and, regardless of their nationality, they were protected by the flag State, which could exercise diplomatic protection. That had been the opinion of the International Tribunal for the Law of the Sea in the “Saiga” case and it was the practice of the United States.

82. Mr. DUGARD (Special Rapporteur) proposed that paragraph (3) should be amended by saying that the traditional practice of the United States, in particular, supported such a rule, by describing that practice and noting in the last sentence that doubts had been raised, including by the United States, and by referring at that point to the United States communication. He would submit a new version of paragraph (3) at the next meeting.

83. The CHAIRPERSON said he took it that the members of the Commission agreed to the Special Rapporteur’s proposal.

It was so decided.

87. Mr. PELLET said it was essential to refer above all to the protection of the members of the crew. He proposed the following wording for the French version: “Le Tribunal a également vu une affaire de protection des membres de l’équipage s’apparentant à la protection diplomatique sans se confondre avec celle-ci.”

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

88. Mr. MOMTAZ pointed out that the fourth sentence contradicted draft articles 2 and 3 by saying that neither of the two States was accorded priority, whereas, in actual fact, priority was accorded to the State of nationality of the members of the crew, which was entitled, pursuant to draft articles 2 and 3, to exercise diplomatic protection on behalf of its nationals. It would therefore be better to delete the words “without priority being accorded to either” at the end of the fourth sentence.

89. Ms. ESCARAMEIA said that she was opposed to the deletion of those words, which reflected the conclusion of a lengthy debate, at the end of which the Commission had decided that there was to be no priority. The argument which referred to the right provided for in draft articles 2 and 3 was not valid: by the same token, it could be argued that draft article 18 gave priority to the right of the flag State.

90. The CHAIRPERSON, speaking as a member of the Commission, said that, as he saw it, the main point was that both possible actions were recognized. The words “without priority being accorded to either” could thus be deleted.

91. Mr. CHEE said that he supported Ms. Escarameia’s point of view.

92. The CHAIRPERSON said that, owing to the lack of time, the Commission would continue its consideration of paragraph (8) of the commentary to draft article 18 at the next meeting.

The meeting rose at 6.09 p.m.

2909th MEETING

Tuesday, 8 August 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Montaz, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue.

Draft report of the Commission on the work of its fifty-eighth session (continued)

CHAPTER IV. Diplomatic protection (concluded) (A/CN.4/L.692 and Add.1)

E. Text of the draft articles on diplomatic protection (concluded) (A/CN.4/L.692/Add.1)

Commentary to article 18 (Protection of ships' crews) (concluded)

Paragraph (8) (concluded)

1. The CHAIRPERSON recalled that the previous day’s discussion of paragraph (8) have revolved around the possible deletion of the third sentence of the paragraph.

2. Mr. ECONOMIDES said that, in the third sentence, the phrase “without priority being accorded to either” was somewhat inaccurate, in that it implied that both the diplomatic protection exercised by the State of nationality and that exercised by the flag State should be recognized, yet the diplomatic protection exercised by the State of nationality was already recognized. The sentence was intended to convey the idea that diplomatic protection exercised by the flag State should be recognized alongside that traditionally exercised by the State of nationality. Since the Commission should not attempt to regulate the priority between them, it would be more apt to word the sentence: “The diplomatic protection exercised by the flag State in seeking redress for the crew should be recognized alongside the diplomatic protection of the State of nationality, which may apply in all cases and which is the traditional form.” The two States could agree which was to exercise diplomatic protection, if they so wished. Usually it was the flag State which would exercise such protection, but it was not out of the question that the State of nationality of the crew might do so.
3. The CHAIRPERSON asked Mr. Economides if it was appropriate to retain the adjective “diplomatic” at the beginning of the sentence.

4. Mr. ECONOMIDES said that, in view of the debate the previous day, when it had been decided that an endeavour should be made to avoid the adjective “diplomatic”, that term could be dropped in his proposed amendment.

5. Mr. MANSFIELD said that the English text had been very carefully worded to make it clear that there was a distinction between diplomatic protection by the State of nationality and the right of the flag State to seek redress. For that reason, he was not in favour of the formulation proposed by Mr. Economides, which suggested that the notion of diplomatic protection also applied to the exercise of redress by the flag State for the crew. That matter had been discussed at length in the Working Group and the Drafting Committee. The phrase as it stood was well crafted and reflected the actual situation. He was therefore a strong supporter of the original text.

6. Mr. DUGARD (Special Rapporteur) endorsed Mr. Mansfield’s statement. It was plain from the plenary debate and from States’ comments that a clear distinction should be drawn between diplomatic protection and the right of the flag State to seek redress for the crew. The term “diplomatic protection” should not be used to cover the latter. He had deliberately refrained from using the term “diplomatic protection”, or even “protection”, in that paragraph in order to avoid confusion. The phraseology had been very carefully chosen. It was equally vital to indicate that no priority was accorded to either form of protection and he had therefore done so in that sentence, which was the result of careful consideration.

7. Ms. ESCARAMEIA said that she likewise supported Mr. Mansfield’s statement. The wording had been discussed thoroughly in the Drafting Committee, where a substantive agreement had been reached. The Commission should not reopen the discussion. The sentence should be retained in its current wording.

8. Mr. MOMTAZ said that, in practice, if a State of nationality was prepared to exercise diplomatic protection, the flag State stood aside. The thesis of the protection of the crew by the flag State was justified in a situation where the flag State was prepared to provide such protection and the State of nationality, for one reason or another, was not in a position to exercise diplomatic protection. The deletion of the sentence in question would represent a compromise solution. There was no need for the Commission to adopt a position. In the kind of situation envisaged in draft article 18, it was the State of nationality which had priority over the flag State. The reasoning behind the draft article was that, if the State of nationality did not, for any reason, wish to exercise diplomatic protection, the flag State was entitled to do so. He was prepared to leave the sentence as it was, but it was not consonant with State practice.

9. Ms. XUE (Rapporteur) said that, for policy reasons, she sympathized with the viewpoint of Mr. Montaz. The aim of the paragraph was to demonstrate that the two kinds of protection were complementary, not contradictory. In practice, if one or more of the crew members of the same nationality were injured, the State of nationality would certainly have priority to exercise diplomatic protection. Case law amply supported that assertion. If, however, the whole crew suffered from an internationally wrongful act and if the members of the crew had many different nationalities, it would be hard to insist that the States of nationality had priority, as that would give rise to the presentation of multiple claims. It would then be better to follow the precedent set in the “Saiga” case, where one State had exercised overall protection for the whole crew. The debate was not over the substance, but on how to phrase the notion in order to bring out the idea that the aim was to provide maximum protection for crew members. She therefore suggested that the end of the sentence should read “should be recognized as complementary”. The remainder of the policy argument set out in the paragraph would then be logical.

10. Mr. ECONOMIDES said that he withdrew his proposed amendment, as the amendment proposed by Ms. Xue achieved the same purpose by removing any allusions to priority and placing the two possible forms of protection on an equal footing.

11. Mr. FOMBA proposed that the sentence should end with the word “recognized”. The clarification supplied by Mr. Montaz with regard to practice was, however, important and should be reflected in a footnote.

12. Mr. DUGARD (Special Rapporteur) emphasized that the wording of the sentence was that which had been included in the commentary on first reading. As such, it had been seen and approved by States. For many States article 18 had been a very controversial provision, and they had ultimately supported it largely because of the careful way in which the commentary had been drafted. For that reason, he would prefer to retain the phrase “without priority being accorded to either”.

13. Mr. BROWNIE said that, as a matter of form, it would degrade a second reading text which had the status of having been seen by Governments if it were to be altered at a late stage at the suggestion of one or two members. If it did make any such amendments, the Commission would be standing its procedure on its head.

14. Mr. KATEKA said that he was in favour of retaining the text as it stood.

Paragraph (8) was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (3) (concluded)

15. Mr. DUGARD (Special Rapporteur) proposed that paragraph (3) should be worded:

“The early practice of the United States, in particular, lends support to such a custom. Under American law foreign seamen were traditionally entitled to the protection of the United States while serving on American vessels. The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State. This unique status of foreigners serving on American vessels was traditionally reaffirmed in diplomatic communications.
and consular regulations of the United States. Doubts have, however, been raised, including by the United States, as to whether this practice provides evidence of a customary rule.”

Paragraph (3), as amended, was adopted.

The commentary to article 18, as amended, was adopted.

Commentary to article 17 (Special rules of international law) (concluded)

Paragraph (1)

16. Mr. DUGARD (Special Rapporteur) presented a new version of paragraph (1), which would read:

“Some treaties, particularly those dealing with the protection of foreign investment, contain special rules on the settlement of disputes which exclude or depart substantially from the rules governing diplomatic protection. Such treaties abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to the nationality of claims and the exhaustion of national remedies. Bilateral investment treaties (BITs) and the multilateral Convention on the settlement of investment disputes between States and nationals of other States are the primary examples of such treaties.”

He noted that, if that paragraph were to be adopted, paragraph (2) should be deleted, as its contents would be included in paragraph (1).

Paragraph (1), as amended, was adopted.

Paragraph (2) was deleted.

The commentary to article 17, as amended, was adopted.

Commentary to article 19 (Recommended practice)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

17. Mr. DUGARD (Special Rapporteur) announced that Mr. Matheson had suggested that the last sentence of that paragraph should read: “If customary international law has not yet reached this stage of development, then article 19, subparagraph (a), may be seen as a recommendation that might at some future time develop as customary law.”

18. Mr. KATEKA, Mr. FOMBA and Ms. ESCARAMEIA opposed that amendment to the last sentence of paragraph (3) of the commentary since they viewed article 19, subparagraph (a), as progressive development, not merely a recommendation.

Paragraph (3) was adopted.

Paragraph (4)

19. Mr. DUGARD (Special Rapporteur) noted that Mr. Matheson had suggested deleting the second sentence, which read: “Like article 19, subparagraph (a), this provision falls into the grey area between codification and progressive development.”

20. Ms. XUE (Rapporteur) said that the Commission’s report should faithfully reflect the discussions in the Working Group and the plenary debates. Only an idea on which members had agreed in those debates could be added. The paragraph had been discussed at some length, because some members had raised the point on a number of occasions. The article referred to recommended practice. It would not be an honest reflection of the Commission's deliberations to claim that it must be seen as an exercise in progressive development.

21. Mr. DUGARD (Special Rapporteur) said that, while article 19 constituted a recommendation, it did contain some elements of codification and progressive development. For that reason, Mr. Matheson had preferred to describe it as recommendatory rather than as a provision representing progressive development. He personally did not have any very strong views on the subject although, as the heading to the article indicated, the Commission was essentially dealing with a recommendation. The proposed amendment therefore deserved further consideration.

22. Ms. ESCARAMEIA said that she was in favour of the text as it stood. The point had been the subject of much discussion. The fact that the article was formulated as a recommendation was already a concession on the part of those members who believed that, in fact, it codified practice. It was therefore quite true to state that the provision fell into the grey area between codification and progressive development. In practice, it was hard to imagine that a State would take action without considering the views of the injured persons, save perhaps in the event of mass claims. The commentary should indicate that some of the Commission members believed that the article in question constituted codification of existing practice.

23. Mr. GAJA said that the paragraph contained two assertions about progressive development. A possible compromise might be to delete the second sentence and retain the last sentence, which was similar to the last sentence of paragraph (3) and expressed the ambiguity between codification and progressive development.

24. Ms. XUE (Rapporteur) said that article 19 was in itself a substantial compromise because it turned a right into a duty. Article 19 had been included for policy considerations, but the claim was being made that it constituted progressive development. Even if the second sentence were deleted, a reference to progressive development would still be found in the last sentence. The last sentence should therefore be deleted or toned down.

25. The CHAIRPERSON, speaking as a member of the Commission, said that the second sentence was a commentary within the commentary and did not contribute any specific elucidation of the text of the article. He therefore suggested that it should be deleted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

26. Mr. MOMTAZ said that footnote whose reference followed the phrase “customary international law” should refer to the footnote whose reference followed the phrase
“customary international law” in paragraph (4) and not to the footnote referring to the Mavrommatis case.

27. Mr. DUGARD (Special Rapporteur) noted that Mr. Matheson had proposed replacing the phrase “This conflicts with” at the start of the second sentence, with the words “This recommendation is designed to encourage responsible conduct by States in light of”. He had no objection to the proposal.

28. In response to a query by the Chairperson, he said that the word “responsible” was appropriate in the context: the intention was to encourage States to act responsibly, in keeping with the recommendations made in article 19.

Paragraph (5), as amended, was adopted.

Paragraph (6)

29. Mr. GAJA pointed out that in the first sentence, the phrase “judicial pronouncements” was an inaccurate description of the dictum of the umpire of the Mixed Claims Commission. He proposed that it should be replaced with the word “view”.

30. Mr. DUGARD (Special Rapporteur) endorsed the proposal as a broader and more judicious formulation.

Paragraph (6), as amended, was adopted.

New paragraph (6) bis

31. Mr. DUGARD (Special Rapporteur) read out a proposal by Mr. Matheson for the insertion of a new paragraph 6 bis, which would read:

“Subparagraph (c) acknowledges that it would not be inappropriate for a State to make reasonable deductions from the compensation transferred to injured persons. The most obvious justification for such deductions would be to recoup the costs of State efforts to obtain compensation for its nationals, or to recover the costs of goods or services provided by the State to them.”

Paragraph (6) bis was adopted.

Paragraph (7)

32. Mr. MOMTAZ said that the final sentence, “While it is an exercise in progressive development it is supported by State practice”, was contradictory, since an exercise in progressive development could not, by definition, be supported by State practice. It also contradicted the clause “this probably does not constitute a settled practice” in the first sentence. He proposed that the phrase “it is supported by State practice” should be deleted.

33. Ms. ESCARAMEIA proposed instead that the final sentence should read simply: “It is supported by State practice and equity.”

34. Mr. CANDIOTI, supported by Mr. BROWNlie, said that the point was that some practice did exist in that area. He proposed the replacement of the phrase “it is supported by State practice” with the words “it is supported by a certain amount of practice”. There would then be no contradiction between the final sentence and the first sentence, because practice could be embryonic before becoming settled.

35. Mr. MANSFIELD said that he endorsed the proposal but would suggest a slightly different word order. The final sentence would read: “While it is an exercise in progressive development it is supported by equity and a certain amount of State practice.”

Paragraph (7), as amended, was adopted.

The commentary to article 19, as amended, was adopted.

Section E as a whole, as amended, was adopted.

C. Recommendation of the Commission (concluded)

(4) and not to decide in accordance with article 23 of its Statute, to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on diplomatic protection.”

37. Mr. CANDIOTI pointed out that the draft articles were a subset of the law on State responsibility. He requested clarification from the Secretariat as to the recommendation the Commission had made on the form the draft articles on the responsibility of States for internationally wrongful acts should take when adopting them in 2001. 378 If the Commission had not recommended that the draft articles on the responsibility of States should be given final form in a convention, it should not make such a recommendation regarding the draft articles on diplomatic protection, because they formed a chapter of the law on State responsibility.

38. Mr. KATEKA said that, although the topic of State responsibility was a broad one, the Commission’s work on diplomatic protection was important and could stand on its own. The fate of the draft articles should not be linked to that of the draft articles on State responsibility, which were important in and of themselves and were already being cited frequently, even though not yet enshrined in a convention. He supported the proposal to recommend to the General Assembly the elaboration of a convention on diplomatic protection.

39. Mr. ECONOMIDES said that he endorsed that view. Linking the draft articles on the responsibility of States and those on diplomatic protection would only do a disservice to the first and slow down progress with the second. The best approach was to recommend the elaboration of a convention on diplomatic protection.

