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## Sixth Committee

**Summary record of the 22nd meeting**
Held at Headquarters, New York, on Thursday, 31 October 2002, at 10 a.m.

*Chairman*: Mr. Prandler . . . . . (Hungary)
*later*: Mr. Zellweger (Vice-Chairman) . . . . . (Switzerland)
*later*: Mr. Prandler . . . . . (Hungary)

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02-67047 (E)

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*The meeting was called to order at 10.10 a.m.*

**Agenda item 159: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/57/L.19)**

*Draft resolution A/C.6/57/L.19*

1. **Mr. Samy** (Egypt), introducing the draft resolution, said that it was based on the previous year's text. A new preambular paragraph had been added to reflect the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization on the issue of prevention and peaceful settlement of disputes and a change had been made to paragraph 3 (c) for the same purpose. Changes had also been made to paragraph 3 (b) in order to continue the Special Committee's work on the implementation of the provisions of the Charter related to assistance to third States affected by the application of sanctions. The sponsors hoped that the draft resolution would be adopted by consensus.

**Agenda item 161: Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel** (*continued*) (A/C.6/57/L.20)

*Draft resolution A/C.6/57/L.20*

2. **Ms. Geddis** (New Zealand) introduced the draft resolution on behalf of its sponsors, who had been joined by the Netherlands. The draft resolution was based on General Assembly resolution 56/89 and had been updated to reflect the work done by the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel in April 2002 and the discussions at the current session. After drawing attention to paragraphs 4, 5, 6 and 8, she said that the Ad Hoc Committee would reconvene from 10 to 14 March 2003. The sponsors hoped that the draft resolution would be adopted by consensus.

**Agenda item 154: Convention on jurisdictional immunities of States and their property** (*continued*) (A/C.6/57/L.21)

*Draft resolution A/C.6/57/L.21*

3. **The Chairman**, introducing the draft resolution on behalf of the Bureau, said that it was essentially procedural and reflected the understanding reached in informal consultations. Drawing attention to paragraph 2, he said that delegations should consult each other in advance of the reconvening of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property.

4. He suggested that the Committee should take action on the three draft resolutions at a later meeting.

5. *It was so decided*.

**Agenda item 156: Report of the International Law Commission on the work of its fifty-fourth session** (*continued*) (A/57/10 and Corr.1)

6. **Mr. Jacovides** (Cyprus), referring to chapter IV of the report of the International Law Commission (A/57/10 and Corr.1), noted that considerable progress had been achieved on the topic through a substantial number of guidelines on the formulation of reservations and interpretative declarations and the commentaries thereon. His delegation looked forward to the completion of the project. In answer to the question posed concerning paragraph 4 of draft guideline 2.1.6 (A/57/10, para. 26), it seemed appropriate that the communication of a reservation to a treaty could be made by electronic mail or facsimile, but that in such a case, the reservation should be confirmed in writing.

7. With regard to chapter V of the report, he said that the core of the issue of diplomatic protection was the nationality principle, in other words, the link between a State and its nationals abroad. Therefore, it was best to confine the draft articles to issues relating to the nationality of claims and the exhaustion of local remedies, so that the topic might be concluded within the Commission's quinquennium. His delegation noted with appreciation the text of draft articles 1 to 7 and their commentaries adopted by the Commission and would await with interest the Commission's deliberations and conclusions on the other draft articles proposed.

8. His delegation was inclined to agree that the 1982 United Nations Convention on the Law of the Sea adequately covered the questions posed in paragraph 27 of the report. In answer to the questions posed in paragraph 28, his delegation agreed that the State of nationality of the shareholders should have the right of diplomatic protection recognized in the *Barcelona Traction* case.

9. With regard to chapter VI of the report, divergent views had been expressed in the Commission, and it had not helped that only three States had replied to the questionnaire addressed to Governments in August 2001. His delegation shared the Special Rapporteur's view that unilateral acts existed in international law and that, subject to certain conditions of validity, they could constitute a source of obligations, as indicated also by the jurisprudence of the International Court of Justice. While reserving its position on the view expressed in paragraph 422 of the report that only those decisions adopted under Articles 41 and 42 of the Charter should be taken into account, his delegation endorsed the Commission's encouragement of Member States to reply to the 2001 questionnaire, thereby facilitating the efforts to advance work on the topic.

10. Turning to chapter VII of the report, he said that the topic as now defined covered situations in which, despite compliance by the State with its obligations, significant transboundary harm arose out of hazardous activities and loss could be allocated among the different actors involved in accordance with specific regimes or through insurance mechanisms. It was correctly recognized that States should be reasonably free to permit desired activities within their territory or under their jurisdiction or control, despite the possibility that they might give rise to transboundary harm; however, it was equally correctly recognized that States should ensure that some form of relief, such as compensation, be made available if actual harm occurred. Thus, the innocent victims should not be left to bear the loss. His delegation was in basic agreement with the considerations set out in the Working Group's report and suggested that the Commission should examine the work being carried out under the auspices of the Permanent Court of Arbitration in The Hague.

11. On the new topic of responsibility of the international organizations (A/57/10, chap. VIII), he noted the conclusions of the relevant Working Group. With regard to paragraph 486 of the report, his delegation considered that an effective dispute settlement mechanism was a sine qua non of a well-functioning legal regime of State responsibility, and the same applied to the regime of responsibility of international organizations.

12. As to the questions posed in paragraph 31 of the report, his delegation preferred that the topic should be limited to issues relating to the responsibility for internationally wrongful acts under general international law, and that the study should be limited to intergovernmental organizations, at least at the initial stage.

