

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

2002

Volume I

*Summary records
of the meetings
of the fifty-fourth session
29 April–7 June and
22 July–16 August 2002*

UNITED NATIONS
New York and Geneva, 2009



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 ... 2001*).

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-fourth session of the Commission (A/CN.4/SR.2711–A/CN.4/SR.2750), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/2002

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Mr. Hans Corell, Under-Secretary-General, the 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 Legal Counsel, represented the Secretary-General.

AGENDA

At its 2711th meeting, held on 29 April 2002, the Commission adopted the agenda for its fifty-fourth session, which, together with items which were added subsequently, consisted of the following items:

1. Filling of casual vacancies in the Commission (article 11 of the statute).
2. Organization of work of the session.
3. Reservations to treaties.
4. Diplomatic protection.
5. Unilateral acts of States.
6. 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).
7. The responsibility of international organizations.
8. The fragmentation of international law: difficulties arising from the diversification and expansion of international law.
9. Shared natural resources.
10. Programme, procedures and working methods of the Commission, and its documentation.
11. Cooperation with other bodies.
12. Date and place of the fifty-fifth session.
13. Other business.

ABBREVIATIONS

FAO	Food and Agriculture Organization of the United Nations
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILO	International Labour Organization
IOM	International Organization for Migration
ITLOS	International Tribunal for the Law of the Sea
MERCOSUR	South American Common Market
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
UNCITRAL	United Nations Commission on International Trade Law
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
WTO	World Trade Organization

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<i>AJIL</i>	<i>American Journal of International Law</i>
<i>BYBIL</i>	<i>British Year Book of International Law</i>
<i>ICJ Reports</i>	<i>ICJ, Reports of Judgments, Advisory Opinions and Orders</i>
<i>ILM</i>	<i>International Legal Materials</i> (Washington, D.C.)
<i>ILR</i>	<i>International Law Reports</i>
<i>ITLOS Reports</i>	<i>ITLOS, Reports of Judgments, Advisory Opinions and Orders</i>
<i>PCIJ, Series A</i>	<i>PCIJ, Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>PCIJ, Series A/B</i>	<i>PCIJ, Judgments, Orders and Advisory Opinions</i> (Nos. 40–80: beginning in 1931)
<i>PCIJ, Series D</i>	<i>PCIJ, Acts and Documents concerning the Organization of the Court</i> (Nos. 1–6)
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

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In the present volume, “International Tribunal for the Former Yugoslavia” refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and “International Tribunal for Rwanda” refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

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NOTE CONCERNING QUOTATIONS

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

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

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

CASES CITED IN THE PRESENT VOLUME

<i>Case</i>	<i>Nature and source of the decision</i>
<i>Aerial Incident of 27 July 1955</i>	<i>ICJ Pleadings, Aerial Incident of 27 July 1955 (Israel v. Bulgaria; United States of America v. Bulgaria; United Kingdom v. Bulgaria). (Israel v. Bulgaria), Judgment, ICJ Reports, 1959, p. 127.</i>
<i>Aerial Incident of 10 August 1999</i>	<i>(Pakistan v. India), Jurisdiction, Judgment, ICJ Reports 2000, p. 12.</i>
<i>Ambatielos</i>	<i>Preliminary Objection, Judgment, ICJ Reports 1952, p. 28.</i> <i>Merits, Judgment, ICJ Reports 1953, p. 10.</i> <i>The Ambatielos Claim, award of 6 March 1956, UNRIAA, vol. XII (Sales No. 63.V.3), p. 91.</i>
<i>Aminoil-Kuwait Arbitration</i>	<i>Government of Kuwait v. American Independent Oil Co. (Aminoil), ILM, vol. 21, No. 5 (September 1982), p. 976.</i>
<i>Application of the Convention on Genocide</i>	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, ICJ Reports 1996, p. 595.</i> <i>(Croatia v. Yugoslavia), Order of 27 June 2000, ICJ Reports 2000, p. 108.</i> <i>(Bosnia and Herzegovina v. Yugoslavia), Order of 10 September 2001, ICJ Reports 2001, p. 572.</i>
<i>Arbitral Award Made by the King of Spain on 23 December 1906</i>	<i>Judgment, ICJ Reports 1960, p. 192.</i>
<i>Armed Activities on the Territory of the Congo</i>	<i>(Democratic Republic of the Congo v. Uganda), Order of 29 November 2001, ICJ Reports 2001, p. 660.</i> <i>(New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, ICJ Reports 2002, p. 219.</i>
<i>Arrest Warrant</i>	<i>Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, p. 3.</i>
<i>Asylum</i>	<i>Judgment, ICJ Reports 1950, p. 266.</i>
<i>Barcelona Traction</i>	<i>Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports 1970, p. 3.</i>
<i>Belilos</i>	<i>Belilos v. Switzerland, European Court of Human Rights, judgment of 29 April 1988, Series A: Judgments and Decisions, vol. 132.</i>

<i>Bhopal</i>	<i>Union Carbide Corporation gas plant disaster at Bhopal, India in December, 1984</i> , opinion and order, 12 May 1986, U.S. District Court, New York. Opinion reproduced in <i>ILM</i> , vol. 25, No. 4 (July 1986), p. 771.
<i>Certain Property</i>	<i>(Liechtenstein v. Germany)</i> , Order of 12 July 2002, <i>ICJ Reports 2002</i> , p. 296.
<i>Chorzów Factory</i>	<i>Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927</i> , <i>PCIJ, Series A, No. 9</i> . <i>Merits, Judgment No. 13, 1928</i> , <i>PCIJ, Series A, No. 17</i> .
<i>Corfu Channel</i>	<i>Merits, Judgment, ICJ Reports 1949</i> , p. 4. <i>Assessment of Amount of Compensation, Judgment, ICJ Reports 1949</i> , p. 244.
<i>De Wilde</i>	<i>De Wilde, Ooms and Versyp v. Belgium</i> (“Vagrancy” cases), European Court of Human Rights, judgment of 18 June 1971, <i>Series A: Judgments and Decisions</i> , vol. 12.
<i>Diallo</i>	<i>Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)</i> , Order of 8 September 2000, <i>ICJ Reports 2000</i> , p. 146.
<i>Dickson Car Wheel Company</i>	<i>Dickson Car Wheel Company (U.S.A.) v. United Mexican States</i> , decision of July 1931, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669.
<i>East Timor</i>	<i>(Portugal v. Australia)</i> , Judgment, <i>ICJ Reports 1995</i> , p. 90.
<i>Eastern Greenland</i>	<i>Legal Status of Eastern Greenland, Judgment, 1933</i> , <i>PCIJ, Series A/B, No. 53</i> , p. 22.
<i>El Oro Mining</i>	<i>El Oro Mining and Railway Company (Limited) (Great Britain) v. United Mexican States</i> , British–Mexican Claims Commission, decision no. 55 of 18 June 1931, UNRIAA, vol. V (Sales No. 1952.V.3), p. 191.
<i>ELSI</i>	<i>Elektronika Sicula S.p.A. (ELSI)</i> , Judgment, <i>ICJ Reports 1989</i> , p. 15.
<i>F v. R. and State Council of the Canton of Thurgau</i>	Swiss Federal Supreme Court, decision of 17 December 1992, <i>Journal des Tribunaux</i> , 1995, p. 523.
<i>Finnish Ships Arbitration</i>	Claim of Finnish Shipowners against Great Britain in Respect of the Use of Certain Finnish Vessels during the War, decision of 9 May 1934, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1479.
<i>Fisheries Jurisdiction</i>	<i>(Spain v. Canada)</i> , <i>Jurisdiction of the Court, Judgment, ICJ Reports 1998</i> , p. 432.
<i>Frontier Dispute</i>	<i>(Burkina Faso/Republic of Mali)</i> , Judgment, <i>ICJ Reports 1986</i> , p. 554.
<i>Haya de la Torre</i>	Judgment, <i>ICJ Reports 1951</i> , p. 71.
<i>Interhandel</i>	Judgment, <i>ICJ Reports 1959</i> , p. 6.
<i>Ireland v. United Kingdom</i>	<i>Ireland v. The United Kingdom</i> , European Court of Human Rights, judgment of 18 January 1978, <i>Series A: Judgments and Decisions</i> , vol. 25.

<i>Case</i>	<i>Nature and source of the decision</i>
<i>Jurado</i>	ILO, Administrative Tribunal, Judgement No. 70 of 11 September 1964.
<i>LaGrand</i>	(<i>Germany v. United States of America</i>), <i>Provisional Measures, Order of 3 March 1999</i> , ICJ Reports 1999, p. 9. <i>Judgment</i> , ICJ Reports 2001, p. 466.
<i>Land and Maritime Boundary between Cameroon and Nigeria</i>	(<i>Cameroon v. Nigeria</i>), <i>Preliminary Objections, Judgment</i> , ICJ Reports 1998, p. 275. (<i>Cameroon v. Nigeria: Equatorial Guinea intervening</i>), <i>Order of 20 February 2001</i> , ICJ Reports 2001, p. 9.
<i>Legality of Use of Force</i>	(<i>Yugoslavia v. Belgium</i>), <i>Order of 20 March 2002</i> , ICJ Reports 2002, p. 192. (<i>Yugoslavia v. Canada</i>), <i>ibid.</i> , p. 195. (<i>Yugoslavia v. France</i>), <i>ibid.</i> , p. 198. (<i>Yugoslavia v. Germany</i>), <i>ibid.</i> , p. 201. (<i>Yugoslavia v. Italy</i>), <i>ibid.</i> , p. 204. (<i>Yugoslavia v. Netherlands</i>), <i>ibid.</i> , p. 207. (<i>Yugoslavia v. Portugal</i>), <i>ibid.</i> , p. 210. (<i>Yugoslavia v. United Kingdom</i>), <i>ibid.</i> , p. 213.
<i>Lockerbie</i>	<i>Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)</i> , <i>Order of 6 September 2000</i> , ICJ Reports 2000, p. 140. (<i>Libyan Arab Jamahiriya v. United States of America</i>), <i>ibid.</i> , p. 143.
<i>Maritime Delimitation between Nicaragua and Honduras</i>	<i>Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)</i> , <i>Order of 13 June 2002</i> , ICJ Reports 2002, p. 216.
<i>Martini</i>	<i>Martini case</i> , decision of 3 May 1930, UNRIAA, vol. 2 (Sales No. 1949.V.1), p. 975.
<i>Mavrommatis</i>	<i>Mavrommatis Palestine Concessions, Judgment No. 2, 1924, PCIJ, Series A, No. 2.</i>
<i>M/V "Saiga" (No. 2)</i>	<i>M/V "Saiga" case (No. 2) (Saint Vincent and the Grenadines v. Guinea)</i> , <i>Judgment</i> , ITLOS Reports 1999, p. 10.
<i>Namibia</i>	<i>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)</i> , <i>Advisory Opinion</i> , ICJ Reports 1971, p. 16.
<i>North American Dredging Company</i>	<i>North American Dredging Company of Texas (U.S.A.) v. United Mexican States</i> , decision of 31 March 1926, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 26.
<i>Norwegian Loans</i>	<i>Certain Norwegian Loans (France v. Norway)</i> , <i>Judgment</i> , ICJ Reports 1957, p. 9.
<i>Nottebohm</i>	<i>Second Phase, Judgment</i> , ICJ Reports 1955, p. 4.
<i>Nuclear Tests</i>	<i>Nuclear Tests (Australia v. France)</i> , <i>Judgment</i> , ICJ Reports 1974, p. 253. (<i>New Zealand v. France</i>), <i>ibid.</i> , p. 457.

<i>Case</i>	<i>Nature and source of the decision</i>
<i>Open Door and Dublin Well Woman v. Ireland</i>	<i>Open Door and Dublin Well Woman v. Ireland</i> , European Court of Human Rights, judgment of 29 October 1992, <i>Series A: Judgments and Decisions</i> , vol. 246.
<i>Panevezys-Saldutiskis Railway</i>	<i>Judgment, 1939, PCIJ, Series A/B, No. 76, p. 4.</i>
<i>Phosphates in Morocco</i>	<i>Judgment, 1938, PCIJ, Series A/B, No. 74, p. 10.</i>
<i>Pinochet</i>	<i>Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)</i> , England, House of Lords, 24 March 1999, <i>ILR</i> , vol. 119.
<i>Reparation for Injuries</i>	<i>Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949</i> , p. 174.
<i>Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case</i>	<i>Order of 22 September 1995, ICJ Reports 1995</i> , p. 288.
<i>Reservations to the Convention on Genocide</i>	<i>Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951</i> , p. 15.
<i>Right of Passage over Indian Territory</i>	<i>Merits, Judgment, ICJ Reports 1960</i> , p. 6.
<i>Robert E. Brown</i>	<i>Robert E. Brown (United States) v. Great Britain</i> , UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120.
<i>S.S. "Wimbledon"</i>	<i>Judgments, 1923, PCIJ, Series A, No. 1.</i>
<i>Sabbatino</i>	<i>Banco Nacional de Cuba v. Sabbatino, Receiver (United States Reports)</i> , vol. 376, 1964), p. 398.
<i>Salem</i>	<i>Salem case (Egypt/United States)</i> , award of 8 June 1932, UNRIAA, vol. II (Sales No. 1949.V.1), p. 1161.
<i>Serbian Loans</i>	<i>Case concerning the Payment of Various Serbian Loans Issued in France, Judgment No. 14, 1929, PCIJ, Series A, No. 20.</i>
<i>Shrimp Products</i>	<i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WTO Appellate Body report WT/DS58/AB/R (12 October 1998).
<i>Sovereignty over Pulau Ligitan and Pulau Sipadan</i>	<i>(Indonesia/Malaysia), Application to Intervene, Judgment, ICJ Reports 2001</i> , p. 575.
<i>Swordfish Stocks</i>	<i>Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community), Order of 20 December 2000, ITLOS Reports 2000</i> , p. 148. <i>Order of 15 March 2001, ITLOS Reports 2001</i> , p. 4.
<i>Tadić</i>	<i>Prosecutor v. Duško Tadić</i> , International Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, judgement of 15 July 1999, <i>ILR</i> , vol. 112, p. 369.
<i>Temple of Preah Vihear</i>	<i>Merits, Judgment, ICJ Reports 1962</i> , p. 6.

<i>Case</i>	<i>Nature and source of the decision</i>
<i>Territorial and Maritime Dispute</i>	<i>Territorial and Maritime Dispute (Nicaragua v. Colombia), Order of 26 February 2002, ICJ Reports 2002, p. 189.</i>
<i>Territorial Dispute (Libyan Arab Jamahiriya/Chad)</i>	<i>Judgment, ICJ Reports 1994, p. 6.</i>
<i>Texaco</i>	<i>Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic (1977), ILR, vol. 53, p. 389.</i>
<i>Trail Smelter</i>	<i>UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.</i>
<i>United States Diplomatic and Consular Staff in Tehran</i>	<i>Judgment, ICJ Reports 1980, p. 3.</i>
<i>Westland Helicopters</i>	<p><i>Westland Helicopters Ltd. v. Arab Organization for Industrialization, ILR, vol. 80, p. 595 (1985) (International Chamber of Commerce Award).</i></p> <p><i>Arab Organization for Industrialization v. Westland Helicopters Ltd., ibid., p. 622 (1987) (Switzerland, Federal Supreme Court).</i></p> <p><i>Westland Helicopters Ltd. v. Arab Organization for Industrialization, ILR, vol. 108, p. 564 (1994) (England, High Court).</i></p>

MULTILATERAL INSTRUMENTS CITED IN THE PRESENT VOLUME

Source

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| American Treaty on Pacific Settlement (Pact of Bogota)
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| European Convention for the Peaceful Settlement of Disputes
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No. 4646, p. 243. |

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No. 7310, p. 95. |
| Vienna Convention on Consular Relations (Vienna,
24 April 1963) | <i>Ibid.</i> , vol. 596,
No. 8638, p. 261. |
| Optional Protocol to the Vienna Convention on Consular
Relations concerning the Compulsory Settlement of
Disputes (Vienna, 24 April 1963) | <i>Ibid.</i> , No. 8640, p. 487. |

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| Convention for the Protection of Human Rights and
Fundamental Freedoms (European Convention on Human
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No. 2889, p. 221. |
| Protocol No. 13 to the Convention for the Protection of Hu-
man Rights and Fundamental Freedoms, concerning the
Abolition of the Death Penalty in All Circumstances
(Vilnius, 3 May 2002) | <i>Ibid.</i> , vol. 2246,
No. 2889, p. 112. |
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No. 9464, p. 195. |
| International Covenant on Civil and Political Rights (New York,
16 December 1966) | <i>Ibid.</i> , vol. 999,
No. 14668, p. 171. |
| Convention on the Elimination of All Forms of Discrimination
against Women (New York, 18 December 1979) | <i>Ibid.</i> , vol. 1249,
No. 20378, p. 13. |
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and Medicine: Convention on Human Rights and Biomedicine
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No. 37266, p. 171. |
| Additional Protocol to the Convention for the Protection of
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gard to the Application of Biology and Medicine, on the
Prohibition of Cloning Human Beings (Paris, 12 January
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No. A-37266,
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| Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930) | League of Nations, <i>Treaty Series</i> , vol. CLXXIX, No. 4137, p. 89. |
| Convention relating to the Status of Refugees (with schedule) (Geneva, 28 July 1951) | United Nations, <i>Treaty Series</i> , vol. 189, No. 2545, p. 137. |
| Protocol relating to the Status of Refugees (New York, 31 January 1967) | <i>Ibid.</i> , vol. 606, No. 8791, p. 267. |
| Convention relating to the Status of Stateless Persons (New York, 28 September 1954) | <i>Ibid.</i> , vol. 360, No. 5158, p. 117. |
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| Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963) | United Nations, <i>Treaty Series</i> , vol. 704, No. 10106, p. 219. |
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- European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977) *Ibid.*, vol. 1137, No. 17828, p. 93.
- European Convention on the Compensation of Victims of Violent Crimes (Strasbourg, 24 November 1983) *Ibid.*, vol. 1525, No. 26456, p. 37.
- International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997) *Ibid.*, vol. 2149, No. 37517, p. 256.
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- Convention on the International Maritime Organization (Geneva, 6 March 1948) *Ibid.*, vol. 289, No. 4214, p. 3.
- Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958) *Ibid.*, vol. 559, No. 8164, p. 285.
- Agreement concerning Interim Arrangements relating to Polymetallic Nodules of the Deep Sea Bed (Washington, D.C., 2 September 1982) *Ibid.*, vol. 1871, No. 31958, p. 275.
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- Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919) *British and Foreign State Papers, 1919*, vol. 112 (London, HM Stationery Office, 1922), p. 1.
- Geneva Conventions for the Protection of War Victims (Geneva, 12 August 1949) United Nations, *Treaty Series*, vol. 75, Nos. 970–973, pp. 2, 85, 13 and 287 respectively.

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- Convention on Treaties (Havana, 20 February 1928)
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- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)
United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
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- Convention on International Liability for Damage Caused by Space Objects (London, Moscow and Washington, D.C., 29 March 1972)
United Nations, *Treaty Series*, vol. 961, No. 13810, p. 187.
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- Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) (with annexed Additional Protocols I and II) (Mexico City, 14 February 1967)
Ibid., vols. 634 and 1894, No. 9068, pp. 281 and 335 respectively.
- Environment**
- Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979)
United Nations, *Treaty Series*, vol. 1302, No. 21623, p. 217.
- Miscellaneous**
- Convention on Rights and Duties of States (Montevideo, 26 December 1933)
League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19.
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| Criminal Law Convention on Corruption (Strasbourg, 27 January 1999) | <i>Ibid.</i> , vol. 2216, No. 39391, p. 228 |
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| Inter-American Democratic Charter (Lima, 11 September 2001) | <i>ILM</i> (Washington, D.C.), vol. 40, No. 5 (September 2001), p. 1289. |

CHECKLIST OF DOCUMENTS OF THE FIFTY-FOURTH SESSION

<i>Document(s)</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/520	Provisional agenda	Mimeographed. For agenda as adopted, see p. vii above.
A/CN.4/521	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-sixth session of the General Assembly	Mimeographed.
A/CN.4/522 and Add.1	Filling of casual vacancies in the Commission (article 11 of the statute): note by the Secretariat	A/CN.4/522. Reproduced in <i>Yearbook ... 2002</i> , vol. II (Part One). A/CN.4/522/Add.1 mimeographed.
A/CN.4/523 and Add.1	Third report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur	Reproduced in <i>Yearbook ... 2002</i> , vol. II (Part One).
A/CN.4/524	Unilateral acts of States: replies from Governments to the questionnaire	<i>Idem.</i>
A/CN.4/525 and Add.1 [and Corr.1 and 2] and Add.2	Fifth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	<i>Idem.</i>
A/CN.4/526 and Add.1-3	Seventh report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.613 and Rev.1	Diplomatic protection. Titles and texts of the draft articles adopted by the Drafting Committee	Mimeographed.
A/CN.4/L.614	Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee	See summary record of the 2733rd meeting (para. 2).
A/CN.4/L.615 [and Corr.1]	Draft report of the International Law Commission on the work of its fifty-fourth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fifty-seventh session, Supplement No. 10 (A/57/10)</i> . The final text appears in <i>Yearbook ... 2002</i> , vol. II (Part Two).
A/CN.4/L.616	<i>Idem</i> : chapter II (Summary of the work of the Commission at its fifty-fourth session)	<i>Idem.</i>
A/CN.4/L.617 and Add.1	<i>Idem</i> : chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem.</i>
A/CN.4/L.618 and Add.1-4	<i>Idem</i> : chapter IV (Reservations to treaties)	<i>Idem.</i>
A/CN.4/L.619 and Add.1-6	<i>Idem</i> : chapter V (Diplomatic protection)	<i>Idem.</i>
A/CN.4/L.620 and Add.1 and 2	<i>Idem</i> : chapter VI (Unilateral acts of States)	<i>Idem.</i>
A/CN.4/L.621	<i>Idem</i> : chapter VII (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))	<i>Idem.</i>
A/CN.4/L.622	The responsibility of international organizations: scope and orientation of the study. Report of the Working Group	Mimeographed. Reproduced in <i>Yearbook ... 2002</i> , vol. II (Part Two), chap. VIII, sect. C.

<i>Document(s)</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.623	Reservations to treaties: note by the Special Rapporteur on the first paragraph of draft guideline 2.1.7 adopted by the Drafting Committee	Mimeographed.
A/CN.4/L.624	Draft report of the International Law Commission on the work of its fifty-fourth session: chapter VIII (The responsibility of international organizations)	<i>Idem.</i> For the adopted text, see <i>Official Records of the General Assembly, Fifty-seventh session, Supplement No. 10 (A/57/10)</i> . The final text appears in <i>Yearbook ... 2002</i> , vol. II (Part Two).
A/CN.4/L.625	<i>Idem</i> : Chapter IX (The fragmentation of international law: difficulties arising from the diversification and expansion of international law)	<i>Idem.</i>
A/CN.4/L.626 and Add.1	<i>Idem</i> : chapter X (Other decisions and conclusions of the Commission)	<i>Idem.</i>
A/CN.4/L.627	International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from trans-boundary harm arising out of hazardous activities). Report of the Working Group	Mimeographed. Reproduced in <i>Yearbook ... 2002</i> , vol. II (Part Two), chap. VII, sect. C.
A/CN.4/L.628 [and Corr.1]	The fragmentation of international law: difficulties arising from the diversification and expansion of international law. Report of the Study Group	<i>Idem</i> , chap. IX, sect. C.
A/CN.4/L.629	Programme, procedures and working methods of the Commission, and its documentation. Report of the Planning Group	Mimeographed.
A/CN.4/SR.2711– A/CN.4/SR.2750	Provisional summary records of the 2711th to 2750th meetings	<i>Idem.</i> The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE FIFTY-FOURTH SESSION

Held at Geneva from 29 April to 7 June 2002

2711th MEETING

Monday, 29 April 2002, at 3.10 p.m.

Acting Chair: Mr. Enrique CANDIOTI

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Opening of the session

1. The ACTING CHAIR declared open the fifty-fourth session of the International Law Commission, which was also the first of the new quinquennium, and welcomed all members of the Commission, particularly the new members.

Election of officers

Mr. Rosenstock was elected Chair by acclamation.

Mr. Rosenstock took the Chair.

2. The CHAIR thanked the members of the Commission for their trust and said that he would make every effort

to deserve it. At the start of the new quinquennium, the Commission's strength lay in what its members brought to it: their intellectual rigour and capacity, their respect for each other's views and their discipline. The Commission was also fortunate in being able to depend on an extremely competent and knowledgeable Secretariat; it thus had all the necessary components for doing effective and productive work. He requested the Planning Group to consider how best to organize the work of the session so that the Commission could make the best use of its time.

3. He then invited the members of the Commission to observe a minute of silence in memory of Adegoke Ajibola Ige of Nigeria, who had been elected a member of the Commission by the United Nations General Assembly at the fifty-fourth session of the Commission and who had passed away a few months after his election.

The Commission observed a minute of silence.

Mr. Candiotti was elected first Vice-Chair by acclamation.

Mr. Kateka was elected second Vice-Chair by acclamation.

Mr. Yamada was elected Chair of the Drafting Committee by acclamation.

Mr. Kuznetsov was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/520)

4. The CHAIR said that the Secretariat had drawn his attention to a note (document without a symbol distributed in the meeting room) addressed to the Secretary of the Commission by various permanent missions on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. That question would be taken up in the context of new topics, the Commission having agreed to consider early in the session the selection of two new or additional topics. The Commission would come back to those issues after consultations with the Bureau.

5. Mr. BAENA SOARES said that there was every justification for including an item entitled “International liability for injurious consequences arising out of acts not prohibited by international law” in the provisional agenda for the fifty-fourth session, since the General Assembly had requested it in its resolution 56/82 of 12 December 2001, and since, in conformity with article 18, paragraph 3, of its statute, the Commission must give priority to requests by the Assembly to deal with any question. Moreover, the question was not an entirely new one: it had already been considered from the viewpoint of prevention of transboundary harm from hazardous activities. The Commission would not be bowing to the instructions of a number of Governments, but applying a decision taken by the Assembly.
6. The CHAIR said that the General Assembly did not determine the Commission’s agenda. It made recommendations which the Commission considered.
7. Mr. OPERTTI BADAN said he shared Mr. Baena Soares’s view that the topic was extremely important and that the Commission should include it without further delay in its agenda.
8. The CHAIR said he had no doubt that the topic was important, but that in his opinion its inclusion in the agenda should be discussed first in an informal working group.
9. Ms. ESCARAMEIA said that, as she understood it, only the first part of the topic—that relating to prevention—had been taken up, and the aspects relating to liability remained to be considered, so the Commission was not before a new topic but before the continuation of an existing one. The Sixth Committee of the General Assembly had strongly urged the Commission to take up the second part of the topic at the current session. Like previous speakers, she thought that it should be included as an item in the provisional agenda. If that was not possible, the provisional agenda could be adopted as it stood on the understanding that informal consultations would subsequently be held on the subject.
10. Mr. BROWNLIE said that the question was whether the Commission could accept a proposal made by a group of States in a peremptory manner. While the views of States had to be taken into account, the members of the Commission, who were not representatives of States, should be able to express their own views in due course and in good order.
11. Mr. TOMKA proposed that the provisional agenda contained in document A/CN.4/520 should be adopted on the understanding that the Commission would come back to the issue of new topics to be included in its agenda and would report on that issue to the General Assembly in its report on the work of its current session.
12. Mr. MANSFIELD said that he did not see a peremptory request in the note under consideration, but, rather, an expression of surprise on the part of a group of States that a topic on which the Commission had not concluded its consideration was not contained in its provisional agenda. As he shared that surprise, he would like some explanation to be given to him in the context of informal consultations before the provisional agenda was officially adopted.
13. Mr. RODRÍGUEZ CEDEÑO said that the agenda could be adopted on a provisional basis with the understanding that informal consultations would be held as quickly as possible, for example, in the framework of a working group. Perhaps the consideration of the topic could be postponed until the second part of the current session. He was in favour of the inclusion of the topic in the agenda.
14. Mr. COMISSÁRIO AFONSO said that he agreed with those members who favoured the inclusion of the topic in question in the agenda.
15. Mr. OPERTTI BADAN suggested that the Commission should provisionally adopt the agenda and immediately proceed in a way that would enable it to come back to the topic. The provisional adoption of the agenda must not be regarded as prejudging whether or not the topic under consideration would be included. The position of the group of States in favour of inclusion could not be considered futile and must be given the members’ full attention.
16. Mr. PAMBOU-TCHIVOUNDA said that the topic could not be included in the agenda without first being considered, in keeping with the Commission’s practice. That could be done only under agenda item 10, “Programme, procedures and working methods of the Commission and its documentation”. It was up to the Planning Group or even a working group to take a decision to that effect. Not until the report on the work of the current session could the Commission inform the General Assembly that it had accepted the request of a group of States and might include the topic in the agenda of one of its later sessions. The provisional agenda could very well be adopted without any impact on the outcome of the initiative of the group of States, it being understood that the Commission reserved the right to consider the initiative under agenda item 6.
17. Mr. PELLET said that he was shocked by the interference of certain States in the Commission’s work and regarded their initiative as an unacceptable precedent. He was also shocked by the precipitous way in which certain members wanted to include the topic in the agenda, although everyone knew how sensitive the problem was. Like Mr. Opertti Badan, Mr. Pambou-Tchivounda and Mr. Rodríguez Cedeño, he thought that, once the agenda had been adopted, an open-ended working group should be set up to reflect calmly on what to do about the topic, which, in any case, was still on the Commission’s programme of work. The provisional agenda should therefore be adopted on the understanding that a working group would be established on the problem of injurious consequences arising out of acts not prohibited by international law and that the Commission would adopt new topics without delay.

18. Mr. GALICKI said he agreed with that proposal and pointed out that, although in paragraph 3 of General Assembly resolution 56/82 the Sixth Committee had requested the Commission to proceed with its work on the liability aspects of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, in paragraph 8 it had also requested the Commission to begin its work on the topic of the responsibility of international organizations. But the note of the group of States was a strange document: members were not required to take instructions from Governments. He thought that the provisional agenda should be adopted as it stood.

19. Ms. XUE said she endorsed Mr. Tomka's suggestion that the issue should be set aside for the moment and that informal consultations should be held to meet the concerns of all members. The concerns of Governments, which members came from, were equally important and must be taken into account.

20. Mr. CANDIOTI said that the item in question had been on the Commission's agenda for more than 20 years. For him, the question was not why it should be included, but why it should be excluded.

21. The CHAIR said that at issue was not whether to continue with the part of the topic on "liability", but whether that was how items should be included in the provisional agenda.

22. Mr. CHEE stressed that the Commission's statute made it an independent and autonomous body. The request of the group of States jeopardized that autonomy. The Commission must, however, not lose sight of the importance of the topic of liability, and he therefore supported the proposals by Mr. Pellet and Mr. Tomka.

23. The CHAIR said that the point was not whether or not the Commission should deal with the topic, but whether, under the circumstances, the topic should be on the provisional agenda. He endorsed the suggestions by Mr. Operti Badan, Mr. Pambou-Tchivounda and Mr. Tomka that the provisional agenda should be adopted as it stood, bearing in mind that the Commission would take up the question of new agenda items, obviously including the item on international liability for injurious consequences arising out of acts not prohibited by international law and the item on the responsibility of international organizations, as a matter of priority. However, the Commission should not adopt a new method of including items in the agenda because, in the long run, that might cause problems. Clearly, the Commission would accept the General Assembly's request. The only question was whether it would depart from the way in which it had adopted the agenda for many years—in keeping with a certain process and not on the spur of the moment. If he heard no objection, he would take it that the Commission wished to adopt the proposal by Mr. Operti Badan and Mr. Tomka.

It was so decided.

The agenda was adopted.

Filling of casual vacancies in the Commission (article 11 of the statute) (A/CN.4/522 and Add.1)

[Agenda item 1]

24. The CHAIR said that, in accordance with article 11 of the Commission's statute, the Commission itself would fill the vacancy; the curricula vitae of the two candidates had been circulated to the members. As was customary, the election would take place in closed session.

*The meeting was suspended at 5.35 p.m.
and resumed at 5.45 p.m.*

25. The CHAIR announced that the Commission had elected Mr. Kabatsi to fill the vacancy resulting from the death of Adegoke Ajibola Ige.

Organization of work of the session

[Agenda item 2]

26. The CHAIR drew the members' attention to the programme of work. Mr. Yamada, the Chair of the Drafting Committee, would submit the list of that body's members the next day. He asked the Chair of the Planning Group to prepare the list of that group's members.

27. Mr. YAMADA (Chair of the Drafting Committee) said that it had been the Commission's practice for the Drafting Committee to have about 14 members and that, in order to ensure optimal participation, its composition should vary depending on the topic under consideration. He requested members who wished to take part in the Committee on a particular topic to make themselves known and said that the Committee's composition should be based on the equitable representation of regions and legal systems.

The meeting rose at 5.50 p.m.

2712th MEETING

Tuesday, 30 April 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr.

Kemicha, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR

1. Mr. DUGARD (Special Rapporteur), providing the Commission with an overview of the work undertaken to date, recalled that he had submitted his first report on diplomatic protection⁴ at the fifty-second session, in 2000. The report had been devoted mainly to the subject of nationality of claims. After a debate and an open-ended informal consultation, the Commission had decided to refer articles 1, 3 and 5 to 8 to the Drafting Committee, together with the report of the informal consultations. The addendum had not been considered for lack of time. At the fifty-third session, the Commission had considered the addendum to the first report, which dealt with continuous nationality, as well as part of the second report (A/CN.4/514), which focused on the general principles relating to the rule on the exhaustion of local remedies. The Commission had decided to refer article 9, on continuous nationality, and articles 10 and 11, on the exhaustion of local remedies rule, to the Committee; articles 12 and 13 in that report had not been considered. So far, the Committee had not had the opportunity to take up any of those provisions; it would begin doing so that afternoon.
2. Paragraphs 11 and 12 of the third report (A/CN.4/523 and Add.1) set out his approach. Diplomatic protection was a subject on which there was a wealth of authority in the form of codification attempts, conventions, State practice, jurisprudence and doctrine. Indeed, no other branch of international law was so rich in authority, something which did not, however, mean the authorities were clear or certain. Indeed, they were frequently inconsistent and contradictory. The Commission must choose between the competing rules. His task was to present all the authorities and options so that the Commission could make an informed choice.
3. The third report set forth article 14, which considered the circumstances in which the exhaustion of local remedies rule did not apply, and article 15, which addressed the burden of proof in the application of the rule. He had prepared an addendum, currently in translation, which dealt with the Calvo clause,⁵ and he hoped to take up the topic of denial of justice, possibly in a working group later or at the next session. He was aware that the subject of denial of justice was controversial, that it was largely a primary rule and that the emphasis in the draft articles was on secondary rules, but it was impossible for the Commission to complete a study on diplomatic protection without examining the Calvo clause and denial of justice, both of which had featured prominently in the jurisprudence on the subject. The Commission must consider whether or not it wished to include a provision on denial of justice.
4. In his next report, he planned to turn to the subject of nationality of corporations, and he hoped that there would be an opportunity in a working group in the second part of the session to consider the direction that he should take on the subject. He did not wish to extend the scope of the present draft articles beyond the traditional topics falling within the subject of diplomatic protection, namely nationality of claims and the exhaustion of local remedies. If the Commission confined itself to those two topics, it would be possible to complete a set of draft articles on first and second reading by the end of the quinquennium.
5. In the course of debate in the previous quinquennium, suggestions had been made to include a number of other matters in the field of diplomatic protection, such as functional protection by international organizations of their officials. This was a very important item and should be considered by the Commission, but not necessarily in the present set of draft articles. It raised many different issues, and if the Commission included it, it would be virtually impossible to complete the draft articles by the end of the quinquennium. He suggested recommending it for a separate study. An analogy was to be found in the approach to the draft articles on State responsibility, where the Commission had left the subject of the responsibility of international organizations for a separate study.
6. Other matters that had been suggested were equally innovative and controversial and might also delay conclusion of the draft. He spoke in paragraph 16 of the third report of the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and possibly also of the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned. This was an important matter, as was the case where a State or an international organization administered or controlled a territory, and he could see the Commission examining the question of diplomatic protection of persons living in East Timor under international administration or, even more difficult, diplomatic protection of the occupants of the West Bank and Gaza. As the Special Rapporteur on that subject for the Commission on Human Rights, he was not afraid of considering that subject, but if the International Law Commission became involved in topics such as the Middle East, the debate would go well beyond the traditional field of diplomatic protection.
7. Articles 12 and 13 were taken up in paragraphs 32 to 67 of his second report. The two provisions must be

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

⁴ See *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

⁵ See *Yearbook ... 1956*, vol. II, document A/CN.4/96, p. 206.

read together. Both dealt with the question whether the exhaustion of the local remedies rule was one of procedure or of substance—perhaps the most controversial matter in the field of exhaustion of local remedies. He might have made it even more controversial by suggesting that the Commission should depart from the provision adopted at its twenty-ninth session⁶ and confirmed at its forty-eighth session within the draft articles on State responsibility provisionally adopted by the Commission on first reading.⁷ In his view, the rule was essentially one of procedure, rather than of substance, and the matter should therefore be reconsidered.

8. Essentially, there were three positions: the substantive, the procedural and what he would call the mixed position. Those in favour of the substantive position, including Borchard and Ago, maintained that the internationally wrongful act of the wrongdoing State was not complete until the local remedies had been exhausted. There, the exhaustion of local remedies rule was a substantive condition on which the very existence of international responsibility depended. Those who supported the procedural position, for example Amerasinghe, argued that the exhaustion of local remedies rule was a procedural condition which must be met before an international claim could be brought. The mixed position, argued by Fawcett, drew a distinction between an injury to an alien under domestic law and an injury under international law. If the injury was caused by the violation of domestic law alone and in such a way that it did not constitute a breach of international law, for instance a violation of a concessionary contract, international responsibility arose only from the act of the respondent State constituting a denial of justice, for example, bias on the part of the judiciary when an alien attempted to enforce his rights in a domestic court. In that situation, the exhaustion of local remedies rule was clearly a substantive condition that had to be fulfilled. On the other hand, if the injury to the alien violated international law, or international law and domestic law, international responsibility occurred only at the moment of injury, and the exhaustion of local remedies rule was a procedural condition for bringing an international claim. For instance, if the respondent State was guilty of torturing an alien and there was a remedy under domestic law, an international wrong was committed when the act of torture occurred, but if there was a remedy before the domestic courts, it must be exhausted before an international claim could be brought. In that case, the exhaustion of local remedies rule was simply a procedural condition which must first be fulfilled.

9. Some had argued that the three positions were purely academic, but the question of the time at which international responsibility arose was often of considerable practical importance. First, in respect of the nationality of claims, the alien must be a national at the time of the commission of the international wrong. Hence, it was important to ascertain at what time the international wrong had been committed. Second, there might be a problem of court jurisdiction, as had happened in the *Phosphates in Morocco* case. There the question had arisen as to when international responsibility occurred for the purpose of

deciding whether or not the court had jurisdiction. Third, there was the case of waiver. He would argue later that a State could waive the exhaustion of local remedies rule, but clearly it could not do so if the rule was a substantive one, as no international wrong would be committed in the absence of the exhaustion of local remedies. For that reason, the Commission must decide which of the three positions to adopt. The difficulty was that the sources were not clear. Attempts at codification seemed deliberately ambiguous. At its twenty-ninth session, in 1977, the Commission had adopted article 22 of the draft articles on State responsibility,⁸ which clearly supported the substantive view. On the other hand, in 2000 Kokott had taken a purely procedural position in reporting to ILA.⁹

10. Prior to 1977, there had been a discernible trend in favour of the procedural view, an assessment that was now open to challenge, simply because the attempts at codification were likewise vague and open to different interpretations that lent support for either the procedural or the substantive position. The leading case was *Phosphates in Morocco*, and it was interesting to recall that Ago, who had been counsel for Italy, had argued the substantive position. In the case, France had accepted the compulsory jurisdiction of PCIJ in 1931 in respect of any dispute arising thereafter. Italy had complained that France had violated an international obligation *vis-à-vis* Italian nationals in 1925 in Morocco, but argued that the wrong had not been complete until 1933, when the local remedies or their equivalent had finally been exhausted. Thus, in essence Italy had supported the substantive position. France, on the other hand, had contended that the rule of the exhaustion of local remedies was *no more* than a rule of procedure and that the international responsibility was already in being, but could not be enforced through the diplomatic channel or by recourse to an international tribunal or to the Court unless remedies had first been exhausted. The Court had found in favour of France and held that there had been no new factor after 1925 that had given rise to the international responsibility of that country. He had quoted the Court's dictum on the case at some length and had italicized an important statement by the Court, namely, "*This act [i.e. the wrongful act committed in 1925] being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States.*" [p. 28]. It was interesting that that sentence had not been quoted by the Commission when it had discussed that decision. Special Rapporteur Ago, examining the *Phosphates in Morocco* case, had maintained that the Court had not ruled against the substantive position. His own interpretation of that passage, however, was that the Court had supported the French contention, which had argued the procedural position. That was also Amerasinghe's view. Thus, judicial decisions, although they might be unclear, at least contained one example in favour of the procedural position, namely the *Phosphates in Morocco* case.

11. State practice was of little value, because it usually took the form of arguments presented in international pro-

⁶ See *Yearbook ... 1977*, vol. II (Part Two), p. 30.

⁷ See *Yearbook ... 1996*, vol. II (Part Two), p. 58.

⁸ See footnote 6 above.

⁹ ILA, *Report of the Sixty-ninth Conference* (London, 2000), p. 606, at pp. 629 and 630.

ceedings and, inevitably, a State was bound to espouse the position that best served its own interests. In the *Phosphates in Morocco* case Italy had argued strongly in favour of the substantive approach, yet 50 years later, in the *ELSI* case, it had backed the procedural position. Hence, no clear conclusion could be drawn from arguments put forward by States, and this form of State practice was not very helpful. One example of State practice, however, that was useful had been the response of the United States Department of State to García Amador's first report on State responsibility, in which it had taken a stance in favour of the "third position".¹⁰

12. Academic opinion was divided on the issue. The third position, which he preferred, had received too little attention. Fawcett maintained that a distinction should be made between the cause of action and the right of action, and set out three possible legal situations in which the operation of the local remedies rule should be considered.¹¹ Case I was where the action complained of was a breach of international law but not of local law. In such a situation, the local remedies rule clearly did not apply, because the act was not contrary to local law, and there were no local remedies to exhaust. The example of apartheid in South Africa came to mind. Apartheid had clearly violated a rule of international law, but had been condoned and, indeed, promoted by the apartheid regime. Hence, there had been a violation of international law, but not of domestic law. Case II was where the action complained of was a breach of local law but not of international law, for example a breach of a contract between the respondent State and an alien. In such a case, the international responsibility of the delinquent State was not engaged by the action complained of; it could only arise out of a subsequent act of the State that constituted a denial of justice to the injured party when he sought a remedy for the action of which he complained. In that case, the local remedies rule acted as a substantive bar to an international claim, as no claim arose until a denial of justice could be demonstrated. Case III, which was controversial, was where the action complained of was a breach of both local and international law. In those circumstances, Fawcett argued that the exhaustion of local remedies rule operated as a procedural bar to an international claim.

13. In his opinion the third school of thought was the most satisfactory. For example, a State which tortured an alien incurred international responsibility at the moment when the act was committed, but it might also find itself in violation of its own legislation. If a domestic remedy existed, it must be exhausted before an international claim could be raised; in such a case, the local remedies rule was procedural in nature.

14. Draft articles 12 and 13 sought to give effect to that conclusion; academic opinion offered some support for such a position, but other views were also represented. Moreover, the Commission might find it difficult to depart from the position it had adopted in article 22 of the draft articles on State responsibility. However, in propos-

ing that article, the Special Rapporteur on State responsibility had assumed that the document in its final form would distinguish between obligations of conduct and result, a distinction which had not been retained. Hence, the Commission was free to adopt the view he had proposed; whether his formulation gave full effect to that position was a matter for the Drafting Committee.

15. Mr. GAJA said that, while he might disagree with many of the Special Rapporteur's conclusions, he found them thought-provoking and believed that the final product would be a good one.

16. It was he who had proposed consideration of the issues mentioned and rejected in paragraph 16 of the third report, all of which related to situations where a State or entity other than the State of nationality had been held to be entitled to exercise diplomatic protection: functional protection by international organizations of their officials; the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew or passengers, irrespective of the nationality of the latter; the case where a State exercised diplomatic protection of a national of another State as a result of the delegation of such a right; and the case where a State or international organization administered or controlled a territory.

17. For example, in the *M/V "Saiga" (No. 2)* judgement, ITLOS had found that the ship's State of nationality was entitled to bring a claim for injury suffered by members of the crew, irrespective of their individual nationalities; thus, the State of nationality did not possess an exclusive right to exercise diplomatic protection. In that context, he had suggested that the Commission should also consider the consequences for the State of nationality of an international organization's entitlement to exercise diplomatic—not functional—protection; the question of the competing claims of the State of nationality and the United Nations with regard to personal injuries to United Nations officials had been raised by ICJ in 1949 in *Reparation for Injuries*.

18. If the Special Rapporteur and the Commission concluded that one or all of those topics did not merit specific consideration in the draft articles, they should at least be mentioned in the commentary. In any case, the Commission should be guided by contemporary practice rather than by tradition in determining the relevance of an issue.

19. Paragraph 55 of the second report referred to his own book on the exhaustion of local remedies.¹² However, owing perhaps to an inaccurate translation, the Special Rapporteur had mistakenly stated that he had argued "that the exhaustion of local remedies rule [was] a 'pre-supposition' for unlawfulness"; in reality, he had held that the exhaustion of local remedies was a precondition for unlawfulness, although he had indeed maintained in the book that that precondition was substantive rather than procedural in nature. His main argument had been that where local remedies were required to be, and had not been, exhausted, diplomatic protection could not be exer-

¹⁰ Reproduced in M. M. Whiteman, *Digest of International Law*, vol. 8 (1967), p. 789.

¹¹ J. E. S. Fawcett, "The exhaustion of local remedies: substance or procedure?", *BYBIL*, 1954, p. 452.

¹² G. Gaja, *L'esaurimento dei ricorsi interni nel diritto internazionale* (Milan, Giuffrè, 1967).

cised, no claim in relation to an alleged breach could be put forward and countermeasures could not be taken. One might well wonder what the practical significance was of an alleged breach which had no consequences at the international level for either the State or the individual concerned, and for which no remedy was available. He had held that, since the precondition applied to all procedures relating to such a case, it must be regarded as substantive.

20. The question of the nature of the local remedies rule raised difficult theoretical questions; it also had political implications, since the procedural theory was widely perceived as belittling the importance of a rule that many States considered fundamental. In view of those problems and the lack of consensus within the Commission, it might be unwise to endorse any of the competing views. The Special Rapporteur had rightly questioned the wisdom of article 22 of the draft articles on State responsibility, a problem that had been resolved by deleting the draft article and taking a neutral approach to the exhaustion of local remedies in article 44 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.¹³ Perhaps it would be equally wise to delete articles 12 and 13 from the draft on diplomatic protection. Undeniably, some implications might follow from the adoption of one or another of the theories mentioned by the Special Rapporteur, but they were not of primary importance and did not justify inclusion of the draft articles in question.

21. He did not agree that waivers were inconsistent with the substantive nature of the local remedies rule. States could waive a precondition for admissibility with regard to either a substantive or a procedural issue. Waivers should not be treated lightly; in the *ELSI* case, a Chamber of ICJ had stated that it found itself “unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so” [para. 50]. Furthermore, he had pleaded for the Italian Government in the *ELSI* case and did not agree with the Special Rapporteur that it had been in Italy’s interest to hold that the local remedies rule was procedural in nature (A/CN.4/514, para. 51); in any case, the Government had not taken that position.

22. Mr. BROWNLIE said that, while the Special Rapporteur had compiled a great deal of important material in his third report, he had been overly limited by academic studies of the issue of local remedies. The question of whether such remedies were substantive or procedural in nature was, to some extent, inescapable in special circumstances such as those of the *Phosphates in Morocco* case. However, he did not find that distinction very useful or relevant as a global approach to the problem. Generally speaking, he supported the approach taken by Fawcett, whose interest in the question of local remedies was based not on academic theory, but on practical experience.

23. It would be preferable to undertake an empirical study of the local remedies rule on the basis of three ra-

tionales: policy, practice and history. Very interesting material was to be found in State practice and especially in nineteenth-century sources. For example, if a British expatriate had built up a successful business in Ruritania and his business was destroyed by local rioters, he went to seek help from the British consulate. However, in such circumstances the British Government was very unsympathetic, because of the principle of assumption of risk on the basis of the business owner’s voluntary, persistent links with Ruritania. Accordingly, he was referred to the local courts. The Government’s view had been based on common sense rather than on issues of procedure or substance. In a modern example, the written pleadings of Israel in *Aerial Incident of 27 July 1955* had argued that it would be unfair to ask the Government representing the victims of an Israeli aircraft shot down by the Bulgarian defence forces to seek redress in the Bulgarian courts since neither the victims nor their families had any voluntary link to Bulgaria.

24. In any event, even if a case was subsequently dealt with through the diplomatic channel, it was useful to have the facts established rapidly in the local courts. Moreover, Governments had taken the view that it was not appropriate for small claims to be addressed initially through the diplomatic channel, an approach which might affect diplomatic relations between States. For all those reasons, the Commission should give greater consideration to the policy basis of local remedies. From a practical point of view, local remedies would acquire greater importance if the Commission took the view that disputes should be settled at the domestic level whenever possible, and a voluntary link rule would place various restrictions on the operation of the local remedies rule. For that reason, it was unfortunate that the voluntary link question, which was just one aspect of the policy issue, had been raised only in article 14. The reader of the draft articles in sequence would gain the impression that the local remedies rule applied in all cases. If the Commission wished to pursue the question of a voluntary link rule, that decision would affect draft article 10 and all subsequent articles. It would therefore be premature to refer that portion of the document to the Drafting Committee; the current emphasis on the distinction between procedure and substance must be heavily qualified.

25. Mr. SIMMA said that, while he supported Mr. Brownlie’s remarks concerning the importance of voluntary links to a State, the Special Rapporteur had made it clear that the distinction between substance and procedure was of practical relevance to the topic under consideration, as was demonstrated in the *Phosphates in Morocco* case. Furthermore, he tended to agree with Mr. Gaja that a State which waived the local remedies precondition should be considered to have agreed to a lower threshold for the commission of an internationally wrongful act; some rules were not peremptory in nature but were open to agreement between States.

26. Mr. BROWNLIE said that the *Phosphates in Morocco* case was one specific example; the *Aerial Incident of 27 July 1955* case and his Ruritania example, on the other hand, illustrated the importance of the absence or presence of a voluntary link between the victim and the

¹³ *Yearbook ... 2001*, vol. II (Part Two) and Corrigendum, chap. IV, para. 76.

State. He agreed that the distinction between procedure and substance was inescapable, and did not contend that it was non-applicable, but he objected to the use of that distinction as a comprehensive framework for the issue as a whole. It was not a suitable general vehicle for approaching the subject.

27. Mr. PELLET said that, while he would do his best to comply with the Special Rapporteur's wishes with regard to the scope of the present debate, he would be unable to refrain entirely from touching on article 14. Paragraphs 1 to 12 of the third report called for no particular comment, but he was disturbed by certain peremptory assertions in paragraphs 13 to 17. First, with regard to denial of justice, following lengthy debate and despite some dissenting opinions, the Commission had concluded that that question should not be dealt with specifically in the draft articles. He was thus somewhat surprised at the Special Rapporteur's announcement of his intention to return to it. If the start of each new quinquennium was used as a pretext for reverting to positions adopted by the Commission in previous years, no topic would ever be brought to a successful conclusion. The Special Rapporteur should resist the temptation to take on the role of Odysseus's wife.

28. On the matter of substance, he reiterated his opposition, not necessarily to the substance of the Special Rapporteur's positions—which in any case, true to his chosen role of Penelope, the Special Rapporteur did not really explain, instead merely promising to do so—but rather to his line of approach. That opposition was not rooted in the fact that, in tackling the question of denial of justice as such, the Commission would be dealing with primary rules: after all, the distinction was neither evident nor written in stone, and nothing in any case prohibited the Commission from dealing with primary rules. Rather, he was opposed to it dealing with the question itself, because denial of justice was merely one of the manifestations of the more general rule whereby local remedies must be regarded as exhausted if they had failed or were doomed to failure. In that regard, it seemed to him from his perusal of the section of the third report dealing with article 14 that the articles could be drafted in such a way as to cover denial of justice without any need to make specific reference to it. For that reason, he was firmly convinced that it would be better not to discuss article 14 in the Drafting Committee without having first seen what the Special Rapporteur was proposing with regard to denial of justice—for the possibility of merging article 14 with a draft article on denial of justice must remain an open question. Furthermore, to deal with denial of justice would involve the Commission in entirely unnecessary incursions into the realm of States' internal law.

29. However, he had no problem with the idea of studying the Calvo clause in the context of the draft articles—although the question of its validity in international law was another matter. It could be argued, on the basis of international law alone, that the issue was a separate one, albeit closely linked to the question of who was the holder of the right to diplomatic protection. That being said, the Calvo clause should perhaps be studied from the more general perspective of the waiver of diplomatic protection (not necessarily by means of a Calvo clause), whether by

the beneficiary or by the State entitled to exercise it. Thus, while the Commission needed to look more closely at the Calvo clause and to adopt a firm position on it, without sitting on the fence, the Special Rapporteur should approach the question from a broader standpoint.

30. It was gratifying that the Special Rapporteur had recalled his commitment to tackle the question of the diplomatic protection of corporations, and the proposal to establish a working group on that sensitive issue was a good idea. However, the group should consist of only a few members, for the subject was highly technical and did not lend itself to "legal tourism".

31. As to paragraph 16, he reiterated his firm opposition to the idea of "nationality of claims". Nationality attached not to the claims but to the persons, ships or aircraft involved. Nationality of claims was a common-law concept which had no place in international law. Nevertheless, the Special Rapporteur was right to seek to exclude from the scope of the draft articles functional protection and the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew or passengers (para. 16, cases (a) and (b)). Both those matters were extensions of the topic under consideration. However, he was persuaded by Mr. Gaja's argument that the Commission should consider functional protection when it arose in conjunction with diplomatic protection. The Special Rapporteur was also right to rule out consideration of the case where an international organization controlled a territory. It was a very specific form of protection, one at least as closely related to functional as to diplomatic protection; and, as in the case of the articles on State responsibility, the Commission should disregard all issues relating to international organizations. On the other hand, he was much more reluctant to abandon the other case referred to under case (d) of paragraph 16, that of a State administering or controlling a territory not its own. Nor could he agree to the elimination of case (c), that of a State exercising diplomatic protection of a national of another State as a result of the delegation of such a right. Both those cases fell squarely within the scope of the topic.

32. The reason was that diplomatic protection was merely an extension of the topic of State responsibility, in the context of which it should, in his view, have been considered. The present topic had, for various reasons, been artificially detached from the topic of State responsibility. The question was to determine how a State could obtain reparation for the injury caused to one of its nationals by the internationally wrongful act of another State. At issue was the means of implementing State responsibility, and he saw no reason for excluding the two cases he had cited. The case of control of a territory by a State could be inferred from several of the articles on State responsibility for internationally wrongful acts, in particular articles 8 and 11.

33. He also wondered whether the topic of diplomatic protection would be fully covered without some discussion of the effects of the exercise thereof. The Special Rapporteur should perhaps address that aspect of the topic in future reports.

34. With reference to articles 12 and 13, he endorsed the comments by Mr. Brownlie and Mr. Gaja almost unreservedly. As he had already had occasion to remark, he failed to understand the Special Rapporteur's fascination with the question of whether the rules of diplomatic protection were of a procedural or a substantive nature. He could understand why Mr. Roberto Ago had taken an interest in the question in the context of the original topic of State responsibility: for Ago, the point at issue had been at what moment an internationally wrongful act arose. Ago, however, had clearly been biased by his positions in the *Phosphates in Morocco* case, and it had to be said that those positions were not tenable. Nonetheless, it had been legitimate to put the question in those terms. However, when viewed purely in the context of diplomatic protection, the question seemed to lose its relevance; and he agreed with Schwarzenberger's view that the distinction was purely theoretical.¹⁴ The postulate was that an internationally wrongful act had been committed; the only question to be considered was thus on what conditions—and perhaps under what procedures—reparation could be required when an individual was injured; for in the absence of an internationally wrongful act, diplomatic protection would not arise.

35. Seen from that perspective, the issue was straightforward: diplomatic protection was a procedure whereby the international responsibility of the State could be implemented; exhaustion of local remedies was a prerequisite for implementation of that procedure; and whether it was a substantive or a procedural rule mattered little. That contention was illustrated not only by the draft article 10 proposed by the Special Rapporteur during the previous session¹⁵ but also by the excellent formulation adopted in 1929 by the Preparatory Committee of the Conference for the Codification of International Law, held at the Hague in 1930,¹⁶ and cited in paragraph 37 of the second report. It was also the position taken in article 44, subparagraph (b) of the draft articles on State responsibility for internationally wrongful acts adopted at the previous session. On the other hand, he failed to see what purpose was served by the qualification of the word “precondition” with the adjective “procedural” in the draft article submitted to ILA¹⁷ and cited in paragraph 43 of the second report.

36. Consequently, he had with great regret to say that he saw no value in articles 12 and 13. Article 10, in clear terms, and article 11, more confusedly, stated what was universally recognized and had been clearly enunciated in 1929, namely, that “the State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State”.¹⁸ That was correct, and it was also suf-

ficient. To reiterate, an internationally wrongful act must by definition have been committed before the question of diplomatic protection arose. If a State could make reparation under its municipal law for the damage sustained, it must be given the possibility of doing so. That idea was the very *raison d'être* of the exhaustion of domestic remedies rule. While Mr. Brownlie's comments were factually and historically correct, the State must nevertheless first be given the opportunity to make honourable amends. And if the responsibility arose from the fact that remedies were not available, it went without saying that there were no remedies to be exhausted and the case was covered by article 14. But articles 12 and 13 served no useful purpose in either case.

37. That did not mean he disagreed with the substance of the approach taken by the Special Rapporteur. Like the latter, he favoured a “third way”, a contention he would illustrate with examples different from those cited by the Special Rapporteur, especially as he had not been convinced by the example of apartheid, which seemed to him irrelevant. It was not clear, in the case of apartheid, what State could have exercised its right of diplomatic protection over the victims. Two better examples could be cited to illustrate that there was no need for article 12 or 13.

38. In a first example, State A nationalized the property of a national of State B without offering the national compensation, an act that clearly violated a rule of contemporary positive international law. Under articles 1 and 2 of the articles on State responsibility, the responsibility of State A was clearly entailed; but it could make reparation for the injurious consequences; and State B could not exercise its diplomatic protection until local remedies had been exhausted. That was stated in article 10, and hence there was no need for article 12 or article 13.

39. In a second example, a national of State D brought a complaint before the courts of State C regarding the amount of a tax levied both on himself and on nationals of State C. In that case, no rule of international law was violated. However, all the courts of State C, including its Supreme Court, then rejected the application by the national of State D, on the grounds that foreigners liable to tax had no right of appeal. That would constitute unlawful discrimination, and it would be the final decision of the Supreme Court that entailed the responsibility of the State for an internationally wrongful act. Yet the problem of exhaustion of domestic remedies would not arise—domestic remedies would be either impossible or doomed to failure. Thus, the rule in article 14 would be applicable and, once again, neither article 12 nor article 13 served any useful purpose. There was in fact no scenario in which they would serve any such purpose. Article 10 covered the one case, article 14 the other; and there was no intermediate case.

40. The drafting of article 12 was also open to question. He had already voiced his opposition to the term “procedural”. More serious was the question how a breach of local law could of itself constitute an internationally wrongful act. That seemed to contradict both the spirit and the

¹⁴ G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, p. 611.

¹⁵ See *Yearbook ... 2001*, vol. II (Part Two), chap. VII.

¹⁶ See League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference Drawn Up by the Preparatory Committee* (document C.75.M.69.1929.V), p. 16; reproduced in *Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 2, Basis of discussion no. 27, p. 225.

¹⁷ See footnote 9 above.

¹⁸ Texts of articles adopted on first reading by the Third Committee of the Conference for the Codification of International Law (The Hague,

1930) (document C.351(c)M.145(c).1930.V); reproduced in *Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 3, article 4, p. 225.

letter of the articles on State responsibility for internationally wrongful acts, and in particular article 3 thereof.

41. However, his reservations with regard to articles 12 and 13 related not to their drafting—which could be amended—but to their function. In his view, they had no function whatever. Accordingly, to his great regret, like Mr. Gaja and Mr. Brownlie, he could not support the Special Rapporteur's proposal that articles 12 and 13 should be referred to the Drafting Committee, especially bearing in mind that some passages of the second report commenting on those articles could certainly be incorporated into the commentaries to articles 10, 11 and 14.

42. Mr. SIMMA asked for clarification of Mr. Pellet's remark that more needed to be said about the effects of diplomatic protection.

43. Mr. PELLET said that more thought should perhaps be given to the question of the moment from which a State was assumed to exercise its diplomatic protection. Did the fact that a State exercised diplomatic protection on behalf of a person who had dual nationality prevent the other State of which he was a national from exercising diplomatic protection? If direct international remedies were available to a natural or legal person, did the exercise of diplomatic protection, assuming such exercise to be possible, prevent him from availing himself of the channels for direct access to international law; or, conversely, did an application to an international body prevent the State from exercising diplomatic protection?

44. The CHAIR said that Mr. Simma and Mr. Pellet seemed to disagree on the formal aspects of the commencement of the process of diplomatic protection. Was there a line which, once crossed, automatically entailed consequences, or were there grey areas in which two countries could both be pursuing what would eventually be diplomatic protection?

45. Mr. PELLET said that there was no real disagreement, but that the Chair was right in saying that the problem was to determine the time from which a State exercised diplomatic protection, and that there would probably be some grey areas. The next problem was to determine what happened when a State exercised diplomatic protection: Did that have any effect other than to set the reparation mechanisms in motion? Did it, for example, prevent certain actions from being taken at the international level? Again, once the time was determined, was the matter over and done with? In his opinion, the answer was in the negative, and it was on that point that he would like to convince the Special Rapporteur.

46. Mr. PAMBOU-TCHIVOUNDA said Mr. Pellet's remarks on the effects of diplomatic protection raised the question of whether the State had a discretionary right to exercise diplomatic protection. Was it the State alone that could determine the time from which international action could begin, or could that be done by the law? Mr. Pellet's remarks also responded to the concerns raised by Mr. Simma: Once the usual notification had been made, how did the machinery operate? Who was involved and who was left out?

47. Mr. OPERTTI BADAN said consideration should be given to whether the general principle of prevention that was part of procedural law applied when an individual had multiple nationality and consequently multiple sources of protection, yet one State exercised diplomatic protection. Surely that principle, which governed actions under domestic law and according to which the institution that was initially seized of a matter followed it through to the end, also applied in international law.

48. Mr. PELLET said his idea could be illustrated by the following example: suppose a person had dual nationality, Uruguayan and French, and suffered injury inflicted by Gabon. Uruguay was faster off the mark than France and exercised diplomatic protection. Did that prevent France from exercising diplomatic protection in its own right?

49. Mr. BROWNLIE said there was fertile ground for debate on the issue of modalities of protection, but that perhaps it should be taken up in the context of the Commission's long-term programme. The Special Rapporteur's topic was already complex enough, and adding more difficult issues might not be a good idea. As to the principle of prevention, States frequently exercised what might be called anticipatory diplomatic protection: they informed other Governments that if certain conditions obtained, they might find it necessary to exercise diplomatic protection in relation to their nationals whose interests appeared to be threatened by their host State.

50. Mr. SIMMA, referring to paragraph 16 of the third report in which the Special Rapporteur listed matters whose inclusion in the draft articles he opposed, said he himself did not agree that they should be excluded. The first matter was functional protection by international organizations of their officials. He agreed with Mr. Gaja that it was a separate subject but one that had links with diplomatic protection, as ICJ had demonstrated in the *Reparation for Injuries* case. The relationship between functional protection and diplomatic protection should be studied very closely, and something would probably have to be said in the draft articles about functional protection.

51. The Special Rapporteur's approach appeared to be a decidedly generalist, traditionalist one, diplomatic protection purified of everything that was new, and he was not convinced that it was appropriate. For example, the Special Rapporteur wished to exclude from the draft articles any mention of the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew. Mr. Gaja had already drawn attention to the *M/V "Saiga"* (No. 2) case heard by ITLOS. He himself would refer to draft article 14, subparagraph (c), which stated that local remedies did not need to be exhausted when there was no voluntary link between the injured individual and the respondent State. The draft articles on prevention of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-third session¹⁹ included a provision on equal access. To his mind, that meant that a person who had no voluntary connection with Ukraine but had been affected by an incident like Chernobyl could benefit from Ukrainian domestic remedies if Ukraine

¹⁹ See *Yearbook ... 2001*, vol. II (Part Two), p. 146, para. 97.

opened them up to all nationals of countries affected by transboundary pollution from the incident. The issue was a very topical one, one which might well arise more and more often in the future, including in connection with internationally sponsored terrorism, yet it was not taken up in the report.

52. The third item in the list the Special Rapporteur wished to exclude, the exercise by a State of diplomatic protection for a national of another State that had delegated that right, clearly needed to be covered by the draft. He could not imagine another issue that could more genuinely be a part of what the Commission should be trying to do in its work on diplomatic protection. On the fourth item, when a State or an international organization administered or controlled a territory, he agreed with Mr. Gaja and Mr. Pellet that a distinction must be drawn between an international organization administering a territory, which was a bit closer to functional protection and which consequently should be left aside for the time being, and that of a State administering a territory other than its own when questions of diplomatic protection might arise, which should be given further study.

53. Mr. CANDIOTI said that the Commission had been applying a general approach to the topic, focusing on the rules of nationality and exhaustion of domestic remedies, yet he seemed to recall that at the start of the exercise mention had been made of the “clean hands” doctrine. Should it be mentioned in the draft articles or excluded in order to determine how far the Commission intended to go in its work of codification?

54. Mr. TOMKA, referring to Mr. Simma’s example of the Chernobyl incident, said that in cases of diplomatic protection there was an underlying assumption that a breach of international law had occurred. The Chernobyl incident, however, had involved damage caused by lawful activities. Mr. Simma had likewise referred to the draft articles on prevention of transboundary harm, but they dealt with activities not prohibited by international law and were aimed at managing the risk that such activities could create.

55. Mr. PELLET said his impression was that Mr. Simma had raised the Chernobyl incident in a more theoretical context, asking whether a failure by Ukraine to provide domestic remedies to foreigners constituted a breach of international law. Chernobyl was a fairly complex and contemporary issue, and it was possible that there had been a breach of the obligation of prevention on the part of Ukraine.

56. Mr. SIMMA said his point had been that neighbouring fields in international law might be relevant to the subject of diplomatic protection. In the event of transboundary pollution, for example, if remedies were available for the local population but not for foreigners, that was of relevance to the topic of diplomatic protection and specifically to draft article 14, subparagraph (c). If local remedies were available for foreigners, if the latter chose not to make use of them and if their State of nationality exercised diplomatic protection on their behalf, the neighbouring State might complain that it had offered all neces-

sary local remedies but that no one had bothered to file a claim in its courts.

57. Mr. DUGARD (Special Rapporteur), offering a preliminary response to the remarks made so far and hoping to stimulate further debate, thanked Mr. Gaja for his description of the report as innovative. Mr. Simma, on the other hand, seemed to think he had taken a highly traditionalist and orthodox view. The matters he wished to exclude from the draft articles could, Mr. Gaja had suggested, be mentioned in the commentary, and he entirely agreed.

58. Members would remember that delegation of the right to exercise diplomatic protection, mentioned in paragraph 16 (c) of his third report, was partly dealt with in the context of continuous nationality, and the view had been expressed that it should be covered more fully in article 9. He agreed, and that was why he was not keen to embark on a more comprehensive discussion in the context of article 14. The “clean hands” doctrine would be addressed in article 5 or possibly the commentary thereto: the point would be made that a State could bring a claim only when its national was a national in good faith.

59. Mr. Pellet had expressed some surprise that the issue of denial of justice had raised its head again. His own view was that all issues that fell squarely within the field of diplomatic protection, particularly from the traditional perspective, must be taken into account. At the present stage, he was not in favour of including an article on denial of justice, for the reasons advanced, *inter alia*, by Mr. Pellet. Yet denial of justice and the Calvo clause had figured prominently in the evolution of diplomatic protection, particularly in Latin America, and several of the members of the Commission from that region had repeatedly raised the issue. The Commission must take a decision on whether to include the subject or not, and that was why he had brought it up.

60. As to the debate about whether the local remedies rule was substantive or procedural in nature, he was not particularly exercised about the distinction, as Mr. Brownlie had suggested, although he found it interesting, and he agreed with him that it was not a general framework for the study of diplomatic protection. As Mr. Brownlie himself had pointed out, however, one could not entirely escape from the issue of exhaustion of local remedies, for a number of reasons. It featured prominently in the first part of Ago’s draft articles on State responsibility as provisionally adopted on first reading by the Commission at its thirty-second session,²⁰ specifically article 22 thereof, and in all the writings on the local remedies rule. It had practical implications. In the *Phosphates in Morocco* case, ICJ had been concerned with the time at which the internationally wrongful act had occurred. The issue also arose in respect of nationality of claims, because the injured alien must be a national of the State in question at the time the injury occurred. When did the injury occur—at the time when the act was committed, or when local remedies had been exhausted? Waiver presented difficulties, and

²⁰ *Yearbook ... 1980*, vol. II (Part Two), pp. 25–61, paras. 17–34.

Mr. Gaja had raised an argument that certainly merited consideration.

61. He was prepared to accept that articles 12 and 13 were not well drafted, but the Commission could not walk away from the issue of exhaustion of local remedies. It had to decide at what time international responsibility arose in that context. He urged members to speak on the matter during the debate.

62. Mr. BROWNLIE said the Special Rapporteur had not reviewed his criticisms with sufficient care. What he had said about the procedural/substantive distinction was not that it should never be made, but that it did not provide a foundation for proper examination of diplomatic protection. The Special Rapporteur had made no reference whatsoever to the policy questions he had raised or the three rationales he had mentioned, which were really the point of his statement.

63. Mr. DUGARD (Special Rapporteur) recalled that he had announced he was giving a provisional, interim response to the discussion so far in order to facilitate further debate. He had not attempted to deal with all the important arguments made, but he would certainly do so on a future occasion.

Organization of work of the session (*continued*)

[Agenda item 2]

64. Mr. YAMADA (Chair of the Drafting Committee) announced that, account having been taken of members' wishes and of the need for equitable representation of regions and languages, it had been decided that the Drafting Committee for the topic of diplomatic protection would consist of the following members: Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Gaja, Mr. Galicki, Mr. Momtaz, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Ms. Xue, Mr. Dugard (Special Rapporteur) and Mr. Kuznetsov (Rapporteur, *ex officio*). Members of the Commission not appointed to the Committee would be entitled to attend its meetings, subject to their exercising restraint in making contributions to the proceedings.

The meeting rose at 1 p.m.

2713th MEETING

Wednesday, 1 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário

Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (*continued*) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. SIMMA said that two of the questions he wished to refer to had been raised at the preceding meeting: the "clean hands" rule and the concept of prevention. The third related to draft articles 12 and 13.

2. The "clean hands" rule, to which Mr. Candioti had referred, was entirely relevant to the discussion on diplomatic protection, but it could not be given special treatment. The same question had arisen during the consideration of the topic of State responsibility, namely, whether a reference to the "clean hands" rule should be included in the list of circumstances precluding wrongfulness. The Commission had decided that, although the "clean hands" rule should clearly be taken into account, it certainly could not constitute a circumstance precluding wrongfulness. In the context of the discussion on diplomatic protection, the issue was to decide to whom the rule must apply. It could be the State of nationality or the wrongdoing State, in which case it would be dealt with by local courts. The more relevant case for the Commission was that of the person who had sustained the injury. The fact that that person did not have "clean hands" by no means warranted his being deprived of his right to diplomatic protection. Thus, although the "clean hands" rule could not be left out, it did not have a specific place in the draft articles.

3. With regard to the concept of prevention, he agreed with the comment Mr. Brownlie had made at the preceding meeting on aspects outside the process of diplomatic protection *stricto sensu*, namely, circumstances preceding the commission of the internationally wrongful act. It would be entirely relevant to discuss them in greater detail, while being careful not to enter into considerations that might cause confusion.

4. The third and most important point related to the wording of articles 12 and 13. Following the criticism levelled at the preceding meeting, he had tried to reformulate

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

article 12 by removing the parts regarded as unnecessary by several members of the Commission. The view had often been expressed that the Commission should not take a position on a doctrinal matter, such as whether the exhaustion of local remedies was a procedural or a substantive issue. If the controversial elements were removed, namely, the words “is a procedural precondition”, the beginning of article 12 became redundant and could be replaced by the words “Local remedies must be exhausted before a State may bring an international claim”. The resulting text was virtually identical to that of article 10, which also set out the principle of the exhaustion of local remedies, with the exception of the last words: “where the act complained of is a breach of both local law and international law”. The Special Rapporteur had explained that that was based on what he considered to be one of the most important studies on the subject, namely, that of Fawcett,⁴ who referred to three cases. The question was whether, in any of those cases, deleting article 12 entirely and simply retaining article 10 would cause a problem.

5. In the first case, namely, where the injury was caused by a breach of international law, but not of domestic law, it was clear that the exhaustion of local remedies rule did not come into play. In the second case, where the injury resulted from a breach of domestic law, but not of international law, the issue of denial of justice arose. He was fully prepared to consider the possibility that the Commission was codifying a rule on denial of justice, but, in any case, that had nothing to do with the question whether the exhaustion of local remedies was a substantial or a procedural rule. In his opinion, the third case, in which the injury was a breach of both domestic and international law, was already fully covered by draft article 10. In conclusion, he agreed with Mr. Brownlie that the question of the distinction between the procedural rule and the substantive rule was inescapable, but it would be better dealt with in the commentary.

6. Mr. BROWNLIE said that he had serious reservations about the legal status of the “clean hands” concept, which was not really part of the topic of diplomatic protection. The Commission should perhaps state that, even if it was assumed that the principle had a legal status, it was not something which would affect the right of a State to exercise diplomatic protection. The concept was little used, however, except as a prejudice argument, and the Commission must therefore be careful not to legitimate it, in a sense, “accidentally”. Concerning the distinction between substance and procedure, he hoped that the Commission would produce practical results, and, if the Special Rapporteur was willing to reassess the importance of that distinction, he would like the Commission to follow Mr. Simma’s practical suggestions.

7. The CHAIR, speaking as a member of the Commission, said he hoped that the Commission was not in the process of taking a position on the “clean hands” rule, but simply indicating that it was leaving the question aside.

8. Ms. ESCARAMEIA said that, in her view, articles 12 and 13 were useful, but not as they now stood. She had al-

ways regarded the issue of local remedies as a procedural question, but, after hearing Mr. Gaja’s comments at the preceding meeting and having read some material on the subject, she acknowledged that the approach according to which the exhaustion of local remedies was a substantive condition was relevant in that it helped prevent an unfair result, for example, where there had been a change in nationality which limited the possibility for the claimant State to intervene on behalf of its national and the change had been entirely involuntary. If the Commission argued that the right to formulate a claim arose at the time the injury was caused, the result might not be fair. However, the main question which articles 12 and 13 must answer was that of the time as of which a claim could be made. It might be possible to say that the right to formulate a claim usually began at the time the wrongful act occurred, but that there were exceptions. If they were so worded, articles 12 and 13 would not duplicate article 10. She agreed that prevention was an important issue, but it must be dealt with carefully because certain acts which might occur prior to the commission of the wrongful act did not necessarily come under diplomatic protection.

9. Mr. PELLET said that he found the concept of prevention confusing. Since diplomatic protection came into play only after injury had been caused, what was being prevented? Preventing diplomatic protection would be meaningless, and preventing the commission of an illegal act lay outside the scope of the discussion. He was surprised that prevention was referred to in the context of diplomatic protection, because it had nothing to do with the topic. As far as the “clean hands” rule was concerned, however, he disagreed with Mr. Brownlie and believed that it was legitimate to raise the issue in connection with diplomatic protection. The question whether or not the person on behalf of whom diplomatic protection was exercised had “clean hands” could not be ignored and, whatever the conclusions drawn from it, it was important for the issue to be raised. The Special Rapporteur should therefore provide the Commission with further information on that matter, which was far more important than the denial of justice and was, moreover, directly linked to the topic under consideration.

10. Mr. GAJA, referring to the various possibilities mentioned in Fawcett’s study, said that the distinction between remedies available under domestic law and those available under international law reflected a dualist view and might lead to a theoretical debate that would complicate the issue unnecessarily; that was another reason for deleting article 12.

11. Mr. DUGARD (Special Rapporteur) said that he would prefer not to pursue the debate on the “clean hands” rule. The “clean hands” doctrine might arise in connection with the conduct of the injured person, the claimant State or the respondent State; it was difficult to formulate a rule applicable to all cases. He hoped that he need not construe the interventions of certain members as a suggestion that he should formulate a general rule on the subject, which would be better addressed in the commentary.

12. Mr. SIMMA said he thought that there had been a misunderstanding. Neither Mr. Candiotti, at the last meet-

⁴ See 2712th meeting, footnote 11.

ing, nor he himself, at the current one, had meant to say that the Special Rapporteur should prepare a draft article; they had merely said that the issue was perfectly relevant in the context of diplomatic protection and that it should be dealt with in the commentary.

13. Ms. XUE said that the three hypotheses concerning the exhaustion of local remedies in articles 12 and 13 might be sound theoretically but served little practical purpose; the real question was the extent to which injured persons were required to exhaust the local remedies available to them, which was reflected in article 14. A distinction between conditional and substantive requirements would greatly complicate the Commission's task, since it would involve detailed consideration of the remedies to be exhausted. It would be better to say that internationally wrongful acts which could not be addressed at the local level should be addressed at the international level. Article 14 tried to make clear the exceptions to the application of the rule on the exhaustion of local remedies. In such cases, the understanding was that the local law to which the person in question entrusted himself should include both national law and international law (conventions or customary law) to which the State was a party. Thus, even a breach of international law did not immediately allow the State of nationality to bring the case to the international plane; the injured person must first exhaust local remedies. That would be a practical approach to the whole matter, since, whether the condition was characterized as substantive or procedural, it would be quite clear that local remedies must be exhausted before a State could make an international claim.

14. Mr. PELLET said he did not think that the Special Rapporteur should undertake a comprehensive study of the "clean hands" issue, especially in the overblown interpretation adopted by certain members of the Commission. That was particularly true when it was asked whether the State responsible for an internationally wrongful act had "clean hands"; it must necessarily have "unclean hands" by virtue of having committed an internationally wrongful act. However, it was fair to ask whether the fact that the injured person had himself committed an internationally wrongful act or had placed himself in a situation where he could be accused of having "unclean hands" prevented the exercise of diplomatic protection. That issue was entirely relevant and he saw no reason why the Special Rapporteur should not address it.

15. With regard to articles 12 and 13, as Ms. Escameia had noted, the problem was whether there was a general rule, on the one hand, and an exception, on the other. There was, in fact, a general rule, that of the exhaustion of local remedies, and there were situations in which it was not compulsory. When a failure to comply with the right to a remedy was in question and it constituted the internationally wrongful act, it was obviously impossible to apply the rule. That case could be viewed as an exception, but it confirmed that articles 12 and 13 were indeed unnecessary.

16. Mr. SIMMA said he thought that he was one of the members who, according to Mr. Pellet, had an overblown concept of "clean hands". In that context, he had men-

tioned the situation in which a State of residence was accused of having violated the rights of an alien, thereby triggering the scenario of diplomatic protection, but he had merely been imagining all possible cases before working by process of elimination. In fact, he had eliminated the case in question using the arguments put forward by Mr. Pellet. He apologized for having followed a process of Teutonic reasoning.

17. Mr. DUGARD (Special Rapporteur) said that, at the risk of disappointing Mr. Pellet, he had written an addendum to the report in which he dealt with the Calvo clause, giving an example of "unclean hands" in which an individual entered into a contract with a Government in which he undertook to abide by local remedies and then, without any attempt to exhaust those remedies, proceeded immediately to the international level and requested diplomatic protection from his own Government. That question would be considered in due course and was doubtless one of the most important contexts in which it was necessary to examine the doctrine of "unclean hands" and diplomatic protection.

18. Mr. FOMBA began with the general remark that the reconvening of the Commission was an exploratory period for its new members. Efforts should thus be made to ensure that they were well prepared, by notifying them in advance, whenever possible, of the first topic in the debate, sending them the relevant documentation and indicating the status of work on each topic. He was thus grateful to the Special Rapporteur for having succinctly summarized, in the introduction to his third report on diplomatic protection (A/CN.4/523 and Add. 1), the present state of the study on the topic. From that summary, it could be learned that during its forty-ninth and fiftieth sessions, held in 1997 and 1998, the Commission had established two working groups, which had submitted reports⁵ that had been endorsed by the Commission. Those reports might usefully be made available, as they would provide an insight into the genesis of the topic and an understanding of its evolution. It would also be helpful to know how the Special Rapporteur saw his own approach in the context of the conclusions and recommendations reached by those working groups. Personally, he broadly endorsed the approach to the topic proposed by the Working Group established at the fiftieth session of the Commission and endorsed by the latter, which was described in subparagraphs (a) to (d) of paragraph 4 of the third report. With regard to the referral of draft articles 9, 10 and 11 to the Drafting Committee, it would be helpful to make the texts of those draft articles available and to provide a summary of the debate which had taken place on them.

19. The approach adopted by the Special Rapporteur, who invited the Commission to choose between rules that, depending on the criteria adopted, were competing, raised the question of the statutory role of the Commission with regard to codification and progressive development and of the difficulties to which that gave rise. Furthermore, while the Special Rapporteur had said that he did not seek to impose any one solution, he must nevertheless endeavour to convince the Commission of the relevance and techni-

⁵ See *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 171, and *Yearbook ... 1998*, vol. II (Part Two), p. 49, para. 108.

cal soundness of any solution proposed. He noted with satisfaction that, to assist the Commission, the Special Rapporteur had prepared an explanatory section of the report mentioning the various rules and their variants, accompanied by the relevant jurisprudence. That approach should assist members of the Commission in coming to a decision.

20. With regard to the future direction of the draft articles, he thought it essential to clarify the nature of the dialectical link between the internationally wrongful act, the international responsibility entailed thereby and the implementation of that responsibility, as had been pointed out by Mr. Pellet at the preceding meeting. Like Mr. Pellet, he thought that the expression “nationality of claims” was incorrect from the standpoint of French-speaking jurists.

21. The exhaustion of local remedies rule was sometimes described as a substantive, sometimes as a procedural condition. That gave rise to stimulating debates, which should not allow one to lose sight of the essential objective, namely, that the rules be functional and that the solutions proposed be as broadly acceptable as possible. The difficulties that raised might be circumvented by considering that rule simply as a condition, without further qualification—in other words, by adopting a more neutral formulation. As to denial of justice, which was presented as one of the important manifestations of the exhaustion of local remedies rule, it was useful and important to bear in mind that, as Mr. Pellet had pointed out, the Commission had not envisaged referring to it explicitly. If the scope of the draft was to be broadened, that too must be done in a neutral manner.

22. The distinction between primary and secondary rules also called for a pragmatic and flexible approach. As for the Calvo clause, over and above the legal questions it obviously raised, it should be studied, but from a general perspective, in the context of the overall approach to the question of waiver of diplomatic protection. On the question of the protection of corporations, he supported the Special Rapporteur’s suggestion that a small working group should be established.

23. Several of the other subjects, including functional protection and control of a territory by an international organization, related to the question of the responsibility of international organizations. In his view, those matters should not be mixed up, and things should be clarified by grouping together questions relating to that general problem. Consideration might also be given to the subject referred to, *inter alia*, in paragraph 16 of the third report, as well as to other subjects such as the delegation of the right of protection or the effects of the exercise of diplomatic protection.

24. Finally, with regard to articles 12 and 13, he fully supported the views expressed by Mr. Pellet, for the reasons so brilliantly set out by the latter. Thus, should there be a majority in favour of referring those articles to the Drafting Committee, he would naturally be ready to join that majority.

25. Mr. BROWNLIE said that he had listened with interest to the excellent *tour d’horizon* by Mr. Fomba, who had, however, made one point with which he disagreed, namely, that the Commission should associate the work on diplomatic protection with some study of denial of justice. He occasionally felt that the Commission had suicidal tendencies. Denial of justice was part of substantive law and of a bigger subject treatment of aliens. It was by no means related to diplomatic protection. It simply happened that, when aliens used the courts, there was sometimes denial of justice, and that could happen quite apart from any circumstances involving recourse to local remedies as such. It could occur whenever a physical or moral person voluntarily used the national courts of a given State. It thus seemed wholly unnecessary to take up the subject of denial of justice. To do so would be wholly illogical and would involve the Commission in enormous difficulties. He simply did not understand why some members took the contrary view.

26. Mr. OPERTTI BADAN said that the question of denial of justice touched on a substantive problem inasmuch as it concerned equal treatment of aliens and nationals in access to judicial systems. That subject was extensively treated in private international law, and conventions existed on the subject, particularly at the inter-American level, such as the two Additional Protocols to the Montevideo Treaties on Private International Law, which provided for the right of aliens to have access to the same remedies as nationals—a right reaffirmed by other, more recent texts. It seemed to him difficult to totally disregard the question of denial of justice, which could be one of the situations giving rise to the exercise of diplomatic protection.

27. Mr. MANSFIELD said that, while he sat in his capacity as an independent expert, he felt that he could bring the perspective of a small, remote country to the proceedings. He saw nothing surprising in the fact that, despite the wealth of doctrine and jurisprudence on the topic, much of it was, as the Special Rapporteur had pointed out, inconsistent or contradictory. Each State’s practice was influenced by very many factors, such as the possible effect of the exercise of diplomatic protection on its relations with the other States concerned at that point in time, the severity of the harm caused, and the public attention accorded to the case—all considerations that would be felt more acutely in small States. While codification work was useful, it was unlikely that practice would ever appear consistent. He therefore agreed with the Special Rapporteur that, where it was necessary to choose between competing rules, it was necessary to be guided not simply by the weight of authority but also by the fairness of a given rule in contemporary international society.

28. As to the scope of the draft articles, it seemed to him preferable, for practical reasons, not to expand it unduly, even though there might be linkages to other areas in need of codification. The question of functional protection of their officials by international organizations was of interest to small States, many of which had nationals employed by international organizations. If the possibility of protection rested solely with the State of nationality, there would be a risk of inequality of treatment among such officials. It should, however, be dealt with as a separate topic. An-

other topic mentioned had been the exercise of diplomatic protection under delegation. On the face of it this issue seemed significant for small countries and one which might merit inclusion in the draft articles. On reflection, however, he thought that in practice a State might be willing to lend various forms of assistance to another State less able to protect one of its nationals, but that in most cases this assistance would stop short of the lodging of a formal claim under delegation. For that reason, he agreed with the Special Rapporteur that it was not necessary to deal with that matter in the draft articles.

29. With regard to articles 12 and 13, the wealth of written material on the subject tended to obscure the various rationales for the exhaustion of local remedies rule, which were important and should be included in the commentary. At the same time, he thought it necessary to determine whether the issue was substantive or procedural. In his view, the third position referred to in paragraph 32 of the second report (A/CN.4/514) was the most satisfactory. In his view the question whether it was essential to take a decision at the current stage hinged on whether practical consequences would follow. In that regard he drew attention to the example, mentioned in paragraph 33 of the second report, of the implications for the rendering of a declaratory judgement in the absence of exhaustion of local remedies. There again, from a smaller State's perspective, in some cases the exhaustion of local remedies was simply not a practical possibility, for example, because of the prohibitive cost of the procedure. A declaratory judgement obtained in the absence of the exhaustion of local remedies might indeed be a potentially significant satisfaction which in fact led to practical changes. Such a possibility would, however, be precluded if the exhaustion of local remedies rule was characterized as substantive. Personally, he favoured the third position and considered that articles 12 and 13 should be retained, although they might need to be redrafted.

30. Mr. TOMKA congratulated the Special Rapporteur on his determination to complete the work on diplomatic protection during the quinquennium that was now beginning.

31. Despite the multitude of different texts, the question was one of choosing not between competing rules but between differing interpretations of the customary rule. The Commission's job was to propose a formulation for the rule which States would either approve or disapprove, or they might subsequently propose new rules.

32. He considered that it was not necessary to go into the topic of functional protection by international organizations of their officials.

33. Concerning articles 12 and 13, it was interesting to discuss whether the exhaustion of local remedies rule was procedural or substantive in nature, but it should be recalled that the distinction had initially been made in another context, that of the determination of the precise moment when a wrongful act was committed. He proposed, in the interests of harmonization, that the Commission should follow the approach taken at the preceding session during the work on article 44, "Admissibility of claims",

of the draft articles on State responsibility for internationally wrongful acts.⁶

34. He shared the view that article 12 did not contribute much compared with article 10, but agreed that it should be referred to the Drafting Committee, which should be asked to consider it in conjunction with article 10. Article 13, on the other hand, had no place in the draft, since it dealt with a situation where injury was the result of a violation of domestic law. In order for diplomatic protection to play a role, however, there had to have been a breach of international law. Article 13 should therefore be omitted from the text.

35. Mr. DUGARD (Special Rapporteur), introducing his third report, said that he would take up only subparagraphs (a), (e) and (f) of article 14 at the current meeting. The debate on articles 12 and 13 remained open, however, and at a later stage he would make his concluding comments on those articles and whether they should or should not go to the Drafting Committee.

36. Article 14 was an omnibus provision which dealt with exceptions to the exhaustion of local remedies rule. It thus responded to the criticism of article 10 formulated both by the Commission and by the Sixth Committee of the General Assembly at their most recent sessions on the grounds that it was only all available adequate and effective local legal remedies that ought to be exhausted. He was very happy to go along with that idea as long as a separate provision was devoted to the ineffectiveness or futility of local remedies. The main reason was that, as was stated in article 15, the burden of proof was on both the respondent State and the claimant State, the former having to show that local remedies were available, whereas the latter had to prove that local remedies were futile or ineffective. Suggesting that the generic term "ineffective" should be discarded as being too vague, and even though article 22 of the draft articles on State responsibility adopted on first reading⁷ had simply required the exhaustion of "effective" remedies, he submitted for the Commission's consideration three tests, grounded in judicial decisions and the literature, for determining what an "ineffective" local remedy was. Local remedies were ineffective where they were obviously futile, offered no reasonable prospect of success or provided no reasonable possibility of an effective remedy. Denial of justice, which was inextricably linked with many features of the local remedies rule, including that of ineffectiveness, could as such be said to have a secondary character. The place of denial of justice in the present draft articles would be considered in an addendum to the third report, and he looked forward to observations by members of the Commission on that subject.

37. The first test, that of obvious futility, which required the futility of the local remedy to be immediately apparent, had been criticized by authors, as well as by ICJ in the *ELSI* case, as being too strict. The second test, that the claimant should prove only that local remedies offered no reasonable prospect of success, had been deemed too

⁶ See 2712th meeting, footnote 13.

⁷ *Ibid.*, footnote 7.

weak. The third test, a combination of the first two, under which local remedies offered no reasonable possibility of an effective remedy, was, in his view, the one that should be preferred.

38. In support of his position, he cited circumstances in which local remedies had been held to be ineffective or futile: where the local court had no jurisdiction over the dispute, for example, in the *Panevezys-Saldutiskis Railway* case considered by PCIJ (para. 38 of the report); where the local courts were obliged to apply the domestic legislation at issue, for example, legislation to confiscate property (para. 40 of the report); where the local courts were notoriously lacking in independence (the *Robert E. Brown* claim, para. 41 of the report); where there were consistent and well-established precedents that were adverse to aliens (para. 42 of the report); and where the respondent State did not have an adequate system of judicial protection (para. 44 of the report). Those examples lent support to the third test, which required the courts to examine the circumstances of the case, including the independence of the judiciary in the respondent State, the ability of the local courts to guarantee a fair trial and whether there were precedents adverse to injured aliens. The Commission should therefore select the third test.

39. Article 14, subparagraph (e), which stated that there was no need to exhaust local remedies where the respondent State was responsible for undue delay in providing local remedies, was supported in various codification efforts, human rights instruments and judicial decisions, such as the *El Oro Mining* and *Interhandel* cases (para. 97 of the report). Nevertheless, that exception to the exhaustion of local remedies rule was a bit more difficult to apply in complicated cases, particularly those involving corporate entities. It could be subsumed under the exception set out in article 14, subparagraph (a), but it deserved to be retained as a separate provision as a way of serving notice on the respondent State that it must not unduly delay access to its courts.

40. Finally, article 14, subparagraph (f), which stated that local remedies did not need to be exhausted where the respondent State prevented the injured person from gaining access to its institutions which provided local remedies, was relevant in contemporary circumstances. It was not unusual for a respondent State to refuse an injured alien access to its courts on the grounds that safety could not be guaranteed or by not granting an entry visa. Human rights jurisprudence corroborated the proposition.

41. He looked forward with interest to hearing the comments of members of the Commission.

42. Mr. PELLET asked why article 14 was being introduced in such a piecemeal fashion and independently of article 15 (burden of proof), which was by no means unrelated to subparagraphs (a), (e) and (f) of article 14. He for one could not review those provisions without referring to article 15.

43. Mr. DUGARD (Special Rapporteur) said he thought that the approach he had chosen was the best. The matters dealt with in article 14 (a), (e) and (f) (futility, undue de-

lay and denial of access) were different from those dealt with in article 14, subparagraphs (b), (c) and (d) (waiver and estoppel, voluntary link and territorial connection). If the members of the Commission wished to await his introduction of article 15 before speaking on the topic, he would go along with that, however.

44. The CHAIR said that it might be advisable for the Special Rapporteur to go further with the presentation of his report.

45. Mr. SIMMA said that he had no problem with the fragmented approach to the presentation of the report but agreed with Mr. Pellet that the question of burden of proof was pertinent with regard to the questions of futility, undue delay and frustration of access to the courts. It would be artificial to deal separately with subparagraphs (a), (e) and (f) of article 14 only to return to them when considering article 15. All those provisions should be examined together. Subparagraphs (b), (c) and (d) of article 14 had nothing to do with the burden of proof.

46. Mr. DUGARD (Special Rapporteur) said that subparagraphs (b), (c) and (d) of article 14 could be considered separately from subparagraphs (a), (e) and (f) of the same article and that he was prepared to introduce article 15 at the next meeting.

Organization of work of the session (*continued*)

[Agenda item 2]

47. Mr. CANDIOTI (Chair of the Planning Group) announced that the Planning Group would consist of the following members: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Tomka and Mr. Kuznetsov (member *ex officio*).

The meeting rose at 12.50 p.m.

2714th MEETING

Thursday, 2 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário

Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Tribute to the memory of Paul Szasz

1. The CHAIR said it was his sad duty to announce the unfortunate news that Paul Szasz, colleague and friend of many members of the Commission, had passed away.

At the invitation of the Chair, the members observed a minute of silence.

Organization of work of the session (continued)

[Agenda item 2]

2. The CHAIR announced that the Commission had been congratulated on its work by Mr. Sergei Ordzhonikidze, Under-Secretary-General, Director-General of the United Nations Office at Geneva, and by Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel. The Commission's Planning Group had made progress during its first meeting but had not finished its work, in particular with regard to choosing a new topic in addition to those of the responsibility of international organizations and international liability for injurious consequences arising out of acts not prohibited by international law. He encouraged members of the Commission who were not members of the Planning Group to consider participating in the selection of the new topic, and, to that end, to study the annex to the report of the Commission to the General Assembly on the work of its fifty-second session,¹ which contained the list of potential topics together with brief summaries of what they could contain.

Diplomatic protection² (continued) (A/CN.4/514,³ A/CN.4/521, sect. C, A/CN.4/523 and Add.1,⁴ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR (continued)

3. Mr. DUGARD (Special Rapporteur), continuing with the presentation of his third report (A/CN.4/523 and Add.1), said that draft article 14, subparagraphs (a), (e) and (f), dealt with futility or ineffectiveness, in other

words, circumstances in which a State was not required to exhaust local remedies, for instance, when local remedies were obviously futile, when they offered no reasonable prospect of success or when there was no reasonable possibility of an effective remedy before the courts of the respondent State. Members of the Commission had been urged to consider those three circumstances in order to decide which best gave effect to the futility or ineffectiveness rule. His own preference was for the third test. Mr. Pellet had suggested that it would be helpful if he introduced draft article 15, dealing with burden of proof, as it went hand in hand with article 14, subparagraphs (a), (e) and (f). However, two additional aspects of article 14 had yet to be introduced: article 14, subparagraph (b), on waiver, and article 14, subparagraphs (c) and (d), on voluntary link and territorial connection. They raised very different issues, and perhaps they should be put aside for the time being.

4. Burden of proof in the context of international litigation related to what must be proved and which party must prove it. It was a difficult subject to codify, first because there were no detailed rules in international law of the kind found in most municipal law systems, and second, because circumstances varied from case to case and general rules that applied in all instances were difficult to lay down. Nevertheless, the subject was important to the exhaustion of local remedies, and some rule on it had to be included in the draft. What rules could be discerned from the present authorities on the subject?

5. A general principle that seemed to be widely accepted, and which fell into the category of principles of law accepted by civilized nations, was that the burden of proof lay on the party that made an assertion. He had incorporated it in article 15, paragraph 1. Paragraph 102 of his report cited a number of Latin maxims that provided support for that principle, although he cautioned new members that there was some disagreement in the Commission about whether it was appropriate to use Latin tags.

6. The general principle was not enough, however. The Commission must go further and seek to establish other rules. He would suggest that two additional principles were important, and he had incorporated them into article 15, paragraph 2. They related to the burden of proof in respect of the availability and effectiveness of local remedies. Previous attempts to codify the local remedies rule had studiously avoided the temptation to elaborate provisions on those subjects. Article 22 of the draft articles on State responsibility adopted by the Commission at its forty-eighth session⁵ had not dealt with the matter. Attention should be drawn to a helpful attempt to enunciate the principles by Kokott, set out in paragraph 103 of the report.⁶

7. The subject had also been considered at some length by human rights treaty-monitoring bodies, and their jurisprudence supported two propositions, namely, that the respondent State must prove that there was an available remedy that had not been exhausted by the claimant State, and that if there were available remedies, the claimant State must prove that they were ineffective or that some

¹ See *Yearbook ... 2000*, vol. II (Part Two), p. 135.

² For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

³ See *Yearbook ... 2001*, vol. II (Part One).

⁴ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

⁵ See 2712th meeting, footnote 7.

⁶ *Ibid.*, footnote 9.

other exception to the local remedies rule was applicable. Such jurisprudence was nonetheless guided strongly by the instruments that established the treaty-monitoring bodies, and it was questionable whether the principles expounded by those bodies were directly relevant to general principles of diplomatic protection.

8. As to judicial and arbitral decisions, in the leading cases on the exhaustion of local remedies rule, the subject had either been addressed directly by the tribunal or raised by one of the parties in the pleadings. Some support for the principles he had outlined could be found in the *Pan-vezys-Saldutiskis Railway* case, the *Finnish Ships Arbitration*, the *Ambatielos* claim, the *ELSI* case, the *Aerial Incident of 27 July 1955* case and the *Norwegian Loans* case. Although the language employed by counsel or the tribunal in those cases was not always clear, two conclusions could be drawn. First, the burden of proof was on the respondent State in that it had to show the availability of local remedies, and second, the claimant State bore the burden of proof for showing that if remedies were available, they were ineffective, or that some other exception applied, for instance, that there had been a direct injury to the claimant State.

9. Yet it was difficult to lay down general rules, since the facts of each case might necessitate some variation. That point could be illustrated by the *Norwegian Loans* case, frequently cited on the subject. France had sought to bring a claim on behalf of French nationals allegedly injured by Norway. Norway had conceded that it had to prove the existence of available local remedies but argued that it was necessary for France to prove that those remedies were ineffective, if it so claimed. France had argued that legislation made it impossible for it to bring the case before Norwegian courts and that the legislation, on the face of it, rendered recourse to local remedies futile. It was in that context that Judge Lauterpacht had laid down four principles which enjoyed considerable support in the literature: it was for the plaintiff State to prove that there were no effective remedies to which recourse could be had; no such proof was required if there was legislation which on the face of it deprived the private claimants of a remedy; in such a case, it was for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence could reasonably be assumed; and the degree of burden of proof ought not to be unduly stringent.

10. Although Lauterpacht had adduced four principles, that did not go against his own hypothesis of two, for they had been elaborated on in the unusual circumstances of the *Norwegian Loans* case. The hypothesis was supported by Jiménez de Aréchaga in one of his academic writings,⁷ cited in paragraph 115 of the report. His basic proposition therefore remained that there were essentially two rules on the availability and effectiveness of local remedies, and they were set out in article 15, paragraphs 2 (a) and 2 (b).

11. The Commission now had before it articles 12, 13 and 15 and the parts of article 14 dealing with futility, undue delay and denial of access. He again invited members

to confine their comments to those provisions, leaving aside the parts of article 14 on waiver, voluntary link and territorial connection, which he would introduce later.

12. Mr. MOMTAZ, thanking the Special Rapporteur for an excellent report received sufficiently well in advance to enable members to study it carefully, said he wished first to address the subject of the direction to be taken in future work. The Special Rapporteur had proposed to limit the scope of the topic with a view to completing the consideration of the draft articles on second reading during the current quinquennium. It was a laudable intention, one that would enhance the Commission's credibility, but it must not be pursued through shortcuts that would undermine the evolution of international law in that field. In his view, the draft articles should set out certain guidelines on functional protection by international organizations of their officials so that States could resolve any issues that such protection might raise. Was an international organization entitled to exercise functional protection simultaneously with the exercise of diplomatic protection by the State of which the official was a national? Could the State be accorded priority in that area and the international organization perhaps placed in an inferior position? Those were the questions raised by ICJ in its advisory opinion in the *Reparation for Injuries* case, questions which remained so far unanswered.

13. The evolution of international law was characterized by increasingly strong concern for respect for human rights. The right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew, although perhaps not deserving a separate article, might perhaps be mentioned in the commentary to article 8. That could also be done for the situation of individuals in a territory administered by an international organization in the aftermath of abuse or atrocities committed by certain States. Recent current events provided examples of such situations.

14. As to the "clean hands" doctrine mentioned by Mr. Candioti, on which Mr. Brownlie and Mr. Pellet had engaged in a very interesting discussion, he was inclined to subscribe to the theory advanced by Mr. Brownlie for a number of reasons. While it was true that aliens had the right of due process in their countries of residence and, in exchange, were required to abide by the law and to respect its requirements, in a number of instances the domestic legislation of the State in question might be found to contradict international law. In such a situation, obviously, the "clean hands" doctrine did not arise. The pleadings of Reuter before ICJ in the *Barcelona Traction* case also supported Mr. Brownlie's theory. Reuter had referred to the heterogeneous nature of the requirement of admissibility of international claims and had pointed out that the "clean hands" doctrine had still to be developed. One could also cite in support of Mr. Brownlie a study published in the 1960s by Salmon, a Belgian jurist, on the basis of a painstaking examination of arbitral awards and the decisions of claims commissions.⁸

⁷ E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), p. 531.

⁸ J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10 (1964), p. 225.

15. He agreed with those who thought it was not necessary to go into the matter of whether exhaustion of local remedies was procedural or substantive. As the Special Rapporteur had demonstrated in his report, the distinction had come up primarily during the codification of the law on State responsibility, specifically during the attempt to determine the moment from which an internationally wrongful act entailed the responsibility of the wrongdoing State. In other words, the question was whether the responsibility of the State came into play as soon as the internationally wrongful act was committed, independently of the exhaustion of local remedies. The answer to the question depended on whether one considered that exhaustion of local remedies was a procedural or a substantive matter. It was not, in his view, of relevance to diplomatic protection, in which the basic postulate was the existence of an internationally wrongful act. He agreed with Mr. Pellet's remarks on that point. It was simply necessary to enunciate the rule on the exhaustion of local remedies, which would apply, as the Special Rapporteur pointed out, when the injury to a foreigner was caused by a breach of domestic law. In such a case, the exhaustion of local remedies would indisputably be a question of substance and not of procedure, although there was no need to say that in the draft articles. On the other hand, when the injury arose from a breach of international law, the exhaustion of local remedies was merely a procedural matter. The exercise of diplomatic protection might even be envisaged in the event of failure to respect the exhaustion of local remedies rule, in which case recourse to the rule would obviously be futile, especially as in a number of cases the act in question might not be prohibited by domestic law.

16. Mr. PELLET said he found Mr. Momtaz's position on the "clean hands" doctrine somewhat difficult to understand. What he had said about it seemed right, but it led to the wrong conclusion. True, the theory still had to be developed in the context of diplomatic protection, but perhaps now was precisely the time to do so. The subject had long intrigued jurists, and rather than discuss the problem and turn away from it, now was the time for the Commission to resolve it. Yes, in some cases domestic legislation might contradict international law, and the question then would be whether the injured person was obliged to respect domestic law. The person would probably be considered not to have "dirty hands", but to have "clean hands", and accordingly the problem would not arise. Still, that was an exception to the "clean hands" rule, and he did not see how it could serve as an argument for not looking into the matter. He also thought that domestic law was generally presumed to be in line with international law.

17. Mr. GAJA, referring first to article 14, said he agreed with the Special Rapporteur that adding the qualifier "effective" to the remedies to be exhausted under article 10 would not make a more specific provision on effectiveness unnecessary. That was what article 14 sought to spell out in subparagraphs (a), (e) and (f). He expressed his preference for option 2 in subparagraph (a); although it could be better drafted, it conveyed the basic idea that a remedy must be exhausted only if there was a reasonable prospect of success. It would also be better to speak of "remedy" in the singular, because each available remedy must be tested for effectiveness.

18. The exception under subparagraph (e), namely undue delay, covered an aspect of effectiveness that might require special mention. In his view, the text should refer not to "delay in providing a local remedy", but to the court's delay in taking a decision with regard to a remedy which had been used. The problem was that courts took undue time to decide.

19. As for subparagraph (f), if access to a remedy was prevented, it would be concluded that there was no remedy at all. The wording of that paragraph did not correspond to what was intended. Paragraphs 100 and 101 of the third report referred to a different situation, one in which an alien was refused entry to the territory of the allegedly responsible State or where there was a risk to the alien's safety if he entered the territory. Those elements would rarely be decisive in the context of civil remedies. Normally, the claimant's physical presence in the territory of the State in which he wished to use a civil remedy was not required. The exception should be limited to cases in which presence appeared to be a condition for the success of the remedy. It might be sufficient to mention such a possibility in the commentary as part of the more general test of effectiveness as stated in subparagraph (a).

20. With reference to article 15, he was not convinced that rules of evidence as such should be included in the scope of the topic. If they were, the Commission should also consider issues relating to evidence of nationality. In any case, customary rules of evidence, if they did exist, were difficult to establish. Common law countries and civil law countries differed considerably on the most basic principles, including burden of proof. Civil law countries did not have the system of *prima facie* evidence. That had an impact in international courts and tribunals. Rules of evidence also varied greatly, depending on the type of international proceedings. There was a world of difference between proceedings in ICJ and in human rights treaty bodies. Moreover, the same treaty body might have different rules of evidence at each stage of the proceedings. For example, the European Court of Human Rights could declare that an application was inadmissible for failure to exhaust local remedies, even without notifying the respondent State. If the respondent State was notified, then its attitude towards exhaustion of local remedies became relevant, because if it did not object that there was failure to exhaust local remedies, the Court would not examine the question on its own motion. In that context, it could also be said that, if a State raised the question of failure to exhaust local remedies, it had a burden of proof which went further than what was imposed on the respondent State in other international proceedings. Whatever statement was made on the burden of proof, it was subject to the principles and rules applying to specific proceedings.

21. There was little point in stating as a general principle, as was done in article 15, paragraph 1, that the party that made an assertion must prove it. It was an ancient maxim that anyway was not accurate. What mattered was not really the allegation, but the interest which the party might have in establishing a certain fact that appeared to be relevant. Although paragraph 1 mentioned exhaustion of local remedies, a general proposition of that type was totally out of place in draft articles on diplomatic protection.

22. The “Norwegian” distinction in article 15, paragraph 2, between the availability of a remedy, which should be shown by the respondent State, and its lack of effectiveness, which should be demonstrated by the claimant State, was somewhat artificial. A remedy that offered no chance of success, i.e. was not effective, was not one which needed to be exhausted. Thus, the respondent State’s interest went further than establishing that a remedy existed. It must also show that the remedy had a reasonable chance of success. Some of the language in the *ELSI* judgment might appear to convey the idea that the respondent State merely had to demonstrate that a remedy was available. But there was little question that the remedy existed; at issue, rather, was the effectiveness of the remedy in the absence of pertinent judicial precedents at the time of the alleged injury. It was a matter of effectiveness more than of availability.

23. Examples could be found in the literature and in jurisprudence to show that the burden of proof was on the respondent State with regard to the exhaustion of local remedies and was heavier than other aspects concerning admissibility or substantive issues. But he wondered whether that was due to something specific to the exhaustion of local remedies, or whether there was a different rationale. It was very difficult for ICJ, for example, to decide whether an effective remedy existed in a State. The respondent State was in a much better position than judges or the claimant to demonstrate the existence of remedies. Similarly, the State of nationality was best able to provide evidence on the nationality of the individual. There, the burden of proof was on the claimant State. Thus, the position of the State as a claimant or respondent seemed to be less important than the availability of evidence.

24. Mr. BROWNLIE said that, from the outset, he wished to dispel any impression he might have given earlier that he was strongly critical of the Special Rapporteur’s third report, which in fact was a model of its kind.

25. He agreed on the whole with the approach in article 14, but not with the treatment of the voluntary link requirement in subparagraph (c), because it was stated that local remedies did not need to be exhausted where there was no voluntary link between the injured individual and the respondent State. The actual content of the Special Rapporteur’s commentary was fairly tentative. Paragraph 70 said that there was no clear authority either for or against the requirement of a voluntary link. That was true, but he failed to see what flowed from that fact. The Commission could engage in progressive development, and it would be a classic case of doing so against the background of a large number of existing principles. Such a course would not mean starting from scratch, for there was a considerable amount of material on local remedies. It was exactly the sort of matter on which the Commission should take a clear stand. Paragraphs 84 and 85, which seemed to suggest that the issue would not arise very often, concerned cases in which an argument could be constructed that there was a direct injury to the State in any case, and hence the domestic remedies rule would not apply. But that skirted the question of whether a voluntary link was needed. Again, paragraph 89 contained a rather tentative but essentially negative conclusion on the question whether the existence of the voluntary link

should be a condition for the application of the local remedies rule. It was disappointing that the Special Rapporteur avoided discussing policy as such. That was his own complaint about the procedure/substance point—not that it was there, but that it was the only theoretical or background question which appeared to have been discussed. The Commission should look more directly at questions of policy. He disagreed with the implication in the commentary that the question of voluntary link was an academic one. The circumstances of the *Aerial Incident of 27 July 1955* case were unfortunately not so exceptional, and there was indeed a serious question to be addressed.

26. Mr. GAJA was right to say that there was no need to deal separately with article 14, subparagraph (f). It could be made part of the discussion of the general issue of effectiveness.

27. As to article 15, like Mr. GAJA he did not consider such a provision necessary. It would be difficult to reach an agreement on its subject matter. It also seemed superfluous to have a separate article on burden of proof, which was a question that arose in any event and must be addressed in context; it was unnecessary, whenever a problem was tackled, to include a provision on the subject.

28. Mr. MOMTAZ said that he was pleased that Mr. PELLET recognized that the “clean hands” doctrine had not yet taken form. It was a matter not for the codification but for the progressive development of international law.

29. Mr. DUGARD (Special Rapporteur) said it would be best for members to refrain for the time being from commenting on article 14, subparagraph (c), which he had not yet introduced. Taking up a comment by Mr. BROWNLIE, he observed that, needless to say, anyone who agreed to act as Special Rapporteur would inevitably hear harsh criticism from other members. After all, that was the nature of the Commission’s debate.

30. Mr. BROWNLIE and Mr. GAJA had raised a question which should be dealt with in greater depth, namely, whether it was necessary to address procedural rules at all. Mr. GAJA had spoken of the conflict between common law and civil law approaches. In the current criminal law context, for example the *ad hoc* tribunals or the International Criminal Court, the attempt to find common ground was a major issue. He wondered whether the time had not come for the Commission to attempt to identify principles governing rules of evidence which applied to both civil-law and common-law jurisdictions.

31. The CHAIR expressed his gratitude to the Special Rapporteur for his inclusive approach to the subject.

32. Ms. XUE said that she was in favour of excluding from the scope of diplomatic protection the areas indicated in paragraph 16 of the third report. The core of the issue of diplomatic protection was the nationality principle, i.e. the link between a State and its nationals abroad. When a State claimed a legal interest in the exercise of diplomatic protection for an internationally wrongful act derived from an injury caused to its national, the link between the legal interest and the State should be the nationality of the

national. On the whole, that principle had been observed throughout the draft so far. If, however, the matters set out in paragraph 16 were included, even as exceptional cases, they would inevitably affect the nature of the rules on diplomatic protection, unduly extending the right of States to intervene. Given its historical application, that point was not far-fetched.

33. She understood the concern to protect officials of international organizations but questioned whether that could be characterized as diplomatic protection. If the Commission agreed to exclude protection of diplomatic and consular officials from the scope of the topic, the same logic should apply to officials of international organizations. Similarly, members of armed forces were normally protected by the State in charge of those forces, but protection as such was not regarded as diplomatic protection. She agreed with the Special Rapporteur that such functional protection, if needed, should be treated separately.

34. In the case of the crew of a ship or aircraft, the issue was not how a State should protect its nationals abroad, but rather how to avoid conflicting claims from different States. If the ship flew a flag of convenience, the State of registration would have no more interest in exercising diplomatic protection for the crew than their own national States, should the latter fail to do so. Either maritime law or air law should take care of the matter, if such protection really presented a problem in international law.

35. In practice, there were cases in which a State delegated the right to exercise diplomatic protection of its nationals or economic interests to another State where diplomatic relations had been suspended or in an emergency, but such a situation might best be characterized as anticipatory representation rather than diplomatic protection. She agreed with Mr. Mansfield that it would be hard to imagine that such delegation would culminate in judicial proceedings without the direct involvement of the delegating State.

36. The last case mentioned in paragraph 16 of the third report would appear to imply that a State or international organization which administered or controlled a territory should have the right to exercise diplomatic protection over the people of that territory while they were abroad. Nevertheless, in practice such administration or control was often established on a temporary basis until a legitimate Government could be put in place; representation of that kind, even when exercised for the protection of human rights, should not be defined as diplomatic protection.

37. Her major concern in the treatment of articles 12 and 13 was the distinction between breaches of national and international law. Article 13 should be reconsidered and, preferably, deleted, while the wording of article 12 should be strengthened, making the local remedies rule obligatory in terms of both procedure and substance, if such a line was to be drawn. In that case, it would be essential to determine which exceptions to that rule should be allowed.

38. The Special Rapporteur's commentary on article 14 was very useful, but, while there were many cases of, and academic studies concerning, procedural denial of justice, there were no generally agreed views on the topic. Furthermore, some of the clauses under the futility rule might leave too much room for subjective judgement by the claimant, and article 14, subparagraph (b), on waiver, could be further improved by a closer study of the issues of implied waiver and estoppel.

39. With regard to article 15, Mr. Gaja had rightly noted that, owing to the differences in legal systems, it was difficult to establish general rules at the level of international law.

40. Finally, she was reluctant to enter into discussion of the "clean hands" rule; as a matter of policy, claimants must be precluded from using diplomatic protection as a means of avoiding the legal liability incurred by their own unlawful acts under the domestic law to which they had willingly subjected themselves.

41. Mr. BROWNLIE said that the distinction between diplomatic and functional protection applied in certain situations, as ICJ had demonstrated in *Reparation for Injuries*. However, he was not fully convinced by Ms. Xue's use of that distinction in the context of diplomatic protection exercised on behalf of members of the armed services. Such cases represented an application of the legal interests of the State to whom the troops in question belonged; the same was true of the crews of ships or aircraft, as had been recognized in recent jurisprudence.

42. Diplomatic protection was usually classified as an issue involving the admissibility of claims. In reality, however, it was both an expression of legal interests and the instrument by which a State implemented those interests by making a diplomatic claim. When a case was brought before the ICJ or a court of arbitration, assuming that there were no problems of jurisdiction or admissibility, the instrumental aspect was covered by the operation of law, and the remaining issue was one of national interests. The principle of nationality was, of course, the major expression of legal interest in States' nationals, national corporations and agencies, but the law might recognize other bases for legal interest, such as membership in the armed forces.

43. Mr. RODRÍGUEZ CEDEÑO expressed his appreciation and respect for the Special Rapporteur's work on the complex topic of diplomatic protection. He agreed that in light of the lack of certainty on the rules governing diplomatic protection, the Commission must choose between competing rules on the basis of their fairness in contemporary international society; its work involved both the codification and the progressive development of law, bearing in mind the ongoing changes in those areas.

44. Functional protection by international organizations of their officials (para. 16 of the report) should be excluded from the draft articles because it constituted an exception to the nationality principle, which was fundamental to the issue of diplomatic protection. Such protection, which had been dealt with extensively in legal

writings and by ICJ, involved an international organization's involvement on behalf of its staff members in a claim against the territorial State, defined as the State in whose territory they had incurred the injury—a definition which should be considered for inclusion in the list of terms to be defined in the draft articles. In its advisory opinion in *Reparation for Injuries*, the Court had made it clear that the claim brought by the Organization was based not on the nationality of the victim but on his status as an agent of the Organization. Similarly, in its judgement regarding the *Jurado* case, the Administrative Tribunal of ILO had stated that the privileges and immunities of ILO officials were granted solely in the interests of the Organization.

45. Those decisions raised interesting issues regarding competing claims between States of nationality and international organizations. It must be made clear that, as the Court had noted in its advisory opinion, the possibility of competition between the State's right of diplomatic protection and the organization's right of functional protection could not result in two claims or two acts of reparation. Thus, while he agreed that the issues mentioned in paragraphs 16 and 17 of the third report did not fall within the scope of the topic under consideration, they might lead to a discussion of the need to limit claims and reparations.

46. A balance had to be found between the general principle that local remedies must be exhausted, which should be clearly stated, and the exceptions to that rule. The futility of local remedies was a complex issue because it involved a subjective judgement and because of its relationship to the burden of proof; it raised the question of whether a State of nationality could bring a claim before an international court on the sole assumption that local remedies were for various reasons futile. While the matter could not be ignored, it must be handled with great care. The Commission must not appear to establish a principle of complementary jurisdiction by granting competence to an international body in cases where local remedies were, in the claimant's view, absent or ineffective. It was important to consider the position taken by ICJ in the *Panevezys-Saldutiskis Railway* case and to prevent extreme interpretations in favour of either the claimant State or the territorial State. Thus, as the Special Rapporteur had concluded (para. 45 of the report), the third option presented under draft article 14, subparagraph (a), was preferable as a basis for drafting a suitable provision. Subparagraphs (e) and (f), raised issues which, however important, were not strictly essential to the topic under consideration.

47. Mr. OPERTTI BADAN said that he had yet to hear any substantive reasons for including or excluding the four situations mentioned in paragraph 16 of the third report. Functional protection by international organizations of their officials was normally a matter to be agreed between States and the organizations working within their territory; diplomatic protection was not the mechanism of first resort. Claims brought on behalf of the crews or passengers of ships, which could involve heavily fished areas or the activities of scientific research vessels in territorial waters, might raise issues that were difficult to resolve. A State could not delegate the right to exercise diplomatic protection unless it was unable to exercise that right. Finally, he could envision a situation in which a State of

nationality might have exercised diplomatic protection on behalf of its nationals under the administration of the United Nations Interim Administration Mission in Kosovo following the action by NATO. It would be useful for the Special Rapporteur to provide further information on those four issues so that the Commission could decide whether to exclude them from consideration. A broader but more thorough discussion was needed.

48. Ms. XUE said that, while she appreciated the clarification provided by Mr. Brownlie, the main issue was that of the connection between the claimant State and the individual. It was important to justify States' exercise of diplomatic protection. By travelling abroad, private citizens established a voluntary link that made them subject to the domestic law of the receiving State. However, diplomatic and consular officials did not establish such a link, nor did members of the armed forces or the crews of ships and aircraft. It must also be made clear that the claimant State could not intervene unless the territorial State failed to protect foreign nationals in accordance with international law. And while reparation for damages incurred by the officials of international organizations was really a matter of international law, the Commission was most concerned with the relationship between domestic and international law. It was important not to confuse functional and diplomatic protection.

49. Mr. SIMMA noted that various members had expressed doubt as to whether situations where one State exercised diplomatic protection of a national of another State as a result of the delegation of such a right (para. 16 of the report) arose in practice. He wondered whether the hypothetical case was based on a misunderstanding of article 8c of the Treaty on European Union, which stated that every citizen of a member State of the Union, while in the territory of a third country in which the member State of which he was a national was not represented, was entitled to protection by the diplomatic or consular authorities of any Member State on the same conditions as its nationals. However, such cases did not constitute diplomatic protection, but rather routine consular protection of nationals.

50. Mr. DUGARD (Special Rapporteur) agreed that the delegation of protection within the European Union did not constitute diplomatic protection; moreover, the issue was also addressed in draft article 9.

51. Mr. RODRÍGUEZ CEDEÑO pointed out that functional protection by international organizations of their officials was based on the individual's status as an agent of the organization—one consequence of which was the fact that an organization could bring a claim against a State which was not even one of its members—whereas diplomatic protection was based on a link of nationality.

The meeting rose at 11.45 a.m.

2715th MEETING

Friday, 3 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (continued) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPporteur (continued)

1. Ms. ESCARAMEIA, referring to the nature of the rule on the exhaustion of local remedies, an issue raised in connection with articles 12 and 13 in the second report (A/CN.4/514), and supplementing the comments she had made at an earlier meeting, said that, having learned more from the debate, she saw the rule, while being a procedural matter, as having substantive outcomes as well. Exceptions should accordingly be created to take account of situations where the application of the rule could be unfair, such as when there was a change of nationality or refusal to accept the jurisdiction of an international court. Once that had been done, it would be necessary to establish the time from which the right of the State to claim diplomatic protection ran, and that would probably be when the injury to the national of that State occurred. Turning to the third report (A/CN.4/523 and Add. 1) and to article 14, specifically its subparagraph (a) (futility), she said she agreed with the Special Rapporteur and the consensus that seemed to have emerged in favour of option 3, namely, that local remedies did not need to be exhausted when they provided no reasonable possibility of an effective remedy. She considered subparagraphs (e) (undue delay) and (f) (denial of access) of article 14 to be pertinent.

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

2. On article 15, she thought that paragraph 1 was useful and had a place in the draft. As for paragraph 2, she agreed with Mr. Gaja that what was important was the proof, not of the availability of local remedies, but of their effectiveness. She understood that that was what the Special Rapporteur thought as well, and the problem was simply one of drafting, which the Drafting Committee could look into.

3. Referring to the future direction of the draft articles and specifically to paragraph 16 of the third report, she said that she agreed in part with the Special Rapporteur's conception of how to expand the scope of the draft articles. Some issues, for example the delegation by one State to another of the right to exercise diplomatic protection, were too specific and too unique to be considered in the draft articles. As for functional protection of international organizations, she had been impressed by the statement made by Mr. Momtaz at the preceding meeting. Even though the question had been taken up by courts, it had still not been resolved, although it was arising more and more frequently. It should be given in-depth study, perhaps even separate study. On the other hand, she thought that the issue of expanding the draft to cover the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and possibly also of the passengers, irrespective of the nationality of the individuals concerned, deserved further consideration. She understood the reservations of the Special Rapporteur and Mr. Opertti Badan on that point. Nevertheless the *M/V "Saiga" (No. 2)* case justified giving the matter further study. Her main interest, however, was in diplomatic protection in the case where an international organization administered a territory, something which had happened in practice in Kosovo and East Timor. The international organization fulfilled all the functions of a State and must accordingly exercise diplomatic protection in respect of persons who might be stateless or whose nationality was not at all clear. That question should be included in the draft articles under consideration.

4. The link of nationality had been of some importance in the past, when States had been the sole actors on the international stage, but it had become less important now, in a world where international organizations and other actors had an increasingly large role to play alongside States. The Commission should take account of that fact.

5. Mr. PELLET said that he disagreed with Ms. Escarameia on two major points.

6. First, he thought that, in general terms, the Commission must give the Special Rapporteur clear guidance by agreeing with him that diplomatic protection was protection exercised by the State. The issue of protection exercised by international organizations should be deferred for later consideration or perhaps included in the topic of the responsibility of international organizations.

7. Second, having heard the arguments developed by Ms. Escarameia, he thought that the principle-exceptions approach she advocated was inappropriate. He could go along with that approach provided that the discussion remained focused on the topic. The topic was diplomatic

protection and the principle was the exhaustion of local remedies, to which there could be exceptions, such as those set out in article 14 proposed by the Special Rapporteur. According to Ms. Escameia, the first stage involved determining the time when the internationally wrongful act had occurred, but that question came under the topic of State responsibility, from which, wrongly, it had been excluded. If diplomatic protection was exercised, that meant that an internationally wrongful act had been committed, and the only question that arose was from what time diplomatic protection could be exercised.

8. Mr. MOMTAZ, referring to the possible exercise of diplomatic protection by the State of nationality of a ship or aircraft raised by the Special Rapporteur in the context of the *M/V "Saiga" (No. 2)* case, which had been brought before ITLOS, asked whether that case had really been about diplomatic protection exercised on behalf of the members of the crew of a ship or about intervention with a view to their prompt release, as expressly provided for in article 292 of the United Nations Convention on the Law of the Sea (prompt release of vessels and crew). That issue was very sensitive and warranted further consideration.

9. Mr. DUGARD (Special Rapporteur) said that he endorsed Mr. Pellet's comments. As for having a study of protection by international organizations, he was not unsympathetic to the idea, but the subject, although very important, came under the topic of the responsibility of international organizations. The draft articles under consideration were grounded in traditional principles of international law, and it would be unfortunate to go beyond that.

10. Mr. OPERTTI BADAN said that he was opposed to extending the exercise of diplomatic protection to international organizations. Diplomatic protection was based on the link of nationality, whereas officials acted expressly on behalf of international organizations which employed them and not as a function of their nationality.

11. The question of the protection of a ship's crew was covered not only in the United Nations Convention on the Law of the Sea, but also in earlier international agreements, such as the Treaty concerning the Rio de la Plata and the corresponding maritime boundary, which had been concluded between Argentina and Uruguay and had entered into force in 1974;⁴ it thus called for a closer examination of other international instruments. In that connection, he noted that the monitoring of fishing grounds was primarily a matter for the police, the goal being to protect species and prevent the depletion of fishing grounds outside authorized areas. Clearly, that issue did not, *stricto sensu*, come under diplomatic protection.

12. For those reasons, he was opposed to expanding the subject under consideration to questions not within its scope.

13. Mr. TOMKA, referring to functional protection, said that it had initially been planned to focus solely on diplomatic protection exercised by the State of national-

ity. The Commission should confine itself to that subject so as to be able to complete its work within a reasonable period of time.

14. He agreed with Mr. Momtaz on the need to be careful when considering the example of the *M/V "Saiga" (No. 2)* case, which had been brought before ITLOS under the special provisions contained in article 292 of the United Nations Convention on the Law of the Sea, and not as a general case of diplomatic protection.

15. Mr. GAJA said that the reference to the *M/V "Saiga" (No. 2)* case related not to the first judgement, which had had to do with the prompt release of the ship, but to the second judgement, in which ITLOS had awarded compensation to crew members who did not have the nationality of the ship. The question had thus not been one of the protection of the ship as such.

16. Several members of the Commission had argued that delegation of the exercise of diplomatic protection, was beyond the scope of the subject under consideration, because delegation did not extend to claims concerning international acts. However, when State A delegated the exercise of diplomatic protection to State B because it did not have diplomatic relations with State X, why should State B refrain from requesting State X to cease a certain conduct once it became internationally wrongful?

17. Mr. GALICKI said that he was opposed to including questions relating to the nationality of a ship or aircraft in the draft articles. The legal principles regulating such a situation were already set out in international law, in particular in many instruments, such as the Convention on Offences and Certain Other Acts Committed on Board Aircraft, which laid down, for example, the obligation to allow crew and passengers to continue their journey. In that example, the determining factor was the special link between the State of nationality or the State of registry and a given ship or aircraft. It did not involve persons and, although the international instruments in question in certain instances granted a State the right to exercise prerogatives which might, at first glance, have a similarity with diplomatic protection, that protection was of another nature. Thus, such questions had no place in the consideration of the subject of diplomatic protection.

18. Mr. MANSFIELD said that he endorsed Ms. Escameia's comments on the importance of some of the questions linked to the nationality of claims referred to by the Special Rapporteur in paragraph 16 of his third report, i.e. the functional protection by international organizations of their officials and the case where a State or an international organization administered or controlled a territory. But he also shared the Special Rapporteur's view that the Commission had started the topic in one direction and that, for a whole series of reasons, including drafting, it would probably be easier to stick with it. As to the delegation of competence, the example used by Mr. Gaja was interesting. From a practical standpoint, however, in that type of situation, although a State could take a range of actions on behalf of another State, they were likely to stop short of a formal lodging of a claim. He therefore re-

⁴ United Nations, *Treaty Series*, vol. 1295, No. 21424, p. 306.

mained of the view that it was preferable to exclude those questions from the topic.

19. Ms. ESCARAMEIA said she feared that her comments had been misconstrued. Perhaps she had not expressed herself clearly enough, but she fully agreed with Mr. Pellet's point that what was of interest to the Commission was the moment from which the right to formulate a claim arose. Thus, there was no disagreement on that question: it was, in fact, her view that articles 12 and 13 must relate to the moment at which the right to formulate a claim occurred and must simply mention that there could be exceptions in certain cases, namely, when the strict application of that rule would produce unfair results. With regard to Mr. Operti Badan's reference to international organizations, she did not know whether he had been alluding to something she had said previously, although he seemed to be saying that international organizations could exercise functional protection, although not diplomatic protection. Actually, she had wanted to make a point about relations between international organizations and persons resident in territories under their administration. The nationality of such persons was not always clearly established, and many were in fact stateless, as in the case of East Timor. That meant that in the event of an incident, such persons did not have any protection; international organizations might then exercise diplomatic protection on their behalf.

20. Mr. BROWNLIE said that that was an important question, but that, as it might complicate the Commission's work, it would be better not to include it in the topic.

21. The CHAIR said that the confusion might be due to the fact that a sufficiently clear distinction had not been made between the role of an administering authority in general and that of an international organization.

22. Mr. BROWNLIE said he thought that the Commission should avoid raising difficult issues such as that of East Timor. It was risky to assume that the special and temporary functions which were transferred to the United Nations were analogous to the administration of a territory by a State. With regard to the question of the crews of ships and aircraft, he regretted that some members found it inconvenient to look at real experience, such as the *M/V "Saiga" (No. 2)* case. As Mr. Gaja had pointed out, that case could not be set aside; it did indeed come within the scope of the draft articles on diplomatic protection. During the previous quinquennium, the Commission had often been tempted to convert nearly every subject into a human rights topic. There was, in fact, an analogy between human rights and diplomatic protection since the latter was part of the broad set of possibilities by means of which individuals' rights might be protected. Moreover, there was a proliferation of international human rights instruments which sometimes overlapped in order to provide additional protection. Similarly, if crew members could receive protection from the State of nationality of the vessel or aircraft, that merely provided increased protection and should be welcomed.

23. Mr. CHEE, referring to paragraph 16 of the third report on diplomatic protection, said that, in theory, the question of the nationality of a ship or aircraft might appear relatively simple; in practice, however, all kinds of difficulties might arise. For example, the crew members might be of various nationalities, or the ship might have several owners. Thus, it would be extremely difficult to develop rules applicable to all cases, and it would be more reasonable not to deal with those issues in the context at hand. For the sake of clarity, moreover, it might be preferable to refer to the type of protection provided by international organizations as something other than "diplomatic protection".

24. Mr. KOSKENNIEMI, commenting on the statement made by Ms. Escarameia, said that it might be useful to at least consider the proposal to deal with international organizations' protection of persons in the territories they administered. Clearly, such protection was different from functional protection, which did not come within the scope of the topic. On the other hand, he did not fully agree with the Special Rapporteur's statement that a major departure from traditional international law would not be advisable. The Commission should take up new topics linked to current events, and there was no reason that that could not be done in the light of traditional international law. Furthermore, States could not divest themselves of their obligations to their citizens by delegating to international organizations the right to exercise diplomatic protection.

25. Mr. DAOUDI said that he had devoted several years to a study of the delegation of competence and had noted that there were various types of such situations in different areas of public international law. Such cases did not constitute a derogation from the rules of international law, but rather an application and a confirmation of these rules. Moreover, such situations were mentioned in various instruments, such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. In the field of diplomatic protection it should be stressed that the nationality link with the first State was unchanged; the second State merely exercised a right belonging to the first State. Functional protection, on the other hand, covered quite different situations and should indeed be considered in a context other than that of diplomatic protection.

26. Ms. XUE said that the question was not whether persons in the type of situations mentioned should be protected under international law, but why that issue should be raised in the context of diplomatic protection. For diplomatic protection, the presumption was that, normally, every State had the duty to protect foreigners in its territory; it was when such protection proved insufficient or impossible that international law would come into play and that the State of nationality could come to the aid of its citizens. Since those situations referred to in paragraph 16 were different, the question of protection did not fall within the context of the topic.

27. Mr. CANDIOTI said he agreed with members who thought that the question of functional protection by international organizations of their officials should be consid-

ered not in the context of diplomatic protection but in that of the responsibility of international organizations, or perhaps as a subtopic under the topic of State responsibility for internationally wrongful acts. The question whether a State could delegate its rights had not been sufficiently considered. Diplomatic protection could be viewed as a discretionary right of States; it might be relevant to state in the commentary on article 3 whether a State could delegate a discretionary right. Personally, he thought that the State had a right to delegate to other subjects of international law the exercise of diplomatic protection on behalf of its citizens or of other people with genuine links to it within the framework of the established exceptions to the nationality principle. However, that did of course constitute diplomatic protection, an area for which there were clear rules concerning nationality and the exhaustion of local remedies; it was important not to confuse those rules with other types of protection of individuals or their interests, of which there might be many and which came within the context of international law institutions.

28. Mr. ADDO congratulated the Special Rapporteur on his treatment of the topic of the exhaustion of local remedies, which was itself exhaustive. Personally, he was not in favour of expanding the scope of the draft articles to include functional protection or any of the other subjects mentioned in paragraph 16 of the third report. In his view, any attempt to expand the draft articles in that way would lead the Commission into a quagmire. Moreover, those topics, while important, did not fall within the field of diplomatic protection in the strict sense of the term.