40. The CHAIRPERSON explained that the reasoning just expounded by Mr. Economides reflected the discussion by the Enlarged Bureau of the proposed

378 Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 25, paras. 72–73.
recommendation. If he heard no objection, he would take it that the Commission wished to adopt it.

_It was so decided._

Section C was adopted.

D. **Tribute to the Special Rapporteur, Mr. Christopher John Robert Dugard (concluded)** *(A/CN.4/L.692)*

41. The CHAIRPERSON said that now that the Commission had completed its consideration of the draft articles on diplomatic protection on second reading, he wished to express his personal gratitude to the Special Rapporteur. He invited the Commission to consider the proposed text of a tribute, to be inserted in paragraph 14 of section D of chapter IV, to read:

_"The International Law Commission,"

_"Having adopted the draft articles on diplomatic protection,"

_"Expresses to the Special Rapporteur, Mr. Christopher John Robert Dugard, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft articles on diplomatic protection."

_"The Commission also expressed its deep appreciation to the previous Special Rapporteur, Mr. Mohammed Bennouna, for his valuable contribution to the work on the topic.""

_The tribute to the Special Rapporteur was adopted by acclamation._

Section D was adopted.

Chapter IV of the draft report of the Commission as a whole, as amended, was adopted.

42. Mr. DUGARD (Special Rapporteur) thanked the Chairperson and members of the Commission for their generous tribute. He had guided the Commission through its deliberations, but it had been a team effort and the end product was the Commission’s. He thanked the Chairperson in particular for his role in bringing the exercise to fruition.

**Chapter V. International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (A/CN.4/L.693 and Add.1)**

43. The CHAIRPERSON invited the Commission to begin its consideration of chapter V of its draft report and drew attention to sections A to D contained in document A/CN.4/L.693.

A. **Introduction (A/CN.4/L.693)**

Paragraphs 1 to 8

*Paragraphs 1 to 8 were adopted.*

Section A was adopted.

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

Paragraphs 9 to 12

*Paragraphs 9 to 12 were adopted, on the understanding that the dates in paragraph 11 would be filled in by the Secretariat.*

Section B was adopted.

44. The CHAIRPERSON drew attention to section E of chapter V contained in document A/CN.4/L.693/Add.1.

E. **The text of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (A/CN.4/L.693/Add.1)**

1. **The text of the draft principles**

Paragraph 16

45. The CHAIRPERSON noted that the draft principles, set out in paragraph 16 of chapter V, had already been adopted.

2. **The text of the draft principles and commentaries thereto**

Paragraph 17

46. Mr. GAJA said there was a problem with the English wording: the phrase “transboundary harm” appeared in the title, whereas “transboundary damage” was used throughout the text. It might be better to change the title to conform to the body of the draft principles.

47. Mr. Sreenivasa RAO (Special Rapporteur) said the proposal was eminently acceptable, as long as it did not present major technological difficulties. The title of the subtopic had been adopted long ago, before the distinction had been made between damage and harm.

48. Mr. MANSFIELD said that the proposal seemed sensible, but since all the consequences could not be easily foreseen, the Commission should leave its decision in abeyance until it had completed its consideration of the commentaries to the draft principles.

49. Mr. GAJA said he had no objections to deferring a decision on the matter.

**General commentary**

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

50. Mr. MOMTAZ thought that it would be preferable to place the very short paragraph (4) at the end of paragraph (3).

*Paragraph (4) was incorporated in paragraph (3).*

Paragraphs (5) and (6)

*Paragraphs (5) and (6) were adopted.*
Paragraph (7)

51. Mr. GAJA said that the words “complying with” should be changed to “infringement of”.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

52. Mr. BROWNLIE said that the first sentence was difficult to understand. He did not see why it was necessary to say that State liability was an exception. It seemed to be a strange way to characterize State liability, which the Commission regarded as a project in its own right. The beginning of the second sentence, which drew a conclusion from State liability being an exception, was also a non sequitur.

53. Mr. Sreenivasa RAO (Special Rapporteur) said that he would give consideration to an alternative. The first two sentences reflected the fact that State liability had been a major point of discussion throughout the consideration of the topic.

54. Ms. ESCARAMEIA said that she agreed with Mr. Brownlie and hoped that the Special Rapporteur would review the points he had raised. She would have liked to have seen more mention in the general commentary of the core principle that those who had suffered harm or loss should not be left to bear the burden alone.

55. Mr. MANSFIELD agreed that the principle was very important, but, since it was stated in paragraph (3), very early in the general commentary, he was satisfied that it had been given sufficient prominence.

56. Ms. XUE (Rapporteur) said that the first sentence simply reflected the current state of legal regimes on liability. In order to meet the concerns raised by Mr. Brownlie, she proposed deleting the words “an exception and” in the first sentence and, in the second sentence, deleting the word “accordingly” and inserting “primarily” before “attaches to the operator”.

57. Mr. MANSFIELD supported the changes proposed by Ms. Xue.

58. Mr. Sreenivasa RAO (Special Rapporteur) said that Ms. Xue’s proposal was useful and took into account Mr. Brownlie’s concerns.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (12)

Paragraphs (10) to (12) were adopted.

Paragraph (13)

59. Mr. MOMTAZ wondered whether the statement that the harmonization of national laws and legal systems was potentially unachievable would not discourage all harmonization efforts in the future. Perhaps the word “unachievable” could be replaced by “difficult”.

60. Mr. MANSFIELD said that he was not as optimistic as Mr. Montaz. He remembered the discussions on that point, and the real intention had been to say that, if it had not opted for non-binding principles, the Commission would be trying to harmonize tort laws, an extremely difficult undertaking indeed. He could go along with the proposal by Mr. Montaz, but the Commission should be realistic: the harmonization of tort laws was probably an unachievable goal.

61. Mr. Sreenivasa RAO (Special Rapporteur) suggested recasting the phrase to read “have the advantage of not requiring a harmonization of national laws and legal systems, which is fraught with difficulties”.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted with a minor editorial change.

The general commentary, as amended, was adopted.

Commentary to the draft preamble

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

62. Mr. MOMTAZ said that the words “est sans incidences sur” in the French version suggested that the draft principles would have no future role to play in the area of responsibility.

63. The CHAIRPERSON suggested that the problem could be addressed by amending the phrase to read “n’affecte pas”.

Paragraph (4) was adopted with that editorial change in the French version.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to the draft preamble, as amended, was adopted.

Commentary to draft principle 1 (Scope of application)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

64. Mr. Sreenivasa RAO (Special Rapporteur) said that the word “could” in the third sentence should be changed to “might”.

Paragraph (3) was adopted with that minor editorial change.

79 Ibid., para. 76.
Paragraph (4)

65. Mr. KATEKA said that for the reader’s sake, the footnote should indicate which of the multilateral environmental agreements referred to were in force. On a more general point, it would be useful if the footnotes cited full titles, rather than short forms and acronyms. Also, some footnotes had been repeated in full, where cross-references would have sufficed.

66. Ms. ESCARAMEIA said that some of the draft principles were couched in prescriptive language, and thus an obligation existed, even if it was not specified in multilateral, regional or bilateral arrangements. She therefore suggested inserting the word “further” before “specify” in the first line, so as to avoid the impression that, if an activity caused a problem, a State, notwithstanding the existence of the principles, was not required to notify or comply with other obligations unless there was a multilateral, regional or bilateral arrangement.

67. Mr. Sreenivasa RAO (Special Rapporteur) said that the Secretariat would take into account Mr. Kateka’s comments on the footnotes and abbreviations. On his other point, the text had not specified the status of the conventions because, regardless of whether they were in force, they had been drawn upon as models and sources. Most of the conventions cited were not in fact in force and might never be; indicating which were or were not might thus give the reader the wrong impression.

68. With regard to Ms. Escarameia’s comment, paragraph (4) was not intended to address the question of States’ obligations arising under the principles. It merely provided that, in their multilateral, regional or bilateral arrangements, States which so desired could specify which activities came under the scope of the principles.

69. Ms. ESCARAMEIA wondered, then, if States did not specify those activities in their multilateral, regional or bilateral arrangements, whether the principles were useless, or whether there were still aspects of the principles which applied. The point of her proposal that States should “further” specify such activities was that at least activities in general should be covered, because otherwise it seemed that the principles had no scope without multilateral, regional or bilateral arrangements. If States wished to derogate from them or specify them in such arrangements, they could do so.

70. Mr. MANSFIELD said that he shared Ms. Escarameia’s concerns, but he interpreted paragraph (4) very differently, namely, to mean that the draft principles applied to transboundary damage caused by, in effect, all hazardous activities not prohibited by international law. The commentary explained why the Commission had decided not to list all those activities. Paragraph (4) merely provided that, if they saw fit, States could specify particular activities which were covered, but actually the principles applied to all such hazardous activities, and all the obligations stemming from the principles applied in respect of those activities. Some would be dealt with through specific agreements, whereas others might not be. States might themselves specify them in their own legislation. He thought that paragraph (4) was logical and could remain as it stood.

71. Mr. BROWNlie said that paragraph (4) stated the obvious. It would not do much harm if it had been left out, but it was worth saying, and it provided a hinge on which the important material in the footnote could be set out. He therefore favoured retaining paragraph (4) in its current form. He did not share Ms. Escarameia’s negative interpretation of it.

72. Mr. MELESCANU said that the idea might emerge more clearly if the material in paragraph (4) came at the end of paragraph (3).

Paragraph (4) was incorporated in paragraph (3).

Paragraphs (5) to (13) were adopted.

The commentary to draft principle 1, as amended, was adopted.

Commentary to draft principle 2 (Use of terms)

Paragraphs (1) to (6) were adopted.

Paragraph (7) was, as amended, adopted.

Paragraph (8)

74. Mr. GAJA said that, as he saw it, the third sentence from the end did not seem to follow from the previous one. Moreover, he was not clear on the distinction being drawn between the loss of income in that sentence and the pure economic loss discussed in the penultimate sentence. He sought clarification from the Special Rapporteur.

75. Mr. Sreenivasa RAO (Special Rapporteur) said that the point was that loss of income was sometimes specifically regulated; treaties or national laws might even disallow it as a head of loss under their compensatory regimes, while providing for alternative arrangements. For instance, loss suffered by factory workers was sometimes excluded, because it was specifically provided for elsewhere. Where such treaties or laws did not exclude compensation for loss of income, where they did not otherwise provide for it or where they were silent on that question, it was reasonable to expect that if an incident involving a hazardous activity directly caused loss of income, the victim was entitled to recover the loss. On the other hand, a distinction had to be made between pure economic loss not linked to personal injury or damage to property and the loss of income resulting from personal injury or property damage.

76. Mr. MANSFIELD said that replacing the phrase “the victim is entitled to recover the loss” by “efforts would be made to ensure that the victim is not left uncompensated”
in the third sentence from the end might make the idea clearer.

77. Mr. CANDIOTI said that Mr. Mansfield’s proposal changed the emphasis of the sentence, which, in his view, should remain unchanged. Rather, the penultimate sentence should be reformulated to read: “On the other hand, other economic loss may arise that is not linked to personal injury or damage to property.”

78. Mr. GAJA said that the logic of the paragraph had been improved but could be improved still further. Since the third sentence from the end related to pure economic loss, the penultimate and antepenultimate sentence should be reversed, incorporating the proposals of Mr. Candioti and Mr. Mansfield. The final sentence of the paragraph should be deleted, since it applied to a later paragraph.

Paragraph (8), as amended, was adopted.

Paragraph (9)

79. Mr. MOMTAZ queried the need to refer to “natural features and sites and geological and physical formations” in the context of a country’s natural heritage.

80. Mr. Sreenivasa RAO (Special Rapporteur) said that he had in mind such natural features as the Grand Canyon in the United States of America.

Paragraph (9) was adopted.

Paragraphs (10) to (14)

Paragraphs (10) to (14) were adopted.

Paragraph (15)

81. Mr. GAJA said that he was concerned about the placement of footnote whose reference was placed after the words “domestic law”. Paragraph (15) referred to reinstatement, but the footnote was largely concerned with the “Patmos” case, which, according to his understanding, did not relate to reinstatement. Perhaps the case could be mentioned elsewhere in the commentary.

82. Mr. Sreenivasa RAO (Special Rapporteur) said that the point was well taken. It might be more appropriate to link the text of the footnote with the discussion of the recent decisions of the United Nations Compensation Commission. The point was that environmental damage per se had received judicial recognition.

Paragraph (15) was adopted, subject to the appropriate relocation to the penultimate sentence of the text of the footnote whose reference was placed after the words “domestic law”.

Paragraphs (16) to (25)

Paragraphs (16) to (25) were adopted.

Paragraph (26)

83. Mr. GAJA pointed out a significant misprint in the third sentence in the English version, which should read: “… territory, jurisdiction or control by a State”.

Paragraph (26), as amended, was adopted.

84. Mr. BROWNIE said that the word “demarcate” should be replaced by the word “identify”.

Paragraph (27), as amended, was adopted.

Paragraphs (28) to (34)

Paragraphs (28) to (34) were adopted.

The commentary to draft principle 2, as amended, was adopted.

Commentary to draft principle 3 (Purposes)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

85. Mr. Sreenivasa RAO (Special Rapporteur) proposed that the final phrase of the first sentence (“and should in fact be compensated”), which did not appear in the French version, be deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

86. Mr. BROWNIE said that, in the second sentence, the phrase “to put protection” should be replaced by the phrase “to recognize protection”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (12)

Paragraphs (7) to (12) were adopted.

Paragraph (13)

87. Mr. GAJA proposed that the following sentence, in the footnote whose reference was placed at the end of paragraph after the word “function”, should be deleted: “It is also preparing to implement the European Directive, 2004, and which will become effective by 2007 that imposed strict liability and polluter-pays principle for environmental harm.” It was redundant to specify that Ireland was preparing to implement the Directive, since the same applied to all member States of the European Union.

Paragraph (13), as amended, was adopted.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were adopted.

Paragraph (16)

88. Mr. Sreenivasa RAO (Special Rapporteur) said that, in the first sentence, the words “also implicates on” should be replaced by the words “is related to”.

Paragraph (16), as amended, was adopted.
Paragraph (17)

89. Mr. GALICKI said that the commentary should be consistent in its nomenclature. The case cited as the Factory at Chorzow case in paragraph (16) was called the Chorzów Factory case in paragraph (17). He believed the latter was the more common short form.

90. Mr. Sreenivasa RAO (Special Rapporteur) said that he proposed to add more detailed references in the footnote whose reference was placed after the word “function” in the sixth sentence, rather than simply referring the reader to the Commission’s report on its fifty-third session. 380

Paragraph (17) was adopted, subject to an expansion of the above-mentioned footnote.

Paragraph (18)

91. Mr. GAJA said that the reference to international tribunals in the first sentence and to awards in the last should be accompanied by footnotes detailing the tribunals and awards concerned.

92. Mr. BROWNLIE said that the order of words should be changed at the end of the first sentence, to read “by the International Court of Justice and other international tribunals”.

93. Mr. MANSFIELD said that, in the last sentence, the word “fuller” should be replaced by the word “full”.

Paragraph (18), as amended, was adopted.

Paragraphs (19) and (20)

Paragraphs (19) and (20) were adopted.

The commentary to draft principle 3, as amended, was adopted.

Commentary to draft principle 4 (Prompt and adequate compensation)

Paragraph (1)

94. Mr. MANSFIELD suggested that the phrase “denude the principle of prompt and adequate compensation of its essential purpose”, in the penultimate sentence (c), should be replaced by the phrase “defeat the purpose of prompt and adequate compensation”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

95. Ms. ESCARAMEIA suggested that, in the second sentence, the word “necessarily” should be inserted in the phrase “is not obliged”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (12)

Paragraphs (4) to (12) were adopted.