13. Chapter IX of the report raised interesting and challenging questions, as set out in the report of the Study Group (A/57/10, paras. 495-513). His delegation considered the increase in fragmentation as a natural consequence of the expansion of international law and was in favour of its consideration by the Commission. The topic did not lend itself to codification, but could be more appropriately treated in a series of studies or seminars. His delegation approved of the inclusion in the Study Group's recommendations of the issue of hierarchy in international law. Indeed, the concept of peremptory norms or jus cogens required authoritative elaboration; he drew attention in that connection to Commission document A/CN.4/454, which contained much relevant material.

14. Lastly, with regard to chapter X of the report, his delegation looked forward to the views of the relevant Working Group. The delegation of Cyprus supported the Commission's position on the issue of honoraria. It also welcomed the activities in connection with the holding of the annual International Law Seminar and the traditional exchanges of information between the Commission, the International Court of Justice, and regional consultative organizations.

15. **Mr. Galicki** (Poland) said that two of the four new topics dealt with in the report, namely, international liability for injurious consequences arising out of acts not prohibited by international law and responsibility of the international organizations, were not really new, being a logical extension of the Commission's work on prevention of transboundary harm and State responsibility. It was to be hoped that the Committee would not have to wait as long for those topics to be finalized as it had waited in the case of State responsibility.

16. His delegation shared the view of other delegations that the inclusion of the topic of

fragmentation of international law in the Commission's programme of work went beyond the traditional codification approach. The Polish delegation was of the view that the scope of the topic should not be limited to the negative effects of fragmentation but should also include possible positive effects.

17. Draft articles 12 to 16 on diplomatic protection had led to heated discussion in the Commission and not all of them had been referred to the Drafting Committee; however, they provided a useful exercise for the elaboration of a text acceptable to all members of the Commission and, in the future, to all States.

18. His delegation had reservations regarding the proposal to extend the scope of diplomatic protection, which was based on the nationality principle, to include the crews of ships, aircraft and spacecraft holding the nationality of a third State; to do so might weaken the effectiveness of the politically sensitive draft articles. Such persons should not be deprived of international protection, but it would seem safer and more reasonable to apply the law of the sea, air law or space law.

19. Similarly, the position taken by the International Court of Justice in the *Barcelona Traction* case was limited to the exercise of diplomatic protection on behalf of a company; it did not justify the exercise of such protection on behalf of shareholders by their State of nationality.

20. **Mr. Shin** Kak-soo (Republic of Korea), speaking with regard to draft article 3 on diplomatic protection, said that in the *Nottebohm* case, the International Court of Justice had not propounded proof of an effective link between the State and its national as a general rule, but rather as a relative rule to be applied to the specific situation of dual nationality embodied in that case; support for such an interpretation could be found in the *Flegenheimer Claim* case.

21. Draft article 7 was a welcome contribution to the progressive development of international law; he also endorsed the statement in the commentary that the term "refugee" was not limited to the definition given in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol but was intended to cover, in addition, persons who did not strictly conform to that definition.

22. While the Calvo clause (draft article 16) had historical importance and was still to some extent respected in Latin American practice, there was no need to include it in the draft articles. It was simply a contractual device; no one could renounce the protection of his or her State since the right to exercise diplomatic protection belonged to the State rather than the individual. Moreover, its practical usefulness was diminishing in the globalized economy where most States' priority was to attract foreign investment.

23. The protection of crew members holding the nationality of a third State was adequately covered by the 1982 Convention on the Law of the Sea and, even if that were not the case, it would be preferable for the matter to be addressed within the framework of the law of the sea rather than as a general rule of diplomatic protection.

24. The decision in the *Barcelona Traction* case had raised doubts regarding the protection of shareholders and had led to an explosion of bilateral investment treaties which provided such protection. Thus, it was difficult to imagine a circumstance in which shareholders' State of nationality should be entitled to exercise diplomatic protection. He was also reluctant to accept the exercise of such protection on behalf of the majority of shareholders in a company by their State of nationality; such an approach might raise the issue of discriminatory treatment of small shareholders, and it would be difficult to establish a quantitative standard for such a distinction. As for the question of whether the State of nationality of the majority of shareholders in a company should have a secondary right to exercise diplomatic protection if the State of incorporation refused or failed to do so, he found it extremely difficult to reconcile the idea of such a right with the discretionary power of the company's State of incorporation.

25. **Mr. Abraham** (France) said that the criteria of injury to the national of a State established in draft article 1, paragraph 1, was acceptable since the State itself had in fact been injured through the intermediary of its national. However, the term "action" was unclear and open to debate; diplomatic protection was not an action, but merely the initiation of a procedure through which a claim brought by a physical or moral person became a legal relationship between two States.

26. Paragraph 2 also raised serious questions since the statement that diplomatic protection could be exercised in respect of a non-national called into question the idea, expressed in paragraph 1, that the

State suffered harm only through injury to its national and thereby departed from the traditional concept of diplomatic protection. It would be premature to address that highly debatable issue as early as article 1; moreover, what the Commission was really proposing — diplomatic protection on behalf of refugees and stateless persons — had absolutely no basis in State practice and, in fact, contradicted it. Draft article 7 was in direct violation of some provisions of the Convention relating to the Status of Refugees.