29. The rule on the exhaustion of local remedies was a universally accepted rule of customary international law. It applied to all international proceedings, whether judicial, arbitral or conciliation proceedings. It required the individual concerned to refer the complaint to the local courts or administrative organs authorized to provide redress. The rule was well illustrated in international jurisprudence, *inter alia*, in the *Ambatielos* claim and the *Finnish Ships Arbitration*. In the *Open Door and Dublin Well Woman v. Ireland* case, the European Court of Human Rights had held that the existence of local remedies must be certain, not only in theory, but also in practice. A provision regarding the need to exhaust local remedies before having recourse to the various international mechanisms appeared in almost all the international and regional human rights instruments. That further attested to the universal acceptance and appeal of the local remedies rule. It was well established both in customary and in conventional international law.

30. In his view, the rule on the exhaustion of local remedies was a procedural rather than a substantive rule. However, he did not think that the Commission should concern itself unduly with that question in the context of the codification exercise in which it was engaged. In his view, what was important was that the rule determined whether the condition precedent to a State's bringing a claim on the international plane on behalf of one of its nationals was complied with. On that score, and despite some other members' eloquent assertions to the contrary, the Special Rapporteur's article 12 was useful. The word "procedural"

should, however, be deleted from that provision, so as to meet the concerns of ardent proponents of the view that the rule on the exhaustion of local remedies was substantive. Subject to that reservation, he suggested that article 12 should be referred to the Drafting Committee.

31. He had not yet made up his mind about article 13, although he was inclined to think that it should be deleted, since it might lead the Commission into pointless disputation, creating more problems than it solved.

32. Subparagraphs (a), (e) and (f) of article 14 were, in his view, perfectly in order and useful. The requirement that local remedies must be exhausted was not an absolute rule and could not be met where domestic remedies were manifestly ineffective or non-existent. The test of ineffectiveness must, however, be an objective one. Such was the case, for example, where local remedies were unduly and unreasonably prolonged or unlikely to bring effective relief, or where local courts were completely subservient to the executive branch.

33. With regard to article 15, he agreed with the Special Rapporteur that the burden of proof was difficult to codify; accordingly, the best course would be to refrain from any attempt at codification. If, however, it were to be codified, he would favour Kokott's formulation,⁵ which was to be found in paragraph 103 of the third report.

34. Mr. FOMBA said that he wondered whether article 15 covered all the concerns of States, or at least their major concerns, and to what extent the content of the rules proposed therein was anchored in positive international law. The Special Rapporteur considered the question of the burden of proof in the light of all the sources of information available and concluded, in paragraph 117 of his third report, that it was difficult—and unwise—to state any concrete rule other than that the burden of proof should be shared by the parties, shifting between them continuously throughout the case, and that the burden lay on the party which made a positive claim to prove it. In his view, the Commission must do its utmost to draw the lessons of that conclusion. As for the questions on which the Special Rapporteur invited the Commission to take a position in paragraph 118, he himself did not yet have a firm position in that regard. Nonetheless, he broadly endorsed the preliminary conclusions reached by the Special Rapporteur.

35. On the question whether the general principle set forth in article 15, paragraph 1, should be codified, he recalled the definition of codification given in article 15 of the Commission's statute: "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine". It was true that that definition had been adopted for reasons of convenience. But it was legitimate to ask whether or to what extent the criteria adopted therein, for lack of a better option, were met in the present case. The Special Rapporteur appeared to deem them to have been fulfilled, since he stated in

⁵ See 2712th meeting, footnote 9.

paragraph 102 of his third report that it was generally accepted that the burden of proof was on the party which made an assertion. On the other hand, the question arose whether there was in fact any need for such a provision, which, in the absolute, seemed to be dictated by the litigated and adversarial nature of the question of local remedies and also by the desire to ensure a sound and balanced administration of justice. More thought should thus be given to the matter, though much depended on the extent to which it was considered necessary to mark out a path for judges and parties, with a view to facilitating their work.

36. With regard to the question whether the Commission should content itself with codifying article 15, paragraph 2, his first impression was that, in the absence of agreement on paragraph 1, it might envisage a provision along the same lines as that appearing in paragraph 2, provided that any problems of substance or form were resolved. However, he did not yet have any specific proposal in that regard.

37. As to the proposal by Kokott, he noted that the Special Rapporteur described it as “concise” and “not inaccurate”. Insofar as it offered a useful and less problematic solution in terms of both substance and form, that proposal could be adopted. But other formulations could also be envisaged. He had no marked preference for any one solution proposed by the Special Rapporteur and thus reserved his position on the question.

The meeting rose at 11.30 a.m.

2716th MEETING

Tuesday, 7 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (*continued*) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. SIMMA said he was aware that, in commenting on articles 14, subparagraphs (*a*), (*e*) and (*f*), and article 15, he was traversing ground that was already well trodden. It seemed to him, however, that in the interests of achieving consensus on the draft articles, the risk of repeating points already made was one worth taking.

2. All in all, the proposals made with regard to article 14 were sound and well balanced. The Special Rapporteur followed the principle that relief from the obligation to exhaust local remedies should not be made too easy: wrongs committed against foreigners should, as far as possible, be remedied by a State’s own legal and judicial machinery. Option 2 in Article 14, subparagraph (*a*), namely, that local remedies need not be exhausted where they offered no reasonable prospect of success, did not require the rule on the exhaustion of local remedies to be taken sufficiently seriously, excluding the claimant too readily from compliance with that rule. The statement by Fitzmaurice cited by the Special Rapporteur in paragraph 35 of the third report (A/CN.4/523 and Add.1), that “the mere fact that there is no reasonable possibility of the claimant *obtaining* that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which will displace the local remedies rule”,⁴ was highly pertinent in that regard. There must be a reasonable possibility, not of obtaining a remedy, but of an effective remedy’s existing.

3. According to paragraph 31 of the report, option 1, namely, that local remedies need not be exhausted where they were obviously futile, meant that it must be “obviously and manifestly clear that the local remedy would fail”. If that criterion were to be applied, the threshold would be too high and the risk for the claimant too great. Thus, option 3, according to which local remedies need not be exhausted if they provided no reasonable possibility of an effective remedy, covered an adequate middle ground and offered a balanced view, though the somewhat repetitious wording stood in need of editing changes.

4. Article 14, subparagraph (*e*), relating to undue delay was not, in his view, rendered superfluous in the light of article 14, subparagraph (*a*). The cases covered by article 14, subparagraphs (*a*) and (*e*), were in a sense consecutive in time: an existing local remedy which might at first appear to be a “reasonable possibility” from the standpoint of article 14, subparagraph (*a*), might sub-

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

⁴ G. Fitzmaurice, “Hersch Lauterpacht—the scholar as judge”, *BYBIL*, 1961, vol. 37, p. 60.

sequently not need to be pursued further, in the light of undue delay in its application. Application of article 14, subparagraph (e), would of course very much depend on individual circumstances: complex litigation might be involved, or the undue length of the proceedings might be partly attributable to the claimant. Yet it did not seem feasible to find any more precise term than “undue” to cover all those contingencies. The standards developed in human rights jurisprudence concerning, for instance, article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), on due process, might offer some guidance as to the use of the term in general international law.

5. As to subparagraph (f) of article 14, on denial of access, his impression was that both the Special Rapporteur and Kokott, rapporteur of ILA, construed that exception narrowly and physically. Mr. Gaja and others had drawn attention to the fact that it would not be necessary for the injured individual personally to have access to the courts if, for instance, a lawyer was hired to represent the individual. There should, however, be some reference, at least in the commentary, to the problem posed where the individual or lawyer was dissuaded, by means of intimidation, from taking up the case. There would also be a need for such a provision in cases where an individual's personal presence was required in domestic litigation proceedings. The question nevertheless remained whether the case provided for in article 14, subparagraph (f), might not be regarded as covered by article 14, subparagraph (a). The Special Rapporteur's argument in that regard, set forth in the last sentence of paragraph 100 of the report, was not convincing. It would be better to delete article 14, subparagraph (f), and to include the relevant points made in the report and during the debate in the commentary to article 14, subparagraph (a).

6. With reference to article 15, he shared various members' doubts as to the relevance of the human rights jurisprudence—developed on the basis of specific treaty provisions within the framework of a procedural system—to the task of delineating the burden of proof in general international law. While the rule proposed by the Special Rapporteur was appealing in its simplicity, the picture was bound to be much more complex in practice. In his comments (paras. 105, 106, 114 and 116 of the report), the Special Rapporteur appeared to take a much more circumspect view about the need for the article. Personally, he saw no need for the provision, either from the systematic or from the policy standpoint. Accordingly, subparagraphs (a) and (e) of article 14 should be referred to the Drafting Committee, while article 14, subparagraph (f), and article 15 should be deleted.

7. Mr. KOSKENNIEMI, speaking first on articles 12 and 13, commended the Special Rapporteur for his very enlightening discussion of the distinction between procedural and substantive rules—a discussion which, however, did not really support the articles themselves. His own conclusion was that the Commission could live without either article. The idea of exhaustion of local remedies as a substantive rule was, as the Special Rapporteur had pointed out, equivalent to thinking of it in terms of a denial of justice—a primary rule in the first place, the breach

of which constituted the wrongful act. On the other hand, denial of justice was also a complex issue that, strictly speaking, fell outside the scope of diplomatic protection. In his view, denial of justice was closely bound up with the various detailed arrangements that existed, for instance, between the Nordic countries on non-discrimination and equal access and led to a number of complex criteria on the basis of which denial of justice could be delineated.

8. Article 13 dealt quite cursorily with the question of denial of justice, as a case in which non-exhaustion of local remedies would of itself be a breach. If one took the view that a denial of justice was not necessary—for instance, because including it would mean defining in much greater detail what constituted a denial of access or discriminatory treatment of aliens in the context of domestic processes—then article 13 would be unnecessary.

9. If so, the question arose of what purpose was served by article 12, which maintained the symmetry of the “third position” outlined by the Special Rapporteur, by juxtaposing the substantive and procedural approaches in articles 13 and 12 respectively. If article 13 were eliminated, the concept of exhaustion of local remedies became exclusively a procedural one. As now formulated, article 12 merely defined local remedies through reference to the background academic debate about substantive and procedural rules. Its objectives were already fulfilled by article 11, which adequately enunciated the rule on the exhaustion of local remedies. To further define that normative requirement as a procedural precondition added nothing, if it had already been decided that as a substantive rule it had no place in the scope of the exercise. Thus, inasmuch as article 13 was unnecessary, article 12 lost its justification as a definition; both articles should be deleted, and he reserved his position as to the formulation of article 11.

10. He agreed that options 1 and 2 in article 14, subparagraph (a), were respectively too stringent and too loose to be acceptable. No alternative was left but option 3. However, as to the drafting, he wished to make the general point—for the first but doubtless not for the last time—that use of the term “reasonable” was superfluous and invidious inasmuch as it implied *a contrario* that people would behave unreasonably unless specifically instructed to behave reasonably. It would be sufficient to say “where they provide no effective remedy”. The assessment of reasonableness, in that and all other connections, was inherent in the legal function of assessment of effectiveness.

11. He could accept Mr. Simma's proposal that article 14, subparagraph (f), should be deleted. Were the article to be retained, however, he wondered what point there was in limiting the condition to cases where it was the respondent State that denied the injured individual access to local remedies. Other, non-State actors might constitute obstacles to such access: mafia and terrorist organizations were obvious examples. Subparagraph (f) should be reformulated so as to take account of such situations.

12. Finally, he too thought that article 15 was unnecessary. In view of the traditional requirements regarding the burden of proof, it seemed unlikely that any judicial or

other body would feel constrained by that extremely complex additional provision.

13. Mr. FOMBA said that the rule on the exhaustion of local remedies was very important, especially from the teleological standpoint, and must in principle be applied in the strictest and most absolute manner.

14. With regard to article 14, subparagraph (a), in the first place there was a difference between option 1, on the one hand, and options 2 and 3, on the other, in that option 1 made no explicit reference to the idea of result. On the face of it, he could see no fundamental difference between options 2 and 3, but if a choice had to be made from among the three options, he would favour option 3, the purpose of which was implicit in option 1, for the reasons given by the Special Rapporteur.

15. The two provisions set out in subparagraphs (e) and (f) of article 14 seemed not to constitute specific categories, inasmuch as a proper reading of article 14, subparagraph (a), whether drafted in the form of option 1 or of option 3, would encompass the exceptions provided for in subparagraphs (e) and (f) of that article.

16. Thus, his position of principle was that a distinction must be drawn between two main hypotheses. The first would cover all those truly exceptional cases in which there were no local remedies to be exhausted. An example would be the situation of Rwanda in 1994, where, following the genocide, the judicial apparatus and all its premises and documents had been destroyed and its officers and staff decimated. The second hypothesis would cover all cases in which there was no reasonable possibility that the existing local remedies would be effective—cases in which there was a presumption of non-exhaustion because of an acknowledged risk that the remedies would not be effective. A number of such cases had been identified by the Special Rapporteur, and they would need to be carefully sifted so as to single out those most worthy of serious attention and credence. That would constitute a substantial task for judges and, in the first instance, for the Commission. One way of overcoming the difficulties might be to consider establishing some central mechanism to monitor and scrutinize local remedies, so as to simplify assessment of their application and effectiveness. In any event, it was his opinion that article 14 should now be referred to the Drafting Committee.

17. Mr. MANSFIELD said that, generally speaking, he was comfortable with the elements of article 14 introduced thus far, and with the Special Rapporteur's approach to the article as a whole. On subparagraph (a), he would join those who found the arguments in favour of option 3 convincing. As to subparagraph (e), there would seem to be substantial authority for the proposition that local remedies need not be exhausted where there had been undue delay in making the remedy available. What constituted undue delay would be a matter of fact to be judged in each case, but he tended to the view that the case should constitute a separate heading, rather than being covered by subparagraph (a), as a component of futility.

18. The case for a separate heading for the circumstances covered in subparagraph (f) was less clear. If the respondent State effectively prevented the injured alien from gaining access to the courts, then in practice there was certainly no reasonable possibility of an effective remedy. But he accepted that there could be cases where the respondent State created a situation that in practice denied the alien access to a remedy that was, on the face of it, available and apparently effective. Mr. Koskenniemi had been right to raise the point that reference should be made to cases where it was not the State but other actors within the State that precluded access. On balance he was inclined to favour including that matter as a separate heading and referring it to the Drafting Committee, which might ultimately conclude that the case need not be covered. In any event, it should be explored in more detail.

19. While he could find nothing objectionable in article 15, he wondered whether the material was included merely for the sake of completeness. What was needed would be determined in each particular case, and he was not convinced that there was a need for codification in that particular area. It might be better to omit article 15 and to include in the commentary some explanation of the reasons for excluding it.

20. The CHAIR, speaking as a member of the Commission, said he wished to pursue the example given by Mr. Koskenniemi. Suppose the mafia barred someone from exercising his or her rights in country A. He could readily agree that country A was involved in its own failure to make it possible for local remedies to be exhausted and therefore, in a certain sense, bore responsibility. What happened, however, if it was country B that made it impossible for country A to permit the exhaustion of local remedies? The rationale for suspending the rule on the exhaustion of local remedies in such a situation was not necessarily the same as in the first situation. There was a major difference between failure based exclusively on another country's having arrested an individual or cordoned off its territory, for example, and failure by the State itself to maintain law and order such that people would not go to court for fear of being shot to death on the courthouse steps. Would Mr. Koskenniemi care to comment on that?

21. Mr. KOSKENNIEMI said that, in a complex relationship of dependence where a third State could manipulate the State in which the claim had arisen to such an extent as to compel it to withhold local remedies, in his opinion the third State was involved in a wrongful act of a different type than the one represented in his own example. Insofar as the individual was concerned, however, it made no difference which State, the one in which the remedy existed or some other State, prevented the remedy from being used: the remedy was still unavailable.

22. Mr. BROWNLIE said he had to confess to continuing frustration with the way the debate was structured. The question of the voluntary link still remained off limits, and many of the specific issues now being discussed did not relate in a very obvious way to the normal problems of delay and the like. Mr. Koskenniemi's point led to a broader spectrum of circumstances in which individuals or even groups of individuals were required to exhaust

local remedies in a jurisdiction with which they perhaps had absolutely no connection. The example of Chernobyl could be cited: the organization involved in the disaster was not a State organization and, had they made any claim, the hill farmers of Cumberland and other parts of the United Kingdom, for example, would have been required to exhaust local remedies in the courts of Ukraine. Requiring groups of people that were not big corporations or well-funded bodies like Greenpeace to exhaust local remedies in such circumstances was oppressive. Because the Commission had not yet dealt with the question of voluntary link, however, the major question of the whole rationale behind the rule on the exhaustion of local remedies had to be left aside.

23. Mr. PELLET said he was surprised to hear the Chernobyl example cited and did not see why local remedies should not be exhausted in such a case. In the case of severe pollution provoked by the sinking of the *Amoco Cadiz*, for example, all the victims (communities, farmers, etc.) had combined forces to bring cases before the courts of the United States.

24. Mr. BROWNLIE said Mr. Pellet's remark only highlighted the fact that the basic rationale of the rule on the exhaustion of local remedies was not being discussed and that the Commission should be considering whether local remedies should or should not be excluded in specific cases. Instead, it was debating the general issue of what was oppressive, Mr. Koskeniemi having given the very useful example of local conditions that in reality made it dangerous and virtually impossible to use the local courts because of threats from local private organizations. The whole question whether the *locus in quo* provided legal aid, of what was oppressive and of the voluntary link, a question that he thought was absolutely basic, was not being discussed because the Commission was as yet precluded from addressing subparagraphs (c) and (d) of article 14.

25. Mr. SIMMA, recalling that the Commission had engaged in a brief exchange of views on Chernobyl-type disasters, said he had at that time drawn attention to the tensions between what the Commission was doing in the codification of general international law and developments regarding various treaty instruments. The Commission had included a provision on equal access in its draft articles on prevention of transboundary harm arising out of hazardous activities. That meant, for instance, that the farmers of Cumberland should have equal access to remedies available in Ukraine. Such provisions, which were found in almost all the state-of-the-art environmental treaties, encouraged the individuals who were affected and lived in other countries to make use of the remedies available in the country of origin of the pollution. What the Commission was doing in article 14, however, was in a sense to discourage people from doing that unless their connection to the country of origin was voluntary. That threw light on the overarching problem of fragmentation in international law. When the Commission did something in the field of general international law, it should keep in mind developments in more specific areas that might diverge from what it was doing.

26. Mr. Sreenivasa RAO said that the third-State problem raised by the Chair was essentially one of effective control of a territory. If the State which lacked control over the mafia nonetheless retained control over the overall territory and the third State had no control, the articles on State responsibility should be consulted to determine whether an internationally wrongful act could be attributed to the first State.

27. Mr. PELLET asked why, in the case of Chernobyl, persons injured outside the territory of Ukraine should not have to exhaust local remedies before diplomatic protection could be exercised on their behalf.

28. Mr. Sreenivasa RAO replied that he agreed with Mr. Simma that everyone who was affected by an incident within a territory, even if they were non-nationals, must have access to the courts and must be given an opportunity to exhaust local remedies.

29. Mr. TOMKA said that in the earlier discussion on Chernobyl he had queried the appropriateness of the example, because he had serious doubts as to whether the accident had been a breach of international law. It was certainly an issue of liability, but not one of responsibility. As he understood it, diplomatic protection was tied to responsibility, not liability. The Chernobyl incident was not in his view germane to the discussion of exhaustion of local remedies because it came under the rubric of liability for injurious consequences of acts not prohibited by international law, not that of responsibility for a breach of international law.

30. The CHAIR said he entirely agreed with that viewpoint but found the subject a fascinating one for discussion on the basis of a hypothesis that responsibility existed, even though it did not.

31. Mr. BROWNLIE said that people still seemed to be missing the point. If one assumed that a Chernobyl-type disaster struck in Ruritania, caesium salts from the radioactive cloud rained down on the United Kingdom, and hill farmers there were told they could not market their lambs but would be given compensation—in other words, that there was *prima facie* responsibility on the part of Ruritania for damage caused by a Chernobyl-type disaster and the installation that had caused the damage was not a State installation—then, according to one view of the law, the rule on the exhaustion of local remedies would have to be applied. It seemed merely common sense to say it would be oppressive for the small farmers to have to go to Ukraine, a society of which they had no experience, and find the funds to pursue remedies in that particular *locus in quo*. Precisely since the Commission had a mandate involving the progressive development of international law and was also concerned with human rights, it should in a logical fashion look into determining what were oppressive circumstances for individuals to have to exhaust local remedies in other jurisdictions.

32. Mr. OPERTTI BADAN said he fully agreed with Mr. Brownlie. Article 14, subparagraph (f), covered solely a situation in which the respondent State prevented access to local remedies. It failed to cover one in which the

obstruction operated with respect to the injured individual not as a consequence of an attitude of the respondent State, but rather as a result of a *de facto* situation that was not necessarily attributable exclusively to the respondent State. Other principles of procedural law could be recalled: for example, the old but valid adage about suspension of time limits, namely that the limits did not apply when, for good reason, the person concerned was prevented from complying with them. In other words, no negative consequences could be derived for the exercise of one's rights from the inability to meet a requirement. The draft would be significantly improved if the Commission did not limit the scope of article 14, subparagraph (f), to prevention by the respondent State but extended it to *de facto* situations which made it difficult to gain access to justice and consequently to exhaust local remedies.

33. Mr. PELLET said he was not sure he agreed with Mr. Brownlie entirely, though there was indeed food for thought in what he had said. One could not dispense with the question of when local remedies were exhausted by saying that it was when something was contrary to the general notion of human rights. One had to look at what rule had been violated, the violation of a rule *erga omnes*, for example, or whether injury had been caused to the common heritage of mankind, and so forth. In such cases, he agreed that local remedies did not need to be exhausted.

34. The position taken by Mr. Tomka and endorsed by the Chair about Chernobyl's not having entailed the responsibility of the State was untenable and raised the issue of whether liability had any content whatsoever. Responsibility definitely came into play for failure to respect the duty of prevention. The Soviet Union could not conceivably be considered to have complied with the obligation of prevention: otherwise the draft articles on prevention of transboundary harm arising out of hazardous activities adopted at the previous session served no purpose.

35. Ms. XUE said that in regard to the mafia example, it was still the responsibility of the respondent State to make sure that a remedy was provided without undue delay. In the situation suggested by the Chair, when country B prevented a claim from being made, effective control or the sovereignty of the respondent State was what mattered. Country B might have a certain influence on the respondent State, but the question was to what extent. If the pressure was such that the respondent State could not fulfil its international obligations, it would be a serious matter, but of a different nature. If, on the other hand, despite some pressure on it, the respondent State could still provide local remedies, that was quite different. In short, in the mafia example, there were no grounds for the respondent State to fail in its responsibility or for the claimant State simply to say there was a threat that led it to believe local remedies would not be available. It was a question of effective control or sovereign rights and duties on the part of the respondent State.

36. The Chernobyl example and Mr. Brownlie's argument about a voluntary link were good points. She wondered, however, if one was really talking about treatment of aliens in that kind of situation. Was it not really about extraterritorial effects? If the injured persons would not go to all the trouble of obtaining local remedies; their

Government could submit an international claim on their behalf. That was the general practice. The principle of equal access was often advocated in international environmental matters. If that principle also applied, it would be contradictory for the voluntary link rule to come into play. In pollution damage cases, one had to look hard, first, at whether there was an international rule governing the international liability of the actor State; second, at whether injured parties could really use the access to justice that was theoretically designed for them; and third, at whether the case could be considered one of diplomatic protection or rather one of international liability for extraterritorial injury. Those issues should not be confused.

37. Mr. SIMMA said that Mr. Koskenniemi had initiated a debate on whether it was a good idea to limit article 14, subparagraph (f), to covering instances in which the respondent State did something intentionally, or whether a subjective element was involved. The overarching principle was set out in article 14, subparagraph (a), according to which the criterion was whether there was a reasonable possibility of an effective remedy. It would be nonsensical to say that if the respondent State prevented a person from exhausting local remedies, this person did not have to go through with the procedure, but that if a third party or even meteorological conditions denied access to the courts, the person still had to exhaust local remedies. The test had to be an objective one; the answer must not depend on whether the State in which the remedy could be provided was itself subjectively or intentionally standing in the way of such a remedy.

38. Mr. DUGARD (Special Rapporteur) said that article 14, subparagraph (f), had engendered an unexpectedly interesting debate. Mr. Gaja and Mr. Koskenniemi had envisaged situations in which an injured party could extraterritorially conduct legal proceedings through local lawyers or lawyers of the party's home State who might be given access to the territory in question. That pointed up the division between common law and civil law systems. In the common law system, the injured individual might have to give evidence in person before the court, and if the individual was not permitted to visit the respondent State, then no claim could be brought.

39. Article 14, subparagraph (b), dealt with waiver and estoppel. The rule on the exhaustion of local remedies was designed to benefit the respondent State, and consequently the respondent State could elect to waive it. That certainly could be done expressly, and whether it could be done tacitly would depend upon the circumstances. Waiver of the rule created some jurisprudential difficulties, and the distinction between procedural and substantive rules came into play. If the rule on the exhaustion of local remedies was procedural in nature, there was no reason why it should not be waived. It was simply a procedure that must be followed, and the respondent State could therefore dispense with it. The international wrong was not affected, and the dispute could be decided by an international tribunal.

40. If, on the other hand, the rule on the exhaustion of local remedies was one of substance, it could not be waived by the respondent State, because the wrong would only be completed after a denial of justice had occurred

in the exhaustion of local remedies or if it was established that there were no adequate or effective remedies in the respondent State. That explained why some substantivists did not deal with the subject and why, on a previous occasion, in adopting article 22 of the draft articles on State responsibility, the Commission had not referred to the question of waiver in the text of that provision or in the commentary. Admittedly, some substantivists, such as Borchard and Gaja, took the view that that could be reconciled with the substantive position, something he accepted. But that gave rise to jurisprudential debate. It was one of the reasons why he had argued that the procedure/substance debate could not simply be dismissed, although he had the impression that the Commission would decide to do so.

41. Waiver might be express or implied, or it might arise as the result of the conduct of the respondent State, in which case it might be said that the respondent State was estopped from claiming that local remedies had not been exhausted.

42. An express waiver might be included in an *ad hoc* arbitration agreement to resolve an already existing dispute; it might also arise in the case of a general treaty providing that future disputes were to be settled by arbitration. Such waivers were acceptable and generally regarded as irrevocable. Implied waivers presented greater difficulty, as could be seen in the *ELSI* case (para. 53 of the report): ICJ had been “unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so” [para. 50 of the judgment]. Hence, there must be clear evidence of such an intention, and some jurists had suggested that there was a presumption, albeit not an irrebuttable one, against implying waiver. But when the intention to waive the rule on the exhaustion of local remedies was clear in the language of the agreement or in the circumstances of the case, it must be implied. It was impossible to lay down any general rule as to when such a waiver could be implied, but he gave four examples in the third report (paras. 56–59) in which special considerations might apply. The first was the case of a general arbitration agreement: where the respondent State had agreed to submit disputes to arbitration that might arise in future with the applicant State and where there was no mention of the rule on the exhaustion of local remedies, there was a presumption that waiver should not be implied. That seemed to follow from the decision in the *ELSI* case. Silence in a general arbitration agreement dealing with future disputes did not imply waiver. The second example was that of the question which had been addressed on one occasion before PCIJ, namely whether the filing of a declaration under the Optional Clause implied waiver. In the *Panevezys-Saldutiskis Railway* case, a dissenting judge of the Court had taken the view that it did, but the Court had not accepted that proposition, and since then, the practice of States suggested that that could not be the case. The third example was the case of an *ad hoc* arbitration agreement entered into after the dispute and where the agreement was silent on the rule on the exhaustion of local remedies. There, silence could be interpreted as waiver, but that was because the *ad hoc* agreement had been entered into after the dispute arose. The fourth example concerned the more difficult

situation in which a contract between an alien and the host State impliedly waived the rule on the exhaustion of local remedies and the respondent State then refused to go to arbitration. If the State of nationality took up the claim in such circumstances, the implied waiver might also extend to international proceedings, but the authorities were divided on that point.

43. It could thus be concluded that waiver could not be readily implied, but that where there was clear evidence of an intention to waive on the part of a respondent State, it must be so implied. For that reason, he suggested that reference to implied waiver should be retained in article 14, subparagraph (b).

44. Similar considerations applied in the case of estoppel. If the respondent State conducted itself in such a way as to suggest that it had abandoned its right to claim the exhaustion of local remedies, it could be estopped from claiming that the rule on the exhaustion of local remedies applied at a later stage. The possibility of estoppel in such a case had been accepted by a Chamber of ICJ in the *ELSI* case and was also supported by human rights jurisprudence.

45. He wished to emphasize the need for article 14, subparagraph (b). Clearly, the respondent State had the power to expressly waive the rule on the exhaustion of local remedies. In certain circumstances, it might be possible to imply a waiver or to find that the respondent State was estopped from claiming that local remedies should be exhausted. Thus, the Commission must make some reference to implied waiver and estoppel, bearing in mind that they should not be easily accepted and would depend on the circumstances of the case.

46. As to subparagraphs (c) and (d) of article 14, he had suggested that the Commission should consider the provisions on voluntary link and territorial connection, which were closely linked. There was support for those rules, but it could also be adduced that the existing rule on the exclusion of local remedies might cover those two subparagraphs. When the Commission had considered the matter in respect of article 22 of the draft articles on State responsibility, it had been decided that it was unnecessary to include such provisions. It was one of the rare occasions in which he came to the defence of article 22, albeit without much enthusiasm. In his report, he raised the question of whether the Commission needed one or more separate provisions dealing with the absence of a voluntary link or a territorial connection. The debate on the subject had largely grown out of the *Aerial Incident of 27 July 1955* case, which had to do with whether Israeli nationals were required to exhaust local remedies in Bulgaria before an international claim could be brought against the latter country as a result of an El Al aircraft's being shot down over Bulgaria. Clearly there had been no voluntary link between the injured parties and Bulgaria. Meron had pointed out that in all the traditional cases dealing with the rule on the exhaustion of local remedies, there had been some link between the injured individual and the respondent State, taking the form of physical presence, residence, ownership of property or a contractual relationship

with the respondent State.⁵ Meron and others had asserted that diplomatic protection had undergone major changes in recent years. In the past, diplomatic protection had been concerned with cases in which a national had gone abroad and was expected to exhaust local remedies before proceeding to the international level. Today, however, there was the problem of transboundary environmental harm; he had cited the example of Chernobyl and the *Aerial Incident of 27 July 1955* case. Obviously, those were different types of situations from those in the past, when, say, an American national went off to a country in Latin America, proceeded to exploit the local people and, having gotten into trouble, called for the assistance of Uncle Sam. Those who supported the adoption of a voluntary link or territorial connection exception to the rule on the exhaustion of local remedies emphasized that in the traditional cases there had been an assumption of risk on the part of the alien in the sense that he had subjected himself to the jurisdiction of the respondent State and could therefore be expected to exhaust local remedies.

47. Unfortunately, there was no clear authority on the need to include a separate rule. Judicial decisions were ambiguous. Those who favoured an exception to the rule on the exhaustion of local remedies had referred to the *Interhandel* case, in which ICJ had stated that “it has been considered necessary that the State where the violation occurred should also have an opportunity to redress it by its own means” [p. 27 of the judgment of 21 March 1959]. Amerasinghe had argued that the reference to the State in which the violation had occurred indicated that there must be some territorial connection.⁶ Again, in the *Salem* case an arbitral tribunal had declared that “as a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence”. But the question of whether there should be an exception to the rule on the exhaustion of local remedies had not arisen in either of those cases.

48. The issue had been set out more clearly in the *Norwegian Loans* case, in which France had argued that French nationals who held Norwegian bonds but were resident in France were not obliged to exhaust local remedies in Norway. The Court had not found it necessary to decide on the matter, but in a dissenting opinion Judge Read had advanced the view that there had been no authority for the French position. The issue had been argued persuasively in the *Aerial Incident of 27 July 1955* case by Rosenne, who had stressed that “all the precedents show that the rule is only applied when the alien, the injured individual, has created, or is deemed to have created, a *voluntary, conscious and deliberate connection* between himself and the foreign State whose actions are impugned. The precedents relate always to cases in which a link of this character has been brought about, for instance, by reason of residence in that State, trade activities there, the ownership of property there” (para. 74 of the report). Again, the Court had not needed to decide on the matter.

⁵ T. Meron, “The incidence of the rule of exhaustion of local remedies”, *BYBIL*, 1959, vol. 35, p. 83; see especially p. 94.

⁶ C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990), p. 145.

49. Cases involving transboundary harm tended to suggest that it was not necessary to exhaust local remedies. In the *Trail Smelter* case, local remedies had not been insisted upon. There had been no local remedies to exhaust in Canada or, for that matter, in the United States. But the *Trail Smelter* case could also be explained by saying that it dealt with a direct injury by the respondent State (Canada) to the claimant State (the United States) and that there had been no need to exhaust local remedies in that situation.

50. The proponents of the requirement for a voluntary link or territorial connection had made a strong case. The opponents were less persuasive, and it was misleading for them to cite the *Finnish Ships Arbitration* and the *Ambatielos* and *ELSI* cases (para. 76 of the report), where there had been no close connection between the individual and the respondent State. Yet there had indeed been some link, albeit not a close one, between the injured individual and the respondent State. Proponents of the voluntary link requirement had never equated it with residence. If residence were the requirement, that would exclude the application of the rule on the exhaustion of local remedies in cases of the expropriation of foreign property and contractual transactions where the injured alien was not permanently resident in the respondent State. State practice was not clear. In paragraph 79 of the report, he pointed out that, where a State had been responsible for accidentally shooting down a foreign aircraft, in many cases it had not insisted that local remedies must first be exhausted. The same applied to transboundary environmental harm; there, he had cited the *Gut Dam Arbitration Agreement*,⁷ in which Canada had waived that requirement, and the *Convention on International Liability for Damage Caused by Space Objects*, which did not require exhaustion of local remedies either.

51. Early efforts to deal with codification (paras. 81–82 of the report) were silent on this subject because they had usually focused on State responsibility for damage done in the State’s territory to the person or property of foreigners and on the traditional situation in which an alien had gone to another State to take up residence and do business. The Commission had refrained from including an exception to the local remedies rule on the matter because, as neither State practice nor judicial decisions had dealt with it, the Commission had felt that it was best to let it be addressed by existing rules and to allow State practice to develop, if necessary in accordance with a specific exception.

52. There was good reason to give serious consideration to including the exceptional rules in subparagraphs (c) and (d) of article 14. It seemed impractical and unfair to insist that an alien be required to exhaust local remedies in the four situations to which he referred in paragraph 83 of the report: transboundary environmental harm caused by pollution, radioactive fallout or man-made space objects; the shooting down of aircraft outside the territory of the respondent State or of aircraft that had accidentally entered its airspace; the killing of a national of State A by a soldier of State B stationed on the territory of State A; and the transboundary abduction of a foreign national from either his home State or a third State by agents of the respondent

⁷ Reproduced in *ILM*, vol. 4, No. 3 (May 1965), p. 468.

State. The Commission needed to examine whether such examples required a special rule exempting them from the scope of the rule on the exhaustion of local remedies or whether they were already covered by existing rules. In many such cases, the injury to the claimant State by the respondent State was direct. If the Commission accepted the preponderance rule which he had proposed in draft article 11, it would find that the local remedies rule would be excluded in many such situations because the injury was direct. That was true of most cases of transboundary environmental harm, the accidental shooting down of aircraft and the transboundary abduction of a national. There might be situations in which the claimant State proposed not to bring a direct claim, and it might then be argued that the local remedies rule should be applied, but there, too, in all likelihood an effective remedy would not be available. That brought him back to the arguments raised against expecting persons injured by the Chernobyl disaster to exhaust local remedies in the Soviet Union. Jiménez de Aréchaga had argued persuasively that it would be inequitable to require an individual to attempt effective remedies in a foreign State⁸ (para. 86 of the report).

53. He had an open mind on the subject and could see the reasons for including such a rule; that was why he had proposed subparagraphs (c) and (d) of article 14. But he was prepared to accept that, in most instances, the existing exceptions to the rule on the exhaustion of local remedies, namely the absence of a need to exhaust local remedies for a direct injury and the absence of an effective remedy, would cover those cases. He left it to the Commission to decide whether it wished to follow the course taken at its forty-eighth session and allow the matter to develop in State practice, or whether it felt there was a need to intervene *de lege ferenda*.

The meeting rose at 11.40 a.m.

⁸ E. Jiménez de Aréchaga, "General course in public international law", *Recueil des cours de l'Académie de droit international de La Haye, 1978-I* (Sijthoff and Noordhoff), vol. 159, p. 296.

2717th MEETING

Wednesday, 8 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda,

Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (*continued*) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GAJA said that waiver played different roles in the field of diplomatic protection. Article 45, subparagraph (a), of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session⁴ considered waiver by an injured State, whereas subparagraph (b) of the present draft referred to waiver by the respondent State. In practice, the respondent State's waiver usually related to the obligation to exhaust local remedies, but it might also concern other aspects of admissibility of claims, such as the nationality of claims. It would seem more logical to formulate a general provision on waiver in the field of diplomatic protection, either by the claimant State or by the respondent State, and also a general provision on acquiescence or estoppel, which were considered in article 45, subparagraph (b), of the draft articles on State responsibility for internationally wrongful acts with regard to the injured State and, with regard to the respondent State, in article 14, subparagraph (b), of the text under discussion. If the Commission nevertheless considered that a specific—rather than a general—provision on waiver of the requirement to exhaust local remedies was necessary, it would be better to separate that provision from those relating to the effectiveness of local remedies or the presence of a significant link between the individual and the respondent State, as the latter dealt with the scope and contents of the rule, whereas waivers mostly concerned the exercise of diplomatic protection in a specific case. Furthermore, waivers should not be confused with agreements between the claimant State and the respondent State to the effect that exhaustion of local remedies was not required, for such agreements had the same function but were instances of *lex specialis* and should not be considered when codifying general international law.

2. Like the Special Rapporteur, and although practice on the question was divided, he thought that, in the absence of a voluntary link between the individual and the respondent State, or when the respondent State's conduct had taken place outside its territory, it might be unfair to impose on the individual the requirement that local

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

⁴ See 2712th meeting, footnote 13.

remedies should always be exhausted, and that it was justifiable to provide for exceptions to the exhaustion of local remedies rule in the context of progressive development. However, the text of subparagraphs (c) and (d) of article 14 perhaps went too far in categorically stating that both the absence of a voluntary link and the fact that the respondent State's conduct had not been committed within its territorial jurisdiction were *per se* circumstances that totally excluded the requirement that local remedies should be exhausted. Consequently, he suggested formulating a single provision allowing for an exception to the rule on the exhaustion of local remedies in either of those two cases, where the circumstances justified it.

3. Ms. ESCARAMEIA said that she agreed with the exception proposed by the Special Rapporteur in article 14, subparagraph (b), and that she would thus have no objection to that provision's being referred to the Drafting Committee.

4. In her view, subparagraphs (c) and (d) touched on the crux of the matter, namely, the nature of the institution of diplomatic protection; hence the need to include those provisions in the draft articles. It was gratifying to note that the Special Rapporteur had taken account of recent world developments such as the growth in travel, as a result of which individuals were more likely than in the past to be injured by a State with which they had no connection. In some cases, it would not be fair, reasonable or practical to require local remedies to be exhausted; nor should the victims be left in suspense as to the ultimate outcome of the court proceedings. The debate on the question revealed the existence of two conflicting conceptions of diplomatic protection. According to the first, more conservative conception, States were the only actors, and it was for States to assess whether diplomatic protection should be exercised. Under that conception, there was not much scope for exceptions; the emphasis was on nationality and on the exhaustion of local remedies, rules that protected the sovereignty of the claimant State and the respondent State, respectively, and the situations to which diplomatic protection was applicable were limited. They would not include, for instance, situations of environmental transboundary harm. The other conception, which took fuller account of the contemporary world in which people were constantly on the move, of transboundary harm and of the fact that non-State entities were involved, placed more emphasis on injury to the individual; it was more willing to accept exceptions to the nationality rule or to the rule on the exhaustion of local remedies and to extend diplomatic protection to situations of transboundary harm. The Commission could, of course, draft a flexible formulation, using ambiguous words, or balance the view taken in one paragraph by putting forward a contrary view in another paragraph, or even defer the problem to the stage of application of the text by the courts. Still, on the two points under consideration, a choice must be made, and the Commission must decide whether it wished to reflect the changes that the contemporary world had undergone. For her own part, she hoped that would be the way chosen.

5. Mr. KATEKA said he was relieved to note that members were endeavouring to avoid getting bogged down in a debate on whether the principle of the exhaustion of

local remedies was substantive or procedural. His view was that article 12 could be referred to the Drafting Committee, while article 13 might need to be relegated to the commentary. In his second report on diplomatic protection (A/CN.4/514), the Special Rapporteur had made it clear that local legal remedies covered both judicial and administrative remedies; however, not many examples of administrative remedies had been given. Such examples might enrich the study of the subject.

6. In his third report on diplomatic protection (A/CN.4/523 and Add.1), the Special Rapporteur indicated his intention of producing an addendum, or two separate addenda, on the questions of the Calvo clause and denial of justice. In his view, the Calvo clause was relevant, and it would be appropriate to include some consideration of denial of justice in the study.

7. With regard to article 14, subparagraph (a), he favoured the intermediate option ("provide no reasonable possibility of an effective remedy"). Subparagraph (e), on the notion of undue delay, should be retained, and subparagraph (f) had some merit. The formulation of subparagraph (b) seemed to him to pose problems, for he was not sure how an implied waiver could be clear and unequivocal. The "hardship cases" covered in subparagraphs (c) and (d) should be retained as exceptions to the rule on the exhaustion of local remedies. Finally, he considered that the question of the burden of proof could be incorporated in the commentary.

8. Mr. PELLET, reminding members that he was in favour of referring subparagraphs (a), (e) and (f) of article 14, but not article 15, to the Drafting Committee, said that subparagraphs (a), (e) and (f) nonetheless offered matter for discussion. On the principle, it was clear that an obligation to exhaust local remedies existed only if those remedies provided a real possibility of success within an acceptable period of time; it was there that the concept of denial of justice, which was inseparable from the question dealt with in subparagraph (a), came into play. He noted that, in paragraph 21 of his report, the Special Rapporteur reproduced the definition of denial of justice given in article 9 of the articles adopted on first reading by the Third Committee of the Conference for the Codification of International Law, held at the Hague in 1930,⁵ but attributed to it a dual scope which it did not in fact have. According to that definition, the exhaustion of local remedies was clearly not obligatory in case of denial of justice, but it was a consequence of that denial of justice. In his view, now was not the time to engage in a debate on whether the concept was a primary or a secondary rule. Denial of justice seemed to him in any case to be covered by subparagraphs (a), (e) and (f). It was thus not necessary to devote a specific provision to it, and the point should be stressed in the commentary. What was important was that remedies were inaccessible, and that the fact was clear to any impartial observer.

9. With regard to the formulation of subparagraph (a), he was persuaded by the Special Rapporteur's arguments in favour of option 3. But, whatever option was adopted, the

⁵ *Ibid.*, footnote 18.

terms proposed left very considerable scope for subjective interpretation, whether of the term “futile” or of the term “reasonable”, which, though more familiar to practitioners of common law, was not unknown in public international law. However, the criterion of reasonableness was vague and related to the problem of the burden of proof, for which reason he had asked the Special Rapporteur to introduce article 14 and article 15 together, in the hope of finding that article 15 contained a limitation to the apparent arbitrariness of the criterion adopted in article 14. That, however, had proved not to be the case; for article 15 was grounded in contentious proceedings, and that was of debatable value in the case of international law, which was essentially a system of law without judges; and the purpose of the draft was to indicate to States what they must do when faced with problems of diplomatic protection. Furthermore, the burden of proof was not a problem specific to the exhaustion of local remedies. Last but not least, the question was not with whom the burden of proof lay, but what was to be proven. Consequently, the concept of reasonableness should be further defined in the context of diplomatic protection, bearing in mind that the State committing the wrongful act giving rise to the injury was supposed to be acquainted with its own internal law and could thus assess the chances of a remedy’s succeeding, whereas that State’s law was not familiar to the injured individual or to the State intending to protect him, so that such an assessment was difficult for both.

10. In that connection, he could not help but think of “imperfect ratifications”, certainly a complex issue but one that had been decided in an acceptable and generally accepted manner by article 46 of the Vienna Convention on the Law of Treaties (hereafter “the 1969 Vienna Convention”), entitled “Provisions of internal law regarding competence to conclude treaties”. Paragraph 1 of the article provided that only a violation by a State of a provision of internal law that was manifest and of fundamental importance could invalidate a treaty, while paragraph 2 indicated that “A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith”. He was not saying that that wording could be transposed unchanged to the topic of diplomatic protection, but he thought that the problem was comparable. In both cases, it was a matter of enabling protector State B or the injured person, which were unfamiliar with the internal law of State A that had caused the injury, to ascertain whether the internal law of State A offered remedies that had reasonable chances of success; and, in both cases, there was certainly a presumption in favour of State A and of the existence of domestic remedies in its law. He was not convinced that the wording of article 46, paragraph 2, of the 1969 Vienna Convention was a panacea or that the words “objectively evident” were better than the word “reasonable”, but it did seem to him that the Special Rapporteur and the Drafting Committee should think further along those lines, since the inclusion in the draft of references to normal practice and good faith would introduce a less subjective criterion, thereby reducing the causes of friction and disputes among States.

11. Summing up his position on the matter, he said that article 15 should be abandoned and that subparagraph (a) of article 14 should be referred to the Drafting Commit-

tee, with the contents having been clarified, even if option 3 was taken as the starting point.

12. He had similar comments to make on subparagraph (e) of article 14. It was true that a decision had to be obtainable “without undue delay”, but the text undoubtedly could and should specify what was abusive. In fact, perhaps subparagraph (e) could be combined with subparagraph (a), to which it should at all events be moved closer, as it was clearly the necessary and obvious extension of that provision. Since he was not a member of the Drafting Committee, he would take the opportunity to propose something along those lines now, in plenary. The proposal might read: “Local remedies do not need to be exhausted where the law of the State responsible for the internationally wrongful act offers the injured person no objective possibility of obtaining reparation within a reasonable period of time”. It would then be explained that “The objective possibility of obtaining reparation within a reasonable period of time must be assessed in good faith [in the light of normal practice] or [in conformity with general principles of law]”.

13. He agreed with Mr. Gaja that subparagraph (f) was either to be interpreted broadly, in which case it obviously duplicated subparagraph (a), or, if it was interpreted literally, it meant that the injured person was physically prevented from gaining access to the institutions that administered domestic remedies. In fact, judging by the position the Special Rapporteur had taken in paragraph 101 of his third report, it was the latter interpretation that was correct. But that interpretation was quite simply a mistake, and probably a human-rightist-type mistake, since it was entirely possible to exhaust local remedies through a lawyer or a representative. That was true, of course, as long as the financial burden was not disproportionate, because, if it was, then that was right in line with subparagraph (a). He really could not see why a remedy could not be reasonable and effective simply because the responsible State did not wish to allow the injured person to enter its territory: it merely had to let the person be represented in an appropriate manner.

14. He had not been won over by the Special Rapporteur’s explanation on that point, in which he maintained that the problem arose from a lack of understanding between practitioners of civil law and common law. In fact, it was generally possible to submit pleadings by proxy in countries of the civil law tradition as well as those where the common law, Islamic law or even socialist legal systems were used, and even the European Court of Human Rights seemed to accept that. On the other hand, if the remedy proved to be abusively onerous because a lawyer’s services had to be used, it could not be described as effective, and he wondered whether that idea should not be explicitly mentioned in subparagraph (a).

15. If, as he hoped, the ideas expressed in subparagraphs (a), (e) and (f) were retained, it then seemed quite unnecessary to add a reference to “adequate and efficient” domestic legal remedies in article 10, as that would be redundant. The draft formed a whole, and there was no need to say vaguely in article 10 what would be developed and explained further in article 14. It would be enough, in

article 10, to set out the obligation to exhaust local remedies and, in article 14, to spell out the limits of that obligation.

16. Before referring to subparagraphs (b), (c) and (d) of article 14, he pointed out that one idea he regarded as important was missing: for an individual to be deemed to have exhausted local remedies, it was not enough for him to have brought a case before the competent domestic court; he must also have put forward the relevant legal arguments if they were not based on public policy. The *ELSI* and *LaGrand* cases adjudicated by ICJ and the *De Wilde* case heard by the European Court of Human Rights provided material that was worth studying and would undoubtedly lead to the inclusion of a provision on that subject, either as an additional paragraph of article 14 or as a new article in the draft.

17. Turning to subparagraph (b) of article 14, he said he did not understand how the question whether the rule laid down was procedural or substantive could have any effect on the problem with which the Commission was dealing. The objective in any case was to protect the responsible State that had committed an internationally wrongful act, and that State could waive such protection if it chose. That having been said, he accepted the principle set out in the article, although he had some reservations about the wording. First, he was not enthusiastic about including the concept of estoppel or even the word itself. Not only were they typical of common law and viewed with some suspicion by practitioners of civil law, but, in addition, the idea of estoppel was covered by the broader concept of implicit waiver. Next, he thought it desirable to state that waiver must be clear and unambiguous, even if it was implicit. The judicial decisions and doctrine cited by the Special Rapporteur seemed to point in that direction. Last, and above all, it being the fundamental issue, he said that he was disturbed, to say the least, by the sudden incursion of the words “respondent State”, which seemed to be associated with the drafting of a text on contentious proceedings and which did not seem to have appeared in the articles already referred to the Drafting Committee or in article 12 or 13. He could see no justification for them and thought that there was every reason, at the present stage, to stick to the terminology used in the articles on State responsibility for internationally wrongful acts. In the present context, the protagonists were a State injured in the person of its national and another State that was responsible for that injury.

18. With regard to subparagraphs (c) and (d) of article 14, he admitted that his reading of the report had aroused his curiosity about the concept of voluntary link (subpara. (c)), but had not entirely dispelled his confusion. His confusion was caused more by the way in which the Special Rapporteur presented the idea—by examining it together with the concept of territorial connection (subpara. (d))—than by the concept itself, which in his view was attractive and quite appropriate, even though it reflected doctrine more than practice. As he understood it, the idea of “voluntary link” meant that local remedies did not have to be exhausted in a case when a State caused injury to a person who had had nothing to do with his own misfortune, had not taken any risk, had not initiated any contact, had not

gone to the territory of the responsible State, and had not invested there. Leaving practice aside, the idea seemed reasonable: it would solve the problems he had raised at the preceding meeting and cover the cases mentioned by the Special Rapporteur in paragraph 83 of his third report. He could understand that the Special Rapporteur saw the idea as “clearly” having “substance”, but he could not understand why, by way of conclusion, he leaned towards rejecting the rule established in subparagraph (c). The underlying principle seemed to be a matter of common sense and equity. True, the rule had not been clearly enshrined in judicial decisions, but it would seem to be justified by the practice cited by the Special Rapporteur, although there also seemed to be practice to the contrary, specifically in respect of compensation for damage caused by pollution. In that connection, he regretted having mentioned maritime pollution of the *Torrey Canyon* or *Amoco Cadiz* type at the preceding meeting, since, from that point of view, they were outside the topic. In subparagraph (c), the Commission nevertheless had an excellent opportunity to engage in the progressive development of international law, and he endorsed the principle of referring that provision to the Drafting Committee, noting that it would probably be better to define the term “voluntary link”, which was neither obvious nor a given, not in the commentary but in the article itself.

19. He saw no merit in subparagraph (d) of article 14, however, because, as submitted by the Special Rapporteur, it seemed to be only a subconcept of the concept dealt with in subparagraph (c). When interpreted literally, moreover, it unhelpfully contradicted the idea of “voluntary link”. For example, in the case of an aerial incident, an aircraft shot down in the territory of a State A by that State A, there was no voluntary link between State A, the author of the internationally wrongful act committed within its territorial jurisdiction, its airspace and the injured party, but what justified the voluntary link was particularly applicable: the persons on board the aircraft had obviously not chosen any territorial link, but it so happened that they had been in the territory of State A. It would therefore be better to drop subparagraph (d).

20. Mr. BROWNLIE, referring to subparagraph (c), said that he was astonished that the Special Rapporteur was so tentative in his approach to the concept of voluntary link. He disagreed with the assertion in paragraph 70 of the third report that there was no clear authority either for or against the requirement of a voluntary link. In fact, there was considerable support for that requirement from various sources. As for the general question of direct injury, he pointed out that, for reasons of personal interest, European States had reacted to the Chernobyl accident with great caution. The British Government, for example, had not made any claim. But in such situations pressure groups could lobby their Governments to take action. He was therefore in favour of retaining subparagraph (c) and referring it to the Drafting Committee. However, far from being an exception to the rule on the exhaustion of local remedies, the provision was a condition of the rule’s application and as such was out of place in article 14, which dealt with exceptions to the rule and whose structure needed to be reviewed.

21. He agreed with Mr. Pellet that subparagraph (*d*) of article 14 was unacceptable; it was not very helpful, it did not have much authority behind it, and it was not really compatible with subparagraph (*c*).

22. Mr. KOSKENNIEMI said that he was increasingly inclined to agree with Mr. Brownlie that the discussions did not have to do with a minuscule exception, but with the very rationale for the rule. He understood the policy considerations behind the concept of voluntary link, as explained by the Special Rapporteur and referred to by many other members of the Commission, but he was afraid that those discussions might put the Commission on the wrong path. There were in fact cases where, despite the existence of a voluntary link, it was desirable to be able to exercise diplomatic protection. The opposite was also true: in certain situations in which there was no voluntary link, it was still not desirable to provide for such protection. He therefore wondered whether the concept of voluntary link was relevant. Rather, the fundamental question was who needed diplomatic protection and who did not really need it. When persons were injured, especially those who were particularly vulnerable, what was important was that they could be protected. That was the case with Asian workers in Kuwait who had had to leave that country when it had been invaded by Iraq in 1990 and who had taken refuge in neighbouring countries, such as Iran or Saudi Arabia. In his view, they should be able to enjoy the diplomatic protection of their States of nationality *vis-à-vis* these latter States even if they found themselves in their territory not really on the basis of voluntary choice. On the other hand, in the case of multinational commercial entities engaged in transnational activities, for example, on the Internet, that was not necessarily desirable. Here as well, one could say that there was no voluntary link with any particular State; still, there was no social or moral need to dispense with the need for exhaustion of local remedies. Thus, the question of the existence or absence of a voluntary link was not the ideal perspective for addressing certain situations and must not be placed on the same footing with other exceptions under article 14.

23. Mr. TOMKA said that the point was not whether or not to accord diplomatic protection, but to examine practice and set out rules. With regard to the example of Asian workers in Kuwait, it must be borne in mind that the injury they had suffered had not been caused by Kuwait, with which they had established a voluntary link, but by Iraq, with which no such link had existed. The State of nationality exercising diplomatic protection should therefore address its claim to Iraq.

24. Mr. KOSKENNIEMI said that actually he had in mind that they might enjoy diplomatic protection in other countries of the region where they had voluntarily taken refuge.

25. Mr. PELLET said that he was not at all convinced by Mr. Koskenniemi's line of reasoning. Rather, the example of refugees from Kuwait which he had cited spoke in favour of the concept of voluntary link, although it really could not be said that the link was voluntary in their case. Perhaps the link was a "necessary" one. The aim of the rule on the exhaustion of local remedies was to pro-

tect the respondent State by allowing it to compensate for the damages which it had wrongfully caused, not to protect persons. Needless to say, it could be deleted, and he would personally be in favour of recognizing the international legal personality of individuals, but that was not the question at issue. The other example, that of transnational corporations, was somewhat more convincing because it prompted the Commission to think about what the link was, but it was such an unspecific case that there was no need to dwell on it.

26. However, he strongly supported Mr. Brownlie's proposal that subparagraph (*c*) should be separated from the rest of the provision. The rules it embodied were of a different nature, and it would therefore be much better to consider the concept of voluntary link on a completely separate basis.

27. Ms. XUE said that the Special Rapporteur's comments on article 14 were very useful; they provided a clear analysis of the question and cited several interesting sources. Of the three options proposed in article 14, subparagraph (*a*), the third deserved special attention. Three elements should be considered for drafting purposes. First, during earlier discussions in the Commission and in the Sixth Committee on article 10, it had been suggested that the provision should be amended to require that all "adequate and effective" local remedies should be exhausted. Second, the words "reasonable possibility" should be looked at more closely, since the terms "reasonable" and "possibility" in the current wording might denote a subjective assessment by the claimant State. The first part of article 14 and subparagraph (*a*) should therefore be redrafted. Third, subparagraph (*a*) seemed to overlap somewhat with subparagraphs (*c*), (*d*), (*e*) and (*f*), which dealt with specific situations for which there might be no possibility of an effective remedy. However, she agreed that subparagraph (*a*) should be referred to the Drafting Committee.

28. Subparagraphs (*e*) and (*f*) both placed emphasis on the responsibility of the State where the injury occurred for ensuring that local remedies were provided. That was the right approach, but the two provisions could be recast in light of the amendment to subparagraph (*a*).

29. In respect of subparagraph (*b*), it would be better not to mention estoppel, a concept which was often a source of misunderstanding. As for implied waiver, it might not be unequivocal in all cases. It would therefore be preferable to simply provide that the respondent State must expressly and unequivocally waive the requirement that local remedies should be exhausted. Subject to that change, subparagraph (*b*) could also be referred to the Drafting Committee.

30. With regard to subparagraphs (*c*) and (*d*) of article 14, the concept of voluntary link was very useful for explaining why local remedies must be exhausted before diplomatic protection could be exercised. But when there was neither a voluntary link nor other jurisdictional connections, a possible solution lay in the rules of international law. As the Special Rapporteur had pointed out in his report, it would be unreasonable to require an injured

alien to exhaust domestic remedies in such difficult cases as transboundary environmental harm, but to treat no voluntary link as an exception to the rule on the exhaustion of local remedies would unduly expand the scope of diplomatic protection.

31. Mr. DUGARD (Special Rapporteur) noted that a number of speakers had suggested that subparagraph (c) deserved special attention and that the question should be considered separately. Should he conclude that they wanted the provision to be moved to article 11, which dealt with the principle of the exhaustion of local remedies? If that was the case, he had no objection; he must simply inform the Drafting Committee.

32. Mr. BROWNLIE, replying to the question asked by the Special Rapporteur, said that he found the various proposed structural amendments interesting. He had no specific proposal to make, but he, too, was of the view that the Special Rapporteur and the Drafting Committee might move the provisions on voluntary link to a more appropriate spot, for example, in article 11.

33. Mr. SIMMA said that Mr. Gaja had been right in saying that express waivers could be viewed as *lex specialis*; thus, they would not fall within the category of waiver which the Special Rapporteur had envisaged in article 14, subparagraph (b). There were few unambiguous cases of implied waiver, and its existence should not be assumed; on the contrary, the point made by the Special Rapporteur in paragraph 56 of his report was corroborated by the fact that one of the few treaties on general dispute settlement, the European Convention for the Peaceful Settlement of Disputes, had an express provision indicating that local remedies must be exhausted. Similarly, in the *LaGrand* case, which had been brought on the basis of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes and could be compared to what the Special Rapporteur called a general arbitration agreement, the United States as respondent had contested the German argumentation on the basis of diplomatic protection, but had not claimed that local remedies therefore did not need to be exhausted. The question of estoppel had led to many misunderstandings. Subparagraph (b) of article 14 was not unrelated to the scenario invoked by the Special Rapporteur in subparagraph (f), in which the respondent State prevented an individual from gaining access to local remedies. The examples that the Special Rapporteur gave with regard to estoppel were, without exception, cases in which an award or a judgement had stated that, since the respondent State had been silent regarding the failure to exhaust local remedies, it could not invoke that failure at a later stage. The consequences were the same as if a State had explicitly stated that local remedies need not be exhausted and had later had second thoughts on the matter. There might be some overlap between the types of estoppel mentioned in subparagraphs (b) and (f) of article 14 in the case involving estoppel by conduct rather than the respondent State's failure to state explicitly that local remedies must be exhausted.

34. With regard to the issue of voluntary link and the question of territoriality (art. 14, subparas. (c) and (d)), he

joined Mr. Brownlie in wondering why the Special Rapporteur was so hesitant regarding the principle that, where there was no voluntary link, there was no obligation to exhaust local remedies. But that tentative attitude could be called bizarre only if the Special Rapporteur was as strongly convinced of the soundness and convincingness of the voluntary link principle as Mr. Pellet apparently was; paragraphs 65 and 89 of the report suggested that such was not the case. However, the more fundamental problem with the concept of voluntary link, as expressed in virtually all case law and doctrine, was that the "link" was almost a physical concept, a nineteenth-century view of the physical movement of people. For example, in the *Norwegian Loans* case (para. 73 of the report), France had argued that French nationals who held Norwegian bonds but were resident in France were not obliged to exhaust local remedies in Norway because they had no voluntary link with that country. However, moving from the 1940s or 1950s to the current situation of economic globalization, it was clear that individuals could make whole economies tremble or even collapse without major barriers under international law. He therefore wondered whether an "anti-human-rights" approach should not be taken and whether the rule on the exhaustion of local remedies was not designed to protect the respondent State, whose interests must be taken into consideration. Of course, in 85 per cent of cases, it was the individual rather than the State who was vulnerable, but the other scenario must also be taken into account. With respect to transboundary pollution cases, he wondered whether it was a good idea to force the Chernobyl case into the paradigm of diplomatic protection. Diplomatic protection presupposed an internationally wrongful act, the existence of which had not been proven in the Chernobyl case, and it would be artificial and clumsy to consider that the measures taken by the United Kingdom and other countries in that case constituted the exercise of diplomatic protection. Environmental law was a new field which should not be forced to conform to old models.

35. Furthermore, too little attention had been paid to borderline cases of physical presence: Was a three-hour stopover between two flights or a six-day or two-week vacation sufficient to establish a voluntary link? That issue was addressed only marginally by the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens⁶ (para. 81 of the report) and by Roberto Ago, but it was nevertheless important as people became increasingly peripatetic, and the consequences of that fact for the concept of voluntary link must be established. The Special Rapporteur was right that, in the most spectacular instances, there would be direct injury to the individual's State of origin, which would therefore not need to resort to diplomatic protection. In other cases, the preponderance test envisaged in article 11 would resolve the problem. Still other cases would be covered by subparagraph (a) of article 14 and could be explained convincingly in that context. If there was a growing consensus that the concept of voluntary link should be singled out and placed, for example, after article 11, however, such an approach would be acceptable, subject to a fuller debate on the matter.

⁶ Reproduced in L. B. Sohn and R. R. Baxter, "Responsibility of States for injuries to the economic interests of aliens", *AJIL*, vol. 55, No. 3 (July 1961), p. 548.

36. Mr. OPERTTI BADAN said that, without explicitly saying so, the Commission was discussing the scope of the age-old instrument of diplomatic protection, which had its own tradition, historical development and practice, but in a changing world it might be asked whether it was suitable enough and whether a new instrument should not be prepared. In all the cases mentioned, including the *Amoco Cadiz* and *Bhopal* cases, the plaintiffs had been private citizens with a choice of proving damage and seeking compensation in their national courts or those of the respondent State, but the wrongful act that had caused the damage was not part of a contractual relationship. The concept of transboundary damage had its own characteristics, which did not necessarily match those of diplomatic protection. It was a new phenomenon which did, of course, have political implications, but the law should have no fear of either the new or the political. For all those reasons, the Commission should not be too quick to refer subparagraphs (c) and (d) of article 14 to the Drafting Committee before it had considered them in depth.

37. Mr. BROWNLIE said he thought that Mr. Simma might be attaching too much importance to the uncertainty and problems of application inherent in the concept of voluntary link. Many well-established and familiar concepts—the continental shelf, for example—had subsisted for years before they had been generally agreed, and well-known concepts of private international law such as that of domicile continued to pose problems of application. With regard to transboundary pollution, all that was novel in the case of the Chernobyl disaster was the number of victims; the risk of nuclear accidents as such had been envisaged in several major European multilateral conventions which had the very purpose of limiting liability between the contracting parties in the event of such an accident. And the 1935 *Trail Smelter* case was an early example of transboundary pollution. The Commission should not ignore the importance of the voluntary link principle merely because it gave rise to problems of application.

38. Mr. RODRÍGUEZ CEDEÑO said that he endorsed the views of Mr. Kateka, Ms. Xue and Mr. Simma with regard to the possibility of an implicit waiver of the requirement that local remedies should be exhausted (art. 14, subpara. (b)). Waiver was a unilateral act which should be irrevocable and should not be assumed to have taken place. Neither jurisprudence (such as the *Barcelona Traction* case) nor doctrine made such an assumption.

Organization of work of the session (continued)*

[Agenda item 2]

39. Mr. CANDIOTI (Chair of the Planning Group) informed the Commission that the Planning Group had held two meetings. At its first meeting, held on 1 May 2002, it had decided to recommend that the Commission should include in its programme of work an item entitled “International liability for injurious consequences arising out of acts not prohibited by international law” and establish a working group on the topic; and that it should also include

in its programme of work an item entitled “The responsibility of international organizations”, appoint a special rapporteur on the topic and establish a working group to assist the special rapporteur during the current session of the Commission. At the same meeting, the Group had also decided to re-establish its Working Group on the long-term programme and to appoint Mr. Pellet to serve as its Chair.

40. At its second meeting, held on 6 May 2002, the Planning Group had decided to recommend that the Commission should include in its programme of work an item entitled “Shared natural resources”, appoint a special rapporteur on the topic and establish a working group to assist the special rapporteur during the current session of the Commission; and to establish a study group on the risk of the fragmentation of international law. The Group would meet again to consider other items on its agenda.

41. The CHAIR proposed that Mr. Sreenivasa Rao should be appointed Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, that Mr. Gaja should be appointed Special Rapporteur on the responsibility of international organizations and that Mr. Simma should be appointed Chair of the Working Group on the Risk of the Fragmentation of International Law, it being understood that consultations on the topic of shared natural resources would continue.

It was so decided.

42. Mr. GAJA expressed his deep gratitude to the Commission for his appointment as Special Rapporteur. He invited members interested in the topic for which he had been made responsible to discuss the direction of the study and to suggest bibliographical items and other materials to be considered.

43. Mr. SIMMA informed members interested in the topic of the fragmentation of international law that the annex to the report of the Commission to the General Assembly on the work of its fifty-second session included a comprehensive study by Mr. Hafner.⁷

44. Mr. Sreenivasa RAO said that the Working Group on the topic for which he was responsible would use the report of the Commission to the General Assembly on the work of its forty-eighth session⁸ as its starting point.

The meeting rose at 1 p.m.

⁷ See 2714th meeting, footnote 1.

⁸ See *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 100.

* Resumed from the 2714th meeting.

2718th MEETING

Friday, 10 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (continued) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPporteur (continued)

1. Mr. OPERTTI BADAN said that with reference to the exhaustion of local remedies, he had doubts as to whether the concepts of voluntary link and territorial connection covered in subparagraphs (c) and (d) of article 14 of the Special Rapporteur's third report (A/CN.4/523 and Add.1), on which there was no general consensus, should be included as criteria in the draft articles, although they might merit separate consideration in another context. That view was supported by the Commission's approach at its twenty-ninth session during its first reading of article 22 of the draft articles on State responsibility.⁴

2. Several members had endorsed the position that local remedies did not need to be exhausted where there was no voluntary link between the injured individual and the respondent State; such a link might include voluntary physical presence (of an individual or, *mutatis mutandis*, a legal person), residence, ownership of property or a contractual relationship with the respondent State (para. 67 of the report), but not private relationships between individuals of one State and individuals of another State. However, there were cases in which such private relationships could, in

fact, give rise to international protection by the State, and they deserved further consideration.

3. He did not agree with Ms. Xue that the exhaustion of local remedies was a procedural issue. Actually the concept was substantive, though the manner in which it was implemented might fall within the scope of procedural law. Where there was a link between the individual and the foreign State, the latter must have an opportunity to provide a remedy under its own legislation.

4. Recent changes in international law had a bearing on both the nature and scope of diplomatic protection, on the one hand, and the applicability or non-applicability of the rule on the exhaustion of local remedies, on the other. In the first case, the changes were, in his view, related to events such as transboundary environmental harm and the shooting down of aircraft that had accidentally strayed into a State's airspace (para. 68 of the report), which did not fall within the traditional scope of diplomatic protection. The question, then, was whether such matters would be better handled under environmental law, in the first instance, or State responsibility, in the second. As to the draft now under consideration, the aim therefore should be to clearly define the object of the future convention, thus making a successful outcome possible.

5. It was important to consider how, in the absence of solutions in public international law, individuals were able to exercise their rights and to make claims. In the private sphere, other forms of law were applicable only to the effects of acts by the authorities, not to the acts themselves; they were useful only in the absence of, or in addition to, other remedies. It had been maintained that the *Trail Smelter* case had resolved the question of compensation, but not that of responsibility. It might then be asked whether, when an individual claimed pecuniary compensation for harm caused by the act of a foreign State in the latter's domestic courts without undertaking proceedings concerning the lawfulness or wrongfulness of the act as such, this should be deemed to be the equivalent of exhaustion of local remedies. A clearer distinction must be made between international claims and diplomatic protection; the former could be brought by either the individual or the State of nationality, while the latter could be exercised only by the State of nationality.

6. Again, it was necessary to distinguish between the types of risk assumed by the individual. A foreigner who carried out activities connected with the foreign State might be assumed to have voluntarily submitted himself to its laws and courts; in such cases, the risk could be said to have been freely assumed. In other cases, however, no such risk had been assumed because no *voluntary* link had been created; in private international law, the appropriate term for such situations would be "extra-contractual responsibility". A link with the foreign State might exist, but it existed against the individual's will or as a result of unforeseeable events, as in the case of the Chernobyl nuclear plant explosion or the *Amoco Cadiz* oil spill. Because the *Trail Smelter* case had been resolved through arbitration, it did not provide a valid example of the principle in question.

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

⁴ See 2712th meeting, footnote 6.

7. In such cases, the victims should have the option of seeking a remedy in the courts of the responsible State, but they should not be obliged to do so. The Special Rapporteur, in commenting on article XI, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects (para. 80 of the report), appeared to be pointing to such a broader view. In the case of catastrophic damage affecting the population of more than one State, one possibility would be to allow victims who had suffered physical harm to lodge claims either in the courts of their own State of residence or in those of States with a reasonable connection to the event. In other words, exhaustion of remedies should not be confined to remedies exclusively in the State causing the damage. The Special Rapporteur's language in paragraph 72 of his third report suggested a certain distancing from the relevance of the concept of a voluntary link rule.

8. In the *Trail Smelter* case, Canada had not insisted on the exhaustion of local remedies. That case, which had established a precedent in private law that the State must assume responsibility for environmental harm resulting from activities that it had permitted in its territory, had been of great importance to the Sandoz-Rhine and *Bhopal* cases. In paragraph 75 of the report, the Special Rapporteur suggested that Canada's position in the *Trail Smelter* case might have been based on the view that local remedies did not need to be exhausted because the case involved direct injury or on the fact that the arbitration agreement in question did not require such exhaustion. The second of those hypotheses would remove the case from the context of the exhaustion of local remedies since arbitration, by its very nature, involved a voluntary agreement by the parties to submit themselves to it.

9. In his discussion of State practice, the Special Rapporteur gave several examples of wrongdoing States which had elected not to require the exhaustion of local remedies. In all those cases, however, the reason for that position seemed to be grounded in policy considerations—such as the impact on public opinion—rather than in legal theory, a fact which diminished their value from the point of view of codification.

10. The Convention on International Liability for Damage Caused by Space Objects was an element to be taken into account and linked up with Mr. Simma's comments at the 2716th meeting that environmental law, for example, entailed other criteria that the Commission had to acknowledge.

11. He was not fully convinced that there were sufficient elements on which consensus had been reached to warrant sending the matter under discussion to the Drafting Committee. In particular, he had doubts regarding article 14 and especially Roberto Ago's statement that local remedies should be effectively usable.⁵ His own view was that, the more usable local remedies were, the smaller the scope for diplomatic protection. He therefore agreed with Mr. Pellet that the draft articles provided a code of con-

duct for States rather than an instrument for the settlement of disputes between them.

12. He wished to stress that the abuse of diplomatic protection could best be prevented by increasing the guarantees of effective local remedies. The remedies currently available under public international law were inadequate; there was no general treaty framework in various areas, including that of environmental law; and there were at the present time no alternatives to make up for the absence of a normative framework in public international law to protect individuals and legal persons and recognize their right to compensation, as in the case of private international law. The Special Rapporteur's work was therefore an invaluable contribution to the topic, and the objections raised by members merely pointed to issues which would, in any case, be raised either in the Sixth Committee of the General Assembly or by States themselves at the time of ratification of the draft articles.

13. Mr. KEMICHA said that draft articles 12 and 13 should be deleted; there was nothing to be gained from a discussion of whether the rule on the exhaustion of local remedies was substantive or procedural in nature and, in any case, those articles added nothing to article 11, although the latter would benefit from redrafting.

14. Article 14, on the other hand, sought to cover too many issues. He preferred the third option presented under subparagraph (a) of article 14, namely where there was no reasonable possibility of an effective remedy. As to subparagraph (b), he joined those who believed that waivers must be explicit, and he had no reservations regarding the reference to estoppel. Subparagraph (d) should be deleted, since the situation in question was already covered by subparagraph (c). He welcomed the suggestion that a separate article should be devoted to the applicability of the rule on the exhaustion of local remedies in the absence of a voluntary link. Subparagraphs (e) and (f) could be combined with subparagraph (a). Last, he supported those who had proposed the deletion of draft article 15.

15. Mr. Sreenivasa RAO said that the institution of diplomatic protection had undergone tremendous changes over the years. At a time when communications had been poor and opportunities for approaching international forums lacking, the intervention of a State on behalf of individuals had been considered essential. However, now that individuals were increasingly acquiring their own personality and the opportunity to exercise their rights through various forums and channels, that need was slowly diminishing: States were at best reluctant to take up individual cases and to upgrade a private claim to a State claim. Nevertheless, the topic continued to be important and was thus in need of codification.

16. The question whether the principle of exhaustion of local remedies was procedural or substantive in nature reminded him of a similar debate on the question whether the principle of recognition was declaratory or constitutive in nature. What was clear was that the principle was a part of customary international law; that, as such, it was central to the triggering of diplomatic protection; and that, accordingly, it must be stated as clearly and unambiguously

⁵ See the sixth report on State responsibility, *Yearbook ... 1977*, vol. II (Part One), document A/CN.4/302 and Add.1-3, p. 39, para. 100.

as possible. Viewed from that standpoint, articles 12 and 13 either duplicated the statement of the principle contained in articles 10 and 11 or else merely flagged notions, such as denial of justice, which they failed to articulate fully. Accordingly, both articles could be eliminated without adversely affecting the economy of the draft articles as a whole, and their content could be integrated in articles 10 and 11, or in the commentaries to these articles.

17. While article 14 should be referred to the Drafting Committee, subparagraphs (a) and (e) needed to be realigned and reconciled. Of the three options presented for subparagraph (a), he, too, favoured option 3. The criterion of “reasonableness” was workable and, as Mr. Pellet had pointed out, one that had wielded considerable influence in the area of maritime law. “Effective remedies” and “undue delay” were relative concepts, in respect of which no universal standards were possible. In the last analysis, they must be judged in the light of the particular context and circumstances, and on the basis of other equally important principles: equality before the law, non-discrimination and transparency, to the extent that they were firmly based in the statutes of the State.

18. Useful comments on the question of waiver by Mr. Gaja, Mr. Simma and others should be accorded further attention in the Committee. Implied waiver must not be lightly presumed, but must be rigorously tested. Similarly, estoppel, where proven, would amount to an exception to the rule on the exhaustion of local remedies, being a general principle of law.

19. Subparagraph (f) of article 14 required further work in the light of comments made by Mr. Koskeniemi, the Chair and others. He shared the view that the concept of voluntary link should be treated more as a condition precedent than as an exception to the operation of the rule on the exhaustion of local remedies. That concept was useful and had underpinned a host of diplomatic claims. However, in the contemporary context, sponsorship of private claims through diplomatic means, even in the absence of a voluntary link in the strict sense, was becoming increasingly frequent. In the case of transboundary harm, it was open to States to consolidate and present claims for redress on behalf of their citizens and others under their jurisdiction to the responsible State. It was also open to individuals to approach the juridical or other quasi-judicial bodies for redress, if this was convenient or otherwise felt to be useful. That was reflected in the principle of non-discrimination, which had gained recognition in Europe and was now part of all recent international environmental instruments, and which did not, in his view, debar the State from intervening on behalf of a group of individuals resident in its jurisdiction and affected by the transboundary harm, particularly if those claims were numerous or if the injured individuals were unorganized, ignorant of the complicated legal procedures, or devoid of financial means of pursuing the claims on their own behalf. Thus, the concept of voluntary link was mostly useful as a legal basis in individual cases and should be dispensed with in some situations, for which specific provision must be made in the draft articles. Injury caused extraterritorially or in a transboundary context was one clear example, but there might be others.

20. Finally, he agreed with those members who did not favour referring article 15, on the burden of proof, to the Drafting Committee. The burden of proof was a principle of evidence and could be left to the rules of procedure or *compromis* in the case of international judicial forums, and to the law of the State in cases of resort to domestic forums of adjudication. Accordingly, article 14 should be sent to the Committee, while articles 12, 13 and 15 should be eliminated, as their content was suitably explained elsewhere.

21. Mr. MOMTAZ said he was gratified to note that, in paragraph 63 of his third report, the Special Rapporteur declared unequivocally that the rule on the exhaustion of local remedies was indeed a rule of customary international law; for there was a danger that, in the light of the imposing list of exceptions proposed in article 14, that valuable rule might be whittled down until little remained.

22. Admittedly, the Special Rapporteur, after offering a nearly exhaustive review of the doctrine and jurisprudence, hesitated to recognize the validity of some of the exceptions he proposed, such as the absence of a voluntary link between the injured individual and the respondent State. He too would concede that, as with any rule of international law, there were exceptions to the rule on the exhaustion of local remedies. One such exception, to which Mr. Fomba had drawn attention, was the case of a State such as Rwanda, in which the judicial system had totally or partially collapsed as a result of internal armed conflict. In his view, however, to provide for an exception to the rule in such cases would do nothing to solve the problem, which was by its very nature intractable. On the other hand, provision could be made for an exception in cases in which a State’s judicial system was unable to obtain the necessary evidence or otherwise unable to carry out its proceedings—a situation specifically covered by article 17, paragraph 3, of the Rome Statute of the International Criminal Court, a provision that the Commission might wish to transpose to the case under consideration.

23. A further candidate for inclusion in the list of exceptions might be the case in which a State’s procedural rules excluded aliens from justice. He was not thinking of subparagraph (f) of article 14, which covered situations in which the State prevented the injured individual from gaining access to its institutions for reasons, *inter alia*, of security or political expediency. In his view, such a case did not warrant elevation to the status of an exception, for in such instances a local lawyer could ensure that local remedies were exhausted. He was thinking, rather, of cases in which there was provision in the State’s legislation for discrimination against non-nationals. They must clearly constitute an exception to the rule. The same was true of cases in which there was a well-established line of precedents adverse to the alien—a situation to which the Special Rapporteur alluded in paragraph 42 of his report.

24. He also had doubts about the validity of the exception set out in subparagraph (e) of article 14, on undue delay. Undue delay might simply be the result of overburdening of the justice system, which often occurred in countries faced with serious shortages of resources, and,

in particular, of qualified judges to deal with cases. Such situations should not be treated as exceptions to the rule on the exhaustion of local remedies, particularly in view of the fact that in such circumstances citizens of the State in question would, like non-nationals, have to wait patiently for justice to be dispensed.

25. As to the question of a voluntary link, which had given rise to an interesting and controversial debate, he had been persuaded by the arguments put forward by Ms. Xue, who rightly considered that the State practice whereby injured individuals were authorized not to exhaust local remedies resulted from the development of international environmental law, a specialized branch of international law that had no great bearing on the issue under consideration. As for cases involving the shooting down of foreign aircraft, referred to in paragraph 79 of the report, generally speaking, the States responsible insisted that the act had been an accident, refusing to accept responsibility for a wrongful act, and offering *ex gratia* payments to compensate the victims. He thus doubted that, in cases of that kind, there was an argument in favour of an exception based on a voluntary link. As for the example to be found in paragraph 83 (c) of the report, that of the killing of a national of State A by a soldier of State B stationed on the territory of State A, the Special Rapporteur clearly envisaged a situation in which the armed forces of State B were stationed on the territory of State A in peacetime and at that State's request. In such a situation, the States concerned generally concluded agreements to settle such matters, and hence there was no need to provide for an exception. The same was true of transboundary abduction of foreign nationals, a situation referred to in paragraph 83 (d), and one which, fortunately, very seldom arose.

26. With regard to waiver of the rule on the exhaustion of local remedies, it was a well-established rule of international law that there must be no presumption as to the limits to State responsibility. Accordingly, he doubted the validity of a provision on implicit waiver. Mr. Rodríguez Cedeño had rightly pointed out that, setting apart cases in which States waived that rule by agreement, any unilateral waiver must take express form. Indeed, like Mr. Simma, he wondered whether it was really necessary to have a provision covering express waiver, which, where covered by an agreement, constituted a *lex specialis*.

27. Finally, he was grateful to Mr. Pellet for his remarks concerning the need to submit legal arguments in order to exhaust local remedies, and for pointing out that it was not sufficient simply to have referred the matter to the courts in order to satisfy that rule. The Special Rapporteur should give that aspect of the question further consideration.

28. In conclusion, article 14 would benefit from being simplified, as some of its clauses could be combined, irrespective of the separate issue of their relevance to the article. The rule on the exhaustion of local remedies should be respected unless local remedies were obviously futile: hence his preference for option 1.

29. Mr. SIMMA said he took issue with the view expressed by Mr. Momtaz that there should be no exception to the rule on the exhaustion of local remedies in cases

in which the undue delay was attributable to the inability of the respondent State's judiciary to cope with a heavy backlog of cases. Even where there had been no intentional frustration of local remedies, there must still come a point in time at which a foreigner would be entitled to resort to the diplomatic protection of his own State. Some international minimum standard must exist, and the Commission might look to the jurisprudence of human rights treaty bodies for guidance on that matter.

30. Mr. MOMTAZ said he agreed that it would be a good idea to refer to the jurisprudence of human rights treaty bodies, with a view to determining what constituted "undue delay". The notion was subjective, and objective criteria needed to be established, in the framework of which allowance could be made for situations in which a State's judicial systems were hampered by a lack of human and material resources.

31. Mr. CHEE said that the Special Rapporteur's work on the topic of diplomatic protection was to be commended for its scope and for its penetrating scholarship. Article 10 reaffirmed the rule on the exhaustion of local remedies in the context of codification, and he accordingly endorsed its wording. Article 12 was acceptable, though it might raise some drafting issues. As to article 13, he was inclined to take the view that the rule formed part of procedural law. Denial of justice was an extremely broad subject, and one which went beyond the scope of diplomatic protection. Accordingly, it should be dealt with separately in an addendum.

32. He favoured option 3 in subparagraph (a) of article 14 and experienced problems with the concept of "implied waiver" in subparagraph (b) as it seemed to suggest that, in some circumstances, the respondent State might waive the rule on the exhaustion of local remedies by tacit acquiescence.

33. As to subparagraph (c) of article 14, the question of a voluntary link—what it was, what it did and what it should not do—was an important matter. The Special Rapporteur produced four cases involving voluntary link that should be regarded as exceptions to the rule on the exhaustion of local remedies. While he agreed with those examples, more could be cited, thereby improving the draft.

34. The domestic law principle that justice delayed was justice denied had essentially been incorporated in the provision on undue delay set out in subparagraph (e) of article 14. Delay was an ambivalent concept, however, and he was not sure that it was an objective standard. "Unconscionable delay", the phrase preferred at the Conference for the Codification of International Law, held at the Hague in 1930, was an aspect of undue delay in which an element of intent was involved. He had no objection to the wording of subparagraph (e) but would prefer to see the unconscionable aspect of delay included.

35. With reference to subparagraph (f) of article 14, he had some doubts about the actual practice by States of obstructing justice. If it was simply a theoretical problem, and unless the Special Rapporteur could present case law

in support of the proposed provision, it should not be included.

36. Finally, article 15 was acceptable. It corresponded to several rules currently practiced by municipal courts in relation to burden of proof, and even though very few international tribunals had clear relevant evidentiary rules, retention of the article might act as a guide to practice in international proceedings. In any event it would do no harm.

37. Mr. MANSFIELD said that he accepted the Special Rapporteur's conclusion in connection with subparagraph (b) of article 14 that the existence of waiver and estoppel as possible exceptions to the rule on the exhaustion of local remedies needed to be specifically covered. He also agreed that the hurdle before any argument based on implied waiver or estoppel was a high one. He had no particular problem with the formulation of the provision and agreed it should be referred to the Drafting Committee, but the Committee might wish to consider its placement, bearing in mind Mr. Gaja's comment that it really was of a different character than the other subparagraphs dealing with the scope and content of the rule.

38. The underlying issues in subparagraphs (c) and (d) of article 14 were very significant, if not fundamental. Undoubtedly a provision was necessary to deal with those issues, which included, but were not limited to, the hardship cases set out in paragraph 83 of the report. He accepted the point made in paragraph 84 that in many of those cases—for example, wrongful transboundary environmental harm or wrongful shooting down of an aircraft—there would be a direct injury to the State, and the rule on the exhaustion of local remedies would be inapplicable. It was inherent, however, in the workings of the contemporary world that many cases could arise in which a State wrongfully injured the national of another State without causing direct injury to that State and the circumstances were such that it would be unfair or would create hardship if the individual was required to exhaust local remedies.

39. He was far from satisfied that subparagraphs (c) and (d) of article 14 would capture all those cases. In the field of commerce, for example, the world worked very differently today from the classic nineteenth-century situation behind the thinking about the rule on the exhaustion of local remedies. It was, of course, inappropriate for an individual who had made his living in a foreign country to refuse to exercise the local remedies available when something went wrong and try instead to get his State of nationality to bring a claim on his behalf. In contrast, many owners of small businesses in small countries, many of them developing countries, were selling goods or services into niche markets around the world. They might never—or hardly ever—set foot in the States where those markets existed. If a regulatory agency in the market State wrongfully injured the foreign national, for example, by negating one of his or her intellectual property rights, but not in such a way as to trigger a remedy through WTO, was it fair or reasonable that the foreign national should have to exhaust local remedies before the case could be raised at the international level? The effect of the wrong-

ful act might be catastrophic for the small business, but the cost of pursuing local remedies through the courts of the market State might be more than the entire business was worth, simply because of the cost structure and exchange rate differential. There might be no class action available to help spread the costs. Was there really a sound policy reason why a State-to-State claim should be precluded in such circumstances? Such issues had to be further discussed in order to give adequate guidance to the Drafting Committee. Subparagraph (c), as it stood, loaded more elements of fairness and equity onto the concept of voluntary link than the concept was really able to bear. In some circumstances, in fact, it might give rise to the very unfairness it was intended to avoid.

40. Like others, he had doubts as to whether subparagraph (d) of article 14 really helped very much with the underlying issues of fairness and equity.

41. The CHAIR, speaking as a member of the Commission, said he agreed with most of what had been said so far. He had no difficulties with referring articles 11, 12 and 13 to the Drafting Committee for consideration, either in connection with article 10 or separately. He could also go along with those who argued against referring article 13, as long as the grounds for not doing so were in no way perceived as disagreement with the "third view" on the nature of the exhaustion of local remedies. The "third view" was espoused by Fawcett and was laid out in exceptionally clear terms in the excerpt from the United States Government submission⁶ contained in paragraph 52 of the Special Rapporteur's second report.

42. As to the third report, he commended the Special Rapporteur on his inclusive approach. It could do no harm to bear in mind that one scholar explicitly and some others implicitly, reasonably or otherwise, had characterized the Commission's draft on State responsibility as thin gruel. That did not mean, however, that the Commission must feel chastened. In paragraph 13 of his report, the Special Rapporteur had referred to *Hamlet* without the Prince of Denmark, but Tom Stoppard's play *Rosencrantz and Guildenstern Are Dead* said a great deal about life in general and the Danish royalty in particular without ever bringing in the Prince of Denmark.

43. As Mr. Brownlie and others had pointed out, to venture into some of the areas raised by the Special Rapporteur was perhaps more foolhardy than courageous and likely to militate against the Commission's ability to produce a useful draft on the core elements of diplomatic protection. He was referring specifically to denial of justice, burden of proof and the notion, now archaic but well motivated at the time of its creation, known as the Calvo clause. What had been defensible in the era of gunboat diplomacy was less acceptable now, when the protection of individuals was paramount.

44. He agreed with the Special Rapporteur that the exercise should not be expanded into the areas listed in paragraph 16 of the report, although some flexibility might be prudent. There was substantial support for options 2 and

⁶ See 2712th meeting, footnote 10.

3 in subparagraph (a) of article 14 which seemed to differ in drafting rather than in substance, and they should be referred to the Drafting Committee. The text and/or the commentary should make it clear that expense and delay figured in the calculation of “reasonable”. The quotation from Mummery⁷ in paragraph 37 of the report was a good example of what the commentary could usefully include.

45. Subparagraph (b) of article 14 could also be referred to the Drafting Committee, although he agreed with Mr. Gaja that waiver and effectiveness should not be mixed. The Special Rapporteur was right to say that subparagraphs (c) and (d) were unnecessary and, for the reasons he gave, did not need to be referred to the Committee. It was important, however, to make clear that not including those provisions was not a denial of their content, but simply a belief that there was no need to spell it out. He was also open-minded about subparagraph (f). It was neither useful nor wise to state that such a provision would constitute progressive development. Any reasonable court or tribunal would find in accordance with the notion set out therein. Hopefully the point could be clarified through the work of the Committee.

46. The role of voluntary link should not dominate the exhaustion of local remedies. He very rarely differed with Mr. Brownlie, but suspected that he was guilty of what Alfred North Whitehead, in a slightly different context, had called the fallacy of misplaced concreteness. Exhaustion of local remedies did not involve the assumption of risk but was a way to resolve issues between Governments before they became international problems. To focus on certain aspects of the rule that tended to distort it into an assumption of risk on the part of the individual would be misleading. There was certainly room for the notion as part of the concept of reasonableness or some other concept leading to distinctions based, *inter alia*, on the activity of the individual and the extent to which the burden of exhaustion was onerous, but it was in that subsidiary capacity that the notion should be examined rather than as a primary consideration which would turn the exhaustion of local remedies into something entirely different from what it had always been meant to be and do.

47. Mr. FOMBA said that subparagraph (b) of article 14 raised three issues. The first, express waiver of the requirement that local remedies be exhausted, posed no problem, although one might question the need to formulate something that was juridically self-evident, even if it was important. On implicit waiver, two trends had emerged in the debate: some, apparently a majority, opposed taking it into account, whereas a minority were in favour, as exemplified by Mr. Pellet’s view. His own opinion was that the possibility of implicit waiver should not be rejected out of hand. The causal approach should be given priority, stressing the criteria of intention and clarity of intention and taking into account all pertinent elements.

48. The term “estoppel” seemed to cause certain philosophical, conceptual and doctrinal difficulties. To avoid them, one might by analogy include that phenomenon

within the more general thesis of implicit waiver, something that seemed to follow from the general tenor of the cases mentioned by the Special Rapporteur in paragraphs 60 to 63 of his report.

49. The phrase “voluntary link” in subparagraph (c) of article 14 seemed bizarre or at least unfamiliar. On substance, his view was that, even if the phrase appeared not to have entered into the literature and judicial decisions, or to a sufficient extent, the situations envisaged in the provision were not without interest. Consequently, it should be taken into account, but in the best way possible and in the proper place within the text, for the purpose of progressive development of the law. He had some doubts about the need to retain subparagraph (d).

50. On the whole, he agreed that in the very structure of article 14, a spirit of contention should be discarded and a more global approach, one of judicial policy, should be envisaged. Last, diplomatic protection should be restored to its proper legal context by replacing the phrase “respondent State” with the words “responsible State”.

51. Mr. BROWNLIE recalled that when he had originally addressed the issue of voluntary link, he had done so from a policy standpoint, not from the point of view of whether it was positive law or not. He had used the possibly emotive phrase “assumption of risk”, not invoking it in the technical sense as in the English and American law of tort, but as a way of explaining the attitude of Governments to certain types of claim. He had tried to demonstrate that, in certain circumstances, to insist on the exhaustion of local remedies was unrealistic and oppressive to individuals who did not have the backing of some specific economic interests, were not part of some kind of lobby or did not have sufficient funds.

52. Although in paragraph 70 of his third report the Special Rapporteur took a very indifferent view of the authority for the requirement of voluntary link, there was in fact a great deal of authority, from all legal traditions and geographical locations and sometimes going back many decades. Nevertheless, some definition had to be provided for the concept of voluntary link. A situation in which tourists or other transients could be seen to have a voluntary link with a State was unacceptable. There had to be some persistence and quality to the link.

53. The CHAIR said the problem might arise from the disparity between voluntary link as a subset of exhaustion of local remedies and voluntary link as a subset of the concept of reasonableness.

54. Mr. YAMADA said the reports submitted by the Special Rapporteur were full of thought-provoking analysis and the debate had been extremely useful. As Chair of the Drafting Committee, he would refrain from commenting on specific draft articles in order to maintain his neutrality, but he wished to make a general observation on the scope of diplomatic protection.

55. He shared some of the concerns expressed by Ms. Xue and Mr. Simma. Perhaps he was a conservative, but to him it seemed that diplomatic protection was a regime

⁷ D. R. Mummery, “The content of the duty to exhaust local judicial remedies”, *AJIL*, vol. 58, No. 2 (April 1964), p. 389; see especially pp. 400 and 401.

essentially meant to enable a State to protect its nationals who suffered injury abroad. The classic case was when a national of State A suffered an injury arising from an internationally wrongful act of State B in a place under the jurisdiction or control of State B, and the injury was not remedied by that State. State A then invoked a fiction, that the injury suffered by its national was injury to itself, and presented a claim to State B.

56. True, the regime of diplomatic protection had to adjust to contemporary requirements and there was a need for progressive development, something that would involve introducing adjustments and exceptions in the rules on State of nationality, continuity of nationality and exhaustion of local remedies and other rules. But to describe cases such as *Trail Smelter*, Chernobyl and other incidents of transboundary harm and environmental pollution as falling under the rubric of diplomatic protection made him, as a practitioner of diplomacy, uneasy.

57. In cases of transboundary harm, the injury occurred in most cases to nationals residing under the jurisdiction and control of the State of nationality. There was a direct injury to that State, which did not have to invoke a fiction but could present a claim directly to the State that had caused the injury. For example, before the conclusion of the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and under Water, the United States had conducted a series of atmospheric nuclear tests in the Pacific. In 1954, a Japanese tuna fishing boat had suffered radioactive fallout well outside the danger area designated by the United States. The crew had been exposed to an overdose of radiation, and as a result, one member had lost his life. The Japanese Government had immediately presented a claim for redress of the injury suffered by Japan. The United States Government had responded promptly, and an amicable settlement had been reached within a short period of time. Neither Government had considered the case as one of diplomatic protection.

58. He hoped the Commission was not expanding the scope of diplomatic protection too far. He was encouraged to hear that the Special Rapporteur intended to complete the topic within five years, making diplomatic protection part of the Commission's achievements in the current quinquennium.

59. Mr. DUGARD (Special Rapporteur), recalling that he had suggested that it was unnecessary to include a provision on voluntary link precisely because in most cases direct injury of one State by another was involved, obviating the need for exhaustion of local remedies, asked whether Mr. Yamada felt that the question of voluntary link could simply be left to the existing exceptions to the rule on the exhaustion of local remedies.

60. Mr. YAMADA said that in the *Aerial Incident of 27 July 1955* case, the United States and the United Kingdom had taken part in the claim against Bulgaria and had resorted to diplomatic protection. The injury had occurred abroad from the standpoint of the United States and the United Kingdom, so there was an element of a voluntary link. That could be considered within the framework of exhaustion of local remedies.

61. The CHAIR, speaking as a member of the Commission, said that Mr. Yamada's point was well taken.

62. Mr. TOMKA said that he had no objection to article 14, subparagraph (a). The Drafting Committee should be able to find a suitable formulation on the basis of options 2 and 3. Clearly, the test of obvious futility would be too stringent. With reference to article 14, subparagraph (b), he agreed with those who argued that the presumption should be against any implicit waiver and wondered whether the Committee might not draw upon the example of article 45 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session⁸ and the loss of the right to invoke responsibility. The same applied to the issue of estoppel. He had no disagreement with the concept as such, but it might be difficult to translate it into other official languages, such as Russian and French.

63. He experienced misgivings about the issue of voluntary link. The Special Rapporteur himself was not convinced that subparagraphs (c) and (d) were necessary and thought that the cases considered might be covered under other exceptions. The examples given were not from the field of State responsibility, but from that of liability. In his own view, the institution of diplomatic protection was closely linked to the issue of State responsibility. The Drafting Committee had proposed that diplomatic protection consisted of the result of diplomatic action or other means of peaceful settlement by a State acting in its own right or because of an injury to a national arising from an internationally wrongful act of another State. Thus, a wrongful act causing injury to a national was an essential element. He therefore did not understand why the example of the Convention on International Liability for Damage Caused by Space Objects was cited, for it did not concern State responsibility, but rather a special regime. Similarly, there were special conventions covering transboundary harm or creeping pollution where no issue arose, strictly speaking, of an internationally wrongful act by a State with resulting injury to a national. He would also be reluctant to draw conclusions, as the Special Rapporteur had done, from the fact that some States had not raised exhaustion of local remedies or voluntary link in proceedings before ICJ, for example in the *Aerial Incident of 10 August 1999* case when Pakistan had filed an application against India. In his understanding, it had been sufficient for India to refer to a general declaration under paragraph 2 of Article 36 of the Court's Statute and to argue that the case was not within the jurisdiction of the Court. Thus, the examples in paragraph 79 of the report did not support the inclusion of voluntary link. He shared the Special Rapporteur's view that article 14, subparagraph (c), was not strictly necessary, and he was against referring it to the Committee.

64. As to subparagraph (e) of article 14, it was difficult to accept the argument about the national judiciary which did not have sufficient means, being overburdened by the number of cases involving both nationals and aliens. The rationale for the exhaustion of local remedies was to give a State an opportunity to redress the injury caused before a local claim became an international one. If a national judiciary had allowed a case to be unnecessarily delayed,

⁸ See 2712th meeting, footnote 13.

a State should not benefit from that fact to argue that local remedies had not been exhausted.

65. Subparagraph (f) of article 14 should be referred to the Drafting Committee and, although the issue of burden of proof was interesting, there was no need to include article 15 in the draft articles on diplomatic protection. He subscribed to the Special Rapporteur's view that a flexible approach to the subject was required. In his view, article 15 should be deleted.

66. Ms. XUE said that the theory of voluntary link was very useful in the context of the regime of diplomatic protection. It offered one of the most convincing arguments for requiring the exhaustion of local remedies before an injured foreign national could turn to the Government of his own State for assistance. It also helped overcome the narrowness of simply establishing the link on a territorial basis. But it would be problematic to use the absence of a voluntary link as an exceptional clause that gave the right to diplomatic protection. Such issues as transboundary harm or some of those set out in paragraph 83 of the report did not fall within the scope of the present topic, because otherwise the Commission would be suggesting that in all cases of transboundary harm, foreign victims must first resort to local remedies for their injury. That was not what was meant here. On the contrary, when transboundary environmental harm became very serious, the State took the matter into its own hands and dealt with it on an international basis. In such cases, it was not just a State's right but rather its obligation, at least on a national basis, to take international action *vis-à-vis* the State which had caused the transboundary harm. It was not a matter that should be covered under diplomatic protection.

67. To enlarge the scope of diplomatic protection to transboundary damage by including the absence of a voluntary link as an exception would have a number of implications. First, it would imply that only through such a clause could a State exercise diplomatic protection on behalf of its nationals who had suffered transboundary damage arising from activities in the territory of another State. That would lead to the sweeping conclusion that all such international claims were covered by the regime of diplomatic protection, which was certainly not the view of States in practice. Mr. Yamada had just given a good example in that regard. The second implication would be that, by having such an exceptional clause, the Commission would transform all cases of transboundary environmental harm into remedy cases. But that was not the reality of the matter either, because such harm often had to do with prevention and cooperation between the States concerned and was not simply a question of remedy. The *Trail Smelter* case, to which reference had been made, was not merely about calculating remedies.

68. The third implication had to do with the relationship between diplomatic protection and international environmental law. What was the rationale behind the principle of non-discrimination? In practice, even when transboundary environmental harm occurred and foreign victims had the necessary financial resources and legal assistance, they were discriminated against as foreigners and were often unable to get local remedies for such reasons as jurisdic-

tion, applicable law, and recognition and enforcement of foreign judgements. All those legal barriers prevented foreigners from getting local remedies. Hence the need for the principle of non-discrimination. The point was not that victims should first exhaust local remedies: they were unable to do so. In the *Trail Smelter* case, American citizens injured by fumes could not go through the Canadian courts, and local laws did not provide any remedies for them. In order to achieve a just and fair result, the two Governments had also agreed to apply American case law on interstate waters, which showed that diplomatic protection should not be confused with general international claims. The growing number of situations involving transboundary harm was all the more reason to treat the matter separately.

69. Diplomatic protection was one of the oldest and most sensitive areas of international relations. The Commission should go with the times and work towards the progressive development of the law, but to classify all international claims as diplomatic protection was inconsistent with international practice as perceived by States. The voluntary link theory could be elaborated on the basis of the exhaustion of local remedies rule rather than being considered an exception.

70. Mr. DUGARD (Special Rapporteur) noted that Mr. Brownlie had been largely responsible for making the idea of voluntary link a basic element of diplomatic protection.

71. The Chair and Mr. Yamada had endorsed his view that the Commission should not include such a provision; other members had argued that it should not be included as an exception but should be treated as a separate provision or made the subject of a separate study. Did members feel that the matter should not be referred to the Drafting Committee, or did they want it to go to the Committee with instructions to make sense of it all?

72. Mr. MANSFIELD said that he agreed with the point made by Ms. Xue about cases of transboundary harm, most of which were cases of direct injury to the State. To that extent, he supported the Special Rapporteur. Mr. Brownlie had, however, rightly noted that the issue of voluntary link was really a question of fairness or reasonableness in a broad context. The Chair had said that that could be covered in the context of reasonableness, presumably under subparagraph (a) of article 14. Personally, he failed to see how. He was happy to have the Drafting Committee consider where the issue of fairness and reasonableness should be placed, but did not want to see it left aside. If the Commission did not follow the idea of voluntary link, which incorporated part of that concept, albeit not very well, then it must address it separately and specifically; perhaps that was a matter for the Drafting Committee.

73. Ms. XUE said her point was that, as an exceptional rule, the voluntary link clause should be left out. The idea was useful for explaining why local remedies should be exhausted, but it would be wrong to conclude that when there was no voluntary link, diplomatic protection should be invoked. If the Commission wanted further arguments in favour of the rule on the exhaustion of local remedies,

it could add voluntary-link reasoning in the commentary, but not as an exceptional clause.

74. Ms. ESCARAMEIA endorsed the view of those members who felt that the question of voluntary link was a substantive question on which the Commission was very divided, and she agreed with Mr. Mansfield and others that it could not be included in subparagraph (a) of article 14. She did not think that the Drafting Committee was the appropriate place to resolve substantive differences of opinion. In any case it had a limited membership and did not necessarily reflect the differences of opinion in plenary. Was there not some mechanism for informal consultations in such cases?

75. The CHAIR said that informal consultations could be held, but that normally the matter was sent to the Drafting Committee which, although limited in membership, was open to all members of the Commission. If members did not endorse the Special Rapporteur's suggestions, another means of reaching agreement would have to be found.

76. Mr. PAMBOU-TCHIVOUNDA said that the comments by members had shown how difficult it was to achieve progressive development of law on such an old question. He did not think that the Commission should take the risk of considering something other than diplomatic protection. He was in favour of a traditional approach to the subject and was thus strongly opposed to including the so-called concept of voluntary link in the draft articles.

77. Mr. SIMMA said he shared Mr. Brownlie's view that the voluntary link concept did not belong in the list of exceptions to the rule on the exhaustion of local remedies. He therefore suggested submitting article 14 on two exceptions to the Drafting Committee and giving further thought to the question of voluntary link, either by holding informal consultations or by mandating the Special Rapporteur to produce a report incorporating the various views on the subject for the upcoming session. The Commission could still add something after article 10 or 11 if the preponderant view turned out to be in favour of voluntary link. The Commission could proceed with article 14, because voluntary link did not constitute an exception to the rule on the exhaustion of local remedies.

78. Mr. CHEE, noting that paragraph 83 (b) referred to the case of the shooting down of an aircraft outside the territory of the respondent State or of aircraft that had accidentally entered the respondent State's airspace as an exception to the rule on the exhaustion of local remedies, asked what happened if there were no relations between two States because of lack of recognition. When Korean Airlines flight 007 was shot down, the case had been taken up by ICAO, but as the Soviet Union and the Republic of Korea had not recognized each other, even if the injured persons had wanted to exhaust local remedies, it would not have been possible. Hence the need to take into account that recognition of a State was a precondition for the exhaustion of local remedies.

79. Mr. TOMKA said that the Commission should be careful about including the issue of voluntary link in the discussion of the justification of the rule on the exhaustion of local remedies, because it might then be argued that if there was no voluntary link, the rule did not apply. He was opposed to including the concept of voluntary link as an exception, because the rationale for the exhaustion of local remedies was to give a State an opportunity to redress an injury; only when it failed to do so could a local claim be transformed into an inter-State one. All other exceptions listed in article 14 had to do either with a State's legal system or with its behaviour, whereas the non-voluntary link exception as proposed was not related to the State, but to a person. The rule on the exhaustion of local remedies protected a State from international claims by giving it an opportunity to redress the injury caused to aliens. For that reason, there was no justification for including the absence of voluntary link as an exception.

80. Mr. OPERTTI BADAN said that he endorsed Mr. Simma's proposal that the Special Rapporteur should be asked to report on the subject at greater length and agreed with Mr. Brownlie that if the subject of voluntary link was referred to the Drafting Committee, the Commission first had to define what the concept meant.

The meeting rose at 1 p.m.

2719th MEETING

Tuesday, 14 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (continued) (A/CN.4/514,²
A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³
A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR
(continued)

1. Mr. DUGARD (Special Rapporteur), summing up the debate on the topic of diplomatic protection, said that there seemed to be support for his desire to confine the draft articles to issues relating to the nationality of claims and to the rule on the exhaustion of local remedies so that it might be possible to conclude the consideration of the topic within the current quinquennium. He realized that Mr. Pellet disliked the term “nationality of claims”, viewing it as having a common-law connotation; however, in the *Reparation for Injuries* case, it had been used by the President of ICJ, who was not an anglophone. In any case, the term “nationality of claims” was unlikely to appear in the draft articles.

2. Members of the Commission had also given their views on the issues which were raised in paragraph 16 of his third report (A/CN.4/523 and Add.1) and were linked to the nationality of claims, but did not traditionally fall within that field. There had been no support for a full study of the first of those issues, functional protection by organizations of their officials; however, several speakers had stressed the need to distinguish between diplomatic protection and functional protection in the commentary, with special reference to the Court’s reply to the second question in the *Reparation for Injuries* case, on how the exercise of functional protection by the United Nations was to be reconciled with the right of the State of nationality to protect its nationals; the question would be dealt with in the context of competing claims of protection. He would deal with that question in the commentary to article 1, but it might be necessary to include a separate article on the subject. There seemed to be very little support for the second proposal contained in paragraph 16 of the report, that of expanding the draft articles to include the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the latter’s crew and passengers. However, it had been suggested that the issue should be dealt with in the commentary with special reference to the *M/V “Saiga” (No. 2)* case, and that would be done. The third case mentioned in paragraph 16, in which one State delegated the right to exercise diplomatic protection to another State, did not arise frequently in practice, and there was very little discussion of it in the literature. Nevertheless, he would investigate the matter further and hoped for the assistance of the members of the Commission who had made a study of the subject, particularly Mr. Daoudi. The fourth issue which might fall within the scope of the study was the exercise of diplomatic protection by a State which administered, controlled or occupied a territory. With the exception of Mr. Pellet, who had been strongly

in favour of its inclusion, there had been little support for that proposal. Finally, some members had suggested that he might consider the question of protection by an international organization of persons living in a territory which it controlled, such as Kosovo or East Timor. There had been some support for that idea, but the majority of the members believed that the issue might be better addressed in the context of the responsibility of international organizations.

3. On the subject of preliminary matters, Mr. Candiotti had raised the question of “clean hands” or, as Mr. Pellet had put it, the question whether a private individual could benefit from diplomatic protection when he himself had not complied with the rules of international or domestic law. He would deal with that question in his addendum on the Calvo clause, in the commentary to article 5 in the context of the *Nottebohm* case and in connection with the nationality of corporations in the context of the *Barcelona Traction* case. In addition to the addendum on the Calvo clause, paragraph 13 of his third report mentioned another addendum on the denial of justice. The current debate had revealed that the majority of the members were hostile or, at best, neutral regarding the inclusion of that question in the study. Several members had stressed that it was a primary rule; however, as Mr. Operti Badan had pointed out, denial of justice did arise in a number of procedural contexts and was thus a form of secondary rule. The content of the notion of denial of justice was, to put it mildly, uncertain. At the beginning of the twentieth century, it had involved a refusal of access to the courts; Latin American scholars had included judicial bias and delay of justice, while others took the view that denial of justice was not limited to judicial action or inaction, but included violations of international law by the administration and the legislature, thereby covering the whole field of State responsibility. At present, the general view was that denial of justice was limited to acts of the judiciary or judicial procedure in the form of inadequate procedure or unjust decisions. In any case, it featured less and less in the jurisprudence and had been replaced to a large extent by the standards of justice set forth in international human rights instruments, particularly article 14 of the International Covenant on Civil and Political Rights. As the Commission clearly believed that the concept did not belong to the study, he did not intend to produce an addendum on it.

4. Articles 12 and 13 had been subjected to considerable criticism. Mr. Brownlie had suggested that they did not offer a useful framework for the consideration of the topic and that it would have been more helpful to offer a rationale of the rule on the exhaustion of local remedies by considering the reasons for which international law had established it, such as the existence of a voluntary link between the alien and the host State and the need to have facts determined expeditiously, something which local courts could do more rapidly. Mr. Brownlie had also made that point;⁴ however, he went on to say that the function of the rule on the exhaustion of local remedies was easier to discern if three situations were distinguished: those advanced by Fawcett,⁵ on which he had relied as a

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

⁴ I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998), pp. 496–497.

⁵ See 2712th meeting, footnote 11.

framework for articles 12 and 13 and which thus seemed nevertheless to provide a useful way of approaching the subject. Moreover, his second report⁶ had included an introductory section on the rationale of that rule, but it had not been particularly well received by the Commission. He would remedy the omission in the commentary on article 10. In any event, it must be acknowledged that articles 12 and 13 had not met with general approval and had been viewed as too conceptual, irrelevant, premised on the dualist position and overly influenced by the distinction between procedure and substance, although in reality they were based on a debate which featured very prominently in the literature, had important practical implications and provided a foundation for the Commission's earlier attempt to codify the rule on the exhaustion of local remedies. Of course, some criticisms of article 13 were well founded. For example, Mr. Tomka and Mr. Pellet had noted that diplomatic protection came into play where an international rule had been violated, whereas article 13 dealt mainly with situations where no international wrong had yet occurred. Ms. Escameia and others had pointed out that article 13 dealt mainly with the issue of when an internationally wrongful act was committed; thus, it clearly did not fall under the rule on the exhaustion of local remedies. Although some members had supported article 12, several others had suggested that the Drafting Committee should simply bear it in mind when drafting article 10. He therefore proposed that articles 12 and 13 should not be referred to the Committee, a solution which would at least have the advantage of avoiding the question whether the rule on the exhaustion of local remedies was procedural or substantive in nature and would leave members free to hold their own opinions on the matter.

5. With regard to subparagraphs (a), (e) and (f) of article 14 on the question of effectiveness, Mr. Pellet had made the helpful suggestion that the word "effectiveness" should not be included in article 10. Several members of the Commission had stated at its preceding session that the concept of effectiveness should be dealt with only as an exception, as had delegations to the Sixth Committee of the General Assembly. He hoped that the Commission's silence on that subject indicated support for that position. There had been nearly unanimous support for referring article 14, subparagraph (a), to the Drafting Committee; most members had favoured option 3, although there had been some support for a combination of options 2 and 3; there had been little support for option 1. He therefore suggested that subparagraph (a) should be referred to the Committee with a mandate to consider both options 2 and 3. Opinions differed on subparagraph (e), on undue delay; one or two members had opposed it, while others had suggested that it might be dealt with under subparagraph (a), but the majority had preferred to deal with it as a separate provision. He therefore proposed that it should be referred to the Committee, bearing in mind Mr. Gaja's suggestion that it should be made clear that the delay was caused by the courts and Mr. Pellet's suggestion that the words "respondent State" should be avoided in several subparagraphs of the article. There had been some support for referring subparagraph (f) to the Committee, possibly with language covering the situation where a mafia-like syndicate rather than the respondent State prevented the indi-

vidual from gaining access to the local courts. However, the majority of members had taken the view that it would be better to deal with that issue under subparagraph (a). He therefore recommended that subparagraph (f) should not be sent to the Drafting Committee.

6. As to article 14, subparagraph (b), there had been strong support for the view that express waiver should constitute an exception to the rule on the exhaustion of local remedies, but many members had been troubled by the notion of implied waiver and had expressed the view that it should be clear and unambiguous. On the other hand, even those members had not denied that the Drafting Committee should consider the question. He therefore suggested that subparagraph (b) should be referred to the Committee with a recommendation that the latter should exercise caution regarding implicit waiver and should consider treating estoppel, to which Mr. Pellet had objected because of its common law associations, as a form of implicit waiver.

7. Subparagraphs (c) and (d) of article 14 had provoked a stimulating debate, but the conclusions to be drawn from it were not clear. There had been general agreement that, whatever became of subparagraph (c), subparagraph (d) was one of its components and did not warrant separate treatment. Many members had expressed the view that, while subparagraph (c) embodied an important principle, it was not so much an exception as a precondition for the exercise of diplomatic protection. Ms. Xue and Mr. Tomka had argued that cases of transboundary harm involved liability in the absence of a wrongful act and should be excluded completely, while Mr. Rosenstock had maintained that those issues could be dealt with in the context of reasonableness under article 14, subparagraph (a). That had been his own original proposal; it was unnecessary to include article 14, subparagraphs (c) and (d), because, in most cases, they would be covered by article 11 on direct injury or article 14, subparagraph (a), on effectiveness. Mr. Simma had put forward the view that the subject should be addressed in a separate report, while others had suggested that it was a matter for informal consultations. He thus found it difficult to determine what the Commission wished to do with those two provisions.

8. Article 15 on the burden of proof had been considered innocuous by some and too complex by others; a large majority had been opposed to its inclusion. He therefore could not recommend that it should be referred to the Drafting Committee.

9. Mr. PELLET said that the Special Rapporteur had provided a very objective account of the Commission's debates on the topic, in the light of which he had expressed justifiable misgivings about referring article 14, subparagraph (c), to the Drafting Committee. Nevertheless, it would be a pity if that provision were to be eliminated, since it had generated a substantial debate, in the course of which several members of the Commission had had second thoughts. Subparagraph (c) should be referred to the Committee, on the understanding that the Committee would be free to make it a separate provision or to retain it among the exceptions—although to do so would, in his view, be a mistake.

⁶ *Ibid.*, footnote 2.

10. The CHAIR, speaking as a member of the Commission, said it was his understanding that the Special Rapporteur was not proposing that article 14, subparagraph (c), should be deleted, but that the Drafting Committee should consider ways of incorporating it in article 14, subparagraph (a).

11. Mr. TOMKA said that the proposal to make the concept of a voluntary link an exception to the rule on the exhaustion of local remedies appeared not to have gained sufficient support among members of the Commission to justify referring article 14, subparagraph (c), to the Drafting Committee. The Committee could take account of the various views expressed in formulating article 14, subparagraph (a), and articles 10 and 11, or else refer to them in the commentary to those articles.

12. Ms. ESCARAMEIA said that, like the Special Rapporteur, she had the impression that most members did not favour treating the voluntary link as an exception. If article 14, subparagraph (c), was referred to the Drafting Committee or incorporated in article 14, subparagraph (a), or another provision, the Commission would have failed to address a substantive point, namely, that it was not an exception but a precondition. She reiterated her proposal that informal consultations should be held, pointing out that, although all members of the Commission could attend its meetings, membership of the Committee was nevertheless restricted. Another possibility would be to hold a special meeting of the Committee, in which all members of the Commission could participate on an equal footing.

13. The CHAIR said that there seemed to be two conflicting points of view, with some regarding the voluntary link as a *sine qua non*, while others saw it more as a factor to be taken into account. It seemed to him that the Special Rapporteur's proposal was a balanced one, since it did not make the absence of a voluntary link a factor with automatic effect.

14. Mr. Sreenivasa RAO said that some flexibility was necessary in order to take account of the differing positions concerning the treatment of the concept of a voluntary link; however, the point was too important to be treated simply as a kind of footnote to article 14, subparagraph (a).

15. Mr. BROWNLIE said that to redistribute the content of article 14, subparagraph (c), among other articles, as envisaged by the Special Rapporteur, might be tantamount to destroying it. Whatever fate lay in store for the provision, many members considered that it was a precondition and not an exception; accordingly, it should be discussed in the context of article 10.

16. Mr. DUGARD (Special Rapporteur) said his fear was that, if the point was not dealt with at the current session, it might not receive its fair share of attention at the next session. Accordingly, he would be willing to reformulate articles 10, 11 and 14 so as to reflect some of the views expressed in the debate. He would have no objection to referring only article 14, subparagraph (a), to the Drafting Committee.

17. Mr. PELLET reiterated his view that, as the vast majority of members seemed to agree that article 14, subparagraph (c), reflected a fundamental principle, it would be logical to refer it to the Drafting Committee, which would then decide whether to retain it as a paragraph of article 14, to redraft it as a separate article or to redistribute its content among other articles, as proposed by the Special Rapporteur.

18. Mr. TOMKA said he seriously doubted that a voluntary link was a precondition for the exercise of diplomatic protection. To adopt such a view would be tantamount to saying that, in the *Aerial Incident of 27 July 1955* case, Israel had had no right to demand compensation from Bulgaria for its shooting down of an Israeli aircraft in Bulgarian airspace—an assertion which would turn the voluntary link argument against the party invoking it. He thus thought it would be wiser to suspend the debate on article 14, subparagraph (c), and to give the Special Rapporteur an opportunity to submit a new proposal on the concept of a voluntary link, as he had expressed his willingness to do.

19. Mr. SIMMA asked whether, on the assumption that the Special Rapporteur was to submit a new proposal at the next session on how to deal with the question of the voluntary link, that proposal would be referred directly to the Drafting Committee, or whether a new debate in plenary would first be necessary.

20. Mr. DUGARD (Special Rapporteur) said that his proposal had simply been to ensure that the concept of a voluntary link was adequately covered in articles 10 and 11 and article 14, subparagraph (a). If the Commission felt that the matter should be dealt with more substantially, it might be better to refer it to informal consultations, which would make it possible to reach a consensus while the arguments were still fresh in the memory, rather than starting again from scratch at the next session.

21. Mr. KAMTO, recalling that the Special Rapporteur had said he had no intention of developing the concept of denial of justice, said that it would be useful to give some indication, either in the report or in the commentary, of the extent to which the situations covered in article 14 coincided with or differed from the concept of denial of justice, without, however, devoting a separate provision to that question.

22. Mr. BROWNLIE said that, in considering article 14, subparagraph (c), the Commission should not confine itself to the question whether the concept of a voluntary link was part of positive law, which was not certain, but that it should be tackled in the framework of progressive development, which was part of the Commission's mandate. In any case, it was a precondition, not an exception. It would be a good idea for the Special Rapporteur to prepare a draft text on the voluntary link, giving a definition of that concept, which merited a serious study in the course of which, *inter alia*, its limits could be defined.

23. Mr. PAMBOU-TCHIVOUNDA said that informal consultations would probably not result in a reconcilia-

tion of opposing positions; consequently, the question of the inclusion of the concept should be put to the vote.

24. Ms. XUE said it was obvious from the debate that the issue of voluntary link was a matter of substance and that to further prolong the debate on the question would lead nowhere. The Special Rapporteur should be given a chance to propose a new formulation taking account of all the views expressed—a course which would prove increasingly difficult if the debate was allowed to continue—any longer.

25. Mr. OPERTTI BADAN said that the problem was not one of form but of substance. To incorporate article 14, subparagraph (c), in article 14, subparagraph (a), would simply be an expedient. It was first necessary to have a proper discussion of the question of voluntary link, which, as the examples cited showed, was an important one.

26. Mr. MANSFIELD said the Special Rapporteur's idea that the wording of articles 10 and 11 and article 14, subparagraph (a), should take account of the opinions expressed during the discussion was extremely constructive. The subject was an important one, but he was not sure that informal consultations would advance the discussion on it. It would be preferable to wait to see the results of the work to be done by the Drafting Committee and the Special Rapporteur.

27. Mr. PELLET said he did not think informal consultations on the matter would be useful. As to whether the question was an exception or a condition, he thought it was a case of differing perspectives that had no practical implications. From the Special Rapporteur's standpoint, the exhaustion of local remedies was compulsory, except where no voluntary link existed; in other words, the absence of a link constituted an exception to the rule. From another standpoint, the existence of a voluntary link was a condition that had to be met in order for the exhaustion of local remedies to be required. He himself would prefer to look at the problem from another point of view by referring to a "fortuitous link". In principle, prior to any international action, local remedies had to be exhausted, but if the link with the State was fortuitous, there were no grounds for making that a requirement. Seen in that way, it was clearly an exception. In any event, he proposed that the matter should be referred to the Drafting Committee, as was the usual practice.

28. Mr. SIMMA, noting that there was a difference of opinion on whether the absence of a voluntary link constituted an exception to the rule on the exhaustion of local remedies, said that it would be unwise to refer article 14, subparagraph (c), to the Drafting Committee at the present stage. He therefore suggested that the Commission should postpone its discussion on the matter and request the Special Rapporteur to hold informal consultations and report on their results as soon as possible.

29. Mr. CANDIOTI said that he supported the proposal made by Mr. Simma.

30. Mr. CHEE said he sincerely hoped that the Commission would give further consideration to the question whether the rule on the exhaustion of local remedies applied in the absence of a voluntary link, as it was a substantive issue. He would like the absence of diplomatic relations between the injured State and the respondent State to be included among the examples of exceptions to the rule cited by the Special Rapporteur in paragraph 83 of his third report.

31. Mr. PAMBOU-TCHIVOUNDA, referring to the term "fortuitous link", which Mr. Pellet had suggested as a replacement for the term "voluntary link", said that, first of all, the problem was not merely linguistic: the concept of "voluntary link" had certain implications, and an in-depth analysis should be made of whether it facilitated the discussion of diplomatic protection. Second, it remained to be seen whether the concepts of "voluntary link" and "fortuitous link" overlapped.

32. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to refer subparagraphs (a), (b), (d) and (e) of article 14 to the Drafting Committee, to delete articles 12, 13 and 15 and article 14, subparagraph (f), and to suspend the discussion on article 14, subparagraph (c), for the time being, on the understanding that it would come back to it at a later stage.

It was so decided.

Reservations to treaties⁷ (A/CN.4/526 and Add.1-3,⁸ A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

33. Mr. PELLET (Special Rapporteur), presenting the introduction of his seventh report on reservations to treaties (A/CN.4/526 and Add.1-3), said that it was essentially a recapitulation for retrospective and even didactic purposes to sum up what had already been done and what still needed doing, especially for the benefit of new members. He described the Commission's earlier work and decisions on the topic, placing them in context and explaining how the Commission had come to include the item on its agenda by taking the unusual step of separating it from the broader topic of the law of treaties, which had already been codified. In so doing, the Commission had taken two important decisions at its forty-seventh session on which he hoped it would not go back: first, that the Vienna rules on reservations, which were on the whole satisfactory, however ambiguous and defective they might be, would not be challenged unless there was an urgent need to do so; and, second, and as a consequence of the first decision, that the Commission would adopt a guide to practice which would, in principle, not become a treaty. It was against that background that, at the Commission's

⁷ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

⁸ See footnote 3 above.

forty-eighth session, he had submitted in his second report a “provisional plan of the study”⁹ to which he had held more or less precisely, even though the work had gone more slowly than planned, for a number of reasons, including the formidable complexity of the topic, which stood at the crossroads of fairly fundamental problems of general international law and, in any event, of the law of treaties. Progress had nevertheless been made: to date, the Commission had adopted 41 draft guidelines, including 30 on the definition of reservations and interpretative declarations and 11 on the formulation of reservations. At its preceding session, it had transmitted 17 new draft guidelines on all the technical matters relating to the formulation of reservations to the Drafting Committee, which had been unable to consider them for lack of time but was to do so at the current session.

34. All the draft guidelines were reproduced towards the end of the seventh report, which set out in normal print the draft guidelines that had already been adopted definitively by the Commission on first reading and were not supposed to be reconsidered, at least until the consideration of the Guide to Practice on first reading had been completed. That was not true, however, of the provisions on conditional interpretative declarations, which, it had been agreed, would be abandoned if the regime applicable to them proved to be the same as that for reservations. He was neutral on that point. The draft guidelines which he had proposed in his sixth report were also set out in italics¹⁰ at the Commission’s preceding session and had been referred to the Drafting Committee. The Commission had not had an opportunity to discuss them in plenary, at least not yet. The same was true for draft guideline 2.1.3 (Competence to formulate a reservation at the international level), for which he had proposed two versions that differed only in form and not in substance, most members of the Commission having preferred the longer of the two. It was up to the Committee to choose between them.

35. The seventh report also contained a new text that was to be discussed in plenary, namely, draft guideline 2.1.7 *bis* (Case of manifestly impermissible reservations), which was a natural extension of draft guidelines 2.1.6 (Procedure for communication of reservations) and 2.1.7 (Functions of depositaries). Those provisions took up the idea of the “depositary as letter-box” on which articles 77 and 78 of the 1969 Vienna Convention and articles 78 and 79 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereafter the 1986 Vienna Convention) had been based. At the preceding session, the idea had on the whole been supported by the members of the Commission, although Mr. Gaja and others had felt that, if a reservation was prohibited by a treaty, the depositary had to be able to reject it. He had to admit that he had not been immediately won over by that argument, if only because the idea of “prohibited reservation” was not always easy to understand, even though, in practice, some depositaries readily rejected reservations that were manifestly impermissible. It appeared that, before adopt-

ing a draft guideline along those lines, the best course of action would probably be to ask States for their opinions on “whether it lies with the depositary to refuse to communicate to the States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of the treaty”.¹¹ The responses given in the Sixth Committee, while not entirely conclusive, did not go against the idea of enlarging the functions of the depositary. He was therefore proposing a middle course, namely, to agree not that the depositary could simply reject an impermissible reservation, but that he could draw the author’s attention to what seemed manifestly impermissible. In the event that the reserving State balked and maintained its reservation, the depositary would transmit it, together with the text of the exchange of views.

36. The inclusion of that new draft guideline would have the advantage that, without restricting the depositary to the role of a letter-box or making him the guardian of the treaty, it would allow him to say no, to speak out on a reservation that was manifestly impermissible. That practice seemed in fact to be discreetly followed by institutional depositaries such as the United Nations, OAS and the Council of Europe. The problem was that it was difficult to determine what was “manifestly impermissible”. It could be said that a reservation prohibited under article 19, subparagraphs (a) and (b), of the Vienna Conventions of 1969 and 1986 was “manifestly impermissible”, but it was not always easy to determine when a reservation was prohibited or, *a contrario*, permitted. It could also be said that draft guideline 2.1.7. *bis* was not in keeping with the trend which had taken shape more and more clearly during the preparatory work for the 1969 Vienna Convention towards making the depositary simply a channel of communication. He had no very firm ideas on that point, although he did lean towards referring the draft guideline to the Drafting Committee, which could always improve its wording. In short, the provision did not give the depositary the final word; it did not allow him to take a decision *erga omnes*, but simply gave him a useful warning function, something that fit in quite well with the general idea of the “dialogue on reservations”, a fruitful and useful concept.

37. For now, he invited the members of the Commission to indicate whether they wished to refer draft guideline 2.1.7 *bis* to the Drafting Committee so that it could, as was only logical, examine it together with draft guidelines 2.1.6 and 2.1.7, which were already before it. With that in mind, he would postpone his presentation of section C of the introduction to his seventh report, entitled “Recent developments with regard to reservations to treaties”.

38. Mr. PAMBOU-TCHIVOUNDA said that, in his seventh report, the Special Rapporteur opened new, interesting avenues with regard to the modification and permissibility of reservations to treaties and to what the Special Rapporteur had rightly referred to as sensitive questions relating to the effects of reservations. He agreed wholeheartedly with the Special Rapporteur on three points. First, he endorsed the idea that the Commission should not go back over the Vienna rules. Second, he subscribed

⁹ *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 48, para. 37.

¹⁰ *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1-3.

¹¹ *Ibid.*, vol. II (Part Two), p. 18, para. 25.

to the view that it should not waste time drawing a distinction between reservations and conditional interpretative declarations, but should instead try to define a system which applied to both. Third, and that was an essential point, he fully endorsed the Special Rapporteur's opinion about the inclusion in the guidelines of draft guideline 2.1.7 *bis*. However, he stressed the importance of a fundamental question which the Special Rapporteur himself had had the presence of mind to raise, namely: What was an impermissible reservation? Was it, say, a prohibited reservation? As to the word "manifestly", if the impermissible nature of the reservation was clear, there was no dilemma for the depositary.

39. Draft guideline 2.1.7 *bis* reconciled the desire for the flexibility needed to manage the dialogue on reservations with the requirement of safeguarding both the universality of the group of parties to the treaty and the universality of the treaty's provisions. Consequently, he believed that it should be referred to the Drafting Committee.

40. Mr. TOMKA drew the attention of the English-speaking members of the Commission to a technical problem that might complicate their work. In the English version of the report of the Special Rapporteur, which contained all the draft guidelines adopted on first reading by the Commission or proposed by the Special Rapporteur, a number of draft articles appeared in italics, unlike in the French version. That gave the impression that they had not yet been adopted by the Commission, whereas it was actually a typographical error. The draft guidelines concerned, namely 2.2.1, 2.2.2, 2.2.3, 2.3.1, 2.3.2, 2.3.3, 2.3.4, 2.4.3, 2.4.4, 2.4.5, 2.4.6 and 2.4.7, had in fact been adopted by the Commission on first reading.

41. The CHAIR thanked Mr. Tomka for his correction, which was important for the work under consideration.

42. Mr. KAMTO, referring only to draft guideline 2.1.7 *bis*, in keeping with the Special Rapporteur's wishes, said that at first glance it was attractive, but it raised legal problems, above all of a practical nature. At the legal level, it introduced the depositary into the dialogue on reservations, because the depositary no longer merely took note of the reservation but evaluated it. Thus, there was no longer simply a dialogue between two States. That reminded him of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which established the International Centre for Settlement of Investment Disputes (ICSID), and article 36, paragraph 3, of which provided that the ICSID Secretary-General could refuse to register a request for arbitration if the dispute was manifestly outside the Centre's jurisdiction. He noted that the word "manifestly" was used. The practice showed that the interpretation of that provision had been very restrictive and that, in fact, the Secretary-General of ICSID had left it to the court to judge whether an arbitration request was justified. The case of impermissible reservations was a comparable situation, and Mr. Tomka thought that it involved a problem. If it was left to the depositary to assess the permissibility of a reservation, he assumed in part the role of States. Draft guideline 2.1.7 *bis*, and its paragraph 2 in particular, also gave rise to a practical problem. The guideline provided that, if the author of a manifestly impermissible res-

ervation maintained the reservation, the depositary must communicate to States the text of the exchange of views which it had had with the author of the reservation. The text did not say for what purpose. Must States react? If so, within what time period? Those were essential questions which had not been resolved. As interesting as the draft guideline was, it might impede the dialogue on reservations by introducing those new elements.

43. In conclusion, he said that draft guideline 2.1.7 *bis* posed more problems than it solved at both the legal and the practical levels, and he was puzzled, if not to say that he had reservations, about its being referred to the Drafting Committee. The Commission should first consider it in greater depth in plenary.

44. Mr. DAOUDI thanked the Special Rapporteur for his very useful presentation of a truly difficult subject. As the Special Rapporteur had explained, draft guideline 2.1.7 *bis* represented a compromise between two approaches, the one regarding the depositary as a simple "letter-box" and the other giving him some discretionary power. Both approaches had their supporters in the Commission. He wondered whether all depositaries could be given that discretionary power. The question should be considered further. As to the wording of the draft guideline, the words "manifestly impermissible" could indeed result in very different interpretations.

45. He endorsed giving the depositary a role, in keeping with existing practice. He merely pointed out that, during discussions in the Sixth Committee, a number of representatives had preferred to confine its role to that of a "letter-box".

46. Mr. GAJA said he greatly appreciated the fact that, following discussions at the Commission's preceding session and then in the Sixth Committee, the Special Rapporteur had proposed an additional guideline. Having taken into consideration the variety of views expressed by the members of the Commission and by delegations, the Special Rapporteur envisaged a significant role for the depositary. Although it was not explicitly stated, it emerged from draft guideline 2.1.7 *bis* that the depositary could not prevent a reservation from being made, but could only raise an objection; if the reserving State insisted, the reservation had to be communicated to the other contracting States. Such a mechanism made it possible to draw the latter States' attention to the fact that a reservation might not be permissible. The practice of States in such a situation was often negligent, because they confined themselves to stipulating in a treaty that no reservation was permitted, but took no action in the case in which a State still wanted to make one. Sometimes the motives were political: it was generally thought that objecting to a reservation made by another State was not a friendly act. It would therefore be wise to give the depositary the role envisaged in the guideline.

47. It was true, however, that there could be some difficulties, in particular in determining whether a reservation was compatible with the object and purpose of the treaty. Another solution might have been envisaged in which the depositary was given the power to intervene when

the reservation was prohibited, but not when there was a problem of compatibility. However, draft guideline 2.1.7 *bis* was well-balanced and deserved to be referred to the Drafting Committee. Its advantages included the fact that, since the reserving State knew that the exchange of views with the depositary would be communicated to the other contracting States, it might reconsider its reservation. It was useful to restrain the rather widespread practice by which, contrary to the provisions of article 19, paragraph (c), of the 1969 and 1986 Vienna Conventions, even a reservation that was not in conformity with the object and purpose of the treaty could be formulated.

48. During the discussions at the preceding session, some members had expressed their interest in a text stating the obligation of the depositary to communicate interpretative declarations, regardless of when they were made. He hoped that that suggestion could be considered by the Drafting Committee, even if no additional draft guideline had been proposed.