Paragraph (13)

96. Mr. BROWNLIE and Mr. MANSFIELD proposed minor editorial amendments.

Paragraph (13), as amended, was adopted.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were adopted.

Paragraph (16)

97. Mr. GAJA said that the words “test foreseeability” in the penultimate sentence should read “foreseeability test”.

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (22)

Paragraphs (17) to (22) were adopted.

Paragraph (23)

98. Mr. Sreenivasa RAO (Special Rapporteur) said, in reply to a question from Mr. MOMTAZ that, in the last sentence of the footnote on Special Drawing Rights, the word “receive” had the sense of “import”, which could be used instead.

Paragraph (23), as amended, was adopted.

Paragraphs (24) to (37)

Paragraphs (24) to (37) were adopted.

Paragraph (38)

99. Ms. ESCARAMEIA said that, in the second sentence, the phrase “make every effort to” should be deleted, to bring the commentary into line with the provisions of principle 4, paragraph (5).

Paragraph (38), as amended, was adopted.

Paragraph (39)

Paragraph (39) was adopted.

The commentary to draft principle 4, as amended, was adopted.

Commentary to draft principle 5 (Response measures)

Paragraph (1)

100. Mr. GAJA said that, since the role of the operator was secondary with regard to response measures, the emphasis of the fourth sentence should be changed by reformulating it along the following lines: “Second, it is expected to ensure that appropriate measures are taken within the means …”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

101. Mr. GAJA suggested that, in the interests of clarification, a sentence should be inserted after the second sentence concerning notification, to read: “It shall contain all relevant information that is available to the State of origin.”

Paragraph (2), as amended, was adopted.
Paragraphs (3) and (4) were adopted.

Paragraph (5)

102. Mr. BROWNLIE said that the last sentence needed some adjustment.

103. Mr. Sreenivasa RAO (Special Rapporteur) said that the idea that the commentary was trying to convey was that some States might need one kind of assistance but not another, while others might need assistance not immediately but later. The assistance should therefore be tailored to the needs of each individual State. He suggested that the last sentence should be reformulated to read: “In this process, the States concerned may seek such assistance as they may desire and need from competent international organizations …. ”

Paragraph (5), as amended, was adopted.

Paragraph (6)

104. Mr. Sreenivasa RAO (Special Rapporteur) proposed some minor editorial amendments: in the third sentence, the word “principles” should be replaced by the word “principle”. In the fourth sentence, the word “equally” should be inserted after the word “could”. In the penultimate sentence, the word “including” should be replaced by the phrase “which includes”.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

105. Mr. GAJA said that, in order to avoid excessive use of the word “necessary”, the second half of the penultimate sentence should be reformulated to read: “the State of origin should make arrangements to take such action.”

106. Ms. ESCARAMEIA said that, in the same phrase, the word “should” should be replaced by the word “shall”, in line with the provisions of principle 5, subparagraph (b).

Paragraph (8), as amended, was adopted.

Paragraph (9)

107. Mr. BROWNLIE said that the word “viewed” should be replaced by the word “considered”.

Paragraph (9), as amended, was adopted.

Paragraph (10)

108. Mr. BROWNLIE said that, in order to be consistent with other portions of the text, the word “jurisdiction” in the third sentence should be followed by the words “and control”.

109. Mr. GAJA said that the additional words should be “or control”.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

The commentary to draft principle 5, as amended, was adopted.

Commentary to draft principle 6 (International and domestic remedies)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

110. Mr. Sreenivasa RAO (Special Rapporteur) said that the fourth sentence should be reformulated and divided into two, as follows:

“Article 3 of the Convention provides equal right of access to persons who have been or may be affected by an environmentally harmful activity in another State. The right of equal access to courts or administrative agencies of that State is provided ‘to the same extent and on the same terms as a legal entity of the State in which the activity is being carried on’. ”

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted with a minor editorial change.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

111. Ms. ESCARAMEIA said that the words “first principle” in the penultimate sentence were confusing, since they seemed to suggest that there was a further principle within the principle of non-discrimination, and that that further principle was only “essentially” procedural. She suggested that the first part of the sentence should be reformulated to read: “The procedural aspect of this principle means that”.

112. Mr. Sreenivasa RAO (Special Rapporteur) explained that he had wished to emphasize that the principle of non-discrimination had both procedural and substantive aspects.

113. Ms. XUE (Rapporteur) suggested the following form of words: “In terms of the procedural aspect, it means that”.

Paragraph (5), as amended, was adopted.

The meeting rose at 1.10 p.m.
Draft report of the Commission on the work of its fifty-eighth session (continued)

CHAPTER V. International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (concluded) (A/CN.4/L.693 and Add.1)

E. Text of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (concluded) (A/CN.4/L.693/Add.1)

2. TEXT OF THE DRAFT PRINCIPLES AND COMMENTARIES THERETO (concluded)

Commentary to draft principle 6 (International and domestic remedies) (concluded)

Paragraph (6)

1. Mr. MANSFIELD, referring to the amendments to paragraph (5) of the commentary made at the previous meeting, suggested that the first sentence of the English version of paragraph (6) should be amended to read: “The substantive aspect of the principle, on the other hand …”.

2. Mr. ECONOMIDES said that it was not clear what was meant by the last sentence, which read: “A number of States may still be in the process of developing the minimum substantive standards as part of their national law and procedures.”

3. Mr. Sreenivasa RAO (Special Rapporteur) explained that he had tried to be optimistic by taking account of the fact that, although not all States had minimum substantive standards as part of their national law and procedures, some of them were in the process of amending their legislation for that purpose.

4. Mr. BROWNLIE said that it was the word “may” in the last sentence which gave rise to a problem. He suggested changing it to “are” to make the sentence sound more positive.

Paragraph (6) was adopted with the amendments proposed by Mr. Mansfield and Mr. Brownlie.

Paragraph (7)

5. Mr. MANSFIELD suggested that the word “deliver” in the third line of the English version should be replaced by “the delivery of”.

Paragraph (7), as amended in the English version, was adopted.

Paragraph (8)

6. Mr. GAJA suggested that a new subparagraph (a) should be inserted in the penultimate sentence, to read: “The act or omission causing injury took place”; the other subparagraphs would be changed accordingly. That was how the Court of Justice of the European Communities had interpreted the 1968 Convention concerning jurisdictional competence and the execution of decisions in civil and commercial matters.

Paragraph (8), as amended, was adopted.

Paragraph (9)

7. Ms. XUE said that, in the first sentence of the footnote whose reference was at the end of the paragraph, which stated that the “most favourable law principle” had been “adopted in several jurisdictions in Europe, Venezuela, Tunisia and possibly even China”, the reference to China should be deleted because it was not entirely in line with that country’s practice.

Paragraph (9), as amended, was adopted.

Paragraph (10)

8. Mr. GAJA suggested that the second sentence of the footnote whose reference was placed after “out of court settlement” should be amended to read: “It sought compensation by approaching United States courts first, but the action failed on grounds of forum non conveniens. The matter was then litigated before the courts of India.”

9. Mr. MOMTAZ said that he had a problem with the footnote on the possibility of a negotiated agreement. In the two cases to which it referred, namely, the reparation by the United States for damage caused to Japanese fishermen by nuclear tests in 1954 near the Marshall Islands and the Aerial Incident of 3 July 1988 case, the United States had paid compensation to the victims ex gratia, with no acknowledgment of any responsibility. A State could thus be led to pay an ex gratia compensation without acknowledging responsibility. The footnote should reflect that aspect of the question. Either the two examples cited should simply be deleted or it should be expressly indicated that, in some cases, the victims received compensation from a State on an ex gratia basis without acknowledgment by that State of its responsibility.

10. Mr. GALICKI said that the reference to the compensation paid to Canada by the USSR following the crash of Cosmos 954, also in the same footnote, was inappropriate because compensation had been paid ex gratia in that case as well. The example should be deleted.

11. Mr. Sreenivasa RAO (Special Rapporteur) said that, in order to accommodate the concerns of Mr. Momtaz and Mr. Galicki, the following phrase might be added at the end of the fifth sentence: “, sometimes as ex gratia, without ascribing any responsibility or liability”.

12. Ms. XUE said that paragraph (10) dealt with the question of allocation of loss. Introducing the concepts of responsibility and liability would complicate matters. In order to give the paragraph the desired coherence, she proposed that the words “victims of” in the first sentence be deleted.

13. The CHAIRPERSON said that it would be difficult to delete the reference to the victims in the first sentence and he therefore suggested the following wording: “Paragraph 4 highlights a different aspect in the process of ensuring the existence of other remedies for victims, including the possibility of obtaining ex gratia compensation.”

14. Mr. MOMTAZ said that he endorsed the Chairperson’s proposed wording, because it showed that ex gratia compensation was one procedure among others.

15. Ms. XUE said that it was inappropriate to raise the question of ex gratia compensation in paragraph (10) because that paragraph referred to paragraph (4) of principle 6, which did not deal with responsibility, but simply specified that States might provide for recourse to international claims settlement procedures that were expeditious and involved minimal expenses.

16. Mr. Sreenivasa RAO (Special Rapporteur) said that, in order to reconcile the positions of Ms. Xue and Mr. Montaz, he proposed that the words “or proceed to an ex gratia settlement” be added at the end of the fifth sentence after the words “negotiate and agree on the quantum of compensation payable”.

Paragraph (10) was adopted with the amendment proposed by the Special Rapporteur.

Paragraph (11)

17. Mr. GAJA suggested that the reference, in the related footnote, to the establishment of the Iran–United States Claims Tribunal should be deleted. The example was not relevant as a model for setting up some of the procedures referred to in paragraph 4 of principle 6. A more appropriate example was needed.

Paragraph (11) was adopted, subject to the amendment proposed by Mr. Gaja.

Paragraph (12) and (13)

Paragraphs (12) and (13) were adopted with several minor drafting changes in the English version.

Paragraph (14)

Paragraph (14) was adopted.

Paragraph (15)

Paragraph (15) was adopted with a minor drafting change in the English version.

Paragraph (16)

18. Following an exchange of views between Mr. GAJA and Mr. Sreenivasa RAO (Special Rapporteur), it was decided that the second sentence should be amended to read: “Such recognition and enforcement would be essential to ensure the effects of decisions rendered in jurisdictions in which the defendant did not have enough assets for victims to recover compensation in other jurisdictions where such assets are available.”

Paragraph (16), as amended, was adopted.

The commentary to draft principle 6, as amended, was adopted.

Commentary to draft principle 7 (Development of specific international regimes)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

19. Mr. GAJA said that paragraph (3) dealt basically with the Commission’s previous work and was of a general nature. He therefore suggested that the text after the first sentence which refers to the assumption upon which the Commission proceeded be moved to the beginning of the general commentary and perhaps placed in a footnote.

Paragraph (3), as amended, was adopted.

The commentary to draft principle 7, as amended, was adopted.

Commentary to draft principle 8 (Implementation)

Paragraph (1)

20. Ms. ESCARAMEIA proposed that the words “Principle 8” at the beginning of the paragraph should be replaced by the words “Paragraph 1”, since paragraph (1) of principle 8 was being referred to, not the entire principle.

Paragraph (1), as amended, was adopted.

Paragraph (2)

21. Ms. ESCARAMEIA said that the word “should” in the first line should be replaced by “shall”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to draft principle 8, as amended, was adopted.
C. Recommendation of the Commission (A/CN.4/L.693)

22. The CHAIRPERSON said that the Commission had left two sections of document A/CN.4/L.693 in abeyance: section C (Recommendation of the Commission) and section D (Tribute to the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao). With regard to section C, the recommendation of the Commission might be worded to read:

“At its 2910th meeting, on 8 August 2006, the Commission recalled that, at its forty-ninth session (1997), it had decided to consider the topic in two parts and that, at its fifty-third session (2001), it had completed the first part and recommended to the General Assembly the elaboration of a convention on the basis of the draft articles on prevention of transboundary damage from hazardous activities. The Commission’s recommendation was based on its view that, taking into account the existing State practice, the first part of the topic lent itself to codification and progressive development through a convention. The adoption by the Commission of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities completes the second part, thus concluding work on the topic “International liability for injurious consequences arising out of acts not prohibited by international law”. In accordance with article 23 of its Statute, the Commission recommends, for this second part, that the General Assembly endorse the draft principles as guidelines and urge States to take national and international action to implement them.”

23. Ms. ESCARAMEIA said that, although the recommendation which the Chairperson had just read out referred to article 23 of the Statute of the Commission, it did not correspond to any of the subparagraphs of paragraph 1 of that provision. To remedy that problem, at least in part, she suggested that the words “as guidelines” in the last sentence should be replaced by “in a resolution”.

24. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to insert the text which he had just read out, as amended, as chapter V, section C, of its report.

It was so decided.

Section C, as amended, was adopted.

D. Tribute to the Special Rapporteur (A/CN.4/L.693)

25. The CHAIRPERSON proposed the insertion of the following tribute to the Special Rapporteur in chapter V, section D, of the report:

“At its 2910th meeting, on 8 August 2006, the Commission following the adoption of the text of the preamble and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, adopted the following resolution by acclamation:

‘The International Law Commission,

‘Having adopted the draft preamble and draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities,

‘Expresses to the Special Rapporteur, Mr. Pemmaraju Sreenivas Rao, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft preamble and draft principles through his tireless efforts and devoted work and for the results achieved in the elaboration of the draft preamble and draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.’

“The Commission also expressed its deep appreciation to the previous Special Rapporteurs, Mr. Robert Q. Quentinx-Baxter and Mr. Julio Barbosa, for their outstanding contribution to the work on the topic.”

26. If he heard no objection, he would take it that the Commission wished to insert the text as chapter V, section D.

It was so decided.

Section D was adopted.

27. Mr. Sreenivasa RAO (Special Rapporteur) expressed his thanks and appreciation to all the members of the Commission who had helped him over the years to complete his work on a topic which had been before the Commission for 27 years.

Document A/CN.4/L.693, as amended, was adopted.

Chapter V of the draft report of the Commission, as a whole, as amended, was adopted.


A. Introduction (A/CN.4/L.695)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

29. Mr. PELLET said that there should be a reminder of what the number in square brackets meant and, to that end, he suggested that the explanation in the footnote whose references was placed at the end of the paragraph should be included in the footnote whose reference was placed in section C, article 15.

Paragraph 3, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.695 and Corr.1)

Paragraphs 4 to 11

Paragraphs 4 to 11 were adopted.

Section B was adopted.
30. The CHAIRPERSON invited the members of the Commission to consider section C.2 of chapter VII of the draft report of the Commission, in particular the commentaries to draft articles 17 to 24, which made up chapter V of the draft articles on responsibility of international organizations (A/CN.4/L.695/Add.2).

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (A/CN.4/L.695/Add.1, Add.2)

2. Text of the draft articles with commentaries thereto adopted by the Commission at its fifty-eighth session A/CN.4/L.695/Add.2

Paragraph (1)

Paragraph (1) was adopted.

General Commentary

31. Mr. GAJA pointed out that the title preceding paragraph (1) should read “General commentary”.

32. The CHAIRPERSON said that the Secretariat would make the necessary change.

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The general commentary was adopted.

Commentary to draft article 17 (Consent)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 17 was adopted.

Commentary to draft article 18 (Self-defence)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 18 was adopted.

Commentary to draft article 20 (Force majeure)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

33. Mr. PELLET said that he seemed to recall that responsibility of international organizations pursuant to their internal rules had been excluded from the draft. However, paragraph (4) and also paragraph (5) referred to the judgments of international administrative tribunals. He requested the Special Rapporteur to provide an explanation.