27. Draft article 4 on continuous nationality was also unacceptable. By proposing that a State should be able to present a claim on behalf of a person who acquired the nationality of that State in a manner not inconsistent with international law, the Commission had challenged the well-established rule of international law that in exercising diplomatic protection, the State asserted its own rights, which presupposed that the protected person must have been a national of that State at the time of the violation. Draft article 4, like those which preceded it, reflected a human-rights-based approach which, in his view, was inappropriate to the topic under consideration. It would be more useful for the Commission to focus on conditions for the opposability of nationality rather than seeking to define the nationality link in the case of physical and moral persons, as it had done in draft article 3, paragraph 2, or the conditions for granting nationality.

28. Draft article 6 was problematic. The principle embodied therein was acceptable and enjoyed considerable support in practice; the difficulty stemmed from the exception made in cases of dual nationality where the nationality of one State predominated over that of another. In addition to the difficulty of establishing such predominance — and, it should be noted, the Commission proposed no criteria for making such a judgement — the concept was in direct contradiction to the general principle asserted in the same sentence. Even if the respondent State and its national were bound by a firm sociological link, the claimant State's claim would be admissible if its factual link to the person was stronger. In practice, the dominant nationality doctrine had been upheld only after major crises when it was necessary to compensate for harm suffered by national economies by dividing the total damage into a series of individual claims, a situation which might not be classified as diplomatic protection. The lack of support for that doctrine on the part of States of emigration cast doubt on its value as a general rule.

29. The Special Rapporteur had raised the question of whether the exhaustion of local remedies rule was a procedural or a substantive rule. Personally, he failed to grasp the implications of such a distinction and thus doubted its relevance; in any case, the problem should be considered in the context of all the draft articles on the exhaustion of local remedies.

30. The wording of draft article 14 (a) could be improved. The general principle embodied in article 14 (b) was acceptable; however, if the possibility of implicit waiver was not to be rejected out of hand at the current stage of work, emphasis must be placed on the criteria and clarity of intention. The Commission might also consider the possibility that estoppel was not covered by the broader concept of implied waiver, in which case it should not be mentioned.

31. While there was some justification for the rule embodied in draft article 14 (c) and (d), it must be accompanied by a clear definition of the concept of voluntary link since the absence of such a link could not be presumed but must be established on the basis of specific criteria; it should be evident that the general rule was that of the exhaustion of local remedies.

32. The concept of undue delay in draft article 14 (e) was too broad; it must be clearly stated that the exception to the local remedies rule was applicable only if the delay was so great that it amounted to a denial of justice. In any case, he was not convinced that the issues raised in article 14 (e) and (f) constituted specific categories; perhaps article 14 (a) should be reworded so as to cover such cases.

33. The inclusion of draft article 15 on the burden of proof was not justified since the rules governing proof were covered by international litigation law and did not fall within the scope of the task at hand.

34. Finally, the wording of draft article 16 on the Calvo clause was unsatisfactory because paragraph 2 contradicted paragraph 1. Moreover, even if the statement made in paragraph 1 was true, it nevertheless lay outside the scope of diplomatic protection since it had nothing to do with relations between States.

35. Thus, the Commission's work on diplomatic protection showed a consistent tendency to include elements which lay outside the scope of the topic; the

Commission should limit itself to codifying State practice in that area and customary rules deriving from such practice.

36. *Mr. Zellweger (Switzerland), Vice-Chairman, took the Chair.*

37. **Mr. Yáñez-Barnuevo** (Spain) said that since the draft articles were a logical extension of the Commission's work on the responsibility of States for internationally wrongful acts, he applauded its decision to base its deliberations on established international practice while addressing new problems and trends in so far as they did not alter the structure and general focus of the codification project. The focus should be on the nationality of claims and the exhaustion of local remedies; to the extent possible, the Commission should avoid straying into areas such as functional protection by international organizations of their officials and other topics which were merely tangential to that of diplomatic protection and might distract it from its primary goal or prevent it from completing the draft articles during the current quinquennium.

38. While he agreed with the overall content of draft article 1, a clear distinction should be made between diplomatic protection and the general protection which a State could always provide to its citizens abroad in the form of diplomatic or consular assistance. He hoped that the Commission would reconsider that matter during its second reading of the draft articles.

39. He agreed that the exercise of diplomatic protection was a right rather than an obligation for the State of nationality, at least at the international level. It was therefore essential to include a clear definition of the nationality link, which was a prerequisite for the exercise of such protection, and of the few exceptions to that principle under contemporary international law.

40. His delegation found draft articles 3 to 7 provisionally adopted by the Commission on the nationality of natural persons in relation to diplomatic protection to be generally satisfactory, subject to a few adjustments. In view of the importance accorded the concept of acquiring the nationality of the claimant State "in a manner not inconsistent with international law" in draft articles 3 and 4, the notion should have been developed further in the commentary. If the Commission had decided to abandon the criterion of effective link used by the International Court of Justice in the *Nottebohm* case to determine the international effects of nationality, it should make it clearer what it proposed to put in its place. The concept of predominant nationality used in draft article 6 on multiple nationality and claim against a State of nationality should be also elaborated on, preferably in the text itself. Drawing on material already in the commentary, his delegation proposed adding a second paragraph that would read something along these lines: "For purposes of paragraph 1, the predominant nationality shall be deemed to be the nationality of the State with which the person had the strongest effective links on the dates indicated".

41. His delegation supported draft article 7 on diplomatic protection of stateless persons and refugees by the State of lawful and habitual residence of the individual in question, subject to the limitations set forth in the text. It represented a progressive development of international law that was fully justified, had a sound basis in international practice and was in keeping with the aims of international codification in the subject area.