The meeting rose at 1 p.m.

2720th MEETING

Wednesday, 15 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

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

[Agenda item 2]

1. Mr. GAJA, Chair of the Working Group on responsibility of international organizations and Special Rapporteur, announced that the working group would consist of Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Kamto, Mr. Kateka, Mr. Koskenniemi, Mr. Mansfield, Mr. Simma, Mr. Tomka, Mr. Yamada and Mr. Kuznetsov (member *ex officio*).

Reservations to treaties¹ (*continued*) (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. Mr. Sreenivasa RAO congratulated the Special Rapporteur on his seventh report on reservations to treaties (A/CN.4/526 and Add. 1–3), which had usefully summarized developments to date, and his draft Guide to Practice, which was appreciated by legal experts the world over.

3. The function of the depositary (draft guideline 2.1.7 *bis*) was an important and closely watched issue. It was generally accepted that the depositary had communication and coordination functions, including with regard to any interpretations, declarations or reservations of States. The depositary also gave States guidance in formulating their positions on an informal basis. The aim was to ensure that the treaty was properly used by States and truly reflected their position on its provisions. But problems had arisen in the past and would do so in the future if a depositary was asked to judge the State's position, whether directly or indirectly, expressly or impliedly. States had been opposed to such a function. In one instance, the Government of India had taken issue with the depositary's statement that reservations India had made were contrary to the object and purpose of a treaty and, as such, not valid. The matter had been brought before the General Assembly, which had found that the functions of the depositary did not lie in the area of judgement.

4. To say that a reservation was manifestly impermissible already implied a judgement. If something was clearly prohibited, then there was nothing manifest about it: it was simply not allowed. For example, if India declared that it was reversing its position on a convention's provisions concerning the settlement of disputes and submitted its position to the depositary, the latter could simply say that it was not permitted, and the matter would be closed. If, on the other hand, a document was submitted which a State said was not a reservation, whereas in the view of the depositary it was, what action must the depositary take? That was where the word "manifestly" came into play. There, the depositary had every right, in an informal setting, to communicate his views in writing or verbally on how a State was using a particular declaration. He had had such a dialogue with depositaries on occasion, and agreement had then been reached. As it stood, the proposition did no service to either the depositary or the State concerned. The depositary could not be placed in a position of conflict with States. There might be different positions taken at the time of the formulation of a particular principle, and there could be constructive ambiguity in the treaty that allowed certain formulations on both sides. In such situations, the 1969 Vienna Convention provided the requisite guidance. One might hope that a more

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

* Resumed from the 2717th meeting.

homogeneous, harmonious practice would develop, but as States were divided and not well-coordinated, certain ambiguities and lack of commonality were inevitable. That could not be solved through the legal fiction of assigning depositaries functions they should not have. In his view, wherever a reservation was not admissible under a treaty, a depositary was entitled to reject it. But where there was room for opinion, he could not endorse the use of the words “manifestly impermissible”; it was a question which should be left to States.

5. Mr. COMISSÁRIO AFONSO said that he was in favour of referring guideline 2.1.7 *bis* to the Drafting Committee, but was concerned about the word “manifestly”. The advisory opinion of ICJ regarding the *Reservations to the Convention on Genocide* case had used the word in a different context, when it had spoken of the character of the Convention on the Prevention and Punishment of the Crime of Genocide. But above all, he had misgivings about the word “impermissible”, which suggested a test of permissibility. It was difficult for the depositary to answer that question. In actual fact, the word “permissibility” or “impermissibility” had to do with the compatibility or incompatibility of a reservation with the object and purpose of a convention, and that meant interpreting the convention; it was not a function that could be left to the depositary. Of course, the United Nations Convention on the Law of the Sea clearly stated that reservations were not accepted in certain matters. Similarly, the Rome Statute of the International Criminal Court did not allow reservations. There, the depositary was clearly in a position to say whether a reservation was permissible or not. In fact, at issue was the non-admissibility of a reservation, although the word did not appear in the 1969 Vienna Convention.

6. The Commission could refer guideline 2.1.7 *bis* to the Drafting Committee to recast it in a more acceptable manner. There were two possibilities. One would be to give the depositary guidance on how to react to a manifestly impermissible reservation. The other would be to use the word “inadmissible”, but in that case he did not think that there was any problem of permissibility or non-permissibility.

7. Ms. ESCARAMEIA said that the way in which the question had been put to the Sixth Committee (para. 44 of the report) had not been sufficiently clear, because it had merged the issue of a reservation being manifestly inadmissible and that of specifying when it was prohibited by the treaty. Had the question been phrased differently, the answer might have been clearer. In her view, most States would understand that, if a treaty clearly prohibited a reservation and a reservation was then entered, the depositary could simply refuse to accept it. But the Sixth Committee had gained the impression that the depositary would have a much broader role, and its response had been somewhat ambiguous. The argument used by some in the Sixth Committee that the 1969 Vienna Convention did not point in that direction was not convincing, because article 77, paragraph 1, in setting out the functions of the depositary, said “in particular”, thus not excluding other functions, and article 77, paragraph 2, even opened up such a possibility. Hence, the role of the depositary now proposed by

the Special Rapporteur would be in line with the Convention as well as human rights treaty practice.

8. She proposed that a different draft should be referred to the Drafting Committee, adding a paragraph to the effect that, when a treaty did not allow reservations or when a reservation was expressly prohibited, the depositary could refuse it. That would concern indisputable cases, for instance, when a reservation said that it could not be applied solely to parts of a country and a State then went ahead and applied it to part of the country. Guideline 2.1.7 *bis* would then concern manifestly impermissible cases, albeit not indisputable ones, and it could go to the Committee. As for paragraph 2, a time limit must be included. It was not clear when States could make objections to reservations; of course, they could only do so once the depositary had communicated the reservation to them. That might not be until after the completion of a lengthy procedure. The Commission should specify the time when a reservation was considered to have been made.

9. Mr. SIMMA said that, as he understood paragraphs 44 to 46 of the report, the Commission had put a question to the Sixth Committee, which had responded, and as a result, the Special Rapporteur had proposed guideline 2.1.7 *bis*. The question put to the Sixth Committee could not simply be transformed into a guideline. The idea behind the question mentioned in paragraph 44 of the report would have done too much violence to the principle that, in the final analysis, it was for the other States parties to a multilateral treaty to assess the permissibility of a reservation. Again, a problem might arise if the depositary did not communicate the reservation to the other States parties, which might have an effect opposite to the one underlying the proposal, because a reservation had been made, and it might stand if nothing further was done.

10. He strongly supported draft guideline 2.1.7 *bis*. The dialogue on reservations was often a dialogue of the deaf: in most instances, States did not react, and if they did, it was in such a way as to leave a number of questions open. For example, a State rarely specified what consequences it would draw from another State’s having made an impermissible reservation. The proposal added a strong, responsible voice to the dialogue. He would emphasize the word “responsible”, because a depositary would not tell a State making a reservation that, in its view, the reservation was impermissible. That would not be taken lightly. He agreed with the Special Rapporteur that the word “manifest” was almost as ambiguous as “reasonable”. Perhaps article 46, paragraph 2, of the 1969 Vienna Convention, which contained a definition of a manifest violation, might provide guidance for determining when a reservation was manifestly impermissible.

11. The new guideline might be useful for cases covered by article 19, subparagraph (c), of the 1969 Vienna Convention, namely where, in the view of the depositary, the reservation was incompatible with the object and purpose of a treaty. To limit that possibility for a depositary to cases under subparagraphs (a) and (b) of article 19 would detract too much from the proposal and unduly limit its thrust. In his opinion, guideline 2.1.7 *bis* could result in the depositary’s taking the lead and giving guidance to

States parties on how to react to another State's reservation and it would make the depositary the guardian of a community interest behind those multilateral treaties in which a reservation made by another State did not immediately and automatically impinge upon benefits for other States.

12. Another problem might be what to do if the depositary was lenient in exercising his function under guideline 2.1.7 *bis*. If the depositary had not made a statement beforehand, States parties might be reluctant to say that they unilaterally considered a reservation to be impermissible. Another problem might arise if there was a divergence of views between a depositary who might not have made a statement under guideline 2.1.7 *bis* and, later on, a treaty body that took up the question and arrived at the opposite result. But those problems already existed. Hence, he was in favour of referring guideline 2.1.7 *bis* to the Drafting Committee.

13. The CHAIR, speaking as a member of the Commission, said that he agreed with Mr. Simma.

14. Mr. MOMTAZ said that there were a number of undeniable advantages to guideline 2.1.7 *bis*. It settled from the outset the difficulties that manifestly impermissible reservations posed in international relations, in particular manifestly impermissible reservations to human rights conventions. Moreover, the publicity given to a legal discussion between the depositary and the State making the reservation would have a deterrent effect: at the very least, it might lead other States preparing to ratify a given instrument to think twice before making the same manifestly impermissible reservation. States would probably be unwilling to engage in a public discussion that might reveal the weakness of their arguments in support of a manifestly impermissible reservation and instead would refuse to ratify the treaty in question. In such cases, discretion and the absence of publicity might prove more constructive. The Special Rapporteur himself had recognized that executive heads and other officials of international organizations who had the function of depositary usually confined themselves to making discreet appeals to States whose reservations were manifestly impermissible. It would be interesting to know to what extent those calls had in fact been heard: he was convinced that they were more effective than publicity, which might lead to a hardening of the position of the State making the reservation. He agreed in that connection with Mr. Simma that it might result in a dialogue of the deaf.

15. Depositary States which wanted to be more than a "letter-box" had always preferred to act with discretion in objecting to manifestly impermissible reservations; injunctions from the secretaries-general of international organizations, too, might not be welcomed. In that regard, the example had been mentioned of a denunciation of the Convention on Fishing and Conservation of the Living Resource of the High Seas in the early 1970s; the Convention did not contain a denunciation clause and the desire of the Secretary-General of the United Nations, as a depositary, to act as more than a mere conduit for the transmission of reservations had been rejected by the majority of States parties.

16. For those reasons, it might be preferable to delete the second sentence of guideline 2.1.7 *bis*.

17. Mr. KUZNETSOV said that paragraph 2 of the guideline was unacceptable; in any dialogue, each party's comments were a reflection of the views previously expressed by the other party. In any case, it would be inappropriate for the depositary to report the views of the reserving State to other contracting parties. Admittedly, the Commission was engaged in the progressive development, not merely the codification, of international law, but special care was called for in the case at hand.

18. Ms. XUE said that, generally speaking, she agreed that the Special Rapporteur had taken a cautious, balanced approach to guideline 2.1.7 *bis*. However, the guideline reflected the drafting history of the 1969 Vienna Convention. The draft of that instrument which the Commission had adopted on second reading at its eighteenth session provided that the functions of the depositary comprised "[e]xamining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles".³ In article 77, paragraph 1 (*d*), of the final instrument, those words had been replaced by "Examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form...".

19. For obvious political and legal reasons, States tended to give the depositary a limited and purely procedural role, as illustrated in the topical summary of the discussion in the Sixth Committee on the report of the Commission during the fifty-sixth session of the General Assembly (A/CN.4/521, paras. 60–67). The views of Member States were not binding on the Commission, but State practice was of fundamental importance to the topic under consideration.

20. For example, the term "impermissible" was likely to give rise to disputes among States. Although modified by the word "manifestly", it might give depositaries an opportunity to consider both procedural and substantive aspects of reservations. It would be particularly inappropriate for them to pass judgement on the legal aspects of interpretative declarations, some of which could be categorized as reservations. And, as Mr. Sreenivasa Rao had pointed out, international organizations which acted as depositaries should not undertake to make such judgements. Moreover, a depositary's statement that a reservation was substantively inadmissible was likely to lead to a dispute with the reserving State, which might in turn delay timely notification of the reservation to other signatory States.

21. Unlike Mr. Simma, she thought it unwise to make the depositary the guardian of the international community. States might have good reasons for making, in the view of the depositary, "manifestly impermissible" reservations, but they should not be required to justify the content of these to the depositary. Even in the case of a reservation clearly in contradiction with general practice, the drafting history of the treaty in question might provide a clear explanation that would be accepted by the

³ See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 269.

other contracting States. Moreover, a depositary with no knowledge of the parties' intentions should refrain from commenting on the result of their negotiations.

22. For example, the Government of her own country, China, and the Government of the United Kingdom had agreed that most of the treaties implemented in Hong Kong, even those to which China was not a party, would remain in force after the restoration of Hong Kong to China in 1997. Such an agreement was contrary to general treaty practice, but the two Governments had not expected to enter into a debate on its legality with the depositaries; they had merely hoped that all other States parties to the instruments in question would be given prompt notification of the matter and, in fact, the depositaries had raised no objections. Furthermore, she agreed with Mr. Momtaz that any exchange of views between the depositary and the reserving State should not be made public; if the impermissibility of the reservation was in fact manifest, it would not be overlooked by other contracting parties.

23. Thus, she did not believe that guideline 2.1.7 *bis* was ripe for drafting. The Special Rapporteur should reflect further on the Commission's views. The goal of enhancing the role of the depositary and strengthening the treaty system was a good policy objective, but it must be borne in mind that States were the real "players" in the performance of their international treaty obligations.

24. Mr. TOMKA said that Ms. Xue's comments on the Hong Kong situation should be viewed in the context of State succession and considered under section V of the provisional plan of the study contained in the Special Rapporteur's second report. He hoped that the Commission would be able to complete its work on the topic of reservations to treaties by the end of the current quinquennium.

25. The term *illicites* in the French text of guideline 2.1.7 *bis* did not fully correspond to the English "impermissible". A reservation constituted an act; to qualify such an act as *illicite* (unlawful) was to engage the international responsibility of States, which was surely not the Special Rapporteur's intention. The French text of the draft should be amended accordingly.

26. A depositary which considered a reservation inadmissible generally engaged in a dialogue with the reserving State; in other cases, a delegation of parties might assume that function. For example, on a twice-yearly basis the Committee of Legal Advisers on Public International Law of the Council of Europe exchanged information on reservations to which member States had objected or planned to object. However, for policy or other reasons, such practices did not usually lead other States to raise similar objections to the reservations in question.

27. He was not certain that the depositary should be entrusted with the task of considering whether a reservation was compatible with the object and purpose of the treaty. Such a position would constitute an excessive departure from the intentions of those who had drafted article 77, paragraph 1 (*d*), of the 1969 Vienna Convention, which authorized depositaries to consider matters of form, not substance. On the other hand, where there was a *prima facie* prohibition of reservations or of certain types of

reservations, it might be appropriate for the depositary to bring the problem to the attention of the reserving State and, if the latter insisted on making the reservation, to communicate that fact to other States parties, including any written, but not oral, exchange of views on the matter.

28. He would support the proposal to refer the paragraph to the Drafting Committee, on condition that it was amended to reflect those comments.

29. Mr. KOSKENNIEMI said that the opposition to guideline 2.1.7 *bis* was surprising, since it represented a compromise which reflected previous discussions in the Commission and the Sixth Committee. Like other members, he was concerned to ensure the neutrality of the depositary, but that term must not be confused with passivity, for the depositary to function merely as a "letter-box" would promote reservations disruptive to the treaty as a whole and might introduce error into the system. The very neutrality of depositaries made it incumbent on them to take action in certain situations.

30. For example, the authors of manifestly inadmissible reservations to a treaty to which all, or certain types of, reservations were prohibited must be given the opportunity to correct their mistake. Notification need not lead to an argument between the depositary and the reserving State. It need not be thought of in adversarial terms. For example, his own country, Finland, had delegated responsibility in treaty matters to the various ministries; consequently, expertise in the subtle game of reservations was not always available and the Foreign Ministry would be grateful to be informed that an inadmissible reservation was being made.

31. Furthermore, if depositaries confined themselves to passively registering all reservations received, there could be no dialogue between States since Governments could not object to reservations they were unaware of. In this regard, it would not go contrary to the play of reservations between States. Instead, it would make this game possible. Finally, depositaries were in any case already empowered to make value judgements under article 77, paragraph 1 (*d*), of the 1969 Vienna Convention, since appreciations of "due and proper form" were necessarily subjective in nature. Moreover, the depositary would in any case be required to interpret the Guide to Practice. Form and content were, after all, related and, as Mr. Sreenivasa Rao had pointed out, the depositary's role was not that of a judge, but rather that of an intelligent, responsible participant. He believed that guideline 2.1.7 *bis* should be referred to the Drafting Committee.

32. Mr. ADDO said that guideline 2.1.7 *bis* was most welcome. The privilege of making reservations was an incident of the sovereignty and equality of States. He did not, however, consider the depositary as a mere conduit for the transmission of documents. Pursuant to article 77, paragraph 1 (*d*), of the 1969 Vienna Convention, the functions of a depositary included "[e]xamining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question". Thus, where a treaty prohibited reservations, the functions of the depositary would include

drawing the attention of the author of the reservation to its impermissibility, and, if the author maintained the reservation, communicating the text thereof to the signatory States, contracting States and international organizations. Such action might persuade the author to abandon the reservation. Accordingly, he would join with those members who favoured referring guideline 2.1.7 *bis* to the Drafting Committee.

33. Mr. FOMBA said that the case of manifestly impermissible reservations raised a number of questions, such as the definition of what constituted a “manifestly impermissible” reservation, who was to define it, and what the consequences thereof would be. A basis for a definition was to be found in article 19 of the 1969 Vienna Convention, which prohibited a State from formulating a reservation in three specified circumstances. In all three circumstances, however, problems of interpretation might arise where the wording of the treaty in question was unclear. Other legal and practical difficulties had been referred to by Mr. Kamto and Mr. Gaja. Among the arguments adduced in favour of a more active role for the depositary was that it seemed logical to recognize the depositary’s right not to communicate a reservation it deemed manifestly impermissible. That presupposed, however, first, that States would be prepared to concede the depositary that right; and second, that the depositary would be able systematically and incontestably to define what constituted a manifestly impermissible reservation. Neither of those assumptions, however, could be taken for granted. It also needed to be borne in mind that article 76, paragraph 2, of the Convention proclaimed the international and impartial character of the depositary’s functions; and that article 77, paragraph 1 (*d*), of the Convention accorded the depositary the right to examine whether a communication relating to the treaty was in due and proper form. Both those provisions, however, needed to be interpreted correctly.

34. With regard to the question whether or not to refer guideline 2.1.7 *bis* to the Drafting Committee, it seemed clear that if, as the Special Rapporteur proposed, the substance of the draft guideline was not to be considered in plenary at that stage, then that task must fall to the Committee. Such a procedure raised questions concerning the Commission’s working methods—methods which were perhaps themselves in need of some codification. Should it be decided to refer draft guideline 2.1.7 *bis* to the Committee in its current formulation, the Committee would have to decide, with regard to the first paragraph, on the issue of definition, and on whether that definition was to be determined by States, the depositary or a third party; with regard to the second paragraph, it would have to decide on the precise nature of the procedure that would ensue following the communication of the text of the reservation—in other words, to decide what was the true purpose of the operation.

35. Given that the Drafting Committee and the Plenary were both constituent parts of the Commission, and were not rigidly compartmentalized, some flexibility seemed desirable with regard to working methods. Accordingly, guideline 2.1.7 *bis* should be referred to the Committee for consideration, bearing in mind that it would be for the Plenary to accept or reject any conclusions reached by that body.

36. Mr. GALICKI said that the seventh report on reservations to treaties gave a very useful summary of the Commission’s work on the topic so far and presented a clear picture of future prospects for that work. The documents were thus useful not only for new members but also for “old-timers”, to enable them to take a more systematic approach to the topic.

37. Draft guideline 2.1.7 *bis* had been drafted on the basis of the views States had expressed in the Sixth Committee and the responses they had given the Commission to the question whether a depositary could or should refuse to communicate to the States and international organizations concerned a reservation that was manifestly inadmissible, particularly when it was prohibited by a treaty. The guideline maintained a position mid-way between extreme opinions expressed by States: for example, it did not follow the suggestion to give the depositary the right to reject evidently prohibited reservations by informing the State concerned of the reason for rejection.

38. The sustainable character of the proposed draft guideline seemed its best advantage. It remained within the limits of the functions of depositaries as described in guideline 2.1.7 and of the functions of depositaries, especially as established in article 77, paragraph 1 (*d*), of the 1969 Vienna Convention and in article 78, paragraph 1 (*d*), of the 1986 Vienna Convention.

39. In considering the possibility of extending the functions of depositaries in the event of manifestly impermissible reservations, two things must be remembered. First, any guideline in that field should remain in line with the Vienna rules, for as the Special Rapporteur had rightly pointed out, the Commission was not preparing a new treaty but drafting a set of guidelines based on existing treaty regulations. Second, in view of the close relationship between guidelines 2.1.7 and 2.1.7 *bis*, the Commission must not forget the significant changes that had taken place during the *travaux préparatoires* on the rule laid down in article 77, paragraph 1 (*d*), of the 1969 Vienna Convention. As the Special Rapporteur pointed out in paragraph 164 of his sixth report,⁴ the draft adopted by the Commission on the second reading at its eighteenth session referred to whether a signature, an instrument or a reservation was “in conformity with the provisions of the treaty and of the present articles”,⁵ whereas the final revision of article 77, paragraph 1 (*d*), of the 1969 Vienna Convention used the phrase “in due and proper form”. Guideline 2.1.7 *bis* also adopted that more limited approach. Those who had drafted the Convention had shown a tendency to limit the depositary’s powers exclusively to examining the *form* of reservations, and that approach should not be contested now.

40. A similarly cautious attitude had been taken by the Special Rapporteur in the formulation of guideline 2.1.7 *bis*. Although manifest impermissibility went beyond the strictly formal aspects of reservations, the powers proposed for depositaries were exclusively of an informative nature and in fact analogous to those provided by the general provisions in guideline 2.1.7. The depositary retained the traditional role of facilitator rather than becoming

⁴ See 2719th meeting, footnote 10.

⁵ See footnote 3 above.

an umpire. The Special Rapporteur did not differentiate between the powers of the depositary when reservations were directly prohibited by a treaty and when they were incompatible with the object and purpose of the treaty: in both cases, a final decision on rejection of such reservations was to be taken by the parties to the treaty, not by the depositary. He shared that view.

41. An additional factor not mentioned so far spoke in favour of taking a fairly restrictive approach to the competencies of depositaries. There were many examples of treaties that had more than one depositary. To give substantial powers to such multiple depositaries could create serious problems in terms of political interpretations and the application of such powers by different Governments that were depositaries of the same treaty.

42. Finally, he was of the opinion that guideline 2.1.7 *bis* should be referred to the Drafting Committee for further elaboration, which seemed necessary from the terminological point of view. For instance, did the term “manifestly” mean the same as “manifest” in article 46, paragraph 2, of the 1969 Vienna Convention, where it was defined in connection with violations of internal law regarding competence to conclude treaties? Or should it be given another meaning? Another problem arose in connection with the word “impermissible”, which appeared nowhere else in the draft. The report used the term “inadmissible”, however, which seemed to be more appropriate. The problem may have arisen in the translation from the French. It seemed inevitable that the terminology used in draft guideline 2.1.7 *bis* would have to be harmonized with that used in the rest of the guidelines and in the Vienna Conventions of 1969 and 1986—but that was a task for the Committee.

43. Mr. Sreenivasa RAO said that, apparently, he had not made it clear whether he thought guideline 2.1.7 *bis* should be referred to the Drafting Committee. Having heard more members speak on the matter, he still had doubts about the guideline. The depositary’s functions as envisaged in the 1969 Vienna Convention and as manifested in existing practice had never been expressed in such concrete terms. Very few cases had arisen such as those described in paragraph 1 of the guideline, namely when a State insisted upon presenting a reservation that was not acceptable under a treaty. What normally happened was clearly exemplified by the workings of article 298 of the United Nations Convention on the Law of the Sea: if a State reserved its position on any of the points mentioned therein, the depositary could simply inform it that such a reservation was not permitted, and it would have to be rescinded. If, under a human rights instrument, a State undertook to perform its obligations but placed various conditions upon such performance, the depositary could—and did, in practice—draw attention to the fact that that constituted a reservation and that the State must revise its position.

44. The phrase “manifestly impermissible” was unclear—did it mean reservations that were prohibited altogether or interpretative declarations and similar statements? States did make declarations and interpretative statements when reservations were otherwise prohibited, and it was from the language in which they made those

communications that one could assess whether they were standard reservations or reservations that were impermissible. As currently structured, the draft guidelines separated reservations, interpretative declarations, statements and so on into different categories, but guideline 2.1.7 *bis* merely blurred those distinctions.

45. He agreed with Mr. Koskeniemi that a depositary was not a dormant institution, but a legal mind with a function to perform. Depositaries must not be insulated from the inclement weather of the international community but given guidance and reasonable rules to apply *vis-à-vis* States. That was why the two paragraphs of guideline 2.1.7 *bis* must be carefully constructed. He experienced no difficulty in referring the guideline to the Drafting Committee, but a great deal of work was required and a distinction must be drawn between reservations clearly prohibited and statements that might or might not be reservations or interpretative declarations for which different guidelines were provided and in respect of which it must be clearly stated what the depositary should or should not do.

46. Ms. XUE said she felt compelled to make a point of principle: after her earlier statement, Mr. Tomka had said that the restoration of Hong Kong was really a question of succession. That was not so, nor had it been treated as such during the negotiations. Therefore, the issue of reservations to treaties had not been dealt with in accordance with the rules on succession. Current practice regarding treaties in Hong Kong continued to reflect such arrangements.

47. Mr. KAMTO said he thought the problem raised by guideline 2.1.7 *bis* was not the neutrality of the depositary, but rather the role that should be given to the depositary, which should be envisaged in the light of the 1969 Vienna Convention. The Commission should avoid transforming the depositary from an administrator of a treaty, as foreseen in article 77 of the Convention, into an umpire of legal relations between States. Guideline 2.1.7 *bis* should be referred to the Drafting Committee, with certain amendments designed to avoid the term “manifestly impermissible” and to incorporate the wording of article 19, subparagraphs (a) and (b), of the Convention.

Unilateral acts of States (A/CN.4/524, A/CN.4/525 and Add.1 and 2,⁶ A/CN.4/521, sect. D)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

48. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), introducing his fifth report on unilateral acts of States (A/CN.4/525 and Add. 1 and 2), said that addenda 1 and 2 to the report had not yet been issued, but would be made available in the course of the session. The entire fifth report comprised four chapters. The introduction referred to previous consideration of the topic, consideration of international practice, the viability and difficulties of the topic

⁶ See footnote 2 above.

and the content of the fifth report and the recapitulative nature of its chapter I.

49. Chapter I dealt with four aspects of the topic considered by the Commission at its previous session: definition of unilateral acts; conditions of validity and causes of invalidity; rules of interpretation applicable to unilateral acts; and their classification.

50. Chapter II examined three questions that might make possible the development of common rules applicable to all such acts, regardless of their material content and their legal effects: the rule regarding respect for unilateral acts, the application of the act in time, and its territorial application.

51. Chapter III dealt briefly with the equally important subject of determination of the moment at which the unilateral act produced its legal effects, and would encompass three extremely important and complex issues: revocation, modification and suspension of the application of the act, and its termination.

52. Finally, chapter IV set out the structure of the articles already drafted and the future plan of work. The Commission would shortly have at its disposal a document containing the texts considered thus far, which would be examined by the Drafting Committee and the Working Group on unilateral acts of States in the course of the current session.

53. His present statement would relate only to the introduction of the report and to the first section of chapter I, concerning the definition. He would introduce the other subjects dealt with in chapter I at a later meeting.

54. It should be reiterated that the topic of unilateral acts was highly complex and had proved difficult to tackle. The literature was extensive, but unfortunately not always consistent. He had considered it in depth, together with the most important jurisprudence—arbitral and judicial decisions referring to unilateral acts and forms of conduct in general, not all of which were to be considered in the context of the Commission's task of codification and progressive development. Unfortunately, he had been unable to consider the full range of State practice, for various reasons. The information available on State practice was basically factual. Serious difficulties arose in determining States' beliefs regarding the performance of those acts, their nature and the intended effects. In most cases, however, those beliefs could be inferred. It was an acknowledged fact that States constantly performed unilateral acts and made unilateral declarations in the context of their external relations. A rapid review of the media would confirm that fact. But the question then arose whether those acts were political or legal. That seemingly simple question could be resolved only through an interpretation of the author States' intention—a highly complex and subjective issue.

55. Even if it was concluded that the act was legal in nature, it would still have to be decided whether it was a treaty act or a unilateral act; and, if the latter, whether it was a formally unilateral act within a treaty relation-

ship, to which the Vienna regime would apply; or whether it was a purely unilateral act, namely, one not linked to another legal regime, which gave rise to effects in and of itself. It was that latter case which was of interest to the Commission, and which might benefit from the elaboration of rules to regulate its functioning.

56. Reference to the law of treaties was essential in considering the present topic. When the articles on the law of treaties had been drafted, the situation had been more straightforward, inasmuch as practice in relation to treaty acts had been clearer. In the case of unilateral acts, doubts arose, not as to whether such acts existed, but as to their nature. There was no clear conviction on the part of States that any given unilateral act belonged to the category with which the Commission was concerned. Consequently, at its fifty-third session the Commission had prepared a questionnaire that had been circulated to States with a view to obtaining fuller information on State practice.⁷ He was particularly grateful to the Governments of Estonia and Portugal for the valuable information they had submitted concerning international practice (see A/CN.4/524). Those Governments had not only provided examples of unilateral acts, but had also classified them and, most importantly, referred to their legal effects, thereby showing that it was indeed possible to find examples of acts considered by States themselves to be of relevance to the Commission's study.

57. It was clear, as most doctrine recognized, that treaties were the form most widely used by States in their international legal relations; but that did not alter the fact that unilateral acts of States were increasingly used as a means of conditioning their subsequent conduct. Nothing prevented the State from making unilateral international commitments, without the reciprocity or mutual concessions that were generally the hallmark of treaty texts. The State was authorized to formulate acts of that kind, described by the doctrine as "heteronormative". Thus, according to international law, the State could formulate an act without any need for participation by another State, with the intention of producing certain legal effects, without the need for any form of acceptance by the addressee or addressees.

58. In section C of the introduction, as a further illustration of the difficulties to which the topic gave rise, it was noted that the unilateral acts considered by the Commission to be the most frequent, namely, waiver, protest, recognition and promise, were not always expressed through declarations, and, furthermore, were not always unilateral. For example, recognition might be effected through conclusive or implicit acts. The State might recognize an entity implicitly, through a legal or political act other than a declaration of recognition of a State—for instance, through an exchange of ambassadors or the reciprocal opening of diplomatic or consular missions. Thus, recognition was not always a unilateral act of the type with which the Commission was concerned. Furthermore, it might sometimes take the form of a treaty, as in the case

⁷ See *Yearbook ... 2001*, vol. II (Part Two), pp. 19 and 205, paras. 29 and 254, respectively. The text of the questionnaire is available at <http://untreaty.un.org/ilc/sessions/53/53sess.htm>.

of recognition of the United States of America and of the two Germanys.

59. Nor were promises always unilateral. There appeared to be nothing preventing a promise from being expressed through a treaty act. A State could promise another State or States that it would observe a certain form of conduct, through a treaty relationship. In such cases, of course, although that was a promise in the sense usually understood in doctrine, the rules applicable to the act from which it stemmed would be the Vienna rules on the law of treaties, even though the undertaking was unilateral.

60. Protest, on the other hand, was essentially—perhaps exclusively—unilateral; and should not be confused with unilateral collective protest, when two or more States formulated a protest by means of a single act.

61. Waiver, too, was a complex and varied phenomenon. International doctrine and jurisprudence had established that it could only be explicit. There could be no such thing as implicit or tacit waiver—a matter of relevance to the topic of diplomatic protection, in the context of waiver by the respondent State of the requirement that local remedies be exhausted. Such waiver must be clear and unequivocal, and must accordingly be explicit. The unilateral act of waiver that was of interest to the Commission was an unequivocal manifestation of the will of the State, with the intention of producing specific legal effects. The persisting uncertainty with regard to the subject matter of the work of codification, to which he drew attention in paragraph 4 of his report, raised the question whether codification of the issue was a viable proposition. Despite the complexity of the topic, a substantial majority, both in the Commission and in the Sixth Committee, had considered that the topic was appropriate for codification and progressive development.

62. Chapter I focused on the definition of unilateral acts, in an attempt to come up with a definition that encompassed the various acts not covered by previous attempts at a definition. With regard to the evolution of the definition and of its constituent elements since the submission of the preliminary report,⁸ the word “declaration” had been replaced by the word “act”, which had been considered less restrictive, covering unilateral acts not formulated by means of a declaration. As Special Rapporteur, he had considered that most, if not all, unilateral acts, including waiver, promises, protest or recognition, could be formulated only through a declaration. However, in response to some members’ comments, he had substituted the word “act” for the word “declaration”.

63. The concept of “autonomy” had been excluded from the definition, although as Special Rapporteur he had considered that one of the characteristics of those acts was that they were independent of other legal regimes such as treaty regimes. The characteristic of autonomy could, however, be dealt with in the commentary.

64. The phrase “unequivocal expression of will which is formulated by a State with the intention of producing legal effects” had been included in the definition. There seemed to be no doubt that the legal act was “an expression of will”: that such acts were defined on the basis of a manifestation of the will of the author was confirmed by doctrine. Will was a constituent element of consent, and also indispensable to the formulation of the legal act. The phrase “manifestation of will with the intention of producing legal effects” had been regarded by some as tautological. In his view, however, it encompassed two different and complementary concepts, namely, performance and purpose. The phrase “the intention to produce legal effects” replaced the previous expression “the intention to acquire legal obligations”, which the Commission had found to be restrictive, in that it ruled out any possibility of the State establishing a separate relationship with the addressee. In his view, one thing was clear: the State could not impose obligations on another subject of international law without its consent—a view confirmed by international doctrine and jurisprudence, in the principles of *res inter alios acta* and *pacta tertiis nec nocent nec prosunt* and in a number of cases cited in paragraph 60 of the fifth report, although the law of treaties established exceptions to that rule such as the stipulation in favour of third parties, and the most favoured nation clause, which required the consent of the addressee.

65. Could a State impose obligations on another State that had neither taken part in the formulation of a unilateral act nor accepted the corresponding obligations? An analysis of those unilateral acts that were considered most representative showed that neither promise nor waiver created obligations for third parties. Indeed, the author State undertook obligations in formulating the act and by the same token granted rights to other States. Stipulation in favour of third parties required no acceptance or reaction signifying acceptance. As ICJ had pointed out in its decisions in the *Nuclear Tests* cases, the unilateral act created obligations from the moment it was formulated. That moment was comparable, *mutatis mutandis*, to the entry into force of a treaty.

66. Recognition of States could perhaps bear closer examination as a unilateral act formulated expressly and not implicitly. While there was no doubt that the author State assumed obligations *vis-à-vis* the addressee State, one might ask whether the latter State thereby assumed obligations imposed by international law. The answer obviously depended on the way one viewed recognition of States, on whether it was seen as declarative or constitutive. If it was the former, the recognizing State merely took note of an existing situation, namely statehood, which obtained not because of a statement of recognition but because the necessary conditions existed for the entity to constitute a State. The State’s obligations therefore stemmed from its status, not from the act of recognition. In the second hypothesis, reflecting a view he did not share, the situation would be different.

67. In past discussions of the term “unequivocal”, it had been suggested that it was hard to imagine how a unilateral act could be formulated in a manner that was unclear or contained implied conditions or restrictions. Some mem-

⁸ See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486, 319.

bers considered that the expression of will must always be clear and comprehensible, and that if it was equivocal and could not be clarified by ordinary means of interpretation it did not create a legal act. The term in any event remained in the definition which was now before the Drafting Committee.

68. The excessively broad term “publicity” had been replaced by the word “notoriety”, since “publicity” was seen as having been used exclusively in the case of a unilateral act formulated *erga omnes*, whereas the key element was that the act should be known to the addressee.

69. The fact that the definition gave States alone the capability to formulate unilateral acts—the matter covered by the Commission’s mandate—should in no way be construed as meaning that other subjects of international law, particularly international organizations, could not do so. The notion of addressee was seen in broad terms, such that a unilateral act could be directed not only at one or more States, but also at an international organization. Some members of the Commission believed that other international legal entities, including liberation movements, could be the addressees of such acts. That raised a number of issues that deserved measured consideration, including international responsibility and international capacity in the event of a dispute, but the draft as it stood remained limited expressly to States and international organizations.

70. The definition of unilateral acts was now before the Drafting Committee and it was crucial that it be adopted at the present session to permit progress on other draft articles. Extensive consideration had been given to the definition, and its conception had evolved on the basis of comments by members of the Commission and by Governments. A recapitulation of the progress made and the reasons why certain concepts and terms had been changed had been provided in response to suggestions made the previous year. While all unilateral acts were similar in formulation and common rules could be elaborated for them, some acts differed in their legal effects. The structure of the draft would therefore have to be divided into two or three parts, depending on the classification made of unilateral acts. He recalled that the Commission had considered that work could be focused in the next stage on international promise and other acts by which States assumed unilateral obligations.

71. With those remarks, he commended the introductory portion of his fifth report to the members of the Commission, on the understanding that at the next meeting he would submit additional aspects of the topic for their consideration.

72. Mr. PELLET said the recapitulation of the Commission’s work presented by the Special Rapporteur was interesting, especially for new members, but there were no new elements or new draft articles for discussion. What were members being asked to speak about in the upcoming meetings on the topic?

73. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said it had been Mr. Pellet himself who had suggested that

a recapitulation be presented, for which he was grateful, since it would help new members of the Commission to assess the progress made. True, there was little that was new for other members, but paragraphs 44 and 45 of the report raised certain points on which he would welcome comments: the application to unilateral acts of the general rule of *pacta sunt servanda*; the application of the unilateral act in time, which raised the issue of retroactivity; the application of the unilateral act in space; and determination of the moment when the unilateral act began to produce its legal effects.

The meeting rose at 1 p.m.

2721st MEETING

Friday, 17 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kateka, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Organization of work of the session (*continued*)

[Agenda item 2]

1. Mr. YAMADA (Chair of the Drafting Committee) announced that, taking into account the wishes of the members of the Commission and the need to ensure an equitable distribution of geographical regions and languages, it had been decided that the Drafting Committee on the topic of reservations to treaties would be composed of the following members: Mr. Pellet (Special Rapporteur), Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue and Mr. Kuznetsov (Rapporteur of the Commission, *ex officio* member). He understood that the Chair of the Commission was willing to take part as an *ex officio* member. The Committee was open to the participation of all the

other members of the Commission who wanted to attend its meetings.

Reservations to treaties¹ (continued) (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

2. Mr. MANSFIELD said he was surprised that draft guideline 2.1.7 *bis* (Case of manifestly impermissible reservations) proposed by the Special Rapporteur in his seventh report on reservations to treaties (A/CN.4/526 and Add.1–3) should be a matter of concern to some members of the Commission. In that draft guideline, the Special Rapporteur had clearly attempted to deal only with cases in which the reservation formulated posed an obvious problem. The provision would certainly not apply in situations in which there was a margin of appreciation as to whether a particular reservation was or was not compatible with the object and purpose of the treaty. The Drafting Committee might consider whether that could be made clearer in the wording. But the work of the depositary always contained an element of judgement which was not qualitatively different from any other judgements it was required to make in other situations, such as whether a reservation had been formulated in due and proper form. One could be reasonably confident that, in any case, the depositary would carry out his communications with the reserving State with discretion. It was in the interest of the depositary as well as the State concerned that the matter should be resolved in that fashion.

3. He agreed with Mr. Koskenniemi that an inactive, letter-box-type depositary was not the same thing as a neutral depositary. The activity referred to in draft guideline 2.1.7 *bis* would be for the benefit of all, including that of the reserving State. A notification of an exchange of views between the depositary and the reserving State could at least draw the attention of the legal departments of the ministries of foreign affairs of the other States parties, but that did not suggest that they would agree with the concerns raised by the depositary or endorse the standpoint of the reserving State. For those reasons, he was in favour of referring the draft guideline to the Drafting Committee, which could reformulate the text to take account of the concerns raised in the discussion.

4. Mr. CANDIOTI said that, as draft guideline 2.1.7 *bis* contained a useful proposal from the practical point of view, he agreed that it should be referred to the Drafting Committee, on the understanding that the Committee would take due account of all the views expressed on ensuring that the depositary's functions and powers remained within the context of the system defined in the 1969 Vienna Convention.

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

5. He suggested that, in the Spanish text, the word *ilícita*, which was not very appropriate, should be replaced by the word *inadmisibile*.

6. Mr. ADDO recalled that the legal basis of a reservation depended on the content of the treaty. Some treaties permitted reservations, while others prohibited them; some permitted only specified reservations, and still others remained silent on the issue. In his view, draft guideline 2.1.7 *bis* was applicable to the situations covered by article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention, which distinguished between permissible and impermissible reservations. At times, States used a declaration as an attempt to make reservations to treaties that prohibited them. That was the case of the Philippines with regard to the United Nations Convention on the Law of the Sea, article 309 of which prohibited reservations: its declaration, which seemed to have the effect of a reservation, had been manifestly impermissible, and several States had in fact formulated an objection. In such a case, the depositary had every right to bring the prohibited reservation to the attention of the reserving State to enable it to withdraw it and, if the latter insisted, to communicate the text of the reservation and the exchange of views which he had had with the reserving State to the other signatories of the treaty, as draft guideline 2.1.7 *bis* provided. The same applied to situations covered by article 19, subparagraph (b), of the 1969 Vienna Convention, namely, when a State made a reservation which was not one of those specifically permitted by the treaty.

7. On the other hand, a reservation incompatible with the object and purpose of the treaty, although impermissible, could not be qualified by the word "manifestly" because it was not simple to identify the object and purpose of a treaty. That was a subjective question which each State party had to decide. A reservation that violated a principle of customary international law which had been codified would be manifestly impermissible. For example, a State could not reserve the right to engage in slavery. In that case, the depositary was not bound to accept such a reservation because it would be ineffective. However, he might draw the author's attention to its impermissibility, thereby enabling the author to abandon it and thus obviate the need to communicate it to the other States parties.

8. In closing, he said that draft guideline 2.1.7 *bis* was useful and that he was in favour of referring it to the Drafting Committee with the caveat that it did not cover reservations incompatible with the object and purpose of a treaty within the meaning of article 19, subparagraph (c), of the 1969 Vienna Convention.

9. Mr. GAJA, commenting on Mr. Addo's remark that another category of impermissible reservations might be those made with regard to a provision of a treaty that corresponded to a rule of customary international law, pointed out that, when a State made such a reservation, it did not necessarily deny the existence of the rule; it simply wished not to add to the customary international law obligations incumbent on it under the treaty and thereby to avoid the supervision mechanism for which the treaty might provide. He did not think that such a reservation could *per se* be considered impermissible.

10. Mr. PELLET (Special Rapporteur) said he agreed that there was nothing to prevent a State from making a reservation to a provision of a treaty that corresponded to a rule of customary law. By so doing, it remained bound by the rule but had a right to refuse to be subject to it in the context of the treaty.

11. Mr. SEPÚLVEDA congratulated the Special Rapporteur on the quality of his reports, which did not go unnoticed and whose thought-provoking nature always inspired many comments.

12. He drew attention to the lack of consistency in the Spanish text of guideline 2.1.7 *bis*, which used two different words to qualify reservations: *inadmisibles* in the title and *ilícita* in paragraph 1; the problem should be remedied.

13. Apart from the issue of terminology, the fundamental question raised by the draft was its compatibility with the 1969 Vienna Convention and the scope that the Commission wished to give the Guide to Practice, which should, in his opinion, not exceed the limits set by the Convention. The reservation system established in articles 19 to 23 of the Convention concerned only States parties, not the depositary. Clearly, it was not for the depositary, whose functions were established in article 77 of the Convention, to determine whether a reservation was permissible or impermissible, as envisaged in guideline 2.1.7 *bis*; that was a matter to be decided by the States parties to the treaty. The depositary was simply required to communicate the text of the reservation to the signatory States and organizations. Furthermore, according to the proposed guideline, after establishing that a reservation was manifestly impermissible, the depositary was to play the unenviable role of bearer of bad tidings by communicating the text of the exchange of views that it had had with the author of the reservation to the other States parties. The Special Rapporteur did not state what the consequences of the depositary's action would be, but it could be assumed that its initial effect would be to cast a cloud of uncertainty over the reservation, which the depositary had unilaterally and perhaps arbitrarily declared to be impermissible. Some annoyance might also be expected, not only on the part of the author State, which might in good faith consider the reservation to be permissible, but also on the part of all the signatory or contracting States, which would consider that the depositary had exceeded its mandate by making a subjective value judgement on the reservation. It would seem unwise to place the depositary, who was responsible for facilitating communication between the Parties, in such a situation of potential conflict.

14. To facilitate the depositary's task, a consultation process between interested States parties should therefore be provided for in order to determine which reservations were admissible and which were not. The depositary might also draw the attention of the signatory and contracting States to the fact that a State had made a reservation which might be prohibited by the treaty, was not among the reservations authorized by it or was incompatible with its object and purpose. It would then be for each State to decide whether to accept the reservation or to object to it in accordance with article 20 of the 1969 Vienna Con-

vention. The inclusion of those elements in the guideline would ensure its consistency with the letter and spirit of the Convention; he hoped that the Drafting Committee would find appropriate wording that would reflect all the comments made.

15. Mr. RODRÍGUEZ CEDEÑO said that guideline 2.1.7 *bis* should be brought into line with the 1969 and 1986 Vienna Conventions and, in particular, with article 77 of the 1969 Vienna Convention, which set forth the functions of the depositary, and with articles 19 and 20 of that Convention. The Special Rapporteur's draft struck a balance between two points of view: that of the 1969 Vienna Convention, according to which the depositary's mission was limited to the management of treaties, and that of progressive development, which gave the depositary broader powers. Personally, however, he was concerned at the fact that draft guideline 2.1.7 *bis* gave the depositary the power to qualify a reservation as "manifestly impermissible". Therefore, while agreeing that it should be referred to the Drafting Committee, he hoped that the latter would reword it in order to take account of the different opinions expressed in plenary, particularly on that point. The inconsistent wording of the Spanish text, which he had already mentioned, should also be addressed.

16. Mr. MOMTAZ pointed out that, in most cases, States which made manifestly impermissible reservations did so in full awareness of that fact rather than through an error on the part of their legal experts, usually as a result of domestic policy issues which left them with no choice but to make impermissible reservations or not to ratify the treaty at all. It might be preferable to use the wording of article 20 of the 1969 Vienna Convention, leaving it to the other contracting States to react to such reservations; the choice was between the integrity and the universality of treaties.

17. Mr. PAMBOU-TCHIVOUNDA said that some ambiguity remained; he was not certain of the effect of the other States parties' silence regarding a manifestly impermissible reservation. Since the 1969 Vienna Convention made the acceptance of reservations tacit, he wondered whether States' silence might be a form of acceptance of manifestly inadmissible reservations or whether it should be viewed as a sign that they considered them to be null and void.

18. Ms. XUE said that, given the large number of treaties drafted in recent times, it could safely be assumed that the depositary could be trusted to exercise judgement in deciding whether a reservation was manifestly impermissible, particularly when that depositary was part of the United Nations system. However, it was most important to bear in mind that, if manifestly impermissible reservations were formulated, the States whose interests were affected would be bound to react. She wondered whether it was wise to place the depositary in a situation in which it must engage in a substantive debate with a reserving State. She was concerned that draft guideline 2.1.7 *bis* might accord the depositary wider interpretative powers than either the Commission or States desired. In the event of a State's formulating a manifestly impermissible reservation, for example, if, in the context of a genocide treaty,

a State reserved the right to conduct genocide in certain circumstances, all contracting States would object to that reservation. In any case, the depositary must remain neutral, in the interest of stable relations between States parties and in its own interest.

19. Mr. CHEE reverted to the formulation of draft guideline 2.1.7 *bis*, which seemed to him to contravene article 77 of the 1969 Vienna Convention, on the functions of depositaries. Nothing in article 77, paragraph 1, subparagraphs (a) to (h), gave the depositary the power to determine the permissibility or impermissibility of a reservation. Subparagraph (d) accorded it the task of “examining whether [...] any [...] communication [...] [was] in due and proper form”—a task that clearly concerned only the procedural aspects. He was concerned about the use of three expressions in draft guideline 2.1.7 *bis*, namely: “in the opinion of the depositary”, “manifestly impermissible” and “in the depositary’s view”. It seemed to him that those expressions went beyond the limits imposed by article 77 of the Convention, as well as exceeding the function of the depositary as recognized by customary international law.

20. Mr. KAMTO said that, irrespective of the various points raised, such as the neutrality of the depositary or domestic policy issues influencing States’ behaviour, there was also a legal problem of the definition of the role of the depositary, in the light of positive law, including the 1969 Vienna Convention, and the subsequent evolution of international practice. The provisions of articles 19, 77 and 20 of the Convention should be respected while taking account of the practical need to confer a more important role on the depositary. He was in favour of referring draft guideline 2.1.7 *bis* to the Drafting Committee, but hoped that the Committee would avoid the French term *illicite*, which belonged to the realm of State responsibility, by instead using a term such as *admissibilité* or by reproducing the provisions of article 19 to specify those types of reservation to which the depositary could react and referring to article 77, paragraph 1, subparagraph (d). The depositary might draw the attention of the reserving State to the fact that the reservation contravened subparagraph (a) or (b) of article 19, in a communication that it would not be necessary to make public. If the reserving State persisted, the depositary could then draw the reservation to the attention of the other contracting States. As for the point dealt with in article 19, subparagraph (c), that matter fell solely within the competence of States.

21. Mr. PAMBOU-TCHIVOUNDA noted with concern that the first paragraph of draft guideline 2.1.7 *bis* began with the words “Where, in the opinion of the depositary, a reservation is manifestly impermissible...”. An opinion, however well-founded from the technical and legal standpoints, could not bind a sovereign State, which remained free to accept or reject any reservation formulated by another State. The Commission would thus seem to be becoming needlessly alarmed.

22. Ms. ESCARAMEIA said that nothing in draft guideline 2.1.7 *bis* contravened article 77 of the 1969 Vienna Convention, which provided a deliberately non-limitative definition of the depositary’s functions. As for the ques-

tion of political choice, she did not think it was a question of the integrity of the treaty versus the universality of the treaty. In practice, it was not the treaty that was universal but some of its provisions, and, furthermore, it was not possible to predict which provisions would be universal. If a State formulated a reservation that was not authorized under article 19 of the Convention, that State was committing an illegal act, and the depositary must not be encouraged to ignore the fact. In practice, the silence of other States amounted to an acceptance of the reservation because, as between the State that had not objected and the reserving State, the treaty was effective and the reservation applicable. Finally, it was inaccurate to say that States could always do what they wanted. In practice, small or medium-sized States often hesitated to compromise their good relations with the reserving State. Within the European Union, objections were often formulated jointly, and small European Union member States were very glad to be able to avail themselves of that possibility. The modest watchdog function conferred on the depositary in the draft guideline would serve a similarly useful purpose.

23. Mr. PELLET (Special Rapporteur) said he was surprised that the debate on draft guideline 2.1.7 *bis* had taken on such proportions, as the provision was purely procedural, useful to be sure, but ultimately innocuous, a middle-of-the-road stance in the range of sometimes extreme positions stated in the Sixth Committee. It meant that, when a depositary considered that a reservation was manifestly impermissible under article 19 of the 1969 Vienna Convention, he should be able to say so to the author of the reservation. That State would then react and, if a compromise was not reached, the parentheses would be closed and the procedure would resume, meaning that the depositary would transmit the reservation to the other States and they would either object or not. What was not innocuous, however, was the argument that the State had the right to raise domestic policy problems to the international level by means of a manifestly impermissible reservation. If a State formulated a manifestly impermissible reservation, i.e. one prohibited by a treaty or one that was fundamentally incompatible with the object and purpose of the treaty, there was no way domestic policy problems could exempt it from abiding by the rules of international law, which were all the more important in that they established a very acceptable balance between the principles of integrity and universality.

24. The Commission appeared to have no objection to referring draft article 2.1.7 *bis* to the Drafting Committee, but it had to give the Committee guidelines based on the lessons to be learned from the debate, which had focused primarily on four issues: terminology; whether manifest impermissibility related only to article 19, subparagraphs (a) and (b) of the 1969 Vienna Convention or also to subparagraph (c); the end of paragraph 2 of the draft guideline; and the problem of the time frame, which in his opinion was a non-problem. The terminology problems related to the words “impermissible” and “manifestly”. The words *illicite* and *ilícita* posed problems in French and Spanish, whereas there had been no objection to the word “impermissible” in English. The word *illicite* did give rise to a problem because in international law it related to State responsibility. However, a State that made a reservation that was *illicite* was not incurring any responsibility and

was simply running the risk that its reservation would be considered null and void. Of the terms that could be used in French to replace *illicite*, *inadmissible* had to be ruled out, at least as a technical term; *irrecevable* was more limited than the English word “impermissible”; and *incompatible* referred only to article 19, subparagraph (c), of the Convention, whereas the problem was much broader and some members of the Commission even wanted to leave subparagraph (c) aside. The best solution might be to return to the terminology he had used in his first two reports, saying, for example, that a reservation was *valide* or *non valide*, even if the word “impermissible” was retained in the English text owing to the objections raised in the past about the use of the word “valid” in English. It would certainly be possible to try to work out a definition for the word “manifestly”, perhaps on the basis of article 46, paragraph 2, of the Convention, but, being fond of soft law, he thought there was no need to rewrite the dictionary for such an innocuous provision.

25. Some members of the Commission had proposed that the depositary should be allowed to react only to the situations dealt with in article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention. He opposed that idea because it was precisely the situations covered in article 19, subparagraph (c), that were most likely to arise in practice. He was not unsympathetic to the comments on the way the text was worded, but the provision must not be emptied of its substance by making it applicable exclusively to situations where a problem could not actually arise. It was the last part of paragraph 2 of draft guideline 2.1.7 *bis*, namely, “attaching the text of the exchange of views which he has had with the author of the reservation”, that gave rise to the greatest misgivings, however. It was true that discretion was a virtue and that the depositary was a facilitator and not a judge, but it was also true that States were frequently careless, and there was something to be said for reminding them of their duties. The exchange of views in question did not necessarily take place in writing, and the depositary did not necessarily have to attach it in its entirety. The Drafting Committee would undoubtedly find a slightly less formulaic way of describing the watchdog function of the depositary. As to the time frame, some members were concerned that the procedure might be extended indefinitely and wondered whether a time limit should be set for the exchange of views with the author of the reservation. He himself thought that, as long as a State was ready to enter into discussions, the exchange should be allowed to continue. It might then be necessary to specify in the commentary that only the State that was the author of the reservation could end the exchange and demand that its reservation should be transmitted. As to the time from which the reservation could be considered to have been formulated, draft guideline 2.1.8 (Effective date of communications relating to reservations) could not be clearer: it was when the reservation had been communicated to the State or organization to which it was transmitted. The time frame allowed for formulating objections thus ran from the date of communication, in conformity with draft guideline 2.1.8. That was the basis for the Committee’s discussions.

26. Mr. MOMTAZ explained that he had not been suggesting that States should be allowed to violate international law. He had been referring to article 20 of the 1969

Vienna Convention and had even said that States had the right to object to manifestly impermissible reservations. He thus emphasized once again that a manifestly impermissible reservation had no legal validity.

27. The CHAIR said that, if he heard no objection, he would take it that the members of the Commission wished to refer draft guideline 2.1.7 *bis* to the Drafting Committee, on the understanding that, in considering that provision, it would take account of all the views expressed in plenary.

It was so decided.

The meeting rose at 11.40 a.m.

2722nd MEETING

Tuesday, 21 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Unilateral acts of States (*continued*)* (A/CN.4/524, A/CN.4/525 and Add.1 and 2,¹ A/CN.4/521, sect. D)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPporteur
(*continued*)*

1. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), continuing the presentation of his fifth report (A/CN.4/525 and Add.1 and 2), recalled that it focused on a fundamental issue: the definition of the unilateral act against the background of the progress made in the work

* Resumed from the 2720th meeting.

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

on the draft articles. He had chosen that approach for a number of reasons, including, among others, as a response to suggestions that he should submit a recapitulation of what had already been done and as a way of starting off the new quinquennium and acquainting new members with the topic. In sections B to D of chapter I of the fifth report, certain aspects of the topic were addressed in a complementary rather than recapitulative manner. These sections dealt with the conditions of validity and causes of invalidity of unilateral acts, with interpretation of such acts and with their classification.

2. One of the comments at the previous session had been that the causes of invalidity should be considered along with the conditions of validity of a unilateral act and should be viewed broadly, not solely in terms of defects in the manifestation of will. Other causes of invalidity that might affect the validity of the unilateral act should be considered, it had been suggested, including the capacity of the author, the viability of consent and the lawfulness of the object of the unilateral act.

3. References to such issues in the literature were minimal, and relevant practice seemed virtually non-existent. Once again, however, the Vienna regime served as a valid reference point. The conditions for validity of legal acts were mentioned in a number of provisions in the 1969 Vienna Convention, specifically articles 42 to 53 and 69 to 71, although it had not been deemed necessary to incorporate a separate provision on the matter. When the Convention was being drawn up, the Special Rapporteur on the topic had submitted a draft article on validity, but it had not been adopted, having been viewed as unnecessary. Some reference should be made to the conditions of validity, however, even if no specific provision was included in the draft articles now being worked on. That was why the conditions of validity of a unilateral act, which did not differ from those for validity of a treaty, were set out in the report.

4. First, it was the State that had to formulate a unilateral act, although other subjects of international law such as international organizations were not precluded from doing so. The reason for that limitation was simply that the work on the topic had to conform to the Commission's mandate, which was restricted to unilateral acts of States. In addition, a unilateral act had to be formulated by a person who had the capacity to act, and to undertake commitments at the international level, on behalf of the State.

5. Another condition for the validity of a unilateral act, characteristic of legal acts in general, was the lawfulness of its object. The unilateral act must not conflict with a peremptory norm of international law or *jus cogens*. In addition, the manifestation of will must be free of defects. By analogy with what was done in the 1969 Vienna Convention, however, those conditions of validity of unilateral acts did not need to be set forth in a specific provision of the draft articles.

6. Section B of chapter I of the fifth report spoke of the regime governing invalidity in international law, which was certainly one of the most complex aspects of the

study of international legal acts in general. Prior to Vienna, that regime had not been examined in great depth in the context of international law, even though it had given rise to international disputes and had been considered in the domestic sphere. A related issue raised was the effects of a unilateral act that conflicted with a previous act, whether conventional or unilateral—in other words, a unilateral act that was contrary to obligations entered into previously by the same State. Reference was also made to absolute invalidity, where the act could not be confirmed or validated, and to relative validity, where it could. In the first case, the act conflicted with a peremptory norm of international law or *jus cogens* or was formulated as a result of coercion of the representative of the State that was the author of the act; in the second, other causes of invalidity could be overcome by the parties, and the act could therefore have legal effects.

7. As was pointed out in paragraph 115 of the report, the single draft article on causes of invalidity submitted earlier had now been replaced by separate provisions, in response to comments made by members of the Commission and of the Sixth Committee. As was indicated in paragraph 116, the new version presented in brackets a reference to the State or States that had formulated a unilateral act. That alternative catered for the possibility that a State might invoke invalidity in the case of a unilateral act that had a collective origin. If the alternative was accepted, a reference to the "State or States" might be included in the definition in article 1 in order to reflect more clearly the possibility of a collective unilateral act. It would be noted that in the new version of draft article 5, the State or States that had formulated the act could invoke error, fraud or corruption of an official as defects in the expression of will, whereas any State could invoke the invalidity of a unilateral act if the act was contrary to a peremptory norm of international law (*jus cogens*) or a decision of the Security Council.

8. A number of issues remained unresolved and could be the subject of further consideration. One was the possibility, in the case of unilateral acts of collective origin, that one of the States that participated in the formulation of the act might invoke invalidity. Another was the effects that the invalidity of the act could have on legal relations between the State that invoked invalidity and the other States that had participated in the formulation of the act, and on their relations with its addressee. Did the invalidity of the act affect only the relationship of the invoking State with the addressee, or did it affect the relationship among all the States that had formulated the act and all the addressees? Consideration would have to be given, *inter alia*, to stipulation in favour of third parties, in which case, if the act that gave rise to the relationship was invalidated, the relationship with the third State was terminated. In that context it should be recalled that article 69 of the 1969 Vienna Convention set out the consequences of invalidity of an act, which differed from those posited for a unilateral act of collective origin. He would welcome comments on that point so that they could be reflected in a future provision on the subject.

9. The diversity of unilateral acts could have an impact on the capacity to invoke the invalidity of the act. In the case of promise or recognition, for example, the author State could invoke the invalidity of the act, but in the case of protest, the situation was not the same: while the author State could hardly invoke the invalidity of the act, nothing would seem to prevent the addressee State from doing so.

10. Another issue taken up in the report but not reflected in the actual wording of the draft was whether the author State could lose the right to invoke a cause of invalidity or a ground for putting an end to an act by its conduct or attitude, whether implicit or explicit. According to some of the literature, there was no defect—or almost no defect—that could not be overcome by the subsequent conduct of the State. By its subsequent attitude, the State could regularize an act that was considered invalid *ab initio*. One could take the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906*, in which ICJ had ruled that Nicaragua could not challenge the award because it had applied the treaty that contained the arbitral clause (para. 109 of the report).

11. The question was raised in paragraph 110 of the report whether a State could validate any and all unilateral acts through its subsequent behaviour, or whether a distinction had to be made according to the differing legal effects of the act. Protest, for example, might be approached from a different angle. Because any provision on the subject might not be generally applicable, none was being proposed.

12. Another issue touched on in the report (para. 113) was invalidation of a unilateral act because of a violation of domestic law concerning competence to formulate unilateral acts and the particular restriction of the power to express will. According to the Vienna regime, that cause could be invoked only if the violation was manifest and if it concerned a norm of fundamental importance to the domestic law of the State.

13. The difficulties of a straightforward transposition of the Vienna regime to unilateral acts should be emphasized in that regard. There was perhaps no basis for comparison with domestic law, since constitutions generally referred to the capacity to conclude treaties without expressly mentioning unilateral acts. There was no justification for a broad interpretation assimilating unilateral acts to treaties. While the representative of a State had the capacity to act on behalf of the State and to commit it at the international level, he or she could not do so in all circumstances. For example, could a representative or even a Head of State or minister for foreign affairs, whose capacity was not open to question, make a unilateral declaration with the object of modifying borders or doing something else that normally required domestic ratification or even a national referendum? Could such a unilateral declaration produce legal effects *per se*?

14. The second matter addressed in the report was the interpretation of unilateral acts. Because expression of will was involved, rules on interpretation could be applied to all unilateral acts, irrespective of their content. Some members of the Commission and of the Sixth Commit-

tee had felt that consideration of the rules of interpretation was premature, while others, perhaps the majority, had deemed it possible to try to establish a general rule and one on supplementary means of interpretation, as in the Vienna regime. The transposition of that regime to unilateral acts must always take into account the specific features of such acts. Hence the proposed wording of draft article (a), paragraph 1, which drew on article 31 of the Vienna Conventions of 1969 and 1986 but took account also of the definition in article 1 of the draft now being worked on.

15. The draft article on interpretation did not expressly refer to the restrictive character of interpretation, but such a reference could be included if the Commission preferred. Otherwise, the commentary should reflect that concept, which had been indicated in the literature and in case law, such as in the *Nuclear Tests (Australia v. France)* case, where ICJ had been dealing with promises, and in respect of declarations of acceptance of the Court's jurisdiction.

16. Another issue tackled in the report was the classification of unilateral acts, which, though an arduous task, could facilitate the structuring of the draft articles. It had rightly been noted that common rules that would apply to all unilateral acts could not be developed. While classification might be an academic exercise, it could help in grouping and structuring the draft articles. Even if the classification could not be done for the time being, the Commission should take a final decision on whether to develop rules for a category of unilateral acts such as promises, which signified the assumption of unilateral obligations by the author State. The next report could then address the complex issues of revocation, modification, termination and suspension of unilateral acts, which could be handled more easily if compared solely with that kind of act.

17. Clearly, the revocation of a unilateral act could not be the subject of a rule that applied to all acts. The revocation of a promise or of an act whereby a State assumed a unilateral obligation did not seem to be the same as the revocation of an act whereby a State reaffirmed a right. The situation could be and was different, depending on whether it was a promise or a protest that was being revoked. Could the author State revoke the act unilaterally in both cases, or was that power limited in one or both cases? A similar question arose in relation to the modification of a unilateral act. Could a State modify a unilateral act in a unilateral manner, in other words, without the participation of the addressee, or was the consent of the addressee required, as in treaty relations?

18. The termination and suspension of application of a unilateral act must be considered in terms of the unilateral act's specific features. Once again, the question was whether the Vienna regime could be transposed, *mutatis mutandis*, and whether it was possible to develop rules that could be applied to all unilateral acts, irrespective of their content. Rules on the termination of the unilateral act should be developed, in his view, along the lines of those laid down for treaties in articles 59 *et seq.* of the 1969 Vienna Convention, and the consequences of termination and suspension of application should be examined

on the basis of articles 70 and 72 of the Convention but with due regard for the particular features of the unilateral act. The rules on the termination or suspension of treaties owing to impossibility of performance or change of circumstances could be made applicable to unilateral acts. It would be more difficult, however, to transpose the Vienna rule on the termination or suspension of the operation of a treaty implied by conclusion of a later treaty. The same could be said of the rule on termination or suspension of the operation of a treaty as a consequence of its breach. Consideration could be given to developing rules on the termination or suspension of an act owing to the severance of diplomatic or consular relations or the emergence of a new peremptory norm of international law, matters covered in articles 63 and 64 of the Convention.

19. Such questions, which in his view could not be the subject of common rules, could be addressed by the Commission and the working group that was to be set up, and the resulting suggestions and conclusions could be taken into account for the preparation of the next report.

20. Chapters II to IV of the fifth report were soon to be circulated, and he wished simply to touch on their subject matter in order to give members of the Commission an overall perspective. It dealt with rules on respect for and application of unilateral acts, in particular a rule drawing on article 26 of the Vienna Convention that would lay down the obligatory nature of unilateral acts. The inclusion of the *acta sunt servanda* rule might be important, and perhaps the Commission could consider it during the second part of the session.

21. Chapter II of the report would also address the important subjects of the application of the unilateral act in space and time. In both cases, the principle of non-retroactivity and of application throughout a State's territory seemed transferable from treaty law to the framework of unilateral acts.

22. To date, articles had been submitted on the definition of unilateral acts, the capacity of States to formulate unilateral acts, persons authorized to formulate unilateral acts, confirmation of an act formulated without authorization, causes of invalidity, *acta sunt servanda*, non-retroactivity of unilateral acts, the application of unilateral acts in space, general rules of interpretation and supplementary means of interpretation. A draft article 6 would be submitted, on determination of the time from which the act had legal effects, which could be compared to the entry into force of a treaty. It was extremely important, since from that time the act was opposable and could have an impact on revocation, termination, modification or suspension of the application of the act.

23. He had raised a number of questions and looked forward to hearing the views of members of the Commission so that they could be taken into account in his future work on the topic.

24. Mr. GAJA, confining himself to comments on novel aspects of the texts just submitted by the Special Rapporteur, said that, under draft articles 5 (a) to 5 (h), only the State that formulated a unilateral act was regarded as en-

titled to invoke a cause of invalidity of the act. That solution did not appear to be adequately justified in the report, which to some extent even defended a different solution. According to paragraph 118, for instance, any State could invoke the invalidity of a unilateral act that was contrary to a peremptory norm. But that point was not reflected in article 5 (f), which related solely to invocation by the State that formulated the unilateral act.

25. It was questionable whether the State which was the author of the unilateral act should be the only subject entitled to invoke a cause of invalidity. Unilateral acts also produced effects for other subjects of international law which might, at least in some cases, be regarded as being entitled to invoke a cause of invalidity. Certainly their interests might be affected by the existence of the act, and they might not be responsible for the cause. Hence, one had to consider whether it would not be justified to give all these States, under certain circumstances, the possibility of invoking invalidity as well.

26. In any case, it would be preferable to use the same language as that used in articles 51 to 53 of the 1969 Vienna Convention relating to treaties affected by coercion or conflicting with peremptory norms. While articles 46 to 50 of the Convention stipulated that the respective causes of invalidity could be invoked by only one of the States parties to the treaty, namely the one affected by error or other causes of invalidity, article 51 held that a treaty was without any legal effect, and articles 52 and 53 regarded the treaty as void in the case of coercion or conflict with peremptory norms. That might be seen as implying that all States parties, and not just one, could invoke the cause, but it also implied a *droit de regard* of States other than the States parties to the treaty, given the general interest that no treaty should be in conflict with a peremptory norm. That kind of concern was also warranted in respect of unilateral acts which were tainted with the same cause of invalidity.

27. Changing the wording of the 1969 Vienna Convention to mere "invocability" in articles 5 (d), 5 (e) and 5 (f), by the State which was the author of the unilateral act would unnecessarily weaken the provisions on invalidity corresponding to those in articles 51 to 53 of the Convention.

28. The Special Rapporteur's reference in article (a) to the author State's intention for the interpretation of unilateral acts (para. 135) was a step forward, although only a half-hearted one, especially in view of what was stated in paragraph 132 on the preparatory work, which after all was the main instrument for ascertaining the author's intention. Reference to preparatory work was made only in the context of a supplementary means of interpretation and was put in square brackets in article (b) (*ibid.*), which showed that it was a minor consideration, whereas actually it was important and should be emphasized in the context of intention.

29. The Special Rapporteur made a case for the restrictive interpretation of unilateral acts. But, as he himself noted in paragraph 134, that view was not reflected in the text of the draft articles, and no reason was given. The

Special Rapporteur had only suggested that a working group should draft a text on restrictive interpretation, but as such a text would affect articles (a) and (b), a proposal in that regard would have been useful.

30. For the fourth year running, he wished to reiterate his conviction that only the availability of a larger body of practice relating to unilateral acts and an analysis of that practice would allow the Commission to make reasonable progress on the topic.

31. Mr. PELLET said that at first he had gained the impression that Mr. Gaja was wrongly criticizing the Special Rapporteur, because in the French version of articles 5 (f) and 5 (g), it was not indicated that it was the author State or States of a unilateral act that could invoke the absolute invalidity of a unilateral act if there was a conflict with *jus cogens*. The absence of a reference to the author State was contrary to the intention expressed in paragraph 116 of the report. For its part, the English text contained the phrase “State [or States] that formulate[s] a unilateral act may invoke” and so on. What did the Special Rapporteur want to say? In any case, the French version was preferable to the English version. In other words, he agreed with Mr. Gaja; in the event of absolute invalidity of the act, any State could invoke it. But if the French version of articles 5 (f) and 5 (g), which did not restrict themselves to the author State, was correct, he did not think that it was only when a unilateral act was contrary to a peremptory norm or a decision of the Security Council that invalidity could be invoked by any State: it should also be the case with the threat or use of force. In other words, the Commission should probably reintroduce in that form the distinction between absolute invalidity and relative invalidity in the 1969 Vienna Convention.

32. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the Spanish version was of course the reference text; its translation was the work of the translators. He was trying to distinguish between absolute and relative invalidity. Articles 5 (f) and 5 (g) were cases involving absolute invalidity which went beyond the interest of the State that was formulating the act and could naturally be invoked by any State. The Commission might also want to consider Mr. Pellet’s comment about the threat or use of force.

33. Mr. PAMBOU-TCHIVOUNDA, referring to Mr. Gaja’s remark on preparatory work, wondered about the possibility of obtaining access to preparatory work when a unilateral act was involved. Imagine an important declaration for which there was no written record but which the addressee must refer to and take note of. Was there really room in such a case for preparatory work? How could access be obtained to a State’s private archives? Was that a simple matter? Could any practical examples be cited?

34. Mr. KAMTO said that, according to the Special Rapporteur, the formulation of article 5 (f) was based on the 1969 Vienna Convention. Yet article 53 of the Convention simply stated that a treaty “is void”. The point of introducing the concept of “invocation” was to affirm the absolute invalidity of the unilateral act when it was in contradiction with *jus cogens*, and not to create a possibility of invocation for any State.

35. Mr. TOMKA said he agreed with Mr. Gaja that a distinction must be made between cases of invocation of invalidity of unilateral acts and cases in which an act was void because it conflicted with a peremptory norm of international law. In the latter case, the sanction of international law made the act void, and not the fact that the State which had formulated the act or any other State had invoked that cause. Mr. Pellet had said that that right should be given to other States. He personally thought that an act which was contrary to peremptory norms of international law was void, irrespective of whether any State invoked invalidity or not.

36. Mr. GAJA said he apologized to the Special Rapporteur because he had not looked at the Spanish text and had not been able to distinguish between articles 5 (d) and 5 (e), where the reference was to *el Estado* [“The State”], the State which was the author of the act, whereas article 5 (f) and 5 (g) spoke of *un Estado* [“A State”]. But, as had also been pointed out by Mr. Kamto and Mr. Tomka, it was preferable to use the term “void”, as in the Vienna Convention, and not say that any State could invoke the invalidity of the act.

37. As to Mr. Pambou-Tchivounda’s comment, the Commission had discussed the question of preparatory work at the previous session, and new members would doubtless express their views. One of the clear conditions for the use of preparatory work was its accessibility.

38. Mr. KOSKENNIEMI said that as a new member of the Commission he had a number of general comments on both article 1 and article 5.

39. He had fundamental doubts about the direction and content of the work. To begin with, the oddness of the language of article 1 and article 5 was indicative of fundamental problems. For example, article 1 spoke of unilateral acts as acts “with the intention of producing legal effects”. Article 5 used the odd phrase “formulation of a unilateral act” and referred to the conditions of validity of unilateral acts as well as their interpretation. That suggested that a unilateral act was to be taken as a fully voluntary scheme or law, a kind of promise or unilateral declaration.

40. Initially, the topic had been conceived in terms of unilateral declarations. Following discussions in the Sixth Committee and the Commission, it had then been changed to “unilateral acts” to ensure that they would not be regarded as promises given by States to each other on a unilateral basis. Such promises were exceedingly rare, and from his 17 years in the Ministry of Foreign Affairs, he had difficulty recalling a single case in which a State had *unilaterally* made a promise and had held itself legally bound by it without expecting reciprocity on the part of any other State. He thus had doubts about the phrase “formulate[s] a unilateral act”.

41. In the relevant jurisprudence, namely the previously mentioned *Nuclear Tests*, *Temple of Preah Vihear* and *Arbitral Award Made by the King of Spain on 23 December 1906* cases, the actor State itself had never conceived of acting in terms of a “formulation” in order to create legal effects. On the contrary, it had found itself bound by

the way it had acted or failed to act or what it had said or failed to say, irrespective of any formulation that it might have made about how it had acted or what it had said.

42. One difference between the topic of unilateral acts and some of the other topics the Commission had successfully considered in the past was that those other topics had dealt with legal institutions which could be defined and set off from the rest of the legal order: the concept of treaty, responsibility, succession of States and diplomatic protection all referred back to legal institutions in which there were rules, principles and considerable practice that lawyers recognized as being an aspect of a whole. Unilateral acts were not like that: they did not refer to any particular legal institution. Instead, they were a catch-all term to describe ways in which States sometimes were bound other than through the effects of particular institutions, or in which States acted in special ways so as to create legal effects. It was a source of some of the difficulties; the Commission was trying to codify something which did not exist as a legal institution and was at a loss as to how to define it so as to make it a legal institution.

43. A second difficulty was that the very concept of a unilateral act was fundamentally ambivalent. It described two different things. On the one hand, it was a sociological description of States acting. States undertook thousands of acts, and they did so in a unilateral way in the sense that they decided to act as individual identities. They were persons in the great marketplace of diplomacy who then encountered each other in the most varied circumstances, sometimes undertaking obligations, sometimes not. On the other hand, the concept also referred to a legal mechanism whereby States' acts created legal effects or, to put it differently, whereby the legal order projected norms and obligations on the way those States acted and attached legal consequences to their actions. It was a mechanism in which the legal order acted irrespective of the actors themselves. By acting, the legal order attached consequences to States' actions.

44. When States came together in the world of diplomacy, they created expectations, which good faith demanded that they not disappoint. That process was impossible to describe in terms of a voluntary scheme in which States had the intention of creating legal effects and in which they formulated actions to that effect. One could take the example of the *Nuclear Tests (Australia v. France)* case. There, ICJ had ruled that France was bound by certain unilateral statements made by French officials for two reasons. First, lip service was paid to the traditional voluntary scheme of diplomacy by the assertion that, when it was a State's intention to be bound by the statements it had made, it should be so bound. Then, two paragraphs later in the judgment, the Court contradicted itself by saying that good faith and trust in international relations and the need for confidence required States not to go back on their word, irrespective of whether they wanted to be bound. Of course, French lawyers had immediately seized upon that by saying that politicians had simply made some statements, but that there had been no intention of creating legal effects or being bound. That showed the significance of the second aspect of the Court's ruling. France had been bound because of the intention behind its action,

irrespective of what the President, the Minister for Foreign Affairs or diplomats had been thinking about when they had made their statements. Thus, States were bound by the fact that through their unilateral actions, they created expectations in other States. The expression of will could not be decisive for two reasons: it was impossible to know what the will of States was, and, more importantly, nothing prevented States from changing their minds and deciding one fine day that they no longer wanted to be bound by earlier statements. At that point, the significance of the second aspect of the Court's ruling in the *Nuclear Tests (Australia v. France)* case became clear: good faith and the need for trust and confidence required that, if a State created an expectation of how it would behave, it would be bound by that expectation, irrespective of whether or not it wanted to be bound.

45. Thus, something other than a promise was involved. A State might be obligated by any kind of action. The Special Rapporteur had outlined the four standard types of unilateral acts, but there were others. A State might be bound because it remained silent, because of what it did or refrained from doing and so on, irrespective of how it thought that it was acting. The *Nuclear Tests*, *Temple of Preah Vihear* and *Arbitral Award Made by the King of Spain on 23 December 1906* cases were not instances of States' being bound because they had promised, because they had intended to be bound or because the ministry of foreign affairs had formulated a unilateral act in the way diplomatic notes or promises were formulated to other Governments on the basis of which treaties and contracts then became binding. They had behaved in a particular way and then found themselves bound because that was the logic of the situation.

46. The simple conclusion was that the legal order attached obligatory force to some actions in a manner different from treaties or other legal institutions, inasmuch as it was a question of creating not universal law but contextual law, a bilateral opposability that existed between the acting State and States in which expectations had been created through particular action. The cases in question, even the *Fisheries Jurisdiction* case, did not have to do with the creation of general law but with bilateral or perhaps trilateral obligations, because the expectations were bilateral or trilateral, and because good faith involved the need to contextualize the effect. Whichever the countries involved in each instance, there had been an opposability in which the legal order did not interpret an action, but the whole context. What had been the message of the actor State, irrespective of what it had wanted to say? How had it been received by others? What did reasonableness and good faith expect to be performed in order to interpret what had transpired in that particular relationship? No general rules could be devised, because particular relationships like those between France, New Zealand and Australia in the *Nuclear Tests* cases or between Cambodia and Thailand in the *Temple of Preah Vihear* case had been the products of a long history and a geographical situation that could not be generalized. The opposability created through unilateral acts could not be made subject to general criteria of understanding, because it was outside international institutions and had to do with what was reasonable in the context of human behaviour and the history of the States concerned.

47. Hence, any analogy with the 1969 Vienna Convention was inappropriate. That could be seen in the odd, artificial reference in the articles to the “validity” of unilateral acts. An act was an act; it did not live in the sphere of validity but in the world of sociology. It was the legal order which projected an obligation upon the act, and the way the act was interpreted gave an idea of whether there was obligation or not. The fundamental ambiguity at the heart of the unilateral act might be compared to a common-law marriage; although the relationship had not been formalized, the parties had acquired certain duties by behaving as they had, and those duties could not later be refused solely because one of the parties no longer wished to be bound by the commitments made.

48. Consequently, the whole exercise was on the wrong track, as was to be seen in the odd nature of the language used, and he did not think the problem could be corrected simply by tinkering with the draft articles. While sympathizing with the Special Rapporteur, Mr. Pellet and other members who had been considering the question of unilateral acts for the past five years, he believed that the topic would benefit from being reformulated as a legal institution.

49. The Commission should abandon the voluntary scheme based on States’ intentions and should focus on the reasonable aspects of the issue in terms of expectations raised and legal obligations incurred. It should also abandon the analogy with the law of treaties, which took an impersonal approach to the entire field of diplomacy, and should instead base its considerations on the law of social relations, where individuals exercised greater or lesser degrees of power in the complex web of relationships. Finally, it should restrict the topic to historical legal institutions that practising lawyers would recognize, such as the recognition of States and of Governments. In that regard, he agreed with Mr. Gaja that a more thoroughgoing review of State practice would be useful.

50. Mr. SIMMA said that he agreed to a very large extent with both the underlying philosophy and the content of Mr. Koskenniemi’s remarks. At the Commission’s previous session, he had maintained that the topic in its present form was not really suited for codification. However, he thought that Mr. Koskenniemi had gone rather too far and could not agree with his diagnosis of the problem. The Commission’s current course would succeed in capturing a certain type of unilateral act, one which did exist in the manner envisaged by the Special Rapporteur and the majority of the members but represented only a small portion of the broader topic set forth by Mr. Koskenniemi.

51. True, a State would not normally formulate a unilateral act without some benefit to itself, but such benefits did not necessarily constitute reciprocity. For example, Germany had recently refused to grant a Turkish request for extradition of the alleged leader of an Islamist movement without a binding promise that, if convicted, the person would not be subject to the death penalty. A dispute had arisen over the question of which national body was competent to make such a promise; Turkey maintained that it was Parliament, while Germany considered that only the Turkish Government itself was so empowered.

52. That example showed there was a logical basis for the draft on the representation of States in the formulation of unilateral acts, something not discussed in the Special Rapporteur’s fifth report. Initially, he had wondered whether such situations would ever arise, but he now saw that, while uncommon, they did in fact occur. Furthermore, while the Turkish case involved a benefit to the Turkish Government—the extradition of the individual in question—it would be inaccurate to speak of reciprocity. In the past, the Commission had never considered unilateral acts in which a State intentionally bound itself by a declaration through which no benefit accrued to it. Furthermore, he saw no contradiction between the intention to be bound as a factor underlying unilateral acts, on the one hand, and a declaration creating legitimate expectations, on the other; the two concepts were complementary in nature. And, as his example had shown, the 1969 Vienna Convention applied to unilateral acts in certain cases.

53. During the fifty-third session of the General Assembly, the Special Rapporteur on reservations to treaties, Mr. Pellet, had submitted to the Sixth Committee a draft guideline on States’ declarations that accession to a given treaty did not imply recognition of another State. As a professor of law, he found such cases fascinating; however, Member States had immediately objected that the issue was political in nature and should not be addressed by the Commission. He therefore feared that, contrary to the draft programme of work prepared by Lauterpacht in 1949, the Commission was not the place to deal with human rights or highly political issues like the recognition of Governments. With the new membership, that situation might change.

54. Mr. PELLET said that international law was not based entirely on the expression of the will of States but that it was plain that, insofar as they were bound by treaty obligations and by unilateral acts, it was by their own individual or collective wish. In the *Nuclear Tests* cases, ICJ had taken a logical, coherent stance by refusing to accept the French position; it had ruled that France had entered into a binding commitment not to carry out further atmospheric nuclear tests in the South Pacific region and was in good faith bound to respect it. Thus, he saw no difference between the two paragraphs which Mr. Koskenniemi considered contradictory. Why were States bound under the treaty mechanism? It was because they wished to be bound and limit their freedom of action. The same was true when States formulated unilateral acts. It was indispensable to orderly relations between States that they should be bound by the expression of their will; he saw no difference between Mr. Koskenniemi’s statement that States might at some point no longer wish to be bound by a unilateral act which they had formulated and the fact that States parties to a treaty remained bound by that instrument even if they later came to regret their accession. Furthermore, the assertion that States did nothing without reciprocity was not true. Admittedly, States always had some self-interest, but reciprocity had a specific meaning in international law. With regard to Mr. Simma’s example, Germany was not the only State to place conditions on extradition—the problem had arisen in the case of requests for extradition of Europeans to, *inter alia*, the United States—and, while it might be improper to speak of reciprocity, there was

certainly a balance of interests involved. But to speak of reciprocity was to confuse matters to some extent.

55. Under the guise of contextuality, Mr. Koskenniemi's words were far too abstract. There was a form of legal reality that could be assimilated to social reality with the former as superstructure and the latter as infrastructure, to use somewhat outdated Marxist terms. Mr. Koskenniemi seemed to be saying that he was not interested in the superstructure because it could not be separated from the infrastructure. However, that was of no importance to jurists; what mattered was to identify the rules.

56. Mr. Koskenniemi's position implied a reconsideration not only of the topic of unilateral acts but of international law as a whole, but the Commission's task was merely to bring order to complicated problems. It was perfectly possible to establish a set of minimum general rules governing unilateral acts; the Special Rapporteur's work might be open to criticism in its details, but international law was a reality and nothing would be gained by diluting it with what were, in his view, extralegal considerations.

57. Mr. DUGARD said that the issues raised by Mr. Koskenniemi lent themselves to broader discussion. It was true that the topic of unilateral acts was unlike any other the Commission had dealt with in the past. For example, in the case of diplomatic protection, for which he was Special Rapporteur, there was a wealth of authority, and the task was to choose between competing and inconsistent rules emerging from State practice. There was no such body of authority on the topic of unilateral acts, a fact which made the work of the Special Rapporteur for this topic more difficult. But rules and State practice on issues such as the recognition of States did exist, and he believed that the Commission could engage in a blend of codification and progressive development in such areas. Mr. Simma had rightly noted that the Commission had scrupulously avoided the question of recognition of States, but he did not agree that the issue must be avoided because it was too politically sensitive; if the Commission was to have a function, it must be prepared to deal with such matters.

58. The replies from Governments (A/CN.4/524) to the questionnaire on unilateral acts² were extremely interesting. In particular, Portugal's remarks concerning the Timor Gap Treaty³ had an application broader than that of relations between Portugal and Australia, since they conveyed the Portuguese Government's position on the status of East Timor.

59. He agreed that the 1969 Vienna Convention could not be taken over in every respect, but it could provide guidance and give rise to fruitful debate on the extent of its applicability to unilateral acts. For example, unlike the Special Rapporteur, he believed that it was possible for the Commission to look at the object and purpose of unilateral acts as a guide to their interpretation.

² See 2720th meeting, footnote 7.

³ Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (Timor Sea, 11 December 1989), *Australian Treaty Series 1991, No. 9* (Canberra, Australian Government Publishing Service, 1995).

60. The Commission had virtually exhausted the list of more traditional topics of the type Lauterpacht had proposed in 1949. It was therefore obliged to embark upon new studies that presented a challenge, but also an opportunity for innovative and progressive development and codification.

61. Mr. FOMBA said that, while the issues raised by Mr. Koskenniemi—law, sociology, institutions and mechanisms—posed epistemological problems, there was a dialectical link between them. Whether unilateral acts were an institution depended on one's definition of that term. Certainly, they were important events and actions by States that deserved to be considered in the context of international law. Under article 15 of its statute, which defined the concepts of codification and progressive development of international law, it was the Commission's task to create institutions where they did not yet exist and to clarify them where needed. Unilateral acts were not a myth, and the analogy with the 1969 Vienna Convention was, *mutatis mutandis*, inescapable.

62. Mr. PAMBOU-TCHIVOUNDA said he had serious doubts about the pertinence of the over-simplistic approach propounded by Mr. Koskenniemi in the course of his apocalyptic indictment—an approach according to which treaties, as an act of will, were the only means of regulating the global marketplace of diplomacy. The relationship between a State's will and its intention was hard to unravel and, both from the logical and from the chronological standpoint, it was difficult to pinpoint the frontier between the realms of will and intention.

63. Recognition of the validity of Mr. Koskenniemi's approach would involve refashioning many of the working tools used by legal practitioners and theorists in their daily work. It would require ministers of foreign affairs to fly in the face of facts by conducting a nation's affairs solely on the basis of international treaties and ignoring all other acts on the grounds that, according to Mr. Koskenniemi, those acts did not exist. Yet a State's silence could be as eloquent as an oral or written declaration.

64. Recognition of that approach would involve drastically rewriting article 38, paragraph 1, of the Statute of ICJ so as to provide that the Court, whose function was to decide in accordance with international law such disputes as were submitted to it, was to apply only international conventions in deciding such disputes. It would involve rewriting all those sections of the textbooks dealing with the sources of international law. Mr. Koskenniemi was right to call into question the analogy with the law of treaties. Unfortunately, he was proposing no viable alternative approach, other than the highly questionable assertion that the topic simply had no place in international law.

65. Ms. ESCARAMEIA congratulated Mr. Koskenniemi on his radical and brilliantly expounded proposals, with whose conclusions and many of whose preconditions she unfortunately could not agree. The gist of Mr. Koskenniemi's argument seemed to be, first, that unilateral acts were not an appropriate topic for consideration by the Commission, since they concerned a social rather than a legal relationship and could thus not be codified; and, second, that no general rules could be formulated, as such acts created only bilateral expectations and needed

to be contextualized. His proposed solution was for the Commission to abandon the voluntary scheme based on States' intentions and the analogy with the law of treaties, and instead to focus on certain areas of practice such as recognition of States or of Governments.

66. On the first point, she could not agree that unilateral acts were an area not open to regulation. While there might ultimately prove to be more exceptions than rules, some rules did exist, and they offered the only viable basis on which to proceed. Nor did she agree that unilateral acts raised only bilateral expectations and thus did not lend themselves to codification. Sometimes such acts could be more general in scope. For instance, the protests that Portugal had presented in connection with the Timor Gap Treaty between Australia and Indonesia had had an effect so broad as to impinge on other States and even on other entities such as multinational corporations with interests in the area. Similarly, Portugal had several times asserted that the right of self-determination of the people of East Timor had an *erga omnes* character—an assertion subsequently confirmed by ICJ in the *East Timor* case.

67. As to the question of how the Commission should proceed, while the proposal to abandon the voluntary scheme had its attractions, no better alternative to the analogy with the law of treaties was currently available. The Commission should resist the temptation to be over-ambitious and should try to come up with some general minimum rules governing unilateral acts before proceeding to consider one or more of the four specific types of act listed by the Special Rapporteur. Of those acts, recognition seemed to her to offer the most potential as a topic for discussion.

68. Ms. XUE said that the Special Rapporteur was to be congratulated on the progress he had made on the topic of unilateral acts of States, one that did not lend itself readily to the formulation of rules. As a practitioner, she shared many of Mr. Koskenniemi's reservations on that score. However, again as a practitioner, she was also well aware of the great importance of unilateral acts in international relations. In that respect she agreed with Mr. Simma that Mr. Koskenniemi should guard against "throwing out the baby with the bathwater". In addition to treaty obligations and obligations under customary international law, there were clearly some international obligations stemming from unilateral acts of States. One obvious example, recognition, was a unilateral political act that also gave rise to legal effects on the international plane. The Special Rapporteur should perhaps focus less on the behaviour and intentions of the actor State and more on the effects of the unilateral act on other States.

69. Other examples could be added to Mr. Simma's example concerning extradition and the death penalty. The Joint Declaration on the Question of Hong Kong⁴ concluded by the Governments of China and the United Kingdom and the Joint Communiqué of China and the United States on mutual recognition, though considered as treaties, in fact contained some unilateral declarations by each of the two parties, entailing binding obligations undertaken by the one party and recognized as such by the other party.

70. The Commission should start by considering examples of unilateral acts such as recognition and promise, in order to ascertain whether any general rules could be laid down. It was a challenging but potentially rewarding task. While too close an analogy with the law of treaties seemed to pose problems, certain treaty provisions could, in her view, usefully be analysed.

71. The CHAIR, speaking as a member of the Commission, said that the Commission should guard against watering down "hard" obligations under the law of treaties by drawing analogies between such obligations and weaker obligations undertaken in the context of unilateral acts.

72. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), responding to Mr. Koskenniemi's comments, said that unilateral acts were a fact of international law. Reciprocity need not be a necessary element in unilateral acts, for it was sometimes absent in the treaty context. The Vienna regime was also a necessary point of reference, constituting a common denominator between the two systems. Practice, while admittedly hard to identify, pointed to the existence of some categories of legal act. Furthermore, as had been pointed out in the context of the debate on reservations to treaties, the formulation of rules often stimulated the evolution of practice in a given area.

73. Mr. KOSKENNIEMI said he wished to clarify the question of the relationship between acts, institutions and obligations. Unilateral acts existed as a phenomenon in the social world. Those acts were sometimes linked to legal institutions such as treaties and customary law. Thus, through the institution of a treaty, a set of acts could create legal obligations. Custom worked in a similar way: when isolated instances of State conduct became sufficiently general in character for the fiction of *opinio juris* to be projected onto them, the end result was an obligation. In the case of unilateral acts, however, it was not apparent what institution converted an act into an obligation. According to one thesis, no such institution existed, so that unilateral acts simply fell outside the realm of legality. Sometimes, however, as in the case law he had cited, an invisible institution created a link between an act and an obligation. That invisible institution was an amorphous conception of what was just and reasonable in a particular circumstance. The Commission might wish to formulate general principles articulating the manner in which particular relationships between States became binding. To attempt to do so would be a tremendously ambitious, albeit extremely worthy, project; as a practitioner he doubted that it was feasible.

74. Alternatively, the Commission might fill the vacuum created by the absence of a legal institution by considering the institution of recognition of States, an institution which, while operating on a level different from that of treaties or custom, nevertheless served as a link between forms of behaviour and legal obligations. If, however, the Commission wished to take the other, more ambitious route, that would entail moving beyond the existing system of international law, in which diplomatic relations were based on voluntary acts, to a system in which States, like individuals in society, were bound by a kind of welfarism, perhaps in order to go beyond Sir Henry Sumner Maine: from status to contract to justice.

⁴ United Nations, *Treaty Series*, vol. 1399, No. 23391, p. 33.

75. Mr. PELLET said that the reason why treaties must be respected was encapsulated in the adage *pacta sunt servanda*. One interesting aspect of the codification exercise proposed by the Special Rapporteur was the idea that, *mutatis mutandis*, the same was true of unilateral acts: in other words, that *acta sunt servanda*. The precise conditions under which the latter adage was applicable would of course need to be determined. However, it was not for the Commission to delve into the recondite reasons underlying that principle. One thing was sure: if the Special Rapporteur were to heed the siren calls of those advocating such a course, any attempt at codification and progressive development in that area would be doomed to failure.

76. Mr. TOMKA said that the first and last elements of Mr. Koskenniemi's scheme based on acts, institutions and obligations were uncontroversial. In his view, however, much of the confusion surrounding the present debate was attributable to the second element in that scheme, namely, institutions. In Mr. Koskenniemi's submission, that category comprised only treaties and custom. He suspected that several members of the Commission entertained some doubts about the validity of that view.

77. Mr. KABATSI expressed appreciation for the opportunity to participate yet again in the Commission's work. He particularly welcomed the fact that, for the first time, the membership included women. Such a historic achievement would counter accusations that the Commission lacked sensitivity to gender issues and would enhance its debates.

The meeting rose at 1.05 p.m.

2723rd MEETING

Wednesday, 22 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Unilateral acts of States (*continued*) (A/CN.4/524, A/CN.4/525 and Add.1 and 2,¹ A/CN.4/521, sect. D)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. AL-BAHARNA paid tribute to the Special Rapporteur for his excellent fifth report (A/CN.4/525 and Add.1 and 2). In chapter I, the Special Rapporteur recapitulated some of the fundamental issues in the light of the discussions of the topic in both the Commission and the Sixth Committee. The question most frequently raised in the Sixth Committee had been the classification of unilateral acts. Some delegations had favoured giving priority to the classification of unilateral acts before developing rules on the topic, while others had thought that the classification of unilateral acts was not necessarily useful or important for States and that what really mattered was whether the unilateral act had binding effect on the author State and whether other States could rely on the binding nature of the unilateral act.

2. In his fourth report,² the Special Rapporteur had expressed agreement with the idea of the classification of unilateral acts on the basis of their legal effects and had proposed to divide them into two major categories, the first relating to acts whereby the author State undertook obligations and the second to acts whereby the author State reaffirmed a right or a claim. The plan had been to deal first with the first category by formulating common rules applicable to all the unilateral acts in that category and then to formulate specific rules in respect of the second category. As the fifth report clearly revealed, however, the Special Rapporteur had shifted from his original plan. He explained why in paragraph 138 of the report and referred the issue of the classification of unilateral acts to the Commission for its opinion, through the intermediary of a working group. Paragraph 145 of the report gave the impression that the Special Rapporteur continued to believe that the classification of unilateral acts was important.

3. In paragraph 144 of the report, the Special Rapporteur confirmed that, in the light of the replies to the questionnaire on unilateral acts of States prepared in 1999,³ the Commission had held that the most important unilateral acts were promise, recognition, waiver and protest. In his statement on the topic at the preceding session, he had expressed the view that some types of unilateral acts such as promise, recognition and waiver fell into the first category of unilateral acts, those whereby a State undertook obligations, and could thus be covered by a general rule. Draft article 1, on the definition of unilateral acts, would therefore apply to them. Protest, on the other hand, fell into the second category, acts which reaffirmed a right or a claim. In all cases they were unilateral acts which, when correctly formulated for a specific purpose and notified to

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

² See *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519.

³ See *Yearbook ... 1999*, vol. II (Part Two), p. 138, para. 593.

the addressees, produced the legal effects that the author State intended to produce.

4. In his statement at the preceding session, he had indicated that declarations of neutrality had a legal effect similar to that of waiver and promise, but some members of the Commission and some delegations in the Sixth Committee considered that they belonged to both categories of unilateral acts and, accordingly, were capable both of creating obligations and of reaffirming rights.

5. He agreed with the Special Rapporteur when the latter concluded in paragraph 146 of his report that, for practical purposes, some rules, including those relating to the formulation of the act and its interpretation, could be regarded as common to all acts.

6. Turning to the draft articles which had been proposed by the Special Rapporteur over the years and some of which had been referred to the Drafting Committee, he noted that the report under consideration contained a revised formulation of draft article 5, which had initially been submitted in the third report⁴ and which set out in a single text the causes of invalidity of the unilateral act. The new text, divided into several provisions, each relating to a cause of invalidity, had been taken from articles 46 to 53 of the 1969 Vienna Convention, without reproducing its terminology. He had therefore attempted to reformulate draft articles 5 (d), 5 (e), 5 (f), 5 (g) and 5 (h) along the lines of the wording used in the Convention. They would thus read:

“Article 5 (d): A unilateral act formulated by a State shall be without any legal effect if the act so formulated has been procured by the coercion of the person formulating it through acts or threats directed against him.

Article 5 (e): A unilateral act formulated by a State is void if its formulation has been produced by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 5 (f): A unilateral act formulated by a State is void if, at the time of its formulation, it conflicts with a peremptory norm of general international law.

Article 5 (g): A unilateral act formulated by a State is void if, at the time of its formulation, it conflicts with a decision of the Security Council.

Article 5 (h): A unilateral act formulated by a State is void if, at the time of its formulation, it conflicts with a norm of fundamental importance to the domestic law of the State formulating it.”

7. His proposed article 5 (g) was not contained in the regime set up under the 1969 Vienna Convention, and article 5 (h) was an adaptation of article 46 of the Convention.

8. Having already stated his views on draft article 1 and draft articles (a) and (b) on the rules of interpretation of unilateral acts, he said he would not refer to those provi-

sions for the time being, but reserved the right to do so if necessary at a later stage.

9. In conclusion, he shared the optimism of some members of the Commission about the inclusion of the topic in its work. The Commission had been slow in its consideration of the topic. The Special Rapporteur had submitted five reports but still did not seem to have a full grasp of the issue, for which he lacked sufficient material on State practice. He had succeeded in establishing common rules concerning the definition, formulation and interpretation of unilateral acts and the conditions of their validity and invalidity because he had relied on the adaptation of the relevant provisions of the 1969 Vienna Convention. However, many issues remained in abeyance, including the classification and grouping of unilateral acts on the basis of a common rule applicable either to all unilateral acts or to a defined set of them; the difficulty of establishing definitively that unilateral acts, once properly formulated, were binding on the author State and that other addressee States could rely on the binding nature of such acts; and the question whether an international court could enforce such acts in a dispute between the author State and the addressee State in the same way in which a valid treaty between them could be enforced. The Special Rapporteur should nevertheless not be discouraged. He should stand up to the challenge and produce a set of draft articles or even conclusions or guidelines. Such an exercise should begin with the four traditional unilateral acts of recognition, waiver, promise and protest and move on to consider other acts or omissions, such as silence, acquiescence and estoppel, which did not constitute unilateral acts in the legal sense. Whatever approach was adopted, the Commission and the Special Rapporteur should make a final decision, by the end of the next session at the latest, on whether to continue with the work on the topic or to drop it. The Commission would then be in a position to report to the General Assembly with a view to a final decision.

10. Ms. ESCARAMEIA, referring to draft article 1 on the definition of unilateral acts, said that, in her opinion, the effects of that provision should be extended not only to States and international organizations but also to other entities such as movements, peoples, territories and even ICRC.

11. Turning to chapter I of the report and specifically to general aspects of the draft articles on the validity and invalidity of unilateral acts, she agreed with the use of the relevant provisions of the 1969 Vienna Convention as a parallel, as suggested by the Special Rapporteur, but thought that article 64 of the Convention on the emergence of a new rule of *jus cogens* could also be included. Concerning persons entitled to represent the State, she would cautiously agree that, in addition to the head of State or government and the minister for foreign affairs, that category should include the persons authorized by the State to make unilateral acts that might affect other States. On defects in the expression of will, she wondered whether the word “renunciation” in the English text of paragraph 110 of the report had the same meaning as the word “waiver”. She agreed with Mr. Gaja and Mr. Al-Baharna that it would be better to follow the structure of the 1969 Vienna Convention by enumerating the effects of the invalidity

⁴ See *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/505.

of a unilateral act rather than stipulating which entities were able to invoke the invalidity of a unilateral act. The concept of “absolute” validity was problematic and not easy to come to grips with. Referring more specifically to article 5 (a), she said that the word “error”, between the words “basis of an” and “of fact”, was perhaps redundant, although that might simply be a drafting problem. Regarding the same provision, she expressed her reticence about the use of the phrase “[expression of will] [consent] to be bound by the act”, since in formulating a unilateral act a State might be simply asserting a right.

12. As to the interpretation of the expression of will, she had doubts about the advisability of using the preparatory work, which was not always accessible. Concerning article (a), on the general rule of interpretation, particularly its paragraph 2, she pointed out that sometimes there was no preamble or annex to an act. She requested clarification of the words “international law” in paragraph 3 of the article: Was it a reference to international, regional or local law or to customary law? In article (b), on supplementary means of interpretation, she again questioned the advisability of including the preparatory work and asked whether the word “circumstances” had the same meaning as the word “context”, which appeared elsewhere.

13. Finally, on the classification of unilateral acts, she favoured setting out a short general theory on unilateral acts and then listing the four classic unilateral acts (promise, recognition, waiver and protest), together with specific rules.

14. Mr. SEPÚLVEDA joined the other members in congratulating the Special Rapporteur on the presentation of his fifth report on unilateral acts of States. He endorsed the view that, for reasons already explained on other occasions, special attention should be paid to the codification of the subject. He was also pleased that, in chapter I of his report, the Special Rapporteur had reviewed a number of fundamental questions so that all members of the Commission could start work on the basis of a common denominator. He also agreed with those members who had argued that it was not enough to compile doctrine and jurisprudence in a report, but that State practice in the area of unilateral acts must also be ascertained. He noted that the Special Rapporteur had not gotten many replies to the questions he had addressed to Governments. Only two had provided criteria, and a third had taken a stance against the codification of the subject. Hence, other sources must be used, including the compilation of State practice published by ministries of foreign affairs and other yearbooks of international law, such as the *American Journal of International Law* and the *British Year Book of International Law*. He agreed with the point made in paragraph 144 of the report that the most important acts which the Commission should consider were promise, recognition, waiver and protest.

15. Although it was clear, as Mr. Simma had noted, that recognition was an eminently political act, it also produced legal effects that must be considered. But no doubt the most important point was that State practice in the area of recognition had changed considerably in recent years. As for recognition of a State, official declarations had become less and less frequent and would probably fall into disuse, the main reason being that, when a new State became a

member of the United Nations, it was usually assumed that other States recognized it. In that connection, perhaps the Special Rapporteur could indicate to the members of the Commission which Member States had unilaterally recognized the independence of East Timor. When he had introduced his report, the Special Rapporteur had said that a State which had made a declaration of recognition could then invoke its invalidity. He was baffled: he had taken it for granted that recognition was an irrevocable act which had irreversible legal effects.

16. The practice of recognizing a Government had also evolved. Mexico had stopped making such declarations in 1930 for two main reasons: it had considered, first, that it was a way of obtaining unfair advantages and, second, that recognition was tantamount to imposing an arbitrary judgement on a country’s institutions, something which was contrary to the principle of non-interference. Mexico had therefore confined itself to maintaining or recalling its diplomatic representatives with the country concerned. In the 1990s, the United States and British Governments had adopted a similar attitude in announcing that they would no longer make declarations of recognition of a Government, but simply establish diplomatic relations. The practice of States was also changing, and there had been cases of so-called collective recognition, particularly in the framework of the European Union. A declaration of recognition could be accompanied by certain conditions. He noted that, in paragraph 18 of his report, the Special Rapporteur said that recognition did not confer rights on the author, but imposed obligations; that assertion was not borne out by the facts. For example, the establishment of a democratic system and respect for human rights were set as conditions by the European Union.

17. With regard to promise, that unilateral act could be included in the framework of a treaty. In the additional protocols to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco), for instance, the nuclear powers undertook not to use or threaten to use nuclear weapons against the other States parties or to commit any act contrary to their obligations under the Treaty.

18. In his report, the Special Rapporteur referred to unilateral declarations which could be qualified as promises, such as the declaration of the Spanish Government of 13 November 1998 on the granting of assistance to mitigate the damage caused by Hurricane Mitch in Central America or the declaration formulated by the Prime Minister of Spain on 4 April 2000 concerning debt cancellation as a means of assisting countries of sub-Saharan Africa. But he did not say what the legal effects of those promises were or even whether the promises had been kept. That type of unilateral act needed to be considered in greater detail and its scope assessed.

19. In respect of the definition of a unilateral act, the Special Rapporteur confined himself to acts whose authors or addressees were one or more States. But there were also unilateral acts whose author or addressee was not necessarily a State or an international organization. That was the case of unilateral acts formulated by a political entity recognized by some Governments but not others, or which represented a State in the process of being created, such as Palestine. It would be interesting to consider the

nature of unilateral acts formulated by the Palestinian National Authority. He also wondered about unilateral declarations formulated by the plenipotentiary representative of a State party which related to such fundamental issues as the cession of territories or entry into war and which therefore required parliamentary approval. Draft article 5 (h) said that the State formulating a unilateral act could invoke the invalidity of the act if it conflicted with a norm of fundamental importance to the domestic law of the State formulating it. Could domestic law be invoked to invalidate an act which had already produced international legal effects? Did that entail the international responsibility of the author State? Those questions should be considered in greater depth.

20. As to draft article 5 (g), pursuant to which a State or States that formulated a unilateral act could invoke the absolute invalidity of the act if, at the time of its formulation, the unilateral act conflicted with a decision of the Security Council, he gathered that the Special Rapporteur was alluding to the decisions covered by Chapter VII of the Charter of the United Nations, but it might be useful to say so. He would also like to know what the legal effect was of declarations made by countries such as Mexico, which had been opposed to the establishment by the Security Council of special tribunals for the former Yugoslavia and Rwanda.

21. With regard to questions relating to extradition, he referred to a case that had occurred in Mexico. In conformity with the law, the Ministry of Foreign Affairs had authorized the extradition of a person who had subsequently appealed before the Supreme Court. The Court had ruled against extradition on the grounds that it would have made that person liable for the death penalty. The Commission should decide whether a separate organ of the state, different from the executive branch, could make a unilateral declaration that committed the State concerned and produced international legal effects.

22. Mr. PAMBOU-TCHIVOUNDA said he was not sure why Mr. Sepúlveda had said that unilateral acts of recognition were irrevocable. For example, did the fact that a State had recognized another State and established diplomatic relations prohibit it from breaking off those relations, and, if not, must there be a certain period of time between the two acts? It would be useful for the Special Rapporteur to consider such questions and, in particular, the issue of the legal effects of unilateral acts over time. The Commission might also examine the relationship between unilateral acts of States and the conduct of States and consider those related concepts. He asked the Special Rapporteur to specify whether a unilateral act must be confirmed and, if so, how the issues raised by silence could be dealt with.

23. Mr. SEPÚLVEDA, replying to the question on the irrevocability of recognition by a Government, gave the example of the *Sabbatino* case, in which a New York State court had ruled that certain actions taken by the Cuban Government were entirely legitimate, that they produced legal effects and that the United States Government could not revoke its recognition of Fidel Castro's Government. However, it was true that State practice in the recognition of a State or Government was changing; for example, both the Government of the United Arab Emirates and the Gov-

ernment of Saudi Arabia had revoked their recognition of the Taliban government in Afghanistan.

24. The CHAIR noted that there was a difference between diplomatic recognition of a Government and of a country.

25. Mr. MANSFIELD said that the recapitulative survey contained in the fifth report on unilateral acts of States gave an impression of the specific difficulties that the Special Rapporteur had encountered, the very wide range of views on the topic and the feasibility of its codification. However, he was concerned at what he had read; it was clear that the Special Rapporteur was working under difficult circumstances. Paragraph 6, for example, stated that the Special Rapporteur's work thus far had been based on an extensive survey of doctrine and jurisprudence, but that it had proved difficult to gather information on practice, which was of growing importance; the Special Rapporteur himself had added that, without information concerning practice, it was impossible to prepare a comprehensive study of the topic, let alone embark on the task of codification and progressive development in that area. Governments had been invited to reply to a questionnaire on their practice, but it appeared that only three of the over 180 Member States had replied. In view of the importance of practice, that was a fact on which the Commission should reflect in considering future work on the topic. The Special Rapporteur himself drew a comparison with the codification of the law of treaties, concluding in paragraph 24 that it had been much simpler to identify rules of customary law in that context than in the context of unilateral acts. The Special Rapporteur's comments on the viability and difficulties of the topic also showed clearly the many problems encountered in identifying and qualifying a unilateral act. Thus, it seemed that some of the material was leading him in one direction, while other material was leading him in another, even an opposite, direction and that the Commission did not have a firm basis on which to engage in the formulation of draft articles.

26. It was time to take stock of the overall situation. There was no doubt that States engaged in unilateral acts and that on some occasions they had been held to be legally bound by such actions; however, the basis of that legal obligation remained problematic, States seemed unable or unwilling to provide information on relevant practice, and there was no substitute for a study of that practice. Perhaps the topic should be broken down into more manageable components, of which some might be amenable to codification and others to more discursive treatment which would nonetheless be of value to States. Studies could be carried out on all or some of those components without any preconception as to the form that the Commission's work on them might take. The Special Rapporteur, perhaps with the assistance of a working group, might suggest on the basis of such studies which components would be amenable to codification and what form that work might take in each case. In any event, if the Commission encountered difficulties in dealing with a subject, it was not only legitimate but essential for it to pause and reconsider its work. Now that its work on the traditional topics had virtually been concluded, it was proceeding into uncharted territory where course adjustments were to be expected and, in fact, were the sign of skilled captaincy. The fifth report of the Special Rapporteur could be read

as a call for help from someone who had been struggling valiantly with a task for which he had not been given the necessary tools, or at least the tools necessary to complete it as originally envisaged.

27. Mr. CHEE said that while protest and renunciation, two of the types of unilateral act described in paragraphs 14 to 17 of the Special Rapporteur's report, were acceptable, the other two, promise and recognition, gave rise to problems. In the case of promise, unilateral acts did not necessarily benefit the addressee; very often they included a declaration intended as a unilateral assertion of a right, a claim or a policy which was of no advantage to the addressee. For example, in 1945, the United States had made two declarations, one on fisheries conservation and the other on the continental shelf, which had set the tone for the post-war evolution of the law of the sea, but which did not serve as a promise; rather, they had prompted emulation by other States. The declaration of a maritime zone for the western hemisphere, which had been designed to prevent the activities of German submarines near the territory of the United States during the Second World War, was also a unilateral declaration. In the case of recognition, there was a wealth of State practice and literature; it thus had its own *sui generis* regime which included *de jure* and *de facto* recognition and withdrawal of recognition of a State or Government. It would therefore be better to exclude recognition from the study.

28. Turning to the definition of universal acts, he endorsed the change in wording described in paragraph 60 and the discussion of the term "unequivocal" in paragraph 69. However, he found it difficult to understand the exclusion of the subject of conduct from the category of unilateral acts; the fact that conduct produced legal effects was supported by various cases, including the decision of ICJ in the *Temple of Preah Vihear* case. The same was true of silence (para. 77), which was the most critical component of a unilateral act; the fact that the addressee State was silent or did not respond within a reasonable time constituted acquiescence and invited estoppel. The Commission should devote more attention to the concept of silence.

29. In paragraph 119, draft articles 5 (d) to 5 (h), unlike draft articles 5 (a) to 5 (c), used the term "absolute invalidity", which raised the question of the difference between absolute and relative invalidity. If the Special Rapporteur wished to depart from the Vienna treaty regime, which did not use that term, those provisions should be dealt with separately and the Commission should consider whether the adjective "absolute" was necessary. With regard to the interpretation of unilateral acts, the Special Rapporteur had transposed the Vienna regime's distinction between a general rule and supplementary means (para. 135). Draft article (a), paragraph 2, on the general rule of interpretation mentioned the "preamble and annexes", which were not often found in unilateral acts; thus, the inclusion of that provision might not be justified. In the case of supplementary means of interpretation, the problems of access to documents and the inherent ambiguity and obscure nature of those supplementary means of interpretation amounted to a *de facto* exclusion of their use. Last, the Special Rapporteur had rightly stressed the diversity of State practice and the problems to which it gave rise. He should therefore proceed on a case-by-case basis rather than trying to

establish any common, uniform rule of interpretation for all unilateral acts.

30. Mr. MOMTAZ expressed surprise at the reference made, in paragraph 93 of the report, to articles 7 to 9 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session⁵ concerning the question of who was mandated to formulate a unilateral act. He wondered whether the Special Rapporteur, by analogy with article 7 of the articles on State responsibility, wished to recognize as a unilateral act a declaration by a State agent exceeding his authority or contravening instructions. The reference, in the context of unilateral acts of States, to articles 8 and 9 of the articles on State responsibility for internationally wrongful acts, which, under certain restrictive conditions, attributed to the State the conduct of persons or groups of persons not belonging to the State structures, such as rebels or national liberation movements, also raised some questions. Did the Special Rapporteur intend to classify declarations by such groups as unilateral acts? Such a position seemed to be contrary to the principle, referred to in paragraph 88 of the report, that only the State could formulate unilateral acts, and also incompatible with draft article 3, which had been referred to the Drafting Committee and which provided that only persons so authorized could act on behalf of the State and commit it in its international relations. In his view, the capacity to formulate a unilateral act should be restricted to those persons mentioned in article 7, paragraph 2 (a), of the 1969 Vienna Convention.

31. Given the state of progress of work on the topic, the consideration of the interpretation of unilateral acts seemed to him premature. Reference could be made to the Vienna regime in that context, provided that caution was exercised, particularly with regard to recourse to the *travaux préparatoires*, which were not always readily accessible and might indeed not even exist, given that, unlike conventions, unilateral acts were often formulated on the spur of the moment to resolve a crisis.

32. The question of classification clearly posed difficulties, among them the fact that the distinction between those unilateral acts whereby States reaffirmed rights and those that were a source of obligations was unacceptable. For instance, the declaration of neutrality cited as an example was both a source of rights for the author State and a source of obligations for the belligerent States to which it was addressed. To treat such a declaration as a waiver or a promise, as was proposed in paragraph 139 of the report, was not a satisfactory solution because the author State might subsequently decide to join in the conflict on grounds of self-defence if it was attacked by one of the belligerents. On the other hand, the distinction between the four traditional categories of unilateral act—promise, recognition, waiver and protest—referred to in paragraph 144 of the report had its merits and deserved careful attention.

33. Mr. SIMMA stressed the value of the Special Rapporteur's recapitulation, given the importance of a theoretical foundation to an analysis of the topic of unilateral acts. With regard to the direction that the Commission's study should take, his impression was that the Special Rapporteur

⁵ See 2712th meeting, footnote 13.

teur wished to propose a rule whose substance would be *acta sunt servanda*, a rule that seemed to him redolent of religious dogma. Positing such a principle would require the Commission to scrutinize every theoretical explanation as to the binding force of unilateral acts—a course to which he wished to voice his opposition at the outset. Reverting to the definition proposed by the Special Rapporteur in paragraph 81 of his report, he proposed that the Commission should adopt it provisionally as a working definition. It seemed to him correct to refer in the definition to the “intention” of the State to be bound, for such an intention clearly existed in the four types of unilateral act listed, namely, promise, protest, waiver and recognition; on the other hand, the word “unequivocal” seemed to him superfluous, for, if the expression of will was not “unequivocal”, there was a strong presumption that there was no real intention to be bound.

34. As to the grounds for invalidity, the analogy with the Vienna regime made good sense, but the question whether and to what degree the rule could be transposed to the case of unilateral acts should be carefully studied. Thus, in draft article 5 (a), the bracketed reference to “consent”, which suggested the law of treaties, should be eliminated. In article 5 (c), it was perhaps too restrictive to limit cases of corruption to corruption by another State. Article 5 (f) had been included by analogy with article 53 of the 1969 Vienna Convention; a reference to *jus cogens superveniens* should also be included, by analogy with article 64 of that Convention. Article 5 (g) might give rise to difficulties, for even though, in the event of a conflict of obligations, obligations under the Charter of the United Nations prevailed, that did not mean that a unilateral act contrary to a decision of the Security Council must necessarily be invalid. He proposed finding a formulation that would give full effect to the hierarchy of norms while avoiding the very dangerous term “invalidity”. The formulation of article 5 (h) might be brought more closely into line with that of article 46 of the Convention; it would be useful to incorporate a reference to the “manifest” nature of the conflict with a norm of fundamental importance to the domestic law of the State. Furthermore, the notion of invalidity could lead to considerable difficulties in the case of collective unilateral acts. For instance, where the ground for invalidity was present only in the case of some of the author States, the question would arise whether the unilateral act was invalid for all the States collectively. As far as interpretation was concerned, he agreed with other members that the essential criterion was the author State’s intention and that it might be useful to consult the *travaux préparatoires*, where these were available.

35. With regard to the best way of proceeding with the consideration of the topic, he had been interested to read the general comments by the United Kingdom, which were reproduced in the report of the Secretary-General containing the replies from Governments to the questionnaire on unilateral acts of States (A/CN.4/524) and also referred to in paragraph 27 of the fifth report, to the effect that any approach which sought to subject the very wide range of unilateral acts to a single set of general rules was not well-founded, but that the Commission might consider whether there were specific problems in relation to specific types of unilateral acts which might usefully be addressed in an expository study. Unfortunately, it was

now too late for the Commission to change its method of work. He therefore proposed that it should try to complete the task of formulating the general part of the draft articles as quickly as possible, ending its consideration of the draft articles with the question of interpretation, without attempting to formulate an *acta sunt servanda* principle or considering the questions of suspension, termination and retroactivity, which could be considered in the context of the more specific work devoted to certain unilateral acts. Subsequently, the Commission might turn to specific types of unilateral act, namely, promise, waiver, recognition and protest. He was surprised to note how ready some members of the Commission were to engage in the consideration of recognition of States and Governments, for practice and doctrine in that area were notoriously divergent and it would be difficult to codify the law on that question. At a third stage in its work, the Commission should revisit the whole range of principles established in the light of particular cases, with a view to deciding whether the drafting of articles on the topic was the best way forward. Consideration should be given to using outside resources to conduct more systematic research into the practice of States in the area of unilateral acts, perhaps establishing a team for that purpose.

36. Mr. PAMBOU-TCHIVOUNDA said that he endorsed the idea of completing the exercise currently under way, but favoured extending it to include suspension and termination so as to have a comprehensive view of unilateral acts throughout their life cycle. Attempts at classification were doomed to failure because it was impossible to find criteria on the basis of which to establish a hierarchy, or affinities between different groups of acts; it would thus be more fruitful to examine the classic cases of promise, waiver, recognition and protest. The Commission would thus first consider the general rules before turning to the specific regimes. He supported Mr. Simma’s proposal that systematic research should be conducted on State practice in that area.

The meeting rose at 12.55 p.m.

2724th MEETING

Thursday, 23 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa

Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Statement by the Legal Counsel

1. The CHAIR invited Mr. Hans Corell, Under-Secretary-General for Legal Affairs and Legal Counsel, to brief the Commission on the latest legal developments in the United Nations.

2. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel) congratulated all members of the new Commission on their recent election, and in particular those who had been elected for the first time. The Commission was also to be congratulated on completing its work on the two topics of State responsibility¹ and international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities).² The completion of the work on State responsibility was a truly historic event. The published articles now formed part of international law and a basis for decision-making by ICJ and other bodies throughout the world. Last but not least, the Commission was to be congratulated on having added three new topics to its agenda for the current session. He looked forward to seeing those topics developed by the Commission in its usual wise and expert manner.

3. It was his understanding that the Commission intended to continue to split its sessions. The Commission would of course be aware that split sessions entailed additional expenses. Consequently, he had been pleased to note that at its fifty-third session it had itself proposed cost-saving measures, an encouraging trend that he hoped would continue, since one of his major responsibilities was to ensure that sufficient financial and human resources were available for the Commission. In paragraph 10 of its resolution 56/82, the General Assembly had taken note of paragraph 260 of the Commission's report on its work at its fifty-third session³ with regard to the cost-saving measures taken by the Commission in organizing its programme of work and had encouraged the Commission to continue taking such measures at future sessions. He could not emphasize strongly enough the importance of implementing paragraph 10 of that resolution, and also the need for continuous consideration of cost-saving measures. The Office of Legal Affairs was doing its best to defend the Commission's interests before the bodies responsible for the budget; but, given the financial constraints under which the United Nations now operated, any cost-saving measures initiated by the expert bodies themselves were more than welcome.

4. With regard to the Preparatory Commission for the International Criminal Court, the International Law Com-

mission had of course been instrumental in bringing forward the preparatory work both for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and, ultimately, for the adoption of the Rome Statute of the International Criminal Court. The Rome Statute would enter into force on 1 July 2002. As of that date, crimes falling under the jurisdiction of the Court would be punishable and—although the Court would not be operational until sometime in 2003—also prosecutable. Consequently, the Preparatory Commission would meet for the last time in July 2002. Arrangements were being made for the first session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, to be held in September 2002. The Preparatory Commission had recently added to its collection of completed texts the basic principles governing a headquarters agreement and two draft resolutions intended for adoption by the Assembly of States Parties. It had also set up a trust fund to support the establishment of the Court. It was working closely with the authorities in the Netherlands and hoped to have an advance team in place within the next few weeks, to provide member States with support in setting up the Court and, in particular, to ensure that incoming mail was dealt with in a competent manner pending the election of senior administrators. The Preparatory Commission had also completed work on the First Year Budget, on the Trust Fund for Victims and on the remuneration of judges, the Prosecutor and the Registrar. The Preparatory Commission was also expected to make a recommendation regarding continuation of the work on the crime of aggression, a crime which had been left undefined in the Rome Statute. It had been a major concern for the Preparatory Commission, given the insistence by many States on the need to make progress on a definition and the close connection between the Rome Statute and Article 39 of the Charter of the United Nations. At its next session the Preparatory Commission would complete its work, including its consideration of the preparatory documents for the first meeting of the Assembly of States Parties.

5. Members would also recall that on 11 April 2002 the Office of Legal Affairs had received 10 further instruments of ratification, bringing the number of ratifications to a total of 66, six more than the figure of 60 required for the Rome Statute to enter into force. A sixty-seventh ratification had since been received at Headquarters.

6. With regard to the situation in Sierra Leone, in August 2000 the Security Council had decided to request the Secretary-General to negotiate an agreement with the Government of Sierra Leone to set up a special independent court in that country⁴ to deal with the atrocities committed during the civil war. The Secretary-General had initially wished the court to be financed through assessed contributions, but in 2001 the Security Council had indicated that it was to be financed through voluntary contributions. That decision had had dramatic effects on the work of the Office of Legal Affairs, which had had to involve itself in the arduous task of fund-raising. The financial resources necessary to begin the task of setting up the court had become available as recently as November 2001. Funding

¹ See 2712th meeting, footnote 13.

² For the text of the draft articles adopted by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. V, p. 146, para. 97.

³ See *Yearbook ... 2001*, vol. II (Part Two).

⁴ Security Council resolution 1315 (2000) of 14 August 2000, para. 1.

was available for the first year of a projected three-year period of operation, and pledges had been made to cover the second year and part of the third year. A planning mission had visited Sierra Leone in January 2002, and on 16 January 2002, together with the Minister of Justice, he had signed an Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. Candidates for the post of judge were being interviewed. Mr. David Crane, a citizen of the United States, had been appointed Prosecutor, and Mr. Robin Vincent, a British citizen, appointed Registrar. It was hoped that the Court would be operational by late August or early September 2002, in parallel with the Truth and Reconciliation Commission set up under Sierra Leone's national legislation. It was of the utmost importance to demonstrate to the population that the two institutions were complementary.

7. Members would be aware that the Secretary-General had been engaged in negotiations with the Government of Cambodia since 1997. A proposal to establish an international tribunal had been shelved following a change of mind by the Government of Cambodia, which had decided instead to request an international presence in its national courts. The negotiations had been completed in July 2000, with very clear indications given as to the requirements concerning national law and the agreement to be concluded. The entire effort had been undertaken through the good offices of the Secretary-General and financed through voluntary contributions. Much time having elapsed without any tangible outcome, the Secretary-General had, after very careful consideration, concluded with great reluctance that the negotiations would have to be terminated. That decision had been based on three considerations: first, the Government's unwillingness to accept some of the standards laid down by the United Nations for the draft law and the agreement to be concluded; second, its unwillingness to allow the agreement to govern the entire operation; and, third and most important, a perceived lack of a sense of urgency on the part of the Government of Cambodia. In the Secretary-General's view, the matter was now firmly in the hands of Member States.

8. The events of 11 September 2001 had come as a great shock to members of the Secretariat at Headquarters, who, as New Yorkers, had felt deeply for others living in New York and elsewhere in the United States. Shortly thereafter, a Working Group of the Sixth Committee working within the framework of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 had resumed its work on three elements: a comprehensive convention against terrorism—a project in which one member of the Commission, Mr. Sreenivasa Rao, had played a leading role; a proposal by the Russian Federation for a convention against nuclear terrorism; and an older proposal to organize a high-level conference on terrorism. Work on the comprehensive convention against terrorism had been well advanced by the autumn of 2001. Sadly, however, obstacles in a few key areas had proved insurmountable. Those key issues were the definition of terrorism; the relationship of the draft convention to existing and future instruments on international terrorism; and the problem of differentiating between terrorism and the right of peoples to self-determination and to combat foreign occupation. The Ad Hoc Committee had continued

its deliberations from 28 January to 1 February 2002, but agreement on those contentious issues had continued to elude it. It would be up to the Sixth Committee to continue work on the elaboration of the draft comprehensive convention as a matter of urgency in the autumn of 2002.

9. In an interesting development, the Secretary-General had requested the Office of Legal Affairs to identify any areas in which work could be done by the United Nations. As recently as 23 May 2002 the Senior Management Group chaired by the Secretary-General had discussed terrorism in that context, and a working group had been set up to look at civil aspects of the issue. The working group's report would be available in June 2002.

10. As to the law of the sea, on 23 April 2002 the twelfth Meeting of States Parties to the United Nations Convention on the Law of the Sea had elected 21 members of the Commission on the Limits of the Continental Shelf for a term of five years, commencing on 16 June 2002. The first application concerning the outer limits of the continental shelf had been received, and arrangements were being made to provide the capacity to deal with a potentially substantial flow of future applications. On 19 April 2002, the twelfth Meeting of States Parties had elected seven judges for a term of nine years, commencing on 1 October 2002. The Office of Legal Affairs had circulated a questionnaire to all States in connection with the twentieth anniversary of the Convention, which was to be celebrated in December 2002.

11. The regular informal meetings of legal advisers of ministries of foreign affairs in connection with the debate on the report of the Commission in the General Assembly were proving a very useful means of drawing attention at the highest levels to the work of the Sixth Committee and the report of the Commission. The next such meeting would take place on 28 and 29 October 2002.

12. Efforts had been made to build up the international law website and to make it more user-friendly. The treaty site, in particular, was very popular, with thousands of hits recorded every month. It was gratifying to learn that the teething problems encountered by some Commission members in accessing the website now appeared to have been overcome. The work of the Commission was now also available on the site.

13. Efforts were being made to speed up publications in general. Four volumes of the *United Nations Juridical Yearbook* had been published in the past year, the latest being the volume for 1996. The English version of the 1997 volume was expected to be released soon. The 1998 volume was already with the editors and the 1999 volume was about to be submitted to them. Work on the 2000 volume, for which contributions from States and international organizations had just been received, would be completed by the end of the year.

14. In the category of non-recurrent publications, he pointed to the publication of a compendium of international instruments related to the prevention and suppres-

sion of international terrorism.⁵ The Committee established to monitor the implementation of Security Council resolution 1373 (2001) of 28 September 2001 was extremely active, and a tremendous amount of information was being published in response to requests from Member States, which were also receiving technical assistance to help them live up to their responsibilities under that resolution.

15. The Secretary-General was not a lawyer, but he had taken an intense interest in legal issues. References to the rule of law in international relations came up repeatedly in his addresses. He had launched a project, called *An Era of Application of International Law*, under which some successes had been scored. Hundreds of events relating to the signature or ratification of treaties had been organized during General Assembly sessions, bringing together very high-level delegations and attracting the attention of the general public to law-making efforts. As an outgrowth of those events, the Secretary-General had asked him to organize technical assistance in the signature or ratification of international instruments using the website of the Office of Legal Affairs,⁶ where one could find a description of United Nations work in that field and names and addresses of contact persons.

16. Areas in which additional activities could be undertaken were to be discussed. The Office of Legal Affairs was cooperating with non-governmental organizations that could provide assistance through field work in the drafting of national legislation. The possibility that the United Nations Development Programme might create projects for that purpose was also being explored. A training programme on treaty law and practice had recently been launched and the feedback had been extremely positive. A handbook was available on the Internet. He was aware of apprehensions in developing countries about increased Internet use, to the detriment of printed material, but the day when the printed medium would be abandoned had not yet come.

17. An in-depth evaluation had been carried out of five of the six subprogrammes of the Office of Legal Affairs. A report by the Office of Internal Oversight Services on the in-depth evaluation of legal affairs (E/AC.51/2002/5) had been issued and was to be considered by the Committee for Programme and Coordination in June–July 2002. Several paragraphs related to the Commission, and he wished to draw attention in particular to paragraph 48. It referred to the problem of the late submission of the Commission's annual report, caused by the fact that the Commission's session closed barely five weeks before the Sixth Committee met. The problem was indeed a recurring one and increased the pressure on printing services at a time when a massive volume of material was already being prepared for the General Assembly in the autumn. He would welcome a discussion on the subject with members of the Commission in closed session.

⁵ *International Instruments Related to the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E.01.V.3).

⁶ <http://untreaty.un.org/ola>.

18. On the whole, the outcome of the in-depth evaluation had been very positive, and he was truly proud of the staff of the Office of Legal Affairs.

19. The CHAIR thanked the Legal Counsel for his informative statement. It was extremely helpful to receive such reports, and he welcomed the opportunity given to the Commission to comment on it.

20. Mr. PELLET said he shared the Chair's view. It was indeed a useful exercise, and the Legal Counsel's willingness to engage in it was welcome. It was no secret that he himself found the discussions in the Sixth Committee unhelpful, cacophonous and repetitive. Relations between the Sixth Committee and the Commission, both institutionally and individually, were unduly formal and unproductive, yielding precious little guidance for the Commission. For several years the Commission had been endeavouring to improve its working methods, but the ball was now in the Sixth Committee's court, and it should do the same.

21. Some progress, it must be said, had been made. At the informal meetings of legal advisers of ministries of foreign affairs, spearheaded by Mr. Sreenivasa Rao, real exchanges of views took place, but the meetings were very short, and many matters, not just those that concerned the Commission, had to be discussed. A welcome opportunity had been provided for all Special Rapporteurs present in New York, not just the one who was officially representing the Commission, to speak before the Sixth Committee. On the whole, however, he had a very negative impression of the proceedings in the Sixth Committee and thought that something must be done to ensure more productive exchanges between the two bodies. States would be receptive to such an idea. The Secretariat too could, he was sure, help to create the conditions for a more fruitful dialogue.

22. It was gratifying that members of the Commission now had access to the *United Nations Treaty Series* free of charge, but he wished to protest at the fact that the general public, especially students, were required to pay for that privilege. The *Treaty Series* should be an international public service, not a money-making proposition. The progress made in publishing the *United Nations Juridical Yearbook* was welcome, but the publication of the *Yearbook of the International Law Commission* was lagging seriously behind and caused him serious inconvenience in his teaching.

23. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel) said the first problem raised by Mr. Pellet had been under discussion for some time and the Commission had indeed taken steps to respond. Its reports were now structured differently, focusing on certain issues and articulating questions on which it would like to hear the views of members of the Sixth Committee. The Sixth Committee's response to such questions was often inadequate, and consideration could be given to how the situation could be improved. In general, however, he thought the atmosphere in the Sixth Committee had improved in the past few years. It was particularly helpful that the debate was now structured topic by topic. Discus-

sion at the informal meetings of Legal Advisers spanned a broader range of subjects than did the Commission's report, and he was not sure if there was anything the Secretariat could do about that.

24. He, too, regretted the fact that the General Assembly had decided to institute a fee for access to the *United Nations Treaty Series*. Students, however, were among certain categories identified some time ago as eligible for access free of charge. He hoped that one day access would be provided as a public service, free of charge for all.

25. Prompt publication of the *Yearbook of the International Law Commission* was certainly desirable, but he had been informed that the necessary resources had been cut by half. In 1994, there had been an 11-year backlog in treaty publication: it had now been reduced to one and a half years, a tremendous effort on the part of the staff. In general, the rate of publication had vastly improved, and every effort would be made to continue to increase rapidly. He was contemplating greater use of electronic media, but how far and how fast progress would be made on that front remained to be seen. The General Assembly had requested the Secretary-General to undertake a review of publications as a whole. He himself had recently been interviewed by a consultant and had strongly defended publications like those of the Commission, which constituted the history of legislative work in the Organization.