34. Mr. GAJA (Special Rapporteur) said that, when it had considered the question of the rules of the organization, the Commission had not reached a firm conclusion on whether they were part of international law. It had decided that those rules were covered insofar as they were part of international law, but there had been differences of opinion as to how far that went; thus, ambiguity persisted. However, even if the rules were not part of international law, they were relevant as an indication of practice. He suggested that a sentence referring to the discussion on the question should be inserted after the first sentence.

Paragraph (4) was adopted, subject to the amendment proposed by the Special Rapporteur.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

The commentary to draft article 20, as amended, was adopted.

Commentary to draft article 21 (Distress)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 21 was adopted.

Commentary to draft article 22 (Necessity)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to draft article 22 was adopted.

Commentary to draft article 23 (Compliance with peremptory norms)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 23 was adopted.

Commentary to draft article 24 (Consequences of invoking a circumstance precluding wrongfulness)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

35. Mr. PELLET, referring to the last sentence, noted that the question of responsibility of entities other than States or international organizations that were also members of an international organization had been the subject of a heated debate in the Commission. It would have been better to say that questions relating to such responsibility went beyond the scope of the draft articles, notwithstanding the opinion to the contrary of many members.
36. Mr. GAJA (Special Rapporteur) said that draft article 1, which defined the scope of the draft articles, related only to responsibility of international organizations and of States. Moreover, dealing with the responsibility of other entities would mean starting a new chapter. Although a few members had in fact been in favour of doing so, that was not a task that should be taken on at the moment.

37. Mr. PELLET suggested that the words “Following the adoption of draft articles 28 and 29” in the penultimate sentence should be replaced by “In addition to draft articles 28 and 29”.

38. Mr. GAJA (Special Rapporteur) said that it would be preferable to bring the French version into line with the English text by saying: “À la suite de l’adoption”.

39. Mr. PELLET said he agreed with that proposal, but without the word “adoption”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

40. Mr. PELLET said that the last sentence should explain why the heading of Part One should be changed, and that was presumably in order to include the responsibility of international organizations that were members of another organization.

41. Mr. GAJA (Special Rapporteur) said that the current heading of Part One was “The internationally wrongful act of an international organization” and should not cover responsibility of States. As a number of points still needed to be considered, including some in relation to State responsibility, it would however be premature to take a definitive decision. He was nevertheless prepared to insert a footnote indicating the current title and explaining why it might have to be amended.

Paragraph (6) was adopted, subject to the insertion proposed by the Special Rapporteur.

The general commentary, as amended, was adopted.

Commentary to draft article 25 (Aid or assistance by a State in the commission of an internationally wrongful act by an international organization)

Paragraph (1)

42. Ms. ESCARAMEIA said that the use of the word “corresponds” in the first sentence implied that there was a relationship between draft articles 25 and 12. It would be better to say that draft article 25 dealt with a situation parallel to that of draft article 12.

43. The CHAIRPERSON suggested that the Special Rapporteur should reformulate paragraph (1) accordingly and submit the new version to the Secretariat.

Paragraph (1) was adopted, subject to that amendment.

Paragraphs (2) to (4) were adopted.

Paragraph (5)

44. Mr. PELLET said it should be made clear that reference was being made to article 16 of the draft articles on responsibility of States for internationally wrongful acts, even if that had already been stated in paragraph (4). Anyone reading the paragraph might have the impression that article 16 of the draft articles on responsibility of international organizations was meant. It should also be specified that the heading had not been amended, but adapted to the purpose of the provision. The same comments applied to paragraphs (4) of the commentaries to draft articles 26 and 27.

45. The CHAIRPERSON asked the Special Rapporteur to amend the text accordingly and to communicate the new version to the Secretariat.

Paragraph (5) was adopted, subject to that amendment.

The commentary to draft article 25, as amended, was adopted.

Commentary to draft article 26 (Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

46. The CHAIRPERSON requested the Special Rapporteur to amend paragraph (4) in the same way as paragraph (5) of the commentary to draft article 25.

Paragraph (4) was adopted, subject to that amendment.

The commentary to draft article 26, as amended, was adopted.

Commentary to draft article 27 (Coercion of an international organization by a State)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

47. The CHAIRPERSON requested the Special Rapporteur to amend paragraph (4) as previously.

Paragraph (4) was adopted, subject to that amendment.

The commentary to draft article 27, as amended, was adopted.

Commentary to draft article 28 (International responsibility in case of provision of competence to an international organization)

Paragraph (1)

48. Mr. PELLET, referring to the first sentence, suggested that the words “a situation which is to a certain extent similar to” should be replaced by “a situation which constitutes to a certain extent the situation symmetrical to”.

385 Ibid., p. 26, para. 76.
Mr. GAJA (Special Rapporteur) said that the word “symmetrical” was not exactly correct. “Similar” would be better.

Mr. BROWNlie suggested the word “analogous”.

Paragraph (1) was adopted with that amendment, as well as the amendment contained in document A/CN.4/L.695/Add.1/Corr.1.

Paragraph (2)

Mr. PELLET said that the last sentence was incomprehensible.

Mr. GAJA (Special Rapporteur) drew attention to a mistake in the French version: the phrase “abusing its rights” had been rendered by “exerçant ses droits”.

The CHAIRPERSON suggested that the word “exerçant” should be replaced by “abusant de”.

Paragraph (2) was adopted with this correction to the French version.

Paragraphs (3) to (8)

Paragraphs (3) to (8) were adopted.

The commentary to draft article 28, as amended, was adopted.

Commentary to draft article 29 (Responsibility of a State member of an international organization for the internationally wrongful act of that organization)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. PELLET said that the following clarification should be inserted at the beginning of the second sentence: “Despite the opinion to the contrary of a number of members, the Commission considered that”.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

Paragraph (6) was adopted with, in the English version only, the amendment contained in document A/CN.4/L.695/Add.1/Corr.1.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

Mr. PELLET said that he was opposed to the reference in the last sentence to “subsidiary responsibility” as a “minor form of responsibility”. The latter phrase should be deleted.

Mr. GAJA (Special Rapporteur) said that it was still necessary to explain that, in accepting a subsidiary responsibility, States were only agreeing to a lesser responsibility. However, he was open to any proposal for more appropriate wording.

Following a discussion in which Mr. PELLET, Mr. MOMTAZ, Mr. CANDIOTI and the CHAIRPERSON took part, it was decided that the words “which is the minor form of responsibility” should be replaced by “which is only residual in character”.

Paragraph (13) was adopted with that amendment and with the amendment contained in document A/CN.4/L.695/Add.1/Corr.1.

The commentary to draft article 29, as amended, was adopted.

Commentary to draft article 30 (Effect of this chapter)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. PELLET said that he had great difficulty understanding that very long paragraph. If it referred to article 16 of the draft articles under consideration, it should say so.

Paragraph (6) was adopted with, in the English version only, the amendment contained in document A/CN.4/L.695/Add.1/Corr.1.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

Mr. PELLET said that the word “globally” in the penultimate sentence was too vague. He wondered whether it meant that the factor in question had to be considered in the global context of the matter, taking account of all aspects of the situation.

56. Mr. GAJA (Special Rapporteur) explained that the size of membership had to be considered together with all other relevant factors.

57. Mr. PELLET suggested the following wording for the French version: “Les facteurs, parmi lesquels le petit nombre de membres, doivent être envisagés de manière globale”.

58. Following a discussion in which Mr. PELLET, Mr. GAJA (Special Rapporteur) and Ms. XUE took part, the CHAIRPERSON requested the Special Rapporteur to submit to the Secretariat a new version of the sentence taking into account the comments made.

Paragraph (10) was adopted, subject to that amendment.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

Paragraph (13)

59. Mr. PELLET said that he was opposed to the reference in the last sentence to “subsidiary responsibility” as a “minor form of responsibility”. The latter phrase should be deleted.

60. Mr. GAJA (Special Rapporteur) said that it was still necessary to explain that, in accepting a subsidiary responsibility, States were only agreeing to a lesser responsibility. However, he was open to any proposal for more appropriate wording.

61. Following a discussion in which Mr. PELLET, Mr. MOMTAZ, Mr. CANDIOTI and the CHAIRPERSON took part, it was decided that the words “which is the minor form of responsibility” should be replaced by “which is only residual in character”.

62. Mr. PELLET said that he had great difficulty understanding that very long paragraph. If it referred to article 16 of the draft articles under consideration, it should say so.

63. Mr. GAJA (Special Rapporteur) said that the reference was to article 19 of the draft articles on responsibility of States for internationally wrongful acts. He himself had not been in favour of article 30, but, as the Commission had decided to include it, he had thought it useful to explain why the provision was drafted.

386 Ibid.
64. Mr. PELLET said it should all the same be recalled that article 30 was the counterpart, for States, of article 16 of the present draft articles, by referring to that article and its commentary. Perhaps the Special Rapporteur could submit a sentence along those lines to the Secretariat; there was no need to bring the matter up again in plenary.

65. Mr. ECONOMIDES said that he also found paragraph (2) difficult to understand, especially the first sentence.

66. The CHAIRPERSON suggested that the Special Rapporteur should submit a new version of the paragraph.

67. Mr. GAJA (Special Rapporteur) said that it was very clear that paragraph (2) referred to what was said in paragraph (1). It was also clear that the chapter was on responsibility of States. However, he was prepared to reconsider the paragraph if Mr. Economides had wording to propose.

68. Mr. ECONOMIDES said that he did not have a specific proposal to make at present, but the text might say something to the effect that there appeared to be less need for a “without prejudice” provision for international organizations analogous to the one in the draft articles on responsibility of States for internationally wrongful acts and that, since responsibility had been saved in the case of States, it was deemed advisable, for reasons of symmetry, to save responsibility of international organizations, too, even though it was less useful. The idea was that, if article 19 was omitted entirely, it would be necessary to explain why, especially as that article might prove useful in practice, although it was perhaps poorly expressed.

69. Following an exchange of views in which the CHAIRPERSON, Mr. GAJA (Special Rapporteur), Mr. MELESCANU and Mr. PELLET took part, the CHAIRPERSON suggested that Mr. Economides should communicate his proposal to the Secretariat in writing and that the Commission should adopt paragraph (2) of the commentary to draft article 30 at a later time.

It was so decided.

Paragraph (3)

70. Mr. GAJA (Special Rapporteur) said that “16” should be replaced by “19”.

Paragraph (3), as amended, was adopted.

Document A/CN.4/L.695/Add.1 was adopted, subject to paragraph (2) of the commentary to draft article 30.

Chapter VII of the draft report of the Commission, as a whole, as amended, was adopted, subject to paragraph (2) of the commentary to draft article 30.

Chapter X. Effects of armed conflicts on treaties (A/CN.4/L.698)

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 4 was adopted.

Paragraph 4 was adopted.

1. General remarks on the topic

Paragraphs 5 and 6

Paragraphs 5 and 6 were adopted.

Paragraph 7

71. Ms. ESCARAMEIA said she was very surprised that the summary of the debate was so short. Many other issues had been considered, in particular the criteria for deciding whether a treaty was applicable or not in the case of armed conflict.

72. Mr. MOMTAZ said that he agreed with Ms. Escarameia. He also thought that the words “the law of war” should be deleted, because that expression was synonymous with “international humanitarian law” in the same sentence.

73. Mr. BROWNLIE (Special Rapporteur), replying to Ms. Escarameia, said that paragraph 7 referred only to paragraphs 5 and 6 and that a summary of the debate was provided after each article. That was why paragraph 7 did not address all the questions that had been discussed.

74. Mr. PELLET said that Ms. Escarameia’s comment was justified only if the title of 1 (General remarks on the topic) was taken literally. The debate on the question of criteria had been duly summarized in paragraph 25. The words “law of war” covered both “jus ad bellum” and “jus in bello” and should not be deleted, since the question of the law of war, i.e. the rules on the use of force, had been left out, as a number of members had regretted. He suggested that the words “the rules of armed conflicts” or “the rules on the use of force in international relations” should be added.

75. Mr. BROWNLIE (Special Rapporteur) suggested that the words “law of war” should be replaced by “jus ad bellum”.

76. Mr. GALICKI said that he endorsed the use of the words “the rules of armed conflicts”, which had the added advantage of being in line with the title of the topic.

77. The CHAIRPERSON, speaking as a member of the Commission, said that he supported Mr. Galicki’s suggestion.

78. Following an exchange of views in which Mr. MELESCANU, Mr. ECONOMIDES, Mr. GALICKI, Mr. PELLET and Mr. BROWNLIE (Special Rapporteur) took part, Mr. PELLET proposed that paragraph 7 should read:

“It was reiterated that it was not possible to maintain a strict separation between the law of treaties and other branches of international law such as the rules relating to the prohibition of the use of armed force in international relations, international humanitarian law and the law of responsibility of States for internationally wrongful acts, which were also relevant to the topic.”

Paragraph 7, as amended, was adopted.

The meeting rose at 6.05 p.m.
2911th MEETING

Wednesday, 9 August 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue.

Draft report of the Commission on the work of its fifty-eighth session (continued)

Chapter X. Effects of armed conflicts on treaties (concluded) (A/CN.4/L.698)

B. Consideration of the topic at the present session (concluded)

1. General remarks on the topic (concluded)

Paragraph 8 was adopted.

2. Article 1. Scope

Paragraphs 9 to 11 were adopted.

3. Article 2. Use of terms

Paragraphs 12 and 13 were adopted.

Paragraph 14 was adopted.

1. Mr. BROWNIE (Special Rapporteur) said that the awkward wording of the final phrase in the penultimate sentence would be improved if it were reformulated to read: “such as the regime based upon the Oslo Accords”.

Paragraph 14, as amended, was adopted.

Paragraph 15 was adopted.

2. Mr. GAJA said that the paragraph dealt with two entirely different matters: the definition of armed conflict and the way that the report should address the issue of internal conflicts. It would therefore be preferable to divide the paragraph into two, with the break coming between the second and third sentences.

Paragraph 15, as amended, was adopted.

3. Mr. MOMTAZ said that, since the reference, in the second sentence, to “conflicts not involving States”, applied to rebel groups that were fighting each other, the final phrase of the second sentence after the reference to the definition in the Tadić case would be more appropriately reworded to read: “because it included internal conflicts in which Government forces were not involved”.

Paragraph 15, as amended, and new paragraph 15 bis were adopted.

Paragraph 16 was adopted.

Paragraph 17 was adopted.

4. Mr. ECONOMIDES said that the word “reiterated” did not adequately reflect the Commission’s discussion on a crucial aspect of the topic. He proposed that the following sentence should be inserted at the end of the paragraph: “This was the view of the majority of the members of the Commission.”

Paragraph 17, as amended, was adopted.

Paragraphs 18 to 20 were adopted.

Paragraph 18 to 20 were adopted.

4. Article 3. Ipso facto termination or suspension

Paragraph 21 was adopted.

Paragraph 21 was adopted.

Paragraphs 18 to 20 were adopted.

Paragraph 22 was adopted.

5. Ms. ESCARAMEIA said that the last sentence was misleading; more than mere doubts had been expressed about the proposed drafting change. She therefore proposed that the final sentence should be replaced by the following: “Others were against the proposed drafting change and preferred to keep the expression ‘ipso facto’ to indicate that the outbreak of an armed conflict did not have the automatic consequence of terminating or suspending a treaty.”

Paragraph 22, as amended, was adopted.

Paragraphs 18 to 20 were adopted.

5. Article 4. The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

Paragraph 23 was adopted.

Paragraph 23 was adopted.