42. With regard to the draft articles submitted by the Special Rapporteur in his second and third reports to the Commission, his delegation had welcomed the innovative attempt to resolve the traditional debate over the procedural or substantive nature of the rule requiring the exhaustion of local remedies before the exercise of diplomatic protection. It therefore regretted that draft articles 12 and 13 had not been referred to the Drafting Committee and hoped that the ideas contained therein could resurface in the commentary to draft article 10, since they clarified some points that were not purely theoretical in nature.

43. With regard to draft article 14, which dealt with exceptions to the exhaustion of local remedies rule, his delegation preferred option 3 in subparagraph (a), namely, that local remedies "provide[d] no reasonable possibility of an effective remedy", as the expression of the exception based on futility, although the Spanish version could be better worded. With regard to the exception of waiver in subparagraph (b), his delegation shared the view that such a waiver must be express. Although an implicit waiver was possible, it should not be lightly presumed to exist, and the same held for estoppel. With regard to subparagraphs (c) and (d), there was no clear justification in practice, jurisprudence or the legal literature for the exceptions based on an absence of a voluntary link or a territorial connection; those issues would be best dealt with in the commentary to article 14. The exception based on

undue delay set forth in subparagraph (e) belonged in subparagraph (a), with suitable drafting changes. The last exception, in subparagraph (f), on denial of access, could be assumed to be implicit in the statement about the lack of a reasonable possibility of an effective remedy in subparagraph (a) and need not be stated separately.

44. Draft article 15 on the burden of proof in matters relating to the exhaustion of local remedies, though interesting, was excessively procedural. His delegation would prefer to leave it out of the draft articles, except possibly as part of a closing section on how diplomatic protection should be exercised.

45. Although the Calvo clause had undoubtedly figured importantly in the practice of Latin American States, it was incompatible with the traditional concept of diplomatic protection as a right or prerogative of the State. According to that interpretation, which Spain advocated, only the State, and not the individual, could waive diplomatic protection. His delegation therefore shared the position that draft article 16 should not be included in the draft articles, but thought that the issue could be discussed in the commentary.

46. With regard to the questions the Commission had put to Governments concerning diplomatic protection of crew members of a ship and shareholders of a company, his delegation believed that the rules set forth in the United Nations Convention on the Law of the Sea were sufficient to cover diplomatic protection of crew members not nationals of the flag State and was not in favour of addressing the issue in the draft articles. Similar arguments applied to crews of aircraft and spacecraft. The question of diplomatic protection of shareholders required careful study based on a survey of practice. The decision in the *Barcelona Traction* case reflected the current state of international law and sufficiently covered the various possible situations. Moreover, in a globalized world in which shares of stock in a company might change hands several times a day, the concept of the State of nationality of the shareholders presented practical difficulties.

47. *Mr. Prandler (Hungary) resumed the Chair.*

48. **Mr. Michel** (Switzerland) said that, in view of the heavy agenda the Commission had set for itself and the questions it had raised about its working methods and documentation, the Committee would do well to devote some thought to the aims and resources of the Commission and how best it could meet the current needs of the international community.

49. With regard to draft articles 1 to 7 on diplomatic protection, which had been provisionally adopted by the Commission, his delegation was pleased to see that in their present form they emphasized the discretionary nature of diplomatic protection and the need for an effective link between the State exercising and the person benefiting from diplomatic protection.

50. His delegation was in agreement with the approach taken in draft article 7, paragraph 3, whereby a State could not exercise diplomatic protection on behalf of a refugee in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee. However, it disagreed with the reasoning in paragraph 10 of the commentary on the draft article that “fear of demands for such action by refugees might deter States from accepting refugees”. In most cases States were not free to accept or reject refugees but were bound to do so by international law or national legislation. Moreover, in view of the discretionary nature of the exercise of diplomatic protection, refugees could not easily bring pressure on the State. A better argument for the rule in paragraph 3 was the principle of “predominant nationality” stated in draft article 6 in connection with multiple nationality. The refugee’s predominant link would seem to be with his or her State of nationality.

51. Among the draft articles considered but not yet approved by the Commission, draft article 10 as currently worded implied that the exhaustion of local remedies rule applied only when a State contemplated bringing an international claim. It should be noted that the concept of an international claim by a State differed from the broader concept of diplomatic protection, defined in draft article 1 as consisting of “resort to diplomatic action or other means of peaceful settlement” and hence comprising non-judicial means. The exhaustion of local remedies rule was highly relevant to the exercise of diplomatic protection by judicial means, but excessive if a State wished to resort to non-judicial means.

52. In draft article 14, his delegation preferred option 3 for subparagraph (a). With regard to subparagraph (b), it was important to guard against making it too easy to conclude that a respondent State had expressly or implicitly waived the right to require the exhaustion of local remedies. The intent to waive must be clearly

evinced by its agreement or conduct. It was perhaps unwise to mention estoppel in that context, since a State might be reluctant to explore non-confrontational solutions if as a result it risked having the argument of estoppel invoked against it later in the proceedings. His delegation shared the view that the concepts of voluntary link and territorial connection reflected in subparagraphs (c) and (d) should be considered in greater detail in the context of draft articles 10, 11 and 14, subparagraph (a). On the other hand, the criteria of undue delay and denial of access set forth in subparagraphs (e) and (f) appeared pertinent, although they might actually be covered by a proper reading of subparagraph (a).