26. Mr. DUGARD pointed out that 30 years had passed since the first attempt to draft a comprehensive treaty outlawing international terrorism. It should have become apparent by now that it simply could not be done, because of disagreements over how to handle wars of national liberation, State terrorism, and so on. Most people believed, in his opinion, that the events of 11 September 2001 were covered by existing agreements. Would it not be more productive to attempt to achieve agreement on particular areas of terrorism rather than on a comprehensive anti-terrorism treaty, an effort that simply highlighted the divisions among nations?

27. Mr. Sreenivasa RAO thanked the Legal Counsel for his willingness to interact with members of the Commission on a wide variety of issues.

28. He had participated in the recent negotiations on a comprehensive convention on international terrorism and, in its defence, he would say that the sectoral conventions were useful in their way but focused on specific elements of the problem. The comprehensive convention, on the other hand, brought together the fine points incorporated separately in the 12 sectoral conventions, and that was the first advantage of the exercise. The second advantage was that the exercise had come quite close to completion. Article 2 of the draft, which was not in dispute, defined terrorism in a very comprehensive manner, something that had defied consensus in previous attempts. The dialogue, the efforts and the progress made represented an important achievement in the history of addressing terrorism in a legal framework. The only difficulty had arisen with the distinction between military acts and State acts, between humanitarian law and the need to control terrorism. Even on those points, a core of consensus existed, however, and

the negotiators had been convinced that with only a little more political will, the obstacles could have been overcome. It would have been a marvellous day, but it was worth waiting for another chance for it to dawn.

29. Mr. PAMBOU-TCHIVOUNDA said that he was pleased to learn about the Legal Counsel's commitment to an evaluation effort, but he was also sceptical. The idea was courageous and promising, but it might not go beyond certain limits. The evaluation would certainly touch upon very sensitive areas, including their legal aspects. But the opposite was also true: if he addressed a particular question from the legal point of view, he would automatically be compelled to consider its political aspects. Systematically evaluating the work done in the area of the law of international legality was fascinating, but the United Nations must make widely known, within a reasonable time period, the results of that exercise, which was not only of great interest but also quite complex.

30. As an illustration of the difficulties facing an evaluation exercise, he referred to the criminal courts created at the initiative of the Security Council or in the framework of an arrangement between a particular country and the United Nations. If he wanted to be provocative, he could say that Cambodia had been a failure; it sounded a warning for the future of the International Tribunal for Rwanda. Why had the United Nations been so set on having a tribunal for Sierra Leone? Had there been a prior evaluation of what the United Nations had or had not done before taking the decision to establish a criminal court for that country? Who would be arrested? Who would be tried? He had misgivings in that regard. The evaluation method, as relevant as it might be in principle, would have to be on a case-by-case basis. To that end, all countries would have to be informed of the premises upon which the evaluation would be carried out, as well as results attained and limits encountered.

31. He also sought clarification as to how the Legal Counsel would undertake work on areas of application of international law. The survey to be conducted would mobilize expert resources. Would the Commission be involved? What form would the results of the work on areas of application of international law take?

32. Mr. DAOUDI said he did not share Mr. Sreenivasa Rao's optimism on reaching consensus shortly on a global project to combat terrorism. He had been present in the Sixth Committee when the subject had arisen; there had been considerable difference of opinion among countries, and for the time being, he was not optimistic overall, since it might be difficult to reach a consensus currently.

33. With regard to the Legal Counsel's reference to a group to combat terrorism, on which a report was to be submitted in June, how that did group tie in with the comprehensive convention to combat terrorism? Was it a group of experts?

34. Mr. GALICKI said he agreed with Mr. Sreenivasa Rao about the importance of the work on a comprehensive United Nations convention against terrorism. There had not yet been any spectacular success, but the Ad Hoc

Committee and the Working Group had made considerable progress towards completing the convention. Only a few important problems remained, but they had been isolated from the rest of the text. It would be a mistake to stop now. Moreover, the work had had a major impact on regional efforts, such as in the Council of Europe, to develop regional anti-terrorism measures and instruments. Participating in a special body of the Council of Europe, he had sought to win acceptance for the Ad Hoc Committee's proposals. Sectoral conventions had their importance, but they were closely tied to the comprehensive convention. The finalization of the draft international convention on the suppression of acts of nuclear terrorism depended on the positive results of the work on the comprehensive convention. He agreed that the United Nations must fight the phenomenon of terrorism in various ways, and he noted with satisfaction that States had responded to the Security Council resolution on that subject. It was very useful to consult national reports on the fight against terrorism as a comparative approach. He looked forward to taking part in the finalization of the comprehensive convention.

35. He agreed with the Legal Counsel on the need to define aggression; that was essential for the proper operation of the International Criminal Court. Without it, the Court was like a crippled giant. But was the Commission the right body for such a task? The problem was of such political importance that it might better be resolved elsewhere.

36. Mr. KOSKENNIEMI noted that during its current session the Commission had embarked upon the topic of the fragmentation of international law, a subject of great importance and complexity, and that a study group had been set up to consider its exact scope. Many members believed that it covered two areas. First, there was the procedural issue of the proliferation of international tribunals, an aspect to which the Legal Counsel had himself referred. Another, more substantive aspect had to do with the diversification of law-making, in other words, the emergence of informal ways of creating international law not only through regular diplomatic means or the classical subject of international law but through various types of normative practice undertaken by representatives of civil society. That seemed to be where the future of international law lay, and the topic of fragmentation sought to address that issue.

37. The topic tied in with concerns raised over the years by the Secretary-General, who had repeatedly highlighted the need for the United Nations to engage in a dialogue with civil society and involve its various informal and non-diplomatic representatives. He had in mind in particular the Secretary-General's Global Compact initiative, in which United Nations bodies were encouraged to cooperate with private companies to promote understanding and enlist support for the Organization and its work.

38. Inasmuch as the codification of international law by such bodies as the Commission was beginning to look like an archaic relic, it was increasingly necessary to involve representatives of civil society, such as international companies, non-governmental organizations and their networks. In autumn 2001, he had met with a number of

United Nations bodies in Geneva and inquired what the Commission should do to help them in their activities in the field of refugee protection, human rights or international trade. Their reply: the Commission should not become involved! He urged the Legal Counsel to consider how the Office of Legal Affairs might cooperate with the Commission to devise programmes that reached out to civil society, which had not shown any interest in the Commission's codification work either. One way would be by assisting the Commission in its study on the fragmentation of international law.

39. The CHAIR recalled that the Commission had produced a draft for the International Criminal Court in very short time. This draft had formed the basis for future work, and many problems which some thought were contained in it had actually arisen later, not at the time of the Commission's work.

40. Mr. TOMKA said that he had closely followed the work of the United Nations in the legal area over the past 10 years. There had been an enormous increase in its involvement in international law-making. Revolutionary steps had been taken, and the Office of Legal Affairs had played an active part in drafting the statutes of the International Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia, in preparing for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and the subsequent process, and in many other areas. The Legal Counsel and his staff had worked on those issues with great dedication, for which he expressed his appreciation.

41. In his view, there should be a division of labour in international law-making. Human rights should be left to the treaty bodies and to States, whereas the Commission should continue to focus on issues originally meant for it.

42. The events of 11 September 2001 showed that the sectoral conventions were not enough to cover all aspects of the problem of terrorism. For example, acts of hijacking could be prosecuted under the appropriate convention. If the hijackers died, those who had assisted them in committing their crimes could be prosecuted. But what convention would be applied in response to the destruction of the World Trade Center? Not the International Convention for the Suppression of Terrorist Bombings: since civilian aircraft were not an explosive or other lethal device, he doubted whether that convention was applicable. Hence the need for a comprehensive convention against terrorism.

43. Those in favour of such a convention should also help resolve certain long-standing political problems in various parts of the world, which, although not directly linked to the convention as such, might have repercussions on the pace of negotiations.

44. Mr. MOMTAZ said that the United Nations was to a large extent responsible for the success of the previous week's elections in Sierra Leone. However, he was concerned that the Special Court was responsible for addressing the problem of impunity, whereas the Truth and

Reconciliation Commission had the task of ensuring national reconciliation. He foresaw a conflict between those two approaches and wondered whether the United Nations had established a mechanism to prevent such situations from arising after other armed conflicts in the future.

45. Mr. YAMADA said that his country, Japan, and other Asian States considered it extremely important for the United Nations to be involved in bringing to justice those responsible for gross violations of humanitarian law in Cambodia and had been discussing the matter with the Office of Legal Affairs. In a recent conversation with the Japanese ambassador, the Prime Minister of Cambodia, Mr. Hun Sen, had confirmed that he still hoped to receive United Nations assistance, and the Japanese Government was prepared to facilitate that process.

46. Mr. COMISSÁRIO AFONSO said he joined Mr. Galicki in stressing the important role that the Commission could play in the essential task of defining the crime of aggression. Resolutions of United Nations bodies and other documents could provide a basis for that work. He wondered whether the International Criminal Court had the necessary financial resources to begin to fulfil its functions in the very near future. Last, the United Nations could do more to assist national legal departments in the harmonization of practice, particularly in the case of countries in need of institution-building.

47. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel) said that it was for Member States to decide whether to move forward on matters relating to terrorism, which had political ramifications. The Secretary-General had been involved in efforts to facilitate agreement among States during the period between the autumn meetings of the Working Group on measures to eliminate international terrorism and the beginning of the Sixth Committee's plenary meetings. In that context, he himself had been asked to give presentations to various groups, including the Organization of the Islamic Conference, and believed that a solution was within reach but that it might depend on the resolution of current problems in the Middle East.

48. The sectoral approach had proven very useful. However, as Mr. Comissário Afonso had pointed out, not all national legal departments were well-equipped, and it would be far easier for States to adopt a single comprehensive convention on terrorism than a series of instruments dealing with various aspects of the problem.

49. Mr. Pambou-Tchivounda's comments lay outside his Office's area of responsibility and concerned decisions to be taken by political bodies. The report of OIOS on the in-depth evaluation of legal affairs to which he had referred (para. 17 above) concerned an evaluation that was carried out at specific intervals by OIOS using a highly methodological approach, including examination of his Office's website and determination of whether its publications were being cited in other studies.

50. The Commission was a body of independent experts which had been established by the General Assembly to develop international law. However, the Sixth Committee

was giving increasingly frequent indications of the areas on which Member States wished the Commission to focus. Some had maintained that the Commission was free to take up whatever topic it saw fit, but its work would be of little use if delegations had no interest in the final product. His Office was part of the Secretariat and, as such, could engage in dialogue with the Commission, but any decisions must be taken by the Sixth Committee.

51. Mr. Daoudi had enquired as to the relationship between the work of the Secretariat and the development of a comprehensive convention on terrorism. His Office did not involve itself in the preparation of the draft convention as such; rather, it concentrated on learning what the Secretary-General could accomplish, either on his own initiative or by encouraging other bodies working in the field of terrorism. The report of the Policy Working Group on the United Nations and Terrorism⁷ would soon be submitted to the Secretary-General, who would then take a decision on the matter. The Secretariat was working in various ways not only with legal experts but also with academics and the media. In particular, it was seeking to determine the root causes of terrorist acts, since conventions came into play only after a crime had been committed. However, it would not address the sensitive issue of a definition of terrorism.

52. Mr. Koskenniemi's comments were very thought-provoking. In many countries, including Australia, Finland and New Zealand, the work of preparing draft legislation for submission to Parliament by the Government had been handled by law commissions. Most of those bodies had subsequently been replaced by specialized commissions responsible for making proposals on different topics. Similarly, legal developments in some areas of United Nations activity, such as human rights, were addressed by bodies other than the Commission, and various bodies engaged in treaty-making as well. Rule No. 97 of the Rules of Procedure of the General Assembly stated that items relating to the same category of subjects should be referred to the committee or committees dealing with that category of subjects. However, that practice had not been followed for years and would cause considerable consternation if it were reintroduced. It would be difficult and perhaps unwise to rein in the current process. In the past, the Commission had asked his Office to assist it by preparing documents and engaging in research, and that possibility could be discussed. But the Secretariat was in the service of the Organization's legislative bodies and should not act without their mandate. He was very interested in pursuing such a dialogue and suggested that he might raise the issue during the discussion of the budget or the next medium-term plan, pointing out that the Secretariat had included presentations by experts from civil society in another new area, that of the reproductive cloning of human beings.

53. Mr. Momtaz had raised a classic question. In the past, States such as South Africa had set up their own institutions designed to heal the nation's wounds. In the case of Sierra Leone, the decision had been taken by the Security Council after consultation with the Government. The relationship between the Special Court and the Truth and

⁷ A/57/273-S/2002/875, annex.

Reconciliation Commission was a very important one; they had both been established under domestic law, pursuant to Security Council resolution 1315 (2000) and by agreement between the United Nations and the Government, but it would be for the two institutions to develop their relationship. To assist them in that task, his Office had sponsored three seminars, two in New York and one in Freetown. There was no lack of material for the Prosecutor of the Special Court and the President of the Truth and Reconciliation Commission to study. Moreover, the Special Court's activities would focus on a relatively small number of people: those who bore the greatest responsibility for the atrocities committed.

54. He was well aware of the Japanese Government's interest in the situation in Cambodia and could only regret the inevitable turn that events had taken there. However, the matter was a political one and was now in the hands of Member States.

55. The budget for the International Criminal Court had been prepared and was expected to be adopted in September 2002. Member States would then pay their contributions into a central fund, which would be administered by the Registrar of the Court; a similar procedure had been followed in setting up ITLOS.

56. Having cooperated with legal departments in many countries, including countries in Africa, he had the greatest respect for what they accomplished with extremely limited resources. In some cases, they lacked even the paper on which to print proposals for the ratification of treaties to be placed before their national parliaments. However, his Office could not cooperate directly with such departments without a direct mandate from the General Assembly. He provided a list of useful names and addresses to legal departments throughout the world, helped to organize informal meetings of legal advisers and encouraged colleagues in developed countries to provide assistance by, for example, making contributions to the legal libraries of developing countries. However, much more could be done. The Secretary-General had noted in his report "We the peoples: The role of the United Nations in the twenty-first century" (Millennium Report)⁸ that many countries declined to sign or ratify international treaties and conventions because they lacked the necessary expertise and resources; bilateral cooperation could help with that problem.

57. Mr. DUGARD asked the Legal Counsel, in his capacity as Under-Secretary-General of the United Nations, to inform his superiors and colleagues at Headquarters of his concern, and that of the other members of the Commission, at the fact that their honoraria had been reduced to the princely sum of one dollar and to convey their hope that those honoraria would soon be restored to an appropriate level.

The meeting rose at 11.50 a.m.

⁸ A/54/2000.

2725th MEETING

Friday, 24 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Tomka, Mr. Yamada.

Diplomatic protection¹ (*continued*)* (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)*

1. Mr. DUGARD (Special Rapporteur), introducing section C of his third report (A/CN.4/523 and Add.1), said that, unlike some members of the Commission, who saw the Calvo clause as a relic of a bygone era of Western intervention in Latin America, he saw that procedure as an integral part of the history and development of the rule on the exhaustion of local remedies and as one that remained relevant. That was why he was submitting draft article 16, on that issue, to the Commission.

2. The Calvo clause was a contractual undertaking whereby a person voluntarily linked with a State of which he was not a national agreed to waive the right to claim diplomatic protection by his State of nationality and to confine himself exclusively to local remedies relating to the performance of the contract. The scheme had been devised by the Argentine jurist Carlos Calvo to prevent nationals of the Western imperialist powers doing business in Latin America from immediately taking their contractual disputes with the host Government to the international plane, instead of first seeking to exhaust local remedies. From the outset, the Calvo clause had been controversial. Latin American States had seen it as a rule of general international law, and certainly as a regional rule of international law, and many of them, notably Mexico, had incorporated it into their constitutions. On the other hand, Western States had seen it as contrary to interna-

* Resumed from the 2719th meeting.

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

tional law, on the ground that it offended the Vattelian fiction according to which an injury to a national was an injury to the State, and that only the State could waive the right to diplomatic protection.⁴ The leading case on the subject was the decision handed down by the General Claims Commission (Mexico and United States) in the *North American Dredging Company* case, in which it had been clearly shown that the Calvo clause was compatible with international law in general and with the right to diplomatic protection in particular. In the case in question, the claimant company had entered into a contract with the Government of Mexico containing a clause, article 18, under which the company and all persons engaged in the execution of the work agreed to be considered as Mexicans in all matters concerning the execution of the contract and further providing that under no conditions would the intervention of foreign diplomatic agents be permitted in any matter related to the contract.⁵ When a breach of the contract had occurred, the claimant company had made no attempt to exhaust local remedies, as it had been required to do under article 18 of the contract, and, relying on article V of the *compromis* establishing the General Claims Commission,⁶ which dispensed with the need to exhaust local remedies, had requested the Government of the United States to bring a claim on its behalf before the General Claims Commission. That Commission had then embarked upon an examination of the effects of article 18 of the contract and had reached a number of conclusions that were set forth in detail in section C.7 of his report. In summary, the General Claims Commission had held that the Calvo clause was a promise by an alien to exhaust local remedies. The alien had thereby waived his right to request diplomatic protection in a claim for damages arising out of the contract or any matter relating to the contract. But that did not deprive him of his right to request diplomatic protection in respect of a denial of justice or other breach of international law experienced in the process of exhausting local remedies or trying to enforce his contract.

3. The decision in the *North American Dredging Company* case had been subjected to serious criticism by jurists, chiefly on account of the refusal by the General Claims Commission to give full effect to article V of the *compromis* establishing the Commission, which had seemed to relieve the claimant of the obligation to exhaust local remedies. Nevertheless, thereafter it could no longer seriously be argued that the Calvo clause was contrary to international law. There was still debate on its purpose and scope, mainly in the context of that case. In paragraph 31 of section C.8 of his report, he had tried to list the principles that emerged from that debate.

4. First, the Calvo clause was of limited validity only in the sense that it did not constitute a complete bar to diplomatic intervention. It applied only to disputes relating to the contract between alien and host State containing the clause, and not to breaches of international law. Second, the Calvo clause confirmed the importance of the rule on

the exhaustion of local remedies. Some writers had suggested that the clause was nothing more than a reaffirmation of that rule, but most writers saw it as going beyond such a reaffirmation. The ruling in the *North American Dredging Company* case had found that the Calvo clause could trump a provision in a *compromis* waiving a requirement that local remedies should be exhausted. Third, international law placed no bar on the right of an alien to waive by contract his own power or right to request his State of nationality to exercise diplomatic protection on his behalf. Fourth, an alien could not by means of a Calvo clause waive rights that under international law belonged to his Government. The right to exercise diplomatic protection was founded on the Vattelian fiction whereby an injury to a national arising from a breach of international law was an injury to the State of nationality itself. Fifth, the waiver in a Calvo clause extended only to disputes arising out of the contract or to breach of the contract, which did not, in any event, constitute a breach of international law; nor, in particular, did it extend to a denial of justice. However, uncertainty persisted about the notion of denial of justice associated with or arising from the contract containing the Calvo clause, as was apparent in the writings of García Amador, who submitted the conclusion that proof of an aggravated form of denial of justice was required before an international claim could be brought.

5. The Calvo clause had been born out of the fear on the part of Latin American States of intervention in their domestic affairs by European States and the United States under the guise of diplomatic protection. European States and the United States, for their part, had feared that their nationals would not receive fair treatment in countries whose judicial standards they regarded as inadequate. Since then, the situation had changed completely. European States and the United States respected the sovereign equality of Latin American States and now had confidence in their judicial systems, which were subject to both regional and international monitoring. The Calvo clause nevertheless remained an important feature of the Latin American approach to international law, and that doctrine influenced the attitude of developing countries in Africa and Asia, which feared intervention by powerful States in their domestic affairs. The Calvo doctrine was already reflected in General Assembly resolution 1803 (XVII) of 14 December 1962, on permanent sovereignty over natural resources. It appeared again in international instruments such as the Charter of Economic Rights and Duties of States, contained in General Assembly resolution 3281 (XXIX) of 12 December 1974, which proclaimed in its article 2, paragraph 2 (c), that disputes over compensation arising from the expropriation of foreign property must be settled under the domestic law of the nationalizing State. The influence of the Calvo doctrine was also to be seen in decision 24 of the Cartagena Agreement [Subregional integration agreement (Andean Pact)]. On the other hand, the North American Free Trade Agreement (NAFTA),⁷ which permitted foreign investors to resort to international arbitration without first exhausting local remedies, was

⁴ See E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758) (Washington, D.C., Carnegie Institution, 1916), vol. III.

⁵ See A. H. Feller, *The Mexican Claims Commissions, 1923–1934* (New York, Macmillan, 1935), p. 187.

⁶ *Ibid.*, p. 321 *et seq.*, especially p. 326.

⁷ See *The NAFTA*, vol. I. North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (Washington, D.C., U.S. Government Printing Office, 1993).

seen by some as representing a departure from the Calvo doctrine.

6. Two options were open to the Commission: either to decline to draft any provision on the subject on the ground that to do so would be superfluous if one took the view that the Calvo clause simply reaffirmed the rule on the exhaustion of local remedies; or to draft a provision limiting the validity of the Calvo clause to disputes arising out of the contract containing the clause, without precluding the right of the State of nationality of the alien to exercise its diplomatic protection on behalf of that individual where he or she had been injured as a result of an internationally wrongful act attributable to the contracting State. Such was the purpose of draft article 16, paragraph 2 of which provided that such a clause constituted a presumption in favour of the need to exhaust local remedies before recourse to international judicial settlement, where there was a *compromis* providing for an exception to the rule on the exhaustion of local remedies. In short, the article reproduced the principles enunciated in the *North American Dredging Company* case, clearly stating that the Calvo clause was not contrary to international law, that waiver of the right to diplomatic protection was limited exclusively to disputes arising out of the contract and that any provision waiving the rule on the exhaustion of local remedies appearing in a *compromis* would not prevail over the Calvo clause.

7. Mr. SEPÚLVEDA congratulated the Special Rapporteur on the high quality of his two reports, which were remarkable for the way in which they ordered and systematized the concepts analysed and for the wealth of sources consulted. The Commission's treatment of that topic could complement its treatment of the topic of State responsibility.

8. The general principle of the exhaustion of local remedies had already been studied by the Commission, as had the exceptions to the general rule. The core concepts on which the Special Rapporteur's analysis was based were the primacy of domestic laws and domestic courts, as an expression of State sovereignty; a reaffirmation of the statutory and political powers of the host State; the possibility for the host State to remedy the injury to an alien in its own legal system before being called upon to account for itself at the international level; and the role of national courts in settling conflicts arising in the national territory. The principle of equality between the national and the alien would be vitiated if the alien was deprived of recourse to the national courts by virtue of the exercise of diplomatic protection, a situation which would be tantamount to denying the validity of the host State's legal system. A breach of an international obligation could be established only after the individual, having exhausted the remedies available, had failed to obtain satisfaction or had been the victim of a denial of justice. Only then could an international procedure begin, whether in arbitration or judicial proceedings or through the exercise of diplomatic protection.

9. Like the Special Rapporteur, he considered that the codification of the rule on the exhaustion of local remedies would be incomplete without a recognition of the

Calvo clause, which formed an integral part of the constitutional law of several Latin American countries and of Latin American regional customary law. Nor, in his view, could it be claimed that the Calvo clause was contrary to international law, on account of two important principles, namely, the sovereign equality of States, which entailed a duty of non-intervention, and the equal treatment of nationals and aliens. By virtue of that principle, anyone establishing himself in a foreign country accepted a common destiny with that country's nationals. That individual thus had a right to the same protection as nationals, and the Government had the same responsibility *vis-à-vis* aliens as *vis-à-vis* its nationals. With respect to codification, as the Special Rapporteur had pointed out, the Calvo clause was incorporated in a number of inter-American legal instruments. Admittedly, the United States had entered reservations at the time of ratification, reaffirming its right to exercise diplomatic protection. Nevertheless, the Charter of OAS, which had been the subject of no reservation on the part of any of the American States, provided a radical definition of non-intervention, prohibiting any form of intervention, direct or indirect, for any reason, in the internal or external affairs of a State.

10. As to jurisprudence on the subject, the Special Rapporteur had rightly indicated that the decision in the *North American Dredging Company* case constituted a dividing line between two periods, before the case and afterwards. The General Claims Commission had established the validity of a concession contract in which a foreign beneficiary had agreed to enjoy the same rights to bring claims as those given to Mexicans. At the same time, it had laid down the following rules: a balance had to be sought between the sovereign right of national jurisdiction and the right of nationals to the protection of their State; there was no rule of international law prohibiting the limitation of the right to diplomatic protection; an alien could not object to the right of his Government to bring an international claim in the event of a breach of an international obligation that had caused injury to the alien; the General Claims Commission had not found a generally recognized rule of positive international law that would give a Government the right to intervene to strike down a lawful contract entered into by one of its citizens; such a contract bound the beneficiary to be governed by the laws of Mexico and to use the remedies provided by them; and denial of justice or any other breach of international law gave rise to the right to diplomatic protection.

11. On the basis of that jurisprudence, the Special Rapporteur had identified a number of common denominators that could help in drafting a rule on the subject: the Calvo clause applied only to disputes relating to a contract between an alien and a host State that contained the clause; it did not apply to breaches of international law; it confirmed the validity of the customary rule on the exhaustion of local remedies; international law did not prevent an alien from exercising the right not to request protection from his Government; a private individual could not waive rights that belonged to the State under international law; through the Calvo clause, an alien undertook not to request the protection of his Government in the event of a dispute relating to the performance of the contract, but that did not extend to a denial of justice or any other breach of international law.

12. In addition to those components of the rule that the Special Rapporteur was proposing, he drew attention to the principle embodied in Basis of Discussion No. 26 formulated by the Preparatory Committee of the Conference for the Codification of International Law, held at The Hague in 1930, and referred to in a footnote in section C of the third report: “If in a contract a foreigner makes a valid agreement that the local courts shall alone have jurisdiction, this provision is binding upon any international tribunal to which a claim under the contract is submitted.”⁸ The spirit of that provision was also reflected in article 27 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, cited in section C.9 of the report. The arbitral tribunals that had applied the Convention had consistently concluded that no contracting State should give diplomatic protection or bring an international claim in respect of a dispute which one of its nationals and another contracting State had consented to submit or had submitted to arbitration under the Convention, unless such other contracting Party had failed to abide by and comply with the award rendered in such dispute. There was a solid foundation of arbitral decisions to that effect. A similar principle was to be found in the international human rights instruments. For example, article 41, paragraph 1 (c), of the International Covenant on Civil and Political Rights stated that the Human Rights Committee could deal with a matter referred to it only after it had ascertained that all available domestic remedies had been invoked and exhausted, in conformity with the generally recognized principles of international law.

13. In conclusion, he said that he agreed with the Special Rapporteur’s recommendation on the drafting of a provision that reproduced the terms of the Calvo clause, thereby reflecting relevant jurisprudence, doctrine and some State practice which reaffirmed the role of domestic courts. In so doing, the Commission would be codifying a regional customary rule which, in the light of recent developments in international law, could legitimately be elevated to the rank of a universal rule.

14. Mr. BROWNLIE said that the well-researched and helpful report under consideration showed that the Calvo clause was not solely of historical interest. No matter how important it might be, however, it was beyond the scope of the Commission’s statute, in particular article 15 thereof: it was not a rule of law and therefore did not lend itself to codification. If the Commission was to codify the Calvo clause, it would have to determine its legality or lack thereof. The Calvo clause was simply a contractual drafting device. As to the “Vattelian fiction” referred to in section C.8 of the report, which was premised on the notion that an injury to an individual was an injury to his State of nationality, it was certainly not a substitute for analysis of the exercise of diplomatic protection on a case-by-case basis. That was why he thought that draft article 16 as submitted by the Special Rapporteur should not be referred to the Drafting Committee.

⁸ League of Nations, Conference for the Codification of International Law, *Bases of Discussion Drawn Up in 1929 by the Preparatory Committee of the Conference*, vol. III: *Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V), p. 135; reproduced in *Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 2, p. 223.

15. Mr. PELLET said that the report under consideration had confirmed the conviction he had expressed at an earlier meeting that the Calvo clause, whose principle he did not object to, should be discussed as part of the broader issue of the waiver of diplomatic protection. The report claimed to deal only with the Calvo clause, but in fact it also dealt with other institutions, particularly the waiver of the exercise of diplomatic protection by the State itself, a problem that arose in a very different way than the Calvo clause *per se*. He basically endorsed Mr. Brownlie’s analysis of the issue and agreed with him that the Calvo clause was a practice, but he did not agree with his conclusion. The fact that the Calvo clause was a practice did not necessarily mean that the questions whether that practice was in conformity with international law and what its effects in international law were should not be examined. That was obviously a topic for legal discussion and even for the codification or progressive development of international law.

16. The Special Rapporteur should have drawn a clear distinction in his report between the two aspects of the issue, namely, waiver by an individual of the diplomatic protection of his State of nationality and waiver by a State of the exercise of diplomatic protection. Since he had not done so, it was all the more difficult, if not impossible, to define the Calvo clause. He was not sure that the Special Rapporteur had been right to support García Amador’s definition,⁹ as section C.3 of the report seemed to imply. While the first and third propositions did appear to be embodiments of what he believed “the” Calvo clause was, the second, which was simply a contractual arbitral clause, was not derived from the Calvo doctrine, unless the foreign contracting party waived the diplomatic protection of his State of nationality when he agreed to arbitration. The Calvo clause was basically a contractual provision by which the foreign contracting party waived the diplomatic protection of the State of which he was a national.

17. He was not certain that that was enough, however, because he wondered whether that definition of the clause must be applied to all contracts or only to state contracts, or even limited to contracts for concessions, as article 27 of the Mexican Constitution, cited in a footnote in the report, would seem to indicate, despite the fact that the Special Rapporteur described Mexico as the most ardent advocate of the Calvo clause. In any event, he thought that the Calvo clause could be referred to only in respect of a state contract, as article 16, paragraph 1, of the text proposed by the Special Rapporteur seemed to suggest. There was, however, also the question of what the fate of such a clause would be in a contract between a national and an alien.

18. He believed the Special Rapporteur had a much broader, or perhaps looser, conception of the Calvo clause, as demonstrated by the examples of what he called the Calvo clause that he gave in section C.4 of the report: the Convention Relative to the Rights of Aliens, article 9 of the Convention on Rights and Duties of States,

⁹ See F. V. García Amador, “State responsibility: some new problems”, *Recueil des cours de l’Académie de droit international de La Hærem 1958-II* (Leiden, Sijthoff, 1959), pp. 455–456; *Yearbook ... 1958*, vol. II, document A/CN.4/111, pp. 62–63.

article VII of the American Treaty on Pacific Settlement (Pact of Bogotá), decisions 24 and 220 of the Cartagena Agreement (Subregional integration agreement (Andean Pact)) (para. 34) and article 27 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. In his own view, however, those were not examples of the Calvo clause at all: they were commitments, some clear, some not, on the part of the States concerned that they would not exercise diplomatic protection or would limit its exercise. They were treaty provisions that appeared in treaties, not contractual clauses that appeared in contracts. As such, and to the extent that they raised questions of validity, they were very different questions from those raised by “true” Calvo clauses. It went without saying that States could undertake not to exercise diplomatic protection or, in other words, not to assert their rights to ensure, in the person of their subjects, respect for their own rights, to use the famous phrase from the decision handed down by PCIJ in the *Mavrommatis* case. It must not be forgotten, as ICJ had recalled in the *Barcelona Traction* case, that the State alone must be deemed capable of deciding whether to exercise diplomatic protection. The national of the State could not replace the State, since it was not his own rights that were involved but those of the State, unless the fiction on which the *Mavrommatis* formula was based was to be challenged, and that, to his regret, did not seem to be the case, even though today it could be said that individuals were subjects of international law and that the State represented individuals.

19. It could nevertheless not be concluded from those observations that the Calvo clause was contrary to international law: an individual could not waive a right that was not his, but he could undertake to respect only the laws of the host country and not to seek the diplomatic protection of his State of origin. In so doing, he would be waiving a right to bring a claim, not a right to diplomatic protection itself. What he could not do was guarantee that his State of nationality would not intervene, not on his behalf, but to ensure respect for its right to see international law respected in the person of its national.

20. That appeared to be the approach taken by the Special Rapporteur, as indicated in section C.8 of the report and draft article 16, paragraph 1. Nevertheless, he was still not convinced by the reasoning used by the Special Rapporteur to reach that conclusion, and he had doubts about the wording of the draft article itself.

21. With regard to the Special Rapporteur’s reasoning, the “arguments” relating to the waiver by a State of the diplomatic protection of its nationals seemed correct in and of themselves and might be in keeping with what Calvo himself had wanted, but they had no effect on the problem with which the Commission was dealing, namely, the validity or scope of Calvo clauses in the specific sense that he himself accorded them, that is, contractual clauses by which an alien waived the diplomatic protection of his State of nationality. The examples of “false Calvo treaty clauses” given by the Special Rapporteur were not cases of complete waiver of diplomatic protection: they were usually treaty provisions that reaffirmed, and even defined, the rule on the exhaustion of local remedies. Such was the

case of the Convention relative to the Rights of Aliens, the Convention on Rights and Duties of States and the American Treaty on Pacific Settlement (Pact of Bogota). Other examples that were wrongly identified as “Calvo clauses”, such as decisions 24 and 220 of the Cartagena Agreement (Subregional integration agreement (Andean Pact)), confined themselves to recalling that the law applicable to a transnational contract was, in principle, the law of the State in which the contract was executed, and that did not mean that, if the host State violated a rule of international law in performing the contract, diplomatic protection was precluded. Last, he did not think that either General Assembly resolution 1803 (XVII) or the Charter of Economic Rights and Duties of States constituted “a classic restatement of Calvo”, as indicated in section C.9 of the report. They were, rather, a restatement of the principle established by PCIJ in the *Serbian Loans* case, according to which “any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country” [p. 41]. Accordingly, it was the municipal law and that law alone which was applicable, unless otherwise provided. That was something completely different from the validity of the Calvo clause.

22. In that connection, he had difficulty following the argument put forward in section C.8 of the report that “the waiver in a Calvo clause extends only to disputes arising out of the contract, or to breach of the contract, which does not, in any event, constitute a breach of international law”. Was that not stating the obvious? In any case, diplomatic protection could be exercised only if an internationally wrongful act had been committed, and it was international law which must be enforced, and never the contract as such. The question then arose whether or not breach of contract was contrary to international law. He doubted that the decision of the General Claims Commission (Mexico and United States) in the *North American Dredging Company* case or its subsequent decisions were the very essence of jurisprudence on the subject. Other equally respectable jurisdictional and arbitral decisions were also relevant, such as the 1904 Ralston ruling in the *Martini* case or PCIJ Judgment No. 2 in the *Chorzów Factory* case. Those precedents were much more guarded about the Calvo clause than the *North American Dredging Company* case, which was ambiguous, to say the least, as the Special Rapporteur himself had shown.

23. Having made those comments, which might belong in the commentary on article 16, he turned to the draft article itself. He agreed with the general idea underlying paragraph 1 but had a few critical remarks to make about the actual wording. He did not think that, in such a provision, it was a good idea to enumerate the “varieties” of Calvo clause, which did not do justice to the imagination of the jurists drafting them. The clause was very varied, and it would be better to use much more general wording. It would suffice to say in a first sentence that an alien could legitimately waive any request for diplomatic protection, perhaps specifying that he could do so “contractually”, but that was not required because, after all, he could also waive doing so outside a contract. Nor did he think that it was appropriate to speak of the “right” to request diplomatic protection: the word “right” might lead to confusion because a connection might be seen between it and

the idea of a “right to diplomatic protection”, which did not exist in international law. The State had the right to protect, but there was no right to protection.

24. The word “stipulation”, which was too specific, should be replaced by the word “provision” in the second sentence of article 16, paragraph 1. In the French version, the words *n’affecte en rien* should be replaced simply by the words *n’affecte pas*. The *Mavrommatis* wording should be followed as closely as possible in both French and English; accordingly, the words “on behalf of” should be replaced by the words “in respect of”. In a much more important amendment, the last part of the sentence in paragraph 1 (c) (“or when the injury to the alien is of direct concern to the State of nationality of the alien”) should be deleted because the word “direct” was not clear. Either the State was directly injured, too, and then diplomatic protection was not involved, or the individual alone was the direct victim of the injury, but, in any event, and still following the *Mavrommatis* wording, the State had the right to enforce international law in the person of its national, and there was nothing special about the premise contained in that phrase.

25. He was strongly opposed to draft article 16, paragraph 2, because it contradicted everything that the draft said about the exhaustion of local remedies. The existence of a Calvo clause was by no means necessary to create a presumption in favour of the exhaustion of local remedies. That presumption existed independently of any contractual clause. It was even a major condition for the exercise of diplomatic protection. If, as he hoped, the Commission decided against the text as it stood, he wondered whether a new paragraph 2 should not be inserted in draft article 16 to the effect that the State of which the injured person was a national could validly and unrestrictedly waive the exercise of its diplomatic protection. What went without saying went even better by saying it. In that case, of course, article 16 would cover a larger area than the Calvo clause did and should be entitled “Waiver of diplomatic protection”.

26. At the start of his introduction, the Special Rapporteur had said that it was imperative for his draft articles to refer to the Calvo clause. Given the differences of views that he sensed in the Commission on the subject, it might be wiser to do without a provision which was in fact merely the consequence of other principles already contained in the draft articles, namely, the *Mavrommatis* wording and the indisputable requirement of the exhaustion of local remedies.

27. Mr. PAMBOU-TCHIVOUNDA said that he wondered whether all the interest in considering the Calvo clause in connection with the rule on the exhaustion of local remedies should not focus instead on the scope of a clause contained in a contract between an individual and a State. He agreed wholeheartedly with the comment by Mr. Pellet that what was at issue was not just any contract, but a government contract.

28. As far as waiver was concerned, the clause in question would enable an individual to think that he was authorized by his State of nationality to undertake on its be-

half a commitment that the State would not exercise a right to which it was entitled. As Mr. Pellet had pointed out, that right belonged not to the individual but to the State. The problem of the validity of the Calvo clause thus arose only as between the parties to the contract. The Commission should decide how a State whose national said that he waived its diplomatic protection was bound by such a statement. It was also important to decide when exactly the State could make such a waiver. Was it at the time of the conclusion of the contract between the individual and the other contracting State, or was it when the individual requested the protection of his State of nationality, the dispute having begun? The exercise of waiver by the State of origin of the individual must be situated temporally for the waiver to have an effect. That involved a problem of validity but also of opposability.

29. Mr. Sreenivasa RAO said that the Calvo clause was of historical importance, but in practice it was used less and less. For example, today most States concluded investment agreements that made provision for direct recourse to international arbitration in the event of a dispute. He was afraid that the Commission was devoting too much time to the consideration of a subject that had lost much of its relevance.

30. Mr. SEPÚLVEDA said that the Calvo clause should not be considered a relic. In Mexico, all foreign companies set up in conformity with national legislation were required to sign a contract containing such a clause. International arbitration was provided for only in certain categories of dispute. In most cases, a foreign company must comply with a Calvo clause, that is, agree to submit to national legislation, for all matters relating to the interpretation or performance of a contract.

31. The CHAIR said he did not have the impression that Mr. Sepúlveda’s remarks were inconsistent with the comments by Mr. Sreenivasa Rao or Mr. Brownlie. After all, at issue was merely a contractual clause, and the Commission should take care not to depart too much from its main objective, which was to produce concrete results that were acceptable to all.

Unilateral acts of States (*continued*)* (A/CN.4/524, A/CN.4/525 and Add.1 and 2,¹⁰ A/CN.4/521, sect. D)

[Agenda item 5]

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

32. Mr. KAMTO said that the Commission should not lose sight of the important work carried out on the subject of unilateral acts over the years. The fundamental question it faced was whether a certain legal entity called a “unilateral act” existed in international law and, if so, what legal regime governed it. He commended the Special Rapporteur on the work he had done in his fifth report (A/CN.4/525 and Add.1 and 2), which was a great improvement over what had been done previously. In addition to

* Resumed from the 2723rd meeting.

¹⁰ See footnote 3 above.

providing a recapitulation, which was very useful for new and old members alike, it set out the results of in-depth research on doctrine and jurisprudence. In that connection, he shared the view expressed by Mr. Gaja and others that information on State practice was painfully lacking. Mr. Sepúlveda had referred to highly relevant sources which might enable the Commission to pursue its work without awaiting States' replies to the questionnaire.

33. Commenting on chapter I of the fifth report as a whole, he drew the Special Rapporteur's attention to several repetitions, particularly in paragraphs 99 and 100. In paragraph 106 of the French text, the Special Rapporteur referred to *défauts de manifestation de la volonté* ("defects in the expression of will"). That phrase was not very clear—perhaps there was a translation problem. In any case, it was necessary to state whether the word "defects" meant irregularities which might affect the expression of will or the absence of an expression of will. With regard to substance, one important question was whether a unilateral act constituted a source of international law of the same rank as the usual sources, namely, treaties and custom. In other words, could a unilateral act derogate from general international law or *erga omnes* obligations? He thought that a unilateral act should never take precedence over general international law or the provisions of a multilateral convention to which the author State of the unilateral act was a party. Jurisprudence contained several indications to that effect. For example, in the *S.S. "Wimbledon"* case, PCIJ, ruling on the denial of that vessel's access to the Kiel canal pursuant to German regulations on neutrality promulgated during the Russo-Polish war, had found that a neutrality regulation, which was a unilateral act, could not take precedence over the provisions of a peace treaty [in this case the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles)]. A unilateral act was thus a source of international law, but not at the same level as treaties and custom.

34. In paragraph 87 of the report, the words *pacta sunt servanda* in parentheses should be replaced by the words *acta sunt servanda*. The main question, however, was whether the expression should be retained. Paragraph 94 said that the State was free to formulate unilateral acts outside the framework of international law, but such acts could not be contrary to *jus cogens* norms. He asked whether the word "outside" concerned the formulation or the effects of the unilateral act. It was, of course, the effects which were important.

35. Turning to the text of the draft article proposed in paragraph 119 of the report, he referred to two terminology problems. First, article 5 (c) concerned the corruption of the "representative of the State", whereas article 5 (d) spoke of the "person formulating the act". It was not necessary to use two different wordings and, since the concept of representation was not relevant in the framework of unilateral acts, it would be preferable to say "the person formulating the act" in both cases. Article 5 (h) referred to "a norm of fundamental importance to domestic law". What did that mean? Was it a reference to a constitutional norm? In any case, it would be better to use the term contained in the 1969 Vienna Convention, "peremptory" norm. On the face of it, articles 5 (d) and 5 (e) were redundant, unless the Special Rapporteur was trying to make

a distinction between coercion of the person formulating the act and coercion in the form of the threat or use of force directed against the State and leading it to formulate a unilateral act.

36. As to the interpretation of unilateral acts, it was not clear in paragraph 123 of the report whether the Special Rapporteur was referring to the *Fisheries Jurisdiction (Spain v. Canada)* case or the *Land and Maritime Boundary between Cameroon and Nigeria* case. In any event, the Special Rapporteur seemed to be saying that, for the moment, he was merely providing some information on what his proposals would be. He therefore reserved the right to return to the question of the interpretation of unilateral acts at a later stage.

37. Mr. PELLET said he strongly supported the suggestion that the relationship between unilateral acts and other sources of international law should be studied. Such a study might not be essential in the case of the 1969 Vienna Convention, but it was a very interesting point in the context of unilateral acts, and the Special Rapporteur should be encouraged not to limit himself to the model of the Convention.

38. Mr. KOSKENNIEMI said that he was opposed to the idea of classifying unilateral acts according to the sources of international law. Such acts created obligations, not law, and the unfortunate use of the word "validity" throughout article 5 stemmed from the inability to conceptualize unilateral acts in terms of reciprocal obligations between States which could, under certain circumstances, create a network of opposabilities. Such reciprocal legal relationships could not be subsumed under general conditions of validity for unilateral acts; their opposability depended on the particular nature of the relationship between the acting party and those who had taken account of that act and might have relied on it. Thus, in the words of Mr. Pellet, he was "totally" opposed to sending article 5 to the Drafting Committee because the issues which it raised were not drafting issues.

39. The CHAIR said that he wondered whether the debate was not really about something close to the doctrine of estoppel.

40. Mr. KAMTO said that taking Mr. Koskenniemi's reasoning to its logical conclusion would lead to the voluntarist view that there were no unilateral acts in international law: every legal act or source of international law was an expression of agreement between the will of two parties, although some time might elapse between those two expressions of will, that is, a *consentement dissocié*. Unilateral acts did not generally create reciprocal obligations and were not part of a direct or instantaneous bilateral or multilateral process with other subjects of international law. Of course, some unilateral acts could not be readily distinguished from international agreements, but in other cases there was indeed a difference between them. In any event, even a theoretical study of the relationship between unilateral acts and the sources of international law would clarify the concept of unilateral acts and would not, moreover, affect the Commission's continuing efforts to codify the topic.

41. Mr. TOMKA said that he had doubts about how far the Commission had come in its work on the topic, which it had begun to study in 1997; thus far, only four draft articles had been referred to the Drafting Committee. The Commission was in a situation similar to that in which it had found itself some 40 years previously with the topic of State responsibility. At that time, the first Special Rapporteur, Mr. García Amador, had concentrated on one particular aspect of the topic; later, others had taken over and, with the Commission's approval, had sought to establish general rules. In the present case, perhaps the Commission should reverse that approach and begin with a systematic study of particular categories of unilateral acts in order to formulate general rules. For example, the type of pledge which the United Nations Legal Counsel had mentioned in his statement to the Commission might be interesting and the Special Rapporteur should provide a more detailed analysis of the legal effects, enforceability and consequences of the examples of promise mentioned in his report.

42. Unilateral acts were not law-creating or norm-creating mechanisms. In convention and custom, the participation of several States and a common will were required. A unilateral act might mark the beginning of a State practice which, in turn, created a norm.

43. With regard to the invalidity of unilateral acts [draft articles 5 (a)–5 (h)], the Special Rapporteur rightly stated in paragraph 99 of his report that it was necessary to distinguish between absolute and relative invalidity, but at the end of the paragraph he gave an example of relative validity which seemed to contradict article 5 (h). That distinction between absolute and relative might not be necessary in the text of the draft articles; the Drafting Committee would probably find another way of expressing it. In paragraph 99, the Special Rapporteur also gave an example of absolute invalidity involving coercion of the representative of the State, but a person who was coerced was not expressing his will or that of his State, without which there was no legal act. Thus, it would seem that absolute invalidity was covered by articles 5 (e) and 5 (f) and relative invalidity by articles 5 (a) (providing that the question of reliance on the bona fides of other States was taken into account), 5 (b), 5 (c) and 5 (h). He shared Mr. Simma's views on article 5 (g). In any event, articles 5 (a) to 5 (h) required further work.

44. Mr. Sreenivasa RAO said that the conceptualization of unilateral acts of States had not yet been achieved because of the scope that the Special Rapporteur himself had set for the topic. He had dropped the reference to the concept of autonomy from the definition of unilateral acts; the problem was that he was still treating them as autonomous acts and trying to study their value in law. Unilateral acts and the different forms in which they were expressed could be of interest and have legal effects, but they did not have the value of international obligations in and of themselves. They could be assessed only in light of the responses, actions and acceptance of other States in one form or another. Without that counterpart, unilateral acts seemed to dangle in the air, particularly as the State which was free to make them was free to terminate them as well. Unfortunately, most unilateral acts were statements of national policy. He therefore wondered why so

many members of the Commission were concerned about lack of access to the preparatory work in the interpretation of such acts. The preparatory work in question was not that of treaty law; it was the context in which the statement was made, the compulsion, the occasion or any other factor which led the country to act or react in a certain way. Experience showed that States which made unilateral pronouncements, feeling the compulsion to act in a particular way because of those statements, logically believed in good faith that they had acquired an obligation. When nuclear States said that they would not use nuclear weapons against non-nuclear States, that was a unilateral statement. Some States might accept it, others might have doubts and still others might not believe it, but the author State considered that it had assumed an obligation. However, it was a matter of comity, not an international obligation. Hence, there was nothing immoral in the fact that India had for 40 years held to its unilateral commitment not to develop nuclear weapons, but had revoked it when circumstances had changed and the expected consequences of its commitment had not materialized. Very few international agreements survived for more than 40 years. Furthermore, the way in which the unilateral obligation created by a unilateral act was terminated differed from the way in which a treaty was terminated. In the latter case, there were a procedure and an agreed methodology which must be respected, whereas in the case of a unilateral act only estoppel, acquiescence or the existence of a treaty, custom or other obligation prevented an equally unilateral termination.

45. Mr. Sepúlveda had raised a very interesting point in the context of the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco), namely, that of a unilateral act of which several States were the joint authors, but in that case there were a treaty format and the signatures of the parties. In another example, State A made a unilateral statement of national policy and State B responded with another unilateral statement. There was a true concordance between the two and a commonality of expectations arising out of it; there was no treaty format and no custom because only a few States were involved, but the two States were bound by a reciprocal commitment. Yet another example was provided by the Agreement concerning Interim Arrangements relating to Polymetallic Nodules of the Deep Sea Bed, in which the United States and three other States had, in the early stages of discussions on the United Nations Convention on the Law of the Sea, set up an alternative system for regulating investments in deep seabed mining. All those examples of State practice should be studied carefully in an attempt to establish the effects and the logic of such acts, which bordered on international obligations without being a source of international law in and of themselves. The Drafting Committee would certainly take account of all the comments made on the issue of the invalidity of unilateral acts, it being understood that the termination of unilateral acts was a topic of study as important as that of their formulation.

The meeting rose at 1.05 p.m.

2726th MEETING

Tuesday, 28 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue.

Unilateral acts of States (*continued*) (A/CN.4/524, A/CN.4/525 and Add.1 and 2,¹ A/CN.4/521, sect. D)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. FOMBA stressed that unilateral acts were important actions and doings by States and should be so viewed under international law. He wondered to what extent that was in fact the case or could become so and in what way, and what critical appraisal could be made of such acts and to what end. He would leave it to the “poets of international law” to answer those questions.

2. It was disconcerting that, as at 14 March 2002, only three Governments had replied (see A/CN.4/524) to the questionnaire on unilateral acts of States, a fact which suggested that Governments did not find the topic of interest, that the practice was more imaginary than real, that unilateral acts were flexible and thus difficult to define or that the entire issue was fraught with risk. In any case, further information on practice was needed. States should again be urged to reply to the questionnaire, and the Office of Legal Affairs should be asked to provide information on the matter.

3. In paragraph 30 of his fifth report (A/CN.4/525 and Add.1 and 2) the Special Rapporteur pointed out that unilateral acts were not referred to in Article 38, paragraph 1, of the Statute of ICJ but that State practice and legal scholars presumed the existence of such a category of legal acts. It was important to note that case law also attested to their existence. The primary difficulty was the scope of unilateral acts, which, as De Visscher had pointed out, was characterized by uncertainties about their legal effects.² ICJ had dispelled such uncertainties by resorting

to the principle of good faith and to objective considerations that were inferred from the general interest, particularly from the need for legal certainty.³ However, in view of the difference in nature and mandate between the Court and the Commission, and without prejudice to the results of the ongoing study of practice, the Commission should be able to proceed further than the Court had done and to propose a genuine legal regime for unilateral acts.

4. Consideration of the concept of legal effects in terms of rights and obligations and from the standpoint of logic, security considerations and practice should help to establish an adequate legal framework for at least the most traditional of unilateral acts: promise, recognition, waiver and protest. Moreover, such an approach would appear consistent with the views of ICJ in the *Fisheries Jurisdiction (Spain v. Canada)* case. It was for the Commission to “decode” the Court’s “message” with intelligence, subtlety and practicality.

5. While the mechanism governing the dialectical process of the development and functioning of conventions and custom as sources of international law was relatively well understood, little or nothing was known about the link between unilateral acts and those established sources. He therefore agreed with Mr. Kamto and Mr. Pellet, who had called for a study of the matter.

6. Generally speaking, international law had had little to say on the issue of classification for reasons relating to the differences between international and domestic law. That was true of both conventions and custom. Article 38, paragraph 1, of the Statute of ICJ did not go into detail on either of those categories. The literature had often addressed the issue, but without great success, and international jurisprudence apparently had little interest in establishing a hierarchy between them. The Commission should follow those examples and refrain from forcing the issue. However, much would be gained by clarifying the legal and functional link between unilateral acts and other sources of international law.

7. As to the draft articles, there appeared to be general consensus on article 1. Some doubt nonetheless remained about the scope *rationae personae* of acts formulated by States. For example, it was not clear whether they should include national liberation movements. In his view, the answer depended on how such entities were ultimately dealt with in international law and on whether there was a practical need to include them in the framework of unilateral acts. It would have been interesting to consider the positions and behaviour, or at least the desires and intentions, of a movement such as the Palestine Liberation Organization concerning recognition, promise, protest or waiver.

8. Article 5 (g) (para. 119 of the report), on the absolute invalidity of an act which, at the time of its formulation, conflicted with a decision of the Security Council, was a wise addition to the Vienna regime from the political and legal points of view. While article 5 (h) reflected article 46 of the 1969 Vienna Convention, it did not include the concept of a “manifest” violation of the domestic law of the

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

² C. De Visscher, *Les effectivités du droit international public* (Paris, Pedone, 1967), p. 156.

³ *Ibid.*, p. 157.

State formulating the unilateral act. He wondered whether the word should be included in the article or simply mentioned in the commentary.

9. Draft articles (a) and (b) (para. 135 of the report), on interpretation, were acceptable on the whole. He agreed with the Spanish Government's position in the *Fisheries Jurisdiction* case. Since unilateral acts did not always include preambles and annexes, it might be preferable for article (a), paragraph 2, to state that the context for the purpose of the interpretation of a unilateral act should comprise the text and, where appropriate, its preamble and annexes. A similar approach should be taken with regard to the reference to preparatory work in article (b).

10. Finally, he endorsed the proposal for the working group on the important topic of unilateral acts.

11. Mr. PELLET said that in his fifth report the Special Rapporteur was rather like a broken record, repeating the same things and, by so doing, forcing Commission members and representatives of States to the Sixth Committee to repeat themselves in turn. In paragraph 37 of the report, the Special Rapporteur was doubtless referring to him as the member who had asked for a recapitulative report on the status of discussions on the topic in general and on the draft articles submitted thus far. If indeed he was the member in question, he had hoped that such a report would afford an opportunity to take a new approach to the topic on the basis of the criticisms and comments made and to propose new draft articles in light of those considerations. Regrettably, that was not the course taken by the Special Rapporteur.

12. He remained convinced that the topic of unilateral acts of States lent itself to codification and progressive development by the Commission. There was already "extensive State practice, precedent and doctrine", to use the terms of article 15 of the statute of the Commission, and it would also be useful for States to know as precisely as possible what risks they ran in formulating such acts. They were willing to commit themselves, but they did not wish to be taken by surprise, as Norway had been as a result of the Ihlen declaration [see pp. 69 and 70 of the PCIJ judgment in the *Eastern Greenland* case] or as France had been in the case of atmospheric nuclear tests.

13. It was clear from paragraphs 136 to 147 of the report that both the Sixth Committee and the Commission remained divided on the issue of classification. Some considered that unilateral acts were too diverse to be treated as a single category; promise, recognition, waiver, protest, notification and so on must be studied and codified separately. Others, including apparently the Special Rapporteur, thought that the applicable rules could be unified, at least at the level of general principles. He shared the latter position. It seemed obvious that States intended their unilateral acts to produce legal effects. In that sense, there was no difference between such acts and treaties, which were also impossible to reduce to a single homogeneous category but were nevertheless subject to the application of common rules.

14. As the co-author of a textbook on general international law, he had encountered no particular problems in writing the chapter on unilateral acts. Moreover, it was often very difficult to classify a unilateral act, for instance, the Ihlen declaration or the 1952 Colombian declaration on sovereignty over the Monjes Islands; that fact suggested that such acts were less alike than some had maintained. On the other hand, their alleged diversity might be more apparent than real. He tended to agree with the views expressed in paragraphs 138 to 140 of the report and in any event wondered whether unilateral acts could not be divided simply into two, and only two, categories, at least with regard to their effects. However, rather than the classification proposed by the Special Rapporteur in paragraph 137 of his report, it might be more useful to distinguish between "condition" acts such as notification and its negative counterpart, protest, which were necessary in order for another act to produce legal effects, and "autonomous" acts which produced legal effects, such as promise, waiver (which might be regarded as the opposite) and recognition (which was a kind of promise). In studying legal effects, a distinction would doubtless need to be made in those two categories, but it should be possible to arrive at a definition of, and a common legal regime governing, unilateral acts.

15. A major argument put forward by those who challenged the very validity of the topic was that unilateral acts did not produce effects in and of themselves, since their effects were dependent on the reactions of other States. He disagreed entirely. A promise to do something, recognition of another State or of a situation, waiver of a right or protest against the conduct of another subject or subjects of international law produced legal effects, although in some cases only if other States or an international court took the author State at its word. The statements made by the representative of France in the General Assembly and the posters on the walls of the French Embassies in Australia and New Zealand would have been of concern to nobody if ICJ had not seized on them in the *Nuclear Tests* cases. A State's recognition of another State might be equivalent to a declaration of platonic love in the unlikely event that it did not call for any reaction from the State thus recognized, but that fact would not deprive the recognition of legal effects. Similarly, if Switzerland agreed to abide by a decision of the Security Council, it was bound by that promise without the need for any formal acknowledgement.

16. Mr. Sreenivasa Rao had maintained that, unlike a treaty, a unilateral act could be revoked at any time. Again, he disagreed. A State which had unilaterally expressed its will to be bound was, in fact, bound. In its judgments in the *Nuclear Tests* cases, ICJ had stated that the unilateral undertaking "[could not] be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration" [*Australia v. France*, p. 270; *New Zealand v. France*, p. 475]. Unilateral acts, like treaties, could be traps in which States were caught against their will; once expressed, their commitment was irrevocable. And even if, as some members maintained, unilateral acts did not produce effects in the absence of an expression of will by another subject of international law, he did not see why that would prevent the Commission from taking up the topic or from codifying the acts in question.

17. At the previous meeting, he had supported Mr. Kamto's suggestion that the Special Rapporteur should study the relationship between unilateral acts and other sources of international law. Mr. Koskenniemi appeared to have been strongly opposed to such a study on the grounds that unilateral acts could not be sources of international law; they could give rise to obligations, but not to rules. It was an excessively doctrinal position, abstract and without concrete consequences. What was important was that unilateral acts produced legal effects in the same way as "genuine" sources of international law. Moreover, treaties could create *ad hoc* obligations for States parties, while unilateral acts could give rise to generalized, impersonal rules, as in the case of a State's unilateral regulation of other States' right of passage through its territorial waters or of foreigners' access to its territory. If it would please Mr. Koskenniemi, he was prepared to abandon the use of the word "sources", but he continued to maintain that it was *absolutely* indispensable, for Mr. Koskenniemi was fond of adverbs, to study the relationship between unilateral acts and other ways of creating rules and obligations in international law for the reasons outlined by Mr. Kamto. A treaty could derogate from custom. Could a unilateral act do so? Certainly, a unilateral act could not run counter to a treaty, perhaps for the reasons lyrically evoked by Mr. Koskenniemi. The Special Rapporteur should definitely consider questions of that kind.

18. As to the specific issues raised in the fifth report he welcomed the fact that the concept of "autonomy" had been excluded from the definition of unilateral acts, although he recognized that it might be relevant to the legal regime concerning them, and that the word "declaration" had been replaced by "expression of will", which left matters open. The replacement of "acquire legal obligations" by "produce legal effects" was particularly welcome in the French text, in which the former term read *créer des obligations juridiques* (create legal obligations). Unilateral acts might recognize or protest against pre-existing obligations, but they did not create them. He was opposed, however, to including the word "unequivocal" in the definition since a declaration with equivocal content could nevertheless bind a State. He also objected to the words "and which is known to that State or international organization", which posed the same problem as "unequivocal" and introduced an element of proof that complicated the definition unnecessarily.

19. It was not clear that "conditions of validity" and "causes of invalidity" were equivalent terms; the latter would seem more appropriate. He did not agree with those who maintained that the Special Rapporteur had followed the 1969 Vienna Convention too closely. Like treaties, unilateral acts were expressions of will intended to produce legal effects. Thus, it was logical to use the law of treaties, *mutatis mutandis*, as a basis for the codification of such acts and to proceed empirically by considering whether the various causes of invalidity enumerated in articles 46 to 53 of the Convention could be used as a basis for the treatment of the question in the draft articles. He did not think that the Special Rapporteur had made a genuine effort to study the list of causes; once that was done, the Commission would be in a position to consider whether there were any factors other than those mentioned in the Convention that were specific to unilateral acts.

20. For example, article 46 of the 1969 Vienna Convention dealt with the provisions of internal law regarding competence to conclude treaties, but he was convinced that there were no such provisions regarding competence to formulate unilateral acts. Any State official, from the most ordinary police officer to the President of the Republic, could bind the State in such matters. Unlike the Special Rapporteur, he was not of the opinion that articles 7 to 9 of the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session⁴ were especially germane to the topic. Article 4, which established that the conduct of any State organ should be considered an act of that State under international law, was more relevant. The main question was whether an organ that acted beyond its powers or contravened its instructions nevertheless bound the State internationally in so doing. According to article 7 of the articles on State responsibility for internationally wrongful acts, the answer was in the affirmative. He was thus inclined to think that article 5 (*h*) needed to be considered in much greater detail before it could be referred to the Drafting Committee, since not only its wording but also its very principle were open to question. The same was true, *a fortiori*, of the issue of specific restrictions on authority to express the consent of a State, dealt with in article 47 of the 1969 Vienna Convention, which the Special Rapporteur proposed not to transpose to the case of unilateral acts—without, however, giving any real reasons for that decision.

21. As for the provisions concerning error, fraud, corruption and coercion, transposition of those grounds for invalidity seemed to pose fewer problems. Nonetheless, further thought should be given to their formulation, with fuller account taken of State practice. Like the great majority of other members who had spoken, he considered that the Special Rapporteur had not devoted sufficient attention to the wealth of practice that was available in that area. It was not uncommon for States to claim that they had not made a valid commitment in entering into some unilateral commitment that they had subsequently lived to regret. Even the case law seemed to have been accorded insufficient attention by the Special Rapporteur: the oral and written pleadings in the *Eastern Greenland* and *Temple of Preah Vihear* cases, in which Norway and Thailand respectively had vigorously denied having bound themselves, were readily accessible and could have offered valuable lessons in that regard. Only when a proper study had been conducted would it be possible for the Commission to take an informed decision on the desirability of referring those provisions to the Drafting Committee.

22. He endorsed the view that the Special Rapporteur had not been sufficiently rigorous in drawing the distinction between absolute and relative invalidity. Irrespective of the use to which it was put, however, the question arose whether such a distinction, which was valid in connection with the law of treaties, could be transposed to the field of unilateral acts. The main reason for drawing such a distinction in the law of treaties was to ensure that States did not jeopardize legal security by calling reciprocal commitments into question. No such reciprocity of wills existed in the case of unilateral acts. Accordingly, two lines

⁴ See 2712th meeting, footnote 13.

of reasoning were possible. Either it could be concluded that invalidity was always relative, and that only the author State could invoke it; or else the view could be taken that all States to which the act was addressed could invoke its invalidity. He was inclined to favour the latter view, since in the case of unilateral acts, unlike that of treaties, the other States had not participated in the formation of the rights or obligations that, by definition, affected them. There, again, further study was needed.

23. There seemed to be one case in which the absolute invalidity of the unilateral act was incontestable, not only in the sense that any State could invoke it, but also in that it was invalid *ab initio* with respect to all of its consequences. That was the case, referred to in article 5 (f), of an act which conflicted with a peremptory norm of international law. On the other hand, he was not convinced of the absolute invalidity of an act that conflicted with a decision of the Security Council, dealt with in article 5 (g). Not only was that case not covered by the 1969 Vienna Convention, but the problem was also one, not of invalidity, but of conflict between instruments of a different nature. That led him back to the question of the relationship between unilateral acts and other sources of international law, or between obligations stemming from unilateral acts and those stemming from other acts in international law. The Commission should await the outcome of a comprehensive study of the question, rather than hastily adopt an isolated provision that seemed to him to have no place in the section of the draft on invalidity. Furthermore, it was worth noting in passing that article 5 (g) postulated the universality of the United Nations—a state of affairs that, while true in the contemporary world, might not persist indefinitely.

24. In short, he did not advocate referring articles 5 (a) to 5 (h) to the Drafting Committee, partly because of his reservations concerning the subject matter of some of those provisions, but also for more general reasons. In his view, the Special Rapporteur did not take sufficient account of the extreme complexity of the problems, and of State practice in that area. Should a majority of the Commission favour referring the articles to the Committee at the present session—which, however, seemed unlikely—the Committee would be faced with the heavy task, not only of harmonizing the various provisions, but also of dealing with a number of substantive problems that did not form part of its mandate. If, however, the Committee was nevertheless called upon to deal with articles 5 (a) to 5 (h) as now drafted, it would be well advised to abandon the plural form “[or States]”, perhaps also adopting a general provision to the effect that there could be such a thing as collective unilateral acts, or else explaining the matter in the commentaries, as suggested by the Special Rapporteur in paragraph 116 of the report. In his view, however, article 5 was not yet ripe for referral to the Committee.

25. On the question of interpretation, he had little to add to what he had said at the previous session, since the Special Rapporteur appeared not to have heeded criticisms of his fourth report,⁵ instead simply reproducing articles (a) and (b) word for word in his fifth report. For the reasons he had given at the previous session, he continued to have

reservations about the desirability of referring those articles to the Drafting Committee.

26. To conclude on a more general note, he could see no reason for the Commission to refer to the Drafting Committee at the present session articles on interpretation and on invalidity which it had decided not to refer to the Committee at previous sessions. While article 5 admittedly incorporated a few amendments to the article 7 proposed by the Special Rapporteur in his second report,⁶ no real changes of substance had been made; and, above all, the draft articles were still not grounded in a proper study of State practice. While he was not one of those who wished to see the topic abandoned, he wondered whether it would not be appropriate to suspend consideration of it for the time being, and to request the Secretariat to conduct a study of State practice in unilateral acts, perhaps in collaboration with some members of the Commission, such as Mr. Simma, who, indeed, had already volunteered his services. That study should be conducted on the basis of the definition contained in article 1, which the Committee could perhaps consider at the current session, and in cooperation with the Special Rapporteur. On the basis of that study the Special Rapporteur could evaluate, modify and expand his existing draft. A working group could be set up, as a matter of urgency, to establish, in the course of one or two afternoon meetings, the precise purpose of the study to be undertaken. While such a course would entail suspending work on the topic for a year, much time would thereby be saved in the long run.

27. Mr. KOSKENNIEMI said he felt obliged to defend himself against Mr. Pellet's perfunctory dismissal of the distinction he had drawn between sources of law and sources of obligation, and against accusations that he was excessively preoccupied with academic abstractions. In his view, the distinction between sources of law and sources of obligation, and between the notions of validity and opposability, lay at the heart of the difficulties facing the Commission with regard to article 5 and was essential to a proper understanding of the distinction between those unilateral acts that produced legal consequences and those that did not.

28. He conceded that the distinction between sources of law and sources of obligation was theoretical. As such, it could have been dispensed with, but for the fact that it led on to the further distinction between validity and opposability. The drafting of article 5 revealed that the Special Rapporteur saw unilateral acts in terms of their validity or non-validity. Such a conception was, in his view, erroneous: unilateral acts should in fact be seen in terms of opposability or non-opposability. Validity was a quality of law: when parliament passed a law, it became valid, and thus binding. Unilateral acts, on the other hand, did not comply with the formal criteria that a law must meet in order to create legal consequences. Instead, they created legal consequences in particular circumstances, in which a State's conduct was interpreted as opposable by a certain number of other States.

⁵ See 2723rd meeting, footnote 2.

⁶ See *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1, para. 109, p. 100.

29. So much for academic abstractions. At the lowlier level of practice, during a visit to Norway in 1977, the President of Finland had informed his Norwegian hosts that Finland accepted Norway's claim to the continental shelf from the Norwegian coastline as far north as Jan Mayen. Ever since then, not a year had passed without Norway's reminding Finland that it had accepted that exorbitant claim. And, in terms of legal analysis, that was indeed correct: Finland was no longer in a position to contest Norway's claim, although any other State was certainly entitled to do so. In other words, while opposable, the statement by the President of Finland did not enjoy the kind of validity enjoyed by a law. The same applied, *mutatis mutandis*, to the legal transactions between France, Australia and New Zealand in the *Nuclear Tests* cases.

30. The relevance of that to article 5 was that, on the basis of his assumption that unilateral acts enjoyed validity, the Special Rapporteur went on to list certain conditions for invalidity, such as coercion, the threat or use of force, or a conflict between the act and a peremptory norm of international law. What was missing from the list was the most evident condition for invalidity—or rather opposability—of an act, namely, the simple case of a wrongful act, one contrary to law and to the State's obligations in the sphere of State responsibility. That omission was attributable to the fact that the Special Rapporteur was thinking in terms of law creation; by placing unilateral acts on the same level as law, the Special Rapporteur had concluded that a unilateral act could not constitute a wrongful act. That was a mistake. Clearly, a unilateral act could be non-opposable—or “invalid”, to use the Special Rapporteur's term—because it was a wrongful act under a general system of law that was valid and that gave meaning to particular actions of States by projecting upon them the quality of opposability.

31. While he was far from obsessed with academic distinctions, it should be recognized that they could sometimes throw light on some aspects of State behaviour and provide grounds for interpreting that behaviour in particular ways. The conceptual framework of unilateral acts was useful inasmuch as it indicated that in particular circumstances States might become bound irrespective of their wishes. The notion of validity, however, had no place in that conceptual framework. Furthermore, the Special Rapporteur's approach was also fundamentally flawed in that it considered only the role of the author State, ignoring the broader context. For all those reasons, he had serious doubts as to the suitability of the topic for codification.

32. Mr. SIMMA, referring to Mr. Pellet's criticisms of comments made by Mr. Koskenniemi at the previous meeting, criticisms that he found excessively dogmatic, said he fully subscribed to Mr. Koskenniemi's view that unilateral acts could be sources of obligation but not sources of law. On the other hand, he could not agree that the essential distinction between unilateral acts and sources of law was one of opposability versus validity. “Validity” was a word whose meaning differed from language to language, and the issue was, in his view, one of *Begriffsjurisprudenz*. He himself could see nothing wrong in describing a solemn promise made by a head of State in contravention of certain constitutional provisions as “invalid”.

33. He also had some reservations about Mr. Koskenniemi's criticism of article 5 (*h*). The problem seemed to stem from Mr. Pellet's use of the word *engager*. It was true that, in the broadest sense, any act of a State organ could entail the responsibility of the State: if a police officer beat a foreign diplomat to pulp, his State would be *engagé*. On the other hand, if a German police officer were to make a promise that Germany would never acquire nuclear weapons, the German State would clearly not be *engagé*. What the Special Rapporteur had in mind in article 5 (*h*) was the contractual or unilateral *engagement* of the State as a result of its statements, rather than as a result of acts entailing State responsibility.

34. As to the concern expressed by Mr. Koskenniemi about the absence of any reference in article 5 to the case of illegality of the unilateral act, it should be borne in mind that illegality in international law was still overwhelmingly a relative or bilateralist concept. Were State A to make a promise to State C, thereby violating some commitment entered into by States A and B, he would be loath to say with any confidence that the unilateral act in question was invalid. That raised the question of the distinction in international law between bilateral obligations and obligations *erga omnes*, which were themselves closely akin to *jus cogens* obligations, a category which the Special Rapporteur had already addressed in his original draft.

35. Finally, with regard to his earlier proposal concerning the desirability of undertaking a comprehensive study, it had not been his intention to involve an already overburdened Secretariat in such a study. What he had envisaged was that the Special Rapporteur, perhaps with assistance from other members, should draft a research project, on the basis of which private-sector researchers could be commissioned to produce a compilation of practice, possibly with funding from some non-political foundation.

36. Mr. PAMBOU-TCHIVOUNDA said he was deeply distressed. The Commission had just heard a plea for it to call a halt to its work on the topic. It was a bit too late for such a plea, however. The Commission was now at the stage when it had to decide whether it could and should fill in the row it had collectively hoed. He did not think it should. It could be argued that nothing had been accomplished, but that was not his impression. He agreed with Mr. Pellet that an analysis of means of revoking unilateral acts should be part of the Commission's future work. Did that mean that the analysis already carried out of means of elaborating unilateral acts should be thrown out with the bathwater? He did not think so.

37. Mr. Pellet had disputed Mr. Sreenivasa Rao's argument that a unilateral act could be revoked at any moment. In his own view, that was both true and not true. Under the law of treaties, the technique of denunciation was not unknown, but neither the 1969 nor the 1986 Vienna Convention indicated when a denunciation must be made in order to be considered admissible. It was the author of the denunciation who had the unilateral, sovereign capacity to determine the moment at which the denunciation was made. That was all the more true with a unilateral act: the author State might subsequently realize that the act should not have been formulated. Was the author State then in

bad faith in denouncing it? If the act had been formulated in good faith, the author State could be in equally good faith in recognizing that it should not have formulated the act. The key to the entire puzzle, reaching back to the *Nuclear Tests* cases, was good faith, and he thought a unilateral act could be terminated in good faith. The technique of revocation deserved its place in the study of means of terminating unilateral acts.

38. A second reason for his distress was the coupling of the regime for unilateral acts with the regime for State responsibility. The *Nuclear Tests* cases and the Ihlen declaration went up in flames when one contemplated the idea that a minor police official who roughed someone up was engaging France's responsibility. There was a difference, after all, between the White House taking action against an individual and someone in Harlem beating up that individual. The institution that had competence to engage a State's responsibility had to be seen in relative terms: one could not put the President of France and a French postal employee, for example, on an equal footing. The topic was difficult and complex enough without such unhelpful reasoning.

39. Another problematic issue was who could invoke invalidity in the context of unilateral acts. Was it open to any and all individuals to do so once there had been a declaration or an expression of will?

40. For his part, he thought that lessons should be drawn from all the work done and the discussions held so far on a topic that the Commission itself had not properly understood. Some things could be salvaged from the work on individual issues: for example, parts of the definition in article 1 should be deleted, but that did not mean the entire article should be expunged. Interesting things had been brought out about interpretation, and they too should be preserved. That was the work the Commission could now take up.

41. Mr. BROWNLIE said the topic was colossally difficult and the Special Rapporteur deserved every consideration for his efforts. He himself thought, and apparently a number of others agreed, that an expository study could be done on unilateral acts. The Government of his own country, in its reply to the questionnaire on unilateral acts of States, had said it considered that any approach which sought to subject the very wide range of unilateral acts to a single set of general rules was not well-founded and had suggested that an expository study be made of specific problems in relation to specific types of unilateral acts. In his opinion, it was a very good suggestion that should be pursued.

42. In the law of treaties, there was a matrix governing certain types of relationship and segregating them into treaty relations. That simply could not be done with unilateral acts: indeed, the phrase "unilateral act" was a very superficial description. All unilateral acts involved long relationships between States. In the *Temple of Preah Vihear* case, the relationship had prevailed for 50 years. The unilateral act had only had legal consequences there because of the ongoing relationship of the States concerned. Similarly, the Ihlen declaration had been made against a

background, in a particular situation, and some very respectable commentators thought it had not been a unilateral act at all but an informal agreement. The problematic outcome of the *Nuclear Tests* cases had startled everyone, and it was well known that ICJ had been avoiding the problem of dealing with a permanent member of the Security Council by casting about for grounds of inadmissibility. Even in that instance, there had been a relationship, namely litigation between the States concerned. It was extraordinarily difficult to find general rules to deal with such a variety of situations, each of which was fact-based.

43. Mr. TOMKA said he had understood Mr. Pellet to say that a unilateral act could be at the origin of an international rule. There was a difference, however, between being at the origin of a rule and being the source of a rule. Were unilateral acts truly sources of rules, vessels for the creation of rules of international law? If so, then a unilateral act was the start of a process of State practice which, in the form of custom, resulted in the creation of a rule of international law. But should any single State be able to create rules for others? He did not think many States would agree to that, as it would mean that the State was elevated to super-State status.

44. In the matter of causes of invalidity, a misunderstanding seemed to have arisen owing to disparities in the English and French versions of article 5 (f). The French text stipulated that the State that could invoke the invalidity of a unilateral act was the author of the act, whereas in the English text, the reference to the author was missing. To his way of thinking, it would be extraordinary if the author of an act had to invoke its invalidity: if it did not do so, did that mean the act was valid? Yet if the act conflicted with a peremptory norm of international law, it was null and void *ab initio*. Article 5 (f) would have to be reformulated.

45. Mr. PELLET said he agreed with Mr. Tomka that a single State should not be able to create rules for all others, not even if it was a super-State, which could and did exist, or at least one did, but that was a socio-political, not legal, phenomenon. He had already cited the example of a State's regulation of the right of passage through its territory, something which, he was convinced, was a unilateral act. But the validity depended on the relationship with a customary or treaty rule, namely another rule of general international law that authorized the State to act unilaterally. That was what had to be investigated, the validity and the effects of the unilateral act, and the Special Rapporteur had not yet done so.

46. He maintained his position that unilateral acts could create rules. Derivative rules, to be sure, but what rule in international law was not derivative? He did not much like Kelsen, but Kelsen was right about one thing: all legal acts presupposed an authorization of some kind, an enabling principle such as *pacta sunt servanda*, and unilateral acts were no exception.

47. As to Mr. Pambou-Tchivounda's remarks about States modifying unilateral acts whenever they chose, as ICJ had said in the *Nuclear Tests* cases, this was the very

opposite of the rule of good faith. Again, concerning the relationship of the topic with the regime of State responsibility, it was the Special Rapporteur who had raised the issue, and he himself thought it was worth pursuing rigorously. Did the fact that a State *could* engage its responsibility mean that it *did* engage its responsibility? As for the example of the police officer given by Mr. Pambou-Tchivounda, there were undoubtedly limits on the extent to which a State's responsibility could be engaged under unilateral acts. In fact, the Special Rapporteur raised that question but failed to respond adequately. He had never suggested that the work on the topic should be abandoned: on the contrary, he wanted to keep on trying to determine general rules rather than taking a case-by-case approach as suggested by the Government of the United Kingdom.

48. Mr. Koskenniemi was obsessed with the imprudent statement by Finland to Norway, but all States, not just Finland, did stupid things. In the *Frontier Dispute* case, Mali's Head of State imprudently declared that it did not matter where the boundary between Burkina Faso and Mali was placed. ICJ had ruled that such statements were not made with the intention of engaging oneself, and that Mali had accordingly not expressed a will to engage itself. He agreed with the Court: justice would not have been served if Mali's Head of State had been taken at his word. The Head of State had been speaking without the intention of engaging the State's responsibility, which was often the case with diplomatic and political discourse. Hence there had been no unilateral act because there had been no intention to produce legal effects. What should be investigated, however, was the point at which diplomatic discourse became something more and turned into an expression of will to engage a State. The Court looked at such questions, and there was no reason why the Commission should not do so also and seek to develop criteria.

49. In the case of the Ihlen declaration, Finland had made an untenable statement and could not be deemed to have engaged its responsibility. In any event, the statement had been addressed to Norway alone. The situation was thus entirely different from that of the *Nuclear Tests* cases, when ICJ had clearly ruled that a promise had been made to all States of the world, and that there had been a real expression of will that created an obligation for France, not *vis-à-vis* a given State but in general terms. Mr. Koskenniemi could not pick and choose what suited him among the decisions of the Court.

50. He did agree with Mr. Koskenniemi, however, that some unilateral acts of States were addressed to a single interlocutor. But there were also treaties that were binding and involved only one interlocutor. The effect of bilateral treaties on third parties was an extremely interesting question. ICJ was now reflecting on it in the context of the *Land and Maritime Boundary between Cameroon and Nigeria* case, in which Cameroon argued that it could invoke a commitment by Nigeria to a third State, Equatorial Guinea. Such were the problems posed by unilateral acts addressed to a single interlocutor, but they were also posed in the case of treaties, whether bilateral or multilateral with limited participation. He could not see why Mr. Koskenniemi wished to insist on the fact that unilateral acts were not law-making. Even if one used his highly re-

strictive definition of law, however, there were still times when unilateral acts were the origin of real rules.

51. Mr. Koskenniemi was very interested in the distinction between opposability and validity, but the two concepts came from two completely different areas. With regard to validity, one asked the question whether an act was in fact capable of creating obligations. Once that question was answered, one could ask for whom the act created obligations, and that could be termed opposability. A unilateral act would always be opposable to the party that had validly formulated it, but the question arose whether it was also opposable to other entities. Opposability was in vogue at present and could certainly be covered in the work on the topic, but he did not see how that would prevent the Commission from looking into the causes of invalidity.

52. On the Secretariat study referred to by Mr. Simma, he recalled that the Legal Counsel had clearly indicated that the Commission was entitled to request such studies. The Special Rapporteur was experiencing difficulty in finding examples of State practice, and the Secretariat had already shown on a number of occasions that it was capable of doing so remarkably well, for example in the areas of international liability and watercourses. The one caveat he would make was that the subject of the study must be clearly delineated, perhaps by a working group.

53. Mr. BROWNLIE, referring to Mr. Pellet's argument in favour of developing a general concept and his opposition to a sectoral approach, said that he failed to see what the force field could be that would provide a real basis, and not just a concept, for a general, unitary study of the subject of so-called unilateral acts. The phrase "unilateral acts" was hopeless. It was a sort of short form for describing the impossible, whereas it would be much more useful and realistic to have a description of what was in fact the conduct of States. The Commission was not talking about unilateral acts, or, rather, it *was* to some extent, for the *Temple of Preah Vihear* case had involved not a single unilateral act but a whole pattern of acts lasting 50 years. To use the phrase "unilateral acts" was to stop well below the threshold of decent analysis. Sometimes no act at all was involved. Most cases involved the conduct of States, including silence, always within a particular context of the relations of the States concerned. Even in the event of a one-off promise in the academic context in which there were no previous questions raised between the two States, once the promise was made there would probably be some development of a relationship.

54. One form of conduct consisted of evidence of a State's attitude. A large number of decisions by international tribunals existed in cases in which the attitude of the State constituted decisive evidence. The attitude might include conduct, statements or silence on certain matters. It was very common for a court to note that a State had remained silent or had not denied a particular fact. In the *Corfu Channel* case, the decision of ICJ on Albania's means of knowledge regarding the mines in the Bay of Saranda had been based in part on Albania's attitude. Thus, it was very difficult to find a unitary subject, and

even the sectoral approach would be problematic to apply in practice.

55. Mr. Sreenivasa RAO said that he had always been in favour of the topic of unilateral acts and appreciated the Special Rapporteur's effort to pinpoint its basic thrust. Unilateral acts were a very important means of expressing States' attitudes and behaviour. Even though by themselves they might not be fully realized legal acts, unilateral acts were certainly a major element in the eventual creation of an international obligation: by response, reaction, silence, and in other ways. As long as the Special Rapporteur focused solely on the formulation of the act—in other words, its initiation—he was confining himself to one side of the question and not showing when the unilateral act, alone or with something else, could be treated as a legal obligation. Mr. Pellet had seemed to indicate that there were a number of ways that could be done. But the draft articles had not yet provided the opportunity to see what the other side of the story was before it could be said that a unilateral act had become a legal obligation. In considering whether a unilateral act could create a legal obligation, it was also important to ascertain how a legal obligation could be terminated.

56. It had been asserted that obligations arising out of unilateral acts were no different from those arising out of treaties. Both could be terminated by various means. If that was the case, a unilateral act without any other constraint upon the State, such as estoppel or acquiescence, could easily be terminated by the State. A unilateral act must be addressed in context, which would help in determining whether the act gave rise to a legal obligation. However, the legal obligation did not arise automatically. Some countries sincerely believed that when they made a statement, it entailed certain obligations. But that was still unilateral in the sense that States were free to rescind it as they wished. Unless all the above factors were also considered, a unilateral act would remain an interesting act, but that would be the end of it.

57. Mr. GAJA said that Mr. Pellet might have overstated his case in arguing a distinction between validity and opposability. He appeared to be saying that once a State intended to be bound, a valid unilateral act existed, even if the act was only opposable to that State. In his own view, a unilateral act could not be seen in total isolation from other States. Without at least bilateral relations in the sense of the act's producing consequences in relation to another State, there was nothing that could be considered binding under international law. That did not mean that issues of validity could not be distinguished from those of opposability. The example given by Mr. Simma of a head of State who made a statement without having the required competence would raise questions of validity, while the opposability might depend on the circumstances, might affect just one other State or more States, and so on. If an act was not opposable to any State, then there was no need to bother about validity.

58. Ms. ESCARAMEIA said that she saw a need for some general theory on unilateral acts. If the Commission confined itself to the four acts referred to by the Special Rapporteur, it might miss many others that could also be

regarded as unilateral acts of States. A unilateral act of a State was one whereby the State wanted to produce certain effects, but she found it troubling that those effects had to be obligations. She also questioned the suggestion that there had to be a bilateral or trilateral relationship: the relationship could be *erga omnes*. To cite an example, the President and the Minister for Foreign Affairs of Portugal had made repeated declarations in favour of the right to self-determination for East Timor. It was a unilateral act by a State in an international forum by which it sought to produce effects. It was not really a question of opposability; some unilateral acts were addressed to the international community as a whole in order to reassert or interpret existing law. Hence her misgivings about contextualized situations. Many acts fell within the general category of unilateral act, but they were not covered by promise or waiver. That was an additional reason why a general theory was needed. It was possible because there were rules that applied whenever a State wanted to formulate a unilateral act—questions such as who could formulate such an act, how it could be considered valid, how to ensure that it did not contain any defects, and so on. Many other rules could also be applied. If the Commission simply took a straightforward view of what a unilateral act was, it could go quite far with a general theory. Some rules applied to all situations. If the Commission became involved in a discussion of whether or not unilateral acts were sources of international law, a question which was not necessary for its work, it would cause enormous problems, which could be avoided to some extent.

59. Mr. KAMTO said that he fully agreed with Mr. Pellet's comments on validity and opposability. An act that was not valid resulted in the non-opposability of that act. Thus, it could be said that the two were linked, although conceptually there was a difference.

60. It was the first time the Commission was dealing with a subject on which so much jurisprudence existed. Reference had been made to the *Eastern Greenland* and *Nuclear Tests* cases, as well as others in which the question of unilateral acts was touched upon. The Commission had not invented the concept. At the present stage, the Commission should be constructive and express its view on Mr. Pellet's proposal. How could it move ahead with the topic? Mr. Simma had made suggestions a few days earlier, which he endorsed: to define a body of general rules on unilateral acts concerning their formulation and their validity—in other words, conditions for a unilateral act in the legal order.

61. The question of effects was another aspect which, owing to the great diversity of unilateral acts, might focus on the four categories in the report. In so doing, the Commission would render great service to the international community. The point was to decide what could be considered a unilateral act and what could not, for not all declarations of States were unilateral acts. The proposals deserved to be examined. He endorsed the suggestion for a study of practice, which should probably be undertaken by a working group, and shared the view that not everything produced by the Special Rapporteur so far needed to be abandoned. Some draft articles and criticism were drafting matters rather than problems of general orienta-

tion, for example the tautology of speaking of both will and intention. The Commission could then focus on the specific categories of effects.

62. Mr. BROWNLIE said that it was fine to sound constructive, but it was another matter to *be* constructive. None of the previous speakers had produced any solid evidence of the existence of general principles. Mr. Kamto had invoked the case law of ICJ in support of the idea that there was a general concept of unilateral acts. But that was not so. Each case was fact-related. The Court did not rely on a general theory of unilateral acts. The *Temple of Preah Vihear* case, for instance, made no reference to such a theory.

63. Mr. PELLET pointed out that, in the *Nuclear Tests (Australia v. France)* case, ICJ had clearly said, "It is well-recognized" [para. 43]. That itself was a generalization, and an interesting one.

64. If it was not possible to generalize, this meant that everything depended on the circumstances. That was true, of course, but it did not release the Commission from the task of seeking to identify a small number of legal rules that made it possible to say that, in specific circumstances, States committed themselves through their unilateral expressions of will. He failed to see how the opposite could be affirmed. It was the very function of law and of those who codified it to try to unite what appeared to be diverse. It was pointless to assert from the outset that the goal could never be reached. A small number of principles would be open to interpretation, but that was a job for jurists. Thus, he agreed with Mr. Brownlie's point of departure but was in full disagreement with his conclusions.

65. Mr. BROWNLIE said that the *Nuclear Tests* cases were usually cited in respect of the principle of good faith. Perhaps the Commission should be studying *that* principle.

66. The CHAIR, speaking as a member of the Commission, said he hoped that the Special Rapporteur would address the ideas presented by Mr. Simma.

67. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that, owing to time constraints, he would address only some of the comments made in the discussion and would revert to all the issues in greater detail in his reply later on. To start with Mr. Brownlie's last point, he did not think that unilateral acts could be confined to the decisions of ICJ on the *Nuclear Tests* cases. The *Frontier Dispute* case and many other decisions should also be taken into account, as well as unilateral declarations in general. The Commission could not disregard existing jurisprudence and doctrine on unilateral acts or the views of Governments, which had expressed their positions both in a questionnaire and in the Sixth Committee. Questioning the existence of such an international legal act as a unilateral act would not be appropriate within a broad concept of international law in which a State could assume international commitments,

not just in the usual way (through a convention) but also through a unilateral act.

68. The suggestion of leaving the topic in abeyance might be considered, but he did not think the Commission should change its course, because that would introduce uncertainty and create legal and political confusion regarding whether unilateral acts did in fact exist in international law. If the Commission were to restrict itself to a study, would it not be possible to arrive at a definition and develop an overall theory of unilateral acts, or at least rules applicable to them? Of course, the Commission could not attempt to regulate unilateral acts, because they were very diverse and produced different legal effects; they could not all be lumped together. It was possible to draw up rules, but perhaps not to regulate the legal effects in all cases.

69. The Commission would need to comment on the rest of the chapter and decide what to refer to the Drafting Committee: presumably the definition and the first two articles. The Working Group could then address issues related to interpretation and other aspects.

The meeting rose at 1 p.m.

2727th MEETING

Thursday, 30 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

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

[Agenda item 2]

1. The CHAIR said that, following informal consultations, it was being proposed that the functions of Special

* Resumed from the 2721st meeting.

Rapporteur for the topic of “Shared natural resources” should be entrusted to Mr. Chusei Yamada.

It was so decided.

Unilateral acts of States (continued) (A/CN.4/524, A/CN.4/525 and Add.1 and 2,¹ A/CN.4/521, sect. D)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

2. Ms. XUE said that unilateral acts of States were one of the most complicated areas of international legal relations and that this explained why the Commission was divided on the question after a most stimulating debate. Perhaps the Commission should take some time to consider the direction of its work so that it could best benefit from the Special Rapporteur’s efforts. The complexity of the topic could be attributed to the wealth of State practice in respect of unilateral acts. States often made different kinds of declarations or statements that could contain a promise, protest, recognition or waiver, and a commitment made unilaterally could become an obligation, often as part of a settlement procedure by a third party. However, unlike treaty relations, unilateral acts were full of uncertainties as to the legal intention, the extent of their effects in time and in scope, and their relationship with existing treaty obligations. Circumstantial evidence thus became important and even essential in determining whether the author of a unilateral act was bound by the act. Like international courts, States became very cautious whenever it came to legal rights and obligations. That explained why the Special Rapporteur had drafted clauses comparable to those of the 1969 Vienna Convention on competence, invalidity and the interpretation of unilateral acts. However, there were certain points about which the Commission should be very careful.

3. First, in the case of treaties, there were, both domestically and internationally, certain and authoritative procedural rules which gave legitimacy to treaty provisions as a source of law. In addition, the legal intention to be bound by the provisions of the treaty was unequivocal to all parties. Those subjective and objective factors were, however, often absent in the case of unilateral acts, and that lacuna could not be filled by doctrine and research work alone, not because unilateral acts were poorly made but because their beauty often lay in ambiguity.

4. Second, the question whether unilateral acts were a source of law or a source of obligations was the result of confusion between the making of rules and the production of legal effects. If a unilateral act was placed in a specific context in real life, it would be found that in some circumstances it could create an obligation for the author State, that the obligation often determined the future conduct of that State and that other States might rely on that conduct. Whether as rights or as obligations, however, the legal effects of a unilateral act could not stand on their own; they must be governed by international law. A State could not make or recognize any territorial claim on Ant-

arctica or claim more than a 12-nautical-mile territorial sea nowadays. If the Commission took unilateral acts out of the context of existing law, particularly treaty relations, and treated them as purely creating legal effects in terms of rights and obligations, it might easily get disoriented because it was placing too much emphasis on criteria for the formulation of such acts. In international law, various types of unilateral acts, such as recognition, could have an impact on international relations, and that was more a matter of concern than the conditions and criteria under and according to which such acts were formulated. It was therefore surprising that, while the Special Rapporteur had adopted a number of clauses from the 1969 Vienna Convention, he had not included the words “governed by international law”, as contained in that Convention (art. 2), in his draft article 1.

5. Third, the introduction of certain rules on unilateral acts would serve a useful purpose for the stabilization of international relations, but, given its nature, the topic of unilateral acts should be treated with care. Before one could look for a general pattern of behaviour, however, there must first be a thorough study of State practice in that regard. Mr. Simma’s offer to assist the Special Rapporteur to carry out a comprehensive study of State practice would certainly be a valuable contribution. Until that had been done, it would be too early to decide whether the work should be done on a general basis or should begin with a study of specific unilateral acts.

6. Mr. CANDIOTI said he hoped that at the current session the Drafting Committee would consider draft articles 1 to 4, which had been referred to it at the fifty-second session of the Commission.² Since then, the Special Rapporteur had submitted new draft articles and had put forward some ideas on how the future work on the topic might be structured. In paragraphs 48 to 81 of his fifth report (A/CN.4/525 and Add.1 and 2), the Special Rapporteur came back, with new considerations, to the question of the definition of unilateral acts (draft art. 1) and concluded by repeating his earlier proposal. That called for four comments.

7. In the first place, there should be a clear indication of the strictly unilateral nature of that type of act, since, as ICJ had stated in the *Nuclear Tests* cases, a unilateral act required no form of expression of will on the part of any subject of international law other than its author. Second, the term “unequivocal”, which characterized the expression of will, was not necessary because it involved a problem of interpretation rather than a problem of definition. Third, the words “in relation to one or more other States or international organizations” might be replaced by simpler wording, particularly because, as members of the Commission had already pointed out, a unilateral act could be formulated with the intention of producing legal effects *erga omnes* or legal effects for entities which were neither States nor international organizations. What was important was that the act had consequences for the international legal system. The condition that States or international organizations must know about the expression of will was redundant, since, if it was expressed, will was

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

² See *Yearbook ... 2000*, vol. II (Part Two), pp. 88–90, paras. 517–525.

externalized and there was thus a possibility that it was known. Another element which should be included in the definition of a unilateral act and which would distinguish it from the definition of a treaty contained in the 1969 Vienna Convention was the non-relevance of the form in which will was expressed, to which ICJ had also drawn attention in the *Nuclear Tests* cases. It would therefore be better to opt for a simpler definition of a unilateral act, which would read: "For the purposes of the present articles, 'unilateral act of a State' means an expression of will, whatever its form, formulated by a State with the intention of producing legal effects at the international level and not requiring any expression of will by another subject of international law."

8. With regard to the causes of invalidity of a unilateral act, the Special Rapporteur reformulated the rule contained in the former article 5 stating eight causes of invalidity in draft articles 5 (a) to 5 (h). That reformulation covered the idea of a collective or joint unilateral act, a case which must be provided for, but which would be better dealt with in a separate provision or in the commentary in order to simplify the text and avoid confusion with a multilateral act. Such a detailed analysis of the content and wording of the eight causes of invalidity was perhaps not necessary at the current stage because practice and jurisprudence in respect of the invalidity of unilateral acts had not yet been sufficiently studied. It would be better to state a general rule on the conditions of validity of such acts, namely, whether their content was materially possible, whether they were lawful in international law, whether the State's organ had the capacity to perform unilateral acts, whether there was any defect in the expression of will, whether the expression of will was a matter of public knowledge and whether the intention was to produce legal effects at the international level. Without such a general provision, the various causes of invalidity could be grouped under two headings, that of the wrongfulness of the act and that of a defect in the expression of will. The Working Group which had discussed that question at the preceding session should meet again to consider draft articles 5 (a) to 5 (h) in detail, bearing in mind the comments and suggestions made during the debate.

9. In his fifth report, the Special Rapporteur also submitted new wording for the draft articles on the interpretation of unilateral acts contained in his fourth report.³ The new wording was based on that of the 1969 Vienna Convention and on the principle that a unilateral act was always a written declaration or document, whereas more general and flexible rules than those governing the interpretation of treaties had to be established. An expression of will did not necessarily have to be written and did not necessarily take the form of a single act or declaration. In paragraph 127 of the fifth report, the Special Rapporteur drew attention to the basic criteria which had been adopted by ICJ in the *Fisheries Jurisdiction (Spain v. Canada)* case and which had included that of trying to determine whether, by its unilateral act, the State had had the intention of producing legal effects at the international level by deducing that intention from a natural and reasonable interpretation of the expression of will, taking into account the context

and circumstances which had prevailed at the time of the expression of will—including the level of confidence or legitimate expectations which the unilateral act might have created in other actors—and the purposes intended to be served. The two draft articles on interpretation should therefore be referred to the Drafting Committee, which should be requested to include all those elements in a sufficiently broad general rule on the interpretation of unilateral acts by relegating to the commentary details such as the use of preambles and preparatory work, on the understanding that it might later be necessary to draft rules of interpretation that were specific to certain categories of acts.

10. In paragraphs 136 to 147 of the fifth report, the Special Rapporteur dwelt at length on the classification of unilateral acts according to their legal effects, a task he considered not only possible but also necessary. That classification would perhaps be premature until the Commission had made more progress in collecting and analysing information on State practice. In that connection, there were points in common in legal writings, which had been reproduced by Governments in their replies to the questionnaire or in their statements in the Sixth Committee on the four classic categories of unilateral acts (promise, recognition, protest and waiver) referred to by the Special Rapporteur, who pointed out himself that some unilateral acts combined the characteristics of several of those categories.

11. In chapter II of his fifth report, the Special Rapporteur drew the Commission's attention to a number of questions, including that of the time when the unilateral act produced legal effects, and proposed the corresponding draft articles. Draft article 7, which was based on article 27 of the 1969 Vienna Convention, stated that a unilateral act was binding in nature. That provision did, of course, apply to acts such as promise, which were formulated with the intention of creating an obligation for their author, but it could not serve as a general rule, in that it could not necessarily be said that protest, for example, was binding on the State which formulated it. At the present stage in the study of the topic, an *acta sunt servanda* provision could not go much further than a statement of the author State's duty to adopt consistent conduct in respect of that act, taking into account the principle of good faith and the need to respect the level of confidence and legitimate expectations created by the act, and also bearing in mind the diversity of unilateral acts. It was only when the Commission had moved on to specific categories of unilateral acts that the legal consequences of each act could be stated more specifically. Consideration would be given, for example, to the binding nature of promise, the opposability of recognition, and the questions of non-opposability in the case of protest and irrevocability in the case of waiver.

12. In chapter IV of his fifth report, the Special Rapporteur dealt with the structure of the draft articles and future work on the topic, which he divided up into one part on rules that were common to all unilateral acts and another part on the rules applicable only to a certain category of acts. That proposal was acceptable as a starting point and should be referred to the Working Group for the necessary

³ See 2723rd meeting, footnote 2.

improvement and reformulation. For example, the second part, on specific rules, should not be limited to the rules applicable to promise or unilateral acts by which States assumed obligations. It should also include specific rules relating to other categories, such as the need for waiver to be explicit, the need to maintain protest and the possibility of withdrawing it, and the form and consequences of recognition and methods and limits of revoking it. Some of the questions introduced on a preliminary basis in chapter IV also related to rules that were specific to a particular category of acts and to some general rules as well. The Working Group would have to consider all those questions in detail.

13. It was also to be hoped that many other States would follow the example of those which had already provided information on their practice in respect of unilateral acts. Mr. Pellet's suggestion that the secretariat should be requested to draw up as broad as possible an inventory of State practice, particularly recent and contemporary practice, was very appropriate and might be supplemented by Mr. Simma's proposal that an institution might provide support for research on the question. With the assistance of an informal working group, the Special Rapporteur should therefore draw up a schedule of work defining the purpose of the research and focusing on an analysis of practice based on specific examples of the four classic categories of unilateral acts. When that information had been made available, the Commission would be able to decide what further work had to be done in order to give final shape to general and specific draft rules. He therefore proposed that the Commission should take a decision in favour of the proposals by Mr. Pellet and Mr. Simma.

14. Mr. SIMMA said that the very small number of States which had replied to the questionnaire on their practice in respect of unilateral acts could perhaps be explained by the fact that such acts were present everywhere in State practice. His own proposal had been that financial support should be sought from an institution in Germany, and that would mean that the request would have to be made by a German academic. He was therefore prepared to make that request, together with the Special Rapporteur. That proposal and the one relating to intervention by the secretariat were not mutually exclusive. It was simply a matter of finding a good way of combining them.

15. Mr. DAOUDI said that, although the fifth report contained a wealth of information, he was not sure whether the rules formulated in it applied to all unilateral acts, which constituted a heterogeneous category with different legal regimes, effects and methods of formation. Before defining unilateral acts, a vertical approach should be taken in order to deal in greater depth with each of the acts in question, thereby allowing for the possibility of subsequently adopting a horizontal approach in order to determine whether such acts had common characteristics on the basis of which general rules, and then special rules, could be established for certain types of acts. A definition, which should come at the end of the study, should therefore not be adopted at the present time. The vertical study in question should be done on the basis of State practice because, while doctrine and jurisprudence were secondary sources of international law, they were not enough in the

present case. The study should, moreover, not be limited to the practice of the very small number of States which had replied to the questionnaire. A study of the practice of unilateral acts in international law, which might be carried out by the secretariat, possibly with the assistance of a research institute, as Mr. Simma had proposed, would therefore be desirable.

16. In theoretical terms, unilateral acts were a fact of international law. Their legal value could, of course, be based on the principle *pacta sunt servanda*, but in practice the binding nature of unilateral acts was based on the principle of good faith and concern to guarantee the security of international legal relations. Unilateral acts were not sources of law, but in some conditions they were binding on the States which had formulated them.

17. As far as conditions of validity were concerned, it would be a good thing, as the Special Rapporteur proposed, to use, *mutatis mutandis*, the criteria of article 7 of the 1969 Vienna Convention on the question of who could bind the State. It would nevertheless have to be determined in State practice whether other organs could bind the State in specific areas. The references to the provisions of articles 7 and 8 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session,⁴ and to article 4, as one member had proposed, did not need to be included, however, because what was involved was not responsibility but an expression of will that was binding on the State and could not be formulated simply by an official of the State.

18. With regard to the lawfulness of the purpose of the unilateral act, account should be taken not only of the case of a unilateral act that was contrary to *jus cogens*, as referred to by the Special Rapporteur, but also of a unilateral act that was contrary to customary law, as illustrated by the example of a 1980 declaration by the Syrian Government setting the limit of Syria's territorial waters 35 kilometres from the coast. Since that decision had given rise to strong protests, particularly by the United States which had said that it recognized only the usual three-nautical-mile zone, Syria had gone back on its decision in order to comply with the rule recognized by the law of the sea. In that case, a unilateral act which was contrary to customary rules had given rise to protests, namely unilateral acts challenging the validity of that act. However, where other States were silent, it was not to be ruled out that a unilateral act was signalling the start of a change in international custom and of a new practice which would be borne out by legal decisions.

19. Referring to the distinction between absolute invalidity and relative invalidity, he pointed out that only the author State could challenge the competence of the person who had formulated the unilateral act. He was not sure that the other States could invoke that argument.

20. In the case of unilateral acts which were contrary to a decision of the Security Council, a distinction had to be made. He was not sure that invalidity could be invoked because the act in question was contrary to recommenda-

⁴ See 2712th meeting, footnote 13.

tions made by the Council under Chapter VI of the Charter of the United Nations, which were not being implemented by States, as could be seen in practice. A unilateral act that was contrary to a decision taken by the Council under Chapter VII of the Charter of the United Nations would, however, be null and void. Article 103 of the Charter did not refer to the problem of the invalidity of a unilateral act, but did indicate that the principles of the Charter took precedence over unilateral acts which contradicted them.

21. Referring to the question of interpretation, he pointed out that unilateral acts were often prepared very rapidly in ministries of foreign affairs and usually did not involve preparatory work.

22. Mr. GAJA, referring to the point made by Mr. Daoudi as to who could invoke the invalidity of a unilateral act, said that in the example of the declaration by the Government of Syria relating to the extension of its territorial waters, it was the States other than the author State of the act which had questioned the validity of the act because of the adverse effects it would have had on those other States.

23. The CHAIR, speaking as a member of the Commission, asked Mr. Gaja whether he thought that the possibility of invoking invalidity was limited to the States which were affected by the act, and whether it could be considered that there were acts which affected some States and others which affected all States and that that determined whether or not States could react to a unilateral act.

24. Mr. GAJA said that, in the case of the law of the sea, all States were affected. In other situations, only some States were affected by the act, such as States bound by a particular treaty.

25. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), summing up the debate on the topic of unilateral acts of States, said that the sometimes critical but very constructive comments which had been made on his report had related to the topic in general and the feasibility of his study, with some members questioning whether unilateral acts really existed in international law and whether it was important and possible to formulate rules governing their functioning. Specific questions had also been raised about the texts submitted for the Commission's consideration.

26. With regard to the general comments, one member of the Commission had said that he was concerned about the lack of progress on the study, since some basic questions had still not been solved after five years of work. No progress could be made, however, until the Commission had reached a minimum agreement on how the topic was to be treated. A theoretical approach was essential, but so was a practical approach. The Commission must consider the topic in depth and take account of the opinions of Governments, which were to be found not only in their replies to the questionnaire but also in their statements in the Sixth Committee. He therefore agreed with Mr. Simma's proposal that a mechanism should be set up to carry out a study of State practice with the assistance of an outside private institution. The members of the Commission might thus transmit information on their countries' practice, as he had requested them to do in the last

few years, but without focusing on the most recent cases, which might be controversial.

27. Various trends had taken shape during the debate. For some members, it was impossible to codify unilateral acts, particularly because they did not exist as such in international law and did not produce legal effects. In other words, they were not sources of international law or international obligations. For other members, the topic was very difficult and the approach adopted would have to be reviewed if progress was to be made. Still others had said that, although they had some doubts, they thought that the subject matter was codifiable and that rules had to be established in order to guarantee legal relations between States. One member had thus suggested that the Commission should first make sure that unilateral acts existed and then, if so, determine which regime was applicable to them. For the vast majority of members, and in his own opinion, unilateral acts did exist. They frequently came up in the news, and that was the first thing to be taken into account, but they did not always involve a legal commitment. It then had to be determined whether such acts were political or legal in nature and, if they were legal, to which category of legal acts they belonged. The Commission's study related to acts which were, above all, unilateral from the formal point of view, but which, at the same time, produced effects in and of themselves. It had been said that the intention of the State was a basic element for determining the nature of the act. Would the expression of the unilateral will of the State then be enough for the act to produce legal effects? The question was whether such acts were truly unilateral, in other words, not conventional and thus the possible subject of specific rules, and particularly whether they could be regarded as legal acts in the strict sense of the term, namely, as producing legal effects. In the majority view, a unilateral act could be binding on the author State, subject to certain conditions of validity. The jurisprudence did not focus on the judgments handed down in 1974 by ICJ in the *Nuclear Tests* cases, even if it was a major reference for the study of one of the unilateral acts that was best defined in doctrine, namely, promise. Other important decisions had been handed down in various cases, including the *Temple of Preah Vihear* case and the *Fisheries Jurisdiction (Spain v. Canada)* case. In all those decisions, the Court had stated that the unilateral acts in question were of a *sui generis* nature because of the way they were formulated, which was different from the way a conventional act was formulated.

28. In chapter II of the fifth report, attention was drawn to the need to formulate a rule on the binding nature of unilateral acts which might be defined by reference to the principle *pacta sunt servanda* contained in the 1969 Vienna Convention. Such recognition would be a step forward in the codification of the rules applicable to unilateral acts. It might be possible to draft a provision defining a principle *acta sunt servanda*, but that question would require further study by the Working Group which would meet the following week.

29. Some members had expressed the view that unilateral acts were not an institution in their own right, but rather acts which were not related to existing institutions. Others had taken the view that such acts did not create obligations for States, but only expectations, and that there was

therefore no need to formulate generally applicable rules. For still others, legal relations were not limited to those deriving from a treaty or a customary rule, and the State could be bound by other means, such as a unilateral act, which, in some members' opinion, was a well-established institution in international law, an opinion he shared. A unilateral act was not a source of law within the meaning of Article 38 of the Statute of ICJ, which was the main reference as far as methods of creating rules of international law were concerned. However, unilateral acts could be a source of obligations. One member had asked whether there must be reciprocity. According to doctrine and jurisprudence, the main characteristic of unilateral acts was that, in order to be valid, they did not require acceptance or any other reaction by the other party in order to produce legal effects. Reciprocity must, moreover, be distinguished from the interest of the author State. It should also be noted that reciprocity was not always present even in the conventional sphere, since a treaty could involve commitment without reciprocity.

30. Some members had said that it would be better to restrict the study to two unilateral acts, namely, promise and recognition, since general rules could not be formulated because the variety of possible subject matters was far too great. In his view, it was possible to draft common rules on the formulation and interpretation of unilateral acts. A unilateral act was a unilateral expression of will, which was the same in all cases, whatever its content or legal effects. It was the intention of the State which gave a legal effect to each of the four recognized types of unilateral act, namely, recognition, waiver, promise and protest. Some members had expressed the view that what was important was the effects produced rather than the intention. In order to determine the legal effects of an act, however, it was first necessary to determine its nature and, accordingly, to determine the intention of the author of the act, and that involved an interpretation. He therefore believed that it was possible to formulate a common definition and common rules applicable to all acts. That would be the task of the Working Group.

31. The topic was definitely complex, but the work on it could continue if a consensus could be reached on certain points. The majority of the members of the Commission appeared to share that opinion. Some had proposed that there should be a pause so that progress could be made on the study of State practice, but he did not agree. His view was that the Commission could continue what had been started and go on to consider practice later.

32. He was opposed not only to a pause but also to the total abandonment of the topic, as had been proposed by one member of the Commission, since such a decision would contradict the Commission's earlier message to the international community that the security of international legal relations was important and that the codification of the operation of unilateral acts might help build confidence in such relations. He therefore proposed that the Working Group should first try to formulate rules that were common to all acts and then focus on the consideration of specific rules for a particular category of unilateral act, such as promise or recognition.

33. Referring to the comments that had been made on various points dealt with in the fifth report, he said he believed that the members of the Commission generally agreed that the definition of a unilateral act contained in draft article 1 could apply to all the acts in question. Some members had, of course, expressed doubts about the need to characterize the expression of will as "unequivocal", had referred to the probably ambiguous nature of some of those acts and had asked whether a unilateral act really had to be "known". All those questions might be solved by the Drafting Committee. It had also been pointed out that consideration should be given to the possibility of broadening the category of addressees of a unilateral act to include entities such as liberation movements, in addition to States and international organizations. That point might be dealt with in the commentary if it was not dealt with in the body of the article itself, but that, too, was for the Committee to decide.

34. With regard to the formulation of a unilateral act and, in particular, the persons authorized to act on behalf of the State and bind it at the international level, two trends of opinion had taken shape. One wanted to limit capacity to formulate a unilateral act to very specific persons, including those referred to in article 7 of the 1969 Vienna Convention, while the other, which was larger, considered that such capacity had to be extended to other persons, if not every person authorized by the State to formulate unilateral acts likely to affect other States. In that connection, some members of the Commission had drawn attention to paragraph 93 of the report, which referred to articles 7 to 9 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session. What he had meant to say in that paragraph was that the extension of responsibility provided for in those articles or perhaps in article 3 was not valid or applicable in the case of unilateral acts because the two subject matters had evolved differently in international law and the considerations to be taken into account were also different.

35. With regard to conditions of validity and causes of invalidity of unilateral acts, some members had indicated that it would be better not to draw a distinction between absolute invalidity and relative invalidity, while others had been of the opinion that such a distinction might be quite useful. In his own opinion, the concept of "absolute" or "relative" invalidity played an important role in determining who could invoke the invalidity of an act. As was indicated in the report, when the act in question was liable to be absolutely invalid, as in the case of an act which was contrary to a preemptory norm of international law or an act formulated under coercion, any State could invoke its invalidity. That was in the general interest, whereas in the other cases the problem was different. Capacity to invoke error as a cause of invalidity belonged to the State concerned, and in that case invalidity was relative. The act could be confirmed by the author State, either explicitly or by means of subsequent conduct, as unambiguously provided for in the Vienna regime on the law of treaties. In that connection, another question arose. In the case of protest, it was the addressee State which could invoke the invalidity of the act on the grounds of an error or any other cause of relative invalidity. In the case of promise, it could be invoked by the author State. The situation varied

according to the act, but that did not mean that a rule applicable to all unilateral acts could not be formulated. The possibility of invoking the invalidity of the act would be left to a State—either the author State or the addressee State—or, in other words, to the States which had established a contractual relationship.

36. He recalled once again that a unilateral act necessarily produced bilateral legal effects, but that did not mean that it was of a conventional nature and that it was therefore subject to the Vienna regime.

37. With regard to articles 5 (a) to 5 (h) on causes of invalidity of unilateral acts, some members had rightly pointed out that the word “consent” referred to the law of treaties and therefore did not belong in the context of unilateral acts. As to the nonconformity of a unilateral act with a peremptory norm of international law (*jus cogens*), he agreed with the suggestion that account should also be taken of article 64 of the 1969 Vienna Convention, which related to the emergence of a new peremptory norm of general international law (*jus cogens*). Referring to the invalidity of a unilateral act as a result of nonconformity with a decision of the Security Council, some members of the Commission had indicated that it was necessary to specify whether the decisions concerned included only those taken under or in the framework of Chapter VII of the Charter of the United Nations, which were binding, or also those taken in the framework of Chapter VI of the Charter. Perhaps only those adopted under Articles 41 and 42 of the Charter would be taken into account. Some members of the Commission had referred to the invalidity of a unilateral act as a result of nonconformity with an earlier obligation assumed by a State either conventionally or unilaterally. In his own view, that would not be a case of the invalidity of the act or of a defect of validity, but a case of conflict of rules, which was governed by the Vienna regime in provisions that were different from those relating to the invalidity of treaties.

38. Situating the topic of unilateral acts in relation to other topics on the Commission’s agenda, particularly that of State responsibility, he recalled that, in the latter case, the act or omission by which a State engaged its international responsibility was usually, if not always, a unilateral act. It was a wrongful act which created a separate situation and to which the concept of invalidity did not apply. An act contrary to international law, a unilateral act which constituted a breach of an international obligation, was a wrongful act, and a wrongful act was invalid and produced no legal effects. It was then international responsibility which came into play.

39. Noting that the use of the word “invoke” in the text of the articles had been considered unnecessary, he said that that term appeared in the corresponding provisions of the 1969 and 1986 Vienna Conventions. In the text under consideration, it referred to the possibility that a State could invoke a cause of invalidity. The invocation of invalidity was something different. In any event, invalidity could be determined only by a court.

40. Important comments had been made on the interpretation of unilateral acts, which was dealt with in draft

articles (a) and (b). Although some members of the Commission thought that it was too early to discuss that question, he was of the opinion that the rules of interpretation, which were essential, should be considered now. Only interpretation made it possible to determine whether an act was unilateral, whether it was legal, whether it produced legal effects and thus bound the author State and whether it was not covered by other regimes such as the law of treaties. It had been emphasized in the Commission and in the Sixth Committee, moreover, that common rules of interpretation could apply to the unilateral acts falling within the scope of the topic. With regard to rules of interpretation, in particular, comments had been made on the reference to the intention of the author State. He repeated that its interpretation must be done in good faith and in accordance with the terms of the declaration in their context, namely, the text itself and its preamble and annexes. The determination of the intention of the author State was indispensable. It could be deduced not only from the terms of the oral or written declaration, in the particular context and in accordance with specific circumstances, but also, when it was not possible to determine the meaning according to the general rule of interpretation, from additional means, such as the preparatory work. Since doubts had been expressed about the use of preparatory work, however, he had placed that term in square brackets in article (b). He nevertheless believed that, despite the problems which might arise, it was possible to use the preparatory work, such as the internal correspondence of ministries of foreign affairs or organs of the State which had taken part in the formulation of the act. In any event, there was nothing to prevent the use of such supplementary means of interpretation, provided that it was combined with an expression such as “when that is possible”, “as necessary” or any other wording referring to the possibility of using the preparatory work, while recognizing that that was neither easy nor frequent.

41. Some members of the Commission had drawn attention to the need to refer explicitly in the text to the restrictive nature of interpretation. That interesting point might dispel fears that any act at all could be binding on the State or that the State might be bound by any act formulated by one of its representatives. Judicial decisions in respect of interpretation were clear-cut, particularly in cases of territorial disputes: the act in question was not of a legal nature, and it was therefore of a different nature. It might be political, but it was not binding on the State which formulated it.

42. The draft articles on causes of invalidity and on interpretation should probably be referred to the Working Group so that it might determine whether provisions common to all acts could be formulated and then deal with the substantive questions raised and indicate whether rules should be added or deleted.

43. During the discussions, reference had been made to some of the “classic” unilateral acts in international law (waiver, promise, protest, recognition), although that characterization was not accepted by all. With regard to recognition, the question had been raised of the irrevocability of an act by which a State recognized a situation, a right or a legal claim—and, in particular, the irrevocabil-

ity of an act of recognition of a State, a question which had not yet been considered because it did not appear to lend itself to the formulation of common rules, but which did warrant some discussion. An act of recognition, or a declaration of recognition, did produce legal effects. In the case of the recognition of a State, several considerations came into play. First of all, the existence of a State as a subject of international law depended not on its recognition but on factors or a combination of factors which, under international law, defined an entity as a State, such as duties or rights. Second, since an act of recognition was a declaratory act, it could be concluded that it produced specific legal effects and that a State which recognized an entity accorded it the status of a State in its international relations.

44. One member of the Commission had said that a State could also revoke a unilateral act which it had formulated. That was a substantive issue that related to the legal effects of unilateral acts. Could a State which formulated an act unilaterally also revoke it unilaterally? The reply to that question was apparently negative: the act was unilateral, but the legal relationship established obviously was not and was therefore bilateral. In his view, a State which formulated an act of recognition would not be able to revoke it.

45. He regretted that he had been unable to reply to all the questions asked, but he assured the Commission that the Working Group would go into all of them in greater detail.

46. The CHAIR said that the informal consultations on the topic would continue in the Working Group on the basis of the proposal made by Mr. Simma and the comments made by Mr. Candiotti.

Diplomatic protection⁵ (continued)* (A/CN.4/514,⁶ A/CN.4/521, sect. C, A/CN.4/523 and Add.1,⁷ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR
(continued)*

47. Mr. COMISSÁRIO AFONSO said that the Calvo clause was based on the two premises that an independent sovereign State was entitled, according to the principle of the equality of States, to complete freedom from interference in any form, whether diplomatic or by force, and that aliens were entitled to no greater rights and privileges than those available to nationals, and the courts of the host State therefore had exclusive jurisdiction over alien claims. In other words, in the context of the Calvo clause, national treatment was the equivalent of the “inter-

national minimum standard”. Specifically, international law required States to accord national treatment to aliens, national laws governed the rights and privileges of aliens and no international adjudication would be admissible.

48. Those two principles were now widely accepted in international law and practice and were embodied in many United Nations resolutions and instruments, such as the Charter of Economic Rights and Duties of States.⁸

49. While he supported that position, he could not help noting that, on at least two accounts, the international context differed from that in which the Calvo clause had been formulated a century ago. First of all, the conduct of States in the modern-day world was strongly influenced, if not conditioned, by common standards imposed by international human rights law. It was, of course, open to discussion how those rights had a bearing on the institution of diplomatic protection in general and on the rule on the exhaustion of local remedies in particular, but the fact was that the existence of the Universal Declaration of Human Rights and other international human rights instruments blurred the distinction between aliens and nationals as far as their treatment was concerned. Indeed, even the way in which a State treated its own citizens within its own territory was no longer a matter of its exclusive sovereignty. Second, the importance that Governments attached, and the recognition they accorded, to private entrepreneurship made it possible for foreign private investments to enjoy a secure legal environment at the present time through bilateral and multilateral agreements designed to promote and protect them.

50. He therefore believed that the Calvo clause could be reconciled with the right of a State to exercise diplomatic protection. The Special Rapporteur could probably indicate when and under which conditions a waiver of the exercise of diplomatic protection or the settlement of an alien’s claim could defeat that right.

51. With regard to draft article 16 as proposed by the Special Rapporteur, he agreed that the Calvo clause should not be extended to a denial of justice. That should be clearly stated in the text. He very much doubted whether paragraph 2 was necessary, because it simply expressed what was embedded in the concept of diplomatic protection. The rule on the exhaustion of local remedies implied that resort to international remedies was always possible, especially in cases of a denial of justice. He was therefore in favour of the deletion of that paragraph.

52. Mr. GAJA said that he would consider the Calvo “clause” and not the Calvo “doctrine”, which was an aspect of the primary rules relating to the treatment of aliens. The first sentence of paragraph 1 of article 16 as proposed by the Special Rapporteur seemed to have only symbolic value. It upheld the validity of the Calvo clause while giving it very limited effects: an alien was regarded as having validly waived his right “to request diplomatic protection in respect of matters pertaining to the contract”. The legal significance of that waiver was uncertain. Nowhere in the draft articles did the alien’s request appear to be a precon-

* Resumed from the 2725th meeting.

⁵ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

⁶ See *Yearbook ... 2001*, vol. II (Part One).

⁷ See footnote 1 above.

⁸ See 2725th meeting, para. 5.

dition for the exercise of diplomatic protection. According to the draft articles already referred to the Drafting Committee, the State of nationality was free to exercise diplomatic protection at its own discretion. The question therefore did not seem to be whether the Calvo clause was valid or not under international law. As interpreted in draft article 16, it was neither prohibited under international law nor regarded as lawful. It was simply irrelevant. There would be a breach of contract, but no breach of an obligation under international law, either by the alien or, of course, by the State of nationality, if the alien requested diplomatic protection from that State. Even supposing that an obligation existed for the alien under international law not to request diplomatic protection from his State of nationality, that would hardly be decisive in practice. While it was likely that the exercise of diplomatic protection would take place only if there had been a request, the request would not necessarily have to come from the injured individual personally because other individuals could well draw the attention of the State of nationality to the problem, and they would not be bound by the contract containing the Calvo clause. There would not be a breach of an alleged rule of international law prohibiting an alien from invoking the diplomatic protection of his State of nationality.

53. In any event, according to the Special Rapporteur, the alien's obligation not to request diplomatic protection ceased to exist once an internationally wrongful act had occurred. Apart from a denial of justice committed during the use of local remedies in connection with a breach of contract, there could be other internationally wrongful acts. As Mr. Pellet had pointed out at an earlier meeting, draft article 16, paragraph 1, implied that an alien could not request the diplomatic protection of his State of nationality until an internationally wrongful act had been committed, but in any case such protection would not be available at that stage. Once an internationally wrongful act had been committed, diplomatic protection could be requested and exercised, whether or not it was provided for in a Calvo clause.

54. Draft article 16, paragraph 2, did not add anything, as Mr. Comissário Afonso had just argued. As the Special Rapporteur had explained, the paragraph stated a presumption against the waiver of the rule on the exhaustion of local remedies by the host State. This was superfluous, because the discussion of draft article 14 had shown that a waiver could not be tacitly inferred.

55. The confirmation of the validity of the Calvo clause was thus highly symbolic. It was also to some extent confusing because the first sentence of draft article 16 seemed to substantiate the position of some host States that the Calvo clause would have the effect in international law of preventing the State of nationality from exercising diplomatic protection, even where an internationally wrongful act had been committed. That was not, however, the underlying intention of article 16, the second sentence of which was in line with the idea that the State of nationality enjoyed the prerogative of exercising its diplomatic protection and that the Calvo clause could not affect that right.

56. His own preference would be for a general provision concerning waiver, both on the part of the State of nationality and on the part of the host State.

57. Ms. XUE thanked the Special Rapporteur for the succinctness and usefulness of section C of his third report (A/CN.4/523 and Add.1) relating to draft article 16, which dealt with the Calvo clause. The clause was very clearly analysed, as were its historical background and current implementation, on the basis of State practice, jurisprudence and doctrine. Two extreme positions had been taken. On the one hand, the rule on the exhaustion of local remedies had been accepted and reaffirmed over the years. On the other, that rule had never deprived the State of nationality of the right to protect its nationals when they had been injured as a result of an internationally wrongful act committed by the respondent State. The Calvo clause should therefore be recognized as one of the rules relating to diplomatic protection.

58. In his report, the Special Rapporteur proposed two options. The first would be to decide not to draft a provision on the question because the Calvo clause merely reaffirmed the rule on the exhaustion of local remedies, which had already been stated in article 10. The second option would be to include a provision which was similar to that contained in article 16. A close look at article 16 showed that the Special Rapporteur had tried to maintain a balance between the sovereign interests of national jurisdiction and the sovereign interests of the protection of nationals abroad. The aim was to avoid any undue interference and any abuse of a right. She was of the opinion that, for a number of reasons and subject to a few drafting improvements, article 16 should be retained. In the first place, as a codified rule, it reaffirmed the right of a State to enter into that type of contractual relationship with an alien who was carrying on business in its territory. Bearing in mind the importance of the activities of transnational corporations and their impact on the world economy, it was clear that that provision was essential. Second, article 16 clarified the limits of such a contractual relationship, particularly by guaranteeing the rights of the State of nationality under international law. Third, in the event that a contract had been drafted differently, as in the *North American Dredging Company* case, it had to be clearly stipulated that local remedies must be exhausted before the case could be referred to international judicial settlement. She hoped that that was the meaning of paragraph 2 of article 16.

59. While she was in favour of draft article 16 as a whole, she had some reservations about paragraph 1. In the other parts of the draft articles, it was only when an internationally wrongful act had been attributed to the respondent State that the State of nationality could exercise its diplomatic protection. In article 16, a new condition was added, namely, that the injury to the alien must be of direct concern to the State of nationality. It would have to be explained whether that expression referred to a breach of an international obligation, to an injury caused directly to the State as well or to a more general concern for the protection of human rights. Otherwise, the thrust of the entire clause would be greatly weakened. Subject to the

comments she had made, she was of the opinion that article 16 should be referred to the Drafting Committee.

60. Mr. MOMTAZ thanked the Special Rapporteur for the additional effort he had made in section C of his third report on the Calvo clause. That text had a great deal of merit, not least because it had refreshed the memory of the members of the Commission about a question which was no longer a subject of much discussion at the present time. The general impression was that, in its day, the real purpose of the Calvo clause had been to rule out diplomatic protection under any circumstances and that that “extremist” approach had never been recognized in international law, even in a regional context. The Special Rapporteur referred (sect. C.4) to the codification of the Calvo clause on the American continent. He explained that those codification efforts had been successful in the Latin American countries and, in support of that statement, cited three regional instruments which seemed to emphasize the need for an alien injured by a wrongful act to bring a case before the competent courts of the respondent State or, in other words, for the rule on the exhaustion of local remedies. In the three cases, the breach of that rule had given rise to abuses which had rightly been denounced by the Latin American States in the late nineteenth and early twentieth centuries. He asked the Special Rapporteur whether, at the time when the Calvo clause was invented, the rule on the exhaustion of local remedies had been regarded as a customary rule. He himself did not think so, and he would like to establish a relationship between the Calvo clause and the making of the rule during that period. The resolution on “international responsibility of the State” adopted in 1933 by the Seventh International Conference of American States⁹ was sufficiently explicit in that regard. Moreover, the jurisprudence established by the General Claims Commission (Mexico and United States) in the context of the *North American Dredging Company* case had also stressed the need to exhaust local remedies. In view of the fact that the Latin American States had softened their position somewhat since then, he was not sure that the Calvo clause had to be codified in the draft articles. It was interesting to note that the developing countries, which were always trying to attract foreign investments, were also trying to create conditions that were favourable to, and would offer legal guarantees for, such investments. The result was that foreign investors received more favourable treatment than national investors, something which the Calvo clause was designed to denounce and prevent. Obviously, nothing prevented an alien from undertaking not to request the diplomatic protection of the State of which he was a national. It went without saying, as had been stressed on many occasions, that such a promise was in no way binding on the State of nationality. In his opinion, the questions raised in section C of the third report were closely linked to those raised by a waiver of the rule on the exhaustion of local remedies, and it would be better for all of them to be considered in that context.

⁹ *The International Conferences of American States, 1889–1936* (Washington, D.C., Carnegie Endowment for International Peace, 1938), p. 546; reproduced in *Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 6, p. 226.

61. He was therefore in favour of the first option proposed by the Special Rapporteur, provided that reference was made to the Calvo clause in the commentary to the relevant draft article, which would probably be the one relating to the rule on the exhaustion of local remedies.

62. The CHAIR, speaking as a member of the Commission, said that the main problem the Commission faced was the lack of consensus and that it would have to be solved without prejudicing any arguments that some members regarded as relevant. He had been quite surprised and unhappy when the Special Rapporteur had indicated that he intended to include material on the Calvo clause in the draft articles because the prospects of reaching agreement on it were close to zero. He did, of course, endorse the rule on the exhaustion of local remedies, but, as Mr. Brownlie had very clearly indicated, the Commission should decline to draft any provision on the Calvo clause because that was not part of its mandate. He urged the members of the Commission not to take a decision on a question which had had more of an emotional than a legal impact in past decades, and not to refer draft article 16 to the Drafting Committee. He invited them simply to take note of the report on the question.

63. Mr. KABATSI congratulated the Special Rapporteur on his particularly rich third report and the skills he had displayed in dealing with the matters under consideration, in particular the rule on the exhaustion of local remedies, the burden of proof in the application of that rule and the controversy surrounding the Calvo clause. He appreciated the fact that the Special Rapporteur had not given in to the temptation of imposing his own position and conclusions on the Commission, but had left the latter entirely free to decide without having to worry about his feelings. He recalled that in the past some special rapporteurs had taken offence at the Commission’s decisions and that one of them had even resigned.

64. With regard to the scope of the draft articles, it therefore had to be determined whether the topic must be limited to the nationality of claims and the exhaustion of local remedies or expanded to cover other questions, such as functional protection by international organizations of their officials, the right of the State of nationality of a ship or aircraft to submit a claim on behalf of the crew and passengers, the case where a State exercised its diplomatic protection in respect of a national of another State as a result of the delegation of such a right, and the case where a State or an international organization administered or controlled a territory. In that connection, he was firmly convinced that, for the reasons the Special Rapporteur had given in paragraph 17 of his report, the scope of the draft articles should be limited for the time being to the questions he had identified.

65. In respect of exceptions to the general principle that local remedies must be exhausted, he was in favour of draft article 14 and, in particular, option 3 proposed in subparagraph (a) (“provide no reasonable possibility of an effective remedy”). As to the burden of proof in the application of the rule on the exhaustion of local remedies, he agreed with the proposal made in draft article 15, para-

graph 2, which very clearly stated the responsibilities of the respondent State and the claimant State.

66. In the case of article 16, the question was whether the Calvo clause added anything new to the rule on the exhaustion of local remedies. It might not, as had been pointed out by the members who regarded article 16 as superfluous. He himself was not entirely certain. He did think, however, that that provision placed useful emphasis on the rule and made it slightly clearer. It should therefore be retained. Paragraph 2 of article 16 did not seem to add much to the content of paragraph 1 and could be abandoned. Subject to that comment, he was in favour of the inclusion of that provision in the draft articles.

67. Mr. DAOUDI said that he associated himself with the members who had thanked the Special Rapporteur for his third report, which, in addition to the wealth of information it contained, had the merit of being remarkably objective. With regard to the two options which the Special Rapporteur was proposing in the conclusion of his report, there was obviously a great temptation to choose the first, namely, not to include the Calvo clause in the draft articles, for two main reasons. In the first place, the circumstances which had led to the Latin American States to adopt the Calvo clause were no longer valid today, even if there were still some traces of it in the doctrine of those States. In the second place, States now agreed to waive the requirement, in contracts concluded with aliens, not only of the exhaustion of local remedies, but also of the application of their national law.

68. He nevertheless believed that the second option, the proposed draft article 16, was more interesting because it was more in keeping with the principles of the sovereignty of States and non-interference in their internal affairs. In paragraph 1, draft article 16 contained three variants of the Calvo clause which had been taken almost word for word from García Amador. The wording of subparagraph (a) was entirely acceptable, but that was not the case for subparagraphs (b) and (c), which provided for the possibility that an alien could waive the diplomatic protection of his State of nationality even when the host State had committed an internationally wrongful act or when there had been a denial of justice. That right belonged not to a private individual but rather to his State of nationality.

69. The second part of paragraph 1, which began with the words "Such a contractual stipulation shall not, however, affect the right of the State of nationality...", might well replace the present text of paragraph 2, which was unnecessary and greatly attenuated the effects of the rule by making it a mere presumption, something which might give rise to a conflict of interpretation that would be left to the judge or the arbitrator to decide. Subject to those reservations, he agreed that the draft article should be referred to the Drafting Committee.

70. Mr. DUGARD (Special Rapporteur) stressed the fact that the Calvo clause had influenced the debate on diplomatic protection throughout its history and that the Commission could not put it to one side on the ground that it was a purely contractual arrangement. If the Commission decided to dismiss that clause on the grounds that

it did not come within its mandate of codifying rules of international law, it might give the impression that it had not discussed that question because it raised such difficult issues. The topic was undeniably a difficult one and was highly emotional and symbolic, but it was not one the Commission could lightly dismiss for reasons of policy. He hoped that the members would bear that in mind when discussing the question at subsequent meetings.

The meeting rose at 1.05 p.m.

2728th MEETING

Friday, 31 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (continued) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR
(continued)

1. Mr. KOSKENNIEMI said that the Calvo clause was no more than a very minor addition to existing law. He agreed with Mr. Brownlie that the clause dealt with a matter which did not really fall within the scope of the topic.
2. When an exception was made to a rule, it often took on considerable importance. Such an exception was contained in draft article 16, paragraph 1, in section C of the

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

third report of the Special Rapporteur on diplomatic protection (A/CN.4/523 and Add.1) in the phrase “an internationally wrongful act attributable to the contracting State or when the injury to the alien is of direct concern to the State of nationality of the alien”. Many members had argued the need for a token nod to sovereign equality and changes in the international system. To his mind, however, the last part of paragraph 1 opened the door for intervention. After all, any contractual relationship, especially if it was of economic importance, would be regarded as being of concern to the State of nationality. To cite an example, a large corporation which contracted with a host State would probably have good relations with the embassy of its own State; if a problem arose, the corporation would surely let the embassy know informally that some involvement at the diplomatic level might be useful. The ambassador would consider that the matter was of direct concern to the State itself and warranted the type of intervention which the clause was designed to address.