6. Mr. PELLET said he found it strange that the Special Rapporteur should openly state in the report that he shared the scepticism expressed concerning a central aspect of the topic, thereby destroying the rationale for his role.

Paragraph 23 was adopted.

Paragraph 24 was adopted.

7. Mr. BROWNIE (Special Rapporteur) said that the paragraph accurately reflected the fact that there had been strong scepticism expressed at the meeting, which he shared. He saw no point in seeking other language.

Paragraph 24 was adopted.

Paragraph 25 was adopted.

8. Mr. PELLET suggested that the following phrase should be added at the end of the first sentence: “owing to
the strengthening of the principle that recourse to armed force is prohibited in international relations”.

9. Mr. BROWNLIE (Special Rapporteur) said that such an amendment would misrepresent the course of the debate. Mr. Koskenniemi and others had made reasonable points about the difficulty of proving intention, and Mr. Pellet had also expressed his views, but no connection had been made between that and the prohibition of the use of force.

10. Mr. PELLET said that Mr. Brownlie was incorrect. He had made such a connection, and so had Mr. Economides, as his notes of the debate showed.

11. Mr. MELESCANU said that, in fact, several speakers had stressed that they could not accept the criterion of intention, given that, once the Charter of the United Nations had been adopted, parties could not conclude a treaty with the intention of resorting to force leading to armed conflict. There was a link between intention and the regime concerning the use of force, and that link had been made during the Commission’s debate. Secondly, the penultimate sentence should be strengthened, in his view. He therefore suggested that the words “Reference was also made to” should be deleted and the following phrase added at the end of the sentence: “were considered by many speakers to be essential to the application and operation of the article”.

12. Ms. ESCARAMEIA suggested the following form of words for that sentence: “Several members also referred to the criteria of the object and purpose” and so forth. That would indicate that more than one speaker had preferred those criteria to the criterion of intention.

13. Mr. ECONOMIDES said that the reason for the loss of significance of the criterion of intention after the Second World War had been the introduction of the Charter of the United Nations, which had made war illegal.

14. Ms. ESCARAMEIA concurred but said that she took the point that not all members held that view. She suggested that the following sentence could be inserted, to follow the first sentence: “Some thought this was due to the principle of the prohibition of the use of force.”

15. Mr. BROWNLIE (Special Rapporteur) said that he would be happy to accept that amendment. What he found unacceptable was the suggestion that the debate as a whole had linked intention with the prohibition of the use of force, whereas most of the debate had concerned the technical viability of the criterion of intention, in particular, the difficulties of proving intention. Admittedly, some speakers had linked the two, but that was because they thought that the whole topic concerned the use of force, whereas, in fact, it concerned the law of treaties.

16. The CHAIRPERSON, noting that many members appeared to share the view that the issue of the criterion of intention was linked to the prohibition against the use of force, suggested that, with the Special Rapporteur’s concurrence, the amendment proposed by Mr. Pellet to the first sentence and the amendment proposed by Ms. Escarameia to the penultimate sentence could be adopted.

Paragraph 25, as amended, was adopted.

Paragraph 26 was adopted.

6. Article 5. Express provisions on the operation of treaties
Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

7. Article 6. Treaties relating to the occasion for resort to armed conflict
Paragraphs 29 and 30

Paragraphs 29 and 30 were adopted.

8. Article 7. The operation of treaties on the basis of necessary implication from their object and purpose
Paragraphs 31 to 33

Paragraphs 31 to 33 were adopted.

Section B, as amended, was adopted.

Chapter X of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter XII. Fragmentation of international law: Difficulties arising from the diversification and expansion of international law (A/CN.4/L.700)

A. Introduction
Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

Paragraph 2 was adopted.

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 5

20. Mr. GAJA said that the last sentence implied that the Study Group’s conclusions were obscure. He therefore proposed that it should read “... these conclusions should be read against the background of the analytical study ...”, which conveyed the idea that the analytical study, while important, was not the key to understanding the perfectly intelligible report produced by the Study Group.

21. Mr. PELLET suggested that it would be simpler and more rational to delete the phrase “could only be fully understood”.

22. Mr. GAJA noted that the English text would then read “these conclusions should be read in connection with the analytical study”.

Paragraph 5, as amended, was adopted.

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

23. Mr. PELLET said that it might be advisable for paragraph 7 to state that the Commission had requested that the analytical study finalized by the Chairperson of the Study Group should be posted on the Commission’s website and published in the Part One of volume II of the Yearbook.

24. The CHAIRPERSON said that wording to that effect would give the erroneous impression that it was the first time that such a procedure was being followed.

25. Mr. PELLET said that, in that case, after the parenthesis “(sect. D.2, below)” the phrase should be added “and requested that, in accordance with practice, the analytical study of the Chairperson of the Group should be posted on the Commission’s website and published in Part One of volume II of the Commission’s Yearbook”.

26. Mr. MIKULKA (Secretary to the Commission) urged the Commission to be cautious, because that wording might be misinterpreted to mean that, in the absence of an explicit request and express authorization from the Commission, the Secretariat was not entitled to publish studies exceeding a certain number of pages in the Yearbook. The study would be published in the Yearbook as a matter of course.

27. Mr. CANDIOTI said that readers of the report would wish to know where they could find the study, which was of great importance. He was therefore also in favour of adding a footnote saying that it would be published in due course in the Yearbook and posted on the Commission’s website.

28. In response to a suggestion from Mr. GAJA, Mr. MIKULKA (Secretary to the Commission) said that the analytical study would certainly be distributed to members of the Sixth Committee and participants in its meetings.

29. Mr. PELLET said that, in that case, it would be useful to state, in a footnote, that the study would be circulated to the members of the Sixth Committee. Moreover, since it was rather cavalier to merely take note of the well-crafted report of the Study Group, he maintained his above-mentioned proposal, in preference to that of Mr. Candioti, in order to emphasize the fact that the Commission wished to publicize the report.

30. Mr. GAJA said that it might help the Secretariat if the Commission’s report contained a recommendation that the analytical study should be distributed to members of the Sixth Committee. Furthermore it would be a means of giving some formal recognition to Mr. Koskenniemi’s contribution.

31. Mr. BROWNLie said that he strongly supported Mr. Pellet’s proposal, because the subject of fragmentation generated enormous interest in universities and elsewhere. It would therefore enhance the Commission’s reputation if the report were to be made easily accessible.

32. Mr. ECONOMIDES asked whether the Commission’s practice would permit a reference in the report to a proposal submitted by a member which had, however, been rejected. He had presented a written and an oral proposal that the Commission should consider on “positive” and “negative” fragmentation, a suggestion which had not received the support of either the Study Group or the Commission meeting in plenary session.

33. Mr. PELLET proposed the wording “A member’s proposal that a distinction should be drawn between ‘positive’ and ‘negative’ fragmentation was not endorsed by the Commission.”

Paragraph 7, as amended, was adopted.

Section B, as amended, was adopted.

34. The CHAIRPERSON announced that Chapter XII of the draft report of the International Law Commission on the work of its fifty-eighth session would be supplemented with a section C containing a tribute to the Study Group and its Chairperson and a section D containing the material in section B (Background) and Section C (Conclusions of the work of the Study Group) from document A/CN.4/L.702.

35. He took it that the Commission wished to include the following text in Chapter XII of the report on the work of its fifty-eighth session:

“At its 2911th meeting, on 9 August 2006, the Commission adopted the following resolution by acclamation:

‘The International Law Commission,

‘Having taken note of the report and conclusions of the Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law,
Summary records of the meetings of the fifty-eighth session

Expresses its deep appreciation and warm congratulations to the Study Group and its Chairman, Mr. Martti Koskenniemi, for the outstanding contribution they have made to the preparation of the report on the fragmentation of international law and for the results they have achieved in drawing up conclusions and the accompanying study on the fragmentation of international law: difficulties arising from the diversification and expansion of international law, which were finalized by the Chairman’’”.

It was so decided.

New Sections C and D were adopted.

Chapter XII of the draft report of the Commission, as a whole, as amended, was adopted.


36. The CHAIRPERSON invited the Commission to begin its consideration of chapter VIII of the report and drew attention in that connection to the portions of the chapter contained in documents A/CN.4/L.696 and Corr.1.

A. Introduction (A/CN.4/L.696)

Paragraphs 1 to 9

Paragraphs 1 to 9 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.696 and Add.1)

37. Mr. KATEKA said that he wished to pay tribute to the Special Rapporteur’s wisdom in reproducing all the guidelines which had been provisionally adopted. That practice was most helpful to the reader.

The portion of chapter VIII contained in document A/CN.4/L.696 and Corr.1, as a whole, as amended, was adopted, subject to the addition of the numbers and dates of the meetings in paragraphs 11, 12 and 15.


B. Consideration of the topic at the present session (A/CN.4/L.696/ Add.1 and Corr.1)

1. Introduction by the Special Rapporteur of the second part of his tenth report

Paragraph 18

39. Mr. GAJA said that the phrase “had not been able to be” should be replaced by “could not be”.

Paragraph 18, as amended, was adopted.

Paragraph 19

Paragraph 18, as corrected by document A/CN.4/L.696/ Add.1/Corr.1 in Arabic, Chinese, English, Spanish and Russian, was adopted.

Paragraphs 20 to 22

Paragraphs 20 to 22 were adopted.

Paragraph 23

40. Mr. GAJA said that the word “reinforcing” should be replaced by “supportive”.

Paragraph 23, as amended, was adopted.

Paragraph 24

41. Mr. GAJA said that the word “non-validity” should be replaced by “invalidity”.

Paragraph 24, as amended, was adopted.

Paragraph 25

42. Mr. GAJA said that the words “one school of legal writers” should be replaced by the words “certain authors”.

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 28

Paragraphs 26 to 28 were adopted.

2. Summary of the debate

Paragraph 29

43. Mr. GAJA said that in the second sentence, the phrase “had to do with the aim” should be replaced by “consisted in the objective” and the word “with” in the last line should be replaced by “in”.

Paragraph 29, as amended, was adopted.
Paragraph 30

*Paragraph 30 was adopted.*

Paragraph 31

44. Mr. GAJA said that the word “reworked” should be replaced by “revised”.

*Paragraph 31, as amended, was adopted.*

Paragraph 32

*Paragraph 32 was adopted.*

Paragraph 33

45. Ms. ESCARAMEIA said that at the end of the final sentence, the words “and was an essential element of interpretation according to article 31 of the Vienna Convention on the Law of Treaties” should be inserted.

46. Mr. PELLET proposed an editorial correction to the French text.

*Paragraph 33, as amended, was adopted.*

Paragraphs 34 to 39

*Paragraphs 34 to 39 were adopted.*

Paragraph 40

47. Ms. ESCARAMEIA said that the final sentence was inaccurate and should be amended by the deletion of the words “included those” and the addition, at the end of the sentence, of the phrase “could rule on the legality of reservations formulated by States even if such a power was not expressly foreseen in the treaty”.

48. Mr. PELLET proposed an editorial correction to the French text.

*Paragraph 40, as amended, was adopted.*

Paragraph 41

49. Ms. ESCARAMEIA proposed the addition, at the end of the sentence, of a new sentence to read: “Others held the contrary view.”

*Paragraph 41, as amended, was adopted.*

Paragraph 42

50. Ms. ESCARAMEIA proposed an amendment following from the one to the preceding paragraph: in the first sentence, the phrase “Following the same line of thought” should be replaced by “Some members thought that”.

51. Mr. GAJA said that in the second sentence, the word “raised” should be replaced by “made”.

52. Mr. PELLET said that the French text of the final sentence should be aligned with the English. The words “au fond” should be replaced by “au cœur” and the words “autour de” by “relative à”.

*Paragraph 42, as amended, was adopted.*

Paragraphs 43 to 44

*Paragraphs 43 to 44 were adopted.*

Paragraph 45

53. Mr. GAJA said that the phrase “have the effect” should be replaced by “entail the risk” and the words “in order” inserted between “use” and “to criticize”.

54. Mr. PELLET said that the French text should be corrected accordingly through the replacement of the word “comporter” by “entraîner” and of the words “de les utiliser” by “qu’ils soient utilisés”.

*Paragraph 45, as amended, was adopted.*

Paragraph 46

55. Mr. PELLET proposed that the words “such as what would happen if” be replaced by “in the event that” and that the words “or its validity” be added after “assessment of the reservation”.

*Paragraph 46, as amended, was adopted.*

Paragraph 47

56. Mr. PELLET proposed that the word “recalled” be replaced by “said”.

*Paragraph 47, as amended, was adopted.*

Paragraph 48

57. Mr. ECONOMIDES said that in the French text of the second sentence the word “constitution” should be corrected to “proposition”. In that same sentence the words “did not seem to be compatible with the law of international responsibility and” should be inserted after the word “assertion”.

58. Ms. XUE (Rapporteur), supported by Mr. PELLET, made a proposal to differentiate the second sentence, which outlined one member’s view, from the first, which stated a view held by a number of members. The words “such an assertion” should be preceded by “It was said that”.

*Paragraph 48, as amended, was adopted.*

Paragraphs 49 to 50

*Paragraphs 49 to 50 were adopted.*

Paragraph 51

59. Mr. GAJA said that the word “arbiter” should be replaced by “arbitrator”.

*Paragraph 51, as amended, was adopted.*

Paragraph 52

60. Mr. PELLET proposed an editorial correction to the French text.

*Paragraph 52 was adopted with that correction.*
Paragraph 53

61. Mr. GAJA proposed that in the first sentence, the words “owing to the normative gap in the Vienna Conventions there was no indication whether” be replaced by “there was no indication in the Vienna Conventions that”.

Paragraph 53, as amended, was adopted.

The portion of chapter VIII contained in document A/CN.4/L.696/Add.1, as amended, was adopted.

62. The CHAIRPERSON drew attention to the portion of chapter VIII contained in document A/CN.4/L.696/Add.2.

B. Consideration of the topic at the present session (continued)

3. SPECIAL RAPPORTEUR’S CONCLUDING REMARKS (A/CN.4/L.696/Add.2)

Paragraphs 54 to 57

Paragraphs 54 to 57 were adopted.

Paragraph 58

63. Mr. GAJA said that the word “start” should be replaced by “beginning”, which suggested a somewhat broader period of time in a treaty’s life.

Paragraph 58, as amended, was adopted.

Paragraphs 59 to 68

Paragraphs 59 to 68 were adopted.

The portion of chapter VIII contained in document A/CN.4/L.696/Add.2, as amended, was adopted.


2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-EIGHTH SESSION (CONCLUDED)

Commentary to article 30 (Effect of this chapter) (concluded)

New paragraph (1)

64. Mr. GAJA (Special Rapporteur) proposed the insertion of a new paragraph (1), which would read:

“The present draft article finds a parallel in draft article 16, according to which the chapter on responsibility of an international organization in connection with the act of a State or another international organization is ‘without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization’.”

The subsequent paragraphs would then be renumbered accordingly.

New paragraph (1) was adopted.

65. The CHAIRPERSON recalled that original paragraph (1), which was to become paragraph (2), had been adopted at the previous meeting.

Original paragraph (2)

66. Mr. GAJA read out a proposal drafted with the assistance of Mr. Economides. In the first sentence, “a similar” would be replaced by “an analogous”. The third sentence would be replaced by: “On the contrary, a ‘without prejudice’ provision analogous to that of article 19 on Responsibility of States for internationally wrongful acts388 would have some use if it concerned international organizations. The omission in the chapter of a provision analogous to article 19 could have raised doubts”. The rest of the paragraph would remain unchanged.

Original paragraph (2), as amended, was adopted.

Original paragraph (3)

67. Mr. PELLET said that to align the French text with the English, references to “article” be replaced by “projet d’article”.