53. His delegation agreed that draft article 16 on the Calvo clause should not be included in the draft articles. Although it had historical importance, it was difficult to reconcile the practice with the current concept of diplomatic protection, whereby the right belonged to the State and not to the individual.

54. **Mr. Lavalle-Valdés** (Guatemala) said that it could be left to the legal literature to debate the procedural or substantive nature of the exhaustion of local remedies rule. The legal text itself need not determine the nature of the rules it contained. It was even doubtful whether the issue should have a place in the commentary. There might be some value in setting out in the draft articles the situations in which the question would have practical consequences, but the effect might be to extend the draft articles beyond reasonable limits. A possible solution could be to reword draft article 10, paragraph 1, slightly to allude to the issue, by inserting, after "injury to a national, whether a natural or legal person" the words "and whether or not the injury by itself constitutes a violation of international law".

55. A significant question was how the draft articles on diplomatic protection interfaced with the articles on the responsibility of States for internationally wrongful acts which were adopted by the Commission at its fifty-third session. Both texts were concerned with secondary rules. For that reason, and also because the draft articles on diplomatic protection regulated the consequences of a violation of substantive rules of international law, there was clearly a close relationship between diplomatic protection and State responsibility, one could even say, that of a part to the whole. The connection was obvious from article 44 of the articles on State responsibility, which set out the two basic aspects of diplomatic protection (nationality and exhaustion of local remedies), and from the mention in article 33, paragraph 2, of "any person or entity". It could be said that the Commission was simply continuing to develop the topic of State responsibility. That being so, it was a matter of concern that some important elements of diplomatic protection that had been omitted from the articles on State responsibility were not being dealt with in the draft articles on diplomatic protection either and might be allowed to "fall between two stools". That was evident from the commentary to draft article 1 and the comments of the Special Rapporteur in paragraph 118 of the Commission's report, which showed a reluctance to extend consideration beyond the conditions to be fulfilled in order for diplomatic protection to be admissible.

56. One such omission related to the link between the claim by the State exercising diplomatic protection and the claim by the national of that State who was enjoying the protection. It would have been appropriate to state, either in the draft articles on State responsibility or in those relating to diplomatic protection, the fundamental principle that the amount of the second claim should form the basis — or, rather, the measure — of the first, thus ensuring that the claim by the State of nationality of the injured person did not constitute a new claim against the State against which protection was being sought.

57. Another question that remained unanswered concerned the position of the claimant State if the person enjoying diplomatic protection, after exhausting local remedies, withdrew his or her claim. The question was whether the claimant State would be obliged to withdraw its own claim and what would happen in cases where the individual concerned died without leaving any heirs. A further question was whether an individual enjoying diplomatic protection could lawfully negotiate with the State from which diplomatic protection had been claimed. Yet another, and more important, question arose in that connection: whether it was lawful for that State to compensate the individual and, more generally, what was the position of the claimant State after such compensation had been paid, particularly if the individual expressed himself or herself satisfied.

58. He also drew attention to cases in which a claim by a State on behalf of its national arose out of a breach of international law, such as the torture of the

person in question by State officials. He wondered whether the State would have the right to take countermeasures, in accordance with article 52 of the articles on State responsibility, before local remedies had been exhausted. Lastly, after urging the further consideration of issues that did not fall squarely into the scope of either State responsibility or diplomatic protection, he expressed agreement with the views of the representative of Switzerland that the requirement that local remedies should be exhausted was excessive and the representative of Austria, who had stressed the importance of taking account of other States' right to exercise diplomatic protection.

59. **Mr. Rosenstock** (Chairman of the International Law Commission) said that he had noted concerns in the Committee that the Commission had not included provisions on dispute settlement in the draft articles on State responsibility. The reason was not that the Commission had a negative attitude to dispute settlement, but that it believed dispute settlement to be a political issue that might not properly belong in the text. Moreover, it had not yet taken a position on the form that the text would take; and provisions on dispute settlement would not be appropriate in some of the forms under consideration.

60. Introducing chapter IV of the report, relating to reservations to treaties, he said that the Commission had adopted 11 draft guidelines on the formulation and communication of reservations and interpretative declarations, accompanied by commentaries providing the necessary examples and clarifications. It had also considered the Special Rapporteur's seventh report (A/CN.4/526 and Add.1-3) relating to the formulation, modification and withdrawal of reservations and interpretative declarations.

61. Draft guideline 2.1.1, "Written form", dealt with the form of reservations, which, in accordance with article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions on the Law of Treaties, must be formulated in writing in order to be registered and notified by the depositary, so that all interested States would become aware of them. The Commission was, however, of the opinion that the question of whether the reservation could initially be formulated orally until its eventual written confirmation could be left open.

62. Draft guideline 2.1.2, "Form of formal confirmation", stated that the formal confirmation of reservations must be made in writing. The requirement was a matter of common sense and stemmed also from the *travaux préparatoires* of the Vienna Conventions.

63. Draft guideline 2.1.3, "Formulation of a reservation at the international level", defined the persons and organs authorized, by virtue of their functions, to formulate a reservation on behalf of a State or an international organization. The text, which was based on article 7 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, reflected positive law on the subject and consistent and long-established practice, especially that of the Secretary-General of the United Nations as depositary. It was also sufficiently flexible, since the use of the expression "subject to the customary practices in international organizations which are depositaries of treaties" allowed for the development of less rigid practices.