3. The Calvo clause did not have merely a symbolic effect. The reference to matters of direct concern to the State left it to the ambassador to decide whether or not to take the matter up at the international level, regardless of the waiver. As the issue of “direct concern” was difficult to deal with in a definition, it would be best not to have a provision on the Calvo clause at all. The Calvo clause showed that doing something for symbolic reasons might create consequences which were the opposite of those intended.

4. Mr. FOMBA said that he was one of those who had considered it useful to study the Calvo clause, provided it was done from the standpoint of the overall question of waiver of diplomatic protection.

5. The starting point of article 16 was the internationally wrongful act, which was of direct concern to the State of nationality, even if in the person of one of its nationals. Hence there was no right to the protection of a national as such, but a right to exercise protection which the State alone enjoyed.

6. With regard to the consequences of the Calvo clause, the two situations relating to the question of waiver must be clarified. First, the State alone, and not the national, had a right of waiver. Second, the sole avenue open to the national was to try to convince the State to waive the exercise of its right, for whatever reason.

7. On the whole, he shared Mr. Pellet’s view on the text’s underlying logic and wording. He was in favour of referring paragraph 1 to the Drafting Committee, provided that only the relevant subparagraph, namely subparagraph (a), was retained, and he supported Mr. Pellet’s proposal for a new formulation of paragraph 2.

8. As to the clause’s regional character, he noted that the prevailing view of experts was well-known, and also that ICJ had accepted the idea of regional custom, but had stressed that “the Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party” (*Asylum* case [p. 276]).

9. Last, he largely endorsed the views expressed by Mr. Daoudi and Mr. Momtaz.

10. Mr. TOMKA said that he had misgivings about article 16. It was the Commission’s task to codify rules of international law, whereas the Calvo clause was clearly a contractual provision which was construed as a valid waiver of the alien’s right to request diplomatic protection. That might cause confusion about the nature of the right concerned. There was no right to diplomatic protection under international law, something that was clear from the jurisprudence of ICJ, in particular the *Barcelona Traction* case. Such a right could be established only by a domestic legal system, but a State usually had the discretionary power to exercise diplomatic protection if it wished. The right to diplomatic protection at the international level related solely to a State’s right to exercise such protection, and not an individual’s right to request it. Thus, if a clause was a contractual stipulation, it could not have any implication for a State’s right. Strictly speaking, the Commission did not need to include such a provision.

11. As for the point made in paragraph 36 of the report, he did not think the issue was one in which an individual deprived a State of its right to provide diplomatic protection, but one in which States themselves waived their right to exercise diplomatic protection under certain conditions, which was clearly a different matter.

12. He was opposed to referring article 16 to the Drafting Committee. The Special Rapporteur should mention the Calvo clause in the commentary, but the clause as such should be left for encyclopedias of international law.

13. Mr. CHEE said the Special Rapporteur’s excellent report on the Calvo clause had made him realize that it was not just a doctrine of the past of no contemporary relevance.

14. In his view, the decision of the General Claims Commission (Mexico and United States) in the *North American Dredging Company* case had been accepted as a rule relating to the Calvo clause. The decision dwelt on the premise that the Calvo clause applied to a commercial contract concluded between a State and an alien in which the alien waived his right to seek diplomatic protection from his Government. However, the General Claims Commission had also ruled that that did not deprive the alien’s Government of the right to extend protection to its nationals “in respect of a denial of justice or other violation of international law experienced in the process of exhausting his local remedies or trying to enforce his contract” [para. 28]. The ruling of the General Claims Commission was still the law. He had no objection to retaining the Calvo clause if members decided that it was necessary and effective, but it should be borne in mind that it had been criticized by many developed States and had not been followed by States outside Latin America.

15. The point of the clause had been to prevent diplomatic intervention by the big industrial powers in Latin American States. Today such fears were unfounded in view of Article 2, paragraphs 3 and 4, of the Charter of the United Nations. In fact, the general trend in State practice

since the Second World War ran counter to the objectives of the Calvo clause. Several factors had brought about that change. First, an alien investor was protected by bilateral investment guarantee agreements. Second, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States permitted an alien investor to bring an action against a foreign State. That in itself was an improvement in terms of the right of an alien to seek protection without going so far as to secure diplomatic protection. Third, under the Multilateral Investment Guarantee Agreement, an alien investor was protected against the risk of loss arising out of political events in the host State. It was likely that those trends would continue. Reliance on foreign investment for the development of the national economy was an imperative for all States, with few exceptions. Today, most States, including the big industrial States, encouraged foreign corporations to open factories in their own territories. It was difficult to imagine that the host States, especially those in need of capital, would require an alien investor to waive the right to diplomatic protection by the investor State.

16. For all those reasons, the Calvo clause had lost importance since the Second World War. Indeed, it was not even in practice in the country where it had originated, namely Argentina. Another development which had led to its decline was the direct application of international law to State contracts, as seen in the 1977 *Texaco* case and the 1982 *Aminoil-Kuwait Arbitration*. Thus, even private contracts, if they were State contracts, were being encroached upon by public international law.

17. The Commission should consider whether it was politically wise to revive the Calvo clause, which had been subject to criticism by capital-exporting States. A doctrine that might discourage or frighten off alien investments should not be adopted.

18. Today, diplomatic intervention took place not in the area of commercial contracts but rather in the area of human rights violations. The Commission should decide whether the Calvo clause really served the interest of States, and the Latin American States in particular.

19. Mr. MANSFIELD said that section C of the third report had persuaded him that no rule on local remedies would be complete without recognition of the Calvo clause: there was simply too much history associated with the clause to ignore it. The Commission should include either an article on the subject or extensive material in the commentary explaining why a specific article was no longer necessary. Having listened to the discussion, he did not find article 16 objectionable, because it did not have much content. In particular, the article made it clear that no contractual provision entered into by an individual could prevent the State of nationality from exercising diplomatic protection on his behalf, and that the right of diplomatic protection belonged to the State, not to an individual. He therefore had no objection to referring article 16 in its entirety to the Drafting Committee, which should also address Mr. Gaja's comment that the issues involved might be dealt with more effectively, less controversially and with less risk of misinterpretation if the article fo-

cused on the question of waiver of the right to diplomatic protection.

20. Ms. ESCARAMEIA said that, having heard the comments made by other members, she was surprised by the high degree of emotion expressed. She wondered why the Calvo clause was considered so important in the modern world for some countries to have incorporated it into their domestic law at a very high level, even that of the constitution. The international situation had changed since the nineteenth or early twentieth century. For some, diplomatic protection might be rooted in the need to protect individuals who resided in a foreign State but had no voice in the international arena. However, that was no longer the most pressing problem. The focus now was on multinational corporations with investments in a foreign country. It might seem that such corporations had a voice in the countries in which they operated and could therefore dispense with diplomatic protection, yet she understood the views of those who stressed the danger of hindering economic development and relations between States and the need for States to be able to speak on behalf of their national corporations, which, no matter how powerful, might nonetheless require diplomatic protection against a foreign Government.

21. She had therefore concluded that the Calvo clause had a value that was not merely historical and symbolic and that it remained an important issue with international implications far exceeding those of contractual stipulations under domestic law. While she understood Mr. Brownlie's comments, she thought that he might have failed to grasp the link between contractual stipulations under domestic law, on the one hand, and international law, on the other. The topic was important, not only because it had dominated all discussion of diplomatic protection for many years but because of its continued importance in the modern world.

22. Initially, it had been difficult to grasp the meaning and internal logic of draft article 16, for recourse to international judicial settlement appeared to be barred in paragraph 1 but permitted in paragraph 2. After reading the report, she had realized that the two paragraphs referred to different circumstances and events. Nevertheless, the juxtaposition of the two paragraphs was confusing. Furthermore, the Calvo clause was most relevant to cases involving multinational corporations, yet the article spoke of "the alien" and "he or she", which suggested the original nineteenth-century context of the mechanism.

23. As Mr. Mansfield had noted, the article did not seem very ambitious: it was limited to the exhaustion of local remedies in disputes involving contracts that contained a Calvo clause. Accordingly, it posed little real risk and could be referred to the Drafting Committee. The issues raised by Mr. Koskenniemi and Ms. Xue could be resolved through redrafting, perhaps by deleting paragraph 2 or rearranging paragraph 1. Alternatively, as Mr. Gaja and Mr. Mansfield had suggested, the Special Rapporteur could prepare a specific draft article on waivers by the State.

24. Mr. TOMKA said that he was opposed to the suggestion by Ms. Escarameia and other members that the

Drafting Committee should prepare an article on waiver before the matter had been discussed in plenary. Moreover, the Calvo clause was a contractual clause unrelated to States' waiver of the right to offer diplomatic protection to natural or legal persons.

25. Ms. ESCARAMEIA said she had already maintained that too much substantive discussion took place in the Drafting Committee. She had not meant to suggest that the Committee should consider the issue of waiver before the matter had been discussed in plenary.

26. Mr. DUGARD (Special Rapporteur) said he had understood Mr. Gaja to suggest that the Commission should consider a draft article of which one paragraph would be on waiver by the State and a second on waiver by the individual. He agreed with Mr. Tomka that those were separate issues. Mr. Gaja had appeared to suggest that, even if the Commission decided to include something along the lines of draft article 16, it might be better placed under a general section on waiver, but that would involve redrafting article 14 and separating it from the other provisions on exceptions.

27. Mr. MANSFIELD said he agreed with the Special Rapporteur. He had chosen his words carefully, stating that the issues involved in draft article 16 could be dealt with less controversially, more accurately and with less risk of misinterpretation in the context of a draft article on waiver. He thought that the Drafting Committee could consider that matter.

28. Mr. ADDO said Mr. Tomka was right to affirm that waiver by States was unrelated to the Calvo clause. The clause, frequently incorporated into contracts between Latin American States and nationals of other States, derived from the Calvo doctrine, which held that non-nationals were entitled to no more protection than nationals. Generally speaking, the Calvo clause was unnecessary because the exhaustion of local remedies was usually a precondition for making a diplomatic claim. It was also ineffective because the individual was not competent to waive a right—that of exercising diplomatic protection—which properly belonged to the State. He therefore believed that a draft article on the Calvo clause would be superfluous and supported the first of the two options put forward by the Special Rapporteur in the conclusion of his report. While the Calvo clause was of historical value and represented an outstanding Latin American contribution to the development of international law, it was of no practical utility in the present-day law that it was the Commission's task to codify. Thus, article 16 should not be referred to the Drafting Committee, but it should be discussed in the commentary in order to highlight its symbolic value.

29. Mr. BROWNLIE, speaking in reply to Ms. Escarameia, said that the members who did not think article 16 should be referred to the Drafting Committee were not minimizing the importance of the Calvo clause. Some, such as Mr. Koskeniemi, were afraid that harm might result from the Commission's attempt to address that issue.

30. In the modern world, the Calvo clause was only one of a vast array of devices, including stabilization clauses and applicable law clauses, which he encountered frequently as an arbitrator and which related to the whole balance between the application of domestic law and the operation of such clauses. If there was general interest in that general topic, perhaps the Commission should consider it under a new agenda item. His position was not that the Calvo clause was unimportant; he had seen no evidence in support of the claim that it was merely a Latin American regional concept or of merely historical interest. But it was not the business of the Commission, or of similar codification bodies, to offer advisory opinions on how public international law should be applied to various devices and situations. For example, it would be very interesting to know what members thought about the application of the law of the sea, but such a discussion would not fall within its mandate.

31. He was not even certain that the Commission was empowered to deal with the issue under discussion. The Calvo clause was not a subject which had not yet been regulated by international law, nor did it require more precise formulation, for the purposes of article 15 of the Commission's statute. It had been in existence and regulated for 150 years and was widely discussed in the literature. The problem lay not in what the law was, but in how it was applied. If the Commission was going to deal with the topic, it should do so in the broader context of devices affecting the placement of investments and inducement to investment by the host State.

32. Mr. KEMICHA noted Mr. Tomka's point that, for the Commission, the importance of the Calvo clause lay in its relationship to the concept of waiver, as the Special Rapporteur had recognized. However, to consider waivers in the historical context of the Calvo clause was to confuse the issue. The Commission must examine not only regional customs and practices of the past but also those of the present. Ms. Escarameia had rightly observed that, in the modern world, the focus was on the protection of multinational corporations rather than of individuals. Host countries wished to attract foreign investors, and many treaties were concluded on that matter. The World Bank compiled an annual list of bilateral and multilateral agreements designed to promote and protect such investments, all of which included references to international arbitration; that fact underscored the importance of the waiver.

33. Mr. GALICKI said the Commission should differentiate between the issue of waiver in the context of the State (art. 14) and in the context of the individual (art. 16). Moreover, the inclusion of article 16 would introduce the concept of the right of the alien to request diplomatic protection in paragraph 1, thereby opening a Pandora's box of problems. Thus far, the Commission had focused on the right of States to exercise diplomatic protection without mentioning the individual as someone who had a right to request it. The draft articles on which agreement had been reached were limited to injuries to nationals as a result of internationally wrongful acts, whereas in the Calvo clause the source of the harm was a contractual obligation, which did not fall within the scope of diplomatic protection. The

Commission should avoid mixing those two areas. With all respect for the Calvo clause and its practical application, it lay outside the scope of the topic of diplomatic protection, and article 16 should not be included in the draft on diplomatic protection.

34. Mr. PAMBOU-TCHIVOUNDA asked Mr. Brownlie to elaborate on his comments concerning the role of the Calvo clause in arbitration: it would be useful for him to explain whether the vestiges of that clause played the same role as in the past, whether it functioned differently from the more recently developed types of stabilization mechanisms that he had encountered in working with international contracts, and what effect it had on contracts between investors and host countries.

35. Mr. BROWNLIE said that there was a whole world of arbitration, for example NAFTA, UNCITRAL and other forms of *ad hoc* arbitration involving instances of some waiver of the application of domestic law; otherwise there could be no arbitration. There was a constant battle on the border between domestic law and international law, including major arbitration between the United States and Canada regarding regulatory changes and the applicable range of domestic law. Even in the case of investment treaties, disputes arose concerning the proper roles of domestic and international law or the general principles of law in relation to a particular treaty or contractual clause. There was a wealth of material in that field, some of it quite old; Mr. Chee had mentioned the *Aminoil-Kuwait Arbitration*. The Calvo clause was only one of many techniques designed to promote investment while maintaining some of the host State's sovereignty and prerogatives. Lately, for example, the Czech Republic had been involved in arbitration regarding the State's right to control the national media.

36. Mr. KAMTO said that he endorsed Mr. Kabatsi's praise of the Special Rapporteur's knowledge and of his open-mindedness in giving the Commission a choice of two options. Latin America had contributed much to international law. However, in the case of the Calvo clause, the question was not whether a regional custom was relevant to the Commission's work on the topic of diplomatic protection but whether the Calvo clause was, in fact, such a custom. He was inclined to agree with Mr. Brownlie that, in its present form, the clause was a contractual technique rather than a norm. He also endorsed Mr. Pellet's comprehensive analysis of section C of the third report.

37. He feared that the Commission had lost sight of the legal perspective. The value of the Calvo clause and its importance to certain countries' sense of national identity were interesting questions, but the Commission's task was the codification and progressive development of international law. Once it was agreed that the clause concerned the right of the individual rather than of the State, the situation was clear; individuals could not alienate the State's right to exercise diplomatic protection in the context of a private contract. The Commission could not codify the Calvo clause as if it were a bilateral investment treaty between States, and even if it was decided to include a draft article on waiver, the clause would have no place in such a provision. It might serve to protect weak countries which were unable to defend themselves against multinational

corporations, but that was not a legal consideration. The Drafting Committee could only note that the Calvo clause was a legal technique used by natural or legal persons in private contracts but that it could not alienate the rights of States. Thus, no portion of article 16 should be referred to the Committee. Even paragraph 1 (a) was irrelevant since only the State, in the context of an investment treaty, could waive its right to exercise diplomatic protection on behalf of its nationals resident in another State.

38. Ms. XUE said that, where a Calvo clause existed, its legal implications must be made clear. Article 16 did not set out to codify the Calvo clause, but instead laid down limits to its application in international relations. The article clearly stated what had been accepted by international practice, and spelled out the implications of the clause in international law, thereby obviating the need for future international arbitrations to rely exclusively on case law. Article 16 also clarified the relationship between the rights of the individual and of the State in that area, which was that a foreign individual or company had the right to seek, and a State the right to exercise, diplomatic protection. Consequently, article 16 was not merely symbolic but also had substantive content. Moreover, though resort to the Calvo clause had been largely confined to Latin America, the problems it had sought to address had a global, not merely a regional, dimension. Accordingly, the issue should be reflected in the draft articles. In codifying the issues raised by the Calvo clause and the resulting practice, article 16 performed a valuable service.

39. The CHAIR, speaking as a member of the Commission, said that in his view the draft articles would not be impoverished as a result of deleting article 16, which encroached on areas that were not the preserve of the Commission. The Calvo clause had been a failed, albeit a valiant, attempt to deal with the problems of intervention and coercion of States. It had now been superseded by the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations⁴ and, for that matter, by the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.⁵ The time was long past when ineffectual gestures such as the Calvo clause could be seen as a useful means of protecting the sovereign independence of States. To revert to the matter would raise all of the questions that Mr. Koskenniemi had touched on, and more besides, as well as being of questionable propriety for the reasons set out by Mr. Brownlie.

40. Mr. KAMTO said Ms. Xue had drawn a distinction that was valid in theory yet nevertheless seemed to split hairs. Admittedly, article 16 stated that the Calvo clause was to be construed as a valid waiver of the right of the alien to request diplomatic protection, not of the right of the State to exercise it. But in practice there seemed to be no difference at the level of international legal consequences. Nowhere in State practice or jurisprudence was it stated that a request by the individual was the condition for the

⁴ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

⁵ General Assembly resolution 2131 (XX) of 21 December 1965.

exercise of diplomatic protection by the State. Even if the individual had contractually waived his right, the State still retained its right to exercise diplomatic protection. Just as there were cases in which the State refused to accord the diplomatic protection requested by its national, so, conversely, silence on the part of the individual did not prevent the State from exercising diplomatic protection.

41. Mr. KABATSI said that, as Ms. Xue had rightly pointed out, the issue under article 16 was not the Calvo clause but the implications under international law of the exercise of that contractual device. It was the injury to an individual that raised the issue of a State's right to diplomatic protection. No question of injury arose in cases of exercise of obligations under a contract. If the contracting State had committed no wrong, but had merely complied with its obligations under the contract—including insistence that the national comply with the contract's provisions—it was very hard to see how that fictional right of the State could in fact arise. The implication of the clause was that in such cases no right to exercise diplomatic protection arose. Article 16 threw important light on the balance between the interests of the national and of the State, and it should thus be retained.

42. Mr. Sreenivasa RAO said that the recent practice of concluding umbrella agreements giving primacy to arbitration under the foreign State's law amounted in effect to a new form of Calvo clause. As Ms. Xue had rightly pointed out, the Calvo clause should not be seen merely in its narrow historical context, which had ceased to be of any particular importance, but in terms of its continuing significance in arbitration matters. The clause raised questions as to the nature of the State's right, as opposed to that of the individual; as to the timing and manner of its exercise; and as to the consequences for other aliens of waiver of the right to diplomatic protection by one alien. The issue raised by the Special Rapporteur in article 16 thus clearly extended beyond the narrow confines of the Calvo clause *per se*, and as such merited further debate.

43. Mr. DAOUDI, noting that Mr. Brownlie had claimed that article 16 covered an arbitration or judicial procedure and thus fell outside the Commission's mandate, said that in his view article 16 as presented by the Special Rapporteur contained provisions that went beyond the Calvo clause as reflected in Latin American practice, offering a specific variant on the rule on the exhaustion of local remedies established in article 10. What article 16 did was to pinpoint the moment at which diplomatic protection must be exercised. The purpose of the article was not, as had been asserted, to prevent an embassy from intervening on behalf of an individual or company—a function that was clearly established in article 3, paragraph 1 (b), of the Vienna Convention on Diplomatic Relations. Its purpose was to prohibit a State from exercising diplomatic protection as long as no internationally wrongful act, in the form of a denial of justice, had been committed. For that reason, he continued to favour referring article 16, with some modifications, to the Drafting Committee.

44. Mr. CHEE said that two sets of rights had been involved in the *North American Dredging Company* case, namely, the rights of a State under international law and the rights of individuals or corporations under internal

law. The question was whether an individual could deprive a State of those rights. The case was consistent with the *Mavrommatis* case and with the "Vattelian fiction". As to enforcement, the questions were whether an individual could enforce the right of a State and whether a State could enforce an individual contract under municipal law. The answer to the first of those questions seemed to be in the negative, unless the State decided to take up the claim. The *North American Dredging Company* case made it clear that an individual could not validly waive, through a contract, his right to diplomatic protection where there was a denial of justice. That subtle distinction should be preserved.

45. Mr. KAMTO said he was not sure that the interpretation of article 16 just given by Mr. Daoudi was borne out by paragraph 1 (b) of the article itself. Diplomatic protection could be exercised only when there was a breach of a rule of international law. The provision amounted to a statement that nothing stipulated by an alien in a contract concluded abroad prevented the State of nationality from exercising diplomatic protection. There seemed no need to spell that out. If the contractual stipulation did not breach an international obligation, there could be no reason to exercise diplomatic protection. The commentary to the provision on waiver should make it clear that, for that reason, the Commission did not regard the Calvo clause as falling within its purview.

46. Mr. DAOUDI said that his reading of article 16 stemmed from the article's overall logic. In subparagraphs (a), (b) and (c) of paragraph 1, it enumerated certain contractual stipulations between an alien and a State derived from the work of García Amador.⁶ As that author pointed out in the excerpt cited in section C.3 of the report, the waiver of diplomatic protection as expressed in the Calvo clause could take a variety of forms. The Special Rapporteur described all the variations on the Calvo clause and then stated that the existence of such variations was a presumption in favour of exhaustion of local remedies. That was the logic of the article: it was closely bound up with the rule on the exhaustion of local remedies set out in article 10 of the draft articles. The only specific feature of article 16 was to be found in a contractual stipulation requiring the alien doing business with a State to exhaust local remedies.

47. Mr. TOMKA, referring to Mr. Brownlie's argument that, since the Calvo clause was merely a contractual technique and not a rule of public international law, the Commission should not deal with it, said Mr. Brownlie was right to the extent that codification meant more precise formulation and systematization of international law in fields in which extensive practice, precedent and doctrine existed. On the other hand, nothing prevented the Commission from drafting a provision on the implications of something which was within the province of domestic law, if it felt the need to do so. Two examples came to mind. Article 3 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session⁷ contained a reference to internal law specifying that the characterization of an act of a State

⁶ See 2725th session, footnote 9.

⁷ See 2712th session, footnote 13.

as an internationally wrongful act was “not affected by the characterization of the same act as lawful by internal law”. Article 46 of the 1969 Vienna Convention was another example.

48. Some members had suggested that article 16 should set forth the implications of certain situations, but the provision concentrated on three scenarios, and they were very limited. In his view, contractual stipulations, whether under domestic law, trade law or whatever, represented a *res inter alia acta*. If the right to exercise diplomatic protection was recognized as a right of a State under public international law, as indeed it had been, then contractual stipulations between an individual or company and a State could not have any legal implications for that right. One member of the Commission had said article 16 could be construed as a presumption in favour of the need to exhaust local remedies, which was a general condition before resorting to diplomatic protection. Would such an interpretation have any legal significance? He did not think so. The article could also be interpreted to mean that a State that entered into such contractual provisions was reaffirming its legal view that local remedies had to be exhausted.

49. On the whole, however, he was not convinced that article 16 should be included in the draft on diplomatic protection. If the Special Rapporteur thought that provisions on waiver were needed, he should propose some, but article 16 was not a suitable foundation. It did not deal with waiver by a State, and to contemplate waiver by an individual would only lead to confusion, since there was no such thing as an international human right of diplomatic protection. From the standpoint of public international law, it was for the State to decide whether or not to exercise diplomatic protection.

50. Mr. MOMTAZ said that, after what had been a thought-provoking discussion, he had come to the conclusion that the only difference between article 16 and article 10 was that article 16 related solely to certain provisions that could be contained in a contract between an individual and a State. Those provisions, or contractual stipulations, fell into the domain of domestic law, not international law. He understood Mr. Daoudi's remark that article 16 was a variation to mean that it was merely a different way of saying the same thing, that it added nothing. Indeed, paragraph 2 summed up all of paragraph 1 as a presumption in favour of the need to exhaust local remedies, the very proposition stated in article 10. Nevertheless, he was in favour of including a provision on waiver of diplomatic protection by States, something that fell within the domain of international law, but saw no need for one on waiver by individuals, which did not.

51. Mr. CANDIOTI warmly commended the Special Rapporteur's impeccable treatment of the issues raised in international law by the Calvo clause. His description of the Calvo clause's history, attempts at codification, decisions of international courts and views expressed in the literature was highly authoritative. In the conclusion of section C of his report, the Special Rapporteur proposed two options, of which he personally preferred the second. Article 16, paragraph 1, would have its place in the draft

on diplomatic protection once the Drafting Committee had considered it and made the necessary drafting changes.

52. Some members contended that it added little to the draft, but, as the French saying had it, what went without saying went even better when said. The provisions in article 16 gave a clearer perception of the institution of diplomatic protection and the historical weight of the Calvo clause in its development. The decision in the *North American Dredging Company* case could not be passed over in silence in the context of the codification of rules on diplomatic protection. It was certainly valuable to specify that a contractual stipulation in which an individual or a company waived the right to request protection from the State did not under any circumstances imply a waiver of the right of the State to exercise diplomatic protection. Article 16 was useful in characterizing the right to diplomatic protection as an exclusive and discretionary right of the State of nationality. In that sense, it complemented article 10. Again, article 16, paragraph 1, was useful as well in that it defined the entity that had the right to waive the exercise of diplomatic protection as the entity that had the right to exercise diplomatic protection in the first place. For those reasons, he agreed that article 16 should be referred to the Drafting Committee for careful consideration of the wording and of its place in the overall draft.

53. Mr. DUGARD (Special Rapporteur), summing up the discussion on section C of his third report, thanked members for a stimulating debate that now left him in some difficulty. Opinions seemed to be fairly evenly divided on whether to include article 16, reminding him of the division of views on whether or not to retain article 19 on international criminal responsibility in the draft on State responsibility. The difference, however, was that members had been in strong disagreement as to the value, purpose and substance of article 19, whereas now even members who thought the Calvo clause was not within the Commission's remit were convinced of its importance in the history and development of diplomatic protection. Inclusion of article 16, which reflected the Calvo clause, would not, therefore, give rise to a sense of outrage—or at least such was his impression.

54. The debate had caused him to change his mind several times. He had initially leaned towards the first option, namely omitting article 16, but strong statements by Ms. Xue, Mr. Daoudi and Mr. Candiotti had swayed him in the opposite direction. In all, he had counted 10 members of the Commission in favour and 9 against inclusion of the article. Interestingly enough, the division did not run along regional lines: representatives from all regional groups could be found on both sides. The substance of the debate could be summed up in the following way: Mr. Brownlie and others had taken the view that article 16 was concerned with contractual arrangements and had no place in the draft. Other members had argued that the provision set the Calvo clause in the necessary context and ought to be included.

55. The Commission now had a number of options. Since there seemed to be very little support for article 16, paragraph 2, except insofar that its contents should be dealt with in the commentary to article 14 (b), the question was whether to refer article 16, paragraph 1, to the Drafting Committee, with the important amendments suggested

during the debate, or to omit the provision from the draft. If it was omitted, the subject would have to be dealt with extensively in the commentary, specifically to article 10 and article 14 (b). Mr. Gaja's suggestion that an attempt be made to draft an omnibus waiver clause could not be taken up for the reasons rightly outlined by Mr. Tomka.

56. He was honestly at a loss to know how to proceed, but on balance he recommended that the Commission refer article 16, paragraph 1, to the Drafting Committee, subject to the suggestions made during the discussion. A slender majority was in favour of that course of action, though he readily conceded that it was a slender majority.

57. The CHAIR, speaking in his capacity as a member of the Commission, said that when half of the members of the Commission were opposed to referring a proposal to the Drafting Committee, it was not a compromise solution simply to go ahead and refer it. Respect for the concerns of advocates of the Calvo clause could be shown, he thought, by including the subject in a commentary.

58. Mr. TOMKA said that if article 16, paragraph 1, was to be sent to the Drafting Committee, some guidance would have to be given about the objectives of the drafting exercise, what form the article should ultimately take, and so on. Some members had said that its scope was too narrow. Should it therefore cover techniques other than contractual stipulation? Perhaps the Special Rapporteur should be allowed time to reflect on the matter, and when he introduced his working paper on the voluntary link at the next meeting, he could outline his conception of a provision reflecting the Calvo clause.

59. Mr. KAMTO endorsed that proposal and added the suggestion that consultations should be carried out with those who had opposed referring the article to the Drafting Committee with a view to achieving consensus.

60. Mr. DUGARD (Special Rapporteur) said the combined wisdom of the two previous speakers had prevailed on him to undertake consultations and seek a solution before the Commission's next meeting. He would do so if there was no objection.

It was so decided.

The meeting rose at 1 p.m.

2729th MEETING

Tuesday, 4 June 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr.

Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (*continued*) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. DUGARD (Special Rapporteur), presenting the results of his reflections on the question of voluntary link, which were contained in section A.3 of his third report on diplomatic protection (A/CN.4/523 and Add.1), said that the Commission had debated the question of the voluntary link as part of its consideration of draft article 14 on exceptions to the rule on the exhaustion of local remedies. It had questioned whether the draft articles should contain a provision stating that the existence of a voluntary link between the injured alien and the host State would be a precondition for the application of the rule and, if so, where such a provision would be placed in the draft articles. Would it be a separate provision? Would it be included in article 10 or in article 14? During the debate, different opinions had been expressed about the voluntary link. Some members, such as Mr. Brownlie, considered that such a link was the rationale for the rule on the exhaustion of local remedies. Others had suggested that it was an exception to the rule, and that had been the way he had viewed it in article 14 (c). For still others, the voluntary link was a necessary connecting factor for the exercise of jurisdiction and a precondition for the application of the rule. Those differences of opinion showed how difficult it was to codify the requirement of a voluntary link. He had finally been persuaded by Mr. Brownlie that the voluntary link was essentially a rationale for the rule on the exhaustion of local remedies and that, as such, it was not suitable for codification, as was confirmed by the changing nature of State responsibility. In today's global village, the nationals of State A were increasingly injured by the conduct of State B or its nationals without having any connection whatsoever with State B. Such developments presented serious challenges to the rules governing jurisdiction, under both private and public international law, and they raised questions about the rationale for the rule on the exhaustion of local remedies.

2. In his opinion, if the Commission wanted to codify the voluntary link, there were a number of ways of doing

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

so, such as amending article 10 to read: "A State may not bring an international claim arising out of an injury to a national, whether a natural or legal person, who has a voluntary link with the responsible State before the injured national has exhausted all available local legal remedies." Alternatively, the voluntary link could be retained as an exception, along the lines suggested in draft article 14 (c). If there were objections to the term "voluntary link", it might be possible to replace subparagraph (c) by the following text: "(c) Any attempt to exhaust local remedies would cause great hardship to the injured alien [be grossly unreasonable]". The other suggestion for a provision requiring a voluntary link would be undesirable, particularly in the light of developments in the law relating to transboundary harm. Such a provision belonged more to the topic of liability.

3. His preference was not to provide expressly for a voluntary link, but to include it in the commentary to article 10 as a traditional rationale for the rule on the exhaustion of local remedies, in the commentary to article 11 with a discussion of direct injury to a State where local remedies need not be exhausted, and in the commentary to article 14 (a), in the discussion of whether local remedies offered a reasonable possibility of an effective remedy. In short, he shared Roberto Ago's view that the topic was not yet ripe for codification. Although that view had been expressed in the late 1970s, it had been confirmed by developments in environmental law.

4. Referring to the hardship cases which had been discussed in paragraph 83 of his third report and in which it was unreasonable to require an injured alien to exhaust local remedies, he pointed out that in the first case, that of transboundary environmental harm caused by pollution, radioactive fallout or man-made space objects, a number of scenarios were possible. If the injury resulted from an act which was not an internationally wrongful act, the context was not that of diplomatic protection but that of liability. If the injury resulted from an internationally wrongful act and was a direct injury, that possibility was already covered by draft article 11. Moreover, an international agreement might dispense with the need for the exhaustion of local remedies, as in the case of article XI of the Convention on International Liability for Damage Caused by Space Objects, the text of which was reproduced in paragraph 80 of the third report. Also, the courts of the responsible State might not have jurisdiction to consider cases of transboundary environmental damage originating in their territory, and that case had already been provided for by article 14 (a). In another case, a national of State A, in which the pollution had occurred, could attempt to sue the government of State B, in which the pollution had originated, in a court of State A. In most instances, the government of State B would successfully plead sovereign immunity. That situation was also covered by subparagraph (a). Last, the courts of the responsible State might, under an agreement with the injured State, provide local remedies for the nationals of the injured State for extraterritorial harm suffered. That case fell not under diplomatic protection but under the draft articles on liability. He was of the opinion that, in the case of transboundary environmental harm, there was no need for a separate provision requiring a voluntary link as a precondition for the application of the local remedies rule.

5. In the second type of situation, involving the shooting down of an aircraft outside the territory of the responsible State or an aircraft that had accidentally entered its airspace, there really was a direct injury, and State practice showed that in most cases the responsible State would not insist on the need to exhaust local remedies. That case was thus covered by draft article 11, and no separate provision was necessary. The third type of situation would involve the killing of a national of State A by a soldier from State B stationed in the territory of State A. In most circumstances, there would normally be an international treaty provision for the possibility of a claim against State B. If there was no such agreement, however, there was no real reason why the government of State A should not be required to request compensation in the courts of State B, provided that there was a reasonable prospect of an effective remedy. That situation was already covered by article 14 (a), and there was no need for a separate provision. Last, with regard to the transboundary abduction of a foreign national from his home State or a third State by agents of the responsible State, there were two possible options: either there had clearly been a violation of the territorial sovereignty of the State of nationality of the foreigner, which could give rise to a direct claim by him against the responsible State and which was already covered by draft article 11, or the injured party might have the possibility to sue in the domestic courts of the responsible State and there was no reason why he would not avail himself of that remedy. If that possibility was not available, the situation was that covered by draft article 14 (a), which required a reasonable possibility of obtaining an effective remedy. In neither case was there any need for a special provision.

6. In his opinion, the Commission should not obstruct the development of international law on the question, particularly as the practice of States continued to evolve, especially in the field of damage to the environment. He suggested that the Commission should say nothing about the voluntary link in the draft articles, but should simply refer to it in the commentary on several occasions and deal with it in the context of the topic of international liability for damage caused by activities not prohibited by international law.

7. Mr. BROWNLIE said that he was in a rather strange position because what he had said before gave the impression that he was an enormous partisan for the voluntary link. He was not. His problem was that the Special Rapporteur's reasons for not taking the voluntary link seriously were not cogent. It was not his position that the voluntary link was the rationale for the rule on the exhaustion of local remedies, and, in the textbook he had written on the subject several years ago, he had simply said that the position one adopted on the voluntary link depended on one's view of the major basis in policy for the rule on the exhaustion of local remedies. If the objective was to provide an alternative, more convenient recourse to that of proceeding on the international plane, then no condition as to a link would apply. If the rule was linked to the existence of a proper base for the exercise of national jurisdiction, then the requirement of a voluntary link such as residence made good sense. He did not, moreover, understand why the question of the rationale for the rule had nothing to do with codification. He thought that it was eminently connected with codification and even more so

with the issue of the progressive development of the law. Rationale or not, some very serious figures had supported the requirement of a voluntary link. He therefore suggested that the Special Rapporteur should take that question seriously. Even though he himself had doubts about the merits of the question of a voluntary link, he thought it should be duly taken into account.

8. Mr. DUGARD (Special Rapporteur) asked Mr. Brownlie how, in practical terms, the Commission should take the voluntary link seriously. He himself had made several suggestions. There might be others, but he would be very grateful to Mr. Brownlie for telling the Commission how, in his opinion, it could get out of the present dilemma.

9. Mr. BROWNLIE said he appreciated that the question was partly covered by draft article 11. He did think, however, that it should at least appear as an exception to the rule on the exhaustion of local remedies. He did not think that the principle of the hardships that the requirement of the exhaustion of local remedies might involve for the injured party really covered the case. It should be indicated in the commentary that the question had been set on one side.

10. The CHAIR said that he was not sure whether the Commission should set the question on one side or accept the Special Rapporteur's proposal that it could be referred to in the commentary to articles 10, 11 and 14, something that would, in his opinion, meet the requirement. He would also like to have some explanations about certain environmental issues. Was the Commission worried about the voluntary link with the State causing the pollution or, as he believed, about the link with persons injured beyond that State?

11. Mr. BROWNLIE said that if the members thought that the question of the voluntary link was a serious policy problem, it should be dealt with in the context of exceptions to the rule on the exhaustion of local remedies. In any event, when a foreign aircraft was shot down and the victims were of several nationalities, it was important to draft some guidelines on the applicability of the rule.

12. Mr. DUGARD (Special Rapporteur) said that it might be a good idea to follow Mr. Gaja's earlier suggestion that the State of nationality of the aircraft might be able to sue in such circumstances. He did think that in such a case it was very difficult to insist on compliance with the local remedies rule.

13. Mr. BROWNLIE said that his concern was that the provision should be drafted in such a way that it would be clear that the local remedies rule did not apply in such a situation. He merely pointed out that the Special Rapporteur was refusing to take a position on the legal status of the voluntary link approach.

14. The CHAIR asked whether there were specific examples of situations which would not be solvable if the voluntary link was relegated to the commentary.

15. Mr. BROWNLIE said he was not convinced that the voluntary link question was not dealt with as part of the hardship principle, which was already in the draft. It would be paradoxical, for example, if victims had to exhaust local remedies because they were efficiently organized in claimants' associations and were therefore denied the application of the hardship principle. The Commission should stop acting as though all it was doing were photographing State practice and should take a position on the underlying policies, on the understanding that it was indeed difficult to define what constituted a sufficient voluntary link.

16. Mr. PAMBOU-TCHIVOUNDA said that he supported the Special Rapporteur's conclusions.

17. Mr. Sreenivasa RAO pointed out that many factors entered into the distinction between hardship cases, where the rule on the exhaustion of local remedies could not apply, and cases where the conduct of the "claimant" State was based on other considerations and the criterion of the exhaustion of local remedies had no role to play at all. Even the distinction made by the Chair between causality and nationality was insufficient because, as was shown in cases of transboundary harm, many factors came into play in the determination of the respective shares of causality, if not responsibility, and they gave rise to problems which had not yet been discussed. He did not think that those problems could be relegated to the commentary to an article on the exhaustion of local remedies. Mr. Brownlie had been right to say that the question of the voluntary link had to be given fuller treatment and that, even as an exception to the rule on the exhaustion of local remedies, it did not only involve hardship. It should therefore be left to the Drafting Committee to find the most appropriate solution.

18. Mr. TOMKA said that he had no major problem in going along with the Special Rapporteur's conclusions, but that, in view of the comments by Mr. Brownlie, he wondered whether it would not be wiser to include a questionnaire for Governments on the topic in chapter III of the report of the Commission to the General Assembly. As the Drafting Committee would probably not deal with that question before the following session, the Commission would thus be able to have the views expressed by Governments both in the Sixth Committee and in their replies to the questionnaire.

19. Mr. MANSFIELD said that he would be satisfied with the Special Rapporteur's conclusions, but that, the more he heard in the discussion, the more he remained concerned about the point he had raised earlier about fairness and equity. It was not clear to him that the draft articles contained a hardship provision. In view of the huge discrepancies among litigation costs in different countries, the voluntary link concept was both over-inclusive and under-inclusive in the sense that a reasonable possibility of an effective remedy under article 14 (a), did not really apply in a situation where it would be unfair and unreasonable to require a person to exhaust local remedies because of the costs involved.

20. Mr. KABATSI said that the voluntary link appeared in one form or another in draft articles 10, 11 and 14. The issue might be best dealt with in the commentary to each of those articles. Treating it as an exception to the rule on the exhaustion of local remedies might not tie up all of the loose ends on that question.

21. Mr. GAJA said that there were two different scenarios—that of an insufficient link, as in the case of an aircraft accidentally shot down over a foreign country, and that of extraterritorial activity or transboundary damage. In some cases, remedies did exist, and the solution to the problem whether local remedies were to be exhausted should not discourage the trend of providing remedies in relation to transboundary harm. He would prefer to have a general text which did not state the principle of the voluntary link or provide for a clear-cut exception, but which was formulated so as to take account, from the viewpoint of an exception or precondition for the applicability of the local remedies rule, of situations where it would be unreasonable to require a private party to seek remedies before the State had been able to exercise diplomatic protection.

22. Ms. ESCARAMEIA said her position was that the voluntary link was a precondition for the rule on the exhaustion of local remedies, the role of which had arisen precisely from the fact that the persons concerned derived some kind of benefit from the activity in question. There was no reason to require a person who had no link with the State which had injured him to embark on the enormous undertaking of exhausting the local remedies of that State. She would have preferred the solution suggested by the Special Rapporteur of redrafting article 10, but, since that solution did not have much support, the Commission should redraft article 14 (a), in the light of the important comment by Mr. Mansfield on situations where local remedies were possible but it would be unfair to require that they should be exhausted; keep the exception in article 14 (c); and include a definition of the voluntary link in the relevant commentary.

23. Mr. KEMICHA said that he agreed with the Special Rapporteur's conclusions that some aspects of the question of the voluntary link related to other draft provisions, while others belonged in the commentary.

24. Mr. SIMMA said that he supported the proposal by Ms. Escarameia.

25. Mr. DUGARD (Special Rapporteur) said that the problem raised by Mr. Mansfield could be regarded as being covered by article 14 (a). There was, however, nothing to prevent the Drafting Committee from explaining that further. The Commission had previously been very much opposed to article 14 (c), but now seemed to have changed its mind as a result of wording which would not necessarily use the term "voluntary link". Mr. Tomka's proposal that Governments should be asked for their views was also acceptable.

26. The CHAIR proposed that the Drafting Committee should be requested to include more flexibility in the wording of article 14 (a), in the light of the comments

made during the debate. He also proposed that draft article 14 (c), which might also be reformulated, should be referred to the Committee. The matters discussed would be described in detail in the commentary and form the subject of a questionnaire to be addressed to States so that, at the Commission's next session, the comments made by Governments in the Sixth Committee and in their replies to the questionnaire would be available to the Drafting Committee.

27. Mr. CHEE said that he supported that proposal, as did Mr. DUGARD (Special Rapporteur), who added that this solution would enable him to deal with the question of transboundary harm in the commentary.

28. The CHAIR said that, if he heard no objection, he would take it that the Commission adopted that proposal.

It was so decided.

29. The CHAIR recalled that the Commission had not yet taken a decision on draft article 16.

30. Mr. BROWNLIE said that, after thinking things over, he could only confirm the views he had expressed the week before.

31. Mr. KAMTO said that draft article 16 did not add anything to the provisions relating to the exhaustion of local remedies. Originally, the Calvo clause had been designed to prevent an investor from appealing to his State so that it would intervene improperly. For States which hosted foreign investors, the danger nowadays was that there were so many international arbitration clauses, which were a safer way for investors to protect their interests than diplomatic protection, which depended on the political interests of the State of nationality. Direct recourse to an arbitration mechanism was sometimes provided for in investment contracts or in multilateral investment treaties, as, for example, in chapter 11 of NAFTA. Such provisions had given rise to a large body of arbitration decisions, which showed that arbitral tribunals took advantage of the slightest indication of consent of the State, even in domestic legislation, to say that consent to arbitration existed. In such circumstances, the purposes which had historically been served by the Calvo clause were outdated.

32. Mr. KEMICHA said that he did not see any need for draft article 16 in the current context, particularly in the light of existing international arbitration practices.

33. Mr. RODRÍGUEZ CEDEÑO said that the solution proposed by the Special Rapporteur would reflect a well-established practice which had given rise to a great many decisions and played an important role in Latin American law. He would support any position for which the Commission opted, but he would be in favour of the one the Special Rapporteur had defended in the conclusion of his report.

34. The CHAIR pointed out that the subject of discussion was not the practice in question, but whether or not a provision to that effect had to be included in the draft articles.

35. Ms. XUE said that it would be useful to include draft article 16 because, in view of historical developments, she regarded it as a technical necessity. The Commission did not have to deal with the content of investment contracts entered into by States, but, when, in practical terms, a waiver of diplomatic protection was provided for in a contract, each of the parties had to know what effect it would have in international law and to what extent the alien was required to exhaust local remedies, since, in the event of an internationally wrongful act, the State of nationality might become involved. That clarification would also be helpful to arbitrators who had to rule in specific cases.

36. Mr. BROWNLIE said that the Calvo clause was not a principle of international law but simply a contractual technique on which the Commission did not have to decide. He pointed out that those in favour of that clause should not support draft article 16, which did not give very firm support to the Calvo clause.

37. Mr. NIEHAUS said that the codification of the Calvo clause was particularly important for the Latin American countries, since it was an integral part of the legal tradition of the majority of nations on the American continent. The proposed text made it possible to restrict the validity of the Calvo clause to disputes arising out of contracts containing that clause and to recognize that that clause created a simple presumption in favour of the exhaustion of local remedies. The proposed text also established a clear-cut distinction between the alien's right to waive diplomatic protection and the right of the State of nationality to exercise diplomatic protection on behalf of a person injured by an internationally wrongful act attributable to the contracting State or when the injury he had suffered was of direct concern to his State of nationality.

38. The CHAIR, speaking as a member of the Commission, said that so far he had heard reasons why there was nothing wrong with the text in question, but he had yet to hear a single reason why it added anything to the draft articles.

39. Mr. DAOUDI said that draft article 16 did not reflect the Calvo clause, which prohibited an alien from requesting diplomatic protection in any circumstance and was in fact only a variant of the rule on the exhaustion of local remedies. Clauses providing for direct recourse to international arbitration were not widespread and were to be found only in certain parts of the world and in certain treaties. That was why the provisions of article 16 were important. He did not know of any national investment legislation which provided for automatic acceptance of arbitration. All States considered that their law was applicable and that their courts had jurisdiction over disputes arising out of an investment contract. The inclusion in a contract of a clause which was contrary to that principle would depend on how much influence the investor could wield during the negotiations. Even in the event of recourse to arbitration, however, the problem of the exhaustion of local remedies would still exist because the host State would have to be requested to issue an enforcement order.

40. Mr. SIMMA said that, in the proposed text, only paragraph 2 had some normative content, while para-

graph 1 simply reflected a practice which existed in a particular part of the world. He questioned how that paragraph was expected to work in practice. What would happen if the Government of the State of nationality of the injured alien intervened without taking account of the waiver accepted by the alien? Would that be a matter of "bad faith" or "dirty hands"? From that point of view, the wording of article 16, paragraph 1, was not satisfactory.

41. Mr. DUGARD (Special Rapporteur) explained that he had designed paragraph 2 as a normative provision following on logically from paragraph 1. It had turned out that some members were in favour of paragraph 1 and opposed to paragraph 2, while others were in favour of both. He urged the new members to make their views clear.

42. Mr. GALICKI said that the text of article 16 should be compared with the letter and spirit of the articles on which provisional agreement had already been reached. He was opposed to the use of the expression "the right of the alien to request diplomatic protection", since the Commission had already decided that the right to exercise diplomatic protection belonged exclusively to the State. That expression reflected a new concept, which should therefore be explained. In his opinion, the question of the Calvo clause was not part of diplomatic protection, which, according to the Commission's work, could be exercised only when an internationally wrongful act had been committed. Since it was a contractual technique and not a rule of law, the Calvo clause did not belong in the draft articles. In a spirit of compromise, however, he could agree that some elements of draft article 16 could be retained, with minor changes. The second sentence of paragraph 1 could thus be included. The provision might read: "A contractual stipulation between an alien and the State in which he carries on business shall not affect the right of the State of nationality of the alien to exercise diplomatic protection on behalf of such a person when he or she is injured by an internationally wrongful act attributable to the contracting State"; and the last phrase, "or when the injury to the alien is of direct concern to the State of nationality of the alien", could be added, although what was of "direct" concern in that context was not very clear. Such wording would confirm the views expressed by the Commission on diplomatic protection and establish a link with contractual provisions which might exist in some regions. If such a compromise solution was not considered useful or desirable, he would be in favour of the adoption of draft article 16 as it stood.

43. Mr. KAMTO said that, however interesting it might be, the Calvo clause was not to be codified as part of the Commission's work. If the Commission undertook to deal with contractual stipulations involving private individuals, why would it stop at the Calvo clause? Its mandate was not to decide what kind of commitment a contractual clause created for a State.

44. Ms. ESCARAMEIA said that article 16 did not really address the Calvo clause and that it was only an example of the rule on the exhaustion of local remedies stipulated in a contract. Article 10 already stated that rule. It might therefore be better for article 10 to include the idea embodied in paragraphs 1 and 2 of article 16, with

an explanation of the kind of contractual stipulations in question. The thrust of the Calvo clause might be referred to in the commentary to article 10.

45. Mr. SIMMA said that he had a problem with the logic of the second sentence of article 16, paragraph 1, because, if it was stated in the first part of that sentence that diplomatic protection was defined as the right of the State of nationality of an alien injured by an internationally wrongful act to exercise diplomatic protection on behalf of that person, how could reference be made in the second part to the right of that State to exercise diplomatic protection when the injury to the alien was of direct concern to it, since that right already existed? That was another reason for dropping article 16.

46. Mr. MOMTAZ, reiterating the position he had expressed at the preceding meeting, asked whether it really had to be stated that there was a presumption in favour of local remedies, since that was a well-established rule of customary international law and it was referred to in article 10.

47. The CHAIR, noting that there was a clear majority in favour of not including article 16, asked whether a compromise might not be to recognize that a separate article on the Calvo clause was not widely supported, but not unsupported. The idea contained in article 16, paragraph 1, would be included in the commentary, either to article 10 or to article 14.

48. Mr. DUGARD (Special Rapporteur) said that that suggestion was not acceptable on procedural grounds. It was obvious that positions within the Commission had not changed, but the Commission still had to explain its view. An indicative vote would therefore be helpful.

49. Mr. KABATSI said he agreed with the Special Rapporteur that the split in the Commission still existed, but he did not think that an indicative vote would provide any indications at all.

50. Mr. DAOUDI said he also did not think that a vote would make the situation any clearer. Would its purpose be to decide on article 16, with the proposed amendments that had been submitted, or on article 16, as submitted by the Special Rapporteur? In the latter case, an indicative vote would not provide any indications because positions were unchanged. He therefore proposed that the Special Rapporteur should submit a new version of the article to the Commission for consideration before a final decision was taken.

51. The CHAIR said that the Commission did not have to decide how article 16 should be worded, but whether it should be referred to the Drafting Committee.

52. Mr. TOMKA said he did not think that article 16, paragraph 1, which provided that no contractual stipulation in a private law contract between an individual and a State affected the independent right of the State, under public international law, to exercise diplomatic protection, was justified in the present context. Perhaps that question related to the waiver of the right to exercise diplomatic protection. Article 16, paragraph 2, was unnecessary,

since it only reaffirmed a clearly established rule of customary law.

53. Mr. MANSFIELD said that he did not see how an indicative vote would be helpful in any way. He proposed that the question should be further discussed.

54. The CHAIR said that, following an indicative vote, the Commission was not in favour of referring article 16 to the Drafting Committee, on the understanding that, as a compromise, the content of the article would be incorporated in the commentary.

It was so decided.

The meeting rose at 11.55 a.m.

2730th MEETING

Wednesday, 5 June 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskeniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (*continued*) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. YAMADA (Chair of the Drafting Committee), introducing the Drafting Committee's report on diplomatic protection (A/CN.4/L.613)*, said that the Committee

* Subsequently distributed as A/CN.4/L.613/Rev.1 (see 2732nd meeting).

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

had devoted 11 meetings to the topic, from 30 April to 16 May 2002. He thanked the Special Rapporteur for his guidance, cooperation and readiness to provide alternative formulations, which had greatly facilitated the Committee's task. He also expressed his appreciation to the Committee members for their active participation and substantial contributions and acknowledged the invaluable support received from the Secretariat and the interpreters.

2. In introducing his third report (A/CN.4/523 and Add.1), the Special Rapporteur had announced that he would make every effort to help the Commission complete its work on the topic by the end of the quinquennium. That commendable commitment was welcomed, and the Drafting Committee had tried to consider as many articles as possible at the present session in order to achieve that purpose.

3. Since the Special Rapporteur had yet to produce draft articles on diplomatic protection of legal persons, the Drafting Committee had decided to structure the articles, at least for the time being, in three parts. Part One would contain general provisions applying to the diplomatic protection of both natural and legal persons. Part Two would contain provisions dealing with natural persons, and a future Part Three might include provisions on legal persons. The seven articles produced by the Committee at the present session fell into Parts One and Two.

4. The first article of Part One performed two functions. It defined diplomatic protection and set out the scope of the articles. It took into account comments made in plenary at the Commission's fifty-second session as well as recommendations made after informal consultations at the same session. There had been general agreement in the Commission on a number of issues: the articles on the topic should not deal with the so-called primary rules; the topic should not include functional protection by international organizations or protection of diplomats, consuls and other State officials acting in their official capacity; the topic should not cover the promotion of a national's interest not done under a claim of right; and the draft articles should stress that diplomatic protection was to be exercised by peaceful means.

5. Article 1, paragraph 1, incorporated those ideas. It provided that diplomatic protection consisted of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State. Diplomatic protection was given a broad meaning: it included "diplomatic action" or "other means of peaceful settlement". Diplomatic action referred to steps taken at the government-to-government level and encompassed a whole range of diplomatic procedures by which Governments contacted each other, negotiated with each other and informed each other of their views and concerns. The phrase "other means of peaceful settlement" covered all forms of dispute settlement, from negotiation and conciliation to judicial dispute settlement. The intention was not to limit modes of peaceful settlement, and the provision left it to the parties involved to decide on the most appropriate means of settling their dispute. The emphasis was on

lawful means of settlement. The words "or other means of peaceful settlement" were intended to qualify the phrase "diplomatic action" by indicating that diplomatic actions could only be of a peaceful character.

6. The phrase "a State adopting in its own right the cause of its national" was intended to support the view that, in the exercise of diplomatic protection, a State asserted its own legal interest. The Drafting Committee was of the view that, in exercising diplomatic protection, a State took up the claim of its national and adopted the cause of its national as its own. The injury was not just to the national but also to the State. For the wording, the Committee had been guided by the language used by ICJ in its judgment in the *Interhandel* case. When referring to the exhaustion of local remedies, the Court had stated that "the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law" [p. 27]. The words "arising from an internationally wrongful act of another State" underscored two points. First, the legal interest of a State in exercising diplomatic protection was derived from an injury to one of its nationals. Second, that injury was caused as a result of a wrongful act of another State.

7. The paragraph referred to diplomatic protection being exercised in respect of a "national". The use of that word left open the question whether the national was a "natural person" or a "legal person". It further emphasized that nationality was the most common link between an individual and a State creating a legal interest for that State. In addition, the link of nationality established a *locus standi* for a State. While nationality was the most common legal interest of a State in the exercise of diplomatic protection, it was not the only one. A State could have legal interests that were created by means other than nationality. Those were exceptions addressed in article 1, paragraph 2, in which it was recognized that in exceptional circumstances, a State was entitled to exercise diplomatic protection in respect of persons who were not its nationals.

8. The Special Rapporteur had raised the subject of diplomatic protection of stateless persons and refugees and had proposed an article on the subject, formerly article 8, now article 7. In addition, some members of the Commission were of the view that there were authorities that supported the right of a State to exercise diplomatic protection with respect to non-nationals in other circumstances. Examples had been given of the State of nationality of a ship or aircraft bringing a claim on behalf of the crew and possibly also the passengers, irrespective of the nationality of the individuals concerned. Reference had been made to the *M/V "Saiga" (No. 2)* case in that connection, and also to another possible exception in respect of non-national members of armed forces. Some members of the Drafting Committee were of the view that the language of that paragraph should not rule out those exceptions and would have preferred a form of language allowing for exceptions without reference to any particular article. Other members had been concerned that open-ended language on exceptions could be misleading if not supported by specific articles indicating precisely what those exceptions were, and they preferred to see specific references to the

articles dealing with exceptions. Ultimately, the Committee had agreed to follow that path, with the understanding that paragraph 2 might have to be reconsidered in case other exceptions were included. That understanding was indicated in a footnote to the paragraph. The commentary to the article would also explain the possibility of other exceptions. Article 1 was entitled “Scope”.

9. As to article 2, formerly article 3, the Drafting Committee had focused its discussions on the text that had emerged from the informal consultations held at the Commission’s fifty-second session. The Special Rapporteur had proposed article 2 to give effect to the Vattelian principle, as confirmed in the *Mavrommatis* case, according to which the right to exercise diplomatic protection belonged to the State and not to the injured national. The Committee had considered a number of options, including a choice between saying that the State of nationality “has the right” to exercise diplomatic protection and saying that it “is entitled” to do so. Bearing in mind that the purpose of the article was to give effect to the rule that it was a right of the State to exercise diplomatic protection, the Committee had preferred to emphasize that notion, which was also compatible with the wording used in the decision of ICJ in the *Mavrommatis* case. The words “is entitled” were more appropriate for inclusion in article 3, on the State of nationality. The Committee had also considered deleting article 2 altogether and covering the issue in the commentary to article 1 or merging the article with article 1, perhaps in an additional paragraph. In the end, it had decided to retain article 2 separately, since it set out an important principle.

10. The Drafting Committee had considered various alternative formulations for article 2 with a view to emphasizing the fact that diplomatic protection was a right of a State, not a duty. The formulations included the following: “the exercise of diplomatic protection is the right of the State of nationality of a person injured by the international wrongful act of another State”; “a State of nationality has the right to exercise diplomatic protection, in accordance with these articles, on behalf of a national injured by the internationally wrongful act of another State”; and, more simply, “a State has the right to exercise diplomatic protection under the conditions set out in these articles”. On balance, the Committee had preferred the last of the three formulations, with the concluding phrase being replaced by “in accordance with these articles”, which was the language used in the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.⁴ It had been felt that the first two formulations had largely been superseded by article 1. An advantage of the third formulation was that it made it clear that the right to exercise diplomatic protection was subject to other articles of the draft. The article left out any reference to the national, which was already contained in article 1 and subsequent articles, as it sought to emphasize that diplomatic protection was a right of the State.

11. Some members of the Drafting Committee had preferred to stress the nationality principle as being predominant in the area of diplomatic protection. However,

the Committee had adopted article 2 on the understanding that its purpose was not to omit nationality as a requirement, but rather to place emphasis on the right of the State. It was for article 3 to stipulate nationality as a basic condition for the exercise of diplomatic protection, subject to the exceptions and conditions covered in subsequent articles.

12. Finally, the Committee had decided to adopt “Right to exercise diplomatic protection” as the title of article 2.

13. As had been pointed out earlier, Part Two dealt with natural persons. The first article in it was article 3, based on the former article 5, and was entitled “State of nationality”. It highlighted the principle enunciated in article 2 and identified the State which had a right to exercise diplomatic protection in respect of natural persons, namely the State of nationality. It comprised two paragraphs.

14. Paragraph 1 enunciated the basic principle that a State of nationality was entitled to exercise diplomatic protection. The Drafting Committee had considered various ways of drafting the paragraph, the intention being to stress that the right to exercise diplomatic protection of natural persons belonged to the State of nationality and that such a right was discretionary. Various options had been considered, such as “the right to exercise diplomatic protection is vested in the State of nationality” and “a State of nationality is entitled to exercise diplomatic protection”. Concerns had been expressed with respect to both of those proposals. Some members felt that the phrase “is vested in the State of nationality” was too rigid to allow for exceptions. Others considered that a reference to the entitlement to the State of nationality to exercise diplomatic protection did not sufficiently emphasize the singular and most important position of the State of nationality in the exercise of diplomatic protection. The Committee had finally agreed on the version now before the Commission, which read “The State entitled to exercise diplomatic protection is the State of nationality”. The paragraph did not, of course, affect the fact that the exercise of diplomatic protection was a discretionary power of the State.

15. Paragraph 2 was based on the original draft by the Special Rapporteur and dealt with the nationality of natural persons. It defined a State of nationality for the purpose of diplomatic protection of natural persons. It did not attempt to provide comprehensive coverage of the rules of international law concerning nationality: instead, it highlighted the most important connecting factors for the exercise of diplomatic protection. Attention should be drawn to a number of important points.

16. First, the article did not adopt the effective link requirement enunciated by ICJ in the *Nottebohm* case. It did not require proof of effective link for the purposes of diplomatic protection. In the Drafting Committee’s view, proof of nationality was sufficient. Genuine or effective link would add yet another condition, and that was not necessary in the context of the article. The only time the question of effective link might have to be considered was in the context of dual nationality, where diplomatic protection was exercised against another State of nationality,

⁴ See 2712th meeting, footnote 13.

a matter which was addressed in a separate article. The approach was also consistent with the generally accepted policy of protection of human rights: namely, more opportunities should be provided by which individuals whose human rights had been violated could have access to remedies. It was also consistent with the general policy of international public order not to allow States that committed internationally wrongful acts to remain unaccountable for them.

17. Second, the paragraph recognized the right of a State to regulate who could become its national. The words “a State whose nationality the individual sought to be protected has acquired” meant acquired under the internal law of the State.

18. Third, the paragraph provided a non-exhaustive list of examples of how nationality was usually acquired. They included nationality by birth (*jus soli*), by descent (*jus sanguinis*), by State succession or by naturalization. The Drafting Committee had not used Latin expressions, since their translation into some of the official languages of the United Nations would create difficulties. The commentary to the article, however, would make it clear that nationality by birth and descent meant what were known in customary international law as *jus soli* and *jus sanguinis*. The words “in any other manner” emphasized the non-exhaustive character of the list. The Committee had recognized that, in some parts of the world, it was still difficult for natural persons to provide documents proving their nationality. Sometimes the mere fact that an individual had resided in a particular State was sufficient proof that he or she was a national of that State. Accordingly, “residence” was not a sufficient basis for the granting of nationality, but it could be proof of nationality. That issue would be clarified in the commentary.

19. Fourth, the Drafting Committee had found it unnecessary to qualify the word “naturalization” with the term “bona fide” as suggested by the Special Rapporteur. As long as naturalization had been acquired lawfully in a manner consistent with the internal law of the State, it should be recognized.

20. Fifth, the right of the State to regulate the acquisition of nationality was not absolute: it was qualified by the phrase “not inconsistent with international law”. The phrase was intended to prevent abuse and to avert situations in which the granting of nationality was done with the idea of purposely overlooking the interest of another State. The phrase covered all methods of the granting of nationality. The reasons why it had been formulated as a double negative were that, first, the granting of nationality was in principle within the competence of the State; second, the matters dealt with in the paragraph were not those on which there were clear rules of international law, but, to the extent that there were applicable rules of international law, national laws should not be inconsistent with them; and, third, it also shifted the burden of proof to those who challenged the granting of nationality. The Drafting Committee had thought that a double negative would be the best way of conveying those understandings.

21. Article 4, entitled “Continuous nationality”, was based on article 9 proposed by the Special Rapporteur. At the previous session, the Commission had held an extensive debate on the requirement of continuous nationality, in which views had diverged. While many members had supported the retention of the requirement, others had experienced difficulty with it. Finally it had been agreed that the requirement should be retained, together with the exceptions. The Drafting Committee had also worked on the basis of the results of an informal consultation held the previous year. As in the plenary, the views in the Committee had been divided. Some members had thought that the requirement of continuous nationality was well-established in practice and should be maintained. For others, the logic of the requirement was no longer defensible, because it simply helped a State that had committed an internationally wrongful act to remain unaccountable. As a result, a number of members had reserved their position on the article, objecting to the form of language in paragraph 2.

22. In terms of structure, paragraph 1 asserted the traditional position that, in order for diplomatic protection to be exercised, the injured person must be a national of the State that exercised it both at the time of injury and at the date of presentation of the claim. Paragraph 2 dealt with exceptions, while paragraph 3 limited the scope of those exceptions.

23. As to the continuous nationality rule, the emphasis in judicial decisions was on two key dates: the date the injury occurred and the date of the official presentation of the claim. State practice was not clear on the requirement of nationality between those two dates. The Drafting Committee had decided to opt for constructive ambiguity that reflected State practice in paragraph 1, where the language left a number of possibilities open that would have to be dealt with in the commentary. The references in paragraph 1 to the “time of the injury” and the “date of the official presentation of its claim” were intended to provide more precise and identifiable dates on which a person should be a national of the State exercising diplomatic protection. While the occurrence of a wrongful act normally coincided with the occurrence of the injury, that was not always the case. The date of injury to the person was more easily identifiable. The words “the date of the official presentation of its claim” referred to the date on which an official approach was made by the State exercising diplomatic protection, in contrast to informal diplomatic contacts on the subject.

24. The word “claim” meant the claim put forward by the State exercising diplomatic protection. It was intended to refer not only to a claim that might be submitted to a judicial body but also to any official notice. The Drafting Committee had decided not to enter into how notice of claim could be given, for that was an issue addressed in article 43 of the draft on State responsibility. There were various ways in which it could be done, and the matter should be dealt with not in the article but in the commentary. The Committee thought that the words “is entitled” should be used when referring to a rule and the word “may” when referring to exceptions to a rule. That applied to the use of those words throughout the draft articles.

25. Paragraph 2 related to exceptions to the continuous nationality requirement that allowed a State to exercise diplomatic protection in respect of a person who was its national at the date of official presentation of the claim but was not its national at the time of the injury. It set out three cumulative conditions for application of the exception: first, the person seeking diplomatic protection must have lost his or her former nationality; second, that person must have acquired the nationality of another State for a reason unrelated to the bringing of the claim; and third, the new nationality must have been acquired in a manner not inconsistent with international law.

26. The first condition, loss of the former nationality, might involve voluntary or involuntary loss. Nationality could be lost, for example, as a result of State succession or by marriage or adoption. Sometimes, as in the case of marriage, it was difficult to determine whether the loss of nationality was voluntary or involuntary. The Drafting Committee had therefore been of the view that the fact that the person had lost nationality sufficed and it was not also necessary to prove that the loss of nationality was involuntary.

27. The second condition, that the new nationality should have been acquired for a reason unrelated to the bringing of the claim, aimed to prevent forum shopping and emphasized good-faith acquisition. It was intended to exclude cases in which a new nationality was acquired solely for the purpose of pursuing diplomatic protection. The language used was intended to cover hardship cases, for instance, when a person automatically acquired a new nationality because of marriage, where the nationality of one of the spouses was imposed on the other, when a person was adopted by a national of another State and automatically acquired the nationality of the adopted parent, or when, as a result of State succession, a person had to opt for the nationality of one of the successor States. The provision was not limited to the cases mentioned: it was broader and could include other good-faith naturalizations that were not obtained just for diplomatic protection.

28. The Drafting Committee had been sharply divided on the need for the requirement that acquisition of a new nationality must be “for a reason unrelated to the bringing of the claim”. Some members objected to the requirement both in principle and on the grounds that the test adopted was unhelpful. Regarding the principle, they pointed out that a number of authoritative sources criticized the continuous nationality requirement. They argued that there might be cases in which a person was injured as a consequence of an internationally wrongful act of a third State, lost his or her nationality and then acquired a new nationality by lawful means. In such cases, the new State of nationality had a legal interest in protecting the individual, provided the acquisition of the new nationality was compatible with international law. In the view of those members, concerns about forum shopping were unjustifiable so long as the acquisition of the new nationality was not inconsistent with international law. Any requirement that denied the exercise of diplomatic protection in such cases only benefited the State that had committed the wrongful act. In view of the fact that paragraph 3 protected the former State of nationality by excluding the exercise of

diplomatic protection against it, they saw no rational basis for adding a further requirement linked to the intention of the individual in acquiring the new nationality. Those members also considered that the words “for a reason unrelated to the bringing of the claim” were too subjective and very difficult to ascertain in practice. They had reserved their position with regard to the requirement. The explanation he had given with regard to the words “in a manner not inconsistent with international law” in article 3, paragraph 2, applied to the use of the same phrase in article 4, paragraph 2.

29. Paragraph 3 set a limit on the exceptions in paragraph 2. It protected the former State of nationality against the exercise of diplomatic protection by the new State of nationality in cases where the injury had occurred at the time the person was a national of the former State and not of the new State of nationality. It was successive nationality cases and not dual nationality cases that were envisaged. The provision was a safeguard against any abuse of the exceptions in paragraph 2.

30. Article 5, based on article 7 as proposed by the Special Rapporteur, dealt with the exercise of diplomatic protection in cases of dual or multiple nationality. The scope of the article was limited to the exercise of diplomatic protection by one State of nationality against a third State of which the person in respect of whom diplomatic protection was exercised was not a national. The exercise of diplomatic protection by one State of nationality against another State of nationality would be dealt with in a separate article.

31. Article 5, paragraph 1, supported the principle set out in article 3, namely that a State of nationality had the right to exercise diplomatic protection in respect of its national. It did not require a genuine or effective link between the national and the State exercising diplomatic protection.

32. Paragraph 2 dealt with the possibility of joint exercise of diplomatic protection by two or more States of nationality against a third State. The Drafting Committee had felt that the paragraph was sufficient to set out the general principle, but that the commentary should elaborate on the question so as to avoid the possibility of abuse when both States of nationality exercised diplomatic protection simultaneously through different channels. That could place an undue burden on the respondent State by requiring it to defend itself in different forums with regard to the same claim. The commentary should also make clear that the paragraph was not intended to allow one State of nationality to exercise diplomatic protection where the problem had already been settled by the exercise of diplomatic protection by another State of nationality. The commentary should also consider cases in which one State of nationality waived its right to diplomatic protection, while the other State of nationality continued with its claim. It should indicate that those were matters that were closely related to the context in which they occurred and should be evaluated on a case-by-case basis, taking into account the facts involved in each case. Article 5 was entitled “Multiple nationality and claim against a third State”.

33. Article 6 dealt with the question whether a dual or multiple national might be protected by one State of nationality against another State of nationality. In terms of structure, the Drafting Committee had accepted the proposal made in plenary that article 6 belonged after former article 7, which was now article 5, on the general situation of diplomatic protection of dual or multiple nationals. During the discussion in plenary at the Commission's fifty-second session, the majority had rejected the traditional view, as espoused in the Convention on Certain Questions relating to the Conflict of Nationality Laws, of not permitting one State of nationality to exercise diplomatic protection on behalf of a national against another State of nationality. Instead, the prevailing view at that time had been that article 6, as proposed by the Special Rapporteur, reflected current trends in international law. The Committee had worked on the text of that article on the basis of that understanding.

34. Paragraph 1 had its origins in the text proposed by the informal consultations at the Commission's fifty-second session,⁵ together with the proposals for safeguards against abuse suggested by those consultations. The Drafting Committee had decided against attempting to define "dominant" or "effective" nationality, which would be very difficult to do given the wide range of possible factors that came into play. Different considerations had been resorted to by different tribunals such as the Iran–United States Claims Tribunal. It had been decided to leave it to the commentary to cover some of those factors.

35. Instead, the Drafting Committee had focused on whether the criterion should be one of "dominant" or "effective" nationality. Arguments in support of both criteria had been considered. It had been said that an individual might have two nationalities that were "effective", but only one that was "dominant". It had been felt that what was necessary was a term with a strong element of relativity, indicating that the individual had stronger ties with one State than with another. "Dominant" had been deemed too strong. While the term might work in cases involving dual nationality, it was less suitable in others, for example, cases of multiple nationality.

36. The Drafting Committee had considered other formulations such as "more effective", as well as the traditional reference to the place of the exercise of civil and political rights. But all this had not been considered sufficient. The proposal had also been made to use the phrase "genuine link", but it had not received majority support in the Committee. The Committee had settled for the term "predominant" in order to reflect the relative nature of the concept when two conflicting nationalities were involved. In addition, the Special Rapporteur would make it clear in his commentary to the article that it was the "predominant" nationality of the individual at the time of the exercise of diplomatic protection that was meant.

37. The Drafting Committee was aware that article 6 would be difficult for some countries to accept. Examples had been cited of national constitutions prohibiting dual nationality. At the same time, it had been recognized that

international law did not prohibit dual or multiple nationality and that there had been a shift in attitudes towards the acquisition of multiple nationalities, which had in some cases come to be viewed as a "right" of the individual. Hence, it was necessary to provide for situations where one State of nationality attempted to exercise protection *vis-à-vis* another State of nationality.

38. The Drafting Committee had considered two revised formulations designed to take into account the concerns of States that did not favour article 6. The difference between the two formulations had consisted in how the "exceptional" case of a predominant nationality was portrayed. The choice had been between saying "where the nationality of the latter State", namely the respondent State, "is predominant" and saying "unless the nationality of the former State", namely the claimant State, "is predominant". There was a difference between the two from the standpoint of the burden of proof. It had been thought that the second formulation, which placed the burden of proving predominant nationality on the claimant State, was the better approach. In addition, by framing the formulation in negative terms and using the term "unless", it suggested that the circumstances envisaged in article 6 would be exceptional.

39. With regard to paragraph 2, the Drafting Committee had accepted the proposal made in the informal consultations at the Commission's fifty-second session that a paragraph based on article 9, paragraph 4, be inserted in article 6. Therefore, the initial reference to "subject to article 9, paragraph 4" at the beginning of what was now paragraph 1 was no longer needed. The purpose had been to avoid abuse of article 6. Paragraph 2 dealt with the temporal aspect: where a State committed an international wrong against one of its nationals at a time when the individual was the national "only" of that State, and where the individual subsequently became a dual national, the new State of nationality was prohibited from exercising diplomatic protection against the other State of nationality.

40. The Drafting Committee had decided not to use the word "only" in respect of "the latter State", since doing so would restrict the provision to cases of dual nationality, leaving out situations where individuals held multiple nationalities. The Committee had decided to make the position clearer by stipulating that the person "was a national of the latter State and not of the former".

41. It was important to bear in mind that the provision dealt essentially with the situations of dual and multiple nationality and was presented as an exception to the latter half of paragraph 1, namely where the State exercising diplomatic protection was the predominant State of nationality. While paragraph 1 in principle prevented one State of nationality from bringing a claim against another State of nationality, it allowed for such a possibility where the nationality of the State purporting to exercise diplomatic protection was predominant. However, under paragraph 2, such a claim could occur only if the individual was a national of both States at the time of injury. Or, to put it in negative terms, as had been done in the provision, such a claim could not be entertained if the individual in respect of whom the State was attempting to exercise dip-

⁵ *Yearbook ... 2000*, vol. II (Part Two), p. 85, para. 495.

lomatic protection was not already one of its nationals at the time of injury.

42. The Drafting Committee had considered the potential overlap with article 4, paragraph 3, which had a similar purpose, albeit in the context of continuous nationality. There was a view in the Committee that either the issue could be better dealt with in the context of article 4, paragraph 3, perhaps reformulated in slightly more general terms, or an explicit cross-reference to the exceptions in article 4, paragraph 2, should be made in article 6, paragraph 2.

43. It had been argued that paragraph 2 could apply only in the context of the exceptions to article 4, because otherwise there would be no possibility for the State to bring a claim on behalf of an individual who was not one of its nationals at the time of the injury, simply by virtue of the operation of the continuous nationality rule in article 4, paragraph 1. Put differently, if the Drafting Committee had decided to adopt a strict application of the continuous nationality rule in article 4, the new paragraph 2 in article 6 would not be necessary because the State purporting to exercise nationality had not been a State of nationality at the time of injury and therefore could not exercise diplomatic protection.

44. However, the Drafting Committee had included several exceptions to the rule of continuous nationality in article 4, making it possible for a State of nationality, in certain circumstances, to exercise diplomatic protection even though it had not been the State of nationality at the time of injury. It had also said, in paragraph 3 of that article, that that would not, however, be possible if the claim was brought against a former State of nationality, to cover the scenario in which the individual had *changed* his or her nationality, in other words, given up his or her former nationality in favour of a new nationality, during the period between the injury and the presentation of the claim.

45. At issue in article 6, paragraph 2, was the scenario in which the individual had not given up his or her original nationality but had instead *acquired a further nationality* after the injury during the critical period between the injury and the presentation of the claim. Under article 4, paragraph 2, the new State of nationality could, in certain exceptional situations, exercise diplomatic protection in respect of an injury committed against its national by a *third State*, even though the claimant State was not a State of nationality of the person at the time of injury. However, it had been felt that such a possibility should be prevented if the injury was committed not by a third State but by *the other State of nationality* at the time of injury, a State of which the person was currently also a national because of his dual nationality, even if the claimant State of nationality was the predominant State of nationality at the moment of the exercise of diplomatic protection.

46. It had also been felt that article 4, paragraph 3, had not sufficiently covered the case of the dual national as just described. Hence, the Drafting Committee had considered it necessary to include a similar rule, in article 6, paragraph 2, to be applied in the context of dual nationality. Put succinctly, even in the cases under arti-

cle 4, paragraph 2, where the State of nationality of a dual national would be entitled to bring a claim in respect of an injury committed against the individual who had not been a national of that State at the time of the injury, that would not be possible against another State of nationality by virtue of the application of article 6, paragraph 2, even if the claimant State had been the predominant State of nationality.

47. Ultimately, the Drafting Committee had decided not to include the suggested cross-reference to article 4, since it could be misconstrued and could lead to a confusing interpretation of article 6. Furthermore, it had been felt that the cross-reference was not strictly necessary since the same outcome sought would, in any event, be realized through the regular application of the draft articles as proposed. In addition, it had been felt that the linkage with article 4 on continuous nationality could be raised in the commentary. All that should be borne in mind was that article 6, paragraph 2, should be viewed in the context of the operation of article 4.

48. One member of the Drafting Committee had held the view that paragraph 2 was illogical because it concerned a situation that could never occur, in view of the provisions in article 4 on continuous nationality.

49. Finally, the Drafting Committee had decided to adopt as the title for the draft article "Multiple nationality and claim against a State of nationality".

50. Article 7, based on former article 8, provided for two exceptions to the rule established in article 3, namely that a State of nationality was entitled to exercise diplomatic protection in respect of one of its nationals. In deviating from the standard rule, article 7 allowed a State to exercise diplomatic protection in respect of a non-national where the latter was either a stateless person or a refugee. That exception had been approved in principle by the plenary when it had considered the Special Rapporteur's first report, and the draft article had been referred to the Drafting Committee in the form proposed by the Special Rapporteur. Therefore, the Committee's task had been to consider not whether those exceptions should or should not be included in the draft articles, but rather how they should best be formulated.

51. At the same time, it had been taken into account that some Governments had expressed reservations about including those exceptions, particularly with regard to refugees, as this could be seen as a ground for a claim of nationality. However, it should be clear that that was not the intention of article 7. Instead, all it asserted was that there were circumstances in which a non-national might be protected, and that doing so was entirely within the discretion of the State. In no way did it oblige the State to protect such individuals.

52. Having said so, the Drafting Committee had discussed the scope of the exceptions as well as the general policy underpinning them with a view to reaching a generally acceptable formulation that would be coherent in relation to the other articles and to the existing bodies of law regulating stateless persons and refugees. The

purpose, therefore, had not been to embark on a consideration of the legal position of stateless persons or refugees *per se*. Instead, the Committee had focused on the narrower issue of the discretionary exercise of diplomatic protection in respect of such individuals, regardless of the fact that they were not nationals of the State purporting to exercise such protection.

53. The Drafting Committee had thus started its work on the basis of the Special Rapporteur's proposal with the above factors in mind. Besides some drafting refinements, including correcting the tenses in what were now paragraphs 1 and 2, the Committee had opted for the wording "may exercise diplomatic protection" to emphasize the discretionary nature of the provision. The reference to "claimant State" had been replaced by "that State", meaning the State exercising diplomatic protection. Furthermore, the original reference to an "injured" person had been deleted so as to conform to the text of the previous articles. Likewise, the Committee had further rationalized the text by including the phrase "when that person at the time of the injury was a lawful and habitual resident of that State", which had led to the deletion of the original proviso contained in the last phrase. That last amendment had subsequently been refined further in the context of paragraph 1.

54. The Drafting Committee had then proceeded on the basis that, since the considerations relating to stateless persons were not entirely the same as those applicable to refugees, it would be preferable to separate them into two different paragraphs, albeit still within the same draft article.

55. Paragraph 1 dealt with the question of stateless persons, and the Committee had taken as its basis the definition of a stateless person contained in article 1 of the Convention relating to the Status of Stateless Persons, in which a stateless person was defined as "a person who is not considered as a national by any State under the operation of its law". Consequently, it was not deemed necessary to include a definition or to examine the reasons for the statelessness or whether an individual had become stateless in bad faith. Instead, the focus had been on the possibility of exercising diplomatic protection of an individual who was considered stateless under international law. In addition, the provision envisaged the exercise of diplomatic protection after the individual had become a lawful and habitual resident, thus further minimizing the need to consider the reasons for the statelessness.

56. As to the wording "lawfully and habitually resident", the original version had used the phrase "ordinarily a legal resident". Other suggestions had included "acquired legal residence" and "lawful and principal residence". The Drafting Committee had noted that the term "ordinarily" did not appear in existing texts relating to nationality and that the term "habitual" had been used in several treaties. It had decided on "lawfully and habitually resident" following the example of the European Convention on Nationality, which used the same phrase in article 6, paragraph 4 (g), in relation to stateless persons and refugees. It had been felt that that was the most modern way of referring to the legal situation of stateless persons and refugees

and that it avoided some of the difficulties of speaking of "ordinary" legal residence. Furthermore, habitual residence had a connotation of permanence, as in the case of the Convention relating to the Status of Refugees, which was to be preferred.

57. Similarly, it had not been considered sufficient to refer simply to "lawful residence" or "habitual residence". Instead, both "lawful" and "habitual" residence had to co-exist and should be applied in combination. Likewise, the criterion of "residence" itself was necessary for the element of permanence.

58. The Drafting Committee had also felt that the criterion of "lawful" residence would not necessarily be too high a barrier for undocumented individuals. A State could still consider them to be lawful residents. At the same time, some members had been of the view that the word "lawfully" was superfluous because the defendant State could not conceivably challenge the claimant State about the individual's being "lawfully" resident in its State. However, the combined requirement of "lawful" and "habitual" residence was thought to be the closest approximation to the criterion of nationality in the regular situation of the exercise of diplomatic protection. Indeed, one positive effect of the decision to speak of "lawful and habitual" residence was that it eliminated the need for the reference to the existence of an "effective link", which had been proposed by the Special Rapporteur.

59. The Drafting Committee had also considered a lower threshold by using the phrase "lawfully staying", which was the terminology used in the existing instruments on refugees. Although the view was held that a lower threshold was advisable to provide the best possible protection for stateless persons, the Committee had refrained from using such language because that article essentially dealt with a very specific exceptional situation. Thus, a higher threshold was deemed preferable.

60. Furthermore, the Drafting Committee had been of the opinion that such lawful and habitual residence must exist at the time of the injury and at the date of the official presentation of the claim in order to avoid a situation in which, subsequent to the injury, the person no longer maintained his or her habitual and lawful residence in the State purporting to exercise diplomatic protection. The formulation was based on the same temporal formula provided for in article 4 in the context of continuous nationality. Indeed, it had been considered necessary to maintain parallelism between article 7 and article 4 so as to ensure the same treatment for non-nationals as that prescribed for nationals. The text had initially referred to the "formal" presentation of the claim, but that had been considered too restrictive as there were no prescribed forms for the presentations of such a claim. Instead, the Committee had settled for "official" presentation so as to suggest an actual point in time when the issue reached the stage of a claim for the exercise of diplomatic protection being made *vis-à-vis* another State. His earlier comments on the notion of "official presentation" in the context of article 4 were applicable to article 7 as well.

61. The text of paragraph 1 had been further refined to read “in respect of a stateless person who, at the time of injury and at the date of the official presentation of the claim, is” lawfully and habitually resident.

62. Paragraph 2 was concerned with the situation of the exercise of diplomatic protection in respect of refugees. The Drafting Committee had approached the paragraph from the standpoint that it raised issues similar to those in the case of stateless persons, and had therefore opted for language similar to that used in paragraph 1.

63. As to the phrase “lawfully and habitually resident”, the Drafting Committee had taken note of article 28 of the Convention relating to the Status of Refugees, which referred to the issuance of travel documents to refugees “lawfully staying” in their territory. However, it was important to stress that, if a State did give travel documents to a refugee, that had no implications for nationality or for diplomatic protection, as was clear from paragraphs 15 and 16 of the schedule attached to article 28. The Committee had considered the *travaux préparatoires* of article 28, which indicated that the term “residence” was not used because it was considered too strict. Thus, there had been, at that time, a preference for “lawfully staying” (*résidant régulièrement*).

64. The Drafting Committee had not, however, decided to adopt the phrase “lawfully staying”, preferring instead to retain the proposed wording “lawfully and habitually resident”. As in the case of paragraph 1, it had been felt that, since it was an exception to the rule that only the State of nationality might exercise diplomatic protection, the more appropriate course was to set a threshold higher than that in the Convention relating to the Status of Refugees. Similarly, the Committee had decided to include the phrase “at the time of injury and at the date of the official presentation of the claim”, as had been done in paragraph 1.

65. The Drafting Committee had considered an alternative proposal for the paragraph making reference to the right of the State which had issued a travel document to a refugee to exercise diplomatic protection, notwithstanding the right of a competent international organization to protect the refugee. However, the proposal had not enjoyed the same level of support as the text now before the Commission, since it had risked comparing the rights of international organizations *vis-à-vis* refugees with the right of a State to exercise diplomatic protection. Again, it would necessarily require the adoption of the standard of “lawfully staying”, which the Committee had decided not to accept.

66. The exact scope of the term “refugees” had been the subject of some discussion in the Drafting Committee. Concern had been expressed that, if “refugees” meant only those persons covered by the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees, it would exclude displaced persons, and therefore the provision should be made applicable to them as well. Furthermore, a State might confer the status of “refugee” on individuals who did not strictly meet the definition of the Convention relating to the Status of

Refugees. It had been considered that the plenary had preferred a broader conception of the term “refugee” and that, as a matter of policy, such broader application was to be welcomed. It had thus been suggested that a further paragraph be included containing a more general wording, such as that of “recognized refugees”, in accordance with article 6 of the European Convention on Nationality. Under such a provision, the term “refugees” would have included, but not been limited to, refugees under the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees. It had been noted that several regional treaties had also followed that approach. However, the Committee had subsequently decided against adopting such an express provision, preferring instead to discuss the matter further in the commentary.

67. In regard to paragraph 3, the Drafting Committee had not thought it possible for a State to exercise diplomatic protection in respect of a refugee lawfully and habitually resident in that State against the State of nationality of the refugee. That would run counter to the basic approach of the draft articles, in which nationality was the predominant basis for the exercise of such protection. Indeed, the Committee had considered including a provision with an additional subparagraph to that effect in the context of paragraph 2 on refugees. Although there had been some reluctance to include a specific prohibition in such a scenario, on balance it had been decided to include the provision to cover the concerns that member Governments might have if it were not included. However, it had been agreed that the matter would be further discussed in the commentary.

68. Finally, the Drafting Committee had decided to adopt the article title “Stateless persons and refugees”.

69. The Drafting Committee was submitting the seven draft articles to the plenary for adoption.

70. The CHAIR, thanking Mr. Yamada for his lucid report, said that the Commission would now proceed with the adoption of the report of the Drafting Committee article by article.

PART ONE

ARTICLE 1 (Scope)

71. Ms. ESCARAMEIA said that she did not agree with the phrase “in accordance with article 7” at the end of paragraph 2. It was very restrictive and went against the evolution of international law, something that was emphasized further on by article 3, paragraph 1. Attention had frequently been drawn to developments in the course of the Commission’s discussions, particularly in connection with the *M/V “Saiga” (No. 2)* case, which was very clear. It was not logical that the Commission should rigidly follow ICJ, but not ITLOS. That was all the more important since the Commission was focusing on the fragmentation of international law. In the *M/V “Saiga” (No. 2)* case, the judges had ruled that it was irrelevant that the State bringing the claim was not the State of nationality of the injured persons, and, pointing to the evolution of interna-

tional law, they had called attention to an important aspect which “relates to two basic characteristics of modern maritime transport: the transient and multinational composition of ships’ crews and the multiplicity of interests that may be involved in the cargo on board a single ship” [p. 44]. When there was a clear judicial precedent, the Commission should follow it.

72. The CHAIR said that Ms. Escarameia’s remarks would be noted in the commentary. If he heard no objection, he would take it that the Commission agreed to adopt draft article 1.

Article 1 was adopted.

ARTICLE 2 (Right to exercise diplomatic protection)

Article 2 was adopted.

PART TWO

ARTICLE 3 (State of nationality)

73. Mr. CANDIOTI pointed out that the words “State succession” had been omitted from the Spanish text of the draft article.

74. Mr. TOMKA noted that in order to bring the text of the article into line with the Vienna Convention on Succession of States in Respect of Treaties and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts and with the Commission’s own work in other areas, the words “State succession” should be replaced by “the succession of States” in paragraph 2.

75. Mr. YAMADA (Chair of the Drafting Committee) said that he had no objection to the proposed amendment.

76. Ms. ESCARAMEIA said that, since the Drafting Committee had chosen to list several ways in which nationality could be acquired (art. 3, para. 2), marriage and adoption should be included. A reference to marriage was particularly important because the paragraph stipulated that, for the purposes of diplomatic protection, nationality must have been acquired in a manner not inconsistent with international law. However, article 9 of the Convention on the Elimination of All Forms of Discrimination against Women stipulated that States parties must ensure that neither marriage to an alien nor a change of nationality by the husband during marriage would automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. Since many women did, in fact, acquire their husband’s nationality automatically upon marriage under domestic law, it might be argued that they had done so in a manner inconsistent with international law—as embodied in the Convention—and so were not entitled to diplomatic protection.

77. Mr. YAMADA (Chair of the Drafting Committee) said it was his understanding that acquisition of nationality by marriage usually took the form of naturalization.

Any exceptions should be covered by the words “or in any other manner not inconsistent with international law”.

78. The CHAIR said that those words left considerable leeway, bearing in mind what the draft instrument was, and was not, intended to cover.

79. Mr. CHEE noted that several years previously he had had occasion to refer to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women in the Sixth Committee, pointing out that in some cases a woman’s acquisition of nationality was automatic as a result of succession of States. He therefore endorsed Ms. Escarameia’s proposal that a reference to marriage should be included in paragraph 2.

80. Ms. ESCARAMEIA said that there were a number of States, including her own, in which the acquisition of nationality by marriage took a form which might be viewed as outside the scope of naturalization and, in fact, might be deemed inconsistent with international law. In no circumstances must women be left without diplomatic protection because of such a situation.

81. The CHAIR said he found it difficult to imagine that the present wording of the draft article would not be adequate in such cases.

82. Mr. BROWNLIE said he agreed that the wording was probably sufficient. However, Ms. Escarameia’s point was well taken, and it might seem anomalous not to include a mention of marriage as a form of acquired nationality.

83. Mr. Sreenivasa RAO said that, having listened to Ms. Escarameia, he agreed that a distinction should be drawn between the acquisition of nationality by marriage and the naturalization process.

84. Mr. GALICKI said that the situation to which Ms. Escarameia had referred had not occurred to him or to the other members of the Drafting Group. Upon reflection, he supported her proposal, particularly as nationality by marriage might occur not only through naturalization but also automatically as a separate method of acquisition, a fact recognized in the European Convention on Nationality as a justification for holding multiple nationalities. Now that the Commission had women members, it should pay heed to them.

85. Mr. DUGARD said that he, too, supported Ms. Escarameia’s proposal. However, it would be anomalous to include a reference to marriage without also mentioning adoption.

86. The CHAIR wondered whether a reference to marriage and adoption would not rob the words “in any other manner, not inconsistent with international law” of any meaning. Moreover, the issues raised by Ms. Escarameia in relation to marriage did not arise in the case of adoption.

87. Mr. DUGARD said that marriage and adoption were normally treated in the same manner. If the Commission included a reference to one, it might as well add the other. Of course, the difficulty was that the article might then be

taken to include an exhaustive list of methods by which nationality could be acquired.

88. Mr. YAMADA (Chair of the Drafting Committee) said there must be a clear understanding that the acquisition of nationality by marriage should take place in a manner not inconsistent with international law. Thus, he believed that marriage was covered by the article in its present form. However, it was for the Commission to decide whether to make the proposed change.

89. Mr. AL-BAHARNA suggested that a reference to marriage should be included in paragraph 2 and that the issue of adoption should be dealt with in another of the draft articles.

*The meeting was suspended at 11.35 a.m.
and resumed at 11.50 a.m.*

90. Mr. YAMADA (Chair of the Drafting Committee) announced that, after consultations with Ms. Escarameia and the Special Rapporteur, it had been decided that the wording of paragraph 2 was adequate and that the Special Rapporteur would address the important point raised by Ms. Escarameia in the commentary. He therefore recommended that the article should be adopted in its present form.

91. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to adopt article 3 subject to the drafting changes proposed by Mr. Candiotti and Mr. Tomka.

Article 3 was adopted on that understanding.

Cooperation with other bodies

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE
INTER-AMERICAN JURIDICAL COMMITTEE

92. Mr. REBAGLIATI (Observer for the Inter-American Juridical Committee) described the work of the Inter-American Juridical Committee at its fifty-ninth and sixtieth sessions, held in July–August 2001 and February–March 2002, respectively. At its fifty-ninth session, the Committee had focused on only one of its numerous agenda items, democracy in the inter-American system, because the General Assembly of OAS was scheduled to adopt the draft Inter-American Democratic Charter at its twenty-eighth special session in September 2001. The Committee had been considering the topic since 1995 and had made numerous contributions that had been welcomed by the General Assembly of OAS and the Permanent Council.

93. At the beginning of its fifty-ninth session, the Chairman of the Permanent Council had invited the Committee to participate in the activities of the Council's working group responsible for preparing the text of the Inter-American Democratic Charter. To that end, the Committee had adopted a resolution containing in annex its observa-

tions and commentaries on the draft Charter on the assumption that the latter would ultimately be adopted as an OAS resolution. In view of the limited time available and the fact that the draft was already at an advanced stage of preparation, it had been deemed inappropriate to propose amendments to the text. The Committee had noted that such resolutions were generally designed to contribute to the progressive development of international law by interpreting the provisions of conventions, providing proof of the existence of customary norms, setting forth general principles of law or proclaiming common aspirations. It had pointed out that some of the resolutions of an international organization's bodies could be made binding on its members when so provided by the Statute of the organization and had noted that such resolutions should include programmatic guidelines.

94. The Committee had then made observations and comments on the organization of the provisions of the draft Inter-American Democratic Charter, the topics covered in it and, in particular, its compatibility with previous resolutions of the General Assembly and the OAS Charter. Article 9 of the OAS Charter provided that a Member of the Organization whose democratically constituted Government had been overthrown by force could be suspended from the exercise of the right to participate in the sessions of the General Assembly of OAS, the Meeting of Consultation, the Councils of the organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established; it also described the mechanism by which such suspension would be imposed and lifted. OAS General Assembly resolution 1080 (XXI-O/91) of 5 June 1991 was compatible with that article but had a broader scope. It covered the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected Government in any of the Organization's member States; it did not envisage the suspension of a member State but authorized the Permanent Council and the General Assembly to take certain measures in response to the situation. The Third Summit of the Americas, held in Quebec from 20 to 22 April 2001, had adopted the "democracy clause", which stated that any unconstitutional alteration or interruption of the democratic order in a member State of OAS constituted an insurmountable obstacle to the participation of that State's Government in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies.

95. The Committee had held a lengthy discussion of that provision, which had essentially been incorporated into the draft Inter-American Democratic Charter, and had made various recommendations regarding the need to bring it into line with the OAS Charter and related instruments. It was probably necessary and politically acceptable, at least for the present, but from the legal viewpoint it might not be compatible with the OAS Charter, depending on the manner in which it was interpreted and applied. Certainly, its scope was broader than the Committee would have wished. In any event, it was proof of the collective will to prevent and punish disruptions of the constitutional and democratic order through non-violent but equally illegal

means, a situation which had occurred in the past in the Americas.

96. The Inter-American Democratic Charter had been adopted by consensus at the twenty-eighth special session of the OAS General Assembly on 11 September 2001. Hence there had been no further negotiations on the text.

97. At its sixtieth session, the Committee had taken note of the adoption of the new Charter and had adopted a resolution stating that it largely reflected the Committee's comments and suggestions and mentioning the appreciation of the Committee's contributions which had been expressed by the Secretary-General and other high-level participants in the special session.

98. In its resolution 1774 (XXXI-O/01) of 5 June 2001, entitled "Elaboration of a draft Inter-American convention against racism and all forms of discrimination and intolerance", the OAS General Assembly had requested the Committee to prepare an analytical document for the purpose of contributing to and furthering the work done by the Permanent Council on that question. In consequence, the Committee had dealt extensively with the topic at its most recent session and had adopted resolution 39 (LX-O/02), of 6 March 2002, expressing its concern with regard to the increase in the number of acts of racism and intolerance throughout the world and confirming the need to make common cause in opposition to such manifestations by intensifying cooperation among States in order to eradicate those practices. It also endorsed the conclusions contained in document CJI/doc.80/02 rev.3, which was transmitted to the Permanent Council together with the resolution. Those texts were available for members to consult. In that connection, it should be mentioned that the Committee had conducted an extensive review of the general and regional normative framework in that sphere, on the basis of a compilation of treaties and legislation and of the replies to a questionnaire circulated to member States. The conclusions reached by the Committee were set forth in document CJI/doc. 80/02 rev.3 and expressed some caution as to the advisability of negotiating a new convention, but specified that, if it was decided to proceed with a new convention, it should be an instrument complementary to the existing universal and regional conventions, covering any general aspects of the question not covered by those conventions, or characterizing forms of racism, racial discrimination or intolerance not yet dealt with in specific international instruments.

99. The Committee was of the clear opinion that it was not advisable to undertake to negotiate and conclude a general convention to prevent, sanction and eradicate racism and all forms of discrimination and intolerance, insofar as to do so might duplicate existing conventions, producing overlaps that would lead to serious problems of interpretation and application. Nevertheless, the Committee had identified some themes that might be of relevance to work on the topic, namely: strengthening mechanisms for monitoring compliance with human rights treaty obligations; studies on specific groups such as indigenous populations and ethnic minorities; and contemporary forms of racism and racial discrimination. The Committee had also concluded that, if it was decided to develop an inter-American convention aimed at some particular aspect of the matter, it should be developed within the framework

of the International Convention on the Elimination of All Forms of Racial Discrimination and other universal and regional conventions on the matter. The Committee had also pointed to other possible procedures for regulating matters relating to racism and racial discrimination, such as the adoption of amendments to existing conventions and interpretative declarations and the conclusion of additional protocols. It would also be possible to have recourse to political procedures such as those recommended by the first and second Summits of the Americas, held respectively in Miami (Florida), United States, on 9–11 December 1994 and in Santiago de Chile on 18–19 April 1998, and by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban (South Africa) from 31 August to 7 September 2001. Last, the Committee had indicated that the organs of OAS might consider urging those member States that had not yet done so to ratify or accede to the existing conventions, and to recommend States parties to the conventions against racism and racial discrimination to take the necessary steps to comply with their obligations under those conventions, *inter alia*, by adopting national laws and regulations.

100. That topic had been considered at the thirty-second regular session of the OAS General Assembly, held in Bridgetown on 2 June 2002, and would certainly continue to be considered in other forums of the organization. The draft agenda of the thirty-second regular session was available to members for consultation. One extremely important topic on the agenda had been the Inter-American Convention against Terrorism, which had just been adopted by the General Assembly. The text of the Convention was available for members to consult.

101. At its sixtieth regular session, the Committee had also considered the results of the sixth Inter-American Specialized Conference on Private International Law, held in Washington, D.C., from 4 to 8 February 2002. The Conference had adopted two model laws, on negotiable and non-negotiable uniform through bills of lading for the international carriage of goods by road. The Conference had also adopted a model inter-American law on secured transactions, aimed at reducing the cost of loans, encouraging international trade and investment in the region, and assisting small and medium-sized enterprises in the hemisphere. A third topic before the Conference had been liability for transboundary pollution. No agreement had been reached on that topic. The Committee had been entrusted by the Conference with the tasks of contributing to the study of the topic "Applicable law and competent international jurisdiction in matters of extracontractual civil liability" and to the preparation of the agenda of the seventh Inter-American Specialized Conference on Private International Law.

102. Last, he drew the Commission's attention to the preparations for the commemoration of the centenary of the Inter-American Juridical Committee, to be celebrated in 2006. Preparations for the event had begun in 2001, and there were plans to involve many inter-American and other regional organs and bodies. It was also hoped to involve the International Law Commission and other organs of the United Nations and its specialized agencies, as well as academic institutions and eminent international

lawyers, in the celebrations. Particular account had been taken of the preparatory work undertaken in the context of the commemoration in 1999 of the centenary of the first Hague Peace Conference. In addition to meetings and special events, the programme would include publications and other academic activities.

103. The Course on International Law had been held each year since 1974 and lasted four weeks, usually coinciding with the Committee's August meeting in Rio de Janeiro, Brazil. The course was attended by some 37 students from member States, 30 of whom were funded by grants. The participants were young graduates working in universities, the public sector or their country's diplomatic service. They studied full-time throughout the course and were assessed. Classes were taught by members of the Committee, international officials and staff members of international bodies, as well as teachers from universities in the Americas and other regions, especially Europe. About 30 teachers participated in the course each year. Various past and present members of the International Law Commission had taught on the course, thereby contributing to its prestige. Each course focused on a main theme. In 2001 the theme had been "The human person in contemporary international law" and in 2002 it would be "Natural resources, energy, the environment and international law".

104. The most recent Joint Meeting with Juridical Advisors of the Ministries of Foreign Affairs of the member States of OAS had been held in Washington, D.C., in March 2000, during the Committee's fifty-sixth regular session. The next meeting would be held in 2003, and its agenda would include an item on the International Criminal Court, which had ceased to be an item on the Committee's agenda. The purpose of the meetings was to exchange information and views on juridical issues of significance for member States.

105. Article 103 of the OAS Charter mandated the Inter-American Juridical Committee to establish cooperative relations with universities, institutes and other teaching centres, as well as with national and international committees and entities devoted to study, research, teaching or dissemination of information on juridical matters of international interest. He was confident that the Committee had made a contribution towards fulfilling that mandate.

106. The CHAIR thanked the Observer for the Inter-American Juridical Committee for his statement. It had been impressive to learn of the extensive achievements of an older and bolder institution, one in which his country was proud to participate. He had been particularly struck by the discussion of the issue of the fragmentation of international law and would welcome further details of the approach the Committee had adopted with regard to that issue, given that the Commission was itself embarking on a consideration of the question of fragmentation.

107. Mr. REBAGLIATI (Observer for the Inter-American Juridical Committee) said that the need to avoid the fragmentation of international law had been a particular concern in the context of consideration of a possible convention against racism. While that concern had not precluded the adoption of an inter-American convention

against racism, particular attention had been devoted to the desirability of integrating it into existing universal conventions.

108. Mr. Sreenivasa RAO thanked the Observer for the Inter-American Juridical Committee for his excellent overview of the work being done in that extremely important body, work which was also of great interest to jurists, international law students and scholars in other regions of the world. The lead taken by the Committee in the recent preparation of the Inter-American Convention against Terrorism was of particular interest, given the worldwide concern to ensure that funds were not placed at the disposal of terrorist organizations. Closer links should be forged between the Inter-American Juridical Committee and the Asian-African Legal Consultative Organization, since the two bodies shared common concerns.

109. Mr. KAMTO thanked the Observer for the Inter-American Juridical Committee for his comprehensive presentation of his organization's admirable contribution to codification and knowledge of international law. With regard to the draft Inter-American Convention against Terrorism, he asked what significant contribution a new regional convention could make, over and above those of existing conventions on the matter. He also wondered whether the Convention's laudable objective of eliminating terrorism, which was essentially a political rather than a legal concern, was realistic. Last, he asked whether the absence of a title to article 14 of the new Convention, dealing with discrimination, was inadvertent or intentional.

110. Mr. REBAGLIATI (Observer for the Inter-American Juridical Committee) said that the Inter-American Convention against Terrorism had been an initiative by political organs of OAS, responding to the need to rid the hemisphere of the scourge of terrorism. While, for obvious and regrettable reasons, a need had been felt to intensify inter-American cooperation in that field, special attention had also been paid to ensuring that the new Convention was compatible with existing conventions. The Committee had played a technical and advisory role in the process of negotiating the Convention. The absence of a title to article 14 of the Convention was a minor editing matter that would be rectified in due course.

111. Mr. NIEHAUS thanked the Observer for the Inter-American Juridical Committee for his excellent overview of the Committee's activities. The exchange of experiences between the two bodies had been of great value. The Inter-American Democratic Charter served as an example not just for the region but for the entire world. The Committee was also to be congratulated on the success of the sixth Inter-American Specialized Conference on Private International Law and on the Conference's adoption of two model laws. In celebrating its centenary in 2006, the Committee would be able to look back on 100 extremely fruitful years.

112. Mr. GALICKI said that the catalogue of universal conventions to be found in article 2 of the new Inter-American Convention against Terrorism made no reference to the Committee's own very important Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes against Persons and Related Extortion That Are of

International Significance. Nor was there any reference to the relationship between the two Conventions.

113. Mr. REBAGLIATI (Observer for the Inter-American Juridical Committee) said that, in his personal view, article 2 of the new Inter-American Convention against Terrorism simply enumerated the universal conventions into which the new Convention needed to be integrated in the context of the more general process of strengthening inter-American mechanisms to combat terrorism and stimulating regional cooperation in that field.

114. The CHAIR thanked the Observer for the Inter-American Juridical Committee for his informative statement and for his patience and willingness to answer questions. The experience had been an enriching one for all concerned.

The meeting rose at 1.05 p.m.

2731st MEETING

Thursday, 6 June 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (*continued*) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev. 1)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE (*continued*)

1. The CHAIR invited the members of the Commission to continue their consideration, article by article, of the

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

draft articles on diplomatic protection as adopted by the Drafting Committee (A/CN.4/L.613)*.

ARTICLE 4 (Continuous nationality)

2. Mr. TOMKA pointed out that the article's title in French (*Maintien de la nationalité*) did not correspond to its title in English (Continuous nationality) and suggested that the French title should be replaced by the words *Nationalité continue* or the words *Continuité de la nationalité*.

3. Mr. KAMTO said that he supported Mr. Tomka's remarks. Either wording was acceptable, although the concept of *continuité de la nationalité* presupposed, at least implicitly, that nationality was continuous, even in the case of a succession of States, whereas the concept of *nationalité continue* might simply refer to a change of nationality. If the words "continuous nationality" covered cases of succession of States, then they should be translated into French by the words *continuité de la nationalité*.

4. He recalled that, when the Chair of the Drafting Committee had introduced his report at the preceding meeting, he had said (para. 24) that the word *peut* ("may") in paragraph 2 was intended to draw attention to the exception to the principle stated in paragraph 1. He himself believed, however, that the exception was announced by the word "Notwithstanding", for the simple reason that the right to exercise diplomatic protection was and remained a discretionary right of the State.

5. Mr. GAJA said that, in paragraph 2, the words "for a reason" had been translated into French by the words *pour des raisons*. That changed the meaning because in the singular the word "reason" referred to the situation which had led to the change of nationality, such as a succession of States or naturalization, whereas in the plural the word "reasons" might refer to what had led the person concerned to change nationality, and that was difficult to determine. That was why the singular should be used.

6. Mr. CANDIOTI said he thought that, in the French text of paragraphs 1 and 2, it would be better to refer to *la réclamation* ("claim") rather than *sa réclamation*.

7. The CHAIR said that, if he heard no objection, he would take it that the Commission adopted article 4, as amended, on first reading.

It was so decided.

ARTICLE 5 (Multiple nationality and claim against a third State)

8. The CHAIR said that, if he heard no objection, he would take it that the Commission adopted article 5 on first reading.

It was so decided.

* Subsequently distributed as A/CN.4/L.613/Rev.1 (see 2732nd meeting).

ARTICLE 6 (Multiple nationality and claim against a State of nationality)

9. Mr. KAMTO said he thought that the end of the French text of paragraph 1, *que si la nationalité prédominante de celui-ci est celle du premier État en question*, should be brought into line with the English text (“unless the nationality of the former State is predominant”) and replaced by the words *à moins que la nationalité prédominante de celui-ci ne soit celle du premier État en question*, thus giving full force to the derogation from the principle embodied in the first part of the sentence.

10. Paragraph 2 was superfluous, as it merely reproduced the wording of article 4, paragraph 3, without adding anything to it.

11. The CHAIR said he thought there would be no problem in implementing Mr. Kamto’s proposal that the French text of the end of article 6, paragraph 1, should be brought into line with the English version.

12. Mr. TOMKA, pointing out that paragraph 1 opened with the words “A State of nationality may not exercise diplomatic protection”, while paragraph 2 began with the words “A State of nationality shall not exercise diplomatic protection”, asked whether they had been formulated differently for a reason or by chance. In that connection, he drew attention to the fact that the words “Diplomatic protection shall not be exercised” were used in article 4, paragraph 3, as well as in article 6, paragraph 2, and that the wording had not been translated into French in a uniform manner. Perhaps it should be.

13. Mr. DUGARD (Special Rapporteur) said he thought that the wording referred to by Mr. Tomka had not been chosen deliberately, but the choice could perhaps be justified by the desire to emphasize the restriction in paragraph 2 by the use of the words “shall not”. For reasons of consistency, however, it might be wise for paragraph 2 to reproduce the words “may not exercise”, as in paragraph 1.

14. Mr. DAOUDI said that the wording that the Drafting Committee had adopted for paragraph 2 on the proposal of one of its members would make the prohibition on the exercise of diplomatic protection by the State of nationality in the cases in question even stronger. The more flexible wording of article 6, paragraph 1, namely, “may not exercise”, allowed the State of nationality to exercise diplomatic protection according to the predominant nationality of the injured person. If the text had to be consistent, however, it would be better to use the expression “A State of nationality shall not exercise diplomatic protection...” in both paragraph 1 and paragraph 2.

15. Mr. MOMTAZ said that he recalled that the Drafting Committee had used two different expressions in paragraph 1 of article 6 and paragraph 2 of the article, in order to stress the discretionary power of the State of nationality to exercise diplomatic protection in the situation referred to in paragraph 1 and the obligation imposed on the State of nationality not to exercise diplomatic protection in the situation referred to in paragraph 2.

16. Mr. GAJA said that, if it was necessary to ensure the uniformity of the text, the wording of article 6, paragraph 2, should be based on that of article 4, paragraph 3. In the light of article 4, paragraph 3, however, there was no need for article 6, paragraph 2. What should be emphasized in article 6 was that the predominant nationality should be taken into consideration not only on the date of the submission of the claim but also at the time the injury had been caused. He therefore suggested that paragraph 1 should be redrafted accordingly and that paragraph 2 should be deleted.

17. Mr. YAMADA (Chair of the Drafting Committee), replying to Mr. Tomka, said that the Drafting Committee had decided to use the words “may” or “may not” each time it was a matter of stating an exception to a rule—which was, to a certain extent, the case of article 6, paragraph 1. However, he agreed with the comments made by Mr. Daoudi and also with his proposal that the expression “A State of nationality shall not exercise diplomatic protection...” should be used in both paragraph 1 and paragraph 2.

18. Referring to the comments made by Mr. Kamto and Mr. Gaja, he recalled what he had said with regard to article 4, which dealt with the case of a person who had lost his nationality, when introducing the Drafting Committee’s report, namely, that paragraph 1 established the principle of continuous nationality, while paragraph 2 referred to an exception to that principle and paragraph 3 to a limitation to the exception. However, article 6, paragraph 2, dealt with a different situation, that of a person who had not lost his nationality, but who had not yet acquired the new nationality at the time of the injury. That was why most members of the Committee had considered that paragraph 2 should be retained, at least when it had been considered on first reading. Whatever the final decision, the different points of view that had been expressed on the point would appear in the summary record of the relevant meetings, in the Commission’s report and in the commentary. It would be dangerous to indulge in a drafting exercise during a plenary meeting.

19. Ms. XUE said that, as a member of the Drafting Committee, she would like to make some additional clarifications. Article 6, paragraph 1, should be retained as it stood, since the phrase “may not exercise” was called for by the “unless” clause which followed it and referred to the exercise of a discretionary right. Using the expression “A State of nationality shall not exercise diplomatic protection” would be tantamount to converting an obligation into a right.

20. Generally speaking, she agreed with Mr. Gaja’s comments and in particular with his suggestion that the predominant nationality at the time the injury had been caused should be taken into consideration.

21. The CHAIR said that the problem was that article 6, paragraph 2, related not to the situation of dual nationality when one nationality was predominant, but to that of the possession, at the time of the injury, of the nationality of the responsible State and not that of the claimant State.

22. Mr. GAJA said he considered that paragraph 2 referred in substance to the situation in which the injured person did not have the nationality of the claimant State. Consequently, according to article 4, paragraph 3, that State was not in a position to bring a claim because the rule of continuous nationality came into play. Article 6, paragraph 2, was therefore illogical because it presupposed the existence of an element that was not present. He reiterated the proposal he had made regarding article 6, on the understanding that the Commission agreed to make a substantive change to the article.

23. Mr. KAMTO said that he was persuaded by Ms. Xue's arguments for the use of the words "may not exercise" in paragraph 1 and "shall not exercise" in paragraph 2.

24. In his view, paragraph 2 dealt not with the case of multiple nationality but rather with a situation already covered by article 4, paragraph 3, namely the situation where the new nationality of the injured person did not compete with his previous nationality and was not concomitant with it. He would nevertheless go along with the decision on paragraph 2 adopted by the Commission in plenary.

25. The CHAIR asked whether paragraph 2 could be placed in square brackets.

26. Mr. YAMADA (Chair of the Drafting Committee) said that it would not be appropriate to take a hurried decision in plenary to make substantive changes to a text prepared by the Drafting Committee. If the Commission in plenary wished to amend article 6, paragraph 2, it should give the Committee instructions to that effect and request it to review the text.

27. The CHAIR said that he saw no drawback to placing article 6, paragraph 2, in square brackets because that would simply indicate that, without being either rejected or adopted, the text would be reviewed by the Drafting Committee in due course, taking into account all the comments that had been made.

28. If he heard no objection, he would take it that the Commission adopted article 6, paragraph 1, on first reading, on the understanding that paragraph 2 would be placed in square brackets for further consideration by the Drafting Committee in the light of all the comments that had been made.

It was so decided.

ARTICLE 7 (Stateless persons and refugees)

29. Mr. KOSKENNIEMI said that he had serious reservations about the policy direction of article 7. He was particularly concerned about two issues. The first related to the application of the rule of continuous nationality. The Chair of the Drafting Committee had already pointed out that there had been a difference of opinion on that subject. He was among those who thought that the rule was not a rule of customary law and that there was no policy ra-

tionale compelling the Commission to include it in either article 4 or article 7.

30. The second issue related to stateless persons and refugees. He believed that the requirement in article 7, paragraphs 1 and 2, that a stateless person or a refugee should be habitually resident in the State in question was unduly restrictive and quite unnecessary. It would prevent the State in which the stateless person or refugee resided from providing diplomatic protection in certain cases, which, from the policy perspective, was completely unacceptable. When a person became a refugee, as in most cases where a person had been divested of his nationality and became stateless, the reason was that the State in which he had previously resided was or had become a totalitarian State. He had the most need of protection precisely at the time when he had taken up legal residence, but had not yet established a habitual residence, in the new State. The problem had often arisen over the course of time. He drew attention to the case of those German Jews who, not being in Germany at the time that the Nazi laws had been enacted, had subsequently been stranded in other countries, such as France or Switzerland. They had been the victims of Nazi legislation passed both before and after their arrival in those other States, and, for purely policy reasons, it would have been extremely important that their new State of residence could exercise diplomatic protection for them against the Nazi regime. The same problem had arisen more recently, for example, in the case of refugees from the Soviet Union or the German Democratic Republic. He suggested that that concern should be expressed in the text of article 7 through deletion of the words "and habitually" in paragraphs 1 and 2. There was no policy reason to retain the requirement of a habitual residence, although there might be a case for retaining that of a lawful residence. Otherwise, the discretion by the State of residence to take up the plight of refugees and stateless persons residing in its territory who were victims of oppression by their own Government would be unduly restricted. He added that his suggestion did not imply that a stateless person or refugee had the right to diplomatic protection; simply, the matter should be left to the discretion of the person's new State of residence. Finally, he emphasized that conceptual concerns were not in question.

31. Ms. ESCARAMEIA said that she entirely endorsed the comments made by Mr. Koskenniemi, who had raised two important points. The first, concerning the question of continuous nationality and the moment at which harm was caused, was also very sensitive. Applying the rule of continuous nationality to refugees or stateless persons could cause very unfair situations. The very moment when such persons had the most need of protection was when they risked losing it.

32. She also fully endorsed Mr. Koskenniemi's view regarding the second point that he had raised. The "habitually resident" threshold was extremely high. It seemed that the Commission had relied on the European Convention on Nationality, which actually had nothing to do with diplomatic protection. Like Mr. Koskenniemi, she stressed that there was no question of imposing a requirement; but no obstacles should be placed in the way of a State's wish to provide refugees or stateless persons in its territory with diplomatic protection.

33. The CHAIR said that the issue was not whether the draft articles would or would not diminish the sufferings of innocent persons who found themselves in very difficult situations. It was important not to stray from the subject of diplomatic protection, which was essentially founded in the right of States. If the Commission allowed itself to be carried away by the concern to respond to the tragic situations facing some people, it risked losing sight of the point of the exercise.

34. Mr. MANSFIELD said that, although he was aware that the Commission had been considering the topic of diplomatic protection for some time and, as a new member, he was wary of treading on ground that had already been covered, he believed that Mr. Koskenniemi had raised a very important question. A State should have the right to take up the case of a person who was placed in one of the extremely serious situations that had been mentioned. He therefore supported Mr. Koskenniemi's proposal.

35. Mr. KABATSI said that the idea of ensuring that refugees and stateless persons whose situation had changed only recently should also be protected was appealing, but there might be a conflict of interests among States. It often happened that a person was accepted as a refugee in a country and therefore had his habitual residence there, but then found employment in another country and lived there for some time. If the word "habitually" were deleted, the question arose as to which State would have the right to act on his behalf: the State in which he happened to be resident or the State in which he habitually resided. The provision would need to be made clear.

36. Mr. YAMADA (Chair of the Drafting Committee) noted that he had said in his report that there had been various views concerning the threshold that should be required for refugees or stateless persons to receive diplomatic protection, but ultimately the Drafting Committee had opted for the higher threshold, as expressed in the current formulation of article 7. He understood and respected the views expressed by some members, but, given that the article related to exceptions to the fundamental rule of diplomatic protection, whereby the right to exercise diplomatic protection belonged to the State of nationality, the Commission was entering the area of progressive development, and the question was how far it wished to go. It should not lose sight of the fact that the draft articles were only at the stage of the first reading. Minority views could be recorded in the commentary.

37. Mr. SIMMA said that, if Mr. Yamada's proposal was acceptable to members who had raised the problem, he himself would say nothing more on the subject. The Drafting Committee had made great efforts to reach the best possible compromise.

38. Mr. GALICKI said that he shared the view expressed by Mr. Yamada and Mr. Simma. It should not be forgotten that article 7 dealt with a specific exception to the general rule relating to diplomatic protection. The text had been carefully formulated. The threshold was not particularly high; it was comparable to that required for acquiring nationality. Refugees and stateless persons should enjoy the same measure of diplomatic protection as nationals. He noted that the entitlement to provide refugees or stateless persons with diplomatic protection would always be dis-

puted by other States. It would be interesting to hear the opinion of States on that point. Meanwhile, it would be wiser to retain the current text until States had expressed their views.

39. Mr. KAMTO said that article 7 did not codify a customary rule—there being none on that question—and posed a real intellectual problem for jurists. First, it disrupted the whole structure of the right to diplomatic protection by disregarding nationality, which was precisely the condition for implementation of that right. Second, it offered a State the possibility of invoking a breach of international law on the basis of a legal instrument—particularly in the case of a bilateral treaty—to which it was not a party. Third, it was intended to regulate a problem that each State could regulate through its own national legislation concerning the granting of nationality. To go beyond the formulation adopted by the Drafting Committee and delete the word "habitually" would constitute premature rather than progressive development of international law.

40. Mr. DAOUDI said that he favoured retaining the existing text because diplomatic protection must not be confused with protection of human rights. The provision constituted progressive development of international law, and the Drafting Committee had been guided by the principle that refugees and stateless persons should not be granted more favourable treatment than was accorded to nationals and should thus not be exempted from the requirement of effectiveness applicable in matters of nationality, to say nothing of complex specific situations such as the one in which a person had the status of refugee in one State and his habitual residence in another State. The criteria applied by the Committee were a good reflection of the compromise achieved by the Commission at the preceding session.

41. Mr. BROWNLIE said that the liberal premise posed problems in its application to the facts, particularly in situations involving refugees. In many catastrophic situations, the victims included not only refugees but also the Government and population of the recipient country, which, more often than not, was a developing country. Furthermore, the refugee flows were not necessarily all caused by intolerance or bad governance in the original State. Why, then, was it necessary to assume that the refugee wished to hasten the curtailment of his links with the State he had just left? It was difficult to create norms on the basis of very specific situations such as that of the German Jews, particularly because, even in that case, when it had come to sorting out questions of property, the Jewish refugees had often insisted that they still had the German nationality that the Nazi regime had illegally taken from them. To link the whole question of nationality as such with the question of the status of refugees might lead to a situation in which even the acquisition of that modest status would become more difficult.

42. Mr. DUGARD (Special Rapporteur) said that Mr. Koskenniemi was right from an ethical point of view, but that the comments of other members of the Commission and the views expressed by States in the Sixth Committee illustrated the need to move with caution. As it stood, the provision represented a hard-won compromise, and a more liberal formulation would be unacceptable both to the Commission and to the General Assembly.

43. The CHAIR said that, in the light of the comments by the Special Rapporteur and the Chair of the Drafting Committee, the Commission might wish to retain the existing text of article 7 and to state in the commentary that a substantial number of members had raised that point and had stressed the need to ensure that the persons covered by the provision were not unduly disadvantaged by the use of the term “habitually”.

44. Mr. KOSKENNIEMI said that he had doubts as to the relevance of the opposition between facts and concepts. Where it was relevant, he himself would always favour the former. However, while the situations of refugees certainly differed widely and each must be considered on its own merits, that was precisely the intended purpose of the discretionary system that the Commission was seeking to establish, namely, that it was up to States themselves to decide whether or not to take up a person’s cause. That being the case, why was it necessary absolutely to prohibit them from taking up claims of refugees? The same was true of the opposition between rules and exceptions; the two terms could easily be transposed. He himself could easily conceive of the whole exercise as relating to the great rule that it was up to the State to decide whether or not to exercise diplomatic protection, the exception—which must be interpreted narrowly—being that it could do so only with regard to its own nationals. Thus, it was not necessarily true that article 7 dealt with an exception which, for some metaphysical reason, must be interpreted limitatively, with that limitation happening to coincide with situations in which refugees were left in the lurch.

45. The CHAIR said that the views expressed seemed to concern the rationale of the basic rule of diplomatic protection and the extent to which that rule must be a matter for the State and must not be approached from the individual human rights perspective, important though that perspective was.

46. Mr. SIMMA, referring to the example of the situation of the German Jews who had emigrated to France or Switzerland in the 1930s, said he wondered whether it would have been realistic, or even conceivable, to ask those two countries not only to admit those refugees—itself no easy feat—but also to exercise diplomatic protection on their behalf against Nazi Germany. Admittedly, times had changed, and the world was now permeated by “human rights thinking”, but examples could still be found of countries with grave human rights problems, towards which neighbouring countries and the rest of the world adopted a very cautious stance. As it stood, article 7 represented a reasonable balance from which human rights considerations were not absent. Perhaps the Chair’s proposal could be expanded by putting a specific question to member States on that issue.

47. Mr. Sreenivasa RAO said that he supported Mr. Simma’s comments.

48. Mr. BROWNLIE said that Mr. Koskenniemi had not been the only member to express views on the policy question and that, on the facts, some members had felt that the policy question was not as clear as Mr. Koskenniemi took it to be. It should thus also be stated in the commentary that, while some members had raised the policy

question, others had considered that, given the facts, the policy premise was not justified.

49. Mr. KAMTO said that the provision under consideration had initially provoked strong opposition, until the situation had changed, resulting in the current formulation, which had been supported by a majority in the Drafting Committee. There was thus no reason to refer to specific opinions in the commentary to that provision, particularly because all the views expressed were recorded in the summary records. Furthermore, while facts prevailed over concepts, concepts conferred a structure on the facts and guided the codification exercise. The rules of diplomatic protection could not be changed to accommodate particular circumstances.

50. Mr. DAOUDI said that he supported Mr. Kamto’s remarks.

51. The CHAIR said that it was not unusual, on first reading, to indicate in the commentary differences of opinion that had arisen in the Commission. He thus suggested retaining the text as it stood; indicating in the commentary that a “substantial” (or, perhaps, “significant”) number of members had favoured deleting the word “habitually”; summarizing the arguments for and against; and requesting States’ views on the matter by means of a question addressed to the Sixth Committee.

It was so decided.

52. The CHAIR said that the Commission had thus completed its consideration of articles 1 to 5 and 7 on first reading.

53. Mr. TOMKA asked whether the Drafting Committee might reconsider the title of article 1, which, in his view, should be entitled “Definition” or “Definition and scope” so as to better reflect its contents.

54. The CHAIR said that the Drafting Committee would look into that question when it met to consider draft article 6.

The meeting rose at 11.25 a.m.

2732nd MEETING

Friday, 7 June 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr.

Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (concluded) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE (*concluded*)

1. The CHAIR said that, at the previous plenary meeting, the Commission had requested the Drafting Committee to reconsider the title of article 1 of the draft articles on diplomatic protection and also the text of article 6. A copy of the title and text worked out by the Committee the previous afternoon (A/CN.4/L.613/Rev.1) had now been distributed.

2. Mr. YAMADA (Chair of the Drafting Committee) said that the Drafting Committee had held a brief meeting the previous day, upon the adjournment of the plenary, to consider the proposal made by Mr. Gaja for an amendment to article 6, as well as a proposal made by Mr. Tomka for a new title for article 1.

3. With regard to article 6 (Multiple nationality and claim against a State of nationality), the Drafting Committee had had before it a drafting proposal, based on the proposal made in the plenary (2731st meeting, para. 16), to add a comma after the word “predominant” at the end of paragraph 1, and to continue with the following text: “both at the time of the injury and at the date of the official presentation of the claim”. Paragraph 2 would thus be deleted.

4. The Drafting Committee had considered that different interpretations might be given to the word “former” in article 4, paragraph 3. While that term conveyed the idea that someone had lost his or her nationality, the word could be given a different interpretation, thereby creating an overlap with article 6. It had been felt that the proposed amendment, while meeting the concern of the current paragraph 2, would avoid that problem because, unless the person in question already had the nationality at the time of the injury, diplomatic protection could not be exercised.

5. The Drafting Committee had decided to accept the proposal as a way of clarifying article 6. Hence the existing paragraph 2 would be deleted, and article 6 as pro-

posed by the Committee would now read: “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 time of the injury and at the date of the official presentation of the claim.”

The title of article 6 remained unchanged.

6. It would be recalled that, at the previous plenary, a proposal had been made to consider a new title for article 1, already adopted by the Commission. The Drafting Committee had agreed with the view that article 1 included some definitional elements. It had considered as alternative titles “Definition and scope” and “Nature and scope” and had settled for the former as being more accurate. The Committee thus proposed that the new title for article 1 should read “Definition and scope”.

7. Finally, the Drafting Committee had taken note of some of the suggestions made in plenary for technical corrections to the draft articles and had requested the secretariat to take those corrections into account when producing the next version of the draft articles.

8. In concluding, he recommended that the Commission should adopt article 6, as amended, and also the new title for article 1.

9. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the title of article 1 as proposed by the Drafting Committee.

It was so decided.

10. The CHAIR said that, if he heard no objection, he would take it that the Commission also wished to adopt article 6 in its revised version.

It was so decided.

11. The CHAIR said that the Commission had thus concluded the adoption of draft articles 1 to 7 on diplomatic protection on first reading.

Organization of work of the session (concluded)*

[Agenda item 2]

12. The CHAIR said that the Commission had thus concluded its business for the first part of its fifty-fourth session. The first plenary meeting of the second part of the session would be held on Monday, 22 July 2002, at 3 p.m.

The meeting rose at 10.15 a.m.

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, para. 1, p. 35.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

* Resumed from the 2727th meeting.

SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-FOURTH SESSION

Held at Geneva from 22 July to 16 August 2002

2733rd MEETING

Monday, 22 July 2002, at 3 p.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Tomka, Mr. Yamada.

Reservations to treaties¹ (*continued*)* (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIR declared open the second part of the fifty-fourth session of the Commission and invited Mr. Yamada to introduce the report of the Drafting Committee on reservations to treaties (A/CN.4/L.614).

2. Mr. YAMADA (Chair of the Drafting Committee) said that the Drafting Committee had held three meetings on the topic, from 21 to 23 May 2002. It had considered 14 draft guidelines: 13 had been referred to the Committee at the previous session and one (2.1.7 *bis*) at the current session. The draft guidelines were contained in the second “chapter” of the Guide to Practice dealing with procedure. The Committee proposed 11 draft guidelines (the number

between square brackets indicates the number of a draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline).

2 Procedure

2.1 Form and notification of reservations

2.1.1 Written form

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation

Formal confirmation of a reservation must be made in writing.

2.1.3 Formulation of a reservation at the international level

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without the person's having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(a) Heads of State, heads of government and ministers for foreign affairs;

(b) Representatives accredited by States to an international conference, for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 [2.1.3 *bis*, 2.1.4] *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*

* Resumed from the 2721st meeting.

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

1. The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 *Communication of reservations*

1. A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. A reservation to a treaty in force which is the constituent instrument of an international organization, or to a treaty which creates an organ that has the capacity to accept a reservation, must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] *Procedure for communication of reservations*

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(a) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(b) If there is a depositary, to the latter, which shall notify the States and organizations for which the communication is intended as soon as possible.

2. A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or, as the case may be, upon its receipt by the depositary.

3. Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification.

2.1.7 *Functions of depositaries*

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

2.1.8 [2.1.7 bis] *Procedure in case of manifestly [impermissible] reservations*

1. Where, in the opinion of the depositary, a reservation is manifestly [impermissible], the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such [impermissibility].

2. 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, indicating the nature of legal problems raised by the reservation.

2.4.1 *Formulation of interpretative declarations*

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.2 [2.4.1 bis] *Formulation of an interpretative declaration at the internal level*

1. The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

[2.4.3 [2.4.2, 2.4.9] *Formulation and communication of conditional interpretative declarations*

1. A conditional interpretative declaration must be formulated in writing.

2. Formal confirmation of a conditional interpretative declaration must also be made in writing.

3. A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

4. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

3. Draft guidelines 2.1 to 2.1.4 dealt with the form and formulation of reservations. Draft guidelines 2.1.5 and 2.1.6 dealt with the procedure for communication of reservations. Draft guidelines 2.1.7 and 2.1.8 dealt with the functions of depositaries. Draft guidelines 2.4.1 and 2.4.2 dealt with the formulation of interpretative declarations. Finally, draft guideline 2.4.3 dealt with the formulation and communication of conditional interpretative declarations.

DRAFT GUIDELINE 2.1.1 (Written form)

4. Draft guideline 2.1.1 had been provisionally adopted by the Drafting Committee as originally proposed by the Special Rapporteur and without any modification. The wording was taken from article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions.

DRAFT GUIDELINE 2.1.2 (Form of formal confirmation)

5. The Drafting Committee had initially considered whether the wording proposed by the Special Rapporteur, which implied that formal confirmation was not always necessary, should be reviewed. It had opted for a more succinct and concise formula, which did not, of course,

imply that formal confirmation was always necessary. It simply stated that the formal confirmation should be made in writing, it being understood that such formal confirmation might not always be required. The written form of confirmation was derived from article 23, paragraphs 1 and 2, of the 1969 and 1986 Vienna Conventions.

DRAFT GUIDELINE 2.1.3 (Formulation of a reservation at the international level)

6. Draft guideline 2.1.3 had originally been presented in two versions in the Special Rapporteur's sixth report on reservations to treaties (paras. 69 and 70),³ one short and the other longer. The Drafting Committee had decided to focus on the longer version, which was more explicit and detailed. It had thought that, in view of the pedagogical and practical intention of the Guide to Practice, it was worthwhile to include clearer, more detailed guidelines.

7. In its original version, the draft guideline had mentioned "a person ... competent to formulate a reservation on behalf of a State or an international organization". As members would recall, there had been a debate in plenary about that "competence" and the use of the term in that context. The wording of the guideline derived from article 7 of the 1969 and 1986 Vienna Conventions, which was entitled "Full powers" and did not use the word "competence". It had been argued that the term "competence" might be ambiguous, since it could also refer to the internal institutions which formulated the reservation before it was expressed at the international level. Several other terms had been considered by the Drafting Committee (for example, "a person authorized", "empowered", "has the capacity", "may"), but they had all finally been discarded, since they had implications which went beyond the context of the guidelines or did not express in a satisfactory manner the very idea of the guideline.

8. On the other hand, article 7 of the 1969 and 1986 Vienna Conventions referred to full powers in the sense of representation of a State or an international organization by a person for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or the international organization to be bound by the treaty. Consequently, the Drafting Committee had decided to align the draft guideline (paras. 1 and 2) more precisely with the wording of article 7 of the Vienna Conventions, keeping in mind that that representation would now concern the formulation of a reservation rather than the adoption or authentication of a treaty or expression of consent to be bound by a treaty. Of course, in practice, those two functions usually merged because (except in the case of a late reservation) the formulation of reservations took place precisely at those moments and most frequently at the moment of the expression of consent to be bound by a treaty.

9. In paragraph 1, the saving clause "Subject to the customary practices in international organizations which are depositaries of treaties" had been retained in order to take into consideration any special practices of the depositaries.

10. Another question related to paragraph 2 (*d*), which had originally been in square brackets. Some doubts had been expressed in plenary about its retention. The Drafting Committee had decided to keep the paragraph, which corresponded to paragraph 2 (*d*) of article 7 of the 1986 Vienna Convention.

11. The title of the draft guideline had been changed to "Formulation of a reservation at the international level" to reflect exactly its content and the changes made to it with the deletion of the term "competence".

DRAFT GUIDELINE 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations)

12. Draft guideline 2.1.4 consisted in principle of the original guidelines 2.1.3 bis (which was now paragraph 1 of the new guideline) and 2.1.4 (which was now paragraph 2), with the title of the original guideline 2.1.4 serving as the title of the new guideline.

13. Members would recall that there had been some hesitation in the plenary regarding draft guideline 2.1.3 *bis*, which several members had considered superfluous. It had also been argued that it expressed an idea not found in the 1969 and 1986 Vienna Conventions and that it stated the obvious. The Drafting Committee had decided to consider the fate of the original guideline after considering draft guideline 2.1.4.