Original paragraph (3) was adopted with that amendment to the French text.

The commentary to article 30, as amended, was adopted.

CHAPTER VII OF THE DRAFT REPORT OF THE COMMISSION, AS A WHOLE, AS AMENDED, WAS ADOPTED.

CHAPTER I. INTRODUCTION (A/CN.4/L.689)

Paragraphs 1 to 12

Paragraphs 1 to 12 were adopted.

Chapter I of the draft report of the Commission, as a whole, was adopted.

CHAPTER II. SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-EIGHTH SESSION (A/CN.4/L.690)

Paragraph 1

68. Mr. PELLET pointed out that the paragraph needed to be completed before it could be adopted. He wished to have it placed on record that he was in disagreement with the Commission’s decision to recommend the elaboration of a convention on the basis of the draft articles on diplomatic protection. Like Mr. Candioti, he did not think that that decision was logical; the topic should have followed the fate of the draft articles on responsibility of States.

Paragraph 1 was adopted.

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

388 Yearbook...2001, vol. II (Part Two) and corrigendum, p. 27.
Paragraph 4

69. Mr. GAJA noted that the Commission had adopted 14 draft articles dealing with circumstances precluding wrongfulness and with the responsibility of a State in connection with the act of an international organization, and not 13 as indicated.

Paragraph 4, as amended, was adopted.

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

70. Mr. PELLET said that the square brackets in the second sentence should be removed, and the text should read “The Commission adopted 10 guiding principles…”.  

71. Mr. RODRÍGUEZ CEDEÑO said that, in fact, the text should read “The Commission adopted 10 guiding principles and the commentary thereto”.

72. Mr. PELLET pointed out that it would be premature to assume that the commentary would be adopted the next day.

The adoption of paragraph 6 was postponed.

Paragraph 7

Paragraph 7 was adopted.

Paragraph 8

73. Mr. GALICKI (Special Rapporteur) pointed out that “judicare” had been spelled throughout the consideration of the topic with a “j”, and not with an “i”.

Paragraph 8 was adopted with that editorial correction.

Paragraph 9

74. Ms. ESCARAMEIA said that in her view, the text in square brackets should be retained. The Commission should also take note of the large analytical study on fragmentation of international law, because otherwise it might seem that it did not exist.

75. Mr. PELLET said that he sympathized with the substance of Ms. Escarameia’s suggestion. However, the Commission had just adopted the material in document A/CN.4/L.700, paragraph 7 of which stated that the Commission had decided merely to take note of the conclusions of the Study Group; it would not be logical for it to go any further than that in the summary.

76. Ms. ESCARAMEIA said that the text could at least say that the Commission had had the two documents before it so as to acknowledge that the large analytical document existed, and that it had considered and taken note of the report. It should say nothing further on the large analytical document, because it had not considered it.

77. Mr. MANSFIELD suggested reversing the order of two parts of the paragraph, which would then read: “…the Study Group thus completed its substantive work (2003–2006) on the basis of a final report prepared by its Chairman (A/CN.4/L.682 and Corr.1 and Add.1), and the Commission took note of that report and of the report of the Study Group containing a set of 42 conclusions (Chap. XII)”.

78. Mr. ECONOMIDES said that the words “en s’appuyant” in the French version were meaningless and should be corrected. Although the Chairperson had presented the document, the Study Group had adopted it, and it had considered and adopted all the recommendations. Thus, it was the Study Group’s work, which had been carried out at the Chairperson’s suggestion. He agreed that reference should be made to Mr. Koskenniemi’s large analytical study; unfortunately, it was still not available in French. He asked the Secretariat whether the French version of the document would be ready before the end of the session.

79. Mr. CANDIOTI said that paragraph 9 should be recast so as to present matters in their chronological order. First, it should refer to the Chairperson’s large analytical report. He did not see why it was termed “final”—it would be preferable to speak of “the comprehensive analytical study prepared by the Chairman”. That would be followed by the report of the Study Group and then the conclusions, of which the Commission had merely taken note.

80. Mr. PELLET agreed with Mr. Mansfield and Mr. Candioti that the paragraph should follow the chronological order of events. Although it was very regrettable that the large analytical study had not yet been translated, the Study Group had after all worked on the basis of the original. In any case, the Secretariat had indicated that the translation into other languages would be ready very shortly. The text should also link the work of the Planning Group with the analytical study and not speak of the analytical study in the context of the Commission, which had not considered it. The last sentence should read that the Commission, and not the Study Group, had thus completed its substantive work on the topic.

81. The CHAIRPERSON suggested that the paragraph could read “…the Commission considered and took note of the report of the Study Group containing a set of 42 conclusions established on the basis of the analytical study prepared by the Chairman of the Study Group”.

82. Mr. MANSFIELD suggested returning to the question later with a new draft. The analytical study had in effect been prepared by the Chairperson, but he had taken account of the work of others in the Study Group.

83. Mr. PELLET agreed and stressed that the new paragraph should draw closely on the formulation in paragraphs 5 and 7 of document A/CN.4/L.700.

The adoption of paragraph 9 was postponed.

Paragraph 10

The adoption of paragraph 10 was postponed.

Paragraph 11

84. Mr. PELLET said that it would be only reasonable to place the ICJ at the top of the list of organizations with which the Commission had continued traditional exchanges of information.

Paragraph 11, as amended, was adopted.
Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

Paragraph 13 was adopted, subject to the insertion of the relevant dates and section.

Chapter III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.691)

85. Mr. PELLET pointed out that some parts of A/CN.4/L.691 had been prepared in French and that the document should therefore state that the original languages were both English and French.

86. The CHAIRPERSON said that the Secretariat would make the necessary correction.

A. Shared natural resources

Section A was adopted.

B. Responsibility of international organizations

87. Mr. PELLET said that, in the second paragraph, subparagraph (a), of the French version, the words "la partie lésée" should be amended to read "la personne lésée".

88. Mr. CANDIOTI, also referring to subparagraph (a), said that compensation was only one form of reparation; it would be preferable to use a more general expression. He therefore proposed that the phrase "have an obligation to provide compensation" be replaced by "have an obligation to provide reparation".

89. Mr. PELLET said that he disagreed: the question arose only in the case of compensation; it did not if restitution in integrum was at issue, and it certainly did not for satisfaction.

90. Mr. GAJA (Special Rapporteur) said that the proposal by Mr. Pellet to replace "la partie lésée" by "la personne lésée" concerned the French version only.

91. As to the proposal by Mr. Candioti, he felt that the question should focus on compensation, which was the most realistic eventuality. It was true that an international organization might not necessarily provide compensation, but the issue was whether member States of an international organization that were not responsible had an obligation to provide funds or to pay the injured party directly. If the idea of reparation were introduced, it would again raise the question of subsidiary responsibility, which the Commission had already dealt with in draft article 29.

92. Mr. RODRÍGUEZ CEDEÑO said that although Mr. Candioti’s comment on reparation was well taken, he also appreciated Mr. Gaja’s explanation. In his view, the Spanish version, which used the word "reparación", should be brought into line with the word used in the French version ("indemnisier").

Section B was adopted with the proposed amendments to the French and Spanish versions.

C. Reservations to treaties

Section C was adopted.

D. The obligation to extradite or prosecute ("aut dedere aut judicare")

93. Mr. PELLET, referring to subparagraphs (c) and (d) in the first paragraph, said that it was confusing for States to be asked for information on practice concerning both universal jurisdiction and the obligation aut dedere aut judicare. He was in favour of deleting the reference to "the principle of universal jurisdiction", because the Commission would be committing itself to an approach to the subject that had been contested during the debate and which might awaken useless and dangerous expectations.

94. Mr. GALICKI (Special Rapporteur) said that, as Mr. Pellet had no doubt noticed, he had eliminated any reference to universal jurisdiction from subparagraphs (a) and (b). His intention in subparagraphs (c) and (d) had been to provoke States to respond, but if it was felt that such provocation was not necessary, he was prepared to endorse Mr. Pellet’s proposal to eliminate the reference to universal jurisdiction.

95. Mr. MOMTAZ said that more than 100 States had made provision for universal jurisdiction in their legislation, but only a few had actually implemented it. It would be useful to know the reason for that hesitation.

96. Mr. GAJA said that universal jurisdiction was not yet a part of the topic and perhaps never would be. It would be confusing to mention it, because it would convey the idea that the topic had been broadened, which was an option, but one which neither the Special Rapporteur nor the Commission had yet taken. It would be preferable to focus on the obligation aut dedere aut judicare as suggested by Mr. Pellet.

97. Mr. CANDIOTI was in agreement with Mr. Gaja and Mr. Pellet. He wondered, however, whether the subject of subparagraph (d) was not already included in subparagraph (b).

98. Mr. GALICKI (Special Rapporteur) said that Mr. Candioti was correct to some extent. However, he was particularly interested in obtaining a direct response to the question in subparagraph (d), because if the Commission was to limit the obligation, on the basis of practice, to certain types of crimes and offences, it would need to know which crimes and offences were acceptable to the individual States. On the other hand, it would also be useful to obtain the broader information requested in subparagraph (b) on all domestic legal regulations concerning not only crimes and offences, but also criminal procedures relating to the obligation to extradite or prosecute. He had separated the two questions because States, in replying to the request for broader information in subparagraph (b), might fail to provide the specific information requested in subparagraph (d).

Section D, as amended, was adopted.

E. Other decisions and conclusions of the Commission

Section E was adopted.
Chapter III of the draft report of the Commission, as a whole, as amended, was adopted.

The meeting rose at 1.05 p.m.

2912th MEETING

Thursday, 10 August 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBÔU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Montaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue.

Draft report of the Commission on the work of its fifty-eighth session (continued)


1. The CHAIRPERSON invited the members of the Commission to continue consideration of document A/CN.4/L.696/Add.3.

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 fifty-eighth session (A/CN.4/L.696/Add.3)

3. Validity of reservations and interpretative declarations

Commentary

Paragraph (1)

2. Mr. BROWNIE said that the word “of” should be inserted in the second line of the English version after “procedure”.

Paragraph (1), as amended in the English text, was adopted.

Paragraphs (2) to (8)

Paragraphs (2) to (8) were adopted.

Commentary to draft guideline 3.1 (Permissible reservations)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

3. Ms. ESCARAMEIA said she was very surprised that the first sentence, which had already appeared in the Special Rapporteur’s report and had been heavily criticized during the debate, should reappear in the commentary and suggested that the second part of the sentence should be amended to read: “even though the Convention proceeds from a presumption in favour of the possibility of formulating reservations”.

4. Mr. PELLET (Special Rapporteur) said that he could go along with the deletion of the word “undoubtedly”, but not with an amendment to the end of the sentence. He suggested that the following new sentence should be added between the first and second sentences: “Some members questioned whether such a presumption existed.”

Paragraph (5), as amended by the Special Rapporteur, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

5. Ms. ESCARAMEIA suggested that the words in parentheses, i.e. “and, by extension, the presumption of their validity”, should be deleted.

Paragraph (8), as amended, was adopted.

Paragraph (9)

6. Mr. GAJA said it was odd to say that a convention “has not been greatly inconvenienced” and suggested that the last sentence should end after the words “Vienna Convention”.

Paragraph (9) was adopted.

Paragraph (10)

Paragraph (10) was adopted.

The commentary to draft guideline 3.1, as amended, was adopted.

Commentary to draft guideline 3.1.1 (Reservations expressly prohibited by the treaty)

Paragraph (1)

8. Ms. ESCARAMEIA suggested that the second sentence, which was too categorical, should be replaced by a sentence that would read: “This does not seem to be the case.”

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

Paragraph (6)

9. Ms. ESCARAMEIA said that the words “the great liberalism” in the last sentence should be replaced by a less categorical formulation.
10. Mr. BROWNLIE suggested that the words “with the great liberalism” should be replaced by “with the relative flexibility”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (12)

Paragraphs (7) to (12) were adopted.

The commentary to draft guideline 3.1.1, as amended, was adopted.

Commentary to draft guideline 3.1.2 (Definition of specified reservations)

Paragraph (1)

11. Mr. GAJA said that the word “details” in the fifth line of the English text should be replaced by “elements”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

12. Mr. GAJA suggested that a sentence should be inserted before the last sentence that would read: “Such a reservation may also be subject to other objections.” The last sentence, which, in his opinion, related to draft guideline 3.1.4, should be moved.

Paragraph (3) was adopted with the insertion proposed by Mr. Gaja.

Paragraphs (4) to (9)

Paragraphs (4) to (9) were adopted.

Paragraph (10)

13. Mr. PELLET (Special Rapporteur) said that he had no objection to Mr. Gaja’s first suggestion, but thought that the end of the proposed sentence could be made clearer by saying: “Such a reservation may also be subject to another ground.” To avoid the repetition of the word “telle” in the French version, the last sentence could begin with the words “C’est la raison pour laquelle”. However, he was firmly opposed to Mr. Gaja’s proposal to move the last sentence because it related to a word used in draft guideline 3.1.2.

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (13)

Paragraphs (11) to (13) were adopted.
Commentary to draft guideline 2.1.8 [2.1.7 bis]³⁹⁹ (Procedure in case of manifestly invalid reservations)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

19. Ms. ESCARAMEIA suggested that, for the sake of clarity, the beginning of the last sentence should be amended to read: “The majority considered that this procedure applied to all the subparagraphs and therefore the Commission did not consider it justified”.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

The commentary to draft guideline 2.1.8 [2.1.7 bis], as amended, was adopted.

Section C, as a whole, as amended, was adopted.

Chapter VIII of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER XI. Obligation to extradite or prosecute (aut dedere aut judicare) (A/CN.4/L.699)

20. The CHAIRPERSON invited the members of the Commission to consider chapter XI of the draft report on the obligation to extradite or prosecute (aut dedere aut judicare) (A/CN.4/L.699).

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR

Paragraphs 3 to 5

Paragraphs 3 to 5 were adopted.

Paragraph 6

21. Mr. MOMTAZ, noting that the last sentence referred to “the possibility that a State would wish to fulfil both parts of the obligation”, asked how a State could both extradite and prosecute.

22. Mr. GALICKI (Special Rapporteur) said that a State could try an individual and then extradite him to serve his sentence. That sometimes happened in practice and was even provided for in a number of treaties. It might perhaps be preferable to say “surrender” rather than “extradite”, but the question could not be disregarded.

23. Mr. CANDIOTI recalled that the Commission had not yet defined what the obligation aut dedere aut judicare covered. In his own view, there was only one obligation: to try, or else to extradite. It would therefore be preferable to adopt more neutral wording.

24. Mr. Sreenivasa RAO, supported by Mr. MOMTAZ, pointed out that the serving of a sentence was not part of extradition.

25. Ms. ESCARAMEIA said that, on the contrary, the laws of many countries provided for extradition for both trial and enforcement of penalty. She suggested that the sentence should be amended to read: “Notwithstanding this, the possibility that the State would wish to try and then extradite for enforcement of penalty had also to be anticipated.”

26. Following a proposal by Mr. GALICKI (Special Rapporteur), which was endorsed by Mr. Sreenivasa RAO and Ms. XUE, the CHAIRPERSON said that the last sentence would be deleted pending more in-depth consideration of the question by the Special Rapporteur in his next report.

Paragraph 6, as amended, was adopted.

Paragraph 7

27. Mr. MELESCANU noted that a number of members had argued that there was no third alternative to the choice of trial or referral to another court—whether that of another State or an international tribunal. The paragraph should be deleted since the reference to a parallel jurisdictional competence to be exercised by an international criminal tribunal implied that a person could be tried twice for the same offence.