64. Draft guideline 2.1.4, "Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations", dealt with the formulation of reservations in the internal legal system of States and international organizations. The procedure for formulating reservations at the internal level did not necessarily follow the procedure generally required for the expression of a State's consent to be bound by a treaty. The diversity that characterized the competence to formulate reservations and the procedure to be followed for that purpose among States seemed to be mirrored among international organizations. The only conclusion that could be drawn, therefore, was that international law did not impose any specific rule with regard to the internal procedure for formulating reservations. Moreover, since it was unlikely that a violation of internal provisions could be "manifest" in the sense of article 46 of the Vienna Conventions, the conclusion could be drawn that a State or an international organization should not be allowed to claim that a violation of the provisions of internal law had invalidated a reservation that it had formulated, if such formulation was the act of an authority competent at the international level. Lastly, even if a reservation could be withdrawn at any time, its withdrawal would not have any retroactive effect. The utility of the guideline would thus be justified.

65. Draft guideline 2.1.5, "Communication of reservations", listed the recipients of reservations, namely contracting States and organizations, and also

other States and international organizations entitled to become parties to the treaty. The guideline reproduced essentially the rule set forth in article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions. The communication should be in writing. The second paragraph concerned the particular case of reservations to constituent instruments of international organizations. In such cases, the reservation should be communicated to the organization concerned or, eventually, to the organ created by a treaty having the capacity to accept a reservation. The communication did not preclude the communication of the reservation to interested States and international organizations.

66. Draft guideline 2.1.6, "Procedure for communication of reservations", clarified aspects of the procedure to be followed in communicating the reservation to the addressees of the communication specified in draft guideline 2.1.5. It concerned three different but closely linked factors: the author of the communication; the practical modalities; and the effects. The text followed closely articles 78 of the 1969 Vienna Convention and 79 of the 1986 Convention, which, in their turn, reflected current practice. The Commission had not thought it possible to establish a rigid deadline for the transmittal of the reservation to States or international organizations and had therefore settled for merely stating that the communication should take place as soon as possible. Lastly, the guideline took account of modern means of communication, such as facsimile or electronic mail, stating, however, that in such cases the communication should be confirmed by diplomatic note or depositary notification. In such cases, the communication was considered as having been made on the date of the e-mail or facsimile.

67. Draft guideline 2.1.7, "Functions of depositaries", reproduced the relevant provisions of article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention. It also reflected the current, and still valid, concept of a fairly limited role for the depositary.

68. Draft guideline 2.1.8, "Procedure in case of manifestly [impermissible] reservations", went a step beyond the Vienna Conventions with regard to the functions of depositaries. It also took into account and was inspired by the nuanced responses given by States in the Sixth Committee to the Commission's question on the issue. According to the procedure advocated by the draft guideline, in cases of an impermissible reservation, the depositary first drew the attention of the author of the reservation to the impermissibility. If the reservation was maintained, the depositary communicated it to all concerned, indicating the nature of the legal problems raised. The word "impermissible" appeared between square brackets because the Commission intended to revisit the term, for reasons that could be found in the commentary to the draft guideline.

69. Draft guideline 2.4.1, "Formulation of interpretative declarations", was an adaptation of draft guideline 2.1.3 on the formulation of reservations. It was not essential for interpretative declarations to be in writing, provided that they emanated from an authority competent to engage the State or the international organization at the international level.

70. Draft guideline 2.4.2, "Formulation of an interpretative declaration at the internal level", similarly adapted the provisions of draft guideline 2.1.4 concerning the formulation of reservations at the internal level.

71. Lastly, draft guideline 2.4.7, "Formulation and communication of conditional interpretative declarations", was modelled on the text of draft guidelines 2.1.1, 2.1.2 and 2.1.5 since, like reservations, conditional interpretative declarations should be formulated in writing. The Commission reserved the option of reconsidering whether draft guidelines on conditional interpretative declarations, including draft guideline 2.4.7, should be retained in the Guide to Practice. If they were substantially similar to reservations, it would be possible to say as much in a single guideline. Indeed, considerable concern had been expressed by some that a specific guideline was an invitation to reservations by the back door. Pending its final decision, the Commission had included draft guideline 2.4.7 provisionally, placing it between square brackets.

72. The Commission would particularly welcome any comments on the text and particularly on the question of confirmation of the communication of a reservation initially made by facsimile or electronic mail, as well as the issue of the possible withdrawal of reservations held to be impermissible by a treaty-monitoring body. Relatively few responses had been received to date. It would also welcome any additional answers to the questionnaire on reservations to treaties circulated in 1995. It could not respond to needs and desires that were not communicated.

73. **Mr. Winkler** (Austria), after assuring the previous speaker that his delegation would respond shortly to the Commission's request for comments, pointed out that both the Commission and the Sub-Commission on the Promotion and Protection of Human Rights were examining the issue of diplomatic protection. His delegation was concerned about the possible duplication of work.

74. After expressing support for draft guidelines 2.1.1 and 2.1.2, he expressed uncertainty as to the meaning, in draft guideline 2.1.3, of the term "at the international level" and wondered whether it needed to be used at all. The Vienna Conventions did not contain such an expression and there seemed no justification for the creation of what was a novel legal concept. Moreover, he wondered whether the Commission really intended to equate the formulation of reservations "at the international level" with the conclusion of a treaty, as the guidelines following guideline 2.1.3 seemed to suggest. Such an understanding did not, however, correspond with the remaining part of draft guideline 2.1.3. The text of article 7 of the Vienna Conventions was used, without taking into account that the various categories of organ referred to in the article were considered to be empowered in different ways: heads of State, heads of Government and ministers for foreign affairs were considered to represent their State for the purpose of performing all acts relating to the conclusion of a treaty, whereas heads of diplomatic missions and representatives accredited by States to an international conference or organization or one of its organs did so only for the purpose of adopting the text of a treaty. If the term "formulation of a reservation" was understood as producing an immediate legal effect, it was highly questionable whether representatives to international conferences, for example, should be empowered to perform such an act.