14. Concerning that provision, two views had emerged in the Drafting Committee. According to one, it was also superfluous and should be deleted. It had been pointed out that a reservation formulated in violation of a provision of internal law could always be withdrawn and that the guideline was not needed. At most, the idea could be expressed in the commentary.

15. According to the other view, the draft guideline (which followed article 46 of the Vienna Conventions) was necessary, since it served to clarify an important point, namely, that a State or an international organization could not invoke the fact that a reservation had been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedures for formulating reservations as invalidating the reservation. The guideline was all the more useful since any internal rules concerning competence and procedure for formulating reservations were arcane and inaccessible to third parties. Moreover, even if a reservation formulated in violation of internal rules could always be withdrawn, the withdrawal would not have any retroactive effect, and consequently the need for the guideline was obvious.

16. The second view had finally prevailed, and then, when the Drafting Committee had returned to guideline 2.1.3 *bis*, the question had arisen whether it should be maintained or deleted. There had again been two views in the Committee, one opting for deleting guideline 2.1.3 *bis* and expressing the idea in the commentary to 2.1.4 and the other preferring the guideline's maintenance, arguing that, even if it appeared to be obvious, there was

³ See 2719th meeting, footnote 10.

no harm in stating the idea in the context of a practical and user-friendly Guide to Practice. Moreover, if kept, the guideline could be merged with guideline 2.1.4. The second view had prevailed.

17. The Drafting Committee had made a few changes to the original wording. Mainly it had substituted the word “authority” for the word “body” in the first sentence of draft guideline 2.1.3 *bis* and added the term “relevant rules” before the words “of each international organization”.

DRAFT GUIDELINE 2.1.5 (Communication of reservations)

18. Draft guideline 2.1.5 followed closely article 23, paragraph 1, and article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions.

19. The Drafting Committee had discussed at length the use of the term “deliberative” in paragraph 2. The term was found in the report of the Secretary-General “Reservations to multilateral conventions: the Convention on the Inter-Governmental Maritime Consultative Organization”,⁴ and the Special Rapporteur had used it in the original drafting of the guideline. It had been argued, however, that the term raised questions, especially concerning its exact meaning when taken together with the previous phrase (“a treaty in force which is the constituent instrument of an international organization”). It should be recalled in that connection that some delegations in the Sixth Committee had already asked for a clarification (see the topical summary of the discussion held in the Sixth Committee during its fifty-sixth session prepared by the Secretariat (A/CN.4/521, para. 50)). Consequently, the Drafting Committee had decided to delete the word “deliberative”, and the phrase now read “or to a treaty which creates an organ that has the capacity to accept a reservation”. The words “to a treaty” had also been added after the word “or” for the sake of clarity.

20. It should be recalled that the words “a treaty in force” would seem to preclude communication of reservations to preparatory commissions. That reflected the general feeling on that point in the debate in plenary.

DRAFT GUIDELINE 2.1.6 (Procedure for communication of reservations)

21. Draft guideline 2.1.6 followed closely article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention. Paragraph 1 of the draft guideline followed paragraph 1 of article 78 of the 1986 Vienna Convention, which was entitled “Functions of depositaries”.

22. Subparagraph (a) of paragraph 1 also followed draft guideline 2.1.5 in its reference to “contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”. Subparagraph (b) remained unchanged and as originally proposed by the Special Rapporteur.

23. The Drafting Committee had also thought that the last paragraph of the draft guideline proposed by the Special Rapporteur should be kept in order to give clear guidance to the users of the Guide to Practice. It had been slightly amended to better reflect the current practice of depositaries. When a communication was made by electronic mail or facsimile, it had to be confirmed by diplomatic note or depositary notification.

24. Paragraph 2 of draft guideline 2.1.6 had originally been draft guideline 2.1.8. The Drafting Committee had thought that the two guidelines could be merged, since both referred to the procedure for communication of reservations. The only modification in the original text (as it had appeared in the former draft guideline 2.1.8) was the addition of the words “or as the case may be, upon its receipt by the depositary”. That addition had been considered to be necessary in order to align the wording with that of article 79, paragraph (b), of the 1986 Vienna Convention and, of course, to include the case when there was a depositary.

DRAFT GUIDELINE 2.1.7 (Functions of depositaries)

25. Draft guideline 2.1.7 was based on article 77, paragraph 2, of the 1969 Vienna Convention and article 78, paragraph 2, of the 1986 Vienna Convention. The first paragraph was based on article 77, paragraph 1 (d), of the 1969 Vienna Convention and article 78, paragraph 1 (d), of the 1986 Vienna Convention. There was a distinction between the group of States and organizations (the signatory and contracting States and organizations) to the attention of which a difference between a State or an organization and the depositary was brought and the group of States and organizations to which the reservation was communicated (contracting States and organizations and other States and organizations entitled to become parties to the treaty).

26. That distinction stemmed from the Vienna Conventions themselves and was justified by the fact that such a difference between the depositary and a State or an international organization concerning the performance of the depositary’s functions pertained only to the narrowly defined “treaty community” established by the treaty, namely, the signatory and contracting States and international organizations. That explanation could also appear in the commentary.

27. The wording of the draft guideline remained practically unchanged from what had been originally proposed by the Special Rapporteur. In a note on paragraph 1 of draft guideline 2.1.7 adopted by the Drafting Committee (A/CN.4/L.623), the Special Rapporteur made some new proposals on draft guideline 2.1.7 for consideration in plenary.

DRAFT GUIDELINE 2.1.8 (Procedure in case of manifestly [impermissible] reservations)

28. Draft guideline 2.1.8 was guideline 2.1.7 *bis*, as originally proposed by the Special Rapporteur in his seventh report (para. 46). It would be recalled that the Commis-

⁴ A/4235, para. 21.

sion had had an extensive debate on that draft guideline in plenary before referring it to the Drafting Committee.

29. One major issue was the expression “manifestly impermissible”, which appeared in the title and in the first paragraph. In the course of a lengthy discussion, two views had emerged in the Drafting Committee. According to the first view, which had finally prevailed, the term “manifestly impermissible” should be kept, although the word “impermissible” should be placed in square brackets. The significance of the square brackets was that there should be further discussion of that word and its French equivalent, *illicéité*, before a decision was taken on which term should be finally used in both French and English. The main problem, particularly with the French term *illicéité*, was that its use should not imply any relation with international responsibility in the context of which the term *illicéité* was used. That problem had already been raised in plenary. It had been suggested that other terms could be used, such as “invalid”, “unacceptable” or “inadmissible”, but the Committee had finally decided to provisionally retain the current terminology, subject to further reflection. Of course, it should be noted that the term “impermissible” (*illicite* in French) was placed in square brackets in both the title and the first sentence; the word “impermissibility” (*illicéité*) at the end of the first paragraph was therefore also placed in square brackets.

30. According to the other view, paragraph 1 of the guideline should avoid the expression “manifestly impermissible” and reflect more closely the wording of article 19, subparagraphs (a) and (c), of the 1969 and 1986 Vienna Conventions. It should simply mention prohibited reservations or reservations incompatible with the object and purpose of the treaty. That view had its merits and had been carefully considered by the Drafting Committee, but the first proposal, which was simpler and more economical, had ultimately prevailed.

31. In paragraph 2, it would be recalled that the issue which raised several questions and on which views had diverged was the last phrase, “attaching the text of the exchange of views he has had with the author of the reservation”. The Drafting Committee had thought that the original text could have far-reaching implications or become the subject of controversy. Consequently, it had decided to replace the phrase with the more cautious one “indicating the nature of legal problems raised by the reservation”. It had been felt that that wording struck a good balance between, on the one hand, the traditional role of the depositary and, on the other, the position of States and the integrity of the treaty.

32. The title of the draft guideline was now “Procedure in case of manifestly [impermissible] reservations”, which corresponded more closely to the content of the guideline and the section in which it was placed.

DRAFT GUIDELINE 2.4.1 (Formulation of interpretative declarations)

33. As the Special Rapporteur had pointed out, the formulation of interpretative declarations was not dealt with in the Vienna Conventions. Consequently, the guideline usefully filled a certain gap in those conventions. The

Drafting Committee had decided, insofar as possible, to align the guideline with draft guideline 2.1.3.

34. However, some differences existed in the sense that the procedure for interpretative declarations was more flexible and less formal. The Drafting Committee had decided, for the same reasons that had been taken into consideration in the case of draft guideline 2.1.3, that the word “competent” should be replaced by the words “considered as representing”. A similar expression was used in the first sentence of article 7, paragraph 1, of the Vienna Conventions. It should also be noted that the guideline included both simple and conditional interpretative declarations. The title of the draft guideline remained unchanged.

DRAFT GUIDELINE 2.4.2 (Formulation of an interpretative declaration at the internal level)

35. Draft guideline 2.4.2 had formerly been draft guideline 2.4.1 *bis*. Several members had questioned its utility. It had been pointed out that its relevance related to possible conditional interpretative declarations that might also be included, since the guideline spoke in general about “interpretative declarations”. The Drafting Committee had finally decided to adopt it, but had placed it in square brackets. The significance of the square brackets was that if, in the future, conditional interpretative declarations were found to “behave” exactly like reservations, so that they could be assimilated to them, guideline 2.4.2 and the one that followed would no longer have any *raison d’être*.

36. The title had been amended to read “Formulation of an interpretative declaration at the internal level”, while the text remained unchanged.

DRAFT GUIDELINE 2.4.3 (Formulation and communication of conditional interpretative declarations)

37. Draft guideline 2.4.3 was the result of a merger of draft guidelines 2.4.2 and 2.4.9. The two guidelines were very similar, and consequently the Drafting Committee had considered that they could easily and economically constitute one guideline. The guideline was now entitled “Formulation and communication of conditional interpretative declarations”.

38. Paragraph 1 remained unchanged and was aligned with draft guideline 2.1.1. Paragraph 2 had been amended to correspond to draft guideline 2.1.2. The last two paragraphs had also been changed to correspond to draft guideline 2.1.5. Guideline 2.4.3 had also been placed in square brackets, for the same reason as guideline 2.4.2; its maintenance would depend on the subsequent decision of the Commission on the whole issue of draft guidelines pertaining to conditional interpretative declarations, depending on whether it decided that they could be entirely assimilated to reservations.

39. In conclusion, he thanked the Special Rapporteur for his advice and cooperation and all the members of the Drafting Committee for their constructive suggestions,

their spirit of cooperation and their participation in the Committee's work. The Committee recommended that the Commission should adopt the draft guidelines which were before it.

40. Mr. PAMBOU-TCHIVOUNDA, referring to draft guideline 2.1.8, repeated his doubts concerning the use of the words "manifestly impermissible", since the word "manifestly" raised the question of the evidence for the non-conformity of a reservation, and the concept of the impermissibility of a reservation did not appear in the 1969 and 1986 Vienna Conventions. He therefore suggested using the expression "manifestly inadmissible reservations", which would be understood to mean "reservations not in conformity with article 19 of the 1969 and 1986 Vienna Conventions".

41. With regard to draft guideline 2.4.1, he suggested that, for the sake of simplicity and clarity, the first part of the guideline should be amended to read: "An interpretative declaration must be formulated by any person duly representing a State or an international organization...". The rest of the guideline would remain unchanged.

42. Mr. DAOUDI said that the phrase "by diplomatic note or depositary notification" in paragraph 3 of draft guideline 2.1.6 ("Procedure for communication of reservations") seemed rather unclear. He also noted that, while it was stated that a communication made by electronic mail must be confirmed by diplomatic note or depositary notification, the text did not specify whether the 12-month period mentioned in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions began on the date of receipt of the electronic mail or the date of the subsequent confirmation.

43. Mr. GAJA said that it was important to distinguish between the date on which the communication relating to a reservation was made and the date marking the start of the 12-month period during which States could, under article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions, raise objections to the reservation. In the interest of greater clarity, the following phrase could be added at the end of paragraph 2 of the draft guideline: "However, the period for raising an objection to a reservation shall not commence, for a State or an organization, until the date on which that State or that organization has received notice of the reservation." With reference to draft guideline 2.1.6, it seemed to him that, according to the text, a communication by electronic mail took effect on receipt of the electronic mail.

44. Mr. PELLET (Special Rapporteur), replying to Mr. Pambou-Tchivounda's first comment, said that it would be better not to take a final decision on the word "impermissible", appearing in square brackets, in draft guideline 2.1.8. There would be an opportunity to find a satisfactory term once the Commission had discussed the effect of non-compliance by States with the rules contained in article 19 of the 1969 Vienna Convention. As for draft guideline 2.4.1, the wording suggested by Mr. Pambou-Tchivounda was undoubtedly more elegant, but it was important for consistency's sake to reproduce the wording of draft guideline 2.1.3, which had come straight from the Vienna Conventions.

45. In response to Mr. Daoudi, he said that the phrase "depositary notification", which was indeed rather disconcerting, was the official phrase for that kind of communication. It would be defined in the commentary. He also endorsed Mr. Daoudi's suggestion that it should be made quite clear whether the 12-month period began from the communication of the reservation or its confirmation. As for Mr. Gaja's comment, the Special Rapporteur's understanding of article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions was that it provided that a reservation was considered to have been accepted by a State or an international organization if it had raised no objection within the 12 months following the date on which it had been notified of the reservation or the 12 months following the date on which it had expressed its consent to be bound by the treaty, if that date was later. In the first case, therefore, the receipt of notification marked the time at which the 12-month period began, as draft guideline 2.1.6 omitted to state. This should be spelled out.

46. Introducing his note on paragraph 1 of draft guideline 2.1.7 adopted by the Drafting Committee, he said that his text of the draft guideline was based on a misunderstanding which he wished to correct. Draft guideline 2.1.7, relating to the functions of depositaries, was closely modelled on article 78, paragraph 1 (*d*), of the 1986 Vienna Convention, under which, if there was any problem with the form of any communication relating to the treaty, the depositary was to bring the matter to the attention of the State or international organization in question. Paragraph 2 stated that, in the event of any difference appearing between a State or an international organization and the depositary, the latter should bring the question to the attention of the signatory States and organizations and the contracting States and contracting organizations or, where appropriate, the competent organ of the international organization concerned. He had taken it that the two provisions were repetitious, but, in fact, the first was directed at the reserving State or international organization, while the second was directed at the other States or organizations concerned. In draft guideline 2.1.7, the first scenario was not mentioned. That was why, in paragraph 6 of his note, he had suggested that wording based on article 78, paragraph 1 (*d*), of the Convention should be adopted. It was logical, given that the text was systematically modelled on the Convention, to reproduce its wording in the current case, too.

47. The CHAIR said that the proposed amendments were fully justified. Since they were matters of drafting and had no fundamental effect, they could, if the Commission was agreeable, be addressed at an informal meeting of the Drafting Committee.

48. Speaking as a member of the Commission, he noted that, according to the commentary by the Drafting Committee concerning draft guideline 2.4.2, in square brackets, it would be virtually essential to prove that conditional interpretative declarations were similar to reservations. Care must be taken, however, to avoid opening the door to disguised reservations, which would not be desirable. It would be preferable simply to state that conditional interpretative declarations had substantially the same effect as reservations.

49. Mr. MANSFIELD said that he shared the Chair's concern in that regard and that further thought should be given to the question whether it would be useful to permit disguised reservations. The issue was an important one.

The meeting rose at 4.45 p.m.

2734th MEETING

Tuesday, 23 July 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Tomka, Mr. Yamada.

Tribute to the memory of José Sette Câmara

1. The CHAIR said he had sad news to announce: José Sette Câmara, Brazilian scholar, diplomat and international lawyer, had passed away a month ago. He had served his country as ambassador, as permanent representative to the United Nations and in many other posts and would be remembered as the author of various publications on international law. He had been a member of the International Law Commission from 1970 to 1978 and a judge at the International Court of Justice from 1979 to 1987. His passing away was a great loss for international law and for all who had known him personally.

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

2. Mr. BAENA SOARES thanked the Commission for the sentiments expressed and undertook to convey them to the family of José Sette Câmara.

Reservations to treaties¹ (continued) (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

REPORT OF THE DRAFTING COMMITTEE (concluded)³

3. Mr. YAMADA (Chair of the Drafting Committee) said that, pursuant to the Commission's instructions at the previous meeting, the Drafting Committee had held informal consultations to consider a number of issues raised. First, it had considered the Special Rapporteur's proposal for the addition of a phrase to draft guideline 2.1.7 (Functions of depositaries). The Committee had felt that the addition was thoroughly justified and therefore recommended the adoption of guideline 2.1.7 in its amended form as set out in the Special Rapporteur's note on paragraph 1 of draft guideline 2.1.7 adopted by the Committee (A/CN.4/L.623).

4. Second, the Drafting Committee had considered guideline 2.1.6 (Procedure for communication of reservations) in the light of proposals regarding clarification of the period of time during which an objection could be made and the precise moment at which a communication was considered to have been made. The Committee thought the proposals had the merit of further clarifying and refining a few difficult issues pertaining to the communication procedure. It therefore recommended the adoption of guideline 2.1.6 with some amendments. After paragraph 2, ending with the phrase "upon its receipt by the depositary", a new paragraph 3 would be added, to read: "The period during which an objection to a reservation may be formulated starts at the date on which a State or an international organization received notification of the reservation." The current paragraph 3 would become paragraph 4, and the following final sentence would be added: "In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile." That wording conformed to the majority view, although one member would have preferred the communication to be considered as having been made on the date of the diplomatic note or depositary notification.

5. The Drafting Committee recommended the adoption of the draft guidelines with the amendments he had read out.

6. Mr. BROWNLIE, referring to the proposal for a new paragraph 3 in guideline 2.1.6, said that the word "formulated" sounded somewhat abstract. The word "made", used elsewhere in the text, would be preferable.

7. Mr. PELLET (Special Rapporteur) drew attention to article 20, paragraph 5, of the 1969 Vienna Convention, in which the English term used was "raised" and the French *formulé*. Since the Commission's objective was to achieve alignment with that Convention, he proposed that that wording should be adopted.

8. Mr. YAMADA (Chair of the Drafting Committee) said he fully endorsed that proposal.

Draft guideline 2.1.6 as a whole, as amended, was adopted.

The titles and texts of draft guidelines 2.1.1 to 2.4.3 were adopted as amended.

³ See 2733rd meeting, para. 2.

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)*

9. The CHAIR invited the Special Rapporteur to continue the presentation of his seventh report (A/CN.4/526 and Add.1–3).

10. Mr. PELLET (Special Rapporteur), recalling that in the first part of the session he had presented the introduction to his seventh report and the consolidated text of the draft guidelines adopted by the Commission or proposed by him in the annex thereto, drew attention to section C of the report, “Recent developments with regard to reservations to treaties” (paras. 48–55), and appealed to colleagues to bring to his attention any new material that might be relevant. Two new developments of particular interest involved reservations to human rights instruments, a phenomenon that had been in the spotlight for the past 10 or 12 years. The first was the important report prepared by the Secretariat in 2001 at the request of the Committee on the Elimination of Discrimination against Women at its twenty-fourth session, which contained a section entitled “Practices of human rights treaty bodies on reservations”.⁴ It conveyed the impression that the bodies in question were much more pragmatic, less dogmatic, than the text of General Comment No. 24 of the Human Rights Committee suggested.⁵ They were more inclined to encourage States to withdraw certain reservations than to censure them. It was of relevance to the Commission’s preliminary conclusions on reservations to normative treaties that, in practice, human rights treaty bodies did not always follow General Comment No. 24.

11. The second development he wished to report was that, despite the continuing opposition of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights had, at its fifty-third session, by its resolution 2001/17 of 16 August 2001, again entrusted Ms. Françoise Hampson with the preparation of an expanded working paper on reservations to human rights treaties.⁶ In this resolution, the Sub-Commission stated that the study would not duplicate the work of the International Law Commission. Ms. Hampson might have been expected to get in touch with him for that purpose, but she had not, and that presented him with a problem. Should he himself take the initiative? Personally he would be inclined to do so, but he also hoped there would be fuller consultations between the International Law Commission, the Sub-Commission on the Promotion and Protection of Human Rights and the major human rights treaty bodies with a view to the re-examination in 2004 of the preliminary conclusions adopted by the International Law Commission at its forty-ninth session on reservations to normative multilateral treaties, including human rights treaties.⁷ He would welcome guidance from members of the Commission on how to proceed.

12. Quite a number of draft guidelines were set out in his seventh report, and he proposed to introduce them in

three groups rather than all at once, in order to facilitate discussion. He was now submitting for the Commission’s consideration draft guidelines 2.5.1 to 2.5.4, on the form and procedure for withdrawal of reservations.

13. Draft guideline 2.5.1 (Withdrawal of reservations) was set out in paragraph 85 of the report and was fairly straightforward. It simply reproduced article 22, paragraph 1, of the 1986 Vienna Convention, which itself was virtually identical to article 22, paragraph 1, of the 1969 Vienna Convention. The background for the draft guideline was given extensively in paragraphs 67 to 79 of his report, in which he summed up the *travaux préparatoires* of article 22, paragraph 1, of the 1986 Vienna Convention. Those *travaux*, together with article 22 itself, had put an end to the controversy that had raged in the literature as to whether the withdrawal of a reservation was an agreed instrument, a treaty or a unilateral act.

14. Article 22, paragraph 1, of the Vienna Conventions clearly indicated that a reserving State or international organization might withdraw its reservation without the agreement of the other contracting States; a reservation was, in other words, a unilateral act. There was a case to be made, as he stated in paragraph 80 of the report, for the principle that a reservation not expressly provided for by a treaty was effective only for the parties which had accepted it. That argument, however, was not only formalistic but provided no real challenge to the provision of the Vienna Conventions, which presented no practical difficulties and could fairly be said to have become a customary rule. In any case, as the Commission had previously agreed, any change to the Vienna Conventions should be made only for extremely compelling reasons. In that regard, he drew attention to paragraphs 31 and 32 of the report. For the same reason, he was not in favour of deleting the phrase “unless the treaty so provides” found in article 22, paragraph 1, of the Vienna Conventions, even though he felt strongly that it was quite superfluous: all the Vienna rules relating to reservations—or other issues—depended on the will of States. It would, however, be both complicated and unhelpful to change what was ultimately a matter of detail.

15. On the same principle, draft guideline 2.5.2 (Form of withdrawal) reproduced the text of article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions: “The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.” It was a matter of simple common sense, as was explained in paragraph 89 of the report. He would therefore not linger over the guideline, except to point out the clear implication that the withdrawal of a reservation could not be implicit. In paragraphs 93 to 101 of the report, he had sought to list a number of situations in which it appeared that a reservation had been withdrawn, although no formal withdrawal had been made. On closer examination, however, it could be seen that in fact that had never been the case. He could not agree with the distinguished specialist Pierre-Henri Imbert that the non-confirmation of a reservation at the time of signature or ratification of a treaty could be described as withdrawal of the reservation. The acceptance of or objection to a reservation might have been formulated but not “made”; it was, in that sense, “virtual”. On purely logical grounds, it was impossible to withdraw what had not previously been made. By the same token, the expiry

* Resumed from the 2721st meeting,

⁴ CEDAW/C/2001/II/4, paras. 20–56.

⁵ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 122.

⁶ E/CN.4/Sub.2/2001/40.

⁷ *Yearbook ... 1997*, vol. II (Part Two), p. 56, para. 157.

of a reservation was not the same as withdrawal, as was shown by some treaty reservation clauses, which drew a clear distinction between withdrawal and expiry.

16. The same applied to “forgotten” reservations. Typically, a State would make a reservation because a given treaty provision did not correspond with its internal law; but when—perhaps some years later—internal legislation was amended or repealed in order to comply with the treaty, the State omitted to withdraw its reservation. His own country had, it seemed, been particularly given to such omissions, although admittedly he was better acquainted with the situation in France than elsewhere. In that context, he noted that the coexistence of reservations and the new provisions of internal legislation could give rise to problems, particularly in countries where international law was being incorporated into the internal legislation: it was often difficult for courts to decide whether to apply the internal law or international law as affected by the reservation, even if the latter was superseded. That, however, was up to the State in question. The fact remained that a forgotten reservation had not been withdrawn; it remained valid at the international level. The notion of an implicit withdrawal made no sense in either law or logic.

17. The existence of forgotten or obsolete reservations gave rise to another problem. It was often said that reservations had some advantages, particularly in that they encouraged wider acceptance of a given treaty. On the other hand, they were harmful to the unity or integrity of the treaty. The opposing claims of universality and integrity had long been recognized, but the General Assembly, the Council of Europe and bodies concerned with human rights and, indeed, with other issues, such as disarmament or environment, were increasingly urging States to reconsider their reservations to treaties. He therefore suggested that it might be useful to include in the Guide to Practice a guideline 2.5.3 (Periodic review of the usefulness of reservations) that would urge States to adopt a review of their reservations, emphasizing the timeliness of withdrawing those that were no longer justified in view of developments in their internal legislation. Although the guideline—the text of which was to be found in paragraph 103 of the report—was more tentative than the other guidelines, using the conditional mood and adopting emollient language, he noted that the guidelines as a whole would not, in any case, be binding; they were, to borrow wording used by the Government of Sweden in 1965, a “code of recommended practices”.⁸ Hence there would be no harm in including guideline 2.5.3 in response to current concerns. He himself, however, was not opposed to reservations in principle, as many activists—particularly “human rightists”—were; he regarded them as a necessary evil. At the same time, it would clearly be preferable if they could be withdrawn.

18. Guideline 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty) had been drafted before the Commission’s discussions during the first part of the session, in which—rightly, in his view—the use of the words “impermissible” and “inadmissible” had been challenged. His remarks at

the 2733rd meeting, therefore, applied also to guideline 2.5.4. It would be premature to deal with the question of impermissibility before there had been a thorough discussion about article 19 of the 1969 and 1986 Vienna Conventions. Meanwhile, he suggested that the words “impermissible” and “inadmissible” should be placed in square brackets throughout the text until the whole concept of the permissibility of reservations could be examined at the next session. As far as the substance of the guideline was concerned, the Commission should nonetheless provide an answer to the basic question of what the effect should be if a treaty-monitoring body found a reservation to be impermissible. Obviously, such a finding by a third party was not equivalent to a withdrawal, which was a unilateral statement made by the reserving State or international organization, although naturally the reserving State or international organization could withdraw its reservation once it became aware of its impermissibility. That was the thinking behind paragraph 1 of the guideline. The impermissibility finding, however, should not, in all justice, be devoid of consequences: the reserving State or international organization was, after all, party to the treaty which had set up the very monitoring body that had made the finding. The question was what those consequences should be.

19. There were two possible solutions. To put them at their simplest, the first was to adopt the course preferred, at least in theory, by the human rights bodies as exemplified by General Comment No. 24 of the Human Rights Committee, and applied by the European Court of Human Rights, whereby the reservation was neutralized: it was considered not to have been withdrawn but never to have been made at all. The second option was to adopt the Commission’s own approach, as expressed in the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, that it had adopted at its forty-ninth session, whereby the reserving State (or international organization) had the responsibility for taking action. That approach would be reflected in paragraph 2 of guideline 2.5.4. He had to admit to some unease regarding the introduction of the guideline, since he believed that it would be unwise to reproduce the Commission’s lengthy and serious discussions at its forty-ninth session. He would prefer to start from the position that the Commission had already reached a conclusion on the general policy, by a large majority if not unanimously. He drew attention to the discussions in that session, a reference to which was contained in the footnote of the report corresponding to the text of the guideline.

20. The most elegant way forward seemed to him to be the adoption of draft guideline 2.5.X (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), which appeared in paragraph 216 of the report. It would have the same wording as draft guideline 2.5.4, but with the addition of the sentence “[The reserving State or international organization] may fulfil its obligations in that respect by totally or partially withdrawing the reservation.” The rationale was that, although withdrawal was obviously the most appropriate response to a finding of impermissibility, in some cases the reserving State or international organization might find a full withdrawal too radical. In that case, modification or partial withdrawal of the reservation might suffice. The

⁸ See the fourth report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2), p. 47.

solution presented by the wording of draft guideline 2.5.X seemed to cover all eventualities.

The meeting rose at 11 a.m.

2735th MEETING

Wednesday, 24 July 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemi-cha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Tomka, Mr. Yamada.

Reservations to treaties¹ (*continued*) (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GAJA congratulated the Special Rapporteur on the very detailed analysis in his seventh report (A/CN.4/526 and Add.1–3). It sometimes happened, however, that he asked the Commission to take a position on proposals that were too obvious or to enter into areas that it would be wiser to leave aside. Such was the case, for example, with draft guideline 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), paragraph 1 of which stated the obvious. It was for the reserving State to withdraw a reservation, and a finding of impermissibility could therefore never constitute withdrawal. A finding of impermissibility could either have the effect of requiring the reserving State to withdraw the reservation or of recommending that it should withdraw it. The text seemed to favour the first possibility. It was by no means certain, however, that a monitoring body had the inherent competence to require the reserving State to withdraw its reservation. The Commission had dealt with the competence of monitoring bodies in a very different way in the preliminary conclusions

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

on reservations to normative multilateral treaties, including human rights treaties, it had adopted at its forty-ninth session.³ At that time, it had considered that, where treaties were silent, the monitoring bodies established thereby were competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States.

2. In his view, whether such bodies had the competence to create obligations or to make recommendations depended on the interpretation of the treaty in question. Any general rule on the subject would thus be of limited value. Hence there was no need to spell out the consequences of a finding of impermissibility, at least as far as the withdrawal of reservations was concerned. A question that might arise in some cases, however, related to competence to invalidate a reservation that had been found impermissible.

3. He did not think that draft guideline 2.5.4 as a whole should be referred to the Drafting Committee, because the first paragraph was self-evident and the second was unnecessary.

4. Ms. ESCARAMEIA, congratulating the Special Rapporteur on the approach adopted in his report, said that she especially appreciated his explicit presentation of his doubts.

5. Referring to section C of the report, which focused on the Commission's relations with the human rights treaty bodies, among others, she said that the Commission should have as many contacts as possible with the other bodies that were dealing with the issue of reservations. That was all the more important in that the fragmentation of international law had been recognized by all as a primary concern. It would be undesirable for the Commission to adopt a regime for reservations that differed from the one that would be arrived at by the Sub-Commission on the Promotion and Protection of Human Rights. She therefore thought the Commission should seek the views of other bodies working in the same field.

6. Turning to the draft guidelines on withdrawal of reservations proposed by the Special Rapporteur in his seventh report, she said that she favoured the retention in draft guideline 2.5.1 (Withdrawal of reservations) of the words "Unless the treaty otherwise provides", even if they might seem superfluous. They did serve a purpose in the Guide to Practice, and in the present instance it was better to err on the side of excess than on that of insufficiency. She fully endorsed draft guideline 2.5.2 (Form of withdrawal), since the written form provided the certainty that was necessary in international law. Concerning draft guideline 2.5.3 (Periodic review of the usefulness of reservations), she welcomed the creative approach adopted by the Special Rapporteur and endorsed the draft guideline, although wondering whether there was any need for expired reservations to be withdrawn since they did not apply anyway. In paragraph 2, it might be useful to refer also to appeals by treaty-monitoring bodies, since internal legislation was sometimes rather ambiguous and scholars did not always agree.

³ See 2734th meeting, footnote 7.

7. While she subscribed to the main elements of draft guideline 2.5.4, she believed that the various types of situation that might arise should be taken into account. The provision could cover not only the bodies set up by treaties but also judicial bodies. Those bodies had differing competences: some only had recommendatory powers, while others had compulsory powers. There seemed to be a problem of logic in paragraph 2, at least in English: if the State or international organization “must act accordingly”, then the reservation must be withdrawn, something that was not made clear by the phrase “it may fulfil its obligations ... by withdrawing the reservation”. In short, it was good that the provision was in the Guide to Practice, but a distinction had to be made among the different kinds of situations that might arise.

8. Mr. PAMBOU-TCHIVOUNDA said he agreed with Ms. Escameia that the Commission should be available and open to bodies dealing with the same matters as it was.

9. Draft guidelines 2.5.1 and 2.5.2 raised interesting points, since they dealt with the time of withdrawal and the initiative for withdrawal, both of which were within the discretionary power of States. Clearly, a reservation, like its withdrawal, was unilateral in nature. It was therefore open to question whether there was any purpose in including those provisions in the Guide to Practice, since they reproduced the wording of article 22, paragraph 1, and article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions. In his view, the Guide to Practice could simply incorporate a reference to those provisions.

10. It was possible to see the point and the purpose of draft guidelines 2.1.1 (Written form), 2.1.2 (Form of formal confirmation), 2.1.6 (Procedure for communication of reservations), 2.1.7 (Functions of depositaries) and 2.4.3 (Formulation and communication of conditional interpretative declarations), which had the advantage of dealing with the function of the written mode and of setting up—on the basis of that mode—specific regimes and regimes which were related to and supplemented the regime of reservations. With regard to objections to and withdrawal of reservations, however, the requirement of written communication was already set out in the Vienna Conventions, and there was no need to spell it out.

11. Draft guideline 2.5.3 gave rise to problems because the review of the usefulness of reservations related not to procedure but to substance, whether in terms of the reasons for the review or the reasons for the reserving State to consider withdrawing reservations. The draft guideline raised two problems that the report did not go into: the conditions for withdrawal and the role of expired reservations.

12. Draft guideline 2.5.4 gave rise to yet another type of problem that would have to be considered in plenary. He endorsed Mr. Gaja’s general comments on the draft guideline, but he also had questions about the form, nature and scope of a finding of impermissibility. Should a finding of impermissibility be deemed to be binding on the reserving State? That raised the question of the nature of the monitoring body that made the finding. It could be a political body, a jurisdictional body or a *sui generis* body. Such

diversity must be taken into account in the draft guideline and the various possible situations addressed.

13. Paragraph 2 of draft guideline 2.5.4 was useful only if a finding of impermissibility was called for, entailing an obligation to withdraw the reservation; the reserving State would then have to abide by it. But if a recommendation was involved, there was no need for the second paragraph. A new provision would have to be inserted before draft guideline 2.5.4, or, alternatively, an intermediary stage would have to be envisaged and incorporated between paragraphs 1 and 2.

14. All those issues came back to the problems of the competence of the monitoring body and the opposability of a finding of impermissibility, which themselves brought up the very question of the permissibility of a reservation, one that permeated the entire discussion, in terms either of definitions or of procedure. If the Guide to Practice was to serve the purpose for which it was intended, those problems would have to be solved with a great deal of precision.

15. The CHAIR, speaking as a member of the Commission, said that he endorsed Mr. Gaja’s comment on draft guideline 2.5.4. It was true that if the State “must act accordingly”, withdrawal was necessary, but a State did not have an obligation to follow the recommendations of a monitoring body.

16. Mr. DUGARD, referring to cooperation with other bodies on the subject of reservations to human rights instruments, said that the Commission should take the initiative with some urgency, since practice was developing fast in that field. The Commission should take advantage of the fact that most human rights bodies were meeting at the same time as itself and make the necessary personal contact. He wondered whether the Chair and the Special Rapporteur could take steps to organize an informal meeting with the interested parties during the next session.

17. The CHAIR said that he had had several discussions with the people concerned, but they had led to nothing.

18. Mr. MANSFIELD endorsed the views expressed by Ms. Escameia and Mr. Dugard that the main question was who should take the initiative. In his view, the Commission should take a proactive stance in order to move matters forward.

19. The CHAIR said that if all concerned were agreeable, he would be glad to write a brief letter to the Chairpersons of the Sub-Commission on the Promotion and Protection of Human Rights and of the Human Rights Committee, urging them to get in touch with the Commission with a view to an informal exchange of views at the next session. Frankly, he did not believe that the Commission had failed to make known its willingness for such an exchange, but the fact was that his “preliminary conclusions” had met with a deathly silence.

20. Mr. MANSFIELD said that he wondered whether it was really necessary to adopt a formal approach. It might be more sensible to make direct contact with the people

concerned and get on with the job, without standing on formality.

21. Mr. PELLET (Special Rapporteur) said that the situation was, he feared, more complicated than that. At its forty-ninth session the Commission had taken the step of adopting its preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. A letter had subsequently been sent to the chairpersons of the human rights bodies, requesting them to send any comments to the Special Rapporteur. At that time, only one had deigned to send a formal reply, the Chairwoman of the Human Rights Committee, who had sent a rather dry, abrupt letter implying that the Committee was out of sympathy with the Commission. A letter had subsequently been received from the chairpersons of the human rights bodies, in which they had simply endorsed the letter from the Chairwoman of the Human Rights Committee. A short time later, Ms. Hampson, a member of the Sub-Commission, had suggested that the Sub-Commission should produce a report on reservations to human rights treaties. Over the years, however, the Commission on Human Rights had been opposed to the Sub-Commission's embarking on any work on that topic, since it did not see the need for such a study, which might duplicate the work of the International Law Commission. It had requested Ms. Hampson several times to make contact with him, as Special Rapporteur, but she had never done so. He had been in touch with her privately several times and had been given to understand that she would tell him the results of her work when it had been completed, but he was still waiting for her to do so. That was why, unlike Mr. Mansfield, he thought that the International Law Commission should adopt an official approach. The best course would be for the Chair and the Special Rapporteur jointly to sign a letter to the Chairperson of the Sub-Commission and to Ms. Hampson. It would also be a good idea to renew contact with the group of chairpersons of the human rights bodies, particularly the Chairperson of the Committee on the Elimination of Discrimination against Women, who was extremely active and had interesting ideas on reservations. It would be useful to invite representatives from each of the bodies concerned to come and participate in debates at the next session, if only because consideration of the preliminary conclusions would need to be resumed one day. From the financial point of view, it would be preferable if that could take place at a time when the International Law Commission was meeting in Geneva at the same time as the other bodies.

22. Mr. CANDIOTI said that he supported the Special Rapporteur's proposal and his idea of a letter to be signed by him and the Chair. The proposal should be recorded in the Commission's report to the General Assembly on its work.

23. The CHAIR said he took it that there was general support for the approach suggested by the Special Rapporteur in response to the Commission's expressed desire to have contact with the bodies in question. He also took it that a letter officially asking for opportunities for consultation during the next session in Geneva would be a solution that was responsive to the views of the Commission. He and the Special Rapporteur would draft a letter, which

would be distributed to the Commission and sent to the relevant parties in order to stimulate some exchange.

24. Mr. PELLET (Special Rapporteur), introducing draft guidelines 2.5.5 to 2.5.6 *ter* relating to the procedure to be followed for withdrawing a reservation, said that the most striking aspect of the 1969 and 1986 Vienna Conventions was their silence on the whole issue. It was therefore not possible to proceed in the same way as for draft guidelines 2.5.1 and 2.5.2, which had been introduced at the preceding meeting, or for many other draft guidelines already adopted: the Vienna Conventions were of no help, and they could not be paraphrased.

25. He had therefore decided that the best approach would be to model the procedure for the withdrawal of reservations on that relating to their formulation, even though it had to be recognized that the rule of parallelism of forms, which was usually observed in internal law, was not necessarily transposable to international law, partly because there was less formalism in international than in internal law. The rules relating to the procedure for formulating reservations could, however, be taken as a starting point. It could then be seen whether they might be applicable to withdrawal, given that, even for the formulation of reservations, the 1969 and 1986 Vienna Conventions were not very detailed and that, in a number of cases, he had been forced to use as models draft guidelines already adopted by the Commission for the Guide to Practice. In that context, he pointed out that he had drafted the seventh report before the Commission adopted the relevant draft guidelines arising out of his sixth report.⁴ He would therefore be proposing a few minor amendments to the draft guidelines contained in the seventh report so as to bring them into line with the draft guidelines on the formulation of reservations adopted at the preceding session.

26. Draft guideline 2.5.5, which he had entitled "Competence to withdraw a reservation", was a case in point. For draft guideline 2.1.3, which was the counterpart and the model for draft guideline 2.5.5, the Commission had preferred the title "Formulation of a reservation at the international level". For the sake of consistency, it would therefore be preferable to give draft guideline 2.5.5 the title "Formulation of the withdrawal of a reservation at the international level".

27. Since the Commission had preferred the long version of draft guideline 2.1.3, it would also be logical to take as a point of departure for draft guideline 2.5.5 the long version which appeared in paragraph 139 of the report. The suggested alternative was thus no longer appropriate: the Commission should deal with withdrawal as it had with formulation and adopt the longer version, unless guidelines specifically relating to the procedure for withdrawal were omitted from the Guide to Practice altogether and there was simply a guideline 2.5.5 referring the reader, *mutatis mutandis*, to guidelines 2.1.3 and 2.1.4 relating to the procedure for formulation, which had been adopted at the previous session.

28. Paragraphs 141 and 142 of the report set out the possibility of including such abbreviated draft guidelines,

⁴ See 2719th meeting, footnote 10.

but he was bound to say that he was not in favour of that approach, for two reasons: first, merely reproducing a provision did not seem to address the practical needs that the Guide to Practice was intended to meet. Users of the Guide had to be able to easily find all the guidelines they needed in the place where they were looking for them; and, for that purpose, it was better to repeat than to refer the reader elsewhere. Moreover, and above all, “*mutatis mutandis*” did not mean “word for word”. The Guide to Practice could not simply transpose to the withdrawal of reservations the rules contained in draft guideline 2.1.3 on the formulation of reservations. Broadly speaking, the procedures for withdrawal and formulation had to be similar but not necessarily identical, and some adaptation was necessary.

29. As was indicated by the Secretariat in the latest edition of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, “withdrawal must be made in writing and under the signature of one of the three recognized authorities, since such withdrawal shall normally result, in substance, in a modification of the scope of the application of the treaty”.⁵ In the past, the Secretary-General had had a slightly more flexible approach, but he himself thought that the new clear and unequivocal formula quoted in paragraph 128 of the report was well-founded. After all, the withdrawal of a reservation signified that the reserving State accepted the content of the treaty more fully than it had previously; and it seemed logical enough that the withdrawal could be made only by authorities entitled to represent the State or international organization in expressing consent to be bound by the treaty. The Secretary-General’s practice, which had become firmly established, was not, however, followed so strictly by other international organizations of which the secretaries-general were major depositaries of international treaties. In particular, such strictness was not favoured by the Council of Europe, which allowed the withdrawal of a reservation to be notified by the permanent representative of the reserving State to the Council.

30. For all those reasons, therefore, there was no reason not to adopt for withdrawal the terminology used in draft guideline 2.1.3 for the formulation of reservations: “Subject to the customary practices in international organizations which are depositaries of treaties”, the withdrawal could be formulated by the same persons as those entitled to express the consent of the State to be bound and to formulate reservations. Two amendments to the text of draft guideline 2.1.3 were necessary, however, as was explained in paragraph 140 of the report. First, a plenipotentiary would need to produce powers specifically applying to withdrawal and not full powers to adopt or authenticate a treaty or to express consent to be bound, if only because a withdrawal might take place several years later and, in most cases, the person withdrawing the reservation on behalf of the State would be different from the person who had expressed the State’s consent to be bound. Even if the individual was the same, the withdrawal of the reservation meant that his instructions had changed and that new full powers were required. That was the reason for the proposed change to draft guideline 2.5.5, paragraph 1 (a),

which appeared in paragraph 139 of the report, from the corresponding provision in guideline 2.1.3. Second, draft guideline 2.1.3, paragraph 2 (b), provided that “representatives accredited by States to an international conference” were competent to formulate “a reservation to a treaty adopted at that conference”. While that applied to the formulation of reservations, however, it did not to their withdrawal: in virtually every case, the international conference that had adopted the text of the treaty was obviously no longer in session at the time when the State wished to withdraw its reservation. He therefore considered that the text of guideline 2.1.3, paragraph 2 (b), should not be reproduced in guideline 2.5.5. On the other hand, since the Commission had decided, despite his own doubts, to retain draft guideline 2.1.3, paragraph 2 (d), he thought that the corresponding provision of draft guideline 2.5.5 (para. 2 (c)) should also be retained and the square brackets currently enclosing it deleted. He therefore proposed that the provision, without square brackets and with the change of title he had mentioned earlier, should be referred to the Drafting Committee.

31. Draft guideline 2.5.5 *bis* (Competence to withdraw a reservation at the internal level), which also appeared in paragraph 139 of the report, had been envisaged as separate from guideline 2.5.5 *ter* (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations). Again, he believed that it was advisable to align those guidelines on the texts adopted on the formulation of reservations; on the one hand, the two draft guidelines on the formulation of reservations proposed originally had been merged into a single draft guideline (2.1.4), and, on the other, the latter was entitled “Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations”. The two draft guidelines 2.5.5 *bis* and 2.5.5 *ter* should therefore be merged, and the resulting guideline should be given the title selected for the latter. As to the content, a simple transposition could be made by substituting the word “withdrawal” for the word “formulation” that appeared in draft guideline 2.1.4. Indeed, practice regarding withdrawals of reservations was doubtless as diverse as practice regarding their formulation, and international law had nothing to say on that score; that explained the proposed text for draft guideline 2.5.5 *bis*, which could become the first paragraph of the new single guideline. However, other States could not be required to know the internal rules applicable to withdrawal; that explained the proposed text for draft guideline 2.5.5 *ter*, which could become the second paragraph of the new single guideline. In order to bring the text of the new guideline into line with that of draft guideline 2.1.4, the last part of guideline 2.5.5 *bis* should be amended to read “is a matter for the internal law of each State or the pertinent rules of each international organization”.

32. Similar reasoning had been used with regard to the communication of the withdrawal of reservations, which was dealt with in draft guidelines 2.5.6, 2.5.6 *bis* and 2.5.6 *ter*. There again, a single guideline could be included that referred to the rules used to communicate reservations, which were set out in draft guidelines 2.1.5, 2.1.6 and 2.1.7, adopted at the preceding session. Contrary to the case of the formulation of a withdrawal, when the rules on the formulation of reservations could not simply be

⁵ United Nations publication (Sales No. E.94.V.15), document ST/LEG/7/Rev.1, para. 216.

transposed, there was no reason to differentiate between the communication of a reservation and the communication of a withdrawal. It was very clear from the *travaux préparatoires* of the 1969 Vienna Convention that the members of the Commission at the time had considered that the depositary should use the same procedure for the communication of reservations and for the communication of their withdrawal. That point had been confirmed by practice. Consequently, transposing the text of guidelines 2.1.5, 2.1.6 and 2.1.7 to three different draft guidelines simply by replacing the words “communication of reservations” with the words “communication of withdrawal of reservations” could seem unnecessary, although perhaps justified by a concern for comprehensiveness and readability; the two options were nevertheless presented in paragraphs 150 and 151 of the report. However, a problem arose owing to the merger into a single guideline (2.1.6) of guidelines 2.1.6 and 2.1.8, which were contained in the sixth report. Although paragraphs 1 and 2 of draft guideline 2.1.6 were directly transposable, paragraph 3, which was the result of an amendment proposed by Mr. Gaja (2733rd meeting, para. 43) and referred to article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions, could not be transposed because it referred only to the time limit for raising objections. Draft guideline 2.5.9, which would be dealt with later, made paragraph 2 relating to the effective date of a communication unnecessary. Guideline 2.5.6 could, however, refer to guideline 2.1.6, either by providing the foregoing explanation in the commentary or by limiting the cross-reference to paragraphs 1 and 2 of guideline 2.1.6; that would probably be preferable. In any event, the Commission had to decide whether it preferred the short version contained in paragraph 150 of the report or the long version, consisting of three different guidelines, contained in paragraph 151. He preferred the former solution.

33. Mr. KATEKA, referring to draft guidelines 2.5.5 and 2.5.6, said that he preferred the long version in both cases because he considered that cross-references should be avoided. He also doubted whether a communication of withdrawal of a reservation could be made by facsimile, as indicated in guideline 2.5.6 *bis*. The use of a facsimile posed the problem of the identity of the sender, which called for the use of special codes. Apart from that, he agreed with the text of the draft guidelines.

34. Mr. PELLET (Special Rapporteur), continuing with the presentation of his seventh report, referred to draft guidelines 2.5.7 and 2.5.8 on the effect of withdrawal of a reservation and on the time at which the withdrawal of a reservation became operative; those matters were covered in paragraphs 152 to 184 of the report. He admitted that it might seem illogical for the draft guidelines on the effect of withdrawal to appear in the section of the Guide to Practice on the withdrawal procedure, but, since the effect of the withdrawal of a reservation was far less complex than the effect of the reservation itself, it was more appropriate to include all of the questions relating to the withdrawal of reservations in a single section. The question of the time at which the withdrawal became operative was resolved by article 22, paragraph 3, of the 1969 and 1986 Vienna Conventions, which established a rule that could simply be stated again. The effect of the withdrawal was obvious, and, at the Commission's 1968 session, the

proposal to include a provision to that effect in the draft guidelines had been rejected. However, that position, which could be justified in the case of a framework treaty such as the 1969 Vienna Convention, was not appropriate in the Guide to Practice, in which it was necessary to include provisions on the consequences of the withdrawal of a reservation. As was indicated in paragraphs 179 and 183 of the report, a distinction should be made between three situations. In the first, which corresponded to paragraphs 1, 4 (a) and 5 of article 20 of the 1969 and 1986 Vienna Conventions, the reservation was simply accepted; in that case, once the withdrawal had taken place, the reserving State or organization and the State or organization that had implicitly or expressly accepted the reservation were bound by the whole provision to which the reservation related. In the second case, which was set out in the first part of paragraph 4 (b) of article 20 of the Conventions, a State or an international organization had objected to the reservation without objecting to the entry into force of the treaty between itself and the reserving State or organization. The effect of the withdrawal was also that the former reserving State or organization and the former objecting State or organization would be bound by the relevant provisions. In the third case, as dealt with in the last part of paragraph 4 (b) of article 20 of the Conventions, where the objecting State or organization had clearly expressed its intention of objecting to the entry into force of the treaty between itself and the reserving State or organization, the treaty did not bind those States or organizations in their relations *inter se*, so that, if the reservation was withdrawn, the treaty would enter into force between them. The last case was covered in draft guideline 2.5.8, while the first two cases were dealt with in draft guideline 2.5.7 (para. 184 of the report). However, the wording of draft guideline 2.5.7 was not satisfactory. It stated: “The withdrawal of a reservation entails the application of the treaty as a whole...”, but that was not necessarily the case because there could be other reservations which had not been withdrawn and which continued to prevent the application of the treaty as a whole. The matter could be clarified in the commentary, but it would probably be better to amend draft guideline 2.5.7, which might read: “The withdrawal of a reservation entails the application of the entire provision of the treaty to which the reservation related”; the rest would remain unchanged. That explanation was not necessary in draft guideline 2.5.8 because, in that case, what was important was the entry into force of the treaty itself, even if other reservations might remain in force. That point could be clarified in the commentary. The question of the date on which the effect was produced was covered in article 22, paragraph 3 (a), of the 1986 Vienna Convention, which read as follows: “The withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.” That rule, which had been stated during the Commission's discussions at its fourteenth session, in 1962, was not self-evident. The sudden entry into force of a treaty as a whole with a former reserving State could give rise to problems for certain States whose internal law was not adapted to the new situation, particularly in the field of private international law. The Commission was aware of that and had consequently indicated in its commentary that it must be accepted that the other parties might need a short period of time to bring their internal law into line

with the situation resulting from the withdrawal of the reservation; that was sensible but hardly satisfactory because it contradicted the text of the 1969 Vienna Convention, which established that the withdrawal became operative when notice of it had been received. However, the 1965 commentary provided an answer to the problem by indicating that it should be left to the parties to settle the matter by a specific provision in the treaty. This was reflected in article 22, paragraph 3, of the Vienna Conventions, which began with the words “Unless the treaty otherwise provides, or it is otherwise agreed”. Such wording, which he usually objected to because it applied to all the rules of the Vienna Conventions, seemed justified in the case of the withdrawal of a reservation if it was regarded as an invitation to negotiators to include a special clause in treaties to deal with the problem that might arise as a result of the application of the rule embodied in article 22, paragraph 3, of the Vienna Conventions in the event of a sudden withdrawal of a reservation. He therefore considered that it would be useful to include model clauses in the Guide to Practice that States should insert in the treaties they concluded in case the sudden withdrawal of a reservation caused problems for the other contracting parties. He recalled that, in its report to the General Assembly on the work of its forty-seventh session, the Commission had stated that the Guide to Practice would be presented in the form of draft articles that would constitute guidelines, accompanied, when necessary, by model clauses;⁶ however, when he had formulated model clauses on the late formulation of reservations, the Commission had rejected them on the grounds that “late reservations” should not be encouraged. He very much hoped that model clauses A, B and C, proposed in paragraphs 164 to 166 of his report, could be referred to the Drafting Committee, provided that they did not give rise to the same objection. If they did, it would have to be decided whether those clauses should be reproduced after the text of draft guideline 2.5.9, to which they corresponded, should be included in the commentary or should even appear in an annex to the Guide to Practice, with an indication to that effect in the commentary. The latter solution was the most appropriate. In summary, model clause A referred to deferment of the effective date of the withdrawal of the reservation, while model clause B shortened the effective date of the withdrawal and model clause C allowed a State that had withdrawn its reservation to set the effective date of the withdrawal itself. Those model clauses were based on clauses that existed in treaties in force, which were referred to in paragraph 163 and in the footnotes that accompanied model clauses B and C in the report.

35. In conclusion, he considered, first, that the provisions of article 22, paragraph 3 (*a*), of the Vienna Conventions should be included in the Guide to Practice, without changing the text, even though it departed from general principles of law in this respect and even though ICJ had taken the contrary position with regard to the acceptance of compulsory jurisdiction. On the one hand, insofar as possible, it was necessary to avoid questioning the rules established in the Vienna Conventions, and, on the other, those rules, which set the effective date of the withdrawal of a reservation at that on which each State had received notice of it, did, of course, leave the State making the

withdrawal in some doubt, but prevented the other contracting parties from being taken by surprise. In any case, the period of time normally amounted to only a few days. Second, States should be helped through the proposal of model clauses by which they could, as necessary, temper the strictness of the principle embodied in draft guideline 2.5.9, which was taken from article 22 of the Vienna Conventions.

36. Third, even in the absence of model clauses, it was not impossible that there would be, or could be, exceptions to that principle. To begin with, nothing prevented the reserving State or international organization from making the effective date of the withdrawal one subsequent to the date of receipt of the notification. In the interests of comprehensiveness, that was recalled in subparagraph (*a*) of guideline 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation), in paragraph 169 of the report. Subparagraph (*b*) of that guideline referred to a rather more complicated situation, in which the withdrawal did not alter the obligations of contracting States or international organizations in the case of “integral” obligations. One such example was that of the reservation formulated by Barbados when signing the International Covenant on Civil and Political Rights. The Government of Barbados had reserved the right not to apply in full the guarantee concerning legal assistance without payment, referred to in article 14, paragraph 3 (*d*), of the Covenant.⁷ If, going back on that position, the Government of Barbados considered that it could accept article 14 in its entirety, even with regard to pending cases, it could address to the Secretary-General a notification of withdrawal concerning all cases that had arisen as of a date prior to the withdrawal, which could then have retroactive effect. A reservation of that type affected only the relations of the reserving State with private individuals under its jurisdiction and had no effect on other States parties in their relations with the reserving State; and it seemed to go without saying that its withdrawal could cause no inconvenience to the other States parties and could indeed only be welcome to them, as it manifested the will of the State withdrawing the reservation to apply the treaty more completely. Accordingly, there was no reason why, in such a case, the withdrawal should not have immediate or retroactive effect, and that was expressed in subparagraph (*b*) of guideline 2.5.10.

37. On a different matter, he said that at the previous session he had protested vigorously on noting that the cover page of his report bore, beneath the date, the classification “Original: English/French”, whereas, like all his other reports, it had been drafted wholly in French. While he was grateful to the secretariat for refraining from prefacing the seventh report with that inaccurate, indeed, downright false description, he had, unfortunately, another grievance, again relating to language problems.

38. In paragraphs 180 and 181 of the original text of his report, he had cited an article from the literature in its original language, Italian, with a French translation of the quotation appended in brackets. However, when editing the report, the secretariat had seen fit to delete the Italian original, retaining only the French translation. That

⁶ *Yearbook ... 1995*, vol. II (Part Two), para. 487 (*b*).

⁷ United Nations, *Treaty Series*, vol. 999, p. 288.

was unacceptable, for reports by special rapporteurs were not the responsibility of the secretariat, but solely of their authors. That a serious work of scholarship should cite a text in translation, without enabling the reader to refer to the original, was contrary to all scientific practice. He recalled that, the previous year, he had been told that his complaints at the suppression of the original of an English quotation were not justified, since the original was to be found in the English version of the report. Whatever the merits of that argument, it was not true in the case of a quotation in the original Italian, to which there was no way of referring since Italian was not an official language of the United Nations. Thus, those initiatives taken by the secretariat without his knowledge called into question his academic and scientific credibility, and he wished to protest formally against such unacceptable bureaucratic practices, which smacked to him of censorship.

39. Mr. MIKULKA (Secretary of the Commission), replying to the Special Rapporteur's comments, said that addenda 2 and 3 of the French version of the report were headed with a "Note" which read: "This report was drafted entirely in French, although some quotations (translated into French by the Special Rapporteur, for which he is wholly responsible) are reproduced in their original language." That note should clarify matters.

40. However, the fact that addenda 2 and 3 to the seventh report were classified as "Original: French" resulted from a technical error: the classification should be "Original: English/French", as the document contained passages in English, albeit not written by the Special Rapporteur and consisting of quotations. The Special Rapporteur's interpretation of the original language classification was not the one applied by the United Nations. The classification: "Original: English/French" indicated that when the text was translated into the other official languages of the United Nations, the quotations in English would be translated, not from the French, but from the English. It was a technical indication addressed to the technical services of the Organization, not an indication of the Special Rapporteur's official working language.

41. As for the deletion of the quotation in Italian, official documents of the United Nations could not include text in languages other than the Organization's official languages. It would be recalled that in the past the Commission had requested a special rapporteur, Mr. Arangio Ruiz, who had been in the habit of including long quotations in Italian in his reports, to discontinue that practice or to provide a translation of his quotations in an official language.

42. In conclusion, he said that, if the Special Rapporteur continued to incorporate passages in languages other than the official languages of the United Nations in his reports, the Organization's technical services would continue systematically to delete them.

43. Mr. PELLET (Special Rapporteur) said that his inclusion of quotations in Italian and German in previous reports had not given rise to any problems and that he was at a loss to understand the secretariat's sudden inflexibility in that regard. Furthermore, all quotations in his reports given in non-official languages were always accompanied by a translation made by himself. The issue was one of

scientific rigour, and if quotations in non-official languages were deleted from his future reports, those reports would be withdrawn.

44. Mr. GAJA said that it would be useful for the Commission to have the text of the draft guidelines, as amended by the Special Rapporteur since the publication of the report, in French and English and, if possible, in other official languages.

45. With regard to guideline 2.5.10, its subparagraph (b) provided that "The withdrawal does not alter the situation of the withdrawing State in relation to the other contracting States or international organizations." In his opinion, however, even with regard to treaties imposing obligations *erga omnes*, the withdrawal of a reservation did indeed alter the situation of the withdrawing State and also the rights and obligations of the other contracting States or international organizations towards the withdrawing State. What the withdrawal did not alter was the content of the obligations of the other States, and the immediate or even retroactive effect of the withdrawal could thus not inconvenience them in any way.

46. Mr. PELLET (Special Rapporteur), replying to Mr. Gaja's first comment, said he was not sure that the course advocated by Mr. Gaja was really necessary, as the matter was basically one for the Drafting Committee. However, if the secretariat wished to undertake that task, he would of course have no objection.

47. As for the comments on the seventh report, he would refrain from commenting on guideline 2.5.4, which raised important problems, until more members of the Commission had given their views on it. He nevertheless wished to state at the outset that Mr. Gaja, and to a lesser extent Ms. Escameia, had misrepresented the wording of the guideline and, consequently, his own words. Mr. Gaja had said that "it was by no means certain that the monitoring body had the inherent competence to oblige the reserving State to withdraw its reservation". That, however, was not what the guideline said: it simply stated that, among the possibilities available to a reserving State to act in accordance with a finding by a monitoring body, one possibility was that of withdrawing its reservation.

48. Mr. Kateka had said that he preferred the "long version" of guidelines 2.5.5 and 2.5.6. It would be helpful for other members to indicate their preference so as to offer guidance to the Drafting Committee. He stressed, however, that the two guidelines should not be dealt with in the same manner, as they referred to different problems. In the case of guideline 2.5.5, the words "*mutatis mutandis*" were essential, as it was not possible to apply the provisions referred to simply as they stood; in guideline 2.5.6 there was no need for that expression, a fact which made all the difference. As for Mr. Kateka's other comment, that he did not favour making the withdrawal of a reservation effective on the date of its communication by facsimile or electronic mail, the Commission had decided at the preceding meeting that that should be the case for the formulation of reservations, and he did not see how it could take a different position in the case of their withdrawal.

49. Regarding subparagraph (b) of guideline 2.5.10, he fully endorsed Mr. Gaja's comment and asked how Mr.

Gaja proposed amending the text to take account of that comment.

50. Mr. GAJA said that reference should be made in the provision to “the content of the obligations”.

The meeting rose at 1 p.m.

2736th MEETING

Thursday, 25 July 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Tomka, Ms. Xue, Mr. Yamada.

Reservations to treaties¹ (*continued*) (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. FOMBA said that draft guideline 2.5.1 (Withdrawal of reservations) gave no particular cause for concern. He thus welcomed the Commission’s decision of principle that there must be cogent reasons for any departure from the relevant provisions of the 1969 and 1986 Vienna Conventions in the draft Guide to Practice, and he supported the Special Rapporteur’s proposal simply to adopt without change the wording of article 22, paragraph 1, of the 1986 Vienna Convention. On the basis of a proper analysis of the various issues, such as the definition and nature of the reservation, its social function, its legal scope and its limitations, there was no good reason to adopt any other course.

2. Again, guideline 2.5.2 (Form of withdrawal) posed no particular problems. Accordingly, he endorsed the Special

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

Rapporteur’s view, expressed in paragraph 90 of the seventh report (A/CN.4/526 and Add.1–3), that the guideline could safely follow the text of article 23, paragraph 4, of the Vienna Conventions, on the understanding that objections to reservations would form the subject of a separate section. On the question of implicit withdrawals, his position of principle was that the withdrawal of a reservation was not to be presumed. Yet the question—discussed in paragraphs 93 to 103 of the report—of whether certain acts or conduct could not be characterized as the withdrawal of a reservation merited further consideration.

3. Guideline 2.5.3 (Periodic review of the usefulness of reservations) was, as the Special Rapporteur pointed out in paragraph 105 of his report, no more than a useful recommendation. In his view, the issue was ultimately one of logic and political responsibility.

4. Guideline 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty) raised three questions, namely the impermissibility of reservations; the right to declare a reservation impermissible; and the entitlement to act on such a finding. He reserved his position on the first question pending a more thorough examination of the matter, probably at the next session. On the right to declare a reservation impermissible, he would likewise refrain at the present stage from pronouncing on the question whether the treaty-monitoring bodies should be entitled to exercise that right. Suffice it to point out that the position of the human rights bodies set forth in paragraph 108 (a) of the report had been endorsed by the Commission at its forty-ninth session, in 1997.³ However, he had some doubts about the validity of those bodies’ position regarding their entitlement to act on their findings, as set forth in paragraph 108 (b) of the report, even though, on the face of things, that position seemed logical. He therefore endorsed the prudent approach adopted by the Commission at that session.

5. He agreed with the Special Rapporteur that the Commission could not pass over in silence the question whether a reservation declared impermissible was automatically “withdrawn from duty” as a result of whether it should or could be withdrawn by the reserving State (para. 107 of the report). In his opinion, first, a finding did not *ipso facto* equate to a withdrawal; second, from the teleological standpoint, the reserving State had not merely the option but the duty to withdraw an impermissible reservation; third, withdrawal was, albeit the main and most logical, not the only possible action, as was illustrated in paragraph 109 of the report.

6. In conclusion, paragraph 1 of guideline 2.5.4 had the virtue of clarifying the nature of the relationship between a finding of impermissibility and withdrawal. Paragraph 2 was consistent with the main purpose of the Guide to Practice, namely, to plead the cause of the integrity and full effectiveness of the treaty. Thus, unlike Mr. Gaja, he thought guideline 2.5.4 should be referred to the Drafting Committee, for it must not be forgotten that the Guide to

³ Paragraph 5 of the preliminary conclusions adopted by the Commission on reservations to normative multilateral treaties, including human rights treaties (see 2734th meeting, footnote 6).

Practice was to be addressed to all States, and that not all aspects of practice were equally self-evident to all countries' legal services and practitioners.

7. He had no particular substantive difficulty with guideline 2.5.5 (Competence to withdraw a reservation at the international level), since it had been demonstrated that a modified version of guidelines 2.1.3, 2.1.3 *bis* and 2.1.4 could be applied to the withdrawal of reservations. His own preference was for the first option set out in paragraph 138 of the report. *A contrario*, a mere cross-reference to other guidelines was undesirable, since, as was pointed out in paragraph 142, the Guide to Practice was not a treaty but a "code of recommended practices" which users should be able to consult directly, easily and rapidly.

8. Finally, concerning guideline 2.5.6 (Communication of withdrawal of reservations), it appeared that a modified form of guidelines 2.1.5 to 2.1.7, on communication of reservations, could be applied to communication of withdrawal of reservations. Here, of the two options, namely, simply to refer to those guidelines or to reproduce them in their entirety, the first clearly had fewer drawbacks. Nonetheless, he favoured the latter solution in the interests of ease of reference and of consistent methodology. He also favoured the recommendation concerning the words "in writing", to be found in the footnote of the report that corresponded to draft guideline 2.5.6.

9. Mr. MOMTAZ congratulated the Special Rapporteur on his tireless efforts to advance the Commission's work on a somewhat intractable topic. The Special Rapporteur's useful summary of the *travaux préparatoires* which had led to the adoption of the 1969 Vienna Convention would give the Commission a better understanding of the reasons for the gaps in that instrument with regard to the procedure for withdrawal of reservations, and would confirm that there was no incompatibility between the spirit of the Convention and the draft guidelines.

10. Referring briefly to the question of cooperation between the Commission and the Sub-Commission on the Promotion and Protection of Human Rights, he expressed the hope that the Commission had taken note of the interesting suggestion made by Mr. Candioti, and that its report to the General Assembly would contain express mention of the decision taken by the Commission in that regard at its previous meeting.

11. As to the Special Rapporteur's seventh report, guideline 2.5.1 posed few difficulties, for it simply reproduced the text of article 22, paragraph 1, of the 1986 Vienna Convention. It might well be asked whether it was a valuable exercise simply to reproduce certain provisions of the 1969 and 1986 Vienna Conventions word for word in the Guide to Practice. His reply was emphatically in the affirmative, for a practical reason: the Guide must be self-contained and usable without the need for additional reference to the Conventions, a consideration that outweighed any concerns regarding duplication.

12. Guideline 2.5.2 was welcome, as formulation in writing of withdrawal of a reservation would indisputably

safeguard the security and transparency of treaty relations. Likewise, the periodic review of the usefulness of reservations recommended in guideline 2.5.3 would undoubtedly reduce the number of reservations which had been formulated in a specific political context and which had subsequently ceased to have any valid *raison d'être*. Nonetheless, he had some doubts about the usefulness of the last phrase of paragraph 2 of the guideline, namely, "and to developments in that legislation since the reservations were formulated". If internal legislation had been modified in such a way as to render the reservation redundant, little seemed to be gained by requiring States to review those legislative developments. The phrase added nothing to the guideline and should be deleted.

13. He welcomed the clarifications provided by the Special Rapporteur in response to the comments by Mr. Gaja and Ms. Escarameia on guideline 2.5.4. It went without saying that the reserving State was in no way obliged to withdraw a reservation declared impermissible by a treaty-monitoring body. Such findings were eminently political in character and could not be binding on States, which retained control over the reservations they had formulated. In his view, the misapprehension that had arisen was attributable to the wording of the second subparagraph of paragraph 110 of the report, which read "The reserving State (or international organization) cannot, nonetheless, ignore the finding and has the duty to take action;" and to that of the third subparagraph, which stated that the reserving State "must eliminate the causes of the inadmissibility...". The over-emphatic wording of those two subparagraphs had no doubt given rise to the confusion. Thus, in paragraph 2 of draft guideline 2.5.4, the words "must act accordingly" should be amended to read "should act accordingly", so as to better reflect the Special Rapporteur's intention.

14. The draft guidelines concerning the procedure for withdrawal of reservations were welcome, inasmuch as they filled the gap left by the 1969 and 1986 Vienna Conventions. Since it was in the interests of the treaty community as a whole to reduce the number of reservations to a minimum, the rules concerning formulation of reservations should not simply be transposed to the case of their withdrawal. While the procedure for formulation of reservations should be made as complex as possible, the procedure for their withdrawal should be made as simple as possible. To judge from paragraph 89 of his report, that seemed to be the Special Rapporteur's own conclusion. Thus, while his own preference with regard to competence to formulate a reservation at the international level was for guideline 2.1.3, in the case of withdrawal of reservations he favoured the "long version" of guideline 2.5.5. That formulation had the great advantage of enabling accredited representatives or heads of permanent missions to an international organization to withdraw a reservation to a treaty adopted in that organization without the need for the exercise of plenipotentiary powers.

15. For similar reasons, guidelines 2.5.5 *bis* (Competence to withdraw a reservation at the internal level) and 2.5.5 *ter* (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations) were welcome, both being such

as to make the procedure for withdrawal of reservations easier and reduce formalities to a minimum.

16. Finally, he saw no reason why the model clauses contained in paragraphs 164 and 166 of the seventh report should not be referred to the Drafting Committee, as they would undoubtedly reduce the difficulties encountered by States parties to a treaty following the sudden withdrawal of a reservation.

17. Mr. TOMKA said he had nothing to add to the discussion with regard to guidelines 2.5.1 and 2.5.2, since the texts simply reproduced the relevant provisions of the Vienna Conventions, on whose *travaux préparatoires* the Special Rapporteur had commented extensively and usefully. The question of implicit withdrawal was, in his view, purely academic and theoretical, since a reservation could not be presumed if in practice it must be withdrawn in writing.

18. Guideline 2.5.3 proposed a solution to the problem of “forgotten reservations”. Despite being couched in the conditional, the formulation proposed by the Special Rapporteur seemed to imply that States were under an obligation to engage in a periodic review of their reservations. Particularly in view of the Special Rapporteur’s own opinions on the question, it might be better to recast the guideline so as to begin with the words “It is recommended that...”, so as to dispel any suspicion that there might be an obligation in that regard.

19. As to guideline 2.5.4, while treaty-monitoring bodies were entitled to assess the extent of States’ compliance with their obligations under the treaty, they could not impose an obligation on a State to withdraw a reservation, even where the reservation conflicted with the object and purpose of the treaty. Where a treaty-monitoring body found a reservation to be impermissible, it was for the State concerned to draw its own conclusions. While he was not opposed to the Special Rapporteur’s proposal that guideline 2.5.4, paragraph 1 of which was uncontroversial, should be referred to the Drafting Committee, paragraph 2 could usefully be amended by deleting the second sentence, which read: “It may fulfil its obligations in that respect by withdrawing the reservation.”

20. Mr. PELLET (Special Rapporteur) said he reserved the right to return to draft guidelines 2.5.4 and 2.5.11 *bis* once he had heard all members’ comments on them. Several members had pointed out that a State had no obligation to withdraw a reservation held to be impermissible by a treaty-monitoring body. That would not, however, be true if the body in question was ICJ. Be that as it might, the State or international organization was obliged to withdraw its reservation, not because of the finding that it was impermissible, but simply because of its impermissibility under international law; for, in the absence of any implementing mechanisms, international law was binding but unenforceable. The fact that the treaty-monitoring bodies did not have the power to oblige States to do something did not mean that they were not obliged to do it. Thus, a State could contest the validity of a finding; what it could not do was to treat that finding with contempt. As a minimum, it must react by contesting it in good faith.

21. As to Mr. Tomka’s proposal, his initial reaction was that, if the second sentence of paragraph 2 of draft guideline 2.5.4 were to be deleted, then the provision would no longer have any place in the section relating to withdrawal of reservations.

22. The CHAIR, speaking as a member of the Commission, said the Commission must not lose sight of the fundamental role of consent: if a State filed a treaty together with a reservation which was deemed unacceptable, the State did not become a party to the treaty. That did not, however, obligate the State to withdraw its offer to become a party, with the reservation, pending the day when it was found that that reservation was a cheap price to pay for the State’s accession to the treaty. To suggest that rejecting a reservation obligated a State to withdraw it was very different from stating that rejecting a reservation was an indication that an entity was not in treaty relations with that State.

23. Mr. TOMKA said it seemed unfortunate that, according to the Special Rapporteur, the reference to a monitoring body was intended to cover judicial and other institutions. In international practice, treaty-monitoring bodies were those created by the relevant instruments, particularly in the field of human rights. ICJ, however, could not be considered a monitoring body: it did not receive reports on how States were fulfilling their obligations under a given treaty. The European Court of Human Rights handled complaints by individuals that States had violated their obligations under the European Convention on Human Rights, and it, too, could not be considered a treaty-monitoring body.

24. He agreed that there was a distinction between a finding by a treaty-monitoring body and a finding by a judicial body. If ICJ found a reservation inadmissible, that meant it was null and void and the State remained bound by the treaty provision to which the reservation had been addressed. The reservation itself did not have legal effect; it was up to the State to draw the appropriate conclusions from the finding. If, on the other hand, one of the treaty-monitoring bodies found a reservation inadmissible, that did not give rise to any obligation for the State to withdraw the reservation.

25. Mr. PELLET (Special Rapporteur), responding to the Chair’s remarks but referring also to Mr. Gaja’s statement at the previous meeting, said he was surprised to see that guideline 2.5.4 was being made to say things it did not say. The second sentence of paragraph 2 read “[The State] *may* fulfil its obligations”, not “[The State] *must* fulfil...”. Nowhere in the draft was it indicated that the State was obliged to withdraw a reservation; rather, it “*must act accordingly*” in response to the impermissibility of the reservation, it must put an end to that impermissibility, and the obvious way to do so was to withdraw the reservation.

26. As to Mr. Tomka’s comments, he admitted that he had been wrong in saying that ICJ could be considered a monitoring body, though he thought a case could be made for identifying the European Court of Human Rights in that way, and he had said as much when the Commission

had reviewed the Court's decisions in preparing its preliminary conclusions. He also agreed that monitoring bodies could not annul a reservation: the Court's decision in the *Belilos* case had always seemed totally unacceptable to him, but the fact remained that it existed. The discussion so far on guideline 2.5.4 appeared to confirm the preliminary conclusions adopted by the Commission at its forty-ninth session on reservations to normative multilateral treaties, including human rights treaties.

27. Mr. TOMKA asked what was the source of the obligations to withdraw an impermissible reservation which, according to guideline 2.5.4, the State "may" fulfil. Surely, since they were mentioned in a legal text, such obligations were legal, not moral or political. Were they part of international law or enshrined in the Vienna Conventions? They were certainly not imposed on the State by any treaty-monitoring body.

28. Mr. GAJA said a distinction had to be drawn between a finding of impermissibility by a treaty-monitoring body and the effects of such a finding, and the impermissibility of the reservation itself. That distinction was very well outlined in the preliminary conclusions adopted by the Commission at its forty-ninth session on reservations to normative multilateral treaties, including human rights treaties. He agreed with the Chair that withdrawal of a reservation that had been found inadmissible was not the sole course of action open to a State: it could, as was indicated in paragraph 10 of the preliminary conclusions, forgo becoming a party to the treaty or modify the reservation so as to eliminate its inadmissibility. If paragraph 2 of the guideline mentioned all three possibilities, and not simply withdrawal, he would be able to go along with it. In its present wording, however, he thought withdrawal was too closely linked to a finding by a treaty-monitoring body.

29. Ms. ESCARAMEIA, recalling the problem she had raised at the previous meeting, said the first sentence of guideline 2.5.4 gave rise to ambiguity in that it mentioned "a body" that was monitoring the implementation of a treaty. That meant, not necessarily the human rights treaty bodies, but others as well, including judicial bodies, as the Special Rapporteur had suggested in his comments. She did agree that such bodies engaged in monitoring when dealing with problems under a treaty, and that was particularly true of regional judicial bodies. An additional difficulty was that some future treaty might expressly establish a body with competence to determine whether reservations were permissible or not. The ambiguity she had mentioned extended to the wording of paragraph 2: the State "must act accordingly", but what did that mean? It would depend on whether the State accepted the findings made by the body in question and whether the body had mandatory or recommendatory powers.

30. Mr. BROWNLIE said that, if he were the Special Rapporteur, he would point out that the Commission was preparing a Guide to Practice, not engaging in legal codification. On the point under discussion, there was an awkward mix of genres, since the Guide to Practice outlined the political or moral duty of a State to review its position if it had made an impermissible reservation. He agreed that there was a wide diversity of monitoring bodies. The

paradigm in Europe, prior to the creation of the European Court of Human Rights, had been the European Commission of Human Rights, which had had a reporting role, not mandatory powers, having been primarily concerned with achieving friendly settlement of disputes. Thus, not all findings were those of full-fledged judicial bodies that engaged in dispute settlement on the model of ICJ, and not all were self-executing. That gave a reserving State a moral duty to review its position in the light of the fact that an authoritative but not binding decision maker had taken a certain view of its reservation.

31. Mr. Sreenivasa RAO said he agreed with Mr. Brownlie and Mr. Gaja: the draft guideline put together too many ideas in too abbreviated a fashion and needed further work. He had understood from the Commission's earlier discussions that a finding by a treaty-monitoring body that a reservation was impermissible was merely a recommendation for the State to give due consideration to the matter: the finding did not have binding force. He also agreed that a distinction must be drawn between judicial bodies and treaty-monitoring bodies and their respective powers.

32. Mr. MANSFIELD said the Commission should bear in mind the original purpose of the exercise, which was to develop guidelines that would be helpful to States in actual practice. Guideline 2.5.3 was very helpful, in his view although he was still somewhat concerned about paragraph 2. Guideline 2.5.4, however, was obscure and even misleading, an attempt to combine too many elements in too small a package. The fact that a treaty-monitoring body found a reservation impermissible did not obligate a State to withdraw it: this was blindingly obvious, although it might be better not to spell that out.

33. Mr. CHEE said that guideline 2.5.4 raised a number of questions. Was there a distinction between a legal obligation under a guideline and under a treaty? Were ICJ and the European Court of Human Rights adjudicatory bodies or advisory bodies? It should be made clear in the guideline whether a treaty-monitoring body had the power to enforce a finding of impermissibility.

34. Mr. BROWNLIE said that, at the risk of complicating matters, he would point out that, even if a monitoring body had mandatory powers, the question of whether they were self-executing or not remained undecided.

35. Mr. PELLET (Special Rapporteur) recalled, in response to Mr. Chee's comments, that the Guide to Practice was recommendatory rather than binding in nature. He endorsed the comments made by Mr. Gaja and others. As for Mr. Tomka's question concerning the basis for a State's obligations, the answer would probably turn out to be article 19 of the 1969 and 1986 Vienna Conventions; but that remained to be settled at the next session, when the soap opera continued. Meanwhile, there were clearly different categories of obligation: it made no sense to establish a monitoring body and then not accept any findings it might make. A State or international organization was obliged to take some action if it wished to make any claim to good faith. Admittedly, some powerful States paid no attention to the findings of monitoring bodies, but such an approach was in contravention of international law.

Perhaps he had been at fault in using the word “monitoring” (*contrôle*), given the variety of bodies in existence. It might have been preferable to use a phrase such as “body empowered to rule on the permissibility of reservations”, which would cover ICJ, the European Court of Human Rights, the old European Commission of Human Rights, the Inter-American Court of Justice and the Committee against Torture, among others. He saw no point, however, in distinguishing between the various categories of monitoring body in the guideline, although he would have no objection to doing so in the commentary. As for the objections to the phrase “act accordingly”, in both French and English it clearly implied, without saying so in so many words, that withdrawal of the reservation was the most appropriate course of action—since that was the surest way for a State to fulfil its obligations—but it was not necessarily the only one. He would nonetheless draft a new text which, he hoped, would take account of the various points raised.

36. Mr. COMISSÁRIO AFONSO commended the Special Rapporteur’s report, which was comprehensive and clear and put forward a number of innovative proposals. Draft guidelines 2.5.1 and 2.5.2, which were in full conformity with the Vienna Conventions, were wholly acceptable. Indeed, the only question was whether they should adhere so closely to the Conventions. The object of the Guide to Practice was, after all, to operationalize the Conventions rather than merely to quote them. He took it that the Guide would indicate the sources of the guidelines, so as to ensure that the text of the Conventions was as widely known as possible.

37. It was completely impossible to reconcile the concept of implicit withdrawals with the principle that a withdrawal must be formulated in writing. The reason was clear: the requirement of a written withdrawal served the important purpose of bringing certainty into the relations between States parties. Admittedly, what could be interpreted as implicit withdrawals did take place in State practice, but they could not take legal effect until the withdrawal was made in duly written form.

38. Guideline 2.5.3 was also very useful and should be included in the Guide to Practice. He fully shared the Special Rapporteur’s view as to the difference between withdrawn and expired reservations, as expressed in paragraph 98 of the report. He also endorsed the opinion that a guideline encouraging States to withdraw obsolete or superfluous reservations should be drafted. As to draft guideline 2.5.4, he agreed with comments made by Mr. Gaja at the previous meeting. He would only add—without wishing to renew the discussion on impermissibility—that paragraphs 108 to 113 of the report referred to “admissibility” and “inadmissibility”, which he himself preferred to “permissibility” and “impermissibility”. The guideline itself, however, reverted to the word “impermissible”, and he wondered whether that was simply to maintain consistency with guidelines that had already been adopted.

39. Finally, paragraph 2 of guideline 2.5.4 should be harmonized with the preliminary conclusions adopted by the Commission at its forty-ninth session on reservations to normative multilateral treaties, including human rights treaties, as was indicated in paragraph 109 of the report.

40. Mr. KABATSI said that, along with other members, he found guidelines 2.5.1 and 2.5.2 perfectly acceptable. They should be referred to the Drafting Committee. With regard to the concept of implicit withdrawals, he believed that, since the Commission’s aim was to give guidance to States and international organizations, certainty was of paramount importance. If a State withdrew a reservation, it was essential for the other parties to be informed and for the withdrawal to be in writing.

41. Guideline 2.5.3 was also very useful. Circumstances often changed within a State or international organization, yet it might not take timely action on withdrawing its reservations. It might, indeed, have simply forgotten that they existed. Or the personalities in government might change and with them the State’s views. Or other parties might be persuaded by the actions of still other parties to withdraw their own reservations. As for guideline 2.5.4, he could not agree with the view that it might cause problems. It laid out, most usefully, what a State should do if a monitoring body found a reservation to be impermissible. It was a simple recommendation, particularly if the reserving State or organization did not contest the finding. The difficulties that other members had found seemed insignificant. Without being binding, the guideline gave the State the opportunity to review and perhaps withdraw its reservations. The Drafting Committee might find appropriate wording to indicate the precise course of action a State should take. The Commission had, after all, the choice between giving useful advice and remaining silent on the matter.

42. Mr. GALICKI said the draft guidelines dealt with some substantial problems that could arise in connection with reservations. Specifically, he was in favour of guidelines 2.5.1 and 2.5.2. His only caveat concerned the phrase “Unless the treaty otherwise provides” in guideline 2.5.1: either the phrase should be deleted or it should be inserted into a guideline of a general character. Otherwise, the impression might be created that the guideline was to be applied differently from other guidelines. As for the form of withdrawal, he agreed that the only acceptable form was in writing, although he was attracted by Mr. Momtaz’s suggestion that a facilitated procedure for withdrawal of reservations, similar to that proposed for reservations themselves, should be established. Just as there was a uniform set of obligations for making reservations, so there should be one for their withdrawal.

43. He did not share the views of those who criticized guideline 2.5.3, which was most useful: it went further than the narrow provisions of the 1969 and 1986 Vienna Conventions and took full account of the reality of treaty relations, including the fact that States often paid little attention to the importance of preserving the integrity of treaties. Moreover, it was sometimes difficult, as in his own country, to obtain information on the position regarding internal legislation in relation to reservations made to international treaties a long time previously. He would, however, prefer to see alternative wording for the phrase “internal legislation”, which was inappropriate in relation to international organizations.

44. He had given much thought to guideline 2.5.4. Undoubtedly, the withdrawal of reservations should be re-

flected in the Guide to Practice, but perhaps the guideline should be placed elsewhere. There were other problems, too—with the inconsistent use of the words “impermissible” and “inadmissible”, the Commission was planting a time bomb for itself. Another point was that, as Mr. Brownlie had said, there were different kinds of monitoring bodies, some with judicial powers and some without. For example, the Human Rights Committee had power but not binding power. The Special Rapporteur was not, of course, aiming to spell out a State’s obligations, but the phrase “act accordingly” seemed so vague as to add even more doubt as to the course of action a State should take. Another element was that of timing: it was strange that a monitoring body could find a reservation impermissible even though the treaty was already operative and the other parties had presumably accepted the reservation. The Drafting Committee should consider the wording very carefully, because, despite some deficiencies, there was much of merit in the guideline. It might be useful to devote a separate guideline to the role that should be played by monitoring bodies and the weight to be given to their findings.

45. Finally, with regard to the approach used in guideline 2.5.5, he doubted whether it was useful or necessary to repeat the same or very similar formulas. The Special Rapporteur had given the Commission a choice of shorter and longer versions. Some members might indeed prefer the longer version, repeating the formula used in the Vienna Conventions, but that implied using the same wording for the formulation and withdrawal of reservations, and also for the formulation and withdrawal of objections. The shorter version should be used, with particular attention paid to highlighting the differences.

46. Mr. PELLET (Special Rapporteur) requested that what Mr. Momtaz and Mr. Galicki specifically proposed should be added to draft guideline 2.5.2.

47. Mr. MOMTAZ said that he had nothing to add to the guideline. He considered the current text to be entirely pertinent.

48. Mr. GALICKI said that he did not wish to rewrite guideline 2.5.2. He had merely suggested that all opportunities should be used to create conditions that facilitated withdrawal of reservations, and that the members of the Drafting Committee could identify such opportunities. When discussing implicit withdrawals, it might be possible to resort to certain technicalities to find a formula consistent with that notion, without conflicting with the general rule that the withdrawal of a reservation must be formulated in writing.

49. Mr. CHEE said that guideline 2.5.2, which stated that withdrawal of a reservation must be formulated in writing, and which therefore referred to an explicit withdrawal, was followed in the report by the heading “The question of implicit withdrawals”. Consequently, there was a conflict between the two texts. The Special Rapporteur referred to the case of implicit withdrawal in paragraph 93, but the situation described was one of a later instrument superseding an earlier instrument. With regard to guideline 2.5.3, paragraph 111 of the report referred to the *Belilos* case and the fact that the reservation had

been partially withdrawn by Switzerland. Was it possible to make a partial reservation?

50. He agreed with Mr. Tomka that the second sentence of paragraph 2 of guideline 2.5.4 should be deleted. If the Special Rapporteur wished to retain it, he could perhaps amend it to reflect the title of the guideline. Last, he fully endorsed guideline 2.5.6 *ter*, since it conformed to paragraph 1 (*d*) of article 77 of the 1969 Vienna Convention, on the functions of depositaries.

51. Mr. KEMICHA said that guidelines 2.5.1, 2.5.2 and 2.5.3 could be referred to the Drafting Committee. He shared the hesitation of some of his colleagues with regard to 2.5.4, on the withdrawal of reservations held to be impermissible, and preferred not to pronounce on it immediately, because he had some difficulty in understanding the ensuing obligations for a reserving State. The guideline stated that “the reserving State or international organization must act accordingly”, which implied that there was an expectation, rather than an obligation, of the State. Perhaps the Special Rapporteur could offer some elements that provided a legal basis for the consequent obligations.

52. While he respected the Special Rapporteur’s point of view, he preferred the longer versions of guidelines 2.5.5 and 2.5.6, as they added clarity, and it should be remembered that the finished text would be the Guide to Practice. Last, and for the same reason, he favoured inserting the model clauses.

53. The CHAIR called on the Special Rapporteur to introduce draft guidelines 2.5.11 and 2.5.12.

54. Mr. PELLET (Special Rapporteur) said that he proposed to present the last episode, but not the epilogue, because it set out only part of the development that he wished to devote to the modification of reservations. He had prepared the ensuing part which dealt with modifications that strengthened existing reservations, expanding their scope, but there had been insufficient time to translate it. Consequently, section B of the report dealt only with modifications that reduced the scope of reservations, in other words, partial withdrawals.

55. Mr. Chee had asked if there could be partial withdrawals, and his response was a categorical yes. Since strengthening and attenuating reservations posed different problems, it made sense to examine the question of partial withdrawals at the present session and to postpone examination of the strengthening of reservations until next year. Strengthening reservations resembled late formulation of reservations, because when a State strengthened its reservation, it added something to the reservation or subtracted something else from the text of the treaty. Therefore, it added to its refusal to implement the entire text. In contrast, the partial withdrawal of reservations was closely tied in with total withdrawal, because it was not adding to, but rather subtracting from, the reservation, thus increasing the State’s obligations.

56. In that respect, he was proposing two principal draft guidelines: 2.5.11 (Partial withdrawal of a reservation) and 2.5.12 (Effect of a partial withdrawal of a reserva-

tion), as well as 2.5.11 *bis* (Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), which was the counterpart to guideline 2.5.4.

57. Guideline 2.5.11, set out in paragraph 210 of the report, consisted of two paragraphs, which it would be preferable to invert, since the definition should precede the rules on form and procedure applicable in the case of partial withdrawal, and the effects. The first of the present paragraphs referred to the rules in force in the case of complete withdrawal. The definition proposed in the second paragraph required little explanation, but it was a necessary point of departure and emphasized that one could speak of partial withdrawal only if the legal effects of the reservation were reduced so that the treaty would be implemented more completely. However, the definition also showed that it was a case of the modification of an existing reservation and not of a total withdrawal followed by a new reservation. That might appear obvious, but a review of the literature showed that what seemed obvious had been overlooked by several authorities on doctrine and practice. It was not clear that a partial withdrawal was a simple modification, because the practice of the Secretary-General of the United Nations was not absolutely consistent and was at times based on a different interpretation. In that respect, he drew the Commission's attention to the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, cited in paragraph 205 of the report, where the authors appeared to exclude the concept of partial withdrawal, which they considered to be total withdrawal followed by "the making of (new) reservations".⁴

58. Some writers had analysed an important 1992 judgement of the Swiss Federal Supreme Court in the *F. v. R. and State Council of the Canton of Thurgau* case on that basis. In that case, the Federal Supreme Court had considered that Switzerland's interpretative declaration in the *Belilos* case, which the European Court of Human Rights had deemed invalid, did not exist, and that Switzerland could not partially withdraw or attenuate that reservation to take into account the reasons that had led the European Court to consider it invalid. The Federal Supreme Court had decided that Switzerland could only make a new reservation, which, in that case, would have been a late reservation and thus impermissible. It was an interesting although, in his opinion, erroneous ruling. As was shown in paragraph 206 of the report, in the case of the practice of the Secretary-General, and in paragraph 200 with regard to the *F. v. R. and State Council of the Canton of Thurgau* case, other interpretations were possible. For example, in its 1992 judgement, the Federal Supreme Court had expressly stated that "While the 1988 declaration merely constitutes an explanation of and restriction on the 1974 reservation, there is no reason why this procedure should not be followed" [p. 535]. Thus, in that phrase, the Federal Supreme Court appeared to admit that there was no reason why Switzerland could not make a partial withdrawal and attenuate its reservation, and that the Court had other reasons for considering that Switzerland's new reservation was invalid.

⁴ *Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties* (see 2735th meeting, footnote 5), para. 206.

59. As for the practice of the Secretary-General, in an important note verbale by the Legal Counsel of the United Nations (modification of reservations) of 2000,⁵ which the Commission had discussed at length with respect to the time limits for objections to late reservations, a firm distinction was drawn between modification of an existing reservation and partial withdrawal of an existing reservation. The Secretary-General considered that the procedure used for late formulation of a reservation should be followed in the former case, while that was not necessary in the case of a partial withdrawal. That was correct, because a partial withdrawal was not the formulation of a new reservation but, on the contrary, a partial withdrawal of the substance of an existing reservation. Nevertheless, the note verbale contradicted the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*; and in that case, the note verbale was right and the *Summary of Practice* was wrong. As had previously been mentioned, the practice of the Secretary-General was at times inconsistent. Partial withdrawals were often treated as if they were a strengthening of the reservation, and attenuations of reservations were dealt with as if they were late reservations, which was unacceptable. Paragraphs 203 to 205 of the report attempted to illustrate that point. In contrast, the recent practice of the Council of Europe in the case of partial withdrawals appeared to be completely consistent and showed that a partial withdrawal was truly the modification of an existing reservation and not the formulation of a new reservation.

60. In short, the same procedure should be followed for both partial and total withdrawal of reservations, as had been envisaged by Sir Humphrey Waldock when he was Special Rapporteur on the law of treaties.⁶ It was also confirmed by the various reservation clauses referred to in paragraph 188 of the report, which placed total and partial withdrawal on the same footing. That interpretation was to be recommended because States should be encouraged to withdraw reservations, and partial withdrawals should be allowed because that could lead to total withdrawal. Therefore, the rules for partial or total withdrawal should be designed to facilitate withdrawal. If the rules proposed in guideline 2.5.1 were transposed, withdrawal could take place at any time without the consent of the other parties being required, which was expressly provided for in article 22, paragraph 1, of the 1969 and 1986 Vienna Conventions. In general, he saw no contraindications to transposing guidelines 2.5.2, 2.5.5, 2.5.6, 2.5.9 and 2.5.10 to the section on partial withdrawal, which spoke of the form of withdrawal, the competence to represent the State or the international organization, the communication of the withdrawal, the functions of depositaries and the effective date of withdrawal. The only problem appeared to be a matter of drafting. Was it appropriate to refer directly to the draft guidelines he had just mentioned, or was it possible to proceed in general as he had in the case of draft guideline 2.5.11, set out in paragraph 212 of the report? A third solution would be to insert the words "total or partial" in each guideline on withdrawal, instead of providing

⁵ *Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2.

⁶ See paragraph 6 of draft article 17, which appears in the first report on the law of treaties by Special Rapporteur Sir Humphrey Waldock (*Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 61).

a set of guidelines on total withdrawal and two guidelines on partial withdrawal. He had considered the latter approach but did not favour it, since, as he had indicated, it was important to define what was understood by a partial withdrawal, and that was the role of guideline 2.5.11. Moreover, guidelines 2.5.7 and 2.5.8, on the effects of total withdrawal, could not be transposed, because partial withdrawals signified that the reservation subsisted and did not, *ipso facto*, evaporate the objections that other States or international organizations might have made, although it did suggest that they should re-examine whether they needed to maintain such objections. Guideline 2.5.12 defined the consequences of a partial withdrawal.

61. There remained the tricky matter of the consequences of a monitoring body's finding that a reservation was invalid, which he had discussed at length when presenting guideline 2.5.4. On that point, he wished only to draw the Commission's attention to the judgement of the Swiss Federal Supreme Court in the *F. v. R. and State Council of the Canton of Thurgau* case. In his opinion, the Federal Supreme Court's reasoning was based on an erroneous premise, because it accepted that the European Court of Human Rights was able to invalidate the Swiss interpretative declaration or reservation, which the European Court evidently believed it had the right to do. On that basis, the European Court considered that it was logical to think that Switzerland could not modify its reservation, but could only withdraw it. However, it was not so logical, because one could question whether Switzerland needed to do anything, since—according to that erroneous assumption—the reservation would have been invalidated by the judgement of the European Court of Human Rights in the *Belilos* case, something which he personally did not accept. While he did not propose to repeat the reasoning that was the basis for guideline 2.5.11 *bis*, he was entirely convinced that the premises of the reasoning of the European Court and the Swiss Federal Supreme Court were erroneous; that monitoring bodies, including the European Court, could only find that a reservation was impermissible; and that, following that finding, it was for the reserving State to act accordingly. The partial withdrawal of the reservation could be a way of acting accordingly, as was the more radical solution of a total withdrawal. That was what guideline 2.5.11 *bis* stated, and, as he had indicated in paragraph 216 of the report, it could be combined with guideline 2.5.4.

62. He awaited with interest the reactions of members to the numerous proposals, while freely acknowledging their technical nature. However, law was technical and it was not possible to continually gad about in the rarefied atmosphere of general ideas. Maybe the draft guidelines, which were a little pedestrian, provided an opportunity to develop real law.

The meeting rose at 1 p.m.

2737th MEETING

Friday, 26 July 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemi-cha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Tomka, Ms. Xue, Mr. Yamada.

Reservations to treaties¹ (*continued*) (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIR invited the members of the Commission to continue their consideration of the seventh report of the Special Rapporteur on reservations to treaties (A/CN.4/526 and Add.1–3).
2. Mr. YAMADA said that he endorsed most of the 11 guidelines proposed by the Special Rapporteur, only a few of which called for comment.
3. With regard to guideline 2.5.3 (Periodic review of the usefulness of reservations), he entirely shared the view expressed by the Special Rapporteur in paragraph 102 of his report that it would be appropriate to include in the Guide to Practice a draft guideline encouraging States to withdraw reservations that had become obsolete or superfluous; and also the view, stated in paragraph 105, that such a guideline should be regarded as no more than a recommendation and that States would remain absolutely free to withdraw their reservations or not. However, as currently formulated, at least in its English version, guideline 2.5.3 seemed to go further. It placed more emphasis on the integrity of treaties, thereby shifting the balance between integrity and universality. In his view, States should not formulate reservations lightly, and reservations made after careful consideration need not be subjected to review after a short span of time. Accordingly, he supported Mr. Tomka's suggestion that the guideline should be reformulated as a recommendation.

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

4. On guidelines 2.5.4, 2.5.11 *bis* and 2.5.X, concerning withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty, the first of which provisions had provoked lively debate at the preceding meeting, he wished to confirm at the outset that he supported the position expressed by the Commission in paragraph 10 of the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties,³ that it had adopted at its forty-ninth session. That paragraph stated that, in the event of inadmissibility of a reservation, it was the reserving State that had the responsibility for taking action. That State could, for example, modify its reservation so as to eliminate the inadmissibility, withdraw it or forgo becoming a party to the treaty. Of course, he had no intention of reverting to the discussion on that preliminary conclusion, but the problem posed by guideline 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), and in particular its paragraph 2, was that it picked up only part of the elements in paragraph 10 of those conclusions. That was probably why the Chair had said that the cardinal principle of international law was the consent of States. In paragraph 110 of his report, the Special Rapporteur stated that the finding that a reservation was inadmissible should not be deemed either an abrogation or, still less, a withdrawal of that reservation. He entirely agreed with the Special Rapporteur on that point and had no problem with paragraph 1 of guidelines 2.5.4 and 2.5.X (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty). However, paragraph 2 perhaps had no place in the guidelines, and he would favour its deletion. If it were to be retained, it needed reformulating. The Special Rapporteur stated in paragraph 110 that the reserving State (or international organization) could not, nonetheless, ignore the finding and had the duty to take action; it must eliminate the causes of the inadmissibility, and one of the ways of doing so—the most radical but the most satisfactory—was obviously to withdraw the disputed reservation or reservations. He did not contest that view but considered that the real question was who had the authority to pass judgement on the permissibility of reservations. The reservation regime of the 1969 and 1986 Vienna Conventions left it to each State party unless the States agreed otherwise. Accordingly, if paragraph 2 were to be retained, it would be necessary to determine with precision what body it was that found the reservations impermissible. It should be noted that even a decision of ICJ declaring a reservation impermissible would not have binding effect on those States parties to a treaty to which the reservation related unless they had accepted the jurisdiction of the Court in respect of the treaty in question. In any event, that paragraph must not depart from the position taken in paragraph 10 of the preliminary conclusions adopted by the Commission at its forty-ninth session.

5. In that connection, an interesting case was that of Iceland's recent adherence to the International Convention for the Regulation of Whaling. Iceland had withdrawn from that convention in 1992. It had again deposited its instrument of accession to the Convention with the depositary in 2001, with a reservation relating to a provision of the Schedule to the Convention which formed an integral

part thereof. A very small majority in the International Whaling Commission had held that Iceland's reservation was impermissible and had rejected its accession, while 16 States parties to the Convention had accepted the accession with the reservation. In his view, the International Whaling Commission was a fishery management body, not an organ competent to judge the permissibility of a reservation, and it had committed a number of legal irregularities in its handling of that case in 2001 and 2002. He would be submitting details of the case to the Special Rapporteur for purposes of reference.

6. Mr. DAOUDI noted that the text of guideline 2.5.1, on withdrawal of reservations, was identical to article 22, paragraph 1, of the 1969 and 1986 Vienna Conventions and, as the Special Rapporteur pointed out in paragraph 83 of his report, was in line with the practice of States and international organizations. The guideline must thus be retained in the form proposed, as, for the same reasons, must guideline 2.5.2 (Form of withdrawal). However, the question of implicit withdrawal of reservations, to which the Special Rapporteur devoted several paragraphs of his report before eventually dismissing it, should not be disregarded. If States could modify the provisions of a treaty by their subsequent practice, notwithstanding the theory of the parallelism of forms, a reservation could become obsolete through the subsequent practice of the reserving State. The "forgotten reservations" referred to by the Special Rapporteur in paragraph 100 of his report were one such example. Guideline 2.5.3 was important and should be retained, subject, however, to the deletion of the reference to the internal legislation of international organizations.

7. The Special Rapporteur had drafted guideline 2.5.4 with great caution, but one might have doubts as to the desirability of such a provision in the Guide to Practice. As several members of the Commission had stressed, the treaty-monitoring bodies took a variety of forms and did not all have the same powers to make findings as to the permissibility of the reservations formulated by States. Nor was it certain that a judicial body was a monitoring body within the meaning of that guideline. A monitoring body normally intervened in the event of a dispute between the reserving State and the other States parties to the treaty concerning the permissibility of a reservation. Such a provision of the Guide might be invoked by some monitoring bodies to claim a right that they did not possess. At the preceding meeting, some members of the Commission had asked on what obligations a monitoring body would base itself in order to declare a reservation impermissible and by virtue of what obligation the reserving State should withdraw it. The Special Rapporteur had rightly referred to article 19 of the Vienna Conventions, but the problem was that a monitoring body's assessment of the permissibility of a reservation was subjective, since it was a body of limited membership, composed of experts elected by States, whose judgement might be influenced by political considerations. Such a conflict of assessment could be judged only by a judicial body or, in some cases, by the States parties as a whole, when a dispute of that order arose between the reserving State and the depositary of the treaty. For the reserving State, there was no obligation to withdraw its reservation after a finding of impermissibility by a monitoring body. As the Commis-

³ See 2734th meeting, footnote 6.

sion had pointed out in paragraph 10 of the preliminary conclusions it adopted at its forty-ninth session, the State could choose between modifying its reservation, forgoing becoming a party to the treaty and withdrawing its reservation. He thus joined with those members of the Commission who proposed that guideline 2.5.4 should not be included in the Guide to Practice.

8. Of the two versions of guideline 2.5.5 (Competence to withdraw a reservation at the international level) proposed by the Special Rapporteur, the “long version” was preferable, as it facilitated the use of the Guide to Practice. However, the entire Guide to Practice should perhaps be reviewed once completed, with a view to deciding whether it would not be better to make do with references in cases where there were identical provisions or to use the expression *mutatis mutandis* where provisions were similar.

9. Finally, guideline 2.5.5 *bis* (Competence to withdraw a reservation at the internal level), as orally revised by the Special Rapporteur, should be retained, as should guideline 2.5.5 *ter* (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations).

10. Mr. PELLET (Special Rapporteur) asked Mr. Daoudi why he wished the reference to the internal legislation of international organizations to be deleted from guideline 2.5.3.

11. Mr. DAOUDI said that the guideline dealt with the review of reservations that had become obsolete because the internal laws of the States formulating them had changed—in other words, because legislation had been adopted that ran counter to those reservations. However, international organizations had no such laws.

12. Mr. PELLET (Special Rapporteur) said that the point at issue was not laws but internal legislation, and that international organizations might well modify their internal legislation. It was important to retain a provision of that type, at least in the case of integration organizations. There was no reason to apply double standards.

13. Mr. GALICKI said he would limit his comments to the guidelines introduced by the Special Rapporteur at the preceding meeting. As the Special Rapporteur had pointed out, provision existed in a number of treaties for the partial withdrawal of a reservation and, as the institution was thus one hallowed by State practice, the Guide to Practice should contain some provisions on the matter.

14. On guideline 2.5.11 (Partial withdrawal of a reservation), he agreed with the Special Rapporteur that the order of the paragraphs should be reversed and that the text should stress, as indeed it did, that the object of a partial withdrawal was to limit the legal effect of the reservation and ensure more completely the application of the provisions of the treaty or of the treaty as a whole. The definition provided by the Special Rapporteur was, however, somewhat idealistic, and in some cases States might use the procedure of partial withdrawal of a reservation to modify it in such a way as to extend, rather than limit, its scope. The Special Rapporteur cited the practice

of the Secretary-General and of the Legal Counsel of the United Nations, but that practice should not be taken into consideration in defining a partial withdrawal, for the end result might be the formulation of late reservations, which must be subjected to the procedures applicable in that regard. For clarity, it might be advisable to add to the definition of a partial withdrawal contained in the current paragraph 2 of guideline 2.5.11 the proposal contained in the last phrase of paragraph 219 of the report, namely: “the partial withdrawal does not eliminate the initial reservation and does not constitute a new reservation”.

15. Guidelines 2.5.11 *bis* (Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty) and 2.5.X raised the same difficulty as guideline 2.5.4, in that they wrongly assigned the treaty-monitoring bodies certain powers over States. Yet, as Mr. Yamada had pointed out, even a judicial decision was binding only on States that had accepted the competence of the jurisdiction that had rendered it. The Council of Europe, for example, had a number of committees whose function was to monitor the application of the Council’s treaties, but their opinions would not have the effect attributed to them by the two guidelines under consideration. It would thus be necessary to revert to the problem of findings of impermissibility by treaty-monitoring bodies, particularly as the formulation used in the English version of guideline 2.5.X, “must take action accordingly”, was unacceptable. As Mr. Yamada had also pointed out, the guideline should refer to all the possibilities envisaged in paragraph 10 of the preliminary conclusions adopted by the Commission at its forty-ninth session.

16. Finally, the second sentence of guideline 2.5.12 (Effect of a partial withdrawal of a reservation) should perhaps be redrafted so as to cover the situation in which an objection concerned the part of the reservation that had been withdrawn, for it was debatable whether, in such a case, it was really necessary to await the formal withdrawal of the objection, since it was henceforth superfluous.

17. Ms. XUE said that she would start with general comments on all the draft guidelines relating to withdrawal of reservations. As the Special Rapporteur had explained, a number of basic principles had formed the basis for his work: the exercise was aimed at providing guidelines for State practice; the withdrawal of a reservation was a unilateral act on the part of the reserving State, which must decide whether to withdraw it and when and to what extent to do so; current practice tended to encourage States to consider withdrawing their reservations; existing conventions on the law of treaties contained very few provisions on procedures for withdrawal and were simply silent on modifications to reservations. Those were the reasons why the planned Guide to Practice could be useful.

18. In general, draft guidelines 2.5.1 to 2.5.12 reflected those basic principles, although she wondered whether it was desirable to establish procedures for the withdrawal of reservations that were as strict as those for their formulation. In withdrawing a reservation, the State undertook additional obligations or restricted more of its rights, and that served to benefit the treaty regime. That could explain why the provisions of the 1969 and 1986 Vienna

Conventions on the formulation of reservations were more detailed than those on withdrawal.

19. In drafting the Guide to Practice, emphasis should be placed on general treaty-making practice rather than on that of certain sectors or regions. Particular concerns arose in connection with human rights treaties, for example, but that was only one aspect of the topic under consideration. The same was true of regional practice. It was necessary to provide guidance that could be used by all States and for all treaties.

20. Turning to her specific comments, she said she had no objection to referring draft guidelines 2.5.1 to 2.5.3 to the Drafting Committee as they stood. She wished, however, to draw the Commission's attention to certain points. In his comments on draft guideline 2.5.2 (Form of withdrawal), the Special Rapporteur raised the issue of implicit withdrawal without providing any response. She thought other forms of withdrawal such as declarations should be covered in the draft guidelines, insofar as the relations of the reserving State with the other parties to the treaty were affected only once those States had received written notification of withdrawal. The withdrawing State, on the other hand, should so act from the moment it announced its intention of withdrawing its reservation, insofar as it could not go back on that decision, according to the principle of good faith, even though other States could not make claims until they had received written notice of the withdrawal. Such a procedure would be useful for strengthening the treaty regime.

21. Draft guideline 2.5.3 was valuable, but it should not refer solely to internal legislation, as there might be other circumstances that would make the reserving State withdraw the reservation.

22. Draft guideline 2.5.4 was a bit more problematic, particularly in terms of the relationship between findings of impermissibility by monitoring bodies and the subsequent actions of the reserving State. In the field of human rights, even if a monitoring body concluded that a reservation was impermissible, it was mainly at the domestic level that the reserving State must take action. In treaty relations, it was for the other contracting parties to decide whether a reservation was permissible or not. The monitoring body should not determine treaty relations among the parties. With regard to the wording of the draft guideline, the first sentence of paragraph 2 was unnecessary, as it referred to the obligations of States parties under the treaty, which had nothing to do with the withdrawal of the reservation. In addition, the logic was broken by the juxtaposition of the words "must" and "may".

23. On draft guideline 2.5.5, she wondered whether it was necessary to restate every step of the procedure for withdrawing a reservation. If the members of the Commission felt that the repetition was necessary, however, she could go along with them.

24. Turning to draft guideline 2.5.6 *bis* (Procedure for communication of withdrawal of reservations), she questioned whether forms of communication such as electronic mail and facsimile should be cited or whether only

the formal presentation of withdrawal by diplomatic note should be mentioned.

25. The 1969 and 1986 Vienna Conventions made no mention of the modification or partial withdrawal of reservations. The reasons for that silence were the complicated nature of the act in practice and the different interpretations that could be given by different States parties. If the Commission thought that partial withdrawal should be covered in the Guide to Practice, it should simply be merged with withdrawal in general.

26. Finally, on draft guidelines 2.5.11 *bis* and 2.5.X, she said their wording could cause confusion, for the reasons she had adduced in connection with draft guideline 2.5.4.

27. Mr. PELLET (Special Rapporteur), referring to Ms. Xue's comments on draft guideline 2.5.2, said that the requirement that withdrawal of reservations should be in writing meant that withdrawal could not be implicit. As to statements in which a minister for foreign affairs or a Head of State announced his or her intention to withdraw a reservation, they fell under the more general heading of unilateral acts. There was no justification for Ms. Xue's suggestion that a separate provision should be devoted to such statements because withdrawal took effect only when it was confirmed in writing, given that announcements of withdrawal were not official and States could not rely on them.

28. Mr. BROWNLIE said that, having listened to the discussion on draft guideline 2.5.4, he had the impression that the problem of permissibility of reservations must be dealt with once and for all. There seemed to be some consensus on the fact that monitoring bodies, generally speaking, did not have the power to oblige States to withdraw their reservations. As the Special Rapporteur had pointed out, withdrawal was merely one of the ways in which a State could respond to a finding of impermissibility.

29. He believed there was a case for including a proviso clearly stating that the Guide to Practice had absolutely no effect on the powers of a monitoring body to determine the treaty relations of States.

30. The CHAIR, speaking as a member of the Commission, said that he did not think it advisable to deal simultaneously with the authority of monitoring bodies and the obligations that a contracting State would or would not incur as a result of their activities. To do so would be to prejudice the existence of such authority.

31. Ms. XUE, referring to her comment on draft guideline 2.5.2, said that the provision was not only formulated correctly but also entirely in line with the law of treaties. The 1969 and 1986 Vienna Conventions dealt with treaty relations between States parties, and in that context the requirement of written form was fully justified, since States needed legal certainty. On the other hand, the Guide to Practice was aimed at providing guidance to States on the procedures they should follow in such matters. It would therefore be useful to make it clear that, when a State decided to withdraw a reservation, it should act in line with this decision, even before it confirmed it in writing.

32. She agreed with Mr. Brownlie and the Chair on the powers of monitoring bodies and thought it should be made clear that the Guide to Practice had no effect on such powers.

33. Mr. TOMKA said that, in his view, the question of impermissibility had been introduced somewhat artificially into the text, which ought to be dealing broadly with the withdrawal of reservations. He could not understand why particular stress was laid on cases in which a monitoring body came to the conclusion that a reservation was impermissible. To avoid difficulty, the question should be left to one side, and the Commission could return to it when it came to study the impermissibility of reservations as such in detail; so far it had considered only certain procedural aspects. It had not yet been given an analysis of article 19 of the Vienna Conventions. The issue before the Commission was implicit withdrawals; and extreme caution was in order, given that implicit withdrawals were impermissible and not even all explicit withdrawals were permissible. A reservation took legal effect only when it was made in writing. He knew of no case, in practice, where the withdrawal of a reservation had not been followed by a written formulation. A good example was provided by the cases of Czechoslovakia and Poland, whose parliaments, in 1929 and 1931, had approved, and whose Heads of State had signed, the declaration accepting the jurisdiction of PCIJ,⁴ as provided for under Article 36, paragraph 2, of its Statute. The declarations had never been deposited with the depositary. In his view, neither State had therefore recognized the jurisdiction of the Court as being binding, since the declarations, although approved by the parliaments and signed by the Heads of State, had not been deposited. They had had no legal effect, and no State could have relied on them in bringing a case against Poland or Czechoslovakia before the Court. A similar situation occurred when a Head of State announced at a summit that his country was going to withdraw a reservation: if that announcement was not followed by written notification of the withdrawal, the reservation had effectively not been withdrawn. That was quite clear from the Vienna Conventions, and the Commission should not introduce misunderstandings or doubts in the minds of the legal community by the back door with regard to the regime of the withdrawal of reservations.

34. Mr. CHEE pointed out that the Commission was engaged in drawing up not a law-making treaty, but a guide to practice, which by definition was not binding. It should therefore avoid using excessively rigid terminology, such as “the State must”; wording along the lines of “States are urged to comply” would be preferable. Moreover, monitoring bodies should not see themselves as holding extraordinary powers not authorized by a treaty. If a monitoring body exercised mandatory power, it was actually acting without the consent of States, which was a crucial aspect of treaty relations. He therefore urged the Commission to focus on adopting terminology appropriate for draft guidelines of a recommendatory nature.

35. Mr. Sreenivasa RAO said he agreed with Mr. Tomka that no value should be placed on implicit reservations. It

sometimes happened, however, that, having made a reservation, a State might not insist on maintaining that reservation in a given bilateral or multilateral relationship, or might even abandon it for any of a number of reasons. The question arose whether there were any precedents or practice that could give the Commission some guidance in that regard. A useful analogy might be made with reservations to declarations of compulsory jurisdiction, which, in specific cases, were often not enforced for a fairly long time. If a State behaved in such a way as to show that it was not insisting on the reservation, it might be that at some point it could take advantage of the fact that the reservation had not been made in writing in order to avoid any estoppel procedure against it.

36. Mr. PELLET (Special Rapporteur) said that he welcomed Mr. Sreenivasa Rao’s analogy, which showed that the oral withdrawal of a reservation had no legal effect. He could not imagine that ICJ, in the case mentioned by Mr. Tomka, would consider a State bound by a mere declaration that it was going to accept its jurisdiction. As Ms. Xue had said, the announcement was not operative until there had been written confirmation. He himself did not consider that oral declarations had any effect, at any rate as far as the law of reservations to treaties was concerned. He considered that he had responded to the idea underlying Ms. Xue’s proposal in draft guideline 2.5.3, which clearly attempted to encourage States to withdraw their reservations. He was glad that the draft guideline had been well received, but it was not enough to tell States that they were taking the right course of action when they withdrew reservations. That did not lead anywhere, since States were in danger of no longer knowing quite what to do. The Commission must decide on the limit, or border area, between the law of reservations, which was covered by the law of treaties, and other aspects of international law, such as the law of good faith or unilateral acts, which seemed to involve a different set of problems.

37. Ms. XUE said that she agreed with the comments made by the previous speakers on draft guideline 2.5.2, especially with regard to the various examples that had been given. If the aim was to establish a hard rule, there was no doubt that the withdrawal of a reservation should be in writing, as provided for under the 1969 Vienna Convention. In that case, however, draft guideline 2.5.2 did not go far enough. It should take its logic through to the end and should not state only that notification must be in writing, but should specify the date on which the withdrawal took effect: it was essential to do so, since the whole point of the guideline was the written notification, not the withdrawal itself. Mr. Tomka’s examples illustrated the point well. A State might very well announce in writing that it was withdrawing its reservation, but the announcement alone was not effective. The point at issue was not the withdrawal but the written notification, which gave effect to the treaty relations among the contracting parties. When a State assumed an obligation, it was bound by the principle of good faith, but the hard legal effect did not occur until the other contracting parties had received notification in due form, namely, in writing. That was the point she had been trying to make, but she repeated that she had no objection in principle to the wording of the draft guideline. She simply considered that, if retained as

⁴ *Collection of Texts Governing the Jurisdiction of the Court, PCIJ, Series D, No. 6*, 4th ed. (Leiden, Sijthoff, 1932), pp. 47 and 54.

it stood, it would not add much to the text by way of recommendation.

38. Mr. DAOUDI invited the Commission to consider, by way of example, a situation in which a treaty of establishment had been concluded among a number of States, but one State had made reservations on the application of certain provisions of the treaty and, although it had subsequently actually adopted legislation in line with the provisions concerning which it had made a reservation, had failed to withdraw the reservation. Meanwhile, the other States had also applied the provision in relation to that State. Such a situation amounted to a substantial change in the application of the treaty, and it was really a typical case of the implicit withdrawal of a reservation. He was fully aware that the requirement in the 1969 Vienna Convention and draft guideline 2.5.2 that the withdrawal should be in writing was perfectly normal, since it provided an assurance of legal certainty. The situation that he had tried to outline, however, could actually occur, and provisions should perhaps be made for it. The Special Rapporteur had said that such a situation arose at the point of intersection between the law of treaties and other institutions of international law, but that was precisely why he himself had tried to highlight that aspect of the matter.

39. Mr. MANSFIELD said that he was still struggling to understand what Ms. Xue was trying to say. He unreservedly endorsed the general intention of attempting to strengthen the international treaty regime, and, as far as he understood, Ms. Xue thought that the draft guideline should state that, when a State publicly announced that it was going to withdraw a reservation, there should be an internal effect, even if it had no legal effect with regard to the States parties to the instrument in question. The difficulty that he saw in that approach was that, in parliamentary democracies, it was perfectly possible that the government in power, having reached the conclusion to withdraw a reservation to a particular treaty, was, before it could do so, replaced by a new government with different views on the question which believed that the previous government had been wrong to withdraw—or declare that it would withdraw—the reservation in question. It was hard to see how the new government could be considered in any way bound by the decision of the outgoing government from the point of view of the law or of internal politics, let alone inter-State relations, which were not obviously affected by the decision, inasmuch as the withdrawal had not been formally put in writing. The question was, however, an interesting one, and Ms. Xue might perhaps clarify what she had in mind.

40. The CHAIR said that the lapse of time that passed while an action was considered in and of itself should be considered inadequate. The situation was different from that in which, after a relatively brief period of time, which should not be considered to justify estoppel, the State changed its mind before taking final action.

41. Mr. PELLET (Special Rapporteur) said that it was hard to understand how what Ms. Xue seemed to have in mind could be included in a draft guideline. He thought that she was mistaken when she said that the issue related simply to written notification. The procedure for the withdrawal of reservations exactly followed that for the

formulation of reservations. A reservation must be formulated in writing, and so, therefore, must its withdrawal. Problems with notification were dealt with later, in draft guidelines 2.5.6, 2.5.6 *bis* and 2.5.6 *ter*, which related to the written communication of reservations, but the two situations were entirely different.

42. Ms. XUE said she wished to make it clear that she was not talking about the implicit withdrawal of reservations. There was no doubt that the withdrawal of reservations should be expressed without any ambiguity, in writing. She shared the concerns raised by Mr. Mansfield. The fate of the withdrawal of a reservation following a change of government applied equally, however, to the signature of a treaty. A new government could refuse to sign a treaty, a convention, a protocol or any other instrument, or it could even declare that it would never ratify it. The principle of article 18 of the 1969 Vienna Convention thus applied, and she was following the logic of that article. She was merely pointing out that, as it stood, draft guideline 2.5.2 stressed the importance of a withdrawal in writing. In practice, the emphasis should be placed on the written notification of withdrawal.

43. Mr. TOMKA said that, according to his understanding, the withdrawal of a reservation was a legal act, and the legal act took a written form. So long as the act was not in writing, no legal act had been performed. An oral declaration alone could very well be interpreted as being an intention to perform a legal act, but such an intention was of no consequence under the 1969 Vienna Convention. It might be possible, in some cases, to find an infringement of the good-faith principle, but the Convention was not concerned with that. To have a legal effect, or to constitute a legal act, the withdrawal of a reservation must be in writing, as the Convention clearly stated.

44. As for Mr. Daoudi's example of a State that made reservations to a treaty but later adopted internal legislation in conformity with that treaty, which could be considered an implicit withdrawal of the reservation, he himself believed that there was a fundamental difference between the legal position of States that ratified a treaty without any reservation and those which ratified it with reservations. The latter could always amend their legislation in the future if the reservations had not been withdrawn, so they had good reason not to withdraw their reservations in order to keep their options open with regard to their internal law. The fact that a State had adopted legislation in conformity with the treaty to which it had made reservations which it had not formally withdrawn gave it the opportunity to make further amendments to its legislation in the future, with the result that its legislation would not be fully in line with the provisions to which it had previously made reservations. It would be far too radical to interpret that as the implicit withdrawal of a reservation.

45. Mr. KOSKENNIEMI said that he was in favour of referring draft guidelines 2.5.1 to 2.5.3 and 2.5.5 to 2.5.10 to the Drafting Committee, but he considered that draft guidelines 2.5.4, 2.5.11 and above all 2.5.11 *bis* posed a substantive problem, and that partly explained the lack of clarity in their wording. Draft guidelines 2.5.4 and 2.5.11 *bis* related to the powers of bodies that monitored the implementation of a treaty and to the effect of the exercise

of those powers from the viewpoint of the obligations of the reserving State or international organization. Paragraph 1 of draft guideline 2.5.4 was unnecessary because it was inconceivable that the finding of a monitoring body might constitute the withdrawal of the reservation. However, it would be useful to include a provision that defined the relationship between the finding by a body monitoring the implementation of a treaty that a reservation was impermissible and the withdrawal of the reservation by the reserving State or international organization. To that end, it would have to be assumed that the content of the guidelines would not have any effect on the nature of the powers of the monitoring bodies, and a distinction would therefore have to be made according to the three types of power that they might have. In the first case, the finding by the monitoring body that the reservation was impermissible made it null and void and, in the most extreme case, in a self-executing way, on the understanding that the Commission would not take a position on the question whether a monitoring body could in fact have such power, something which could not be decided at present. In the second case, the finding of impermissibility by the monitoring body created an obligation for the State to take measures, for example, to withdraw the reservation in whole or in part. In the third case, the finding of impermissibility amounted to a recommendation to the reserving State or international organization to take appropriate measures. He considered it unnecessary to make a distinction between the withdrawal of the reservation in whole or in part and agreed with the structure proposed by the Special Rapporteur in paragraph 216 of his report, namely that guidelines 2.5.4 and 2.5.11 *bis* should be merged into a new guideline which would be placed at the end of section 2.5 of the Guide to Practice. The new guideline could read:

“The finding by a body monitoring the implementation of a treaty that a reservation is impermissible may, depending on the powers of the body:

- (a) Make such a reservation null and void;
- (b) Create an obligation on the reserving State or international organization to withdraw the reservation in whole or in part; or
- (c) Constitute a recommendation for the reserving State or international organization to withdraw the reservation in whole or in part.”

46. Paragraph 2 of the current draft guideline 2.5.4, which stated that the reserving State or international organization “must act accordingly”, would then be unnecessary. On reflection, it appeared that guidelines 2.5.4 and 2.5.11 *bis* related not to withdrawal of reservations, which was only a secondary aspect of the issue, but to the consequences of the finding by a body monitoring the implementation of a treaty that a reservation was impermissible, on the understanding that the monitoring bodies in question could vary widely from ICJ to small groups of experts in the case of technical treaties between a small number of States. That matter was important, but it related to problems that would be dealt with later in the discussion, and it was not appropriate to settle it at the current stage.

47. Mr. FOMBA, referring to draft guidelines 2.5.7 to 2.5.10, said that there appeared to be some contradiction in the explanations provided by the Special Rapporteur in paragraph 152 of his report, which stated: “it is scarcely possible to dissociate the effect of the withdrawal from that of the reservation itself” and “the effect of a withdrawal may be viewed simply as a matter of form, thus precluding the need to go into the infinitely more complex effect of the reservation itself”. He also noted that the word “effect” was used in both the singular and the plural in the report, and he therefore wondered whether the withdrawal could have several autonomous types of effects. However, what was involved was the legal effect of the withdrawal, which could be reflected in several ways, as was indicated in paragraphs 179 to 182 of the report. Moreover, the wording used in paragraph 152, which stated that the withdrawal “cancels out” the reservation, should be qualified in order to take account of the difference between a partial withdrawal and a total withdrawal, which did not have the same legal effect. Draft guidelines 2.5.7 (Effect of withdrawal of a reservation) and 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization) did not give rise to any particular problems. With regard to draft guideline 2.5.9 (Effective date of withdrawal of a reservation), he supported the choice of reproducing article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions and was also in favour of the idea that the Guide to Practice should include model clauses A, B and C, which reflected the concerns expressed during the work of the Commission at its seventeenth session. He also agreed with the idea of maintaining the date of receipt of notification of the withdrawal by the depositary, rather than by the other contracting parties (para. 165 of the report). In the case of draft guideline 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation), he shared the opinions expressed in paragraphs 167 and 168 of the report establishing the possibility (in the absence of model clause C) for the reserving State to set freely the time at which the withdrawal of a reservation became operative. Having said that, he thought the limits to the decision taken unilaterally by the reserving State should be clearly defined and should not prevail over the provisions of the Vienna Conventions if the other contracting parties objected. Last, he did not understand the specific content of 2.5.10, subparagraph (b). On the whole, however, he was in favour of referring the draft guidelines to the Drafting Committee.

48. Mr. PAMBOU-TCHIVOUNDA, referring to draft guideline 2.5.4, said that, like Mr. Koskenniemi, he considered that a withdrawal was only one aspect of the consequences of the finding that a reservation was impermissible and it would have been interesting to study other aspects of the question and discuss the various possible types of conduct when it had been found that a reservation was impermissible. He supported Mr. Koskenniemi’s proposal to reformulate the guideline and make distinctions according to the nature and powers of the monitoring body. He also questioned whether the distinction made in article 19 of the 1969 and 1986 Vienna Conventions between reservations prohibited by the treaty, reservations that did not appear among those reservations authorized by the treaty and reservations incompatible with the ob-

ject and purpose of the treaty had an impact on the consequences of the impermissibility of the reservation.

49. Mr. KOSKENNIEMI, replying to Mr. Pambou-Tchivounda on the general consequences of a finding that a reservation was impermissible, said that the question could not be dealt with at present, as it was very complex and might, in some cases, relate to State responsibility. The Special Rapporteur could deal with the subject later. By proposing a new formulation for the draft guideline, he had intended to establish a link between the finding that a reservation was impermissible and a possible obligation for the reserving State or international organization to withdraw it. On the question of the three types of impermissible reservations identified by article 19 of the 1969 and 1986 Vienna Conventions and the consequences of that classification, he presumed that the consequences of impermissibility would not differ according to the type of reservation in question. However, that was perhaps not true for every possible type of consequence.

50. Mr. CANDIOTI suggested that all the proposed draft guidelines should be referred to the Drafting Committee, with the exception of the two guidelines on monitoring bodies, the study of which could be postponed until later, when the question of the impermissibility of reservations was examined. The withdrawal of a reservation was a possible consequence of a finding by a monitoring body that a reservation was impermissible, but it could also simply be the consequence of an objection by another State.

The meeting rose at 12.40 p.m.

2738th MEETING

Tuesday, 30 July 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Reservations to treaties¹ (*continued*) (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. MOMTAZ said that he endorsed the very pertinent remarks of Imbert, emphasized by the Special Rapporteur in paragraph 193 of his seventh report (A/CN.4/526 and Add.1–3), on the need to encourage partial withdrawals of reservations, which was a procedure that could enable States to gradually adapt their participation in a treaty to the evolution of their national law.³ However, it raised the question of whether the States parties to a treaty that had not objected to the initial reservation could object to a partial withdrawal. It seemed the Special Rapporteur had not answered that question and had merely dealt with the case of States that had made objections to the initial reservation. The reference in paragraph 201 of the report to “some of the other parties” was confusing: Did it refer to States that had made no objections to the initial reservation? In any event, he considered that, in order to favour the integrity of the treaty and encourage partial withdrawals, while awaiting complete withdrawal of the reservation, States should tolerate such partial withdrawals and waive the exercise of their right to object to them.

2. Guideline 2.5.11 (Partial withdrawal of a reservation) confirmed the merits of that option. At least, that was the logical conclusion to be drawn from the reference to the rules of form and procedure applicable to a total withdrawal in paragraph 1. It was inconceivable that a State party to a treaty should object to a total withdrawal of a reservation by another State party.

3. Paragraph 2 of the guideline defined what was understood by a partial withdrawal and appeared to consider that partial withdrawal of a reservation and modification of a reservation were synonymous. That assimilation could lend itself to misunderstandings. Indeed, as the Special Rapporteur pointed out in paragraph 207 of the report, the Secretary-General of the United Nations made a clear distinction between partial withdrawal of a reservation and modification of a reservation, reserving the latter expression for cases in which a withdrawal strengthened the scope of the reservation. That was evidently not the case envisaged in guideline 2.5.11.

4. It might therefore be advisable to eliminate any reference to the word “modification” in paragraph 2, for example, by eliminating the phrase *est la modification de cette réserve par l'État ou l'organisation internationale qui en est l'auteur, qui* in the French version and the correspond-

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

³ See P.-H. Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1978), p. 293.

ing text in the other versions. That would not affect the definition, yet would avoid any risk of misunderstanding.

5. Regarding guideline 2.5.11 *bis* (Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), he favoured the solution preferred by the Special Rapporteur, on condition that any reference to the obligation of the State author of the impermissible or inadmissible reservation was eliminated from the text. However, he understood that guideline 2.5.4 would be reformulated taking into account the concerns expressed by members of the Commission.

6. Regarding withdrawal of reservations, he was concerned about implicit withdrawals, particularly since the Special Rapporteur went on to emphasize that a guide to practice “must, as far as possible, provide users with answers to any legitimate questions they might have” (para. 215 of the report). The examples provided in paragraphs 92 and the following of the report of the circumstances in which one could speak of implicit withdrawal did not include the case where a reserving State acted as if the reservation that it had formulated had become null and void—for example, when a State acted in accordance with the provisions of a treaty, although it had made reservations to it. He could envisage cases in which, contrary to the situations mentioned in paragraph 101 of the report, it was not the negligence of the competent authorities or insufficient consultation between the relevant services that was at the root of the withdrawal, but rather a voluntary act by the executive. It could happen that, to avoid opposition by the legislature, which was at the origin of the reservation, the executive preferred to comply at the international level with the provisions of the treaty that was the subject of the reservation and not do anything to withdraw it, for fear of raising an outcry on the domestic front.

7. The following question arose: Could the States that objected to the reservation when it was formulated use the subsequent practice of the reserving State to declare that the said reservation had fallen into abeyance and that, henceforth, it had no validity in their treaty relations with the reserving State? He believed that the question needed to be dealt with in the Guide to Practice.

8. Mr. PAMBOU-TCHIVOUNDA said that he had some difficulty in following the arguments of Mr. Momtaz in proposing the reformulation of paragraph 2 of guideline 2.5.11, eliminating the reference to modification. Admittedly, the guideline did not define the notion of modification, but how could the partial withdrawal of a reservation be anything other than a modification of the reservation? Withdrawal was a procedure that consisted in eliminating certain elements that had been stated within the framework of the reservation, and, accordingly, the purpose of a partial withdrawal was to modify the reservation. Therefore, he was unable to support Mr. Momtaz’s suggestion, unless he had misunderstood the meaning of modification.

9. Mr. PELLET (Special Rapporteur) said that one of the main justifications for paragraph 2 of guideline 2.5.11 was to state that partial withdrawal was the modification of an existing reservation, not the withdrawal of a reser-

vation followed by the formulation of a new reservation. However, as he had explained in the preceding paragraphs in the report, practice was highly inconsistent, and even the Secretary-General himself had said that he could not accept a partial withdrawal, on the pretext that it was a case of a total withdrawal, followed by the formulation of a new reservation. That was why the word “modification” was useful. It showed that the question was not one of formulating a new reservation, but rather one of modifying an existing one. While Mr. Momtaz had based his arguments on the position taken by the Secretary-General, it was precisely the position that, for his own part, he was contesting, because it led to inconsistencies.

10. He was not sure that he completely understood the first comment made by Mr. Momtaz, who had asked, in the case of a partial withdrawal, about the relations between a State that had not made an objection and the reserving State. The State that had not made an objection was considered to have accepted the reservation, and the matter fell under guideline 2.5.12 (Effect of a partial withdrawal of a reservation). Following a partial withdrawal, the reservation was diminished. Consequently, in principle, that State would not object to it. If Mr. Momtaz wanted that to be explicitly stated in the commentary, it could be included, but it seemed curious to observe that acceptances of reservations still remained.

11. Mr. MOMTAZ said that he had requested the inclusion of a clarification to the effect that a State which had not made an objection to a reservation could not make an objection in the case of a partial withdrawal, because there was a lack of clarity on that point.

12. Regarding his second point, which had been taken up by both the Special Rapporteur and Mr. Pambou-Tchivounda, since the Special Rapporteur had referred to the inconsistent practice of the Secretary-General as depositary, it would be useful to remove the reference to “modification” in paragraph 2 of guideline 2.5.11 and eliminate the phrase he had suggested during his initial statement.

13. Ms. XUE asked whether, in guideline 2.5.11, the Special Rapporteur had considered two possible scenarios for partial withdrawals. In the first, when State A became party to a convention, it might make reservations to two or more articles and subsequently withdraw its reservation to one of them: a straightforward partial withdrawal. In the second, when State A became party to a convention, it might make a reservation to one specific provision by declaring that implementation of the provision would be in accordance with its domestic legislation. Subsequently, the State might modify its reservation because there was an amendment to its domestic legislation that strengthened its obligations under the convention.

14. Under the first hypothesis, it was clear that the objections by other parties would disappear, since the reason for the objections had been eliminated. In the second, however, that was not the case because the other States parties could consider that, even with the new legislation, the reservation affected satisfactory implementation of

the convention. The draft guidelines did not appear to take both scenarios into consideration.