28. The CHAIRPERSON pointed out that paragraph 7 was part of the Special Rapporteur’s introduction, i.e. what the Special Rapporteur had said, and not of the summary of the debate, which began in paragraph 9.

29. Mr. CANDIOTI said that, in that case, the Commission should not have deleted the last sentence of paragraph 6.

30. Mr. ECONOMIDES said that Mr. Melescanu’s point was nevertheless well taken because the word “parallel” was poorly chosen. He suggested that the phrase “parallel jurisdictional competence to be exercised” should be replaced by “jurisdictional competence to be exercised instead”.

31. Mr. MANSFIELD proposed that the phrase should be reworded to read: “while the obligation to extradite or prosecute was traditionally formulated in the alternative, there was another issue to be considered, the possible jurisdictional competence to be exercised by an international criminal tribunal”.

³⁹⁹ The numbering in square brackets corresponds to the original numbering of the draft guidelines in the report of the Special Rapporteur or, where applicable, the original numbering of the draft guideline in the report of the Special Rapporteur that was incorporated into a final draft guideline.
32. Mr. GALICKI (Special Rapporteur) suggested that the word “parallel” should be deleted and that the sentence should end with the words “which contemplated the existence of a jurisdictional competence to be exercised by an international criminal tribunal”.

Paragraph 7, as amended by the Special Rapporteur, was adopted.

Paragraph 8

Paragraph 8 was adopted.

2. SUMMARY OF THE DEBATE

Paragraph 9

33. Ms. ESCARAMEIA suggested that the words “crimes under national laws” in the last sentence should be replaced by “crimes that are solely foreseen under national laws”. Many national laws provided for the punishment of crimes under international law.

34. Mr. GAJA said that he had a suggestion along the same lines and that the words in question should be amended to read: “crimes that are not international crimes”. He also proposed that the word “conventional” in the penultimate sentence of the English version should be deleted because the reference to “treaty instruments” was sufficient.

Paragraph 9 was adopted with the proposal by Ms. Escarameia for the last sentence and the proposal by Mr. Gaja for the English version.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

35. Mr. PELLET said that the second sentence was unrelated to the rest of the paragraph and should therefore be moved to the end of paragraph 14.

It was so decided.

36. Mr. MOMTAZ said that the first sentence was difficult to understand and needed to be clarified.

37. Mr. GAJA said that the problem was partly due to the French translation: the word “gaps” should be rendered in the French text by “lacunes”, not “déséquilibres”.

38. Mr. Sreenivasa RAO asked whether the monitoring system referred to at the end of the first sentence related to the execution of penalties.

39. Ms. XUE said that the use of the word “possible” in the third sentence of the English text was odd; she did not see what it meant.

40. Mr. GAJA suggested that, to meet Mr. Sreenivasa Rao’s concern, the words “with regard to compliance with the obligation to prosecute” could be added at the end of the first sentence. On Ms. Xue’s point, he suggested that the word “possible” in the English text should be replaced by “question of the existence of a”.

Paragraph 11, as amended, was adopted.

Paragraph 12

41. Ms. ESCARAMEIA said that, to take account of her own opinion and that of several other members, a new sentence should be added at the end of the paragraph, to read: “Some members considered that the obligation to extradite or prosecute had acquired a customary status, at least as far as crimes under international law were concerned.”

Paragraph 12, as amended, was adopted.

Paragraph 13

42. Mr. MOMTAZ said that he did not see why, as stated in the last sentence, limitations on extradition should be inapplicable in the situation of international crimes.

43. Mr. PELLET said that the sentence in question was correct because some limitations, such as rules making it permissible not to extradite nationals or rules granting immunity to political leaders, could be inapplicable. To take account of the concern expressed by Mr. Momtaz, he suggested that the word “many” should be replaced by “some”.

Paragraph 13, as amended, was adopted.

Paragraph 14

44. Mr. CANDIOTI said that, in paragraph 14, he recognized an opinion he himself had expressed. To make that idea clearer, he suggested that the third sentence should be amended to read: “What was specific to the topic and the precise meaning of the Latin maxim aut dedere aut judicare was that, failing an extradition, an obligation to prosecute arose”. For greater clarity, the words “to prosecute” should be inserted at the end of the paragraph.

45. Mr. PELLET said that, also for the sake of clarity, the order of the sentences should be changed. The paragraph should begin with the first sentence, followed by the third, the fourth and the second; the last sentence would be the one moved from paragraph 11.

Paragraph 14, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

Paragraph 16

46. Mr. MOMTAZ said that, in the light of the debate, it would be better to end the paragraph after the words “lex specialis rules”.

47. Mr. ECONOMIDES suggested that the following sentence should be added at the end of the paragraph in order to reflect one of the opinions expressed: “According to another view, the ‘triple’ alternative should be favoured as much as possible”.

Paragraph 16, as amended, was adopted.
Paragraphs 17 and 18

Paragraphs 17 and 18 were adopted.

3. SPECIAL RAPPORTEUR’S CONCLUDING REMARKS

Paragraph 19

48. Mr. MOMTAZ said that the word “parallel” in the last sentence should be deleted: the jurisdiction in question could be either exclusive or residual.

Paragraph 19, as amended, was adopted.

Paragraph 20

49. Mr. GALICKI (Special Rapporteur) said that the paragraph did not faithfully reflect his conclusions. The penultimate sentence should end after the words “human rights law” and a new sentence should be added before the last sentence, to read: “Furthermore, he agreed with the suggestion that the focus of the whole exercise should be on the elaboration of secondary rules”. The last sentence would remain as it stood.

Paragraph 20, as amended, was adopted.

Paragraph 21

Paragraph 21 was adopted.

Section B, as amended, was adopted.

Chapter XI of the draft report of the Commission, as a whole, as amended, was adopted.


B. Consideration of the topic at the present session (concluded)

1. The CHAIRPERSON proposed that the following paragraph should be inserted in section B of chapter VIII: “The Commission had before it the eleventh report of the Special Rapporteur on the subject of reservations to treaties (A/CN.4/574). The Commission decided to consider the report at its next session in 2007.”

The new paragraph was adopted.

Section B, as amended, was adopted.

Chapter VIII of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter IX. Unilateral acts of States (A/CN.4/L.697, Add.1 and Corr.1, Add.2; A/CN.4/L.703)

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

Mr. PELLET said that, in keeping with past practice, it would be preferable for the reference to the Working Group in the first line to say that it was open-ended.

Paragraph 3, as amended was adopted.

Paragraphs 4 to 7

Paragraphs 4 to 7 were adopted.

Section A, as amended, was adopted.


B. Consideration of the topic at the present session (continued)

Paragraph 8

Paragraph 8 was adopted.

Paragraphs 9 to 12

5. The CHAIRPERSON noted that, in accordance with Corrigendum 1, the title, “1. Introduction by the Special Rapporteur of his ninth report” was deleted and paragraphs 9 to 12 were replaced by a single paragraph.

The text of A/CN.4/697/Add.1/Corr.1 was adopted, replacing paragraphs 9 to 12.

Paragraph 13

Paragraph 13 was adopted.

The portion of chapter IX contained in documents A/CN.4/L.697/Add.1 and Corr.1, as amended, was adopted.

6. The CHAIRPERSON drew attention to the portion of chapter IX contained in document A/CN.4/L.697/Add.2.

B. Consideration of the topic at the present session (continued)

Paragraph 1

Paragraph 1 was adopted.

Paragraphs 9 to 5

7. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) pointed out that, of the paragraphs contained in document A/CN.4/L.697/Add.2, only paragraphs 1 and 5 belonged in section B. Paragraphs 2 to 4, which reproduced paragraphs 2 to 4 of the report of the Working Group (A/CN.4/L.703), belonged in section C.

8. Mr. PELLET said that it would then be necessary for the phrase “in the light of these comments, the Commission therefore adopts” at the beginning of the current paragraph 5 to be replaced by “Following this consideration, the Commission adopts”, since the paragraph would follow directly on paragraph 1 without the intervening comments.

9. Mr. MOMTAZ said that it would be preferable to reverse the order of the words “difficulties” and “value” in paragraph 2.

10. Mr. PELLET pointed out that the text of paragraphs 2 to 4 had already been adopted when the Commission had adopted the report of the Working Group (A/CN.4/L.703) at its 2906th meeting and it was not advisable to reopen discussion on them.

11. Mr. BROWNlie said that the reference to “behaviour” in the English version of paragraph 3 was an unusual locution which should be corrected.

12. The CHAIRPERSON said that the Secretariat would make the necessary corrections.

C. Text of the guiding principles applicable to unilateral declarations of States capable of creating legal obligations adopted by the Commission

1. Text of the guiding principles

13. The CHAIRPERSON noted that the content of paragraph 6 had already been adopted.

2. Text of the guiding principles with commentaries thereto adopted by the Commission at its fifty-eighth session

Paragraph 7

14. Mr. GAJA pointed out that the numbering of the footnotes in the English and French versions were inconsistent. He supposed that the term “commentaries” had been used to upgrade the status of the document. He thought that they were more in the nature of explanatory notes.

15. Ms. ESCARAMEIA said that, while Mr. Gaja’s point was well taken, and although they were in the nature of footnotes and had not taken debate into account, she still preferred the term “commentaries”, which had been decided in the Working Group. There had even been instances in which the Commission had agreed on a principle with the proviso that certain references would be made in the commentary. If the commentaries were degraded to explanatory notes, it would diminish their importance.

16. Mr. GAJA said that it would be confusing to the reader to speak of commentaries in the current case. They were very short and did not explain the use of terms.

17. Mr. PELLET said that he had no strong preference but was inclined to agree with Mr. Gaja. The guiding principles were a new exercise for the Commission, and the more a distinction was made with the usual exercise, the better. There was nothing pejorative about the term “explanatory notes”.

18. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that Mr. Gaja’s point was well taken, but that Ms. Escarameia was right to stress that there had been agreement on using the term “commentaries”. One solution might be to insert a footnote in paragraph 7 explaining that, pursuant to a decision by the Working Group, they were not commentaries in the strict sense, but explanatory notes, and they should not be understood in the way the term was usually employed in the Commission.
19. Mr. PELLET proposed that a footnote be placed at the end of the paragraph, which would read: “This commentary comprises notes based exclusively on the jurisprudence of the International Court of Justice and its case law, which were considered comprehensively in the Special Rapporteur’s eighth report”.

20. The CHAIRPERSON took it that the Commission wished to insert the footnotes proposed by the Special Rapporteur and Mr. Pellet.

   It was so decided.

   The chapeau of paragraph 7, as amended was adopted.

Commentary to draft guiding principle 1

Paragraph (1)

21. Mr. ECONOMIDES noted that there was no commentary on the preamble and wondered whether that had been a deliberate decision. With regard to paragraph (1), a sentence should be inserted at the end that would read: “Consequently, such intention must be clear and unambiguous in every sense.”

22. Mr. PELLET disagreed with the proposal by Mr. Economides. The Commission had just agreed that the commentaries were somewhat different than usual, and the reason was that those explanatory notes were based solely on the case law of the ICJ and the studies of practical cases summarized in the Special Rapporteur’s eighth report. He cautioned against going any further and making actual commentaries. He was also opposed because what Mr. Economides had just said was expressly set out later in guiding principle 7.

23. Mr. ECONOMIDES withdrew his proposal.

   Paragraph (1) was adopted.

Paragraph (2)

   Paragraph (2) was adopted.

   The commentary to draft guiding principle 1 was adopted.

Commentary to draft guiding principle 2

Paragraph (1)

   Paragraph (1) was adopted.

   The commentary to draft guiding principle 2 was adopted.

Commentary to draft guiding principle 3

Paragraphs (1) to (3)

   Paragraphs (1) to (3) were adopted.

   The commentary to draft guiding principle 3 was adopted.

Commentary to draft guiding principle 4

Paragraph (1)

   Paragraph (1) was adopted.

Paragraph (2)

24. Mr. GAJA said that in the beginning of the second sentence the reference to “the two cases” gave the impression that there were only two such cases, whereas in reality those were merely the only ones that had been cited. He therefore proposed changing the wording to read “in the two cases which were examined”.

   Paragraph (2), as amended, was adopted.

Paragraph (3)

   Paragraph (3) was adopted.

   The commentary to draft guiding principle 4, as amended, was adopted.

Commentary to draft guiding principle 5

Paragraphs (1) to (3)

   Paragraphs (1) to (3) were adopted.

   The commentary to draft guiding principle 5 was adopted.

Commentary to draft guiding principle 6

Paragraph (1)

25. Mr. GAJA said that the word “thus” in the first line should be deleted and the words “have the other State as their sole addressee” should read “have another State as their sole addressee”.

   Paragraph (1), as amended, was adopted.

Paragraph (2)

26. Ms. ESCARAMEIA suggested replacing the phrase at the end of the paragraph which read “and to the Palestine Liberation Organization (PLO)” by “and to another entity, the Palestine Liberation Organization (PLO)”, because there had been confusion about what other entities were concerned. In the third sentence, “they” should be replaced by “the latter” to make it clear that the reference was only to the French declarations.

   Ms. ESCARAMEIA suggested replacing the phrase at the end of the paragraph which read “and to the Palestine Liberation Organization (PLO)” by “and to another entity, the Palestine Liberation Organization (PLO)”, because there had been confusion about what other entities were concerned. In the third sentence, “they” should be replaced by “the latter” to make it clear that the reference was only to the French declarations.

27. Mr. BROWNLIE said that other States had intervened in the Nuclear Tests case. He therefore suggested that, in the penultimate sentence, the phrase “and certain intervening States” should be inserted after the words “New Zealand”. Fiji had been one and there might have been others.

28. Mr. PELLET suggested that the State or States concerned should be listed in a footnote.

   Paragraph (2), as amended, was adopted.

   The commentary to draft guiding principle 6, as amended, was adopted.

Commentary to draft guiding principle 7

Paragraph (1)

   Paragraph (1) was adopted.

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Paragraph (2)

29. Ms. ESCARAMEIA said that the language of the paragraph, particularly in the English version, was too restrictive. She proposed that the opening words, “To determine” be replaced by the words “In case of doubt concerning” and the word “must” by the word “should” in the last sentence.

30. Mr. PELLET said that the quotation from the judgment of the ICJ in the Nuclear Tests case showed that a unilateral declaration must be interpreted in a restrictive manner. It seemed strange to ignore the Court’s judgment in one instance when the whole commentary was based on such judgments.

31. Ms. ESCARAMEIA recalled that the question had been discussed in the Working Group. The scope of a unilateral declaration was not always clear-cut and should not always be interpreted in a restrictive manner. The draft principle itself used the phrase “in the case of doubt”.

32. Mr. PELLET said that he endorsed the proposed amendment to the beginning of the sentence, but it was important to retain the word “must”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to draft guiding principle 7, as amended, was adopted.

Commentary to draft guiding principle 8

The commentary to draft guiding principle 8, was adopted.

Commentary to draft guiding principle 9

Paragraph (1)

33. Mr. ECONOMIDES said that the Commission had had little opportunity to comment on the provision in depth, despite its importance. In his view, two explanatory notes should be added. First, it should be made clear that the provisions of the first sentence of the guiding principle applied only to unilateral acts based merely on the will of the State making a unilateral declaration. They did not apply in cases where the State acted unilaterally as empowered by international law, treaty law or customary law, or in accordance with the decision of an international organization. For example, a State might extend its territorial waters in accordance with international law.

34. Mr. PELLET said that the footnote whose reference was placed after “unequivocally accept these obligations” in the commentary to draft guiding principle 8, which also referred the reader to the introductory footnote whose reference was placed after “international law” in the second paragraph of the introduction (A/CN.4/L.697/Add.2), covered the issue raised by Mr. Economides.