75. His delegation believed that a reservation could be "formulated" only by the State organ that was competent to conclude the treaty. The aide-memoire of 1 July 1976 by the United Nations Legal Counsel, quoted in paragraph 10 of the commentary to the draft guideline, was perfectly correct and there was no need to depart from it.

76. With regard to draft guideline 2.1.6, his delegation urged the Commission to consider a provision concerning the language in which reservations should be formulated, even if paragraph 22 of the commentary to the draft guideline saw no need for such a provision. It would surely be useful to provide that a reservation — and any interpretative declarations — should be formulated in one of the authentic languages of the treaty.

77. The wording of draft guideline 2.1.7 was not very clear, particularly with regard to the functions of the depositary referred to in the second paragraph. Although the provision apparently related only to any possible dispute concerning the depositary's duty to examine whether the reservation was in due and proper form, the wording used implied wider functions.

78. Draft guideline 2.1.8 related to a subject of major significance, the procedure to be adopted in cases of manifestly impermissible reservations, which was linked with the question of the legal status of illicit reservations. The text rightly distinguished between absolute illegality, where the reservation was manifestly or prima facie illegal, and relative illegality, where the illegality was still to be established. In the first case, the depositary should be entitled to react, whereas in the latter only the States parties had the right to act. Unfortunately, the text of the draft guideline did not clearly specify the powers of the depositary, although it could be inferred from the second paragraph that the depositary was entitled to withhold the communication of the reservation to the other States parties and to seek, as a first step, the reaction of the reserving State. If that interpretation was correct, it would be advisable to reflect it in the wording of the guideline. A final decision, however, would depend on the outcome of the work concerning the legal status of illicit reservations. In the meantime, the draft guideline should be placed between square brackets.

79. With regard to the draft guidelines proposed by the Special Rapporteur at the fifty-fourth session of the Commission, his delegation supported the concept of a permanent review of reservations with the aim of facilitating their withdrawal at any time. It would also favour the possibility of the partial withdrawal of reservations, despite the absence of any such rule in the Vienna Conventions.

80. **Mr. Ehrenkrona** (Sweden), speaking on behalf of the Nordic countries, said that they continued to take a great interest in the topic and believed that the Guide to Practice would be of great practical value to governments. Although reservations could never be used in such a way as to undermine respect for the

object and purpose of a treaty, the possibility of formulating reservations could be helpful in achieving wide acceptance of a treaty. At the same time, the trend towards a drop in the number of reservations to human rights treaties was welcome.

81. He expressed concern at the proposal that the question of impermissible reservations should be referred to a working group, since that would inevitably delay the issuance of any useful guidance. Delicate though the issue was, it should be treated by the Special Rapporteur in the same detailed and constructive manner with which he had dealt with other topics. He should give it the highest priority. In that context, he expressed the concern of the Nordic countries at the emerging tendency to submit reservations containing general references to domestic law without any further description of that law. The Commission should consider the matter closely, especially the question of whether or not a reservation had to be autonomous, in the sense of providing sufficient information to enable other States to consider its intended legal consequences. It was important to make objections to reservations when they were found incompatible with the object and purpose of a treaty. Parties to a treaty shared a common interest in ensuring that common norms were not diluted.

82. Turning to the functions of depositaries and the procedure proposed by the Commission in draft guideline 2.1.8 for manifestly impermissible reservations, he said he agreed with the Commission that no form of censorship by the depositary could be allowed. However, it was also inappropriate to require the depositary to communicate the text of such a reservation to the contracting or signatory States without previously drawing the attention of the reserving State to its defects. The Nordic countries were unwilling to oblige the depositary to play any wider role. There was nothing to prevent a depositary, or indeed a human rights treaty body, from sharing its opinion on a reservation with the reserving State; but no action by the depositary could alter the fact that ultimate responsibility for the integrity of a treaty, and for protecting its object and purpose, lay with the States parties.

83. As to the role of human rights treaty bodies, they helped to protect the integrity of the conventions concerned, and it was useful for them to deal also with the matter of reservations. A good example of such involvement was the recent report by the secretariat of the Committee on the Elimination of Discrimination against Women on ways and means of expediting the work of that Committee (CEDAW/C/2001/II/4), which contained an informative commentary on the practice of the various treaty bodies relating to reservations. The Nordic countries had reacted against impermissible reservations, especially to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child. They welcomed the work on reservations by Françoise Hampson for the Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/1999/28), and hoped for a successful outcome to the consultations with her. The Nordic countries also wished to draw attention to General Comment 24 of the Human Rights Committee, on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights or to the Optional Protocols. As to the draft guideline, now withdrawn, on withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty, the Nordic countries agreed with the Commission that the matter must be discussed again in the general context of impermissible reservations.

84. Commenting on paragraph 4 of draft guideline 2.1.6, he said the Nordic countries appreciated receiving notifications by electronic mail from the United Nations as depositary, via their missions at headquarters. However, they saw no reason to set the starting point of the time limit for raising objections to a reservation earlier than the date of the written notification by the depositary.