15. Mr. GAJA, referring to the first point raised by Mr. Momtaz, said that, in general, a State that had not made an objection to a reservation would not have any objection to make to a reservation which had been modified through a partial withdrawal. Nevertheless, it should not be said that a State could not make objections to a partial withdrawal if it had not made objections to the reservation: everything depended on the consequences of the withdrawal. For example, in the hypothetical case of a treaty protecting the rights of foreigners, if a provision of that treaty said that foreigners had the right to own real estate and a State made a reservation to that provision, other States might not raise objections. However, should the reserving State make a partial withdrawal, saying that it would withdraw the reservation, but not for nationals of country X, the State affected by the discriminatory partial withdrawal should have the opportunity to object. Therefore, the possibility of making objections in the case of partial withdrawals should not be categorically ruled out.

16. Mr. Sreenivasa RAO said that he agreed with Mr. Gaja. Partial withdrawal of a reservation could almost amount to a new reservation. It was not simply a matter of deleting part of a reservation that had been accepted by some and objected to by others; when an element was eliminated or added, a completely new reservation was established. Hence, at least technically, it could be argued that a modification should be treated as a new reservation.

17. Mr. PELLET (Special Rapporteur) said his report had covered the point extensively and he was still convinced that a modification to a reservation was not a new reservation. However, that did not mean he totally rejected Mr. Gaja's position and the example he had given. Indeed, he wondered whether there were other examples, similar to "discriminatory" withdrawals, and, although he did not believe it necessary to include a provision on them in the draft guidelines, he would be prepared to envisage such a course if a proposal was put forward. If it was only a question of discriminatory withdrawals, the situation was clear. However, it would be necessary to see if there were any other similar situations where a State that was a victim of a discriminatory partial withdrawal could wish to react.

18. Ms. Xue had mentioned two situations. In the first, the partial withdrawal could refer to one or several reservations. In that case, guideline 2.5.12 was very clear and would be even clearer with the addition, at the end, of the phrase proposed by Mr. Galicki: "to the extent that the objection does not relate exclusively to the part of the reservation that was withdrawn." In the second case, where the State aggravated its reservation as domestic legislation became more restrictive in the implementation of the convention, it made a new reservation to reflect that. The situation had not been envisaged in that part of the report which, as he had already pointed out, was incomplete because it dealt only with partial withdrawals that attenuated and did not aggravate reservations. An aggravation of a reservation did not come under draft guidelines 2.5.11

and 2.5.12. Hence there was another argument in favour of maintaining the word "modification" in the case of a partial withdrawal, which was a modification that reduced the scope of an existing reservation. Strengthening an existing reservation was a modification that expanded the reservation and was equivalent to the formulation of a new reservation, which led on to the issue of late formulation of reservations. Paragraph 185 of the report clarified that point. Members of the Commission could reproach him for not having provided the final part of his report which dealt with that matter, which might cause misunderstandings.

19. The CHAIR said that Mr. Gaja's statement had also brought to mind the case of amended reservations that affected some States adversely and others positively, something which raised another series of problems.

20. Mr. FOMBA said that although, in paragraphs 185 to 210 of his report, the Special Rapporteur pointed out that doctrine and practice revealed some elements of uncertainty with regard to the question of modification of reservations, he nonetheless concluded that "the modification of a reservation whose effect is to reduce its scope must be subject to the same juridical regime as a total withdrawal" (para. 209); and that a single draft guideline should be able to take account of that alignment of regimes. Given that the difference between a partial and a total withdrawal of a reservation was one not of nature but of degree, he endorsed that conclusion.

21. In the light of the methodological principles established by the Commission, it was reassuring to note that the definition of a partial withdrawal contained in paragraph 2 of guideline 2.5.11 was modelled as closely as possible on the definition of reservations in the 1969 and 1986 Vienna Conventions. Nonetheless, he had two concerns in that regard. On the substance, he noted that the current definition had three components, namely, modification, limitation of the legal effect, and fuller application of the treaty's provisions. Since the modification did not eliminate the reservation and the latter's legal effect was merely limited, how could it contribute to re-establishing the juridical regime of the treaty more completely, or as a whole? There seemed to him, as one not well versed in practice in the field of the law of reservations, to be a contradiction between the text of paragraph 2 of the guideline and the content of paragraph 217 of the report. As to the form, the two phrases "ensuring more completely the application of the provisions of the treaty" and "or of the treaty as a whole" seemed to express the same idea. Consequently, one or the other should be deleted.

22. With reference to the transposability of guidelines 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), 2.5.7 (Effect of withdrawal of a reservation) and 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization) to the case of partial withdrawals, the Special Rapporteur stated that the thorniest case was probably the one where a treaty-monitoring body had found that the reservation initially formulated was not valid. In that

regard, without begging the question of the monitoring body's powers, he endorsed the Special Rapporteur's reasoning as set out in paragraphs 213 and 214 of his report.

23. On the question whether it was useful to specify in the Guide to Practice, and if so in what form, that partial withdrawal was one of the means by which the State or international organization might fulfil its obligations if one of its reservations was found to be impermissible, he shared the Special Rapporteur's doubts about the wisdom of simply mentioning it in the commentaries to guidelines 2.5.4 and/or 2.5.11. The Special Rapporteur did not state his position with regard to the second possibility, namely, inclusion of draft guideline 2.5.11 *bis*. Personally, leaving aside the matter of impermissibility and competence to determine it, he had no objection to including such a guideline, provided the State's freedom of action was not impaired. In regard to the third course of action, namely, mentioning the possibility of a partial withdrawal in paragraph 2 of guideline 2.5.4—the Special Rapporteur's preferred solution, involving the insertion of a new guideline 2.5.X (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty) at the end of section 2.5 of the Guide to Practice—he would welcome clarification of the need for individualization of guideline 2.5.11. With that proviso, he could support the proposal to merge guidelines 2.5.4 and 2.5.11 *bis*, since paragraph 2 of guideline 2.5.4, by referring simply to withdrawal of the reservation (in line with the terminology of the Vienna Conventions), left the distinction between total and partial reservations wide open for interpretation, a grey area that would be eliminated by the inclusion of guideline 2.5.X. In that case, however, guideline 2.5.11 should nonetheless be retained.

24. He agreed with the Special Rapporteur's conclusion, expressed in paragraphs 218 and 219 of the report, about the fate of objections in the event of a partial withdrawal. That line of reasoning appeared to be supported by logic and practice, as was guideline 2.5.12, which also had the merit of reproducing the terminology of article 21 of the 1969 and 1986 Vienna Conventions. Subject to any further clarifications that might be provided, he proposed referring guidelines 2.5.11 and 2.5.12 to the Drafting Committee.

25. Mr. DAOUDI said that the "long version" of guideline 2.5.6 (Communication of withdrawal of reservations) was to be preferred as facilitating use of the Guide to Practice, but the Commission should revert to that question once the full text of the Guide was available. In paragraph 2 of guideline 2.5.6 *bis* (Procedure for communication of withdrawal of reservations), it should be mentioned that the date of the electronic mail or facsimile was the date of the withdrawal of the reservation, not the date of the confirmation, so as to harmonize the provision with the Drafting Committee's proposal on the matter, approved by the Commission at its 2734th meeting.

26. With regard to the effective date of withdrawal of a reservation, he endorsed the Special Rapporteur's position concerning the principle posed in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions. That provision was reproduced in its entirety in guideline 2.5.9

(Effective date of withdrawal of a reservation). He also supported the three model clauses proposed with a view to reflecting State practice and attenuating application of the effective date requirement in certain situations. Those clauses, and other model clauses, should be incorporated in an annex to the Guide to Practice.

27. However, in paragraph 173 of the report, the Special Rapporteur considered that the principle of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions departed from ordinary law, according to which, in the Special Rapporteur's opinion, an action under a treaty took effect from the date of its notification to the depositary. In substantiation of that reading, the Special Rapporteur referred to article 78, subparagraph (b), of the 1969 Vienna Convention and the judgment of ICJ, in the *Right of Passage over Indian Territory* case, concerning optional declarations of acceptance of its compulsory jurisdiction under Article 36 of the Court's Statute. In that regard, he wished to point out that ordinary law as established in article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention provided that a notification or communication produced effects with regard to the State for which it was intended only when that State had received it from the reserving State or been informed of it by the depositary. The Court's jurisprudence confirmed that principle. The relevant articles of the Vienna Conventions began with a phrase that permitted States to waive the application of ordinary law, namely, "Except as the treaty or present Convention otherwise provide...". Consequently, Article 36 of the Statute of the Court, which provided that an optional declaration took effect upon its receipt by the Secretary-General in his capacity as depositary, thus constituted an exception to the application of ordinary law.

28. As for guideline 2.5.7, it should perhaps begin with some such phrase as "Unless other reservations continue in force...", so as to reflect the idea referred to by the Special Rapporteur in paragraph 183 of his report.

29. Mr. MANSFIELD asked the Special Rapporteur for clarification of his intentions with respect to guidelines 2.5.4 and 2.5.11 *bis*. He reiterated his opinion that guideline 2.5.4 was too compressed and, as such, not ripe for referral to the Drafting Committee. At the previous meeting, Mr. Koskenniemi had pointed out that a very wide range of bodies might wish to comment on reservations and that, while some of those bodies had a self-executing power to declare a reservation null and void, and others created an obligation on the reserving State, yet others produced findings which amounted to no more than a recommendation. In his view, that analysis was correct. Other members, however, considered that the implications of guideline 2.5.4 went beyond those cases: Mr. Yamada, for instance, had referred to the recent action of the International Whaling Commission in relation to the reservation by Iceland (2737th meeting, para. 5). While the International Whaling Commission was clearly not a monitoring body within the meaning of guideline 2.5.4, the contentious issue in that case, namely, whether the reservation in question and the action of a majority fell within the terms of article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions, illustrated the complexity of the is-

sue, confirming his opinion that the text as it stood was too general to be helpful. Mr. Koskenniemi had also made the important point that the issues perhaps fitted better under the general rubric of impermissibility, rather than in the section on withdrawal. Did the Special Rapporteur intend to provide the Commission with a reformulation of guideline 2.5.4 in the context of impermissibility, or did he regard that as a task for the Drafting Committee?

30. Mr. BROWNLIE said he was not convinced that the problem could be dealt with simply by reclassifying it as an issue of admissibility, even though it clearly overlapped with that question. The role of the monitoring bodies needed separate treatment. His own suggestion, which had attracted absolutely no comment, favourable or otherwise, had been that the Special Rapporteur should consider the possibility of what, in a more formal context, would be described as a proviso. Although a proviso as such would be anomalous in the context of guidelines, its equivalent, *mutatis mutandis*, seemed a feasible option.

31. Mr. PELLET (Special Rapporteur) said that, as a result of a misunderstanding, he had prepared preliminary conclusions only for the first two groups of guidelines introduced, namely, guidelines 2.5.1 to 2.5.6 *ter*, with the exception of guideline 2.5.4, to which he would return only at the very end of the debate, presumably at the next meeting.

32. As he had had occasion to remark the previous week, the topic of formulation of reservations *largo sensu* was, if not thankless, undoubtedly somewhat austere and technical. Nonetheless, the Commission rendered the international community a greater service by attempting to codify technical rules of that type, which responded to a real need, than by squabbling over doctrine and theory. In any case—with the exception of guidelines 2.5.4 and 2.5.11 *bis*, to which he would return at the next meeting—none of the 17 guidelines he had proposed was likely to lead to a slippage of that kind.

33. By and large, the debate had focused on very specific points and had not posed insuperable problems of principle. The dominant sentiment appeared to have been very clearly in favour of referring the entire set of draft guidelines—again with the exclusion of guidelines 2.5.4 and 2.5.11 *bis*, on both of which he would take a firm decision at the next meeting—to the Drafting Committee for consideration at the next session.

34. Before reviewing the guidelines one by one, he would try to respond to a few general concerns voiced by members. It bore repeating that the Guide to Practice was intended to comprise, not a compilation of binding rules, but a “code of recommended practices” with no binding force—a point that might perhaps eventually be reflected in a change of title. However, there was no reason not to draft them as carefully and rigorously as possible, since they were intended as a guide to State practice. In that regard, he entirely supported Mr. Brownlie’s most recent remarks. Furthermore, it was clear that the rules contained in some of the guidelines were indeed binding—not because they were to figure in the Guide to Practice, but

because they were customary rules, or because they were transposed from the 1969 and 1986 Vienna Conventions and thus binding. That illustrated the difference between the legal value of a norm and of a source.

35. Mr. Pambou-Tchivounda had raised the question whether there was any value in incorporating provisions of the Vienna Conventions word for word in the Guide to Practice. The Special Rapporteur’s reply to that question was categorically in the affirmative. That practice had been adopted for a large number of guidelines, including guideline 1.1, on the definition of reservations, for good reasons to which Mr. Momtaz and Mr. Comissário Afonso had alluded: the value of the Guide to Practice would be seriously compromised if users were unable to find answers to all their general questions in the Guide itself. Albeit incomplete and sometimes ambiguous, the Vienna Conventions were the inevitable starting point for any practice in the matter of reservations, and to compile a Guide to Practice that made no reference to it would indeed be odd. Mere reference to the Vienna Conventions would oblige users to constantly skip back and forth between the three instruments, and would also pose technical problems for States and organizations not parties to those Conventions. Accordingly, it was simpler, more logical, and more convenient, practical and useful to transpose the relevant provisions in their entirety.

36. Some speakers had reverted to decisions already taken by the Commission. For instance, Ms. Escameia, Ms. Xue and Mr. Kateka had expressed doubts about the soundness of the solution proposed in guideline 2.5.6 *bis* concerning communication of a reservation by electronic mail and its effects. While he was fond of the *Odyssey*, he had no wish to play the role of Penelope: as Mr. Daoudi had recalled earlier in the meeting, the Commission had, for better or worse, taken a position in that regard in guideline 2.1.6 (Procedure for communication of reservations), and it would be totally inconsistent not to adopt the same solution in guideline 2.5.6 *bis*. In that regard, he appealed to members not to call into question solutions already adopted – unless, of course, some material error came to light. If the Commission continually unravelled the fabric already woven, its work would never be done.

37. As to the individual guidelines, guideline 2.5.1 (Withdrawal of reservations) seemed to pose no real problems other than the question raised by Mr. Pambou-Tchivounda. The only suggestion he had noted came from Mr. Galicki, who had proposed deleting the words “Unless the treaty otherwise provides...”. In principle he agreed that such an amendment would be useful, and he had himself pointed out as much in paragraph 86 of his report and in his oral presentation. However, that expression occurred in article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions, which was reproduced in its entirety in guideline 2.5.1; and it was both unnecessary and potentially dangerous to rewrite that provision. The guiding principle must be to retain the Vienna provisions unless there was a compelling reason to depart from them.

38. On guideline 2.5.2 (Form of withdrawal), Mr. Galicki had pointed out that the withdrawal of reservations should be facilitated as much as possible—an opinion with

which he concurred in principle. How, though, was that to be achieved? Just as, in the words of Alfred de Musset, “a door must be open or closed”, likewise, a reservation or its withdrawal must be written or unwritten. Guidelines 2.1.1 (Written form) and 2.5.2 required the written form; there was no intermediate solution, and the security of legal relations—and, to a lesser extent, the principle of parallelism of forms—required the written form, particularly as such withdrawal was the means of completing a State’s consent to be bound by the treaty, which must be a formal act.

39. Ms. Xue, however, had suggested including in guideline 2.5.2—or, more controversially, in guideline 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation)—the words “When a reserving State has submitted a written notification of withdrawal of its reservation, it should act in line with that withdrawal even before such notification is received by the other States parties.” That proposal seemed more acceptable than her previous formulation. At first sight, it might seem that there was no drawback to a State’s becoming bound by its withdrawal of a reservation from the moment of notification. Upon reflection, however, he saw a serious problem with Ms. Xue’s proposal. A treaty was an agreement, presupposing the meeting of two or more minds at a given point in time on a *single* text. It did not seem at all satisfactory that, on the date of its withdrawal of a reservation, State A became bound by the entire treaty, whereas State B became bound by the entire treaty in its relations with State A only two or any other given number of days later. States could be bound only as a group and by a single text, but Ms. Xue’s proposal would have the two sets of obligations diverge. Even when written in the conditional, as she had drafted it, the proposal seemed likely to create unnecessary complications and he could therefore not go along with it.

40. Another question about draft guideline 2.5.2 raised by Mr. Momtaz echoed one brought up earlier by Mr. Pambou-Tchivounda: What happened if in practice a State applied a provision on which a reservation had been made? In his view, the problem transcended the sphere of reservations and approached the Commission’s new field of inquiry, the fragmentation of international law. The problem was to determine which would prevail among contradictory obligations, namely those assumed under the treaty and those assumed in practice by the State, presumably through some form of unilateral act. He was not convinced that the problem should be addressed in the Guide to Practice, although there might be a need to enlarge on what he had said about implicit reservations. If, however, the Commission felt strongly that a draft guideline along the lines suggested by Mr. Momtaz should be included, he would have no objection.

41. Finally, Mr. Chee had accused him of inconsistency—of having first suggested that a reservation must always be withdrawn in writing, and then invited discussion about implicit reservations. He pleaded not guilty: he had raised the question of implicit reservations only theoretically and had clearly come out as saying the proposition was inconceivable.

42. As for draft guideline 2.5.3 (Periodic review of the usefulness of reservations), he said he was very pleased with the Commission’s reaction to what was a fairly unusual proposal. His apprehensions, engendered by past instances of the Commission’s conservatism, had in fact been unfounded. The guideline appeared to have gained unanimous and even warm approval, and the specific proposals made could be studied by the Drafting Committee. Mr. Pambou-Tchivounda had questioned the placement of the provision in the part of the Guide to Practice on procedure, and in logical terms he was right to do so, but he himself thought there was an advantage to combining in section 2.5 everything relating to the withdrawal of reservations. Ms. Escarameia had wished to see a reference to appeals by treaty-monitoring bodies, but in that case why not mention also the appeals of the General Assembly and regional bodies? Since most members of the Commission were quite reticent about treaty-monitoring bodies, it was unlikely that the proposal would gain wide acceptance.

43. Mr. Tomka, supported by Mr. Yamada, had endorsed guideline 2.5.3 but wanted to make the recommendatory aspect stronger by starting it with the phrase “It is recommended that States...”. It would be for the Drafting Committee to decide on that proposal, but he himself was not convinced of its usefulness. It seemed somewhat awkward and in fact redundant, as the Guide to Practice itself was a set of recommendations addressed to States.

44. Mr. Tomka again, but supported by Mr. Momtaz and Mr. Mansfield, had suggested that the last phrase in paragraph 2 should be deleted because of the reference to developments in internal legislation. It was precisely such developments that made a periodic review of reservations so essential, however, and he still thought it would be useful to refer to them because they were the primary situations in which, objectively speaking, reservations could be considered to have become obsolete, not merely politically inconvenient. There again, however, it would be for the Drafting Committee to decide.

45. As he had indicated, he would pass over in silence draft guideline 2.5.4. As to draft guidelines 2.5.5 (Competence to withdraw a reservation at the international level) and 2.5.6 and their variants, some sympathy had been expressed for his preference for applying a double standard. The longer version of draft guideline 2.5.5 was indeed the better of the two, since one could hardly transpose the rules on formulation of reservations lock, stock and barrel: it could only be done *mutatis mutandis*. In the case of draft guideline 2.5.6, however, that distinction did not apply. Nearly all of the speakers on that point had seemed to prefer the longer version of both draft guidelines, the sole exception being Mr. Galicki, who had advocated the short versions and, in addition, a single draft guideline for the formulation and withdrawal of reservations, and undoubtedly objections to them as well. As Mr. Kemicha had said, that would be necessary if the Commission was drafting a convention, but it was not. In the interests of facilitating the task of future readers of the Guide to Practice, the subject matter should be treated separately, even at the expense of repetition. In any event it would be better to wait until the draft was considered on second reading before taking a position on the approach outlined by Mr. Galicki.

Once the full draft was available, it might become clearer how to help the reader find his way around the text.

46. In regard to substance, the two draft guidelines had drawn very little criticism and few specific proposals. He drew attention to an omission in the French text of the chapeau to draft guideline 2.5.6 *bis*: the words *est transmise* should be added after the last word, *réserve*.

47. He would conclude his summing up of the debate at the next meeting, focusing on draft guidelines 2.5.7 to 2.5.12 and 2.5.4 and 2.5.11 *bis*.

Cooperation with other bodies (*continued*)*

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

48. The CHAIR welcomed Mr. Wafik Kamil, Secretary-General of the Asian-African Legal Consultative Organization (AALCO), and invited him to address the Commission.

49. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization) congratulated all of the members that had been elected to the Commission since 2001 and said he was confident their contributions would enhance the Commission's work. AALCO attached great significance to its long-standing ties with the Commission. One of its primary objectives was to examine questions under consideration by the Commission and to place before it the views of its member States. Over the years, that practice had helped to forge closer bonds between the two bodies, and it had become customary for each to be represented at the other's annual sessions. He thanked Mr. Yamada for having represented the Commission at AALCO's forty-first session, held in Abuja from 15 to 20 July 2002, and Mr. Momtaz and Mr. Simma for having made valuable contributions to the deliberations. AALCO, for its part, appreciated the presence of representatives of the Commission at its annual sessions.

50. At the forty-first session, no fewer than 15 substantive items had been considered, one of which had been the work of the Commission at its fifty-third session. At a general level, delegates had welcomed the completion and adoption of the draft articles on State responsibility for internationally wrongful acts.⁴ Most delegates had acknowledged that they were balanced and a fair reflection of customary international law. One delegate had been of the view that they emphasized codification rather than introducing progressive elements of international law. While codification admittedly had the advantage of rendering the draft articles more acceptable to States, elements of progressive development, such as the notion of serious breach of obligations under peremptory norms of international law and the invocation of responsibility on the part of a State other than the injured State, had the potential to invite further debate. Overall, delegates had

felt that the draft articles were the best that could be obtained after almost 50 years of hard work. They had unanimously endorsed the decision of the General Assembly to take note of the draft articles and to include the topic on the agenda for its fifty-ninth session.⁵ The interim period would offer time for States to reflect on the provisions and allow for State practice to develop.

51. Some delegates had been concerned that the notion of serious breaches of obligations arising under peremptory norms of general international law would prove to be controversial, since the articles did not clarify who should judge whether an internationally wrongful act constituted a serious breach. The decision to delete any reference to "international crimes" had been welcomed and, it had been felt, would not weaken the articles. The view had been expressed that the examples of peremptory norms given in the commentary were only indicative: the precise content and conditions under which they could be treated as peremptory norms were open to debate. Accordingly, the concept required careful study on the basis of further development of State practice.

52. With regard to the consequences of a serious breach, the obligation placed on States to cooperate to bring a breach to an end through lawful means and not to recognize the situation resulting from the breach as lawful or to render aid or assistance in maintaining it had been welcomed. The omission of any reference to "punitive damage" and the simplified structure of the provisions relating to the consequences of serious breaches had been noted with appreciation.

53. One delegate had welcomed the limits within which a State other than the injured State could invoke responsibility. Others, however, had acknowledged that any State other than an injured State could express its concern in some appropriate form or demand that the responsible State cease the wrongful act. Doubts had nonetheless been expressed about the appropriateness of elevating such actions to the level of the legal responsibility of the State.

54. In the opinion of many delegates, the uncertainty of the concepts of an obligation owed to the international community as a whole and an obligation for the protection of collective interests contained potential for abuse. More particularly, the phrase "the beneficiaries of the obligation breached" in article 48, paragraph 2 (*b*), conferred on third States a broad and excessive right and was therefore likely to lead to disputes.

55. By and large, delegates had welcomed the checks and balances incorporated in the draft articles in order to prevent abuse of countermeasures. At the same time, they had cautioned against expanding the scope of States entitled to take countermeasures and against introducing the notion of "collective countermeasures". Since unilateral determination of the legitimacy of countermeasures operated in favour of powerful States, however, some delegates had been disappointed that the draft articles had left it to the State taking countermeasures to determine whether an act was unlawful. In that connection, the need to establish linkages between countermeasures and compulsory settlement of disputes had been emphasized.

* Resumed from the 2730th meeting.

⁴ See 2712th meeting, footnote 13.

⁵ See General Assembly resolution 56/83 of 12 December 2001.

56. Countermeasures should be reversible and should not inflict serious or irreparable damage on the responsible State. For that reason, one delegate had felt that the list of prohibited countermeasures should have been more exhaustive, including two additional obligations: first, prohibition of any measures of economic or political constraint affecting self-determination, territorial integrity or political independence; and, second, prohibition of countermeasures that banned access to markets by responsible States for which exports were the principal source of income.

57. He wished to convey AALCO's appreciation to the Commission for the successful completion of work on the topic and its deep appreciation for the contribution of all the special rapporteurs to the shaping of the draft articles.

58. AALCO wished to compliment the Commission, the Special Rapporteur and his predecessors on the successful completion of work on the draft articles on prevention of transboundary harm from hazardous activities.⁶ Many delegates considered the draft articles a significant step forward in the field of international environmental law. It had been felt that they could provide a solid basis for a framework convention for international cooperation and regulation and could serve as a practical guide for the development of international legal instruments dealing with specific aspects of environmental protection. The principles relating to public participation, non-discrimination and settlement of disputes were in the nature of progressive development of international law. As State practice on such matters varied from region to region, it might take time before universal standards could be developed. Finally, given the interrelations between prevention and liability, delegates had urged the Commission to expedite its consideration of the liability aspects of the topic.

59. Regarding the topic of reservations to treaties, delegates had generally been opposed to acceptance of late reservations, in the interests of the stability and integrity of treaties. In exceptional cases, where late reservations were permitted, the Guide to Practice should regulate the matter and clarify the conditions for the practice as well as the procedure to be followed in accepting or refusing the late formulation of a reservation.

60. Opinion had been divided on conditional interpretative declarations. One view held them to be reservations in another form, and hence not to be treated as a separate category from reservations. Another view had been that conditional interpretative declarations, as distinct from simple interpretative declarations, limited or modified the effect of treaty articles on a particular State party and thus functioned as reservations to treaties. A distinction should therefore be made between conditional and simple interpretative declarations, without setting separate norms for the first category, and they should both be made subject to the same legal regime with regard to reservations.

61. It had been thought that the role of the depositary should not go beyond the scope of the 1969 Vienna Convention. In accordance with article 77, paragraphs 1 (d) and 1 (e), of the Convention, the depositary could exam-

ine the appropriateness of the form of a reservation to see whether it was in conformity with the relevant rules, but a depositary was neither an interpreter of the text of the treaty nor a judge of compliance by a State with the treaty. Hence, the depositary should not be endowed with the right to review the permissibility of reservations and to refuse to communicate such reservations to the States concerned.

62. With regard to the topic of diplomatic protection, support had been expressed for the view that the continuous nationality rule should be maintained as the basic standard of diplomatic protection, although exceptions could be allowed in cases where individuals had changed nationality involuntarily and ended up with no diplomatic protection from any State. As to the rule on the exhaustion of local remedies, one delegate had pointed out that draft article 10 as presented by the Special Rapporteur in his second report⁷ had not specified the criteria for determining whether such remedies had been exhausted. Moreover, it would be too great a burden for victims of generalized human rights violations to require that all available local remedies should be exhausted. Another delegate had said that an international claim brought on the basis of a direct injury to a State rather than to one of its nationals was beyond the scope of diplomatic protection and the rule on the exhaustion of local remedies had no relevance. The rule contained in draft article 11⁸ was therefore unnecessary.

63. Several delegates had commented on the need to make a distinction between diplomatic protection for companies and for shareholders. It was agreed that only the State whose nationality a company had acquired through incorporating or registering in that State had the right to provide diplomatic protection for the company. Nor was it appropriate for a State whose nationals were shareholders to exercise diplomatic protection *vis-à-vis* the State in which the company was incorporated. On the other hand, if an individual shareholder was injured by a wrongful act of the State in which the company was incorporated, the shareholder's State of nationality had a right to provide diplomatic protection. That, however, lay within the scope of diplomatic protection for individuals rather than for the company.

64. Regarding the topic of unilateral acts, delegates had considered that, notwithstanding its theoretical usefulness, the Special Rapporteur's classification of unilateral acts based on the criterion of legal effects might not be viable in practice. The suggestion was made that the draft articles should be divided into three parts: a general section; a section on rules relating to acts under which the State undertook an obligation; and a section on rules relating to acts under which the State reaffirmed its right. It was thought that the Commission should focus, for the time being, on formulating general rules applicable to all unilateral acts. While the importance of interpreting unilateral acts was generally acknowledged, delegates had felt that it was not the right time to consider the issue; interpretation could be discussed after the scope and definition of unilateral acts had been delineated. It was agreed,

⁶ See 2724th meeting, footnote 2.

⁷ See 2712th meeting, footnote 15.

⁸ *Ibid.*

however, that, when it came to formulating rules on interpretation, the relevant provisions of the 1969 Vienna Convention could be used as a point of reference. When interpreting those provisions, specific circumstances should be taken into account in considering the true intention of a State, as should the special characteristics of the unilateral act itself. The session had adopted a resolution urging AALCO member States to respond to the Commission's questions on the topics of reservations to treaties and diplomatic protection.

65. The other items considered at the Abuja session had included international terrorism; status and treatment of refugees; deportation of Palestinians and other Israeli practices, among them the massive immigration and settlement of Jews in all occupied territories in violation of international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949; extraterritorial application of national legislation, with reference to sanctions imposed against third parties; follow-up of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court; the United Nations Conference on Environment and Development; legislative activities of United Nations agencies and other international organizations concerned with international trade law; WTO as a framework agreement and code of conduct for world trade; and establishing cooperation against trafficking in women and children. In cooperation with the Office of the United Nations High Commissioner for Human Rights, AALCO had also organized a one-day special meeting on human rights and combating terrorism.

66. Since the introduction of an agenda item on the legal protection of migrant workers at the thirty-fifth session, AALCO had continued to study the topic. At its fortieth session, a one-day special meeting on migration challenges had been held in cooperation with IOM. At the end of that meeting, a resolution had been adopted giving the Secretary-General a mandate to prepare a model regional agreement between States of origin and States of destination, in collaboration with IOM. The AALCO secretariat had prepared the agreement and submitted it for consideration by member States. Two new items had been included on the agenda of the forty-first session: the development of an effective international legal instrument against corruption, and human rights in Islam. A comprehensive report on the forty-first session would be sent to the Commission at the earliest possible opportunity.

67. AALCO, as an intergovernmental body with 45 member States from Asia and Africa, was uniquely placed to serve the States of the region in examining and formulating their responses to newly emerging challenges of international law. The expanding scope of its work programme was indicative of its willingness to respond to those challenges. As one of the intergovernmental organizations having a cooperative relationship with the Commission, AALCO believed that the relationship should be further intensified. Given, therefore, that in-depth consideration of important legal issues was often impossible on formal occasions, he reiterated the proposal he had made the previous year that the two bodies should jointly organize a seminar or workshop. Despite the tight financial constraints on both of them, the benefits of such

an exercise would outweigh the difficulties. The seminar could either focus on one of the topics currently at a formative stage within the Commission or discuss the topics proposed under the Commission's long-term programme. As to other future cooperation, the AALCO secretariat would continue to prepare notes and comments on substantive items considered by the Commission with a view to assisting the representatives of member States of AALCO to the Sixth Committee in their deliberations on the Commission's report to the General Assembly on its fifty-fourth session. He extended to all members of the Commission an invitation to participate in AALCO's forty-second session, in 2003, which would probably be held in the Republic of Korea.

68. The CHAIR said that the statement by the Observer for AALCO demonstrated that organization's breadth of interests. He noted that, although AALCO had not always reached the same conclusions as the Commission, it had raised the same questions and, for lawyers, questions were almost as important as answers.

69. Mr. MOMTAZ said that the statement by the Observer for AALCO was doubtless based on the very full report of the AALCO session produced by the team of lawyers working under the Secretary-General. The report, which he had seen, was detailed and full of insight—sometimes critical—into the work of international organizations. It was a pity that such a wealth of material could not be circulated to a wider audience. He therefore wondered whether the Secretary-General could make the report available to members of the Commission, particularly when it related to topics under consideration by the Commission, such as unilateral acts of States, reservations to treaties or diplomatic protection. He had also been impressed by the AALCO report containing an extremely useful summary of the jurisprudence of ITLOS.

70. Mr. YAMADA said that he had attended the AALCO session together with Mr. Momtaz and Mr. Simma. The Commission would undoubtedly benefit greatly from increased cooperation with AALCO in its work of codification. The Observer for AALCO had omitted one item discussed at the session, namely jurisdictional immunities of States and their properties, on which a number of AALCO member States had expressed interest in the Sixth Committee, on the basis of the draft articles adopted by the Commission at its forty-third session, in 1991.⁹ As for the proposal by the Observer for AALCO regarding a joint seminar, as a first step the regular meeting of the legal advisers of AALCO member States during the General Assembly should be extended in order to advance dialogue between AALCO and the Commission. Both sides would benefit. He would be happy to assist in preparing such a meeting.

71. Ms. XUE said that the success of the forty-first session of AALCO, the only interregional legal body for Asia and Africa, highlighted the importance of developments in those regions and its more active participation in the development of international law. AALCO and the Commission had much in common, and cooperation between the

⁹ For the text of the draft articles adopted by the Commission, see *Yearbook ... 1991*, vol. II (Part Two), chap. II, p. 13, para. 28.

two would be most useful. She endorsed Mr. Momtaz's request that the AALCO report should be circulated to members of the Commission. As for the question of joint seminars, while she saw merit in Mr. Yamada's suggestion, she also wondered whether AALCO might consider inviting members of the Commission to the seminars that it already held on its own account. A joint seminar could have difficult financial implications. She herself would be glad to help in any way.

72. Mr. SIMMA pointed out that AALCO was the only intergovernmental organization in the world solely concerned with the development of international law; all other bodies existing for that purpose were subsidiaries of larger bodies. Cooperation between it and the Commission should therefore be pursued. He had observed, at the forty-first session of AALCO, that a number of French-speaking African States had experienced difficulty in participating, and he wondered whether there was any possibility of their being helped by the International Organization of La Francophonie. As for the suggestion regarding joint seminars, he endorsed the proposals by Mr. Yamada and Ms. Xue. Many members of the Commission attended the Sixth Committee, and any meeting between them and the AALCO representatives need not be excessively formal. Finally, he echoed the request for the report of the AALCO session to be distributed to members of the Commission, at least insofar as it concerned topics being dealt with by the Commission.

73. Mr. DUGARD expressed his appreciation of the fact that AALCO had commented on future possibilities for the topic of diplomatic protection, which, for him as Special Rapporteur, was more useful than the criticism of draft articles already adopted. He was, however, glad to have received support on the need to retain the broad principles of the *Barcelona Traction* case.

74. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization) said that he would gladly grant the request by Mr. Momtaz and others that the report of the AALCO session, at least insofar as it concerned the Commission's work, be made available. On the question of joint seminars, he was inclined to suggest combining both possibilities: the legal advisers' meeting could be used to discuss topics of concern to both the Commission and AALCO; and AALCO would make every effort to invite members of the Commission to seminars held during intersessional periods.

75. Mr. PELLET said that, although he regretted injecting a negative note into the discussion, he was slightly uneasy at the thought of the independent members of the Commission working jointly with the States which made up AALCO. It could be a volatile mixture.

76. Mr. Sreenivasa RAO said that, if debate was engaged in all honesty, the results would be worthwhile. He thanked AALCO for its support for the Commission and urged it to find new approaches and techniques for coordination in the interests of the ultimate aim of the codification of international law.

77. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization) said that the contribution of

members of the Commission would be that of experts, whose knowledge of certain topics could only enrich AALCO's proceedings.

The meeting rose at 1 p.m.

2739th MEETING

Wednesday, 31 July 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Cooperation with other bodies (*continued*)

[Agenda item 11]

VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIR welcomed Mr. Gilbert Guillaume, President of the International Court of Justice, with whom the Commission was pleased to be able to hold its traditional exchange of views.

2. Mr. GUILLAUME (President of the International Court of Justice) said he welcomed the fact that, in the past few years, it had become the custom for the President of ICJ to come to the Commission to speak to its members about the Court's current situation and activities. Referring to the Court's composition, he said that when Mr. Bedjaoui had resigned, Mr. Elaraby had been elected on 12 October 2001 to replace him, and that the next triennial elections would be held in autumn 2002. Owing to the growing number of cases submitted to the Court, the number of judges *ad hoc* had risen to 19, creating certain administrative problems. In terms of recognition of the Court's jurisdiction, 63 States now accepted the optional provision on compulsory jurisdiction contained in Article 36, paragraph 2, of its Statute.

3. There were now 24 cases before ICJ concerning States from all parts of the world: 5 involving African States; 1, Asian States; 12, European States; 2, Latin American States; and 4, States from different regions. The Court's activities thus had a truly international dimension, something which had not been true in its early days, when most cases had involved Europe and Latin America. The subjects of the disputes varied widely. Five cases were territorial disputes: one brought by Cameroon against Nigeria (*Land and Maritime Boundary between Cameroon and Nigeria*), one, submitted by special agreement, between Indonesia and Malaysia (*Sovereignty over Pulau Ligitan and Pulau Sipadan*), two brought by Nicaragua, against Honduras and against Colombia (*Maritime Delimitation between Nicaragua and Honduras* and *Territorial and Maritime Dispute*) and a case brought by special agreement between Benin and Niger (*Frontier Dispute (Benin/Niger)*). Another classic cause of dispute, the status of foreigners, had given rise to a case brought by Guinea against the Democratic Republic of the Congo (*Diallo*) and to a case brought by Liechtenstein against Germany (*Certain Property*). More and more cases were closely linked to current diplomatic and even military affairs: the two cases brought by the Libyan Arab Jamahiriya against the United States and the United Kingdom (*Lockerbie*); two cases brought by Bosnia and Herzegovina and Croatia against Yugoslavia (*Application of the Convention on Genocide*) and an application for revision submitted by Yugoslavia concerning the case brought against it by Bosnia and Herzegovina, eight cases in which Yugoslavia was contesting the actions in Kosovo of the member States of NATO (*Legality of Use of Force*) and two applications submitted by the Democratic Republic of the Congo, against Uganda in one instance and Rwanda in another (*Armed Activities on the Territory of the Congo*). Even taking into account the fact that some of those cases were part of a series, such as the two involving Lockerbie and the eight concerning Kosovo, it could be seen that the Court was currently hearing 16 separate cases. In addition, there had been many procedural motions, and they slowed down the Court's work still more. In addition to preliminary objections on grounds of inadmissibility and lack of jurisdiction and requests for interpretations, there had been an increase in the number of counter-claims and applications for permission to intervene.

4. Describing the Court's activities in the past year, he referred to the first case in which a decision on the merits had been handed down (*Arrest Warrant*). When a Belgian investigating judge had issued an international arrest warrant against the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo for crimes against humanity and war crimes, the latter State, believing that action to be a violation of international law, had instituted proceedings against Belgium with ICJ. The case had been handled with dispatch, in part because Belgium had agreed to submit the objections it intended to raise regarding jurisdiction and admissibility together with its responses on the merits of the Congolese Memorial, and the Court had thus been able to hand down its judgment in just over a year. Having rejected Belgium's objections, the Court had then had to deal with two issues: first, the immunity from the jurisdiction of a foreign court of a minister for foreign affairs; and, second, the jurisdiction of the Belgian court, in so far as the alleged offences had

been committed outside Belgian territory, no Belgians had been alleged to have been injured, and the accused was not Belgian and had not been on Belgian territory. That issue having been initially raised by the Democratic Republic of the Congo, but not pursued, the Court had ruled only on the first issue. It had found that, throughout the duration of his or her office, a minister for foreign affairs enjoyed full immunity from criminal jurisdiction for acts performed before he or she had assumed office and acts committed during the period of office as well as for acts performed in an official capacity and in a private capacity. The Court had emphasized that that did not mean that such persons enjoyed impunity, since they could be tried in their own countries or before a competent international court. In addition, their immunity could be waived, and, when an incriminated minister for foreign affairs ceased to hold office, his or her immunity applied only to acts committed in an official capacity. The decision, adopted by a large majority, had clarified the issue of immunity from criminal jurisdiction.

5. In the *Sovereignty over Pulau Ligitan and Pulau Sipadan* case, ICJ had handed down a judgment in relation to an application by the Philippines for permission to intervene. In that case, which related to sovereignty over two islands east of Borneo, the Philippines had asked to intervene, since the Court's reasoning could have an effect on its claim to another territory (North Borneo), over which it was involved in a dispute with Malaysia. The Court had been required to determine whether the Philippines had a legal interest that justified its intervention. While acknowledging that the legal interest that must be adduced by a State requesting permission to intervene could relate not only to the subject matter of the judgment but to the reasoning behind it, the Court had found that, in the case at hand, such an interest had not been demonstrated. It had accordingly rejected the application for permission to intervene.

6. In a third case brought by the Democratic Republic of the Congo against Uganda (*Armed Activities on the Territory of the Congo*), the Court had ruled on the admissibility of counterclaims by Uganda to which the Congo had submitted objections and had found that two of them had a sufficient connection with the main claim to be admissible, while a third was not admissible. In a fourth case, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the Court had ruled on a request by the Congo for the indication of provisional measures. Finding that it did not have *prima facie* jurisdiction, the Court had rejected the request for the indication of provisional measures. Rwanda had also requested that the case be removed from the list because the Court manifestly had no jurisdiction, citing decisions adopted along those lines in the Kosovo cases involving the United States and Spain. The Court had rejected that request, and hearings in the case were continuing. All those decisions had been adopted by a large majority or unanimously.

7. Other cases were currently under deliberation. The *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* case, which had been on the docket for a long time, had given rise to a number of procedural motions: Nigeria

had filed eight preliminary objections, of which seven had been rejected and one joined to the merits, plus a request for an interpretation of the initial judgment, which had been rejected, and finally counter-claims, which had been declared admissible. In addition, Equatorial Guinea had submitted a request for permission to intervene, which had also been declared admissible. The Court was now debating the merits of the case. Five weeks of public hearings had been devoted to that very thick case file, and the judgment was to be handed down in the second half of 2002. In a second case under deliberation, *Sovereignty over Pulau Ligitan and Pulau Sipadan*, hearings had lasted a week and a half, and the judgment would also be forthcoming in late 2002. Counting the application for the indication of provisional measures submitted by the Democratic Republic of the Congo (*Armed Activities on the Territory of the Congo (New Application: 2002)*), the Court had had three cases simultaneously under deliberation in June 2002, and that was probably the most it could handle.

8. Faced with that increase in its caseload, ICJ had sought to improve its procedures. It had decided to publish practice directions, simple recommendations that had the advantage of being easier than the Rules of the Court to amend when necessary. There were nine. The first invited the parties to cases brought by special agreement to deposit pleadings in order, not simultaneously; it had not always been followed. The second recommended that, in drawing up written pleadings, each of the parties should try not only to reply to the arguments of the other party but also to present clearly its own submissions and arguments. The third proposed strict selection of annexed documents, since their translation was costly. The fourth invited the parties that had translations of documents to provide them. The fifth reduced the time limit for presentation of preliminary objections to four months from the date of deposit of the Memorial. The sixth urged that brevity should be observed in the oral statements made at hearings, although it was obvious that the length of the hearings would depend on the nature of the cases being heard. The seventh and eighth directions indicated that certain functions, such as that of judge *ad hoc*, were incompatible with the functions of agent, counsel or advocate in another case before the Court. It was worth noting that those directions had immediately been followed. The ninth direction established stricter rules for the submission of new documents after the closure of the written proceedings.

9. He had stated the year before that ICJ lacked sufficient financial resources. The budget for 2000–2001 had provided additional resources for language staff. For the biennium 2002–2003, the creation of many new posts in the Registry had been authorized. The Court had likewise requested that a research assistant should be assigned to each judge; that request had been partially met. The number of Registry staff, which had remained unchanged since the Court's establishment, had grown from 63 to 91, with 28 in the Professional category. The biennial budget totalled US\$ 23.8 million, representing a 7 per cent increase. However, the General Assembly's decision to freeze 10 per cent of the budgets of all bodies in the United Nations system was creating difficulties. Last, he mentioned the workshops which were offered for students

at the advanced level and which were financed by their home universities.

10. In conclusion, he emphasized that ICJ's activities were expanding and its budgetary situation improving and that it would try to continue to improve its procedures.

11. The CHAIR, speaking as a member of the Commission, said that he recalled the time when ICJ had had only one case on its docket, and he was interested to see that the Court was trying to reduce the length of oral proceedings to one or two weeks. In that respect, the time that the supreme court in certain countries allowed for pleadings could be counted in hours or even minutes.

12. Mr. Sreenivasa RAO said he hoped that reducing the amount of time available to the parties for their pleadings and also the number of annexes that they could attach to their memorials would not deprive them of the possibility of stating their position thoroughly.

13. Mr. GUILLAUME (President of the International Court of Justice) said that the parties obviously needed to be able to state their positions as completely as possible, and that ICJ itself should be able to examine the cases with all the facts in hand. It was simply a matter of balancing written proceedings and oral proceedings. The Court had never objected to the length of the documents submitted by the parties during written proceedings, because it considered that such documents should be as complete as possible. However, it had, at times, complained about the number of annexes attached to the documents and about the length of counsels' pleadings.

14. Mr. PELLET said he did not think that the supreme court of any given State and ICJ could be compared, as Mr. Rosenstock had done; sovereign States pleaded before the Court, and all cases could therefore be considered "sensitive". The way in which the President of the Court had emphasized the reduction of the length of oral proceedings had disturbed him. There had, of course, been abuses, but, above all, the length of such proceedings should be adapted to each case. He asked how the practice directions referred to by the President of the Court were drafted, how they could be amended and whether the Court accepted outside opinions, for example, from counsel who were used to pleading before it and who, like himself, might wish that a particular direction could be amended.

15. Mr. GUILLAUME (President of the International Court of Justice) said he did not think that the length of oral proceedings before ICJ could be reduced to that of proceedings before the Supreme Court of the United States, for example, or even before the European Court of Justice. Matters would not come to that. Oral proceedings served two purposes: first, from a technical point of view, they allowed the parties to summarize their positions and refine their final conclusions; and, second, they enabled States to show public opinion and parliament that they had fully defended the national cause. The length of the oral proceedings should be adapted to the nature of the case; in some legally and politically important cases, such as the *LaGrand* case or the *Arrest Warrant* case, the oral proceedings had been quite short, and the parties had been satisfied. The problem was that the time allotted was not

always well used, particularly during the second round of pleadings, which was often repetitive.

16. The practice directions were prepared first by the Rules Committee and then by ICJ in plenary; that two-fold examination ensured that problems were examined carefully. Official comments were not necessary, but there were more discreet ways by which counsel who were accustomed to pleading before the Court could make their views known. The advantage of the practice directions was that they could be amended easily, in the light of experience.

17. Mr. DUGARD said that the length of oral proceedings could be reduced if the members of ICJ were allowed to question counsel, as was done in the supreme courts of some States.

18. Mr. GUILLAUME (President of the International Court of Justice) said that ICJ had been discussing the matter for some time and three factors had to be taken into account. First, the Court was dealing with sovereign States, and, most of the time, counsel could not respond immediately to the questions they had been asked, if only because their answer had to be discussed by the team or even the Government concerned. Second, if the Court questioned counsel, it would have to deliberate in order to determine which questions it should ask, and some judges were not prepared to take a decision on the questions to be asked before having heard the pleadings. Third, some judges had been trained in the Romano-Germanic tradition and others in the Anglo-Saxon tradition, and there were thus two different approaches to the proceedings. Judges trained in the latter tradition customarily asked questions that might reveal, at least in part, what their thinking was, while, in other countries, such as France, that would be a violation of the proceedings. In countries with a Romano-Germanic tradition, questions must be purely factual or relate to a point of law. Within the Court there were diverging opinions on the issue, and in the past some judges had objected to questions that other judges had wanted to ask counsel.

19. Mr. MOMTAZ, referring to the *Arrest Warrant* case cited by the President of the Court, said he believed that one of the arguments that had led the Court to decide that a minister for foreign affairs enjoyed absolute immunity was that his functions required him to travel abroad frequently. Since nowadays all ministers were required to travel abroad in the exercise of their functions, he would like to know whether all ministers enjoyed absolute immunity from jurisdiction in the same way as the minister for foreign affairs.

20. Mr. GUILLAUME (President of the International Court of Justice) said that that question had not been decided by the Court and it was not for him to answer it.

21. Mr. BROWNLIE said that, like Mr. Pellet, he considered the analogy between the supreme courts of States and ICJ inappropriate. Given the financial pressure that the Court was experiencing and its current workload, it was difficult for an outside observer to say whether a particular change in the Court's working methods was the result of a decision of principle or an empirical reaction to

a financial imperative. The Court's judgments were more concise than they had been, and that was a matter of concern to some jurists, who deplored the fact that, while the States concerned had put forward very detailed written and oral arguments, the Court had responded briefly.

22. Mr. GUILLAUME (President of the International Court of Justice), referring to the more concise nature of ICJ's decisions, said that, while it appreciated counsel's covering all aspects of a case in their briefs, that did not mean that it was obliged to rule on every one of the grounds put forward by the parties. Its only obligation was to rule on all the submissions. However, States did not always make a clear distinction between the submissions, to which the Court must respond in the operative parts of its judgment, and the grounds for the claim, which the Court might or might not examine in its findings.

23. ICJ tried to be more concise in its judgments for two reasons. The first was that, like all courts throughout the world, it applied the principle of cost-effectiveness. In that respect, the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case provided a good example: having considered that the border for which it had been requested to establish the boundary line had been defined in the 1955 Treaty of Friendship and Good-Neighbourliness between France and the United Kingdom of Libya,¹ the Court had stated in three lines that it was not necessary to consider the thousands of pages of arguments submitted by the parties on other issues. He understood the frustration of counsel in such a case, but, while it was normal that they should have prepared such lengthy arguments, it was also normal for the Court not to consider them. Second, since the Court had less time owing to the increase in the number of cases on its docket, the principle of cost-effectiveness was even more relevant because the Court needed to rule rapidly, while replying to all the submissions of the parties. Third, the judges came from different national backgrounds and, in particular, from countries where supreme court decisions could cover more than 100 pages and from other countries where such decisions were only one or two pages long. The Court tried to strike a balance between these differing traditions.

24. Ms. ESCARAMEIA said that it seemed that ICJ's decisions were now taken by a broader majority than in the past and that there were fewer dissenting opinions and thus greater unity within the Court. She asked whether that phenomenon, which was remarkable in itself, since the world and its legal assessment were changing so noticeably, was a result of the methods used by the Court to reach its decisions and of its working methods in general.

25. Mr. ADDO said that he wished to know what the legal effect was if a party did not comply with the practice directions. He asked whether the party would be afforded the opportunity to comply or whether ICJ would decline to hear the case on its merits because of the party's non-compliance.

26. Ms. XUE asked the President of ICJ whether he could make any comments that might help the Commis-

¹ United Nations, *Treaty Series*, vol. 1596, No. 27943, p. 151.

sion in its consideration of the topic that it had just taken up, the fragmentation of international law.

27. Mr. CHEE, noting that his question was similar to Ms. Xue's, recalled that the President of ICJ had spoken on the subject of the fragmentation of international law in the Sixth Committee. He wondered whether the President had changed his opinion on the topic since the previous year.

28. Mr. GUILLAUME (President of the International Court of Justice), replying to Ms. Escarameia, said that making decisions more concise meant that it was easier to obtain a larger majority. That had been the effect in, for example, the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, on which ICJ had unanimously—with the exception of the Libyan judge *ad hoc*—ruled that, according to the Treaty of Friendship and Good-Neighbourliness, the Aouzou strip formed part of Chadian territory. If the Court had had to delve into all the events preceding the Treaty of Friendship and Good-Neighbourliness, the range of views might have been wider. There was thus a clear link between the principle of cost-effectiveness and the unanimity of decisions.

29. Turning to Mr. Addo's question, he said that practice directions were in the nature of recommendations. If the parties failed to heed those recommendations, they were entitled to do so, although in practice they usually did heed them.

30. As to the fragmentation of international law, it could occur in relation to both rules and courts. He had not yet had occasion to adopt a position on the subject of the fragmentation of rules, but it seemed clear to him that, in view of the involvement of international law in an ever wider variety of topics, the risk of conflict between rules became ever greater. As to the fragmentation of courts, he had already spoken on the matter before the General Assembly on several occasions, as Mr. Chee had recalled. The proliferation of courts was one consequence of the extension and specialization of international law, which was not in itself a bad thing. Indeed, all developed systems of internal law had specialized courts. The problem was to maintain the unity of the law, since the proliferation of courts could both give rise to "forum shopping" by States and lead to perversity in the grounds for judgements. The phenomenon had been apparent over the past few years in the *Tadić* case and the *Swordfish Stocks* case involving a dispute between Chile and the European Union.

31. One solution he had suggested was that international courts be able to submit preliminary questions to ICJ. Thus, the International Tribunal for the Former Yugoslavia had recently proposed that the Security Council request an advisory opinion from the Court. In the event, the Council had decided that it would be easier to amend the statute of the Tribunal without asking for the Court's opinion, but the case was interesting in that it showed that the machinery existed and could be used.

Reservations to treaties² (concluded) (A/CN.4/526 and Add.1–3,³ A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(concluded)

32. Mr. PELLET (Special Rapporteur) said that he wished to sum up what had been said about the draft guidelines contained in his seventh report (A/CN.4/526 and Add.1–3).

33. Draft guidelines 2.5.7 and 2.5.8, which related to the effect of withdrawal of a reservation, had not aroused any passionate debate; the only comment made related to the question whether the word "effect" should be used in the singular or the plural. Article 21 of the 1969 and 1986 Vienna Conventions used the plural, but the article concerned the legal effects of reservations and objections to reservations. In the case of the withdrawal of a reservation, the singular would be more accurate, but he would leave it to the Drafting Committee to settle the question.

34. He wondered whether the extremely pertinent comments made by Mr. Galicki on the subject of draft guideline 2.5.12 (Effect of a partial withdrawal of a reservation) should not be applied also to draft guideline 2.5.7 (Effect of withdrawal of a reservation). Mr. Galicki had noted that the partial withdrawal of a reservation left some of the reservation in place and that that should be taken into account in the wording of draft guideline 2.5.12. In the case of draft guideline 2.5.7, the withdrawal might well be complete, but it was probably excessive to claim that the withdrawal of a reservation entailed the application of the treaty as a whole. Draft guideline 2.5.7 should therefore be reworded to indicate that the withdrawal of a reservation entailed the application of the treaty provisions affected by the reservation in the relations between the State or organization withdrawing the reservation and all the other parties, whether they had accepted or objected to the reservation. Ms. Xue's comment on draft guideline 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization), on the other hand, seemed to him to have less substance, given that the provision related only to objections to the withdrawn reservation.

35. Turning to draft guidelines 2.5.9 and 2.5.10, which related to the effective date of withdrawal of a reservation, he said that the draft guidelines had evoked almost as few comments as the previous ones. Mr. Daoudi, however, had reproached him with having written, in paragraph 173 of the report, that article 22, paragraph 3 (a), of the 1969 Vienna Convention, from which the text of draft guideline 2.5.9 was taken, "departs from ordinary law", on the grounds that the provisions of the Convention constituted the ordinary law on reservations. He himself considered

² For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

that it depended on how the question was viewed. Although draft guideline 2.5.9 (Effective date of withdrawal of a reservation) used the wording of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, it could hardly be called ordinary law, since article 20 of the Conventions set out slightly different rules with regard to the effective date of reservations themselves. If one looked at the larger picture of the law of treaties as a whole, the rule in article 22, paragraph 3 (a), of the Conventions was contradicted by that in article 16, subparagraph (b), or article 24, paragraph 3. Last, if a still wider view was taken, to cover international law in general, and specifically the system of the optional clause in Article 36, paragraph 2, of the Statute of ICJ, the opposite applied. It could be inferred from the above that perhaps there was no general rule. He conceded, however, that, in paragraph 173 of the report, he probably should have referred to article 78, subparagraph (c), of the 1969 Vienna Convention rather than to article 78, subparagraph (b).

36. He was grateful that those who had spoken on the draft model clauses had been in favour of their being referred to the Drafting Committee.

37. Very little had been said about draft guideline 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation). Mr. Gaja, however, had pointed out, with regard to article 78, subparagraph (b), that it was not the situation of the other contracting States or international organizations that should remain unaltered by a withdrawal, but the obligations of the withdrawing State or international organization in relation to those other States or organizations. The point was well taken, and the Drafting Committee would need to reformulate the provision accordingly.

38. Ms. Xue, too, had raised some problems with regard to partial withdrawals, but he believed he had addressed her concerns in his presentation of draft guidelines 2.5.11 and 2.5.12. Finally, he referred Mr. Fomba, who had asked about the specific effect of draft guideline 2.5.10, subparagraph (b), to paragraph 168 of the report, explaining that a question of “integral” obligations was involved, namely, those which bound States not so much among themselves as in relation to their nationals or to foreigners who were in their territory. There was therefore no disadvantage in leaving the reserving State to set the date of entry into force of the withdrawal; indeed, it could be advantageous, if the date was prior to that arising from the general principle stated in draft guideline 2.5.9.

39. Draft guidelines 2.5.11 and 2.5.12, which related to partial withdrawals, had elicited more comment. For example, Mr. Galicki had rightly suggested reversing the order of the two paragraphs of draft guideline 2.5.11 so as to give a definition of partial withdrawal before describing the form it should take or the procedure to be followed. He noted, however, that all the criticisms and suggestions had been directed exclusively at the second paragraph, namely, at the definition of partial withdrawal. Mr. Galicki, referring to a concern expressed by Ms. Xue, had mentioned the possibility that States might try to portray the aggravation of a reservation as a partial withdrawal. While he was fully aware of the possibility, he believed that it was for the courts to establish classifications and to determine, in

the case of a given modification, whether the reservation had been attenuated or aggravated, a judgement that was sometimes difficult to make. Either way, and contrary to what Mr. Momtaz thought, the word “modification” was an essential element of the provision, since a partial withdrawal related to an existing reservation, which would continue to exist. That was not the same as the withdrawal of a reservation followed by a new reservation, as in the case of an aggravated reservation.

40. Still on draft guideline 2.5.11, Mr. Fomba had urged him to choose between two expressions that appeared in the provision, following the words “ensuring more completely the application”: “of the provisions of the treaty” and “of the treaty as a whole”. He himself was anxious to retain both terms, since they were not synonymous. As was stated in paragraph 211 of the report, the text was closely modelled on the definition of reservations resulting from draft guidelines 1.1 and 1.1.1, which the Commission had already adopted and which were clearly directed at the two different situations.

41. With regard to draft guideline 2.5.12, Mr. Galicki had rightly pointed out that the guideline made no provision for the very possible situation in which an objection was expressly justified by its author on the grounds of its author’s opposition to the part of the reservation that had not been withdrawn. To cover that point, it would probably be enough to add a phrase at the end of the draft guideline along the lines of: “as long as the objection does not relate exclusively to the part of the reservation that has been withdrawn”. He thought that such a solution would also deal with one of the problems raised by one of the alternatives put forward at the preceding meeting by Ms. Xue.

42. When Mr. Momtaz had said that there could be cases in which contracting States could make an objection, even when a partial withdrawal had been made, he himself had at first been very sceptical, since, after all, if an existing reservation was attenuated there was no reason why the possibility of making objections should be reintroduced, at any rate after the expiry of the 12 months’ grace following the formulation of the reservation, as was provided for in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions. It had to be said, however, that he had been shaken by the example given by Mr. Gaja, in which a reservation, general though it was, became discriminatory against a specific State or group of States. In that case, it was completely understandable that the State or States that fell foul of such discrimination might legitimately wish to make an objection that they had not considered it necessary to make at the outset. Mr. Gaja and Mr. Momtaz had not, however, replied to the question whether the legitimacy of objections was restricted to the one case in which a reservation had become discriminatory or whether there were other cases of the same kind. It was an important question, particularly if a guideline was to be drafted to meet that specific point (or if a new paragraph were added to draft guideline 2.5.12), since the draft would be worded differently according to the reply he was given. In any case, the relevant situation or situations must be mentioned not only in the commentary but also in draft guideline 2.5.12 itself or in a guideline 2.5.12 *bis*. During the meeting, Mr. Gaja had given him a draft which had the advantage of leaving open all the possibili-

ties, with the following wording: “No new objection may be formulated in the case of the partial withdrawal of a reservation unless the reservation resulting from the withdrawal raises new questions and the objection relates to such a question.” It would thus be made clear that, in principle, it was not possible to formulate new objections, unless the general drift of the reservation was altered to the extent that such an objection would be reasonable. He was fully in favour of the addition and hoped that the Drafting Committee would consider it.

43. Draft guidelines 2.5.4 and 2.5.11 *bis* or, alternatively, 2.5.X on the consequences of a finding of impermissibility of a reservation by a body monitoring the implementation of a treaty, had, in his view, aroused a rather excessive degree of concern among members. If the argument was based just on draft guideline 2.5.X, which was a combination of draft guidelines 2.5.4 and 2.5.11 *bis* and was the version preferred by members, it would be possible to agree with Mr. Koskenniemi and Mr. Gaja that paragraph 1 stated the obvious. On the face of it, they were right: however one looked at it, no monitoring body of any kind could withdraw a reservation. He had considered it important, however, to state that such bodies could never, in any circumstances, determine the treaty commitment of a State; in other words, they could neither withdraw nor cancel a reservation. The most they could do, as was set out in paragraph 1 of draft guideline 2.5.X, was to find a reservation impermissible (or inadmissible). In his view, however, it would be appropriate to state—or rather to restate—somewhere in the draft guidelines what the Commission had already said in paragraph 10 of its preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, which it had adopted at its forty-ninth session, and which stated that “in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action”.⁴ If that was the case, clearly the monitoring body itself could not take action. It could find a reservation impermissible, but the reservation itself, as an instrument, was left unaffected by the finding, whatever body had found it impermissible. Whatever Mr. Daoudi might say, he himself had never claimed anything to the contrary.

44. Ms. Escameia had considered, however, that some bodies had the power to withdraw or, at any rate, nullify a reservation and to act as if it did not exist. Although the European Court of Human Rights had wrongly arrogated that power to itself in the *Belilos* case and its subsequent case law, the International Court of Justice could neither withdraw nor nullify a reservation. At most, it might perhaps refuse to apply an impermissible reservation, but it would then have to decide whether the reservation was detachable from the treaty (in which case it would apply the treaty without the reservation in the case submitted to it) or whether the impermissibility of the reservation prevented it from applying the treaty as a whole. Either way, the authority of its judgement would be restricted to the case in hand, as Mr. Galicki had pointed out, and, in the relations between the reserving State and the States other than the defendant, the reservation would continue to exist, although still inadmissible (*illicite*) or impermissible (*non valide*): he did not take a position on the terminological problem.

45. It was at that stage of the reasoning that paragraph 2 of guideline 2.5.X entered into the picture. The first sentence of that paragraph was taken, almost word for word, from the first sentence of paragraph 10 of the preliminary conclusions. The first difference was that in the French version he had added the phrase *à la suite d'une telle constatation* (“Following such a finding”) to the beginning of the sentence. A State that was concerned to observe the law should certainly “take some action” to deal with an impermissible reservation, whether or not it had been found impermissible by a particular body. Unless the reserving State had acted in bad faith, before the finding, it had not been aware of the impermissibility of the reservation; hence the addition he proposed. The second difference was that, in guideline 2.5.X, he had written that the State “must” take action accordingly. Mr. Momtaz proposed the word “should”. Mr. Tomka proposed the wording “It is the reserving State that has the responsibility...”. Personally, he found the latter expression preferable, as it was also to be found in the preliminary conclusions. On the other hand, he could not accept the Chair’s comment to the effect that the State could do nothing. Such an attitude would have no basis in law. The State in question was party to a treaty; that treaty created a monitoring body, which, by definition, was competent to find the reservation impermissible; it seemed to him unacceptable to maintain that the State could, in good faith, “do nothing” if it was concerned to observe the law. On that point, he agreed with the comments made by Mr. Brownlie the previous week.

46. He was not forgetting paragraph 5 of the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, to which Mr. Gaja had drawn the Commission’s attention. That paragraph stated that the monitoring bodies established in human rights treaties were “competent to comment upon and express reservations with regard, *inter alia*, to the admissibility of reservations by States”, which tended to confirm the comments made by the Chair and Mr. Gaja. But—a fact that Mr. Gaja had overlooked—that applied, again according to paragraph 5, “where these treaties are silent on the subject”, a situation that Ms. Xue seemed to regard as the only valid one in positive law. Yet that was inaccurate. Normative treaties or human rights treaties creating monitoring bodies were not always silent on the subject, and it sometimes happened that those bodies had much wider and more binding powers than the power to comment and express recommendations. A recommendation was not in any event devoid of legal force. Such was the case for the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples’ Rights and the International Court of Justice. It had been asserted that the latter was not a treaty-monitoring body. That did not seem to be true of cases where it was called upon by the parties to decide on the application of a treaty. Accepting, for the sake of argument, that it was true—in which case one must either overlook the expression “monitoring body” or replace it with the expression “body competent to find a reservation impermissible”—one could not in any case endorse the affirmation by Mr. Momtaz that the monitoring bodies were eminently political: they were not all political, they were not always political, they were not only political and they were never exclusively political. Nor could he

⁴ See 2734th meeting, footnote 6.

understand how Mr. Yamada could claim to endorse the preliminary conclusions while in the same breath calling for the deletion of paragraph 2 of guideline 2.5.4, which, for the most part, simply reproduced paragraph 10 of the preliminary conclusions.

47. Whatever Mr. Gaja, Mr. Pambou-Tchivounda, Ms. Escarameia, Mr. Tomka or Mr. Mansfield claimed, he had never said, written or believed that a State that had made a reservation which a body competent to do so had found impermissible was under an obligation to withdraw that reservation. Guideline 2.5.X said nothing of the kind. It simply reproduced verbatim paragraph 10 of the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, pointing out that total or partial withdrawal of the reservation was one possible means, but not the only means, of fulfilling its legal obligations. He did not see how that differed from the statement in the second sentence of paragraph 10 of the preliminary conclusions: “This action may consist, for example, in the State’s either modifying its reservation so as to eliminate the inadmissibility [the case of partial withdrawal] or withdrawing its reservation ... [the case of total withdrawal].” Those were ways in which a State could fulfil its obligations in that regard, and he thanked Mr. Kateka for his endorsement of that interpretation, which, in his view, was the only correct one.

48. Several members of the Commission, including Ms. Escarameia, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao and Mr. Mansfield, had stressed the need to distinguish between the monitoring bodies on the basis of their differing powers. In that regard, he thanked Mr. Koskenniemi for his efforts to submit a categorization. Mr. Koskenniemi identified three possibilities. In the first case, the body might find the reservation “null and void in whole or in part”. The problem was, however, to know what action to take on the basis of such a finding, as no such body was ever entitled to find that a reservation was null and void. In a second case, the monitoring body might oblige the reserving State to withdraw its reservation in whole or in part. He accepted that hypothesis, but, while total or partial withdrawal was one form of action the State could take in the event of the impermissibility of its reservation, it was not the only form of action: according to paragraph 10 of the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, the reserving State could also forgo becoming a party to the treaty. Last came the third case, in which the monitoring body could recommend that the reserving State should withdraw its reservation in whole or in part. Broadly speaking, that did not seem to him to contradict what was stated in guideline 2.5.X; and, in any case, that was doubtless not what Mr. Koskenniemi was intending to assert. But such an attempt at elucidation seemed to belong more appropriately in the commentaries than in the guidelines themselves.

49. He had demonstrated that he was far from convinced by the criticisms made concerning paragraph 2 of guideline 2.5.X; however, he would not be asking the Commission to refer that draft guideline (or, consequently, draft guidelines 2.5.4 and 2.5.11 *bis*) to the Drafting Committee, despite several members’ support for such referral. He was very mindful of an objection which had been made with particular trenchancy by Mr. Tomka, Mr. Brownlie

and Mr. Mansfield (although their positions did not entirely coincide), but which also underlay several of the other comments made. Ultimately, the question of withdrawal was a secondary issue. Guideline 2.5.X had two central components: first, the powers of the treaty-monitoring bodies with regard to reservations; and, second, the consequences of the impermissibility of a reservation. During the debate, it had been asked under which of those two headings those points should appear. Opinions had differed. It seemed that no clear-cut answer could be given and that the Commission should revert to the matter at its next session, when the permissibility (or admissibility) of reservations would be discussed; it would also have to revert to the matter when it returned to consideration of the preliminary conclusions in two years’ time. On those two occasions, he would submit amended and, he hoped, more appropriate versions of those draft guidelines to the Commission, taking account of the discussions at the current session. Consequently, he was withdrawing draft guidelines 2.5.4, 2.5.11 *bis* and 2.5.X. For the rest, there seemed to be no very cogent reason why draft guidelines 2.5.1 to 2.5.3, 2.5.5 to 2.5.12 (including the *bis* and *ter* provisions) and the draft model clauses linked to guideline 2.5.9 should not be referred to the Drafting Committee, and he hoped that the Commission would take a decision to that effect at the present meeting to enable the Committee to consider those guidelines at the start of the next session.

50. The CHAIR thanked the Special Rapporteur for his recapitulatory statement and particularly for his gracious withdrawal of draft guidelines 2.5.4, 2.5.11 *bis* and 2.5.X. If he heard no objection, he would take it that the Commission agreed to refer all the draft guidelines appearing in the part of the Special Rapporteur’s seventh report to the Drafting Committee entitled “withdrawal and modification of reservations and interpretative declarations”, having regard to the oral comments made during the debate in plenary, with the exception of draft guidelines 2.5.4, 2.5.11 *bis* and 2.5.X.

It was so decided.

51. Ms. ESCARAMEIA said that she wished to correct the interpretation of her position made by the Special Rapporteur. She had not said that the fact that a monitoring body found a reservation to be inadmissible or impermissible automatically resulted in the withdrawal of that reservation. She had said that such a finding would entail an obligation for the State party to withdraw that reservation wholly or partially. She could have accepted draft guideline 2.5.4, but the phrase “it may fulfil its obligations” implied that the State was free to choose whether or not to fulfil its obligations. In her view, the State had the obligation to do so.

The meeting rose at 12.50 p.m.

2740th MEETING

Friday, 2 August 2002, at 10.10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Tomka, Ms. Xue, Mr. Yamada.

The responsibility of international organizations (A/CN.4/L.622)¹

[Agenda item 7]

REPORT OF THE WORKING GROUP

1. Mr. GAJA (Chair of the Working Group on the Responsibility of International Organizations, Special Rapporteur), introducing the Working Group's report (A/CN.4/L.622), said that, since the topic had only recently been taken up by the Commission, any decision would be premature. The Working Group, which had been established on 8 May 2002 (2717th meeting), had, however, produced a number of preliminary guidelines that pointed the way to future work and appeared in the body of the report.

2. The term "responsibility" had been given a precise meaning in the draft articles on the responsibility of States for internationally wrongful acts, adopted by the Commission at its fifty-third session,² which specifically excluded, under article 57, the questions of the responsibility under international law of an international organization, or of any State for the conduct of an international organization. It therefore seemed reasonable that the new topic should address those two questions, although it should be stressed that the word "conduct" did not necessarily imply that it was unlawful: the organization might not be the legal addressee of the rule establishing an obligation. The new draft should presumably attempt to express rules of general international law relating to the responsibility of international organizations, including responsibility arising in the relations between them and their member States, even though in many cases such relations were mainly governed by special rules. In that context, he noted that, in the Working Group's view, the matters to be considered

were not necessarily identical with those dealt with by the articles on State responsibility for internationally wrongful acts, although there was naturally some correspondence in subject matter.

3. In the Commission's work since its twenty-second session, held in 1970, issues of liability that did not presuppose the existence of unlawful conduct had been considered as a separate topic. The Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law had not, as far as he knew, yet decided whether the topic would also include liability on the part of international organizations. Meanwhile, it seemed reasonable for the Working Group on the Responsibility of International Organizations to defer consideration of issues of liability until the other Working Group had made progress. The Commission could then decide whether the issue deserved special consideration and, if it did, what the most appropriate context for the study would be.

4. As for the other essential element for the definition of the scope of the topic, codification conventions generally defined international organizations as intergovernmental organizations. The existence of a legal personality on the part of the international organization was thus implied. Indeed, such a requirement was essential, as the organization's conduct would otherwise have to be attributed not to the organization itself but to its members. There might, however, be a need to establish different rules for different types of organization, especially with regard to the issue of member States' responsibility for the organization's conduct. Some intergovernmental organizations, for example, had non-State members, which might be either private entities or other international organizations. In the latter case, the situation clearly fell within the topic of responsibility of international organizations, but the same did not apply in the case of the former. It might therefore be preferable to consider only issues relating to States and international organizations as members of international organizations and to take non-State members into consideration only if their conduct affected the responsibility of States or organizations in any way.

5. The Working Group had discussed extensively the question of the relations between the draft articles on State responsibility for internationally wrongful acts and the new articles to be drafted. It had been recognized that the former had elucidated a number of issues and that every effort should be made to be consistent. The articles on State responsibility for internationally wrongful acts would thus have to be constantly taken into account. Nonetheless, every issue relating to international organizations would need to be the object of an independent study. Given the limited practice available, some questions might have to be put aside, or else resolved by referring to the rules applicable to States; alternatively, some other form of progressive development might occur. There had been a clear wish not to repeat the experience of the law of treaties, which had resulted in the adoption of a convention in 1986 that was regarded as a pale copy of the earlier codification convention. Members of the Commission who had been present at that time would recall it as a painful exercise, since the whole process could have been made

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. VIII, sect. C.

² See 2712th meeting, footnote 13.

far simpler by including a general reference to the 1969 Vienna Convention in a protocol concerning international organizations. The difference in the present instance was that the Commission could not look at a codification convention that had already been adopted: the status of the draft articles on State responsibility for internationally wrongful acts had not yet been determined. Moreover, it was possible that issues specific to international organizations were more numerous in the field of responsibility than in that of the law of treaties.

6. The Working Group had therefore expressed a preference for drafting a completely independent text. Pending consideration by the General Assembly of the draft articles on State responsibility for internationally wrongful acts, priority should be given to questions that undoubtedly related specifically to international organizations, in order to avoid duplicating the Commission's work on State responsibility or needing to modify any suggested solutions. One such issue was the attribution of wrongful conduct to an organization. The first step would be to define when the conduct of an organ of an organization or of another entity or person could be attributed to that organization. In some cases, the rule might be similar to that applying to States, but in other instances the situation was more doubtful, as in cases in which a State organ acted on behalf of an international organization in the area of peacekeeping, for example, or in an area pertaining to the exclusive competence of the international organization. Some treaty provisions, such as annex IX to the United Nations Convention on the Law of the Sea, linked responsibility with competence. That did not, however, necessarily imply that wrongful conduct on the part of a State organ acting within the organization's exclusive competence was to be attributed to that organization.

7. Another frequently discussed question concerned the responsibility of member States for internationally wrongful acts for which the organization was also responsible. If they were regarded as responsible, it would then have to be determined whether the responsibility was subsidiary, or joint, or joint and several. It was obviously a matter of practical significance, especially when an international organization could not meet its financial obligations or was dissolved. The International Tin Council case and the *Westland Helicopters* litigation had involved situations in which the organization was not in a position to pay its debts, with the result that creditors addressed their claims to member States, with varying degrees of success.

8. The topic would probably involve the examination of most of the questions included in Part One and Part Two of the draft articles on State responsibility for internationally wrongful acts. The Working Group was more hesitant about matters under Part Three. The consideration of the implementation of responsibility could give rise to difficulties in such areas as the invocation by an international organization of the responsibility of another organization and that of States, the possibility of which had been specifically left unprejudiced in article 33, paragraph 2, of the draft articles. Other difficulties concerned the identification of who was entitled to invoke responsibility on behalf of an organization; and the question of countermeasures by international organizations in mat-

ters that fell within that competence, when a breach was committed not against the organization itself but against a member State. The Working Group's recommendation was to defer any decision on whether to take up the issue of the implementation of responsibility. The same applied to the settlement of disputes involving international organizations, an issue that had also been excluded from the articles on State responsibility, for a variety of reasons that could also be relevant to international organizations. On the other hand, the methods currently available for resolving disputes involving international organizations were less than satisfactory.

9. All the relevant practice would need to be considered, including cases concerning responsibility under systems of law other than international law, which might contain incidental remarks on international responsibility or concern analogous issues. United Nations practice was mostly published in the *United Nations Juridical Yearbook*, but knowledge of practice relating to other international organizations was harder to acquire. The abundant literature on the topic referred to a limited number of cases. The Commission could accomplish its task only if it gained a wider knowledge of practice. The Working Group therefore recommended that the Secretariat should be requested to approach international organizations with a view to collecting relevant materials (para. 27 of the report).

10. The CHAIR said that the Chair of the Working Group had vividly recalled the feeling of many participants that the Vienna Convention of 1986 had been the result of the activities of a small, determined minority, which would not accept that States and international organizations should be treated in the same context, since to do so would give international organizations ideas above their station.

11. Mr. MANSFIELD said that the activities of the Working Group, of which he was a member, had proceeded smoothly, partly because the topic was a natural consequence of the articles on State responsibility and partly because of the carefully considered guidance of the Chair. The topic was, however, by no means straightforward; indeed, it was proving increasingly complex in such areas as peacekeeping, in which the United Nations was working side by side with national armed forces. The European Union and other regional organizations were in the same position, and the establishment of guidelines delineating the relative responsibility of such organizations and member States in activities ranging from broad issues of peace and security to the details of politically and commercially fraught topics such as fisheries management was all the more important.

12. As to the Working Group's report, he supported the assertion in paragraph 6 that, in the case of non-universal international organizations, responsibility might well be more likely to occur in relation to non-member States.

13. With reference to paragraph 7, he concurred that, for the time being, it was appropriate to defer the related question of liability, pending the outcome of the Commission's work on that topic in relation to States. However, that should not be interpreted as meaning that the question of

the liability of international organizations was not important. As to what the Commission should attempt to cover by the term “international organizations”, he accepted the Working Group’s conclusion (paras. 8–11) that it should be formally restricted to intergovernmental organizations. Even with that limitation, it would be trying to encompass a very wide range of quite different bodies. Nevertheless, with the emergence of organizations that were adopting a more inclusive approach to participation and even membership, and with the strengthening of civil society and the major involvement of the private sector in many aspects of international life, the variety would continue to increase. Accordingly, as work on the topic proceeded, it might be necessary to verify tentative conclusions to see how they related to some of the hybrid organizations.

14. The question of the relations between the topic of responsibility of international organizations and the articles on State responsibility had been keenly debated in the Working Group, and the general approach set out in paragraphs 12 to 14 seemed eminently sensible.

15. On the issue of attribution, he noted that the case identified in paragraph 16, where the conduct of a State organ was mandated by an international organization or took place in an area that fell within an organization’s exclusive competence, was a matter of considerable interest and sensitivity to the wider international community, to which membership in that organization was not open, but whose interests might be greatly affected by its actions.

16. Mr. PELLET said that both the written report and the oral presentation underlined the most important points. However, there were two general issues on which the report took a position that could be debated. The first was a matter of substance, namely the relations between the topic of the responsibility of international organizations and the draft articles on State responsibility for internationally wrongful acts, whether member or non-member States. The second was a question of form, in other words, how to deal with the topic. Members of the Commission who had taken part in the 1986 discussion on the law of treaties relating to international organizations, the 1986 Vienna Convention, appeared to have been traumatized by what had occurred at that time. He had not been present, but he had examined the reports by Paul Reuter, who had finally been obliged to admit that one could only transpose the general law of treaties to the law of international organizations. The Working Group’s report showed that it was unlikely that a simple transposition would be made, and, in any case, the matter called for the exploration of very different and in some cases more complex issues than in the case of State responsibility. The title of the topic would in all likelihood remain the same, but he would like the Special Rapporteur to deal with the question of responsibility linked to international organizations.

17. He had reservations about the way in which the Working Group had dealt with the formal aspects of the relations between the future work on the responsibility of international organizations and the articles on State responsibility for internationally wrongful acts. On several occasions, for example, in paragraphs 12 to 14, it was said that it would be necessary to include in the new text a

general reference to rules adopted in the context of State responsibility. While not objecting to it being said that the principles applicable to State responsibility also applied to international organizations, he deemed it unsatisfactory to continually refer to one set of draft articles in another. The new draft could include a general reference citing the exceptions, which were rather numerous, or it could refer to the rules applicable to State responsibility in each specific case. It should be borne in mind that, unlike States, organizations were not sovereign, and that led to many differences.

18. He disagreed with the statement in paragraph 9 that the definition of international organizations comprised entities of a very different nature. The common principles and general rules that pertained to all intergovernmental organizations should be pinpointed. Plainly, there were some very distinctive international organizations. Organizations such as the European Union or MERCOSUR could pose specific problems and, in view of their role, might represent a sub-category of sufficient importance to make a subheading. As an author of manuals on international law, he had never experienced difficulty in drafting the part on the law of international organizations. States were also very diverse, as were the different commitments they undertook towards regional groupings, but that did not prevent the development of a general theory of States.

19. Paragraph 10 stated that the study could include questions of responsibility arising with regard to hybrid organizations, whose membership included States as well as non-State actors, and mentioned the World Tourism Organization as an example. He was legal adviser to the organization and could confirm that it had never had any relevant legal problems; he believed that most legal advisers of international organizations could say the same. It was true that the World Tourism Organization was essentially a classic intergovernmental organization and the status of its State members differed greatly from that of the other non-State members.

20. In taking up the question of attribution (paras. 15 and 16), it would be worthwhile if the Special Rapporteur looked at how the Commission had dealt, or not dealt, with the responsibility of international organizations when considering State responsibility, before the Commission decided to postpone the examination of several of the problems posed until it studied the specific topic of the responsibility of international organizations.

21. In the French version of paragraph 18, the phrase “a joint or a joint and several responsibility” had been translated as *responsabilité conjointe ou conjointe et solidaire*, which was an anglicism. The phrase should read *responsabilité conjointe ou solidaire*.

22. Paragraph 19 said that the question of succession between international organizations raised several issues that did not appear to fall within the topic of the responsibility of international organizations and could be left aside. That was debatable, in view of the beginning of the paragraph, which referred to member States’ responsibility in case of non-compliance with obligations that were

undertaken by an international organization that was later dissolved. The only reason for not including it would be that the study of State responsibility had not examined the question of succession to responsibility. The argument in favour of retaining it related to the fate of the debts of an organization that was dissolved, which was such an important problem that it should perhaps be included, even though it might extend the study of the topic.

23. The statement, in paragraph 20, that the Commission would have to consider the responsibility of an organization in connection with the acts of another organization or a State and to circumstances precluding wrongfulness, including waivers as a form of consent, required clarification.

24. Paragraph 24 said that “given the complexity of some of these issues, it may be wise, at this stage, to leave open the question whether the study should include matters relating to implementation of the responsibility of international organizations and, in the affirmative, whether it should consider only claims by States or also claims by international organizations”. In general, he did not see how a draft on the responsibility of international organizations could fail to deal with implementation. However, the Commission had always had a rather hazy conception of implementation; for example, in considering State responsibility it had not examined diplomatic protection, which was the way *par excellence* of implementing responsibility in a case of indirect harm. Functional protection was another important issue that could well be examined.

25. Finally, regarding paragraph 26, he agreed that the report should not examine directly the question of responsibility relating to commercial contracts, provided it was clarified that such responsibility pertained to internal law. However, if international law was directly concerned, he was not sure that the issue should be discarded, even if it had not been considered in the case of States. But, as Mr. Mansfield had mentioned, circumstances changed, and such problems were becoming increasingly important. He himself had made a study of contracts and could provide the Special Rapporteur with the pertinent extracts. He was surprised that the Working Group had not examined the question of responsibility related to the civil service, as it posed very specific problems and was the field in which the law on the responsibility of international organizations was most developed. He was in favour of excluding it because, from a conceptual standpoint, internal law relating to international organizations was another legal sphere, and the Commission was discussing the international responsibility of international organizations and not their responsibility under their internal law; that, however, needed to be explained. Nevertheless the Special Rapporteur would not be able to avoid examining the case law of the international administrative tribunals to see whether it was possible to extract general principles of law.

26. Mr. KATEKA, thanking the Chair of the Working Group on the Responsibility of International Organizations for the Working Group’s draft report, said that, while different hybrid international organizations did exist, in examining responsibility the Commission should confine itself to intergovernmental organizations. As to the relationship between that topic and State responsibility, care should be taken when making a linkage. The articles on

State responsibility were not yet final: there was a possibility of a diplomatic conference being held, and some of the provisions of those articles could change. Thus, a problem could arise if the Commission merely copied the articles. In any case, there were controversial issues in the draft articles on State responsibility for internationally wrongful acts, for example, with regard to countermeasures, and presumably the work on the responsibility of international organizations would try to avoid examining that issue, insofar as possible. If the topic were to include controversial issues such as countermeasures, or if the final product were to take the form of a convention, there would be a need for a linkage with the question of settlement of disputes. Accordingly, although the Special Rapporteur advocated leaving that question in abeyance, the Commission should not altogether rule out the possibility of taking up the issue of dispute settlement at a later date.

27. As to the pattern the final product should follow, adoption of a comprehensive text on the topic would seem to be the best course, since it was not possible to make cross-reference to a set of draft articles that had not yet been finally adopted, still less entered into force—the analogy with the Vienna regime being incomplete in that regard. Thus, it might occasionally be necessary to reproduce textually some provisions of the draft articles on State responsibility.

28. Like Mr. Pellet, he also wondered why the important issue of functional protection, to which he had drawn attention in the Working Group and in the context of the debate on diplomatic protection, had been excluded from the topic. Last, he stressed that, while a flexible approach was desirable, consistency would also be necessary, in order to avoid the apparently contradictory conclusions that had sometimes characterized the Commission’s work in the past.

29. Mr. MOMTAZ said he was concerned that the highly topical issue of delegation of the powers of international organizations to regional organizations was not raised in the section of the report on questions of attribution. He had particularly in mind delegation of the coercive powers of universal organizations, especially the United Nations. A number of recent Security Council resolutions authorized States and regional organizations to use force, one example being authorization to intercept vessels on the high seas in order to enforce an embargo. He wished to ask the Special Rapporteur whether such issues would be dealt with under the rubric of questions of attribution.

30. Mr. GAJA (Chair of the Working Group on the Responsibility of International Organizations, Special Rapporteur) said he would endeavour to clarify some issues and also to dispel some misapprehensions that had arisen with regard to the Working Group’s report. The question of authorization of the use of force and delegation of powers to States, raised by Mr. Momtaz, would have to be considered in due course. It was difficult to assert that the conduct of State organs, whether or not authorized, was attributable to the international organization. The question as to whether the international organization shared the responsibility for unlawful conduct was touched upon, albeit perhaps too lightly, in section 4 of the report, under which section the question raised by Mr. Momtaz should

perhaps mainly be addressed. Since the conduct could not be attributed to the international organization, chapter IV of Part One of the draft articles on State responsibility would not cover cases analogous to those that might occur in relations between international organizations and States.

31. The question of functional protection had not been positively excluded from the topic, but simply deferred for consideration at a later stage. His personal opinion was that functional protection might best be dealt with as a separate topic. If, following the pattern of the draft articles on State responsibility for internationally wrongful acts, it was eventually decided that there would be a Part Three dealing with implementation, it would be necessary to treat functional protection, even if briefly.

32. As to Mr. Pellet's comments, he regretted any mis-translations of the original English of the report, for which, however, the Working Group was not responsible. Nowhere did the report propose that cross-references should be made to the draft articles on State responsibility for internationally wrongful acts. The conclusion set forth in paragraph 12 had been that the new text would have to be fully independent of the articles on State responsibility. Where no special feature differentiated international organizations from States, it would be possible to say that the same rules would apply as applied to States, without specifically identifying the rules in question, whether drawn from the articles on State responsibility or from other sources. As to the meaning of the expression "waivers as a form of consent" in paragraph 20, the idea was that a unilateral waiver was one of the two possible forms of consent, the other being an agreement, and that consent was considered a circumstance precluding wrongfulness.

33. As to the question of dissolution of international organizations, the succession of international organizations was usually regulated by the treaties establishing the new organization. Interestingly, when various issues relating to the succession of States had been taken up by the Commission, it had not been proposed that it should also consider succession of international organizations. Insofar as any general rules concerning succession of international organizations existed, the consequence might be that the new international organization would be the debtor to which creditors could address themselves. He doubted that there was any justification for the Commission's becoming involved in that complex issue, particularly as most such questions were dealt with either in agreements among States or by virtue of the new organization's acceptance of succession and assumption of responsibility for any extant debts.

34. On paragraph 9, given the wide variety of international organizations, the nature of the relationship between the respective organization and member States might also differ widely. That would have consequences with regard to the rules applicable. An organization such as the Multinational Force and Observers established by Egypt and Israel following the Camp David Accords³ was, despite its legal personality, very difficult to treat in isolation from its

member States. The purpose of paragraph 9 was to point out that different rules might apply to different types of organization, depending on the nature of the relationship with the member States.

35. Regarding the question of relations between an international organization and its officials and the case-law of administrative tribunals, that issue would not normally be considered to be part of the topic of the responsibility of international organizations, and the Working Group had not envisaged dealing with substantive matters of the content of such relations. However, the case law of administrative tribunals might prove to be of some use, whether to establish a general principle of law or to enable the Commission to draw analogies. In that regard, he would be grateful if members would draw his attention to any relevant material or practice of which they were aware. It would also be helpful if any members who had personal contacts with international organizations could encourage them to cooperate actively with the Commission so as to facilitate its work on the topic.

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

37. Mr. PELLET said that, while he had no objection to the adoption of the report, he wished to know whether any comments made on it in the plenary meeting would be reflected in the report of the Commission to the General Assembly on the work of its fifty-fourth session. If his own comments were not reflected in the report, he would be obliged to amend it accordingly.

38. The CHAIR said that the report of the Working Group could be adopted or rejected, but not amended, in plenary. Comments on it would become part of the permanent record with the issuance of the summary records.

39. Mr. PELLET said that the section on the report of the Working Group included in the chapter on the responsibility of international organizations should reflect the positions expressed in the plenary meetings of the Commission, as was done in other chapters of the Commission's report.

40. Mr. MIKULKA (Secretary of the Commission) said that, whenever the Commission discussed the report of a special rapporteur, the Commission's report contained an analytical summary reflecting the views expressed on the topic. In the past, when the plenary had discussed the report of a planning group, drafting committee, working group or study group, the fact that the report had been discussed had been reflected in the report, and the dates and numbers of the relevant meetings had been clearly indicated. All those elements provided the special rapporteur on the topic, the general public and Governments with sufficient material to locate the comments made on the report in question. It had not been the practice in the past to prepare an analytical summary of the views expressed where the report of the special rapporteur on the topic had not been discussed.

³ Framework for peace in the Middle East agreed at Camp David, signed at Washington, D.C., on 17 September 1978 (United Nations, *Treaty Series*, vol. 1138, No. 17853, p. 39).

41. Mr. PELLET said that, while that practice seemed reasonable in the case of reports of the Drafting Committee on texts adopted on first reading, since the views expressed were reflected in the commentaries, it seemed completely unreasonable in the case of the reports of working groups: such a practice would inevitably prompt requests from members for corrections to the report. Regardless of what the practice might have been in the past, he was hostile to its continuation.

42. The CHAIR said that view could be reflected in the report of the Commission when it adopted the chapter of the report on the topic under consideration. If he heard no further objections, he would take it that the Commission agreed to adopt the report of the Working Group on the Responsibility of International Organizations.

It was so agreed.

The meeting rose at 12.15 p.m.

2741st MEETING

Tuesday, 6 August 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue.

The fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/L.628 and Corr.1)¹

[Agenda item 8]

REPORT OF THE STUDY GROUP

1. The CHAIR invited the Chair of the Study Group on the Fragmentation of International Law to introduce the Study Group's report.

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. IX, sect. C.

2. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that, in the course of the last quinquennium, the Commission's Working Group on the long-term programme of work had identified the topic "Risks ensuing from fragmentation of international law" as a subject that might be suitable for further study. Mr. Gerhard Hafner had been assigned the task of conducting a feasibility study on the issue. At the Commission's fifty-second session (2000), he had submitted a document that formed the starting point for the consideration of the topic at the current session.²

3. The Study Group, composed of most members of the Commission, had met four times during the session. Its report consisted of two parts: a summary of the discussions and a set of recommendations. One of the main questions that the members of the Study Group had considered was whether the topic of the fragmentation of international law was suitable for study by the Commission; they had also considered the potential scope of the topic and the approach to be adopted. In the end, they had supported taking up the topic, considering that it was an area where the Commission could provide useful guidance, at least in relation to specific aspects of the issue.

4. From the beginning, the members of the Study Group had recognized that the topic was different in nature from others and might require an original approach. They had agreed, however, that fragmentation was not a new development, because international law was inherently the law of a fragmented world. Fragmentation was also the natural consequence of the expansion of international law into areas that were sometimes entirely new. The Study Group had therefore considered that the Commission should not approach fragmentation as a new phenomenon, as that could distract from the existing mechanisms that international law had developed to cope with the challenges arising from fragmentation.

5. The Study Group had also thought it important to highlight the positive aspects of fragmentation, which could be seen as a sign of the vitality of international law. The proliferation of rules, regimes and institutions and the increased diversity of voices were not necessarily negative and, on the contrary, meant that the scope of international law was widening.

6. Regarding procedural issues, the members of the Study Group had questioned whether the topic fell within the Commission's mandate and whether the Commission would have to seek the approval of the Sixth Committee of the General Assembly before taking up the topic, but they had concluded that the necessary support could be obtained.

7. The question of the title of the topic had given rise to considerable discussion because it had been felt that the title of the Hafner report, "Risks ensuing from fragmentation of international law", depicted the subject matter in too negative a light. The word "fragmentation" denoted certain undesirable consequences of the expansion

² See *Yearbook ... 2000*, vol. II (Part Two), annex, item 5, p. 143.

of international law, which the Commission should try to counter. That effort would justify the study of the topic.

8. The issue of methodology had also given rise to lengthy discussions. It had been agreed that the topic was not suitable for codification in the traditional format of draft articles drawn up by a special rapporteur and accompanied by commentaries. Several members had suggested that the work should focus on specific themes and identify certain areas where conflicting rules of international law existed in order to, if possible, find solutions to those conflicts. At the other end of the spectrum, a more exploratory approach had been proposed, confining work to recognizing the importance of fragmentation as a problem of international law without, at that stage, establishing the methodology or seeking specific results.

9. The members of the Study Group had identified several areas that were not suitable for study by the Commission, such as questions of the creation of international judicial institutions and the relationship among such institutions. They had considered, however, that, to the extent that the same or similar rules of international law could be applied differently by judicial institutions, the problems that arose from such divergencies should be addressed. The members had also agreed that drawing analogies to the domestic legal system might not always be appropriate because it introduced a concept of hierarchy that was not present at the international legal level and should not be superimposed. It had been agreed that, in international law, there was no final body to resolve conflicts. It had also been acknowledged that the Commission should not act as a referee in relations between institutions, even though it could usefully address issues of communication among such institutions.

10. In practical terms, several members had suggested that, at the beginning of each annual session, the Commission should organize a seminar in order to gain an overview of the practice of international institutions and States and provide a forum for dialogue and potential harmonization. Other members had proposed going even further in that direction by organizing more institutionalized and periodical meetings similar to some that already existed, such as the meeting of chairpersons of human rights treaty bodies and the annual meeting of national legal advisers at the United Nations. Another suggestion had been that a questionnaire should be prepared which would provide guidance for the research into existing coordination mechanisms.

11. With regard to the final result of the Commission's work, and even though it was a little too soon to discuss the matter, it had been decided that a study or research report should be drafted, although agreement had to be reached on the exact format and scope of any such report.

12. Referring to the second part of the report, entitled "Recommendations", he indicated that, in the light of the discussion on the title of the topic and the negative connotation of the word "fragmentation", it had been proposed that the Study Group should adopt the title "Difficulties arising from the diversification of international law". Some members of the Study Group had also been

in favour of an alternative: "Difficulties arising from the expansion and diversification of international law".

13. With regard to content, the Study Group recommended that a series of studies on specific aspects of the topic should be carried out and submitted to the Commission for its consideration and appropriate action. The purpose of such studies would be to assist international judges and practitioners in coping with the consequences of the diversification of international law.

14. The Study Group had chosen five main topics for study that had in common that they were all topics linked to earlier work done by the Commission, and they could build on and further develop earlier texts. The aim would be to provide a "toolbox"—suggestions and practical means for solving problems arising from the incongruities and conflicts that might exist between existing rules and regimes. The study topics chosen were listed in paragraph 21, subparagraphs (a) to (e), of the Study Group's report. The title of the first topic was "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes' ". Those elements were interesting because both *lex specialis* and "self-contained regimes" could provide a ready-made answer to the problems of conflicts of law by creating a kind of "independent" domain outside the ordinary rules of international law. That study could be submitted to the Commission at its next session.

15. The other study topics were: "The interpretation of treaties in the light of 'any relevant rules of international law applicable in the relations between the parties' (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and 'contemporary concerns of the community of nations'" (that wording had been taken from the *Shrimp Products* case, submitted to the WTO Appellate Body); "The application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties)"; "The modifications of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties)"; and "Hierarchy in treaty law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules". Although *jus cogens* and obligations *erga omnes* had already been the subject of numerous studies, the idea in that context would be to consider such "super rules" as rules designed to resolve conflicts between different systems.

16. Now that the Study Group's report had been introduced, the Commission should discuss it and, if necessary, amend it, adopt it and incorporate it into its own report to the General Assembly.

17. Mr. KATEKA, commending the Study Group on its very clear report, said he regretted that it had not defined the word "fragmentation", although he himself did not object to it. As the report had stressed, fragmentation was not a new phenomenon and denoted an increased diversity of voices and a polycentric system, which had positive aspects. The new title contained in the Study Group's recommendations seemed more appropriate than the one proposed by Mr. Hafner, but he did not agree with the introduction of the word "expansion".

18. With regard to the methodology and the format of the work of the Study Group, an evolving methodology would be the most appropriate. In that respect, the Commission should not decide *a priori* that it would not study the risks arising from the proliferation of international judicial institutions. However, it might be wise to refrain from drawing analogies to domestic legal systems, in view of the lack of hierarchy in systems of international law.

19. As for the outcome of the Commission's work, it was preferable to be cautious, because the topic was unusual and the ramifications would become clear only as work progressed.

20. At the practical level, he did not object to the idea of organizing seminars, but it did not seem necessary to hold one during each of the Commission's annual sessions. He agreed with the study topics chosen by the Group and also the "toolbox" approach to the solution of practical problems. However, with regard to the second topic, he was not sure that it was necessary to refer in its title to the *Shrimp Products* case, submitted to the WTO Appellate Body; a reference of that kind did not belong in a title. He also regretted that the study of extradition treaties and human rights norms mentioned in the Study Group's initial draft had not been included in the list of topics.

21. Despite those comments, he was fully in favour of adopting the Study Group's report.

22. Mr. FOMBA said that the Study Group had successfully carried out its task and that, by and large, he endorsed its preliminary conclusions. In particular, he agreed that the topic fell within the Commission's mandate and that the study should be aimed at countering the undesirable consequences of the expansion of international law into new areas.

23. As for methodology, it was obvious that the subject was not suitable for codification in the traditional format of draft articles. That being the case, he preferred an approach focusing on specific themes as opposed to a broader, more exploratory approach. As to the areas that the Commission should not include within the scope of the study, on the whole he endorsed the approach taken by the Study Group, although he wondered whether all analogies with domestic legal systems should be entirely avoided. In any case, the Commission should be very careful in dealing with such matters. In addition, he was not sure that the suggestion that matters relating to the application of international law should be excluded from the study was quite appropriate, in view of the very purpose of the study, which was to solve the practical problems caused by incompatibility and conflicts between various legal rules and regimes.

24. As for the possible outcome of the Commission's work, he saw no reason why seminars should not be organized at the beginning of the Commission's annual sessions or more institutionalized meetings envisaged, as long as those initiatives pursued a single objective.

25. Finally, he endorsed the five topics that the Study Group recommended to the Commission for its consideration and the proposal that, as a first step, the Chair of the Study Group should undertake a study on the func-

tion and scope of the *lex specialis* rule and the question of "self-contained regimes".

26. Ms. ESCARAMEIA said that she agreed with the report of the Study Group on the whole. She would, however, have liked to see the word "expansion" included in the title, since that would give a sense of the vitality of international law, which now encompassed situations that had previously pertained only to internal law.

27. She welcomed the inclusion in paragraph 14 of the sentence stating that, to the extent that the same or similar rules of international law could be applied differently by judicial institutions, the problems that could arise from such divergencies must be addressed. She also appreciated the revision of paragraphs 21 and 22 of the Study Group's draft report to give a better sense of the methodological approach to be taken by the Commission.

28. While the Commission must indeed begin by studying substantive law and the relationship between different types of substantive law, she thought that it must also address the institutional background for the application of substantive law and, in particular, try to find out what problems were encountered by existing bodies, including treaty bodies, and how they solved them.

29. Mr. BROWNLIE, commending the Chair of the Study Group on his report, said that he was pleasantly surprised by the rapidity with which consensus had been achieved on the document, which faithfully reflected the views expressed in the Study Group and was drafted judiciously, so as not to alarm the Sixth Committee. The new title of the study was better than the original: after all, the word "fragmentation" had a negative connotation, but it would probably continue to be used for the sake of convenience.

30. The idea of the "toolbox" was somewhat bland but would make it easier to tackle essential problems.

31. He regretted the fact that no reference was made in paragraph 11 of the Study Group's report to extradition treaties and human rights standards, a problem that was at the heart of the subject of fragmentation. It would be recalled in that connection that, in the United Kingdom, in its 1999 decision in the *Pinochet* case, the House of Lords had decided by a six-to-one majority to strip Senator Pinochet of his immunity, thereby giving precedence to developments in international criminal law. That body had protected itself by emphasizing that the decision had concerned an ex-Head of State, but all the arguments used would actually apply to incumbent Heads of State. That decision showed that there was a fundamental incompatibility between the present content of international criminal law and that of the law relating to the immunity of States and Heads of State. It would be unfortunate if the Commission did not even mention such an important example of fragmentation.

32. On self-contained regimes, the Commission must be very careful not to designate regimes for which there was no proof that they could be described as such. There was no evidence, for example, that the word applied to human rights. He had worked on many cases before the European Commission on Human Rights and the European Court

of Human Rights concerning Cyprus. Most of the law of human rights was of course, treaty law, which was part of general international law. In the cases he had mentioned, when incidental questions had arisen, such as questions of statehood or State responsibility, they had been solved by reference not to a self-contained regime of human rights but to principles of general international law on those subjects. Of course, self-contained regimes existed, and many of them were bilateral treaty regimes governing relations between States, but one should not make a presumption in favour of a regime's being self-contained. The Commission would, moreover, have to elaborate on the concept of the self-contained regime.

33. In the 1950s and early 1960s, to express support for human rights had been considered to be an attack on the colonial system, whose partisans spoke of interference in the internal affairs of States. The United Kingdom and France had been slow to enter into the European machinery for monitoring human rights precisely because of the colonial question. Standards for the protection of human rights were not Eurocentric; they had now developed as a part of general international law. It was therefore necessary to be careful not to speak of fragmentation when it did not exist. Even if one accepted that it might be absolutely necessary for human rights approaches to involve certain special outlooks on general international law, that did not mean that, in general, human rights standards had become a self-contained regime.

34. Mr. GALICKI said that, like Ms. Escameia, he regretted the fact that the title did not mention the expansion of international law. International law had now expanded its scope into new fields, whether social affairs or international relations. The Commission might be missing something if it failed to study that development.

35. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that he did not remember why the reference in paragraph 11 to extradition treaties and human rights norms had been deleted. He nevertheless thought it preferable at the current stage not to "politicize" the exercise by taking up subjects that might give rise to controversies. The "toolbox" approach was admittedly a little bland, but it had the advantage of avoiding such controversies. For example, it would be unwise to start off the work on the fragmentation of international law by addressing contentious issues, such as ICJ's judgment of 2002 in the *Arrest Warrant* case, in which it had clearly pronounced itself in favour of the old established law of immunity of foreign ministers from criminal prosecution. He would prefer not to take such an approach at the outset because it presupposed a value choice. The issue was what values were to be granted to human rights, what place they were to have in the hierarchy of values. In a sense, those questions might have to do with the topic suggested for study in paragraph 21 (e) of the Study Group's report. Nevertheless, he thought that it would be better to take a pragmatic approach and start out with technical issues, to see how things developed and leave controversial issues for a later stage.

36. With regard to self-contained regimes, he, too, believed that one should not presume that a given regime was self-contained, quite the contrary. The view that human rights were a self-contained regime was based on a

very specific political view of human rights, which, fortunately, no longer prevailed, although, in certain cases, such as that of WTO, references to State responsibility were considered to be out of place.

37. Mr. BROWNLIE said his comment on paragraph 11 had been that it would be a good thing if the report were to indicate that some members had had that point of view. He had not been making a substantive point.

38. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said it was true that some members had referred to the conflict between extradition treaties and human rights norms, and that a few words to that effect could be added to paragraph 11.

39. The CHAIR said that members would be able to make specific proposals on that point when the Commission came to adopt the report of the Study Group paragraph by paragraph.

40. Mr. KOSKENNIEMI said that, when the Commission had started to debate the topic, there had been considerable uncertainty regarding the results of its work. A number of speakers in the Sixth Committee had voiced concern that the topic had no limits, and that the Commission might engage in debates that were of purely academic relevance and of doubtful practical significance, while not addressing some of the most important aspects of contemporary political and institutional developments. The report of the Study Group should dispel those fears. The question of the diversification of international law reflected some of the most interesting and important developments in the field of international institutional law. That diversification of law was certainly technical, but it also and above all reflected different political preferences. In that regard, the preferences of a body such as WTO were not those of a human rights body, and the preferences of experts in international criminal law were not identical with the preferences of the generalists in ICJ. Ambiguity was in any case inherent in the subject, and the current title established a balance between "positivists" and "negativists". Some members of the Sixth Committee had noted that the Commission itself represented an aspect of the diversification of international law and had expressed fears that the Commission would see itself as a kind of supreme court arbitrating in institutional conflicts that had arisen between institutions such as ICJ, the International Tribunal for the Former Yugoslavia and WTO. In a nutshell, they feared that the Commission would become embroiled in institutional politics or would engage in interminable abstractions about normative hierarchies. Paragraphs 14 and 16 of the report of the Study Group made it clear that the Commission did not intend to engage in institutional politics, while paragraph 15 showed that it did not think of itself as a constitutional convention that would establish a hierarchy through which conflicts between, for example, human rights experts, trade experts, immunity experts and generalists could be solved. The Commission had chosen an approach whereby its work in that field would be based on its previous work. In a sense, the Commission had been able to present itself to the international community as a guardian of the 1969 Vienna Convention, and, having been the originator of that Convention, it could take on something of the role of "grandfather" and could pronounce with some authority on its interpretation. Further-

more, most of the topics proposed in paragraph 21 of the report related to that Convention. The studies proposed could lead to guidelines or other recommendations.

41. The proposal made in the Study Group to conduct a separate study on conflicts of interpretation that might arise out of the jurisprudence of different international organs had not been included in the report because the Commission was not in a position to articulate a hierarchy of values that could authoritatively resolve such conflicts; and if paragraph 21 (*e*) of the report stated that it nonetheless intended to deal with the hierarchy of norms, that was solely in relation to treaty law, and thus in a limited context.

42. As to Mr. Kateka's proposal to delete the footnote in paragraph 21 (*b*) of the report, that footnote was important in that it indicated that the Commission's perspective was a technical one, as well as attenuating the somewhat abstract nature of the words in inverted commas in that subparagraph.

43. With regard to the comment made by Ms. Escarameia and Mr. Galicki, the concept of the expansion of international law had not been taken up, for three reasons: first, the term harked back to the notion of the expansion of international law from Europe to other regions; second, international law had always been extremely wide in scope and it was its content that had changed; and, third, it was sociologically wrong to say that international law had expanded, since it had in fact been marginalized. That, furthermore, was a problem with which the Commission should come to grips.

44. Finally, as Mr. Brownlie had suggested, it might be mentioned in the summary of the discussions that some members had referred to the conflicts between different norms. As for self-contained regimes, nothing in the report presupposed their existence or indicated that there should be self-contained regimes. Regimes of that type should be an exception.

45. Mr. SEPÚLVEDA said that the title of the topic wrongly placed too much stress on the negative aspects of the diversification of international law, even though the positive aspects of the phenomenon were briefly alluded to in paragraph 7 of the report of the Study Group. One of the objectives of the series of studies recommended in paragraph 21 should, however, be to find solutions to some of the problems raised by that diversification. It would thus be desirable to make some reference in the title to the concept of integration, which was the antithesis of fragmentation.

46. Mr. KATEKA said that, contrary to Mr. Koskeniemi's understanding, he had proposed deleting not only the footnote but all the words in subparagraph (*b*) following "general developments in international law", so as to preserve the uniformity of the report and eliminate any Eurocentric connotations.

47. Mr. RODRÍGUEZ CEDEÑO said that, broadly speaking, he endorsed the report and that he supported the change made to its title. Expansion and diversification were two different things, and, if one were to talk of an enlargement, that enlargement was thematic, not territorial. If, as was stated in paragraph 14 of the report, the

Commission was not to deal with the relationship among international judicial institutions, it could nonetheless not ignore the effect of judicial decisions on international law.

48. He supported the proposal that a seminar should be organized on the subject referred to in paragraph 17 of the report. While the subject was unquestionably academic, it had practical consequences, and paragraph 21 rightly stated that the purpose of the studies proposed must be to assist international judges and practitioners in coping with the consequences of the diversification of international law.

49. With regard to the title, the term "difficulties" perhaps had too negative a connotation, and it might be preferable to replace it with a reference to the "consequences" or "effects" of the diversification of international law.

50. Moreover, it should be stated in paragraph 6 that the increase in the fragmentation of international law had its origin in the intensification of international relations. He would make a precise proposal in that regard when the Commission came to adopt the report.

51. With regard to methodology, there was no doubt that, as was stated in paragraph 10 of the report, the subject was not suitable for codification. As for the three aspects of the undertaking referred to in paragraphs 11 and 12, they must be conceived as complementary. Last, he supported the recommendations of the Study Group set out in paragraph 21.

52. Mr. Sreenivasa RAO said that the fragmentation of international law was a topic of contemporary relevance whose study was timely indeed and of interest in technical as well as in practical terms. Even without contemplating situations where the rules of international law were indeed fragmented, States and peoples had expectations of international law that were by no means identical and were thus fragmented in themselves.

53. When taking up the study of the diversification of international law and the corresponding difficulties, a number of questions should be asked. What was the exact purpose of the study? Was the Commission to study the diversification of international law in order to see how it affected its own mandate, or should it rather be looking at the opportunities and challenges it posed for the development and codification of the law? He thought that aspect deserved to be clarified. Similarly, with regard to the subjects proposed for study in paragraph 21 of the Study Group's report, what could be the connecting link that could bind them together?

54. He also had questions about the seminars that were to be organized according to paragraph 17 of the report. He wondered what the Commission's exact role should be, where the seminars would be held and who would cover the costs. The analogy with the human rights treaty bodies was not relevant because, unlike the institutions that would participate in a seminar on the fragmentation of international law, they worked under a single rubric.

55. Finally, he recalled that the Commission reported to the Sixth Committee. It therefore had to know precisely

how it would present the study of the subject to the Sixth Committee, which would in return give it useful guidance for its work.

56. Mr. MOMTAZ, referring to the first part of the report (“Summary of discussion”), said that, while he welcomed the reference in paragraph 14 to the problem of fragmentation caused by the differing application of rules of law by international judicial institutions, he thought that the explanation given in the second sentence was not clear enough. In his opinion, a distinction must be made between two different situations.

57. The first was when judicial institutions applied different rules of international law to solve the same problem. The International Tribunal for the Former Yugoslavia and ICJ had based themselves on differing criteria, for example, for the attribution of an act to a State.

58. The second situation related to the differences between courts in what they determined to be the applicable rule of law. The decisions of the International Tribunal for the Former Yugoslavia and ICJ differed in that respect as well. With regard to environmental protection, for example, the International Tribunal for the Former Yugoslavia had found that the applicable rule was a customary rule, whereas ICJ had considered that it was a conventional rule.

59. Turning to paragraph 21 of the report, he pointed out that the subject for study proposed in subparagraph (e) (hierarchy in treaty law) actually related to the determination of the rule, which varied from one court to the next.

60. He therefore proposed that the wording of paragraph 14 should be amended to make the meaning of paragraph 21 (e) clearer.

61. Mr. ADDO said that, contrary to what the Study Group stated in paragraph 9 of its report, the term “fragmentation” should be retained in the title of the topic. Not only was that term catchier than those that had been proposed to replace it, but it also corresponded better to the reality. He did not see how the retention of the term could place the study in an unduly negative light. Even if there were negative connotations, the Commission must determine and describe in the text to be adopted what should be done to counter them. In addition, the term was in the title under which the Sixth Committee had approved the study of the topic.³

62. Finally, he requested Mr. Koskenniemi to explain what he had meant when he had spoken of the Commission’s “grandfather rights” over the Vienna Conventions.

63. Mr. MANSFIELD said that, as the Chair of the Study Group had explained, the subject of the fragmentation of international law was different from those the Commission had dealt with in the past, and this could and should affect the Commission’s approach to it. It was un-

necessary to have a fully developed methodology or clear end product before commencing work. A more exploratory approach was appropriate. But the work must above all be of practical relevance and be timely. That was why he entirely endorsed the “toolbox” approach advocated in the report.

64. Mr. KOSKENNIEMI, replying to Mr. Addo’s question, said that he had spoken of the Commission’s “grandfather rights” over the 1969 and 1986 Vienna Conventions because people might ask why the Commission was arrogating to itself the right to take up the question of the fragmentation of international law. The fact that the Commission had drafted the texts of the Conventions was one of the reasons why subjects like that of reservations to treaties had been allocated to it. It could be said that the Commission was the guardian of the Conventions.

65. Mr. KAMTO, endorsing the comments made by Mr. Addo, said he thought that the original title of the topic should be retained for both practical and conceptual reasons. If the term was dropped, the topic would in a sense be deprived of its meaning. The Commission should not be haunted by the negative connotations of the term, which could be countered by giving it a good definition in the body of the text. He could, however, understand Mr. Rodríguez Cedeño’s concerns and could agree to the study’s being entitled “Consequences of the fragmentation of international law”.

66. The CHAIR invited the members of the Commission to think about formal amendments that they might like to make to the report with a view to its adoption paragraph by paragraph at the next meeting.

67. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) requested the members of the Commission to think about questions they might wish to put to the Sixth Committee.

The meeting rose at 12.45 p.m.

2742nd MEETING

Wednesday, 7 August 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr.

³ General Assembly resolution 55/152 of 12 December 2000, para. 8.

Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue.

The fragmentation of international law: difficulties arising from the diversification and expansion of international law (concluded) (A/CN.4/L.628 and Corr.1)¹

[Agenda item 8]

REPORT OF THE STUDY GROUP (concluded)

1. Mr. NIEHAUS recalled that at the previous meeting it had been suggested that questions on the topic of the fragmentation of international law should be incorporated in the report with a view to their consideration by the Sixth Committee at its forthcoming session. He had three questions in mind.

2. The first and most important was whether States considered that the topic was suitable for the Commission's attention or lay outside its mandate. In paragraph 8 of its report on the fragmentation of international law (A/CN.4/L.628 and Corr.1) the Study Group itself expressed doubts in that regard, while paragraph 10 indicated that the subject was not suitable for codification in the traditional form of draft articles. Even though the Sixth Committee was seen as likely to say the topic fell within the Commission's mandate, he thought the question should be asked.

3. Another question was whether States considered that the proliferation of judicial institutions was beneficial or detrimental to their freedom to choose peaceful means of settling disputes. Yet a third question was what solutions should be applied where there were conflicting judicial precedents.

4. Mr. AL-BAHARNA congratulated the Study Group on the Fragmentation of International Law on a comprehensive and lucid report. Under article 1 of its statute, the Commission's primary task was the codification and progressive development of international law. Article 16 of the statute outlined the procedure to be used for achieving that objective, namely the preparation of drafts on topics chosen and approved by the General Assembly. Article 17 further provided that the Commission was to consider proposals and draft multilateral conventions submitted by Members and organs of the United Nations and other official bodies. The Commission's experience with undertaking research studies on international law as suggested in the Study Group's report was, on the other hand, rather limited.

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. IX, sect. C.

5. In his feasibility study entitled "Risks ensuing from fragmentation of international law",² the basis of the present report, Mr. Gerhard Hafner had argued that, since the fragmentation of international law could endanger its stability, consistency and comprehensive nature, it fell within the Commission's purview to address those problems and to seek ways and means of overcoming the possible detrimental effects of such fragmentation. That, however, was an assumption on Mr. Hafner's part, and the fact remained that the research study envisaged in the Study Group's report did not fall specifically within the Commission's objective as specified in article 1 of its statute.

6. In support of his view that the Commission could draw up a report to single out the problems relating to fragmentation and raise the awareness of States about them, Mr. Hafner had referred to a Secretariat report that cited two isolated cases which could serve as precedents. In its work on treaties at its third and fifteenth sessions in 1951 and 1963, the Commission had departed from its practice of producing draft articles and had instead carried out studies, accompanying them with its conclusions.³ Those exceptions should not, however, be taken as precedents for the Commission to undertake a study that did not fit in with its objectives and purpose.

7. He agreed with the view expressed in paragraph 8 of the Group's report that the issue needed specific approval from the Sixth Committee. On the other hand, he endorsed the idea set out in paragraph 17 of organizing a seminar on the issue of fragmentation whose purpose would be to gain an overview of State practice and to provide a forum for dialogue and potential harmonization. The issue could also be taken up at the annual meetings at the General Assembly of legal advisers of ministries of foreign affairs.

8. He wished to draw attention to the statement in paragraph 19 that no agreement had yet been reached on the exact format or scope of any report on the topic, and in his opinion the recommendation in paragraph 21 that a series of studies on specific aspects of the topic should be undertaken was premature. The task would be time-consuming, and it would be more appropriate for the Commission to focus on topics falling within its mandate, as approved by the Sixth Committee at the fifty-sixth session of the General Assembly, in 2001,⁴ and contained in the long-term programme of work, such as responsibility of international organizations and shared natural resources. Paragraph 122 of the topical summary of the Sixth Committee's discussions at the fifty-sixth session of the General Assembly (A/CN.4/521) prepared by the Secretariat indicated that many delegations thought those topics should be given priority.

9. Paragraph 21 of the report said that the purpose of the proposed studies would be to assist international judges and practitioners in coping with the consequences of the diversification of international law. Surely, the judges at ICJ hardly needed to be briefed by the Commission on that issue and were undoubtedly well placed to deal with

² See 2741st meeting, footnote 2.

³ *Yearbook ... 1951*, vol. II, document A/1858, p. 125; and *Yearbook ... 1963*, vol. II, document A/5509, p. 217.

⁴ General Assembly resolution 56/82.

the conflicting rules of international law and the problems arising from them. Mr. Hafner himself, in section F of his feasibility study, had cited Judge Schwebel, former president of the Court, as having suggested that conflicting interpretations of international law might be minimized by enabling international tribunals to request advisory opinions from the Court on issues of importance to the unity of international law. In his own view, the difficulties connected with the diversification of international law arose from State practice, in the sense that the rules of international law were being applied to suit the interests of individual States, something that posed problems of ethics, not of the law.

10. The Commission should sponsor the publication of a book of articles on the fragmentation or diversification of international law to which its members could contribute. In the past, it had published a similar work, for which Mr. Pellet had served as chief editor. Finally, he hoped Mr. Simma's candidacy for ICJ would not interfere with his assignment to undertake a study on the *lex specialis* rule, as stated in paragraph 22 of the Study Group's report.

11. The CHAIR, speaking as a member of the Commission, said that the progressive development of international law did not mean simply drafting treaties that restated the law in a new or more socially acceptable form: it embraced all forms of concern with the way the law worked and how to make legal systems function more smoothly. He did not see how one could argue that the topic lay outside the Commission's purview, for in paragraph 8 of resolution 55/152 the General Assembly had taken note of the Commission's long-term programme of work, which included the topic of the risk ensuing from the fragmentation of international law. On the other hand, he did agree that the topic covered sensitive areas that would have to be handled with care.

12. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law), summing up the discussion, said it had been agreed that the reference, in paragraph 21 (b) of the Study Group's report, to the *Shrimp Products* case, together with the related footnote, would be deleted. On the other hand, a reference to the specific conflict between human rights norms and extradition treaties would be reintroduced. It had been suggested that the new title of the study should include the word "expansion", so it would now read "Difficulties arising from the expansion and diversification of international law". One member had thought that the word "difficulties" was unduly negative and had suggested that the word "consequences" should be used instead.

13. A number of members had been critical of the idea of organizing a seminar, citing issues such as the cost to the Organization and the necessary input, but it was merely mentioned in the summary of discussion, not as part of the Study Group's recommendations. If the Commission wished to hold a seminar at some later stage, it could do so. One member had been of the view that paragraphs 4 to 7, which dealt with the phenomenon of fragmentation, did not say enough about the positive aspects of fragmentation, including integration.

14. Mr. Niehaus had proposed that certain questions be incorporated, specifically on clarification of the Commission's mandate, although he himself agreed with the Chair's remarks on that point. Another question was whether the subject was suitable for codification in the traditional format of draft articles (para. 10). A third related to the proliferation of international judicial institutions, but he thought that might lead to endless controversy.

15. Ms. Xue took the view that paragraphs 4 to 7 painted the phenomenon of fragmentation in such a positive light that the reader might fail to understand why action was proposed to deal with it. Drafting work might be required to clarify that and other points.

16. The CHAIR invited the Commission to consider and adopt the report of the Study Group paragraph by paragraph.

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

17. Mr. KAMTO drew attention to a mistranslation in the French text: the words *l'examen du sujet par les membres nouvellement élus de la Commission* ("consideration of the subject by the newly elected members of the Commission") did not adequately render the English ("consideration of the topic by the newly elected Commission").

18. After a brief exchange of views, Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) proposed the deletion, in the English text, of the words "newly elected", and in the French text, of the words *les membres nouvellement élus de*.

It was so decided.

Paragraph 2, as amended, was adopted.

Paragraph 3

19. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that the words "During the first half of the session" in the second sentence were inaccurate and should be deleted. The words "at the first two meetings" should be deleted from the third sentence, which should end with the word "discussion". The brackets should be removed from "(Sect. I)", which should form the start of the fourth sentence.

20. Mr. CANDIOTI endorsed those proposals but suggested that the word after "Section I", "including", should read "includes".

Paragraph 3, as amended, was adopted.

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

Paragraph 6

21. Mr. MOMTAZ said that the wording of the first sentence in the French text—and probably also in the English—was most inelegant. The word “phenomenon” would be greatly preferable to the word “development”.

22. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said it had been the very quest for elegance that had led him to use the word “development”: the word “phenomenon” appeared in the last sentence of the paragraph, and he had wished to avoid repetition. He had no objection, however, to using the word “phenomenon” both times.

23. Mr. KEMICHA said that the first sentence was superfluous in any case and could be deleted.

24. The CHAIR pointed out that some members considered that it made an important point. It should perhaps be retained where it was for the sake of emphasis.

25. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) agreed that the fact that fragmentation was not a new phenomenon should be emphasized at the outset. If any change was to be made, he would prefer to delete part of the last sentence, which repeated the same observation.

26. Mr. CANDIOTI said the last sentence of the paragraph in the French text did not tally with that in the English and the Spanish.

27. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed that the word “development” was to be replaced by the word “phenomenon”.

Paragraph 6, as amended, was adopted.

Paragraph 7

28. Ms. XUE said that, as a member of the Study Group, she fully endorsed its work and generally agreed with many of the comments already made. Nevertheless, additional elements could be inserted in paragraph 7 to justify the Commission’s undertaking future studies. Only the positive aspects of fragmentation were cited, yet the potential negative effects must also be indicated. Language to that effect was to be found in the second sentence of paragraph 14 (“It was, however, considered that, to the extent that the same or similar rules of international law could be applied differently by judicial institutions, problems that may arise from such divergencies should be addressed”), and she proposed that it be transposed to paragraph 7, with the words “judicial institutions” replaced by “different forums”.

29. The CHAIR said that the issue hung on whether fragmentation was a negative effect of an otherwise positive development or a development having both positive and negative aspects, depending on the circumstances.

30. Mr. KATEKA said that Ms. Xue’s concerns, some of which he shared, could be met by adding the words “some of” at the beginning of the first sentence, thus making it clear that the Study Group had not been unanimous in wishing to highlight the positive aspects of fragmentation. It was important for the report to reflect the various shades of opinion within the Study Group.

31. Mr. KEMICHA said that transposing the last sentence of paragraph 14 to paragraph 7 would destroy the balance of paragraph 14, which had its own logic. The Study Group had agreed to avoid referring to any problems in relations between judicial institutions and rather to focus on difficulties that could arise in such matters as the interpretation of the law. He would therefore prefer to add a final sentence to paragraph 7 along the lines of “Nevertheless, fragmentation also has certain negative aspects.”

32. Mr. BROWNLIE said that the Commission was in danger of treating a succinct report as a statutory exercise. Nor should an over-mechanistic approach be adopted, categorizing aspects of law as “positive” or “risky”. Otherwise the effect would be like writing a school paper on the whole of international law, with the teacher’s comments. All that the report was trying to do was to correct the original impression that fragmentation had only negative effects.

33. Although he had not attended all the meetings of the Study Group, to the best of his knowledge there had been no mention of regional international law, nor was there any reference to it in the report. He was not suggesting that the topic need be considered forthwith, but—as in the case of the topic of incompatible decisions by different judicial bodies, which the Commission had rightly decided was a constitutional question and therefore not appropriate for it to consider—the matter could be set aside. The report could state that there had been no desire to discuss the question of regional international law. Certainly, to omit any reference to it would be strange. Opinions concerning the value of regional international law had fluctuated during the course of his career, but at times it had been regarded as particularly significant, while at other times regional differences, such as special elements in Latin American law, as exemplified in the *Haya de la Torre* case, had been accepted more neutrally. It would be a mistake to classify all international law as either healthy diversification or risky fragmentation.

34. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that Ms. Xue and Mr. Kateka had made some valid points. The reason for the positive gloss on fragmentation in the report was that the starting point for discussions had been the feasibility study conducted by Mr. Hafner, in which fragmentation had been shown in a negative light. The report thus faithfully reflected the discussion within the Study Group. He acknowledged, however, that the background might not be clear to members of the Sixth Committee. He would, therefore, after informal consultations with other members of the Commission, propose a text for a sentence to be added at the end of paragraph 7.

35. Mr. KAMTO said that the question of regional international law had indeed been discussed by the Study Group: he himself had offered some examples of contrasts between universal conventions and African regional conventions.

36. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) proposed that the first part of paragraph 7 should be reformulated to read: "The Study Group took note of the risks and challenges posed by fragmentation to the unity and coherence of international law as discussed in the report by Mr. Hafner referred to in paragraph 1 above. The work of the Commission would have to be guided by the aim of countering these risks and challenges. On the other hand, the Study Group also thought it important...".

Paragraph 7, as amended, was adopted.

Paragraph 8

37. Mr. NIEHAUS suggested that, in order to dispel any doubt as to the need for the Commission to obtain the approval of the Sixth Committee, the paragraph should include a reference to the authorization already granted in 2000.

38. Mr. AL-BAHARNA said that the different views in the Study Group might be more accurately reflected if the last sentence were recast by placing a semi-colon after the word "topic" and making the last phrase read: "it was thought that, in this case, the necessary specific support of the Sixth Committee should be obtained."

39. Mr. TOMKA pointed out that amendments to the report were being proposed by both members and non-members of the Study Group, which he found strange. He wondered whether the report should indeed be regarded as that of the Study Group or of the Commission as a whole.

40. Mr. KATEKA suggested that, in the second sentence, the words "a clear majority of" should be replaced by the word "most"; that was the standard language denoting neutrality. Similarly, the beginning of the third sentence should be amended to read: "Some members raised the issue of whether...", since the concern had not been shared by the whole Study Group.

41. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) expressed doubts about the wisdom of replacing the word "could" by the word "should". The use of "could" contained an implicit reference to the authorization given by the Sixth Committee in 2000, whereas "should" would imply that most members of the Commission thought that renewed assent from the General Assembly would be required.

42. The CHAIR suggested that the phrase "seek the approval" could be replaced by the phrase "seek further approval". In that way, it was possible to safely change "could" to "should".

43. Mr. KOSKENNIEMI said that it was hard to keep track of the various proposals made, apart from the conceptual issue raised by Mr. Tomka concerning the participation of non-members of the Study Group in amending the report. In his view, paragraph 8 should make it clear that only some members had been concerned about whether the topic fell within the Commission's mandate and that most members had considered the concern unfounded. He could recall no suggestion that specific authorization from the Sixth Committee was required; had such a suggestion been made, he would have raised an objection. The Commission should not, however, embark on a discussion of the substantive issue.

44. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that the Commission was both adopting the Study Group's report and simultaneously redrafting the text and making it its own, as was only right if the report was to appear in the Commission's report to the General Assembly. Regarding the question of the need for renewed approval from the Sixth Committee, he distinctly recalled that the issue had been raised by Mr. Sreenivasa Rao. As for the relative merits of the words "could" and "should", he would submit new wording to meet the concerns that had been raised. A reference to the relevant General Assembly resolutions from 2000 might also be worth making.

45. Ms. XUE, supported by the CHAIR, said that the current wording reflected the discussions that had taken place in the Working Group on the long-term programme of work. In determining the new topics to be added to the Commission's agenda, the choice had been made from five topics already discussed by the Commission and the Sixth Committee. The fragmentation of international law was one of those five topics, and thus it already had the Sixth Committee's support.

46. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that, in order to take into consideration the different opinions that had been expressed, the paragraph could be amended to read: "Regarding procedural issues, some members questioned whether the topic fell within the Commission's mandate. However, most members thought that this concern was unfounded. Some members raised the issue of whether the Commission would have to seek further approval of the Sixth Committee before taking up this topic. However, most members thought that, in this case, the necessary support of the Sixth Committee could be obtained." After the words "further approval", a footnote could be added referring to the relevant General Assembly resolutions.

Paragraph 8, as amended, was adopted.

Paragraph 9

47. Mr. PAMBOU-TCHIVOUNDA said that he failed to understand the *raison d'être* for the paragraph. The first two sentences appeared to set out a similar idea, while the third mentioned the consequences that the work of the Commission should aim to counter. Did that refer to the negative consequences evoked by the word "fragmenta-

tion”, or to the consequences linked to the risks posed by the fragmentation of international law?

48. Mr. NIEHAUS, referring to the change of title, emphasized that the negative aspect most members of the Working Group wished to avoid was contained in the word “fragmentation”, as reflected in paragraph 9, and had nothing to do with the word “risks”, used in the title of the report by Mr. Hafner. The word “consequences” seemed inadequate, because all legal rules had consequences. If the Commission wished to refer to the proliferation or the fragmentation of international law, it should emphasize that a problem was caused by using the word “risk”, or at least “difficulty”. The point was that the title should underscore the element to be studied.

49. The CHAIR said that the key issues were to be found not in section 1 but in section 2 of the document and that the Commission could discuss the matter further when examining this section.

50. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that the point raised by Mr. Pambou-Tchivounda was justified and the text could be improved by making a slight amendment. The first sentence could remain unchanged, while the second sentence could read: “However, the Study Group considers that the term fragmentation does include certain undesirable consequences of the expansion of international law into new areas.” Then, it would become clear that, even though the Study Group considered that the title of the Hafner report depicted the issue too bleakly, fragmentation did include certain undesirable consequences and the purpose was to deal with them.

51. Ms. XUE said that she agreed with the proposal of the Chair of the Study Group. However, paragraphs 7 and 9 outlined contradictory arguments. The latter referred only to the negative aspects of fragmentation, and the former only to the positive aspects. The paragraphs should be reformulated to make them more consistent.

52. Mr. BROWNLIE said he thought the word “fragmentation” had been rehabilitated during the discussion at the previous meeting. He therefore agreed with the amendment suggested by the Chair of the Study Group, but with the inclusion of the word “may”, so that the sentence would read: “fragmentation may denote...”. Then it would not appear that the Commission presumed that there were necessarily undesirable consequences.

53. Mr. KAMTO proposed that the second sentence should be amended to read: “...reflected certain consequences linked to the expansion of international law into new areas. The work of the Commission would have to be guided by the study of these consequences.”

54. The CHAIR said that members of the Commission understandably did not want to imply that “fragmentation” had adverse consequences, but the object of the study was to find ways to improve the negative consequences of fragmentation, while bearing in mind the need to recognize its positive results.

55. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) proposed that, in view of the comments made, the second sentence of paragraph 9 should be amended to read: “However, the Study Group considers that the term fragmentation may include certain undesirable consequences of the expansion of international law into new areas” and that the third sentence should be transposed to the end of paragraph 7.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

56. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) proposed that, since several members strongly recommended a reference to human rights norms in relation to extradition treaties, the phrase: “for example, extradition treaties and human rights norms,” should be inserted after “conflicting rules of international law existed,” in the second sentence.

Paragraph 11, as amended, was adopted.

Paragraphs 12 and 13

Paragraphs 12 and 13 were adopted.

Paragraph 14

57. Mr. MOMTAZ said that at the previous meeting he had made a linkage between paragraph 14 and the list of proposed topics for possible study. The fragmentation of international law, a result of the case law of international courts, was due not only to a different application of the rules of international law but also to a different classification of the rules of international law. Consequently, the second sentence of paragraph 14 should be amended to read: “or similar rules of international law could be classified or applied differently.”

58. Ms. XUE said that, in view of that amendment, she would withdraw her own proposal regarding paragraph 14, made during the discussion of paragraph 7.

59. Mr. CHEE said that the second sentence of paragraph 14 stated that “international law could be applied differently by judicial institutions”. However, it was judicial institutions that interpreted the law, but it was the executive branch of Government that applied it. Also, there were many law-making bodies in specialized agencies such as ICAO and FAO, so it was not appropriate to confine the reference to judicial institutions. A more inclusive wording such as “law-making body” should be used.

60. Mr. MOMTAZ said that the rationale for paragraph 14 was to emphasize the proliferation of judicial institutions and the Study Group had decided not to deal with

the proliferation as such, but rather with the fragmentation resulting from the case law of judicial institutions.

61. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said he agreed with Mr. Momtaz that the issue of paragraph 14 was the proliferation of judicial institutions; it did not deal with other law-applying or law-making institutions, such as ICAO. In any event, ICJ applied international law to given cases, so he would never have considered that courts did not apply international law.

62. Ms. ESCARAMEIA said that she had drafted the paragraph and had originally referred to “law-enforcement mechanisms”, since it was not only judicial institutions that applied law. However, the matter had been discussed in the Study Group, and it had been pointed out that the issue was simply the judicial institutions and not the mechanisms that applied international law.