35. Mr. ECONOMIDES said that he would have preferred stronger language in both the commentary and the footnote, but at least the substance was there. With reference to the second sentence of the draft guiding principle, he said that it should be made clear that acceptance meant acceptance of the unilateral act as such and did not constitute a reply establishing a treaty relationship. He suggested that an explanatory note should be added along the following lines: “The acceptance referred to in the second sentence of guiding principle 9 means the acceptance of a unilateral act and does not constitute the outcome of the treaty process”.

36. Ms. ESCARAMEIA said that the first sentence of the paragraph was not strictly accurate: under jus cogens, obligations could be imposed on a State without its consent. She therefore proposed that the last part of the sentence should be reformulated, to read: “cannot be imposed by a State upon another State without its consent”. That would accord more closely with the draft guiding principle itself.

37. Mr. PELLET said that he fully supported Ms. Escarameia’s proposed amendment. As for that of Mr. Economides, he considered it too bold. He would propose a less radical solution to address Mr. Economides’ concerns: at the end of the last sentence of the paragraph the words “these obligations” should be replaced by “the obligations resulting from that act”, referring back to “unilateral act”. In response to concerns raised at an earlier meeting by Mr. Melescanu and Mr. Kabatsi, who had pointed out that, legally, States were bound not by the original unilateral declaration but by their acceptance of it, he proposed that the following sentence should be added at the end of the paragraph: “In these circumstances, an addressee State is bound by its own declaration”.

38. Mr. GAJA said that the final word of Mr. Pellet’s proposal, “declaration”, should be replaced by “acceptance” since the acceptance might not necessarily take the form of a declaration.

39. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he fully supported the amendments proposed by Mr. Gaja, Ms. Escarameia and Mr. Pellet.

Paragraph (1), as amended, was adopted.

Paragraph (2)

40. Mr. MOMTAZ said that the date of the 28 September 1945 Truman Proclamation should be given at the beginning of the paragraph, not halfway through. Secondly, he proposed that, in the third sentence, the words “the declaration was taken up” should be replaced by the words “the content of the proclamation was taken up”.

41. Mr. Sreenivasa RAO said that the draft guiding principle was self-explanatory. The reference to the Truman Proclamation, however, was not a good illustration of the principle, yet that was surely the whole point of the commentary. He would not ask for it to be deleted but wished his view to go on record.

Paragraph (2), as amended, was adopted.

The commentary to draft guiding principle 9, as a whole, as amended, was adopted.

Commentary to draft guiding principle 10

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

42. Mr. GAJA said that the guiding principle related to arbitrary revocation, but, in a case in which the declaration itself stipulated the circumstances in which its author might terminate it, the revocation was not necessarily arbitrary. He therefore considered that either the beginning of the paragraph should be deleted or the following phrase should be added after the words “terminate it”: “if those circumstances do not exist.”

43. Mr. ECONOMIDES said that such an amendment might complicate the issue.

44. Mr. GAJA said that it might be simpler to delete the mention altogether.

45. Mr. PELLET said that, although Mr. Gaja was right in saying that, in the case outlined in paragraph (3), the revocation was not strictly arbitrary, the draft guiding principle was attempting to illustrate the three categories of conditions for assessing whether a revocation was arbitrary. He therefore suggested that Mr. Gaja’s proposed amendment should appear as a footnote.

46. Ms. ESCARAMEIA said that the final sentence in the English text should be aligned with the French text by replacing the word “radical” by the word “fundamental” and the phrase “in the direction and within the strict limits” by the phrase “within the meaning and the strict limits”.

Paragraph (3), as amended, was adopted.

The commentary to draft guiding principle 10, as amended, was adopted.

The commentaries to the draft guiding principles, as a whole, as amended, were adopted.

47. Mr. CANDIOTI said that the Commission, having adopted the guiding principles relating to unilateral acts, should recommend that the General Assembly inform States of that fact, by way of a follow-up to the Commission’s completion of the mandate it had been given for that topic.

48. Mr. PELLET endorsed the proposal of Mr. Candioti and proposed that the Commission adopt the same formula as that which it had used for the topic of the fragmentation of international law.

49. The CHAIRPERSON suggested that account should be taken of Mr. Candioti’s proposal in paragraph 5 of document A/CN.4/L.697/Add.2.

It was so decided.

The portion of chapter IX contained in document A/CN.4/L.697/Add.2, as amended, was adopted.

Tribute to the Special Rapporteur

50. The CHAIRPERSON took it that the Commission wished to include the following text in Chapter IX of the report before the section presenting the draft guiding principles and the commentary thereto:

“At its 2913th meeting, on 11 August 2006, the Commission, after adopting the text of the guiding principles, adopted the following resolution by acclamation:

‘The International Law Commission,

‘Having adopted the guiding principles applicable to unilateral declarations of States capable of creating legal obligations and the commentaries thereto,

‘Expresses its deep appreciation and warm congratulations to the Special Rapporteur, Mr. Victor Rodríguez Cedeño, for the outstanding contribution he has made, through his devoted work and tireless efforts, to the preparation of the guiding principles applicable to unilateral declarations of States capable of creating legal obligations and for the results he has achieved in the elaboration of the said principles.’

“The Commission also expressed its deep appreciation to the Working Group on unilateral acts of States, chaired by Mr. Alain Pellet, for its tireless efforts and contribution to the work on this subject.”

The tribute to the Special Rapporteur was adopted by acclamation.

Chapter IX of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER XIII. Other decisions and conclusions of the Commission (A/CN.4/L.701)

51. The CHAIRPERSON invited the Commission to commence its consideration of chapter XIII of the report and drew attention to the portion of the chapter contained in document A/CN.4/L.701.

A. Expulsion of aliens (A/CN.4/L.701)

Paragraph 1

Paragraph 1 was adopted.
B. Programme, procedures and working methods of the Commission and its documentation

Paragraphs 2 to 4

Paragraphs 2 to 4 were adopted.

1. Long-term programme of work

Paragraphs 5 to 10

Paragraphs 5 to 10 were adopted.

2. Documentation and publications

Paragraphs 11 to 16

Paragraphs 11 to 16 were adopted.

3. Meeting with United Nations human rights experts

Paragraph 17

Paragraph 17 was adopted.

C. Date and place of the fifty-ninth session of the Commission

Paragraph 18

Paragraph 18 was adopted.

D. Cooperation with other bodies

Paragraphs 19 and 20

Paragraphs 19 and 20 were adopted.

Paragraph 21

52. Mr. GAJA said that the office held by Mr. Jean-Paul Hubert, Vice-President of the Inter-American Juridical Committee, should be specified.

53. The CHAIRPERSON suggested that the following sentence should be inserted in paragraph 21: “The Commission decided to convey its congratulations to the Committee on the occasion of its one hundredth anniversary and to be represented at the proceedings to commemorate that anniversary by Mr. João Baena Soares”.

54. He took it that the Commission wished to include that sentence in paragraph 21.

It was so decided.

Paragraph 21, as amended, was adopted.

Paragraph 22

55. Mr. GAJA said that the office held by Mr. Guy De Vel, Director-General of Legal Affairs, Council of Europe, should be specified.

56. Mr. PELLET said that the paragraph should also mention the name of Mr. Rafael Benítez, who had likewise addressed the Commission.

Paragraph 22, as amended, was adopted.

Paragraph 23

57. Mr. GAJA proposed the deletion of paragraph 23.

Paragraph 23 was deleted.

E. Representation at the sixty-first session of the General Assembly

Paragraph 24

58. Mr. PELLET proposed the addition of a second sentence stating “The Commission regrets that due to budgetary constraints it was not possible for a Special Rapporteur to attend the sixty-first session of the General Assembly”.

Paragraph 24, as amended, was adopted.

F. International Law Seminar

Paragraphs 25 to 39

Paragraphs 25 to 39 were adopted.

B. Programme, procedures and working methods of the Commission and its documentation

Honouraria

59. Mr. MANSFIELD reminded members that, after the date on which the members of the current Commission had been appointed, the General Assembly had adopted resolution 56/272 of 27 March 2002, which had reduced the honoraria payable to them and to members of certain other bodies. In that and subsequent years, the Commission had drawn attention, in its report, to that resolution and had noted that this decision of the General Assembly had been taken in direct contradiction to the conclusions and recommendations contained in the report of the Secretary-General on a comprehensive study of the question of honoraria payable to members of organs and subsidiary organs of the United Nations,392 which had indicated that the level of the honoraria had not been reviewed since 1981. The Commission had likewise noted that the decision by the General Assembly had been taken without consultation with the Commission, and that in the latter’s view this decision was not consistent in procedure or substance with either the principles of fairness on which the United Nations conducted its affairs, or with the spirit of service with which members of the Commission contributed their time and approached their work. The Commission had also stressed in those reports that this particular resolution especially affected Special Rapporteurs, in particular those from the developing countries, as it compromised support for their research work. It was his view that, at the end of the quinquennium, the Commission should once again draw the attention of the General Assembly to the impact of its decision on Special Rapporteurs, especially those from developing countries. He therefore proposed the insertion of the following paragraph:

“The Commission reiterated once more its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which were expressed in its previous reports. The Commission emphasized again that the above resolution especially affects the Special Rapporteurs, in particular those from developing countries, as it compromises support for their research work. The Commission urges the General Assembly to reconsider this matter, with a view to restoring, at this stage, the honoraria for Special Rapporteurs.”

392 A/53/643.
60. The CHAIRPERSON suggested that that paragraph should be inserted in the customary place and that the subsequent paragraphs should be renumbered accordingly.

It was so decided.

The portion of chapter XIII contained in document A/CN.4/L.701, as amended, was adopted.

Chapter XIII of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER II. Summary of the work of the Commission at its fifty-eighth session (concluded) (A/CN.4/L.690)

61. The CHAIRPERSON invited the Commission to resume its consideration of Chapter II of the draft report and drew attention in that connection to the portion of the chapter contained in document A/CN.4/L.690.

Paragraph 6 (concluded)

62. Mr. PELLET proposed the insertion of the words “adopted” in the place indicated by the square brackets in the second sentence.

63. Mr. CANDIOTI proposed that the words “a set of 10” should be inserted before the words “guiding principles”.

Paragraph 6, as amended, was adopted.

Paragraph 10

64. The CHAIRPERSON suggested that, in the second sentence, the phrase “begin the preparation” should be replaced with the words “should prepare”.

Paragraph 10, as amended, was adopted.

Chapter II of the draft report of the Commission as a whole, as amended, was adopted.

The report of the International Law Commission on the work of its fifty-eighth session as a whole, as amended, was adopted.

Closing remarks

65. The CHAIRPERSON paid tribute to the Secretariat for its extraordinary competence and consummate sense of responsibility. As for himself, during the 12 weeks of the Commission’s session, he had discovered the possibilities and limitations of his position as Chairperson. He had learned that the exercise of power and authority was a fiction: the reality was responsibility to others. The Commission was, after all, only an intermediary between the international community and the law, and its work was not entirely its own: it was in the service of responsibility. As for himself, during the 12 weeks of the Commission’s session, he had discovered the possibilities and limitations of his position as Chairperson. He had learned that the exercise of power and authority was a fiction: the reality was responsibility to others. The Commission was, after all, only an intermediary between the international community and the law, and its work was not entirely its own: it was in the service of responsibility. As for himself, during the 12 weeks of the Commission’s session, he had discovered the possibilities and limitations of his position as Chairperson. He had learned that the exercise of power and authority was a fiction: the reality was responsibility to others. The Commission was, after all, only an intermediary between the international community and the law, and its work was not entirely its own: it was in the service of responsibility. As for himself, during the 12 weeks of the Commission’s session, he had discovered the possibilities and limitations of his position as Chairperson. He had learned that the exercise of power and authority was a fiction: the reality was responsibility to others. The Commission was, after all, only an intermediary between the international community and the law, and its work was not entirely its own: it was in the service of the world.

66. Mr. KOSKENIEMI said that, as the quinquennium came to a close and his tenure on the Commission came to an end, he wished to place on record his gratitude for the experience of collaborating with the other members of the Commission. It had been a transforming experience in how he saw international law, the United Nations and the interaction between them. He wished to sketch out what he saw as the possibilities and limitations of the Commission and of the United Nations.

67. The possibilities were enormous. The collective wisdom gathered within the Commission existed nowhere else. Its quest to find new topics and new working methods reflected the changing international legal situation. It was a unique international organ in which the opposite of fragmentation took place: the universal could be expressed and heard. The General Assembly was often seen from the outside as a world parliament; even if that was not so, the Commission might be viewed as ministry of justice to the world, preparing legislation meant for universal application. To have such an institution was an enormous asset, something the international community should not dispense with lightly.

68. The limitations in the Commission’s activities could be broken into five categories. First, the background work needed for preparing legislation was often lacking. If the Commission was truly to serve as a world Ministry of Justice, it would need much greater financial and human resources. Second, the Commission had a tendency to view the elaboration of international legislation in terms of a collective exercise in writing legal textbooks. That prevented it from reacting to changing contingencies in the world or seeing its work as a response to actual needs. Third, special interests should be addressed and special expertise brought in. The work on transboundary aquifers in the context of shared natural resources had been a step in the right direction, and more such exercises should be carried out.

69. A fourth limitation was that States had by no means always embraced the outcomes of the Commission’s work. There was no ready recipe for how to convince States and other actors to be more actively involved, however. Fifth, the Commission’s procedures were a perpetual source of concern. The incoming Commission would undoubtedly continue the discussion of procedural issues.

70. Many of the possibilities and limitations in the Commission’s work were influenced by the outside world, and the Commission had no control over them. The outside world was now more unjust, violent and dangerous than it had been five years ago at the start of the current quinquennium. The Commission had not made much of a contribution to alleviating the problems leading to those injustices and dangers. Its task must now be to attack the problems and help prevent the world from becoming more unjust, violent and dangerous in the coming quinquennium. He wished the Commission success in that task.

71. Mr. Sreenivasa RAO, speaking as the most senior member of the Commission, said it was difficult to sum up 20 years of experience, but what he could say, as he departed, was that there was no better legal body for helping to build a better world for justice, equity and the common good. The primacy of law for which the United Nations worked and fought could only be projected through the work of the Commission. The Commission’s summary records, final conclusions and commentaries to the instruments it adopted stood on their
own and had their own role to play in the development of international law. It was significant that the President of the International Court of Justice, the premier legal body within the United Nations, often cited the Commission’s work as the basis for the Court’s conclusions on many difficult issues.

72. Speaking from the vantage point of his years of experience, he would advise the Commission not to rush ahead with too many idealistic propositions. Good ideas had to be digested by States and other actors in small doses. The goal of ensuring the primacy of law was a long-term one, and it should be pursued in small steps, judiciously, constructively and steadily. The Commission should avoid becoming involved in too many politically sensitive issues because of the danger of being caught in political crossfire.

73. The Commission’s achievements were always a collegial effort. Those of its current session, some on very difficult issues, were no exception. The Commission’s strength was in having experienced older members and newer members with the zeal and enthusiasm to take it further every quinquennium. That mix, continuously coalescing in the work of the Commission, was really its greatest strength.

74. Mr. PELLET, speaking as the secondmost senior member of the Commission, congratulated the Chairperson on his successful stewardship of the session and his particular skill in diminishing tensions. He wished to pay a special tribute to those members who were leaving the Commission. He thanked Mr. Sreenivasa Rao, in particular, for his wisdom and good humour, and said he would be greatly missed.

Closure of the session

75. After the customary exchange of courtesies, the CHAIRPERSON declared the fifty-eighth session of the International Law Commission closed.

    The meeting rose at 12.35 p.m.