85. **Mr. Abraham** (France) said that he welcomed the definition of reservations adopted by the Commission. However, for the sake of avoiding confusion it would be as well to distinguish clearly between States and international organizations as authors of reservations. Draft guidelines 1.1.5 and 1.1.6 were satisfactory in substance, but he doubted whether both were necessary, given that the effect of both was to clarify the meaning of the term “modify” in the definition of reservations in draft guideline 1.1. The same clarification could be found in draft guideline 1.4.1, on statements purporting to undertake unilateral commitments, and in draft guideline 1.4.2, on unilateral statements purporting to add further elements to a treaty. All four provisions confirmed that a modification by way of a reservation invariably limited

the obligations of the reserving State or organization. Draft guidelines 1.1.5 and 1.1.6 could therefore be presented as additional paragraphs to draft guideline 1.1.1, on the object of reservations.

86. The criterion adopted by the Commission for distinguishing interpretative declarations from reservations, namely, the legal effect which the statement was intended to produce, was acceptable provided it was based on the objective effects of the statement rather than the subjective intentions of the State making it. The purport of the statement must be compared with that of the text to which it applied. The phrasing or name given to a unilateral statement, as proposed in draft guideline 1.3.2, was not a reliable indicator of the intended legal effect. He was glad to note that the Commission was excluding the criterion of timing from its definition of interpretative declarations. However, for the sake of legal certainty it would be desirable for such declarations to be made within a limited period from the date when the State concerned was first bound by the treaty.

87. Draft guideline 1.2.1 was too vague to permit of a reliable distinction between interpretative declarations and conditional interpretative declarations. The latter, in the Commission's definition, were merely reservations which emphasized the unbreakable link between a treaty commitment and a reservation to it. Instead of being treated as a separate category, such declarations should simply be equated to reservations.

88. The work of the Special Rapporteur and of the Commission had raised the difficult question of the consequences at the international level of the violation of internal rules regarding the formulation of reservations. He endorsed the solution proposed in draft guideline 2.1.4, in preference to the option under article 46 of the 1969 Vienna Convention, which would allow for a reservation to be invalidated in such cases if the violation was a serious and manifest one. Since a State could always withdraw a reservation, that provision would place the reserving State in a position whereby it could retroactively require the other parties to give effect, in relation to itself, to the treaty provision which was the subject of the reservation. There was no basis in positive law for such a solution.

89. Turning to the functions of depositaries, he said he agreed with the emphasis placed in draft guidelines 1.1.6 and 2.1.7 on the purely administrative role of a depositary. However, according to draft guideline 2.1.8 the depositary would also be required to appraise the validity of reservations. That was not a proper role for the depositary, whose functions should be confined to the registration and communication of reservations, even those which were obviously unlawful.

90. As to the proposed periodic review of the usefulness of reservations (draft guideline 2.5.3), in spite of its being generally approved by the Commission he doubted whether it should be included in a guide intended to frame legal rules governing the identification of reservations, the arrangements for making them and their effects.

91. On the question of the effect of a finding by a monitoring body that a reservation was unlawful (draft guideline 2.5.X), he said that such a finding might render the reservation void but could not bring about its withdrawal or cancellation. The author of the reservation could withdraw it, as proposed in the draft guideline, but there was also the possibility of denunciation, not mentioned in the text. It was unclear, moreover, whether States parties to the treaty could retroactively require the reserving State to perform, in its dealings with them, the treaty obligation which was the subject of the reservation. Those points called for further reflection.

92. Commenting on the question of international liability in case of loss from transboundary harm arising out of hazardous activities, he said he welcomed the fact that the Working Group had confined its study to the question of compensation for losses caused. The scope of the study should not be further extended, nor should it deal with the liability of States for failure to perform their duties of prevention. Since responsibility for unlawful acts was covered by the articles already adopted by the Commission, the current study was confined to the question as to whether there was a duty to compensate for harm arising from lawful hazardous activities by States which had in fact performed their duty of prevention. However, it was far from clear whether any such duty existed in positive law. Any liability of the State in such cases could only be secondary to that of the operator concerned. The Commission should heed the views of States which were unwilling to accept a form of liability not derived from a breach of a legal obligation.

93. **Mr. Szenazi** (Hungary) endorsed the view that the right to invoke diplomatic protection lay with the

State, not with the injured person. The possibility of legal regulation of the concept should be given careful consideration. One significant problem was the difficulty of exhausting local remedies. The question as to whether they had in fact been exhausted in individual cases, or merely blocked by the State concerned, should be further examined, as should the issues of nationality and multiple nationality and diplomatic protection for non-nationals, stateless persons and refugees.

94. On the topic of reservations to treaties, he emphasized that the 1969 Vienna Convention required treaties to be made in writing, and the same rule should be imposed for reservations, to avoid any dispute as to the scope of the legal obligations concerned. Moreover, reservations should only be made and accepted by persons duly authorized to undertake international treaty responsibilities on behalf of the State in question. In that respect, he agreed with the views of the Special Rapporteur. He could agree to the procedure proposed in draft guideline 2.1.9 for manifestly impermissible reservations, subject to a clear and convincing definition of the kind of reservation regarded as manifestly impermissible. The role of the depositary should not be limited to acting as a kind of mailbox; however, nor should the depositary be given too much leeway to decide whether a reservation was impermissible, that being almost exclusively the role of the States parties to the treaty. The same principle should apply to interpretative declarations.

*The meeting rose at 1.10 p.m.*