Paragraph 14, as amended by Mr. Momtaz, was adopted.

Paragraphs 15 and 16

Paragraphs 15 and 16 were adopted.

Paragraph 17

63. Mr. MOMTAZ said that, in the last sentence, it would be preferable to use the formal title in the reference to the annual meeting of national legal advisers at the United Nations.

64. Ms. XUE said that the meeting of national legal advisers was an informal event that had no specific title. However, it should be specified that the reference was to the annual meeting of legal advisers of States held at the United Nations during the General Assembly.

65. Mr. DAOUDI said that, since the Study Group had agreed that the seminar could be organized at a later stage of the Commission’s work, the beginning of the paragraph should be amended to read: “It was suggested that the Commission organize a seminar at a later stage of its work on fragmentation and that...”, so as not to convey the impression that it was related to the series of studies mentioned in paragraph 21. In his opinion, the seminar should deal with the major reasons for fragmentation, such as the problems of regionalism and the cultural approach to international law.

66. The CHAIR said the English version of the text made it clear that the seminar was simply a suggestion for the time being.

67. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law), responding to Mr. Daoudi, said paragraph 17 simply reflected the ideas that had been aired during the Study Group’s meetings. No reference was made to a seminar in the second part of the report. The matter of the seminar should be taken up at a later stage in the Commission’s consideration of the topic.

Meanwhile, his offer to contribute the first paper to the future seminar held good.

68. Mr. DAOUDI said it should be made clear at the outset that the Commission would organize a seminar “at a later stage”.

Paragraph 17, as amended, was adopted.

Paragraph 18

69. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that paragraph 18 should logically be the last paragraph of section D (Methodology and format of work), rather than the first paragraph of section E (Suggestions as to the possible outcome of the Commission’s work).

Paragraph 18, as amended, was adopted.

Paragraph 19

70. Mr. MOMTAZ drew attention to a discrepancy between the English title of section E and the French translation.

71. Mr. GAJA proposed deleting the word “final”, which had been rendered redundant by the addition of a second sentence to paragraph 19.

Paragraph 19, as amended, was adopted.

Paragraph 20

72. Mr. PAMBOU-TCHIVOUNDA said that if, as Mr. Brownlie claimed, the term “fragmentation” had been rehabilitated, it should perhaps also be resuscitated. Rather than sacrifice the concept of “fragmentation”, which had been totally obliterated by substituting the term “diversification”, and which, furthermore, the Commission had not even attempted to define, the latter should consider incorporating it in the new title for the topic, in addition to, rather than instead of, the term “diversification”. He also had doubts as to the nature of the “difficulties” referred to in the new title. Were those difficulties conceptual, normative or technical?

73. Mr. KATEKA said that a happy compromise, along the lines of the solution adopted in the case of the topic of international liability, might be to add to the title a subtitle in brackets. The full title of the topic would thus be “Fragmentation of international law (Difficulties arising from the diversification of international law)”. A further alternative would be to replace the word “difficulties” by “consequences”.

74. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said the proposal would be acceptable.

75. Mr. GALICKI, drawing attention to some language used in paragraph 9 of the report, said that a more neutral

and comprehensive formulation for the subtitle proposed by Mr. Kateka would be “Consequences arising from the diversification and expansion of international law”. If the word “expansion” was not acceptable, the word “proliferation” could be substituted as a more neutral near-synonym.

76. The CHAIR said that, perhaps for cultural reasons, to his ear the word “proliferation” had a very different ring.

77. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said he strongly advocated retaining the word “difficulties”. The object of the exercise was not to provide a comprehensive overview, running to several hundred pages, of the consequences—positive and negative—of the fragmentation of international law. It was to offer assistance in overcoming any difficulties encountered—in other words, the “toolbox” approach to which he referred in paragraph 21 of the report.

78. The term “proliferation” was one he associated with nuclear and other weaponry. International law could expand; it could diversify; but it could not proliferate. Objects proliferated—witness the Sorcerer’s Apprentice. Courts, too, could proliferate; however, the mind boggled at the prospect of the Commission drafting a non-proliferation agreement on courts and tribunals. In short, the term “diversification” should be retained, with or without an additional reference to “expansion”.

79. Ms. ESCARAMEIA said that, while she could go along with Mr. Kateka’s proposal, that formulation shifted the emphasis back to the negative aspects of the phenomenon. A more balanced formulation, reflecting also its positive aspects, would be “Fragmentation of international law (Difficulties arising from the diversification and expansion of international law)”.

80. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to adopt the new title of the topic in the wording proposed by Ms. Escarameia.

It was so decided.

Paragraph 20, as amended, was adopted.

Paragraph 21

81. Mr. MOMTAZ, referring to paragraph 21 (e), asked why the hierarchy of norms had been limited to treaty law. Personally, in the interests of consistency with paragraph 14, he would have preferred to see the study deal with the hierarchy of norms in general international law.

82. Mr. KATEKA proposed that the words “and ‘contemporary concerns of the community of nations’ (*Shrimp Products* case)”, together with the footnote, should be deleted from paragraph 21 (b).

83. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law), responding to the question raised by Mr. Momtaz, said that the wording “in gen-

eral international law” seemed to exclude treaties. With regard to Mr. Kateka’s point, the first part of paragraph 21 (b) referred to the existence of “relevant rules” such as the advisory opinion in the *Namibia* case; the latter part, with which Mr. Kateka took issue, reflected a proposal several times made in the Study Group by Mr. Gaja, namely that a phrase should be added to cover the question whether those interpreting a treaty could take into account rules that had developed reflecting a major concern of the international community but to which not all parties to the treaty had expressly bound themselves. He was anxious to see that point reflected somewhere in paragraph 21 (b). However, as a compromise, he proposed, first, deleting the quotation marks from the phrase; second, amending the words “community of nations” to read “international community”; and third, either deleting the reference to the *Shrimp Products* case or consigning it to a footnote.

84. Mr. KATEKA said that the proposal of the Chair of the Study Group involving deletion of the reference to the *Shrimp Products* case would be acceptable.

85. Mr. KAMTO said a proposal he had made in the Study Group had been ignored. A subparagraph (f), on interaction and conflicts between the various judicial decisions, should be added to the list of topics for study.

86. Mr. MOMTAZ supported the proposal.

87. Mr. PAMBOU-TCHIVOUNDA said that a subparagraph (g) was also needed, to take account of regional developments.

88. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said he had several problems with the two most recent proposals. If those proposals were adopted, first, the choice of topics to be studied would no longer be guided by earlier work done by the Commission, as was currently stated in paragraph 21; nor would those topics be compatible with the “toolbox” approach he advocated. Second, paragraph 14 currently stated that the Commission should not deal with questions of the creation of or relationship among international judicial institutions. If the proposals were adopted, the “toolbox” approach would cease to be applicable, and the Commission would be unable to avoid becoming involved in the “proliferation” issue. A short reference to the Commission’s awareness of regional developments, and to its intention not to address that issue in the short term, could be included somewhere in the report, though not in the section setting out recommendations. He would prepare an appropriate sentence, together with a proposal for its location, in time for the Commission’s next meeting.

89. The CHAIR asked whether, given that the language of the paragraph referred very loosely to “the following topics, among others”, the Commission could agree to adopt paragraph 21 as a whole, on the understanding that the Chair of the Study Group would produce an acceptable formulation on the question of regional developments in time for the Commission’s next meeting.

Paragraph 21 as a whole, as amended, was adopted on that understanding.

The report of the Study Group on the Fragmentation of International Law, as a whole, as amended, was adopted.

The meeting rose at 1 p.m.

2743rd MEETING

Thursday, 8 August 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue.

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.627)¹

[Agenda item 6]

REPORT OF THE WORKING GROUP

1. The CHAIR informed the members of the Commission that Mr. Sreenivasa Rao had agreed to continue as Special Rapporteur for the second part of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, which was international liability for failure to prevent loss from transboundary harm arising out of hazardous activities.

2. Mr. Sreenivasa RAO (Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law), introducing the report of the Working Group (A/CN.4/L.627), said that in its report the Working Group was proposing

some guidelines for the Commission's work on the second part of the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

3. Some basic ideas were set out in the introduction. First, it had been considered useful to indicate what the relationship of the current endeavour would be to the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.² In the Working Group's opinion, the State's failure to perform the duties of prevention assigned to it under the draft articles on prevention of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-third session³ would entail its responsibility. Furthermore, since harm could occur, even though preventive measures had been taken, it seemed that the core issue consisted in allocating the loss among the different actors involved in the activities that had caused the harm. Even though States should generally be free to authorize desired activities within their own territory, they should ensure that, if harm occurred, some form of relief was available to the victims. Without that assurance, States that could be harmed and the international community might insist that the activities in question should be prohibited.

4. The Working Group had recommended that the scope of the topic should be limited to the activities covered in the part on prevention. In that connection, the question arose of the threshold that would trigger the application of allocation of loss. For some members of the Working Group, the threshold agreed for the articles on prevention ("significant harm") could also be useful for the second part of the topic. However, as was reflected in the footnote corresponding to paragraph 7 of the report, some members of the Working Group had considered that a higher threshold was necessary in order to exclude a multiplicity of small and trivial claims and focus the regime on large-scale harm, which could result in substantial claims for restitution and compensation. It had been felt advisable to seek comments from States on that important point. It had also been decided that the study would deal with losses to persons, property (including elements of State patrimony and the national heritage), and the environment within the national jurisdiction.

5. The next part of the report dealt with the roles of the operator and the State in assuming the loss. The Working Group had agreed that, in principle, the innocent victim should not be left to bear the loss alone; that any regime on allocation of loss must ensure that there were effective incentives for all involved in a hazardous activity to follow best practice in prevention and response; and that such a regime should, in addition to the States concerned, also cover the different elements involved, such as the private sector, insurance companies and funds pooled by the industrial sector.

6. The Working Group had considered that the operator, who had direct control of the activities, should bear the primary liability in any loss allocation regime, since it was

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. VII, sect. C.

² See 2712th meeting, footnote 13.

³ See 2724th meeting, footnote 2.

his responsibility to prepare the work programme, carry out the necessary risk studies, envisage risk-management mechanisms and request State authorization. The State had to notify and inform the interested parties, monitor the situation and, if necessary, authorize the planned activities. Other considerations came into play, particularly with regard to the insurance regime, the establishment by the State of provisions for emergencies or unforeseen situations and mechanisms to cover the costs of restitution and compensation, if harm should occur. In that respect, it had been recalled that the operator might have to internalize any costs that it might eventually have to assume if harm occurred.

7. Nevertheless, in the case of major harm, the operator might not be able to bear the entire loss. Some members of the Working Group had considered that the balance of the loss could be allocated to the State, which would then assume a residual liability. In any case, the State played a crucial role in assessing the risks of a hazardous activity, monitoring the activity in question to ensure that it was carried out in accordance with the prescribed standards and, more importantly, ensuring that effective remedies were available to potential victims. It was not always easy to distinguish between the role of the operator and that of the State when accidents occurred that resulted in large-scale harm.

8. Finally, the Working Group considered that procedures for processing and settling claims of restitution and compensation warranted more thorough discussion. Such procedures included inter-State and intra-State mechanisms for the consolidation of claims, the nature of available remedies, access to the relevant forums, and the quantification and settlement of claims.

9. Ms. ESCARAMEIA said that she fully endorsed the report and would like to make five remarks. First, she welcomed the fact that liability had been recognized as distinct from State responsibility for internationally wrongful acts; second, now that the Commission had examined the question of international liability from the point of view of prevention, she agreed with the decision to look at what happened when harm occurred despite prevention measures; third, she was satisfied that the Working Group had recognized the existence of several actors when harm occurred and that the role of the State had been duly acknowledged, even though there were differences of opinion among the members of the Working Group; fourth, she appreciated the fact that the report raised several important questions without anticipating the result of the Commission's discussions; and, fifth, she considered that the report was interesting because it suggested several avenues of reflection to guide the Commission in its future work on the topic.

10. She had some questions about the mechanisms by which victims could obtain compensation if harm should occur. Normally, the subject of international law was the State; what mechanisms would allow individuals to file an international claim in the State of origin and in the other affected States? The Commission would be breaking new ground by replying to that type of question. Also, she was not convinced that the environment should be included

among the innocent victims, as that would personalize it unduly.

11. Finally, she thought that a questionnaire should be sent to States requesting information on their practice and on their position, particularly with regard to the victims' participation in the procedure, the role of the operator and the State in sharing the loss, and the importance of the global commons.

12. Mr. PELLET said that, in order to be dealt with properly, the topic that the Commission was proposing to study would require technical, economic and financial expertise that the Commission did not have. Even if, in theory, it had the right to call on outside experts for their advice, that might cause practical problems. The topic also did not lend itself either to codification or to the progressive development of the law. By its very nature, the topic required negotiations among States, and the members of the Commission were neither States nor representatives of States. Whether for setting up the necessary insurance schemes for operators, establishing compensation funds or developing funding or cost-sharing mechanisms, it was hard to see how a group of experts that represented only themselves could take on such tasks. Thus, if the Commission insisted on dealing with a topic that went far beyond its competence, it would be wise, in his view, if it confined itself to suggesting ideas and options that might be used on a case-by-case basis.

13. The members of the Working Group had not been wrong to point out in paragraph 4 of the report that specific regimes would be of particular importance in dealing with the topic. They had also noted in paragraph 14 that any residual State liability could arise only in exceptional circumstances. Only in very specific cases, such as damage caused by space objects, had States accepted primary liability. In point of fact, that liability had been accepted under a convention that had been negotiated on the basis of the particular characteristics of the activities involved and it was hard to see how the members of the Commission could decide to generalize a solution of that kind or even, as suggested in paragraph 11, make a determination on the development of insurance schemes or the allocation by States of funds to meet emergencies and contingencies. The dilemma was the following: If the Commission decided to go ahead and take a position on such thorny issues as that of the potential liability of the State or the "polluter pays" principle, it might be moving onto dangerous ground where it would get bogged down at every session. If, on the other hand, it decided not to take a position, it was in danger of turning in circles and getting nowhere.

14. Consequently, if the Commission decided to adopt the report of the Working Group as part of the report of the Commission—something on which he reserved his position—a number of elements should be clarified or improved. In the English text, there appeared to be a lack of consistency between the subtitle, where the word "liability" was used, and paragraph 2, where the word "responsibility" was to be found. It was a simple matter of common sense that, if there was a duty of prevention, failure to respect that duty did indeed entail "responsibil-

ity” in the sense of responsibility for an internationally wrongful act. It would therefore be better, in his opinion, to choose a more neutral title, such as “Consequences of the occurrence of transboundary harm arising out of hazardous activities”.

15. Turning to the body of the text, he said he regretted that in paragraph 4 the consequences of the fact that specific regimes existed had not been fully taken into account. If the report of the Working Group was to be reproduced in the Commission’s report, it might be useful in paragraph 7 (a) to recall, for the benefit of readers, how hazardous activities had been defined in the draft articles on prevention of transboundary harm arising out of hazardous activities. Paragraph 11 brought out very well the fact that the topic did not lend itself to codification. While there was good reason to set up insurance schemes and oblige operators to contribute to funding mechanisms, such measures were not by any means within the Commission’s competence. In that connection, it was not clear what was meant at the end of paragraph 13: Was the liability of the operator limited, or was it strict or absolute? The penultimate sentence of paragraph 14 was a statement of the obvious, namely, that any residual State liability could arise only in exceptional circumstances. That statement seemed, however, to be contradicted by the preceding sentence, which said that, in the view of some members, when private liability proved insufficient, the remainder of the loss should be allocated to the State. In his view, the State’s liability could come into play only following negotiations, and even then the inter-State or intra-State mechanisms for the consolidation of claims mentioned in paragraph 16 were not within the Commission’s competence.

16. In conclusion, he said that the proposed topic was the subject of negotiations between sovereign States and not something that lent itself to the codification or progressive development of international law. The Commission had proved incapable of dealing with it over a period of 28 years, and nothing indicated that it would do better in future.

17. The CHAIR said that, whatever doubts one might have about the topic, the Commission’s hands were to some extent tied, since the Sixth Committee had called on it to push forward with its consideration of the question and had even adopted a decision to that effect.⁴

18. Mr. MANSFIELD reminded Mr. Pellet that the topic was already on the Commission’s programme of work; the members of the Working Group had worked very hard to draft a constructive report, which was, in his view, a good starting point for advancing the discussion in the Sixth Committee. His comment would be primarily from a practical perspective: there was general agreement that “prevention” was the most critical aspect and that an ounce of prevention was worth a pound of cure. No matter how good the prevention might be, however, it was not possible to eliminate the risk of damage entirely, and that was precisely the reason why the Commission was involved in the work it was doing.

19. In that connection, one aspect must not be lost from sight: safe operations were of the utmost concern to operators themselves, since accidents posed a direct threat to the profitability of their enterprises by entailing expenditure on repairs, increases in insurance costs and loss of confidence among customers, *inter alia*. Operators were thus the first to seek to manage risk and would normally expect to participate in loss-sharing mechanisms. If loss occurred, however, despite the best prevention measures, there was a general understanding that the victims should not be left to bear the loss unsupported and that the operators should bear the primary responsibility. It was accordingly inadvisable for operators to realize from the outset that, if they did anything wrong, the State would pick up the pieces. That knowledge would remove part of the incentive for them to manage the risk. As was pointed out in paragraph 14 of the report of the Working Group, residual State liability should arise only in exceptional circumstances, in cases when private liability proved insufficient for achieving an equitable allocation of loss. As Mr. Pellet had pointed out, that was a very complex matter.

20. No matter how difficult the task, however, he was convinced that the Commission could do constructive work and define a number of general principles, even though it was not for the Commission to develop insurance schemes. That was why he fully supported the report of the Working Group, which pointed to ways of moving forward on the topic.

21. Mr. PELLET, replying to the Chair, said he was aware that the General Assembly had adopted a decision urging the Commission to take up the topic. He believed, however, that the Commission had the responsibility to begin by taking a critical look at its own capacities and considering whether the issue really fell within its mandate.

22. Mr. SIMMA said that he too had been rather sceptical about the feasibility of the Commission’s taking up the topic, but that he had become more optimistic after the presentation of the Working Group’s report. He wished, however, to hear the opinion of the Chair of the Working Group and Mr. Mansfield as to whether outside, non-legal experts should be called on at some stage for advice on economic or technical questions. The Chair of the Working Group had not indicated in the report what his intentions were for the next two sessions.

23. Mr. MANSFIELD said that it was probably a bit early to make any decision on that point. It might well be that, if the Commission broached the kind of questions to which Mr. Pellet had referred, it would need to call on outside expertise, whether for authoritative advice or for guidance on areas to avoid.

24. Mr. Sreenivasa RAO (Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law) noted that technical complexities had never prevented the Commission from studying such topics as watercourses or State responsibility, for which it had had to grapple with the problems of quantification, interest and damage. Even if in some areas the Commission needed to call on outside expertise, such assistance should not be impossible

⁴ General Assembly resolution 56/82, para. 3.

to obtain. When the Commission had been working on the question of watercourses, the World Bank had given it extremely valuable technical assistance.

25. Mr. KATEKA said that he did not share the pessimism expressed by Mr. Pellet. The Commission was not trying to reinvent the wheel. Important groundwork had been done on the question by various agencies, including UNEP, not to mention the contributions of previous special rapporteurs. When people wanted to abandon a subject, they often advanced the argument that the Commission lacked technical competence or expertise, but, as the Chair of the Working Group had very rightly said, that had not prevented it from considering subjects on which its expertise might be in some doubt.

26. It was, of course, well known that special regimes for the environment—covering areas such as oil pollution, nuclear accidents and space objects—already existed. There even existed a number of agreements and conventions on the topic, but it was interesting to note that many of them had not yet entered into force. He wondered whether the reason might not be that they were too ambitious and did not adequately address some of the realities of insurance and compensation. It was to be hoped that the Commission would examine some of those issues carefully so as to stimulate the interest of Member States. The topic might also give it the opportunity to resume consideration of other environmental problems that it had been forced to abandon in the past, following unfavourable feasibility studies.

27. With regard to the report, the subtitle was particularly well chosen, since it brought out the link between the prevention and the liability aspects of the topic, which the General Assembly had endorsed. As for the scope of the study, one of the subjects that should have appeared in the list contained in paragraph 7 (c) was the “global commons”. It would also be helpful to speak of environmental damage rather than loss, since damage was associated with the possibility of compensation. Environmental damage was, however, often irreparable. In many cases, financial compensation could not provide reparation, and it was sometimes better to allow natural processes to do their job than to embark on a cleaning-up exercise. It was to be hoped that the Special Rapporteur would explore the question of defining environmental damage, despite the doubts that had been expressed about the Commission’s lack of expertise. With regard to the role of the operator and the State, he shared the view that the operator should be primarily liable in any regime of attribution of losses, while the State had a residual responsibility. It was a step in the right direction.

28. Finally, he said that, while the experts fought over their competence, the degradation of the environment continued. He hoped that, with the World Summit for Sustainable Development to take place shortly in Johannesburg, the Commission would help to establish a framework to ensure that the environment would be saved.

29. Mr. GAJA congratulated the Chair and the members of the Working Group on the suggestions they had made in the report. The subtitle of the study proposed by the Working Group, however, posed a problem. When the Com-

mission had drafted the articles on prevention of transboundary harm arising out of hazardous activities, it had assumed that activities that could produce transboundary harm were lawful *per se*, but that did not exclude a State’s obligation of prevention in the territory in which the activities took place. In draft article 1, such activities were described as not being prohibited by international law, irrespective of the obligation to prevent harm. The injurious consequences arising out of such non-prohibited activities could thus be due both to activities taking place when the obligation of prevention had been fully complied with and to activities which were lawful *per se* but constituted infringements of that duty of prevention. In the latter case, an internationally wrongful act had occurred, since there had been a failure to comply with the duty of prevention. On the other hand, activities which were not prohibited by law and were carried out in compliance with the duty of prevention, but which nonetheless resulted in harm, were activities for which the term “failure to prevent loss” did not seem appropriate: it gave the impression of non-compliance with a duty. He therefore suggested wording even more neutral than that suggested by Mr. Pellet, along the following lines: “International liability in case of loss from transboundary harm arising out of hazardous activities”.

30. In the report, the Working Group did not address the question of the nature of the end product of the Commission’s work. The Commission might be heading for a framework convention establishing substantive rules concerning liability, whether that of private operators or that of States. Such a regime would be viable only if all the States concerned were bound by the convention. Should that not be the case, an operator could face additional claims for the same loss in a State not party to the convention. He would not be protected by the ceiling hinted at in paragraph 13. Moreover, a State would naturally be unwilling to contribute to making good a loss for the benefit of another State, if it was not assured that the other State was similarly liable in a reciprocal situation. A precise definition of the scope of application of such a convention and the adoption of rules of jurisdiction would be major factors in persuading States to accept being bound by such an instrument.

31. Unlike the draft articles on the prevention of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-third session, the rules envisaged in the Working Group’s report could not be converted into rules of general international law. They would apply only if States were bound by a convention embodying them. The novelty of the exercise therefore lay not only in the substantive elements contained in the rules on liability, but also in the attempt to write a draft treaty regime that could function only if a large number of States agreed to be bound by it. If the Commission was in a position to undertake the task, it should provide some clarification as to the end product envisaged, in order not to give the impression that it was adopting general rules of the same kind as those adopted at the previous session. It could only sketch out a draft regime, on the basis of which States would negotiate with a view to drafting either a general treaty or several specific treaties relating to areas not yet covered for the kind of harm currently under consideration by the Commission.

32. Mr. KAMTO thanked the Chair and the members of the Working Group for the fact that, in their report, they had defined the focus which should enable the Commission, if all its members got down to work, to hold more in-depth discussions of such a complex and technical topic and, on the basis of existing international legal instruments, to formulate a set of principles of international law, which might, as Mr. Gaja had suggested, lead to a framework convention. In any event, it would be for States to decide on the final form the Commission's work would take.

33. He supported the amendment to the title of the study proposed by Mr. Pellet. It would be better, however, not to refer to hazardous activities but to activities not prohibited by international law, because the purpose was to study the question of unforeseeability, not the question of non-prevention, which was part of the classical regime of State responsibility, as discussed by the Commission at the preceding session, not of the regime of liability. When it was stated that prevention was ineffective or insufficient, that could come under liability, but the problem could also be approached from the viewpoint of the classical regime of responsibility when a State had not taken all of the measures required by an obligation of means. In such a case, responsibility could be said to exist, and the distinction between obligations of means and obligations of result would be relevant. In actual fact, the regime that the Commission intended to draft related to activities not prohibited by international law, whether they were hazardous or not.

34. Paragraph 3 of the report raised the problem of unforeseeability, and it might be asked whether that question should not be dealt with in connection with the principle of precaution, assuming that that principle was at present regarded as a rule of international law. The Commission, which had not discussed the principle of precaution in enough detail at the last session, should now determine how it differed from the principle of prevention. If the principle of precaution existed as a rule of international law, that would have an impact on the way in which the Commission conducted its study.

35. In that connection, the three points indicated in paragraph 7 of the report for consideration as part of the study should be further elaborated on in the light of the comments made by Mr. Kateka on environmental protection. In addition, activities not prohibited by international law should not be considered only from the point of view of prevention but also comprehensively, so as not to fail to meet the expectations of the Sixth Committee.

36. Mr. PELLET, noting that now was not the time to question the principle of precaution, said that at the preceding session the Commission had perhaps missed an opportunity to consider the very real links between that principle and the principle of prevention. Even though the principle of precaution did not appear in the draft articles on prevention, it was mentioned in the commentaries. It might well be a topic that the Commission could study.

37. Perhaps the Chair of the Working Group could explain whether "international liability for failure to prevent

loss from transboundary harm arising out of hazardous activities" was a title or a subtitle, because, if it was a subtitle, Mr. Kamto's proposal was far from obvious, since the title already indicated that the topic was "international liability for injurious consequences arising out of acts not prohibited by international law". The Commission had spent about 15 years trying to define the scope of the topic. It had finally decided that the study should initially be limited to hazardous activities. It would therefore be wiser to study that question in depth before considering activities which did not involve any particular danger.

38. He also wished to know why the English version of the title referred to "loss" rather than to "damage", and why the word "loss" had been translated into French by the word *sinistre* rather than by the word *dommages*.

39. Mr. KAMTO drew the attention of the Commission to paragraph 5 of the report, where the Working Group recognized the fact that States should be free, within reasonable limits, to authorize activities that they wished on their territory, under their jurisdiction or under their control, even if these activities could cause transboundary harm. Such a sentence would be significant if the precautionary principle existed in international law. For this reason he thought there might be reason to examine this principle, whatever form this examination might take.

40. Mr. TOMKA said that the Commission should bring its terminology into line with that used at the preceding session and that, in French, the words *sinistre transfrontière* should be replaced by the words *dommage transfrontière*.

41. Mr. SEPÚLVEDA said that he joined in congratulating the Working Group and its Chair and, like Mr. Mansfield, Mr. Kateka and the Chair of the Working Group, was glad that the Working Group had prepared a positive report and had tried to break new ground rather than simply referring to obstacles and problems.

42. The Spanish title of the topic should be brought into line with the title in English and French. He was not sure whether the Spanish word *empresa* corresponded to the words "operator" and *exploitant* in English and French. It should also be explained what was meant by *patrimonio nacional* (State patrimony) and *patrimonio del Estado* (national heritage).

43. With regard to substance, the Commission had to try to find wording designed to share the burden of the loss resulting from harm among the various operators involved in the activity. In that connection, three main questions must be asked: Who had authorized the activity, who had managed it and who had benefited from it? The State played a key role, since appropriate domestic and international systems had to be established to allocate the loss fairly.

44. The question of the residual liability to be attributed to the State in the event of harm also had to be properly studied. Although the operator had to be primarily liable in any loss allocation system, it might, in some cases, not be able to afford to react, and the liability of the State which

had authorized the activity must then be implemented. Finally, it was essential to establish machinery such as that referred to in paragraph 16 of the report of the Working Group, as well as procedures guaranteeing reparation or compensation so that an innocent victim would not have to bear the loss alone.

45. Mr. BROWNLIE, congratulating Mr. Sreenivasa Rao on having agreed to be Special Rapporteur for the topic, said that initially his own position on the question of liability had been similar to that of Mr. Simma and his attitude had been one of scepticism verging on hostility. The early version of the draft articles on the liability topic had, moreover, caused a great deal of misunderstanding, which probably persisted in the Sixth Committee. His views had changed once the work on prevention had been successfully completed, and he had been converted to the idea that the Commission could study several autonomous but nonetheless related topics which would not simply be a *doppelgänger* of State responsibility. One of the reasons he had wanted to be a member of the Working Group was to protect State responsibility from new sources of confusion. It was important to try to appreciate that the prevention topic was about management of risk and that the Commission had now entered the next stage in its work. What separated the prevention topic from State responsibility was that there was a new and separate basis for claims. There was also a separate procedure, and ultimately there might be a multilateral framework agreement and some multilateral mechanism for the weighing up of claims for damage caused.

46. Mr. PAMBOU-TCHIVOUNDA said that the topic was new, but not really new, and that that ambiguity might explain why it had been dealt with unfairly in the report under consideration, as was shown in the paragraphs on the scope of the topic, some aspects of which seemed to have been overlooked, but also by the emphasis which had been placed on the fact that the regime focused on two actors, the operator and the State. That inequality was also apparent in paragraph 16, which raised questions that had not been considered at all in the report, even though they were at the heart of the matter. A system of reparation had to be organized, and, if the term “liability” actually referred to reparation, then reparation must be understood as the implementation of liability. That would help explain why the Chair of the Working Group was trying to establish a connection between the work being done now and the work on prevention, on which 19 articles had been adopted. If that was true, the report of the Working Group called for two general comments. The first was that the exercise related to mechanisms for the implementation of liability for failure to prevent transboundary harm, and he wondered whether such mechanisms should not be seen, within the meaning of the general law of the international liability of the State, from the viewpoint of compensation in the event of a breach of an international obligation of prevention. Article 19 of the draft articles on prevention of transboundary harm arising out of hazardous activities, relating to the settlement of disputes, covered practically every possible case imaginable, and it was perhaps in that type of provision that a solution to the questions that arose might be found. Article 19 should therefore focus on ways of dealing with the technical aspects of the topic. In the report of the Working Group, the section on scope was

incomplete, and that was where the relationship between the draft articles on prevention and the work being done now should be explained. In his preliminary report, perhaps the Special Rapporteur could give a more detailed description of the scope of the topic that focused more on the relationship with prevention.

47. The report of the Working Group also did not contain clear-cut indications on the regime of reparation. That question was dealt with too briefly, since the entire focus was on the operator and the State. A number of problems arose in that regard. In the case of the operator, for example, paragraph 10 of the report referred to basic concepts, such as direct control, without any explanation. Did “renovation” mean *restitutio in integrum* or a return to the *status quo ante*? Those were basic questions that required clarification.

48. As far as the role of the State was concerned, distinctions were made implicitly, as in the case of the distinction between the primary liability of the operator and the residual or secondary liability of the State. Paragraph 14 gave no indication of the consequences of such a distinction. Similarly, the question of the status of the State as an operator was a matter for the internal law of States, and it was to be hoped that in his preliminary report the Special Rapporteur would give the indications on that point, or at least on the main systems governing the role of the State as an operator. The issues referred to in paragraph 16 of the report of the Working Group should also be elaborated on so that the Commission could give the Special Rapporteur guidance for his future work.

49. Mr. CANDIOTI said that in Spanish the subtitle of the topic in parentheses was confusing and that, on the basis of what Mr. Gaja had suggested, it should be amended to read: *Responsabilidad en caso de daño transfronterizo resultante de actividades peligrosas*. It was too early to decide what form the final results of the Commission’s work might take.

50. Ms. XUE said that liability for damage to the environment was a very complex question in both internal law and international law. Since the United Nations Conference on Environment and Development (Rio de Janeiro, 3–14 June 1992), there had been far-reaching changes in environmental law, and it was therefore not surprising that the Sixth Committee should have requested the Commission to study the topic of international liability for transboundary harm after it had completed its work on prevention.

51. The main question was whether strict liability could generally be established for environmental harm. It must be asked whether, when a State carried out hazardous activities which might cause transboundary harm, it could have increased liability, even when it had fulfilled its obligations of prevention. In that connection, the Commission should focus on two aspects of the question: how to develop the “polluter pays” principle in international law, and what the role and responsibility of States would be in that regard. Ultimately, international liability for transboundary harm was a question of compensation for loss and sharing of resources; in economic terms, it might be referred to as “corrective sharing of resources”. That

process had not only legal but also political and economic implications. There were systems for the allocation of liability, for example, in the fields of nuclear power, outer space, shipping and the international carriage of dangerous goods. The mechanisms provided for under such regimes could serve as a basis for the Commission's study, even if many of them were not international but regional and, in particular, European and North American. The Working Group had taken account of those regimes and of the questions which would have to be dealt with later; Mr. Gaja's comments in that regard were very constructive. Whatever form the results of the Commission's work took, the two main questions were whether those results would meet the needs and expectations of States and the international community, and to what extent States would accept them as international rules.

52. The CHAIR pointed out that the Commission had not yet officially appointed Mr. Sreenivasa Rao as Special Rapporteur for 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) and that it still had to do so. He therefore took it that the Commission did want to appoint Mr. Sreenivasa Rao as Special Rapporteur for that topic.

It was so decided.

The meeting rose at 1 p.m.

2744th MEETING

Friday, 9 August 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue.

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.627)¹

[Agenda item 6]

REPORT OF THE WORKING GROUP (*concluded*)

1. The CHAIR invited Mr. Sreenivasa Rao, Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law and Special Rapporteur, to make a clarification concerning the title of the item.

2. Mr. Sreenivasa RAO (Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, Special Rapporteur) said that the bracketed words "(International Liability for Failure to Prevent Loss from Transboundary Harm Arising out of Hazardous Activities)" appearing as part of the title of the report of the Working Group (A/CN.4/L.627) formed a subtitle to the item. As to the wording of the subtitle, the words "for failure to prevent" had given rise to difficulties in the Working Group particularly in the light of the Commission's wish to avoid any linkage of the item with issues of responsibility and prohibition that it had considered in the past under other agenda items. Accordingly, Mr. Gaja had suggested that those words should be replaced by the words "in case of". The new subtitle would thus read "(International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities)".

3. The CHAIR said that, if he heard no objection, he would take it that the proposed subtitle was acceptable to the Commission.

It was so decided.

4. Mr. CHEE said that, given the prominence environmental issues had assumed since the 1992 United Nations Conference on Environment and Development and the continuing evolution of international law in that field, he was strongly in favour of the Commission's proceeding with work on the item under consideration with a view to developing a convention.

5. Mr. AL-BAHARNA said that the subtopic of prevention of transboundary harm from hazardous activities, on which the Commission had completed work at the previous session,² would be incomplete if the question of liability for transboundary harm affecting the territory of another State was not pursued. It had been approved by the General Assembly,³ and there was no reason why the Commission should not attempt to bring it to a satisfactory conclusion in the form of draft articles that could ultimately take the form of a framework convention integrating the two subtopics of prevention and liability. The liability issue was a useful and worthwhile exer-

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. VII, sect. C.

² See 2724th meeting, footnote 2.

³ See 2743rd meeting, footnote 4.

cise, and the report of the Working Group offered a good starting point for further work by the Commission.

6. It was not clear from paragraph 2 of the report how there could be an understanding that “failure to perform duties of prevention addressed to the State in terms of the earlier draft articles on prevention” entailed State responsibility. The draft articles should contain a specific provision to that effect; thus far, however, he could see none.

7. In paragraph 3 the verb “prove” should be in the past tense, and the word “and”, in the last sentence of the paragraph, should read “the”. In paragraph 5, the words “for example compensation” should be amended to read “such as restoration and/or compensation”, to make the paragraph consistent with paragraph 10. He agreed with the statement in paragraph 6 that harm done to the environment in the areas beyond national jurisdiction should be excluded from the topic, for the reasons given in that paragraph.

8. The words “it is understood”, in paragraph 7, should be changed to the stronger formulation “it is agreed”. Moreover, the threshold in paragraph 7 (b) should be determined in favour of significant harm, in order to be consistent with the subtopic of prevention, and so as to avoid wasting time on determining a different threshold for allocation of loss caused—a task that was likely to prove very difficult, given the difficulty the Commission had experienced in reaching an agreed conclusion on the expression “significant harm”.

9. The issue of the detailed distribution of loss between the operator and the State or States concerned, as reflected in paragraphs 10, 13, 14 and 15, was likely to prove one of the most difficult aspects of the topic. Moreover, in line with the principle of “equitable loss allocation” referred to in paragraph 14 and the principle that the innocent victim should not be left to bear the loss, proclaimed in paragraph 9, the residual State liability should definitely arise in all circumstances, not just in exceptional circumstances, as was felt by some members of the Commission.

10. Mr. ADDO said that the liability topic had had a chequered history, and that at one time it had been in real danger of sinking into oblivion. Whatever the reason, it had been an unloved child for some members. Thanks, however, to the superb handling of the topic of prevention by the Special Rapporteur, the topic of liability had been resuscitated in the form now before the Commission and, as such, constituted a natural sequel to the topic of prevention. This was a welcome development. Being a realist, however, he feared that the development of the topic in its present form would lead to problems. He drew consolation from the fact that the Special Rapporteur had left the Commission in no doubt as to his capacity to travel the long and tortuous road ahead. It was also reassuring that some previous opponents of the topic had now been won over. Finally, he would lend his weight to the adoption of the report.

11. Mr. FOMBA said that, although some members advocated that the Commission should abandon its consideration of the topic, it was too late to adopt that course,

for a number of reasons: first, the request made by States in paragraph 3 of General Assembly resolution 56/82; second, the Commission’s long-term, albeit sometimes uncertain, involvement in the process of finding the best way to approach the topic; and third, the fact that work on the subtopic of prevention had been completed, together with the need to clarify the relationship between the topic and that of State responsibility. Two reactions were possible: either it could be considered that everything boiled down to the question of breach of the obligation of prevention—in which case there was nothing further to discuss; or else that view could be rejected, in which case it would be necessary to define carefully what the present topic had to offer over and above the results of the prevention subtopic. Most members of the Commission seemed to take the latter view.

12. In his opinion, the Working Group’s report offered a good basis for further reflection. The Working Group proposed some sound principles to guide the Commission’s future work on the topic. Paragraph 3 helped to delineate the boundary between the two topics of international liability and State responsibility; paragraph 4 highlighted the useful concept of allocation of loss; paragraphs 6 and 7 recommended limiting the scope of the remainder of the topic to the activities that had been covered under the topic of prevention; and paragraphs 9 to 15 set forth a number of useful principles. As to the additional issues referred to in paragraph 16, provided no insuperable technical problems arose, they, too, were worthy of consideration. All in all, the Working Group’s preliminary conclusions were a step in the right direction and struck a proper balance between the various interests involved—a balance that, however, must not be allowed to jeopardize the effectiveness of the regulatory system that was to be established. The Commission must now pursue its consideration of the topic so as to respond positively to States’ expectations.

13. Mr. DAOUDI said the report of the Working Group revealed that the topic had potential for further development, in accordance with States’ wishes, to be expressed at a later date. He would have liked to find some mention, in the introduction to the report, of the decision to treat liability for failure to prevent loss as a separate issue. Furthermore, the report dealt in depth with only one situation in which liability might arise as a result of hazardous activities, namely, the situation in which an operator and the State were involved. In that case, the liability of the State was described as residual. However, the case in which the State was itself the operator was alluded to only indirectly, in paragraph 5 and at the end of paragraph 15. That situation should have been given fuller treatment in the report. Last, the additional issues enumerated in paragraph 16 were clearly of the utmost importance. However, the direction that the Commission’s future work on the topic took would depend on the reactions of States in the Sixth Committee.

14. Mr. MOMTAZ asked the Special Rapporteur whether the property referred to in paragraph 7 (c) as “national heritage” was confined to tangible property or also included intangible property. That question was currently on the agenda of UNESCO, and the expression “national heritage” should thus be more clearly defined.

15. Mr. Sreenivasa RAO (Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, Special Rapporteur) said that no detailed discussion of the scope of the term had taken place in the Working Group. It had been felt, however, that the term “property” would not cover certain priceless works of art, or national treasures to which no precise economic value could be assigned.

16. Mr. BROWNLIE said it had been felt that the loss caused by transboundary harm should not be restricted to certain forms of property. The original term, “environment”, had not been entirely comprehensive; the current wording might, however, eventually need further refinement. Some movables, while not part of national territory, were part of the national heritage, and the law applicable to them was public international law. The agreement between Egypt and the United Kingdom in respect of the transport of the Tutankhamen exhibition items was one example; the Cambodian claim in the *Temple of Preah Vihear* case was another inasmuch as it also related to steles and other movables removed by the respondent State.

17. Mr. KABATSI said that, for the many reasons given by other members, with all of which he agreed, he fully supported the idea that the Commission should take up the topic on the basis of the contents of the Working Group’s report. He had always been firmly of the view that, wherever loss and/or injury ensued as a result of an activity of others, whether national or international in origin, carried out in pursuit of gain or profit, compensation to the innocent victim should, in fairness and justice, logically be expected and should follow. It should not matter that the conduct of the activity was itself lawful, as long as there was an innocent victim of the gain- or profit-seeking activity. In that spirit he supported and welcomed the report of the Working Group.

18. The CHAIR said that, in the light of the value of the debate on the report of the Working Group, the Commission might wish, as an exception to its usual procedure, to adopt the report of the Working Group in its entirety, rather than paragraph by paragraph.

It was so decided.

The report of the Working Group, as a whole, was adopted.

19. Mr. Sreenivasa RAO (Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, Special Rapporteur) said that, following the adoption of the Working Group’s report, he wished to thank all who had participated in the discussion. Very useful comments had been made: the difficulties of pursuing the subject had been identified, and the dangers of setting unduly high expectations signalled. Although much more work could be done, essentially there was a consensus that providing the necessary relief, expeditious justice and appropriate compensation to innocent victims of hazardous activities in a transboundary context should be given high priority.

20. The topic certainly involved considerations of policy development, economics and the quantification of claims, entirely aside from the issues of jurisdictions and forums. There were limits on the extent to which the Commission could pursue many of those matters, given the fact that it was a legal body with its own mandate and did not have the requisite expertise in certain areas. Even without having a specialist’s knowledge of science, economics or mathematics, however, a lawyer could still successfully speak about them in pleading a case before a court.

21. There was much room for collective thinking: the work on the topic was by no means the responsibility of the Special Rapporteur alone. He would welcome every suggestion, as long as it was made in a constructive spirit, all the more so as the topic had been around for over 25 years and had been plagued the entire time by crossed connections and needless expectations. The many suggestions made on substance could be taken into account in good time. Procedural matters would play a crucial role as well, but the Working Group’s view had been that since substantive issues had been intermingled with procedural ones for so long, they had first to be sorted out before the work could go further. That was exactly what had been done.

22. He was sure that, after the matter was discussed in the General Assembly, the scheme for further work would be fully developed, with a view to discharging the Commission’s mandate.

Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/L.629)

[Agenda item 10]

REPORT OF THE PLANNING GROUP

23. Mr. CANDIOTI (Chair of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.629), said it was divided into five sections dealing with the main issues on the Planning Group’s agenda. He drew attention to editing changes to the French and Spanish versions of paragraph 10 and to the titles of certain topics listed in the work programme for the period 2003–2006, annexed to the document. Last, he thanked all the members of the Planning Group for their efforts and the Secretariat for its assistance.

24. Mr. GAJA said that, in the title and text of paragraph 10, “honorarium” should read “honoraria”. In the last sentence of the text in that paragraph recommended for inclusion in the Commission’s report to the General Assembly on the work of its fifty-fourth session, the words “The members of” should be inserted before “The Commission”, since the members, not the Commission, received the symbolic honorarium mentioned there.

It was so decided.

25. Mr. MANSFIELD said that the Planning Group's report was satisfactory and that, without wishing to reopen debate, he wanted merely to offer a suggestion. The third sentence of paragraph 7 referred to a proposal made in the Planning Group by Mr. Pellet and Ms. Escarameia, one aspect of which had related to more balanced gender representation among Commission members. While he understood the reasons why it had not been adopted, it might nonetheless be appropriate to insert some form of language, in paragraph 7 or elsewhere, to reflect the spirit of the proposal. Such a text might read: "The Commission welcomed the fact that, for the first time, its membership included two women, and it noted with appreciation the contribution they had made at this first session of the new quinquennium. The Commission was further pleased to note that the number of women of recognized competence in international law was increasing all the time. It considered that this development was likely to be reflected in the nomination and election process for the next and subsequent quinquennia." The proposal contained nothing substantive. It was merely a series of statements of fact which, he thought, would reflect the sentiment in the Commission.

26. Mr. Sreenivasa RAO said that, while welcoming and supporting the proposal, he did not believe the Commission should single out its two women members for commendation. They had joined the Commission on their own merits, and their participation had provided added value in the Commission's work. An increase in the number of women on the Commission would be a welcome development.

27. Mr. KABATSI said he supported Mr. Mansfield's proposal, which was factually correct. He too thought it was important to acknowledge the entry of women into the ranks of the Commission and the contribution they had made.

28. Mr. SIMMA said he strongly supported the timely proposal by Mr. Mansfield. On the other hand, he agreed with the Chair of the Working Group that a separate commendation of the women members might have a slightly patronizing overtone. That part of the text proposed by Mr. Mansfield should perhaps be deleted.

29. Mr. KATEKA, commending Mr. Mansfield for drawing attention to issues raised by Mr. Pellet and Ms. Escarameia, said that he too had made a proposal, on the rotation of geographical distribution of seats on the Bureau, that was likewise reflected in paragraph 7 of the Planning Group's report. There seemed to be no basis in logic for the fact that, at the start of every quinquennium, the Chair of the Commission came from a specific regional group, and at the end, from another specific group. No support had been given for his proposal, a conservative stance that he had accepted.

30. While endorsing Mr. Mansfield's proposal, he would prefer to see it speak not of "two women" but of "some women", in keeping with the general United Nations practice of not citing the number of speakers in favour of or against a proposal. The proposal might also be expanded

to indicate that the addition of women to the Commission's membership was a first step towards gender mainstreaming to reflect the realities of the contemporary world.

31. Mr. OPERTTI BADAN said that, without wishing to detract from the merits of Mr. Mansfield's proposal, he agreed with the remarks made by the Chair of the Working Group and Mr. Simma. It was rather patronizing and indeed absurd to congratulate the women members of the Commission on anything other than their merits as jurists. Their presence should be presented as a new development, nothing more.

32. Mr. PELLET said that the second sentence of Mr. Mansfield's proposal was indeed condescending and paternalistic. As to the remainder of the text, there was good reason for the Commission to welcome the presence of women among its members, but he was not sure the report of the Planning Group was really the best place to express those sentiments. Paragraph 7 of the Group's report should be retained unchanged and Mr. Mansfield's proposal incorporated elsewhere in the Commission's report to the General Assembly on the work of its fifty-fourth session.

33. Regrettably, the Planning Group had failed to take up not only his proposal on balanced gender representation but also his proposal on partial renewal of the Commission's membership. He continued to believe that partial renewal would be preferable to the present full renewal, which seemed, incidentally, to have created problems at the present session.

34. Mr. KAMTO said he supported the idea of expressing the Commission's appreciation for the participation in its work of its two women members and of saying that it was to be hoped that their election would be the start of a new trend. The text proposed went a bit too far, however, and could have an adverse impact. Nominating women as candidates fell within the sovereign rights of States, and it was not for the Commission to meddle in their choices of candidates.

35. Mr. BROWNLIE said that he was not strongly opposed to Mr. Mansfield's proposal but fully agreed with Mr. Kamto that it sounded somewhat patronizing. The report should simply indicate that the Commission had noted with satisfaction the participation of women in its work and urged Governments to take account of that new development when nominating candidates in the future.

36. Mr. GALICKI said he supported the substance of Mr. Mansfield's proposal but thought the form was slightly inadequate. It was not the Planning Group but the Commission that should express satisfaction at the involvement of women in its work. He accordingly agreed with Mr. Pellet that the text should be inserted elsewhere in the Commission's report to the General Assembly on the work of its fifty-fourth session, perhaps under "Other matters".

37. Mr. AL-BAHARNA said he agreed with Mr. Galicki and Mr. Pellet that the report of the Planning Group was not the proper place to include the text of Mr. Mansfield's

proposal. He endorsed the first sentence but would prefer the last two sentences not to be incorporated. Again, it would be remembered that the presence of women on the Commission had been welcomed at the very start of the session.

38. Ms. ESCARAMEIA said that, having been one of the few to have supported Mr. Pellet's proposal, obliquely mentioned in paragraph 7, which had been withdrawn for lack of support, and having subsequently tried to introduce an amendment to article 8 of the Commission's statute to urge electors to bear in mind a number of criteria for nomination to the Commission, including gender balance, she warmly welcomed Mr. Mansfield's proposal. Some fault could, however, be found with the wording: the reference to the contribution by the new women members might not be endorsed by all members, and in any case the sentiment might appear patronizing, implying that the Commission was primarily a body of men that had welcomed, as outsiders, two women, whom the men were assessing. The reference in the second sentence to the fact that the number of women of recognized competence in international law was increasing was not necessarily accurate: there had probably always been as many such women, but they had not been given access to the positions in which they had had the opportunity to be nominated for the Commission by Governments. By far the most important sentence was the last, which said that the increasing role of women was likely to be reflected in the nomination and election process for the next and subsequent quinquennia. It was not a revolutionary remark but a mere statement of fact, she hoped. In a world where women in fact outnumbered men, the Commission should keep pace with developments. She drew attention to the rules for the election of judges to the International Criminal Court, in which it would be compulsory to vote for six women when there were a certain minimum number of female candidates. As for where in the report Mr. Mansfield's amended proposal should appear, she agreed that some more appropriate place could be found, perhaps among the conclusions. She truly appreciated Mr. Mansfield's efforts and commended him for them.

39. Mr. KEMICHA commended the wisdom and dignity with which Ms. Escarameia had spoken. For his part, he was glad that the Commission included women, but he saw no need for the report to dwell on the fact. The two women were simply members like the rest, playing an appropriate role within the Commission. To lay too much stress on their role would come across as patronizing. It was a fact of life—one which he welcomed—that an increasing number of women were active in international bodies, and the Commission should accept that for the normal development that it was. He therefore endorsed Ms. Escarameia's comments.

40. Mr. PAMBOU-TCHIVOUNDA pointed out that the two women members had not sought any special favours or recognition. They should be treated, as they were entitled, as nothing more or less than members of the Commission. He found Mr. Mansfield's proposal thoroughly inappropriate and would be unable to support its adoption. The feeling within the Commission would be represented far more faithfully if the following phrase were added at

the end of the third sentence of paragraph 7: "as an extension of the trend initiated when the membership of the Commission was renewed at the election in 2001".

41. Mr. SIMMA expressed a strong preference for retaining Mr. Mansfield's proposal, as amended, rather than that just proposed by Mr. Pambou-Tchivounda. He himself was exercised about where it should appear. The report of the Planning Group was clearly an inappropriate place, but he would be reluctant to see the text buried under the anonymous heading of "Other business". The issue was of sufficient importance to merit a separate entry.

42. The CHAIR said that it might appear under a sub-heading of agenda item 13 (Other business), which would respect the logic of where it was located but would not trivialize the issue.

43. Ms. XUE said that the discussion should end forthwith: the more she heard, the more she felt herself to be in a man's world. The question was surely not that the Commission was "welcoming" women members; rather, the women carried out their work as people, without a constant awareness that they were women among men. They had been elected not for their gender but for their competence. The wording of paragraph 7, as it stood, was unfortunate, since it did not identify precisely what measures to achieve more balanced gender representation had been put forward; women's groups would be dismayed by such phrases as "extremely difficult to implement in practical terms". She therefore warmly welcomed Mr. Mansfield's proposal, although she would prefer to have the complimentary reference to the women's performance omitted: the two women members were, like other members of the Commission, simply doing their duty.

44. The CHAIR, supported by Mr. TOMKA, said that he detected a large measure of agreement within the Commission that Mr. Mansfield's proposal should be adopted, in an amended form, but should appear in another part of the Commission's report. He suggested that Mr. Mansfield should make the suggested amendments and consider where his text would be best placed.

45. Mr. KAMTO, referring to the second sentence of paragraph 8, said it was not entirely accurate from the historical point of view to say that the "mini-debates" were an innovation in the Commission's working methods. Summaries of its discussions on the law of treaties in the 1950s showed that the practice had existed even then.

46. The CHAIR said the term "innovation" was acceptable because the mini-debates had been a departure from the previous practice in which statements were programmed in advance. They enabled members to respond rapidly to a specific part of a statement, to bring up facts, issues or questions relating to a single point immediately after it was made rather than waiting for all other speakers on an item to have spoken.

47. Mr. KAMTO said that, with all due respect, he had documentary evidence that bore out the historical point he had made.

48. Mr. PELLET said that, to flesh out the bare bones of paragraph 6, he would favour an additional sentence along the following lines: “At this stage, the work was of a purely preliminary nature.” Otherwise, the Working Group had very little to show in the way of progress. Paragraph 7 he would retain without amendment. As for the “mini-debates” mentioned in paragraph 8, Mr. Kamto was correct up to a point: in the remote past, when the Commission had had only 11 members, “mini-debates” had taken place. The practice had, however, lapsed completely. It was therefore fair to call it innovative in paragraph 8. Regarding paragraph 10, he supported Mr. Gaja’s comment that the last paragraph of the text drafted by the Planning Group should read “The members of the Commission, concerned...”. The issue of the plural of “honorarium” did not arise in French, but since the honorarium amounted to only US\$ 1, it might be more appropriate to use the word in the singular.

49. Mr. KAMTO suggested that, in the interests of complete accuracy, the word “recent” could be inserted before the phrase “working methods of the Commission” in paragraph 8.

50. Mr. CANDIOTI (Chair of the Planning Group) said that the English text of paragraph 6 already met the concern expressed by Mr. Pellet, for it used the phrase “progress report”. He endorsed the suggestion that the first words of the last phrase of the proposed text in paragraph 10 should be reworded to read “the members of the Commission”.

51. Mr. SIMMA expressed concern that the annex had reproduced abbreviations, such as IL for “international legal”, that he had jotted down for later typing; and his handwritten word “treaties” had been misread and mistyped as “notices”.

52. The CHAIR, after confirming that such items could be regarded as minor editing changes and that Mr. Simma could make them without further reference to the Commission, said that he took it that the Commission wished to adopt the report of the Planning Group, as amended.

The report of the Planning Group, as amended, was adopted.

Cooperation with other bodies (concluded)*

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE
COUNCIL OF EUROPE

53. The CHAIR extended a warm welcome to Mr. Rafael Benítez, Secretary of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, and invited him to address the Commission.

54. Mr. BENÍTEZ (Observer for the Council of Europe), after expressing his pleasure at appearing before the newly appointed Commission, men and women alike, drew attention to the Council of Europe booklet that had been distributed to members, *Working Together to Build Europe on the Rule of Law*, which contained an overview of the Council’s wide-ranging activities in the legal field. Documents could also be found on the Council of Europe’s Internet site, www.coe.int.

55. A number of recent developments might be of interest to the Commission. Bosnia and Herzegovina had acceded to the Council of Europe on 24 April 2002, thus becoming the forty-fourth member State. Monaco and the Federal Republic of Yugoslavia were also applying for membership; fairly rapid progress was being made on the latter’s application, and it was hoped that accession would follow shortly. Another development had been the opening for signature at Vilnius in May 2002 of Protocol No. 13 to the European Convention on Human Rights, concerning the abolition of the death penalty in all circumstances; 33 members had signed and 3 had ratified the Protocol on the first day. The Committee of Ministers had adopted the Convention on Contact Concerning Children, which would be opened for signature at the forthcoming European Conference on family law in October 2002. Also worth noting was the successful international conference on the contribution by the Council of Europe to the European Union’s Community *acquis*, held in Santiago de Compostela, Spain, on 3 and 4 June 2002.

56. CAHDI, which was chaired by a member of the Commission, Mr. Tomka, brought together the legal advisers to the foreign ministries of the 44 member States of the Council of Europe, together with a significant number of representatives from observer States and international organizations. One of its tasks was to act as the European observatory of reservations to international treaties. The work had proved extremely valuable. It had helped to establish dialogue with the States concerned—in the case of reservations to treaties that could include both members and non-members—and, in some cases, to understand the reasons behind a given reservation. On occasion, the need to raise an objection had been avoided, or the reservation had been changed or withdrawn. The exercise was followed with considerable interest not only by the academic community but by Governments and, more recently, a number of Council of Europe intergovernmental committees, including the one responsible for monitoring the implementation of the Council’s instruments in the human rights field. The Committee of Ministers had issued special terms of reference to CAHDI to help the fight against terrorism via the observatory.

57. In 2001, CAHDI had started work on a pilot project on State practice regarding State immunity. The first step was to gather details of State practices, including court decisions, executive decisions and pieces of legislation. It was hoped that the initial phase would be completed by the end of 2002. Work had also been done on the immunities of Heads of State and Government, as well as certain categories of high officials. It had been decided, however, following the ruling of ICJ in the *Arrest Warrant* case, to halt the discussions because some of the relevant

* Resumed from the 2739th meeting.

issues had been resolved; the study would be resumed in due course. CAHDI also kept developments in the International Criminal Court, the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda under constant review, along with the question of the problems of the victims of armed conflict. Last, CAHDI greatly valued its relationship with the Commission. The mutual benefits were illustrated by the participation of members of each body in the work of the other. It was to be hoped that the relationship would continue.

58. Among the more general activities of the Council of Europe, the fight against corruption was of particular significance. The Group of States against Corruption (GRECO), an enlarged partial agreement open to both member and non-member States, was constantly expanding; the membership had reached 34 following the accession of Malta, the Netherlands and Portugal. It would be noted, in that context, that the United States was also a member. Accessions to international instruments in the field were constantly increasing. The Criminal Law Convention on Corruption had 28 signatures and 13 ratifications, while the Civil Law Convention on Corruption had 25 signatures and 6 ratifications. In the field of bioethics, the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine) had been signed by 18 member States and ratified by 12. Its Additional Protocol on the Prohibition of Cloning Human Beings had been signed by 19 States and ratified by 10. A second protocol to the Convention, concerning the transplanting of organs and tissues of human origin, had been opened for signature in January 2002 and had already been signed by seven States. The Convention and its first Additional Protocol—which were, to date, the only international instruments in the field of bioethics—had entered into force on 1 December 2000 and 1 March 2001, respectively.

59. Recent developments on the other side of the Atlantic had shown that the legal cooperation activities of the Council of Europe were fully in tune with the major questions of world society. One example—also unique in its field—was the Convention on Cybercrime, which had been opened for signature in November 2001 and had already been signed by 32 States, including 4 non-member States which had been closely involved in negotiating the text. There was in fact an increasing tendency for the Council's international instruments to be open for membership by non-members of the Council. A draft additional protocol to the Convention, relating to the criminalization of acts of a racist or xenophobic nature committed via computer networks, had also been adopted by the relevant working bodies and was currently before the Committee of Ministers. It was hoped that the protocol would be adopted by the end of 2002.

60. The Council of Europe had continued its activities in the fight against the sexual exploitation of children, and the Committee of Ministers had adopted recommendation (2001) 16 on the protection of children against sexual exploitation on 31 October 2001, updating recommendation (91) 11 of 1991, which took into account the provisions of the Convention on Cybercrime relating to child por-

nography. The Council had also taken an active part in the second World Congress against Commercial Sexual Exploitation of Children, held in Yokohama, Japan, from 17 to 20 December 2001.

61. The twenty-fourth Conference of European Ministers of Justice, held in Moscow on 4 and 5 October 2001, had looked at the implementation of judicial decisions in conformity with European standards. In the light of the events of 11 September 2001, the agenda had been expanded to include discussions on how to enhance cooperation to combat international terrorism. That had resulted in the adoption of three significant resolutions: Resolution No. 1 on combating international terrorism, Resolution No. 2 on the implementation of long-term sentences, and Resolution No. 3 on general approaches to and means of achieving the effective enforcement of judicial decisions.

62. On 12 September 2001, the Committee of Ministers of the Council of Europe had issued a declaration in which it condemned the terrorist attacks with the utmost force and expressed its solidarity with the victims. It had also begun to examine the specific actions it could take within its area of expertise, building on its own know-how and on the efforts of other international organizations, including the establishment of a specific body to deal with the issue. Owing to its own multidisciplinary nature, there was broad consensus that, in order to solve the problems posed by the new forms of terrorism, a holistic approach was needed that covered issues in the fields of criminal, civil, commercial and administrative law, and all other legal matters. Thus a multidisciplinary group, which would also take into consideration the activities of other relevant bodies, was the best way of addressing the urgent and fundamental task. Accordingly, on 8 November 2001, the Committee of Ministers had decided to take steps to increase the effectiveness of the existing international instruments of the Council of Europe that were relevant to the fight against terrorism and to establish the Multidisciplinary Group on International Action against Terrorism, adopting its terms of reference. One of the members of the Commission, Mr. Galicki, was also a member of the Multidisciplinary Group.

63. The two main tasks of the Multidisciplinary Group were to review the operation of, and examine the possibility of updating the Council of Europe's instruments relating to the fight against terrorism, in particular the European Convention on the Suppression of Terrorism: and to prepare a progress report on actions the Council could usefully carry out in order to contribute to the fight against terrorism, taking into account the work of the European Union.

64. The report had been presented to the Committee of Ministers at its 110th session, held in Vilnius on 2 and 3 May 2002, and had resulted in the identification of various questions to be looked at in greater detail, including substantive criminal law, special investigative techniques, funding of terrorism, protection of witnesses, international law-enforcement cooperation to improve mutual assistance, and protection of victims, by revising the functioning of the European Convention on the Compensation of Victims of Violent Crimes.

65. With regard to the review of the relevant Council of Europe treaties, the Multidisciplinary Group had reviewed the European Convention on the Suppression of Terrorism and, in May 2002, had received a formal mandate to prepare a draft amending protocol, which should be adopted at the next meeting of the Group in October 2002, submitted to the Committee of Ministers of the Council of Europe in November, and open to signature by the end of the year.

66. Mr. MOMTAZ, thanking the Observer for the Council of Europe for his very comprehensive report on the work of the Council and congratulating the Council for the wide variety of its activities, said that he was concerned about the question of the immunity of Heads of State. He understood that the matter had been on CAHDI's agenda, but that work had been suspended pending the decision of ICJ in the *Arrest Warrant* case. He would be interested to know whether CAHDI had resumed work and whether the suspension had been decided in order to avoid a possible contradiction between the general trend within CAHDI and the conclusions of ICJ concerning the immunity of ministers of foreign affairs in the performance of their duties.

67. Mr. SIMMA, referring to jurisdictional immunity, asked whether there was any coordination between the project of the Council of Europe on the compilation of State practice on immunity and the work being pursued at the United Nations. Also, with regard to the Council's efforts to fight terrorism, he observed that the Council was the guardian of respect for human rights in member States and, in particular, of the European Convention on Human Rights. He had the impression that some ministers of the interior had taken advantage of the events of 11 September 2001 to implement legislation that affected the fundamental rights of citizens and foreigners in their countries, and he would be interested to know whether there was any mechanism in place in the Council of Europe, apart from the organs of the European Convention on Human Rights, which, at the more political level, monitored the conformity of actions taken by member States with regard to that Convention. More specifically, did the Council take the view that not all its members had acted in accordance with article 15 in connection with the measures they had taken against terrorism?

68. Mr. CHEE said that it would be useful to know whether the Criminal Law Convention on Corruption, the Civil Law Convention on Corruption and the Convention on Long-range Transboundary Air Pollution had been successfully implemented and whether their provisions were being enforced. Again, had there been any cases where there had been a conflict between obligations under the European conventions and the Charter of the United Nations, a matter covered by Article 103 of the Charter?

69. Mr. BENÍTEZ (Observer for the Council of Europe), responding to Mr. Momtaz, said that about two years previously CAHDI had begun discussing the question of immunity, based on contributions from States. Subsequently, ICJ had delivered its judgement in the *Arrest Warrant* case, which had resolved some of the matters that CAHDI had been discussing. CAHDI had therefore decided to take note of the Court's decision and suspend considera-

tion of the question, even though it did not exclude the possibility of taking it up again at a future date.

70. Regarding the question of jurisdictional immunity raised by Mr. Simma, one of the purposes of CAHDI activities was to make a practical contribution to the work of the United Nations, and great importance was attached to effective coordination. In that respect, there had been an informal exchange of views with Mr. Hafner in 2001, when CAHDI was designing its programme, and Mr. Hafner had been invited to the September meeting of CAHDI, where information would be provided on the first stage of that programme (collection of material).

71. In implementing its activities in the fight against terrorism, the Council of Europe was building on the work of all international organizations and other relevant bodies of the Council, particularly the European Court of Human Rights and, at the intergovernmental level, the Steering Committee on Human Rights, attached to the Committee of Ministers and responsible for implementing the Council's activities in that field. After 11 September 2001, the Committee of Ministers had decided to set up a group of experts on terrorism and human rights entrusted with the task of drafting guidelines on how to combat terrorism while respecting the Council's standards on the protection of human rights. Those guidelines had been adopted by the Committee of Ministers in July 2002 and were already being used by the Multidisciplinary Group on International Action against Terrorism. The Group was also taking into account inputs from other Council committees, for example, the Committee of Experts on Data Protection. The Council periodically monitored possible suspension by member States of provisions of the European Convention on Human Rights, and CAHDI itself periodically examined outstanding reservations to international treaties, including reservations to European conventions. In that context, CAHDI had discussed recent reservations made by member States from the standpoint of the need to adopt new legislation. The Committee of Ministers, composed of the ministers for foreign affairs of member States, dealt with the more political questions.

72. Mr. Chee had posed various questions about the absence of monitoring or enforcement mechanisms in the conventions adopted by the Council of Europe. That was indeed a problem, and the Council had acknowledged that there was little point in continuing to produce international treaties if they did not include specific mechanisms for monitoring respect by States for their commitments. Nevertheless, several Council of Europe conventions provided for specific monitoring mechanisms. The most important example was the European Convention on Human Rights and its 13 protocols, which were monitored by the European Court of Human Rights. An effort was being made to provide for such specific mechanisms when new European conventions were drafted.

73. The issue of corruption lay at the heart of State operations. The activities of the Council of Europe in that area were relatively recent, dating from 1992. Since then, the Council had adopted two international conventions, the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption, as well as resolution (97) 24 with 20 guiding principles for the fight against

corruption and recommendation (2000) 10 on codes of conduct for public officials. The monitoring mechanism for that effort was GRECO, which supervised the extent to which signatories of the agreement respected the guiding principles and the relevant conventions. The endeavour seemed to be effective, particularly in view of the significant attention paid by civil society to the evaluation rounds carried out by GRECO in member States.

74. Mr. KAMTO said that he would be interested to know whether GRECO had compiled specific elements on national practice and whether it had identified cases of corruption within the European Union or elsewhere (involving companies, for example) which had been prosecuted in the national jurisdiction. The international press had exposed cases of corruption involving Heads of State in some countries.

75. Mr. BENÍTEZ (Observer for the Council of Europe) said that GRECO was not mandated to consider specific cases of corruption within the national jurisdiction. It examined to what extent national legislation, its implementation, and all the administrative and judicial bodies could respond effectively to the phenomenon of corruption. Each year, GRECO chose some of the 20 guiding principles and examined whether States had legislation or systems that allowed them to be implemented. For example, the first evaluation cycle had looked at the system of public prosecutors in GRECO member States to see whether they had sufficient independence to ensure that cases of corruption could be prosecuted effectively and without interference from the political authorities, particularly when the individuals concerned occupied important public positions. Parliamentary immunity had also been examined to see whether it was an obstacle to prosecuting certain persons accused of acts of corruption.

76. The CHAIR thanked the Observer for the Council of Europe for an extremely interesting report.

The meeting rose at 1 p.m.

2745th MEETING

Monday, 12 August 2002, at 3 p.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemi-cha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr.

Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Simma, Mr. Tomka, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fourth session

CHAPTER V. *Diplomatic protection* (A/CN.4/L.619 and Add.1–6)

1. The CHAIR invited the members of the Commission to start their consideration of the draft report with chapter V on diplomatic protection. He suggested that the Commission should first consider section C of that chapter.

C. *Text of articles 1 to 7 of the draft articles on diplomatic protection with commentaries thereto provisionally adopted by the Commission* (A/CN.4/L.619/Add. 2–5)

Paragraphs 1 and 2 (A/CN.4/L.619/Add.2)

Paragraphs 1 and 2 were adopted.

Part One: General provisions

Article 1 (Definition and scope)

Article 1 was adopted.

Commentary to article 1

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

2. Mr. GAJA proposed that the words “Although analogous to diplomatic protection” should be deleted and that the rest of the sentence should be amended accordingly in order not to give the impression that States could not also be concerned by functional protection. Non-nationals could be employed by the State, in the armed forces, for example.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

3. Mr. DAOUDI said that, during the informal consultations, the Special Rapporteur had submitted a document on the diplomatic protection of ships’ crews, but he was not sure whether the last two sentences of paragraph (8) accurately reflected the conclusions of the informal consultations on that point.

4. Mr. DUGARD (Special Rapporteur) said that he intended to prepare a report on the diplomatic protection of ships' crews for the next session. As Mr. Daoudi had pointed out, the end of paragraph (8) did not reflect the support that had been expressed during the informal consultations for a provision on that question.

5. Ms. ESCARAMEIA said that she agreed with Mr. Daoudi's comment and was surprised that the results of the lengthy consultations held on the document submitted by the Special Rapporteur were not mentioned.

6. Mr. TOMKA said that the commentary was intended to explain the text of provisions, not to indicate the Commission's future intentions. He therefore proposed that the last two sentences of paragraph (8) should be deleted and that, before coming back to the question, the Special Rapporteur should submit a report on which the Commission would take a decision.

7. The CHAIR said that informal consultations were part of the Commission's internal work and were held for its benefit and that of the Special Rapporteur. If he heard no objection, he would take it that the Commission agreed to Mr. Tomka's proposal.

It was so decided.

Paragraph (8), as amended, was adopted.

Article 2 [3] (Right to exercise diplomatic protection)

Article 2 [3] was adopted.

Commentary to article 2 [3]

Paragraph (1)

8. Mr. PELLET proposed that the words "more carefully" in the second sentence should be deleted because PCIJ had used the exact wording of what Vattel had written.

9. Mr. TOMKA said that, in order to reflect faithfully what Vattel had written, the word "indirect" should be added before the word "injury" in the first sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

10. Mr. TOMKA said that the word "limited" at the end of the first sentence was unfortunate because any right exercised as part of a procedure must follow that procedure. He therefore proposed that paragraph (3) should read: "The right of a State to exercise diplomatic protection is subject to the parameters defined in the present articles."

11. Mr. DUGARD (Special Rapporteur) said that he agreed with Mr. Tomka's comment but thought that it would be better to amend paragraph (3) to read: "The right of a State to exercise diplomatic protection can be exercised only within the framework of the parameters defined in the present articles."

It was so decided.

Paragraph (3), as amended by Mr. Dugard, was adopted.

Part Two: Natural persons

Article 3 [5] (State of nationality)

Article 3 [5] was adopted.

Commentary to article 3 [5]

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

12. Mr. PELLET said that the penultimate sentence was ambiguous and should be amended because the automatic acquisition of nationality by marriage was contrary to international law only if it was discriminatory.

13. The CHAIR suggested that that problem might be solved by deleting any reference to husbands and wives and referring only to "spouses".

14. Mr. DUGARD (Special Rapporteur) said that he was prepared to amend the sentence and asked whether Mr. Pellet had a proposal to make.

15. Mr. PELLET proposed the following wording: "Where marriage to a national automatically results in the acquisition of nationality, problems may arise in respect of the consistency of such an acquisition of nationality with international law when the acquisition is discriminatory."

16. Ms. ESCARAMEIA said that she did not entirely agree with Mr. Pellet's point of view. If it was true that the automatic acquisition of nationality was discriminatory and, therefore, contrary to international law only if women were involved, the fact of imposing nationality as a result of an act such as marriage, which had nothing to do with nationality, was contrary to the fundamental principles of human rights, regardless of whether men or women were involved.

17. Mr. TOMKA said that he had the same doubts, but, in view of the reference to article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women contained in paragraph (7) of the commentary, the sentence under consideration should not be amended.

18. Mr. AL-BAHARNA said that it was not clear how the fact that internal law provided for the automatic ac-

quisition of the nationality of the spouse was contrary to international law, if the persons concerned so agreed. He was thus also in favour of amending the penultimate sentence.

19. Mr. OPERTTI BADAN said that, in the Spanish version at least, the last sentence should also be amended because States did not acquire nationals; persons acquired nationality.

20. Mr. PELLET, noting that the problem arose in the French text as well, proposed that the beginning of the last sentence might be amended to read: "A person may also acquire nationality as a result...". With regard to the automatic acquisition of nationality by marriage, he proposed, as the Chair had done, that the sentence in question should be amended to read: "When marriage to a national automatically results in the acquisition by one spouse of the nationality of the other...".

21. Mr. CANDIOTI suggested that, in the third sentence, the words "to a national" should be deleted, that the same change should be made in the fourth sentence and that the text should then be amended along the lines indicated by the Chair and Mr. Pellet. He proposed the following wording for the last sentence: "Nationality may also be acquired as a result of...".

22. Mr. GALICKI said that, out of such concern for generality, the Commission might be creating something impossible. In practice, he did not know of any case where internal law provided for the automatic acquisition of the nationality of the wife by the husband. If no one could tell him of such a case, he would continue to be in favour of retaining the wording proposed by the Special Rapporteur because it was realistic.

23. Mr. MOMTAZ said that the reference to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women faithfully reflected the discussion in the Drafting Committee. The problem which arose was the result of the fact that the other human rights instruments had no equivalent article relating to men.

24. Mr. KAMTO said that Mr. Candiotti's proposal would solve the problem and that more general wording was desirable because, while it was true that the automatic acquisition of nationality by marriage usually concerned women, the Commission could not claim to know what provisions in that regard were contained in the internal law of all countries.

25. The CHAIR suggested that the wording proposed by Mr. Candiotti should be adopted and that the words "See, for example, article 9, paragraph 1,..." should be added to the footnote.

It was so decided.

Paragraph (4), as amended by Mr. Pellet and Mr. Candiotti, was adopted.

Paragraph (5)

26. Mr. PAMBOU-TCHIVOUNDA said that the wording of the third sentence was too categorical. In many cases, residence was not enough to establish proof of nationality. It would be better to indicate that residence could or might constitute proof of nationality.

27. Mr. DUGARD (Special Rapporteur) said that he agreed with Mr. Pambou-Tchivounda's comment.

Paragraph (5), as amended, was adopted.

Paragraph (6)

28. Mr. KAMTO said that the wording of the first sentence was not really correct because, in the *Nottebohm* case, it had been for the national, not the State, to provide proof of an effective link. He proposed that that sentence should be amended to read: "Article 3 (2) does not require proof of the existence of an effective link between the State and its national, as in the *Nottebohm* case."

29. Mr. PAMBOU-TCHIVOUNDA said that he agreed with the wording proposed by Mr. Kamto, but that, since the role of the State had to be borne in mind, the words "by the State" should be added after the word "proof".

30. Mr. PELLET, noting that he agreed with Mr. Pambou-Tchivounda's comment, said that it was indeed the State which had to prove that an effective link existed, since ICJ dealt only with cases involving States. In view of the lack of agreement on that point in the Commission, he proposed that the words "Despite diverging opinions in the Commission on the interpretation of that judgement..." should be added at the beginning of the second sentence.

31. Mr. DUGARD (Special Rapporteur) said that he agreed with Mr. Pellet: the first sentence was right and its wording should be retained. The proposed addition to the second sentence was justified.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

32. Mr. PELLET said that the construction of article 3 [5] was rather strange because paragraph 2 dealt with natural persons and it could therefore be expected that there would also be a paragraph on legal persons. He proposed that a paragraph (9) should be added to the commentary to indicate that the Commission reserved the right to add a paragraph 3 to the article.

33. Mr. DUGARD (Special Rapporteur) pointed out that paragraph (4) of the commentary to article 1 explained that "the term 'national' covers both natural and legal persons" and that "Later in the draft articles ... where necessary, the two concepts are treated separately."

34. Mr. PELLET said that the problem was one of structure and that since article 3 [5], paragraph 1, applied both to natural and to legal persons, the wording as it now stood would make it necessary to say so again in the provision on legal persons.

35. The CHAIR proposed that a note should be added to indicate that the Commission might look again at the wording of the article when it came to consider the case of legal persons.

It was so decided.

Article 4 [9] (Continuous nationality)

Article 4 [9] was adopted.

Commentary to article 4 [9]

Paragraph (1)

36. Mr. PAMBOU-TCHIVOUNDA said that the words *opinions judiciaires* in the first sentence did not mean anything in French. The words *décisions judiciaires* should be used instead.

37. Mr. TOMKA said that reference was being made to the opinion of one judge, not to a judicial decision. The footnote showed that reference was being made to the comments by Sir Gerald Fitzmaurice in the *Barcelona Traction* case.

38. Mr. KABATSI said that, when reference was made to the opinion of one judge, it was not a personal opinion that was meant, but an opinion that formed part of a judicial decision.

39. The CHAIR said that the term was entirely correct in English.

40. Mr. DAOUDI said that there was a mistake in the Arabic version: contrary to what was indicated, what was meant was the individual opinion of one judge, not an advisory opinion.

41. Mr. PAMBOU-TCHIVOUNDA said that what was meant could be either an individual or a dissenting opinion, but certainly not a “judicial opinion”.

42. Mr. PELLET, agreeing with Mr. Pambou-Tchivounda, said that, for those trained in the civil law system, the concept of “judicial opinion” did not exist. Such persons considered that judges could have feelings, but that had nothing to do with a judicial decision. What was meant was “doctrine”. In his opinion, it would therefore be better to refer only to “doctrine” and to merge the footnotes corresponding to the last part of the sentence so that they would refer both to the comments of Fitzmaurice and to those of Wyler.

43. Mr. DUGARD (Special Rapporteur) said that that concept did exist in common-law systems, but not in civil-law systems. He was therefore prepared to accept Mr. Pellet’s proposal.

Paragraph (1), as amended by Mr. Pellet, was adopted.

Paragraph (2)

44. Mr. TOMKA said that the last sentence, which stated that “the Commission decided against including the requirement that nationality be retained between injury and presentation of the claim”, contradicted article 4, paragraph 1, in which the principle of continuous nationality was very clearly stated, as the title of that article confirmed.

45. Mr. PELLET said that such continuity was emphasized in the French text of article 4, paragraph 1, by the use of the words *a toujours cette nationalité*. At the very least, the word *toujours* should be deleted because it was not used in the other language versions.

46. Following an exchange of views in which Mr. GAJA, Mr. KOSKENNIEMI, Mr. OPERTTI BADAN, Mr. PAMBOU-TCHIVOUNDA, Mr. GALICKI and Mr. DUGARD (Special Rapporteur) took part, the CHAIR requested the Special Rapporteur and all interested members to submit a drafting proposal for the last sentence to take account of the comments by Mr. Tomka and Mr. Pellet and of the other comments made.

47. Mr. DUGARD (Special Rapporteur) proposed that the last sentence should be replaced by the following: “In these circumstances, the Commission decided to leave open the question whether nationality should be retained between injury and presentation of the claim.”

48. The CHAIR asked the Chair of the Drafting Committee whether that drafting proposal was acceptable to him. If he heard no objection, moreover, he would also suggest that, in view of the lack of consistency between the different language versions, the word *toujours* in the French text of article 4, paragraph 1, should be deleted.

49. Mr. YAMADA (Chair of the Drafting Committee) said that, during the drafting of article 4, the ambiguous wording of paragraph 1 had deliberately been retained because there was no uniformity in the practice of States as to whether nationality must be retained between the time of the injury and the date of the official presentation of the claim. It was up to the plenary Commission to decide on the wording of paragraph (2) of the commentary. The proposal by the Special Rapporteur was fully acceptable to him.

50. The CHAIR said that, if he heard no objection, he would take it that paragraph (2) of the commentary, as amended by the Special Rapporteur, was adopted and that, in the French text of article 4, the word *toujours* in the first sentence of paragraph 1 should be deleted.

It was so decided.

Paragraph (2), as amended, was adopted.

Paragraph (3)

51. Mr. GAJA said that the second and last sentences were redundant. The idea had obviously been to emphasize the fact that, in the context of the article in question, the rule on the exhaustion of local remedies was to be excluded for practical reasons, but it was perhaps not necessary to say so more than once. He therefore proposed that the last sentence should be deleted and that the call-out for the footnote, which would have to be renumbered, should be placed at the end of the second sentence, after the words “the date of the injury”. The penultimate sentence, which stated that “The Commission has, however, refrained from giving approval to this approach” (according to which the exhaustion of local remedies rule would be regarded as a substantive condition), was also not very clear.

52. Mr. PELLET said he also found that the penultimate sentence was very ambiguous and that the mysterious footnote to which it referred did not make matters any clearer. Perhaps the footnote should be more explicit. In any event, it should be explained that the “approach” to which reference was being made had been retained in the draft article on State responsibility on first reading, but abandoned on second reading.

53. Mr. DUGARD (Special Rapporteur) said that the footnote which Mr. Pellet had described as “mysterious” referred to a discussion in the Commission during which it had been decided to reject draft articles making the exhaustion of local remedies rule a substantive condition. Mr. Gaja’s proposal that the last sentence of paragraph (3) should be deleted was entirely acceptable.

54. Mr. PELLET said that paragraph (3) could not contain a footnote simply referring to a “discussion” in the Commission. That was too vague. Perhaps reference could be made to the relevant report of the Special Rapporteur, explaining that he had proposed that the exhaustion of local remedies rule should be adopted as a substantive condition, but that that proposal had not been agreed to by the Commission. The reader would find such a footnote much clearer. The words “on first reading” should also be added in the penultimate sentence between the words “included” and “in the draft articles”.

55. Mr. TOMKA said that article 4, paragraph 1, referred to “the time of the injury”, not to the time of the breach of international law, as in the draft articles on State responsibility. In order not to confuse the reader, he proposed that the problems to which the exhaustion of local remedies rule gave rise should not be referred to, since no decision had been taken in that regard, and that only the first two sentences of paragraph (3) should be retained.

56. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraph (4)

57. Mr. PELLET said he had been assured that the words “nationality of claims” would not be used. He was therefore surprised to find them in paragraph (4). He pointed out that paragraph 39 of the Commission’s draft report stated that that concept was confusing.

58. Mr. DAOUDI said that the Arabic version of paragraph (4) did not refer to the nationality of the claim.

59. Mr. DUGARD (Special Rapporteur) said he had assured Mr. Pellet that those words would not be used in the draft articles, but it was difficult not to use them in the commentaries.

60. Mr. PELLET said that he could agree to the retention of those words, provided that the following footnote was added: “According to one opinion, the concept of ‘nationality’ is confusing. It is taken directly from common law and has no equivalent in other legal systems.”

61. Mr. GAJA proposed that the words *dies ad quem* in the second sentence should be deleted and that the same words in the third sentence should be replaced by the words “the date of the claim”.

62. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to the proposals by Mr. Pellet and Mr. Gaja.

It was so decided.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

63. Ms. ESCARAMEIA said that she did not see why marriage was not placed on the same footing as succession of States and adoption. She therefore proposed that the third sentence should be deleted, because it implied that loss of nationality could in a way be voluntary. The second sentence should be amended to read: “In the case of succession of States and, possibly, adoption and marriage, where a change of nationality automatically follows, nationality will be lost involuntarily.”

Paragraph (7), as amended, was adopted.

Paragraph (8)

64. Mr. MOMTAZ proposed that, in the French text of the last sentence, the word *douloureux* should be replaced by the word *exceptionnel*.

65. Mr. DUGARD (Special Rapporteur) proposed that reference should be made to “cases involving compulsory acquisition of nationality”.

Paragraph (8), as amended by the Special Rapporteur, was adopted.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

66. The CHAIR invited the members of the Commission to continue their consideration of chapter V, section C, of the draft report.

Article 5 [7] (Multiple nationality and claim against a third State) (A/CN.4/L.619/Add.3)

Article 5 [7] was adopted.

Commentary to article 5 [7]

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

67. Mr. PELLET proposed that, at the end of the first sentence, the words “the weight of authority is against such a requirement” should be replaced by the words “the weight of authority does not require such a condition”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Article 6 (Multiple nationality and claim against a State of nationality) (A/CN.4/L.619/Add.4)

Article 6 was adopted.

Commentary to article 6

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

68. Mr. PELLET pointed out that the Convention on Certain Questions relating to the Conflict of Nationality Laws was still in force and the word “declared” should therefore be replaced by the word “declare”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

69. Mr. GAJA proposed that, at the beginning of the fourth sentence, the words: “The [Italian–United States Conciliation] Commission made it clear” should be replaced by the words “The Commission held” in order not to give the impression that the International Law Commission supported what the Italian–United States Conciliation Commission had said, when in fact it did not, as was shown in paragraph (5) of the commentary.

70. Mr. PELLET said that, in the first sentence, the words “arbitral decisions” should be replaced by the words “some arbitral decisions”.

Paragraph (3), as amended by Mr. Gaja and Mr. Pellet, was adopted.

Paragraphs (4) to (8)

Paragraphs (4) to (8) were adopted.

The meeting rose at 6 p.m.

2746th MEETING

Tuesday, 13 August 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fourth session (*continued*)

CHAPTER V. *Diplomatic protection* (continued) (A/CN.4/L.619 and Add.1–6)

1. The CHAIR invited the members of the Commission to continue their consideration of chapter V of the draft report.

C. Text of articles 1 to 7 of the draft articles on diplomatic protection with commentaries thereto provisionally adopted by the Commission (concluded) (A/CN.4/L.619/Add. 2-5)

Article 7 [8] (Stateless persons and refugees) (A/CN.4/L.619/Add.5)

Article 7 [8] was adopted.

Commentary to article 7 [8]

Paragraph 1

2. Mr. SIMMA proposed that the first part of the quotation from the 1931 *Dickson Car Wheel Company* case should be eliminated, since it reflected a position that was inappropriate and no longer politically correct. The quotation would therefore read: “No State is empowered to intervene or complain on behalf [of an individual lacking nationality] either before or after the injury.”

3. Mr. DUGARD (Special Rapporteur) said the Commission should not have to hide the harsh realities of international law, and that the quotation simply set out the position in 1931. He would prefer to keep the paragraph as it was, but if political correctness prevailed, he would not object.

4. Mr. TOMKA said that he agreed with Mr. Simma. However, there appeared to be a contradiction between the first sentence, which stated, “The general rule is...”, and the phrase which stated that the rule was out of step with contemporary international law. The first sentence should be amended to read “The general rule was...”; then the quotation could remain unchanged.

5. Mr. BROWNLIE agreed that the first sentence should be rephrased, as the current version was quite dogmatic and gave the impression that the Commission accepted that the law continued to be as it had been in 1931. The Commission should not give the impression that it was making a complete about-turn; the present position was more nuanced. Some members of the Commission had long thought that habitual residence granted a status, even though the individual concerned might also have refugee status, for example.

6. Mr. DUGARD (Special Rapporteur) said that he agreed with Mr. Tomka’s and Mr. Brownlie’s suggestions, which made it clear that the *Dickson Car Wheel Company* case reflected an earlier position. The first two sentences could be amended to read: “The general rule was that a State might exercise diplomatic protection on behalf of its nationals only. For instance, in 1931, the United States–Mexican Claims Commission...”. Then the sentence following the quotation could be changed to read: “This dictum no longer reflects the accurate position in international law of both stateless persons and refugees. Contemporary international law reflects a concern for the status of both these categories of persons.”

Paragraph 1, as amended, was adopted.

Paragraph 2

Paragraph 2 was adopted.

Paragraph 3

7. Mr. PELLET proposed that the definition of stateless persons set out in the paragraph should be followed by a sentence reading: “This definition may be regarded as having become customary.”

Paragraph 3, as amended, was adopted.

Paragraph 4

8. Ms. ESCARAMEIA proposed that, in order to reflect the views of several members of the Commission, a sentence stating: “Some members thought that the 1997 European Convention on Nationality should not be the model for diplomatic protection, since this issue differs from that of acquisition of nationality” should be added to the footnote. For the same reason, the third sentence should be amended to read: “... this threshold is too high and would lead to situations of effective lack of protection for the individuals involved, the majority took the view...”.

9. Mr. TOMKA said that, although he understood Ms. Escarameia’s views, the commentary should not reflect the Commission’s discussion; rather, it should comment on the provisions of the draft articles. Moreover, no one had suggested that the European Convention on Nationality dealt with diplomatic protection, so her first proposal seemed redundant. He questioned whether it was necessary to refer to the Convention and proposed that, to avoid confusion, the first sentence should be deleted. Since the right to provide diplomatic protection was a right of the State, it set a threshold for a State to be entitled to exercise diplomatic protection and not for individuals seeking protection, because under international law they were not entitled to such protection.

10. Mr. GALICKI said there appeared to be a misunderstanding about the purpose of the first sentence of paragraph 4. The intention was merely to state that the Commission had used the European Convention on Nationality as a source of the words “lawful and habitual residence”. The formula proposed by the Special Rapporteur was well-balanced. It explained the source of the terminology and then reflected the discussion on whether the threshold was too high or too low. The text should be retained as it was, with the addition of the second amendment proposed by Ms. Escarameia, which explained why some members of the Commission considered that the threshold was too high.

11. Mr. SIMMA proposed that, to emphasize Mr. Galicki’s point, the first sentence should be made into a separate paragraph, thus clarifying that it merely referred to the source of the terminology used. With regard to Mr. Tomka’s comment that the different views of members of the Commission were not generally reflected in the commentary, he believed that if something was really controversial, the point could be made in the text adopted on first reading and the attention of States could be drawn to it. He therefore agreed with Mr. Galicki that the text should remain unchanged, except for the additional wording proposed by Ms. Escarameia for the last sentence.

12. The CHAIR said that there was a substantive difference between the first and second readings. On the first reading the text should include the divergent opinions of the members of the Commission, whereas on second reading it should indicate a single position.

13. Mr. DUGARD (Special Rapporteur) said that, in general, he had not reflected the divergences of opinion of the members of the Drafting Committee. To satisfy the concerns voiced, the paragraph should be amended so that it started: “The requirement of both lawful residence...”. Then, in a footnote, it could be explained that the terminology “lawful and habitual residence” was taken from the European Convention on Nationality, which dealt with acquisition of nationality. The final sentence would be amended as suggested by Ms. Escameia.

14. Mr. GALICKI said that he agreed with the Special Rapporteur’s proposal. The European Convention on Nationality did not, however, deal only with acquisition of nationality, so the footnote should clarify that, in the Convention, the term “lawful and habitual residence” was used in connection with acquisition of nationality.

Paragraph 4, as amended, was adopted.

Paragraphs 5 and 6

Paragraphs 5 and 6 were adopted.

Paragraph 7

15. Ms. ESCARAMEIA said that paragraph 4, which dealt with residence requirements in the case of stateless persons, had accurately reflected the divided opinions of members of the Commission. That was not the case in paragraph 7, which covered the same issue with regard to refugees. It gave the idea that the Commission had a single opinion, and she proposed that the beginning of the first two sentences should be amended to read: “The majority of the Commission...”.

16. Mr. KOSKENNIEMI said that he shared Ms. Escameia’s concern; those who had expressed the minority view believed that the point concerned both stateless persons and refugees. The rationale and justification were the same in both paragraphs 4 and 7, something that would be useful to reflect. Paragraph 7 should indicate that, “as in paragraph 4 above, some members of the Commission considered that the threshold was too high”.

17. The CHAIR said that, instead of referring to paragraph 4, it would be preferable to add the following sentence: “Some members took the view that the threshold was set too high for refugees as well as for stateless persons.”

18. Mr. KATEKA (Alternate Rapporteur) pointed out that there would be a contradiction if the paragraph started by saying that “The Commission decided” and then went on to speak of “Some members...”. For the sake of consistency, the beginning of the paragraph should read:

“Most members of the Commission decided...” and then say: “while some members held the view...”.

19. Mr. TOMKA said that paragraph 7 related to paragraph 2 of article 7, which had been adopted by the Commission unanimously. While it was true that divergent views had been expressed in the debates leading up to its adoption, those views had been fully expressed in the Commission’s reports on its fifty-second¹ and fifty-third² sessions. However, as the commentaries were being adopted on first reading, he could accept the inclusion of a sentence along the lines proposed, in deference to the wishes of new members.

20. Mr. KATEKA (Alternate Rapporteur) said the record must make clear that some members—not all of them “new” members—had been opposed to including any provision on diplomatic protection of refugees and stateless persons.

21. After a discussion in which Mr. SIMMA, the CHAIR and Mr. KEMICHA took part, Mr. DUGARD (Special Rapporteur) said that the simplest solution would be to incorporate the contents of the footnote at the end of the paragraph in the main body of the text, after the words *de lege ferenda*.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

Paragraph 11

22. Mr. SIMMA said that the words “State of refugee” should read “State of refuge”.

Paragraph 11, as amended, was adopted.

Paragraph 12

Paragraph 12 was adopted.

Chapter V, section C, of the Commission’s draft report, as amended, was adopted.

23. The CHAIR invited the Commission to take up consideration of section A and the first part of chapter V, section B, of the Commission’s draft report.

A. Introduction (A/CN.4/L.619)

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

¹ See *Yearbook ... 2000*, vol. II (Part Two), chap. V, p. 72.

² See *Yearbook ... 2001*, vol. II (Part Two), chap. VII, p. 196.

Paragraph 6

24. Mr. TOMKA said that the verb in the expression “established an open-ended informal consultation”, also to be found in paragraph 8, should be changed to “convened” or “held”.

25. Mr. PELLET said it appeared that English-speaking members who raised points affecting only the English version were treated with indulgence, whereas speakers of other languages were asked to address their comments to the secretariat. The same rules should be applied to all members, regardless of their working language.

26. Mr. BROWNLIE said that in his view the language used in paragraph 6 was perfectly acceptable.

Paragraph 6 was adopted.

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.619 and Add.1 and 6)

Paragraph 9 (A/CN.4/L.619)

Paragraph 9 was adopted.

Paragraph 9 bis

27. The CHAIR drew attention to a new paragraph 9 bis, which read:

“At its 2740th meeting, held on 2 August 2002, the Commission established an open-ended Informal Consultation, to be chaired by the Special Rapporteur, on the question of the diplomatic protection of crews as well as that of corporations and shareholders.”

Paragraph 9 bis was adopted.

Paragraphs 10 to 12

Paragraphs 10 to 12 were adopted.

Paragraph 13

28. Mr. TOMKA said that the second sentence of the paragraph begged the question whether diplomatic protection was a branch of international law. Furthermore, the assertion that “no other branch of international law was so rich in authority” was in any case debatable. Accordingly, the sentence should be deleted.

29. The CHAIR said that the sentence reflected not the Commission’s but the Special Rapporteur’s opinion on the matter.

30. Mr. DUGARD (Special Rapporteur) said that the report contained a number of statements attributed to himself with which the Commission could not agree. It would, however, constitute a bad precedent if the Commission were to censor his errors at that late stage.

Paragraph 13 was adopted.

Paragraphs 14 to 17

Paragraphs 14 to 17 were adopted.

Paragraph 18

Paragraph 18 was adopted with a minor editing change.

Paragraph 19

31. Mr. SIMMA, referring to the first sentence of paragraph 19, said it was not clear how a distinction could be drawn between the entitlement of an international organization to exercise diplomatic protection and the entitlement of the organization to exercise functional protection. Did the former entitlement in fact exist?

32. Mr. PELLET said that the statement was correct. Some members had raised the question whether in certain circumstances, for example, when an international organization administered a territory, it could perhaps exercise a protection that was diplomatic rather than functional in nature. In that regard, he was at a loss to understand some members’ determination to censor others’ remarks.

33. The CHAIR said he agreed with Mr. Pellet. If an international organization went beyond the exercise of functional protection by asserting full diplomatic protection, that might raise questions for the State of nationality.

34. Mr. SIMMA said that the United Nations could not exercise diplomatic protection in the proper sense.

35. Mr. GAJA recalled that, in the *Reparation for Injuries* advisory opinion, ICJ had addressed two questions: first, functional protection, and second, the possibility for the United Nations to assert a claim for personal injury. The Court had concluded that both the State of nationality and the United Nations could assert such a claim. He appealed to Mr. Simma to leave the text unchanged.

36. Mr. SIMMA proposed that the words “exercise diplomatic—not functional—protection” should be replaced by “assert a claim for personal injury”.

37. Ms. ESCARAMEIA supported Mr. Simma’s remarks. Her recollection was that, in the case cited, personal protection had in any case been seen as a form of functional protection. The reference to diplomatic protection in paragraph 19 was extremely confusing and should be deleted. At the very most, it should be replaced by a reference to personal protection.

38. Mr. GAJA proposed, for the sake of compromise, that the words “diplomatic—not functional—” should be deleted.

Paragraph 19, as amended, was adopted.

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

39. Mr. SIMMA asked for clarification of the meaning of the second sentence of the paragraph.

40. Mr. DUGARD (Special Rapporteur) said that the sentence reflected remarks made by Ms. Xue, as reported in the summary record. It was surely not the function of the Commission at the current stage to correct the expression of opinion of a member.

Paragraph 21 was adopted.

Paragraphs 22 and 23

Paragraphs 22 and 23 were adopted.

Paragraph 24

Paragraph 24 was adopted with a minor editing change.

Paragraph 25

41. Mr. MOMTAZ said that, in the last sentence of the paragraph, the reference should be not to “maritime law” but to “the law of the sea”.

Paragraph 25, as amended, was adopted.

Paragraph 26

Paragraph 26 was adopted.

Paragraph 27

42. Mr. SIMMA said that the phrase “which laid down, for example, the obligation to allow crew and passengers to continue their journey”, at the end of the first sentence, was irrelevant and should be deleted.

43. Mr. DUGARD (Special Rapporteur) said that the previous day the media had reported the seizure, off the coast of Somalia, of a British-owned ship with a Ukrainian crew. The Royal Navy was now engaged in the task of searching for the Ukrainian crew members, to enable them, in the words of paragraph 27, “to continue their journey”. The paragraph dealt with a form of protection which, while not diplomatic, was intended to protect the

crew of ships and aircraft. The phrase referred to that obligation on the part of States, and was thus apposite.

44. Mr. MOMTAZ said that the obligation was incumbent on the State on whose territory the offence had taken place. In the interests of clarity, wording to that effect should be added to the sentence.

45. Mr. GALICKI said that the sentence revealed the wide variety of sources of obligations and of possibilities for the exercise of protection of crew members and passengers, and should thus be retained.

46. Mr. SIMMA said it was not the entire paragraph but just the end of the first sentence that he wanted to see deleted. The obligation of a State on whose territory an aircraft had landed to allow crew and passengers to continue their journey had nothing to do with diplomatic protection. Diplomatic protection came into play only if, for example, the aircraft had been hijacked and landed in another State’s territory. That State was then under an obligation to let the crew and passengers go, and if it did not, their State of nationality could exercise diplomatic protection. It was an entirely different matter from the point being made in paragraph 27, which was that certain treaties contained *leges speciales* on the diplomatic protection of crews and passengers. He again urged that the last phrase in the first sentence of the paragraph be deleted.

47. The CHAIR said that it set the general context of the special laws that could apply in such cases. Hence it was not incorrect and reflected comments that had been made during the discussion.

48. Mr. BROWNLIE said he had no problems with the inclusion of that phrase, but an important point of principle was involved. As he and Mr. Pellet had once remarked, diplomatic protection had a close relative, something that could be described as “protection law”, but that was not part of the Commission’s remit. A great deal of law and practice related to the significance of carrying a passport, for example, but that pertained to the direct duties of a State and had nothing to do with diplomatic protection. The *M/V “Saiga” (No. 2)* case was not about diplomatic protection but about direct injuries, ordinary duties deriving from the United Nations Convention on the Law of the Sea.

49. Mr. KAMTO said he thought that paragraph 27 referred not to diplomatic protection but to cases in which international law offered protection to the crews of aircraft or ships through various conventions or treaties. The paragraph contrasted with the arguments given in earlier paragraphs. The only problem was the lack of clarity about which State was under the obligation mentioned in the first sentence. Was it the State of nationality of a ship or aircraft? Was it the State in which the incident or accident had occurred? If that point was clarified, the paragraph should be acceptable.

50. Mr. DUGARD (Special Rapporteur) stressed once again that the first sentence made an accurate and relevant statement, but added that the amendment proposed by Mr. Momtaz was entirely acceptable.

Paragraph 27, as amended, was adopted.

Paragraphs 28 to 32

Paragraphs 28 to 32 were adopted.

Paragraphs 33 and 34

51. Mr. PELLET said that the first two sentences of paragraph 34 constituted criticism of the suggestion that the draft articles should refer to the “clean hands” doctrine, and that paragraph 33 also comprised such criticism, whereas paragraph 34 defended the suggestion. The two sentences in question should be placed at the end of paragraph 33.

It was so decided.

52. The CHAIR, responding to comments by Mr. AL-BAHARNA and Mr. PELLET, suggested that, as a consequence of that amendment, the word “Conversely,” at the start of the third sentence of paragraph 34, should be changed to “On the other hand”.

It was so decided.

53. In response to remarks by Mr. MOMTAZ and Mr. SIMMA, Mr. BROWNLIE proposed that the words “except as a prejudice argument”, in the second sentence of paragraph 34, should be replaced by “and then mainly as a prejudice argument”.

It was so decided.

Paragraphs 33 and 34, as amended, were adopted.

Paragraphs 35 and 36

Paragraphs 35 and 36 were adopted.

Paragraph 37

54. The CHAIR, replying to remarks by Mr. KAMTO and Mr. PELLET, noted that even if a proposal was not taken up, it was customary to reflect it in the report.

Paragraph 37 was adopted.

Paragraph 38

Paragraph 38 was adopted.

Paragraph 39

55. Mr. DUGARD (Special Rapporteur) said it had been drawn to his attention that the second sentence was

inaccurate: the phrase “nationality of claims” had been used not by the President of ICJ but by the Court itself in its *Reparation for Injuries* advisory opinion. He therefore proposed that the words “then President of the” and “who was not an anglophone” should be deleted.

56. Mr. GAJA said that the point actually was that ICJ had used the French phrase *nationalité de réclamations* in its opinion. The end of the second sentence should be amended to read “it had been used also in French by ICJ in the *Reparation for Injuries* advisory opinion”.

57. The CHAIR, responding to remarks by Mr. BROWNLIE, Mr. SIMMA and Mr. PAMBOU-TCHIVOUNDA, said that all references to the opinion of ICJ would be shortened and corrected to read “*Reparation for Injuries*”.

58. Mr. SIMMA said that, in the first sentence, the characterization of the concept of nationality of claims as an “anglophone concept” was problematic. Was there such a thing? Should it not rather be referred to as a common law concept? It had been pointed out, not that the phrase did not have its analogue “in other official languages”, but that it did not exist in certain other legal systems.

59. Mr. PELLET said the sentence faithfully reflected something he himself had said, but it was true that the concept should be described not as being anglophone but as pertaining to the common law. As such, it was incomprehensible to practitioners of anything other than the common law. The French Government, as he had already emphasized, had vigorously protested the use of the phrase “nationality of claims” in the draft on State responsibility, and on that point he fully agreed with it.

60. Mr. KAMTO, supported by Mr. PAMBOU-TCHIVOUNDA, said that the phrase “nationality of claims” could be better described as an expression than as a concept.

61. Mr. PELLET, recalling that it was his remarks that were being quoted, reaffirmed that he had referred to the phrase as a concept.

Paragraph 39, as amended, was adopted.

Paragraphs 40 and 41

Paragraphs 40 and 41 were adopted.

Paragraph 42

62. Mr. DUGARD (Special Rapporteur), responding to remarks by Mr. PELLET and Mr. BROWNLIE, suggested that the paragraph should be rephrased to read: “The Special Rapporteur noted that there was a division of opinion on the proposal to expand the draft articles to include the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the latter’s crew and passengers. He noted that further consideration would be given to this matter.”

Paragraph 42, as amended, was adopted.

Paragraph 43

Paragraph 43 was adopted.

Paragraph 44

63. Mr. SIMMA said that the phrase at the end of the first sentence about a State which “administered, controlled or occupied a territory” seemed rather unclear. He proposed that the words “not its own” should be appended at the end of that sentence.

64. The CHAIR said that seemed to suggest that there was some question as to the legitimacy of the State’s presence in a territory.

65. Mr. BROWNLIE said it was indeed necessary to avoid giving the impression that the exercise of diplomatic protection had anything to do with jurisdiction: it did not. It was dangerous to appear to connect control of territory, whether or not such control was sovereign, with the power to exercise diplomatic protection.

66. Mr. SIMMA said the first sentence referred to the fact that the Commission did not want to take up the question of whether something like diplomatic protection might be possible in situations in which a State administered, controlled or occupied a foreign territory. As it stood, however, it was unclear what territory was meant. At the least, the sentence should indicate that it did not refer to cases in which a State administered its own territory, because that constituted normal diplomatic protection.

67. Mr. DAOUDI asked for clarification as to the kind of occupation envisaged. If the Special Rapporteur had in mind a military occupation which transgressed the rules of the Geneva Conventions of 12 August 1949 relative to the protection of war victims, the Commission might, by using such terminology, be lending some legitimacy to foreign occupation.

68. Mr. PAMBOU-TCHIVOUNDA said he endorsed that view. If the reference was to a military occupation such as that of Palestine, the use of the word “occupied” would not be acceptable to the Sixth Committee.

69. Mr. DUGARD (Special Rapporteur) said that when he had first raised the matter, he had mentioned two obvious examples, the occupation by Morocco of the Western Sahara and the occupation by Israel of Palestine. The reference had clearly been to foreign territories. He had no objection to inserting the word “foreign” before the word “territory” or adding the words “other than its own”. He failed to see, however, how the sentence could be interpreted as giving legitimacy to occupation; it was simply a statement that the Commission did not intend to take up the issue.

70. Mr. MOMTAZ supported the view expressed by Mr. Daoudi: he had difficulty with the word “occupation”, particularly since occupation was an illegal act under international law. It stretched belief that occupation could

be the basis for diplomatic protection by an occupying State.

71. Mr. OPERTTI BADAN concurred. In using the word, even if it was qualified by the fact that Mr. Pellet’s proposal had received little support, the Commission would be taking the first step on the road to legitimizing occupation. The issue of diplomatic protection should not be confused with situations which were in breach of international law.

72. Mr. PELLET said that the discussion had run into problems of both substance and form. The fact that an occupation—whether of Palestine by Israel or of Namibia by South Africa, to take but two examples—was illegal did not affect the question of why the inhabitants of an occupied territory should be deprived of protection, whether diplomatic or not. As for the form of the sentence to which several members had taken exception, the fact was that it accurately reflected what he and others had said, and hence there was no reason to delete the word “occupied”. The question of whether members agreed or disagreed with his original proposal was immaterial.

73. Mr. DUGARD (Special Rapporteur), after repeating that he could not see how the sentence in question raised the question of the legitimacy or not of a state of occupation, pointed out that the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) acknowledged the lawfulness of occupation and established a legal regime correspondingly. When, in March 2002, the Secretary-General had called the occupation of Palestine illegal,³ he had been alluding to the fact that the occupation was a violation of article 49, paragraph 6, of the Convention.

74. Mr. PAMBOU-TCHIVOUNDA said he challenged those in favour of retaining the word “occupied” to cite just one case in which a State illegally occupying a territory had exercised diplomatic protection on behalf of those inhabiting that State.

75. The CHAIR, after pointing out that the issue concerned not States but individuals caught in a particular set of circumstances, wondered whether members needed to preclude certain expressions because of their views on the legality of those circumstances.

76. Mr. TOMKA said that there had been a request for an example of a situation in which an occupation had not been illegal. The occupation of Germany in late 1945 and early 1946, when the German State as a subject of international law had not existed, had been legal.

77. Mr. SIMMA said that Mr. Pambou-Tchivounda had in fact requested an example of diplomatic protection being given to inhabitants of an occupied territory by the occupying Power.

78. The CHAIR said that, in post-war Germany, if one of the four occupying Powers had, for example, removed trolley tracks for use in its own country, one of the other

³ See S/PV.4488.

four might have intervened to prevent such action, on behalf of a German trolley company.

79. Mr. DAOUDI said that, because in practice there was no known case of diplomatic protection being exercised by an occupying State, the situation was hypothetical, and that fact should be reflected in the report. As for the substance, he questioned how an occupying authority could possibly protect the inhabitants of the occupied territory, when, as in the case of Palestine, the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) was not being applied in reality. Military protection might be another matter.

80. Mr. DUGARD (Special Rapporteur) said that the topic, which also related to the question of recognition, could be the subject of a most interesting debate. For example, Jordan had occupied the West Bank from 1949 to 1967. Although it had considered itself the sovereign Power and had been recognized, he believed, only by Pakistan and the United Kingdom, in the eyes of the rest of the world it had been an occupier. It had, however, issued Palestinians on the West Bank with passports and protected such passport holders in various parts of the world. Similarly, South Africa had on occasion protected some Namibians when it was occupying their country. However, though the subject was a fruitful one for discussion, it was unconnected with the first sentence of paragraph 44, which simply stated that Mr. Pellet had made a given suggestion that had been rejected by the Commission as being beyond its mandate.

81. Mr. KOSKENNIEMI said that, from 1940 to 1990, the Baltic States had been occupied by the Soviet Union, which had regularly exercised diplomatic protection for those living under the occupation.

82. Mr. KEMICHA said the mere suggestion that diplomatic protection was available to those living in occupied territories smacked of cynicism. Occupation was illegal and, for him personally, shocking. He therefore proposed that the phrase "administered, controlled or occupied a territory" should be amended to read "administered or controlled a territory".

83. The CHAIR invited the Commission to consider the proposal, which would be without prejudice as to whether occupation was covered by administration or control.

84. Ms. ESCARAMEIA said that the term "occupied territory" was often associated with the situation in the Middle East. If, however, it were given a broader sense, to include any situation in which a *de facto* occupation was contested by the inhabitants of the territory concerned or the rest of the world, it was possible to find many examples of diplomatic protection provided by an occupying Power, particularly if colonies and former colonies were taken into account. There were some cases in which Portugal had exercised diplomatic protection on behalf of the inhabitants of Macau, even though the latter had not, since 1976, been considered Portuguese territory and had, since the Sino-Portuguese Joint Declaration of 1987, been regarded as just an administration, without territorial sov-

ereignty. That had not prevented Portugal from providing diplomatic protection, or at least some sort of protection, for inhabitants of Macau, for example, when a woman had been sentenced to death in Singapore. Neither Singapore itself nor China had raised any objection. Diplomatic protection was compatible with occupation, but if occupation was automatically taken to mean illegal occupation, she could understand the position of members who were opposed to the first sentence of paragraph 44.

85. Mr. DUGARD (Special Rapporteur) said that he wished to place on record his extremely strong objection to any change in the first sentence. Deletion of the word "occupied" would be an assault on freedom of speech. He did not like occupation more than anyone else. Indeed, he was Special Rapporteur for the Commission on Human Rights on human rights violations in the occupied Palestinian territories. All his reports were directed at the illegitimacy of the occupation. Occupation was, however, a fact of international life. Mr. Pellet had actually made a proposal; and he was opposed to suppressing what had been said simply because some people thought the subject was too sensitive to be mentioned.

86. Mr. CHEE pointed out that when Syngman Rhee, the Korean president at the time, had travelled to the United States as a private citizen to plead with the United States Congress for the independence of Korea during the period between 1945 and 1948, when the country was occupied by United States forces, the United States had issued him travel documents. He was not sure if that qualified as diplomatic protection.

87. The CHAIR said that the Commission had strayed from the question of whether paragraph 44 reflected what had been said on a particular occasion to a general discussion on occupation. He accepted the Special Rapporteur's request that the word "occupied" should not be deleted.

88. Mr. PELLET said that, whereas Mr. Kemicha and others were shocked by his position, which he persisted in defending, he himself was shocked by the fact that, according to some members of the Commission, the Palestinians, for example, who had endured occupation for so many years, were condemned to enjoy no diplomatic protection, if an occupying Power was denied that possibility. He passed no judgement on the legality of the occupation; simply, if occupation there was, the inhabitants of the occupied territory needed diplomatic protection. He believed his position to be justified *de lege ferenda*, while under *lex lata* a whole range of examples could be found to support his case. As for the use of the word "occupied", he strongly supported the stance of the Special Rapporteur; any other course of action was pure censorship. The views expressed by himself and others might be wrong, but it was even more wrong to suppress what they had said. It was not for one member of the Commission to censor the views of another.

89. Mr. DAOUDI said that he well understood the case made by the Special Rapporteur, who had provided examples on the basis of which diplomatic protection could be exercised by an occupying Power. He defied anyone, however, to quote a case in which a resident of the Sahara had received diplomatic protection from Morocco or a

Palestinian or Syrian from Israel. The notion was absurd. The situation of colonialism, which was covered by paragraph 43 of the report, was quite different. He trusted that his views would be fully reflected in the summary record.

90. The CHAIR, after saying that all positions would undoubtedly be reflected in the record, urged the Commission not to debate the legal merits of what the Special Rapporteur had said but merely to accept paragraph 44 as a faithful account of what had been said.

91. Mr. KAMTO, after pointing out that it was perfectly legitimate for each member to want to express an opinion, said that, in view of the debate that had just taken place, there must be a question as to whether paragraph 44 truly reflected the feeling of the Commission. The debate showed virtually no support for the present wording of the paragraph. The first sentence should be recast to read: "The Special Rapporteur noted further that there had been a proposal to include within the scope of the study the exercise of diplomatic protection by a State which administered, controlled or occupied a territory." If the Commission wished, a further sentence could say: "This proposal did not receive any support."

92. Mr. DUGARD (Special Rapporteur) said that such wording flew in the face of the facts. Mr. Pellet had made his proposal and, according to his recollection, a number of people had supported the idea.

93. Mr. PELLET confirmed that there had been support for his proposal that the inhabitants of occupied territories should not be left without diplomatic protection, notably from Mr. Simma, who was currently out of the room. He would raise no objection to the first part of Mr. Kamto's suggested text; but to say that there had been no support for the proposal was simply untrue.

94. Mr. DUGARD (Special Rapporteur) said that the suggested text implied that Mr. Pellet had made a ridiculous proposal and that he had been isolated in the Commission. Although he himself, in common with most other members, had opposed it, the proposal had been perfectly rational in the context of the discussion on topics that might or might not be dealt with under the subject of diplomatic protection.

95. Mr. AL-BAHARNA said that the Commission's views would be reflected if a sentence was inserted in the report, along the following lines: "Some members objected to the use of the word 'occupied'."

96. Mr. MOMTAZ said that, while he was personally sympathetic to Mr. Pellet's proposal and to the concern that lay behind it, deletion of the word "occupied" would not diminish the force of that concern in any way. Administration or controls did not preclude occupation, but the word "occupied" resonated very disagreeably with many members of the Commission.

97. Mr. AL-MARRI suggested that a phrase should be added at the end of the first sentence, saying: "provided that the provisions of the Geneva Conventions of 12 Au-

gust 1949 relative to the protection of war victims were not thereby violated".

98. The CHAIR said that he saw no prospect of compromise on the issue. It was Orwellian that the Commission was unable to report what had been said. Unless he heard any formal objection, he proposed that paragraph 44 should be adopted as it stood.

At the request of Mr. Kemicha, a vote was taken.

Paragraph 44 was adopted by 15 votes to 9, with 3 abstentions.

99. The CHAIR said he very much regretted that it had proved necessary to take a vote, which was a most unusual occurrence in the Commission.

The meeting rose at 1 p.m.

2747th MEETING

Tuesday, 13 August 2002, at 3.05 p.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kateka, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Opertti Badan, Mr. Pellet, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fourth session (*continued*)

CHAPTER V. *Diplomatic protection* (concluded) (A/CN.4/L.619 and Add.1-6)

1. The CHAIR invited the members of the Commission to continue their consideration of chapter V, section B, of the draft report of the Commission.

B. Consideration of the topic at the present session (*concluded*) (A/CN.4/L.619 and Add.1 and 6)

Paragraph 45 (A/CN.4/L.619)

2. Mr. TOMKA said that the commentary to article 3 [5] did not refer either to the Calvo clause or to the "clean hands" principle in connection with the *Nottebohm* case. He therefore proposed that the words "as well as in the

commentary to article 3 [5] in the context of the *Nottebohm* case” should be deleted.

Paragraph 45, as amended, was adopted.

Paragraph 46

3. Mr. DUGARD (Special Rapporteur) said that paragraph 46 dealt with the question of denial of justice, which was discussed in a practically identical way in the last part of section B of the report. He therefore proposed that paragraph 46 should be deleted.

Paragraph 46 was deleted.

Paragraphs 47 to 51

Paragraphs 47 to 51 were adopted.

Paragraphs 52 and 53

Paragraphs 52 and 53 were adopted with editing changes.

Paragraphs 54 to 56

Paragraphs 54 to 56 were adopted.

Paragraph 57

4. Mr. PELLET said it should be stated that the distinction referred to at the end of the penultimate sentence had not been retained “on second reading”.

Paragraph 57, as amended, was adopted.

Paragraph 58

Paragraph 58 was adopted.

Paragraph 59

5. Mr. GAJA proposed that the words “from a smaller State’s perspective” in the second sentence should be deleted because they implied that it was the State which exhausted local remedies. He also proposed that the word “always” should be added after the words “was not”.

Paragraph 59, as amended, was adopted.

Paragraphs 60 to 63

Paragraphs 60 to 63 were adopted.

Paragraph 64

6. Mr. PELLET proposed that the last sentence should be amended to read: “The exhaustion of local remedies

rule was not peremptory, but was subject to the agreement of the parties.”

Paragraph 64, as amended, was adopted.

Paragraphs 65 to 79

Paragraphs 65 to 79 were adopted.

Paragraph 80

7. Mr. PELLET said that, in the French text, the words *droit romain* should be replaced by the words *droit romano-germanique* or *droit d’origine latine*.

8. Mr. SIMMA said that the fifth and sixth sentences dealt with the relevance of human rights jurisprudence and that they should therefore be incorporated in paragraph 82 dealing with that question.

Paragraph 80, as amended, was adopted.

Paragraph 81

Paragraph 81 was adopted.

Paragraph 82

Paragraph 82 was adopted with the addition of the fifth and sixth sentences of paragraph 80.

Paragraphs 83 and 84

Paragraphs 83 and 84 were adopted.

Paragraph 85

9. Mr. PELLET said that he did not understand the penultimate sentence.

10. Mr. DUGARD (Special Rapporteur) said that that sentence was not absolutely necessary and proposed that it should be deleted.

Paragraph 85, as amended, was adopted.

Paragraph 86

Paragraph 86 was adopted.

11. The CHAIR invited the members of the Commission to consider the remainder of chapter V, section B, of the draft report, which dealt with articles 14 and 16.

A/CN.4/L.619/Add.1

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

12. Mr. SIMMA proposed that the word “generic” in the first sentence should be deleted.

Paragraph 2, as amended, was adopted.

Paragraphs 3 to 13

Paragraphs 3 to 13 were adopted.

Paragraph 14

13. Mr. SIMMA, supported by Mr. PELLET, said that it should be explained in a footnote which document the reference to the *ELSI* case was taken from.

Paragraph 14, as amended, was adopted.

Paragraphs 15 to 27

Paragraphs 15 to 27 were adopted.

Paragraph 28

14. Mr. GAJA said that, in the *Trail Smelter* case, the United States had been the claimant State and Canada the respondent State, and not the other way around. The penultimate sentence should therefore be amended accordingly.

Paragraph 28, as amended, was adopted.

Paragraphs 29 to 31

Paragraphs 29 to 31 were adopted.

Paragraph 32

15. Mr. PELLET said that the last sentence should contain a reminder of what the course taken in 1996 had been.

16. Mr. DUGARD (Special Rapporteur) said that that sentence referred back to the last sentence of paragraph 26. He agreed with Mr. Pellet that an explanation was necessary.

17. Mr. GAJA proposed that the reference to 1996 should be deleted because, in any event, the decision had been taken in the 1970s. The last sentence should therefore be amended to read: “As such, he left it to the Commission to decide whether to allow the matter to develop in State practice or whether it felt there was a need to intervene *de lege ferenda*.”

Paragraph 32, as amended by Mr. Gaja, was adopted.

Paragraphs 33 to 43

Paragraphs 33 to 43 were adopted.

Paragraph 44

18. Mr. GAJA, referring to the last sentence, said that European multilateral conventions did not have the purpose of limiting the liability of the contracting parties, but of settling the question of civil liability. He therefore proposed that the end of that sentence should be amended to read: “which had the very purpose of settling the question of civil liability in the event of such an accident”.

Paragraph 44, as amended, was adopted.

Paragraphs 45 to 48

Paragraphs 45 to 48 were adopted.

Paragraph 49

19. Mr. SIMMA said that the words “as confirmed by the changing nature of State responsibility” in the second sentence did not mean anything and were unnecessary. He therefore proposed that they should be deleted and that the sentence should end with the word “codification”.

20. Mr. PELLET said that the words “Any attempt to exhaust local remedies” in the penultimate sentence were quite awkward and should be replaced by the words “Requiring the exhaustion of local remedies”.

21. Mr. DUGARD (Special Rapporteur) said that the words “Any attempt” might be replaced by the words “The requirement”.

Paragraph 49, as amended by Mr. Simma and Mr. Pellet, was adopted.

Paragraph 50

Paragraph 50 was adopted.

Paragraph 51

22. Mr. GAJA, referring to the penultimate sentence, said that it was not an alien who could submit a direct claim, but his State of nationality. The words “a direct claim by him” should be replaced by the words “a direct claim by that State”.

23. Mr. BROWNLIE, referring to the first sentence, said that it was not enough to mention liability because a claim might, depending on the circumstances, be based on State responsibility.

24. Mr. PELLET, supported by Mr. DUGARD (Special Rapporteur) and referring to the comment by Mr. Brownlie, proposed that the end of the first sentence should be

amended to read: “the context was not that of responsibility covering diplomatic protection, but that of liability.”

Paragraph 51, as amended by Mr. Gaja and Mr. Pellet, was adopted.

Paragraph 52

25. Mr. SIMMA said that the word “obstruct” was too strong.

26. The CHAIR proposed that the word “obstruct” should be replaced by the word “hamper”.

Paragraph 52, as amended, was adopted.

Paragraphs 53 to 63

Paragraphs 53 to 63 were adopted.

A/CN.4/L.619/Add.6

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

27. The CHAIR, speaking as a member of the Commission, asked whether it was really necessary to refer to the Vattelian “fiction” and whether the word “approach” might not be used.

28. Mr. BROWNLIE said that, instead of referring to a “fiction”, it would be better not to mention Vattel at all because, for Vattel, the problem had not been a fiction but a reality.

29. Mr. PELLET said he regretted that the Chair had deemed it necessary to reopen the debate on a question which the Commission had discussed for hours. He stressed that there was no possible doubt that a fiction was involved and that, in any case, that was what the Special Rapporteur had said.

30. Mr. DUGARD (Special Rapporteur) said that the Vattelian fiction had often been referred to and that he had used the term when he had introduced article 16. He would therefore prefer to keep it.

Paragraph 2 was adopted.

Paragraph 3

Paragraph 3 was adopted.

Paragraph 4

31. Mr. SIMMA proposed that, in the second sentence, the word “intervention” should be replaced by the word “protection”.

32. Mr. DUGARD (Special Rapporteur) said that the word “intervention” was broader in meaning than the word “protection” and he had chosen “intervention” purposely.

Paragraph 4 was adopted.

Paragraph 5

33. Mr. BROWNLIE proposed that, in the second sentence, the words “Western States” should be replaced by the words “capital-exporting States”.

Paragraph 5, as amended, was adopted.

Paragraphs 6 to 8

Paragraphs 6 to 8 were adopted.

Paragraph 9

34. Ms. ESCARAMEIA said that paragraph 9 did not reflect one of the points of view expressed, namely, that article 16 was not properly speaking a Calvo clause, but related instead to the exhaustion of local remedies. She therefore proposed that the following sentence should be added after the second sentence: “The view was expressed that the proposed article did not deal with the Calvo clause in its classical sense, but with a mere obligation of exhaustion of local remedies in particular circumstances”.

35. The CHAIR proposed that, in the light of the beginning of the paragraph, the beginning of the new sentence should be amended to read: “Some also expressed the view that the draft article...”.

It was so decided.

Paragraph 9, as amended, was adopted.

Paragraphs 10 to 12

Paragraphs 10 to 12 were adopted.

Paragraph 13

36. Mr. GAJA proposed that the word “only” in the fourth sentence should be deleted. The fifth sentence should also be deleted because it did not mean anything.

37. Mr. PELLET said that, if the word “only” was deleted, the sentence would not mean anything at all. Since the wording of the sentence was awkward, he proposed that it should be amended to read: “The alien could, however, place himself exclusively under the protection of the laws of the host country.” The fifth sentence could not be deleted, but its wording could be improved.

38. Mr. GAJA said that he could agree to the wording proposed by Mr. Pellet for the fourth sentence. In his opinion, however, the fifth sentence would have to be reworded if it was to be kept, because diplomatic protection

was the prerogative of the State, not of the alien. Perhaps it could be said that the alien would have to waive his right to invoke the protection of his State.

39. Mr. OPERTTI BADAN said that Mr. Pellet's proposal might restrict the scope of diplomatic protection.

40. Mr. PELLET said that a waiver of the protection of international law did, of course, involve a waiver of diplomatic protection, but those were nonetheless two different types of waiver. In his opinion, the word "respect" was the cause of the problem. It could not be said that the alien undertook to "respect" the laws of the host country. He had no choice in the matter. He had to do so.

41. Mr. GAJA, supported by Mr. BROWNLIE, proposed that the words "respect only" should be replaced by the words "rely only on" and that the fifth sentence should be deleted.

Paragraph 13, as amended, was adopted.

Paragraph 14

42. Mr. OPERTTI BADAN said that the beginning of the first sentence had to be amended because it was too vague.

43. The CHAIR proposed the following wording: "Some also stated that...".

Paragraph 14, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

Paragraph 16

44. Mr. GAJA said that he had made the suggestion referred to in paragraph 16, but the paragraph did not faithfully reflect what he had meant to say. He had suggested not that article 16 should be reformulated but that a general provision on waiver should be drafted.

45. Mr. DUGARD (Special Rapporteur) said that that suggestion was to be found elsewhere in the text as well and that account must be taken of it if it was decided that paragraph 16 should be redrafted.

46. Mr. GAJA proposed the following wording: "The Commission further considered a suggestion that a general provision on waiver should be drafted".

Paragraph 16, as amended, was adopted.

Paragraphs 17 to 19

Paragraphs 17 to 19 were adopted.

Paragraph 20

47. Mr. PELLET said that, by adopting Mr. Gaja's suggestion that the reference to the Drafting Committee in paragraph 16 should be deleted, the Commission had made paragraph 20 very difficult to understand. Since the suggestion that the Committee should draft an omnibus waiver clause had been deleted, it was no longer clear what the Special Rapporteur was referring to in paragraph 20. The words "before a full consideration of such a provision was undertaken by the plenary" were also not clear. Unless that suggestion was included in the report of the Special Rapporteur, it was not obvious how it could have been "drafted" without being considered in plenary.

48. Mr. DUGARD (Special Rapporteur) said he recognized that paragraph 16 had been amended without taking account of paragraph 20. He remembered, even if Mr. Gaja did not, that he had indeed proposed that the Drafting Committee should be requested to prepare an omnibus waiver clause. In any event, in order to bring paragraph 20 into line with paragraph 16, the reference to the Committee in paragraph 20 could be deleted and it might simply be stated, for example: "The Special Rapporteur further pointed out that it would not be appropriate to draft an omnibus waiver clause before a full consideration of such a provision was undertaken by the plenary."

49. Mr. PELLET said that the French text used the word *inapproprié*, not the word *approprié*.

50. Mr. DUGARD (Special Rapporteur) said that that was a mistake. The French text should read: *qu'il ne serait pas approprié*.

51. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to Mr. Gaja's proposal that the reference to the Drafting Committee in paragraph 20 should be deleted.

It was so decided.

Paragraph 20, as amended, was adopted.

Paragraphs 21 and 22

52. Mr. PELLET said that paragraph 22 was a rather abrupt end to what had been a very lengthy discussion. Perhaps one or two sentences should be added to explain why the Commission had decided not to refer article 16 to the Drafting Committee.

53. The CHAIR, supported by Mr. BROWNLIE, said that the commentary simply reflected matters as they stood. The Commission did not have to explain why it had decided not to refer article 16 to the Drafting Committee. In addition, the reasons why various members had made a decision to that effect were many and varied, and the motives could not be described in detail.

54. Mr. AL-BAHARNA said that one solution would be to add paragraph 22 at the end of paragraph 21. The last sentence of paragraph 21 would then read: "However, the

Commission decided not to refer article 16 to the Drafting Committee.”

55. The CHAIR said that the word “However” might give rise to problems. Perhaps it could be left out. As to substance, he believed that there had been an “indicative vote” on the question whether or not article 16 should be referred to the Drafting Committee and that opinions had been divided.

56. Mr. DUGARD (Special Rapporteur) said that he would prefer that reference not be made to that vote because the results had not been very clear-cut.

57. Mr. PELLET said that the reasons why the Commission had decided not to refer article 16 to the Drafting Committee were explained in paragraphs 12 to 15. On the basis of Mr. Al-Baharna’s suggestion, perhaps paragraph 22 could be deleted and paragraph 21 could end with the following wording: “However, for the reasons explained in paragraphs 12 to 15 above, the Commission decided not to refer article 16 to the Drafting Committee”.

58. Mr. SIMMA said that the reasons given in paragraphs 12 to 15 were basically negative, but the members of the Commission had been divided “almost evenly”, as was indicated at the beginning of paragraph 21. It would therefore be better to adopt Mr. Al-Baharna’s original proposal.

59. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed that paragraph 22 should be deleted and that its content, except for the words “subsequently”, should be added at the end of paragraph 21.

It was so decided.

Paragraph 21, as amended, was adopted.

Paragraphs 23 to 26

Paragraphs 23 to 26 were adopted.

Paragraph 27

60. Mr. BROWNLIE proposed that the words “relating to the treatment of foreign nationals” should be added after the words “State responsibility” at the end of the second sentence.

61. Mr. TOMKA said that the rules of State responsibility relating to the treatment of aliens were primary rules, not secondary rules. He therefore wondered whether it would not be better to add the wording proposed by Mr. Brownlie in the first sentence, the end of which would then read: “Denial of justice was not limited to judicial action or inaction, but included violations by the executive and the legislature of international law relating to the treatment of foreign nationals, thereby covering the whole field of State responsibility.”

62. The CHAIR questioned whether it could be said that international law relating to the treatment of foreign nationals “covered” the whole field of State responsibility.

63. Mr. BROWNLIE said that, although that wording did not change the meaning of the paragraph, it did place too much emphasis on the executive and the legislature, whereas the concept of “denial of justice” was now very commonly used in arbitral procedure, where it constituted the basis of many legal cases brought in order to obtain compensation for injury to foreign nationals.

64. Mr. GAJA said that the words “State responsibility” might be replaced by the words “the conduct of States”.

65. Mr. SIMMA said that the juxtaposition of the words “international law relating to the treatment of foreign nationals” and “thereby covering the whole field of State responsibility” did give rise to a problem. The latter phrase should be amended.

66. Following a discussion in which Mr. DUGARD (Special Rapporteur), Mr. BROWNLIE, Mr. SIMMA and Mr. TOMKA took part, the CHAIR suggested that the words “thereby covering the whole field of State responsibility” should be deleted, thereby solving the problem of the definition of the scope of State responsibility.

It was so decided.

Paragraph 27, as amended, was adopted.

Paragraph 28

Paragraph 28 was adopted.

Chapter V, section B, as amended, was adopted.

Chapter V, as amended, was adopted.

The meeting rose at 6 p.m.

2748th MEETING

Wednesday, 14 August 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto,

Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

Unilateral acts of States (*concluded*)* (A/CN.4/524, A/CN.4/525 and Add.1 and 2,¹ A/CN.4/521, sect. D)

[Agenda item 5]

1. Mr. RODRÍGUEZ CEDEÑO (Chair of the open-ended Working Group on Unilateral Acts of States, Special Rapporteur) informed the Commission that informal consultations on unilateral acts of States had taken place the previous week, following similar consultations during the first part of the session. There had been two main topics of discussion, the first being the need for a compilation of State practice in the field of the unilateral acts of States, in order to put the Commission's work on a firmer basis and, indeed, to arrive at a proper definition of the topic. Mr. Simma had put forward the interesting proposal that the compilation could be carried out with the assistance of a private German company. Coordination would be the responsibility of both Mr. Simma and himself. The methodology and terms of reference of the compilation, which would be drafted shortly, would be put before the Commission, and progress on the project would be assessed by Mr. Simma and himself.

2. The scope of future work had also been discussed. It had been agreed that the focus should be on the topic of recognition, a fundamental institution of international law, with reference to the research that had been done and how it could advance the Commission's own work. Finally, the Working Group hoped to discuss the draft articles on unilateral acts of States submitted to the Commission by the Special Rapporteur in his fourth report at the previous session,² with a view to improving the text, taking account both of members' comments and of the results of the compilation of State practice. He hoped to be able to maintain contact with his colleagues during the intersessional period in order to keep them abreast of any developments.

Draft report of the Commission on the work of its fifty-fourth session (*continued*)

CHAPTER IV. *Reservations to treaties* (A/CN.4/L.618 and Add.1–4)

3. The CHAIR invited the members of the Commission to consider chapter IV of the draft report of the Commission.

* Resumed from the 2727th meeting.

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

² See 2723rd meeting, footnote 2.

C. Draft guidelines on reservations to treaties provisionally adopted so far by the Commission (A/CN.4/L.618/Add.2 and 3)

2. TEXT OF THE DRAFT GUIDELINES ON RESERVATIONS TO TREATIES WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FIFTY-FOURTH SESSION (A/CN.4/L.618/Add.3)

Commentary to guideline 2.1.1 (Written form)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

4. The CHAIR questioned whether it was technically correct to refer to the "second reading" of the draft guideline, since the first reading had not yet been completed.

5. Mr. PELLET (Special Rapporteur) pointed out that, as was indicated in the footnote, the paragraph related to the fourth report on the law of treaties in 1965 by Sir Humphrey Waldock, the Special Rapporteur at the time.

6. The CHAIR, supported by Mr. TOMKA, proposed that the words "Special Rapporteur" should be replaced by the words "Sir Humphrey Waldock", in order to avoid confusion.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (11)

Paragraphs (7) to (11) were adopted.

The commentary to guideline 2.1.1, as amended, was adopted.

Commentary to guideline 2.1.2 (Form of formal confirmation)

7. Mr. SIMMA said that, in the English text, the draft guidelines should appear in a typeface that made them stand out from the rest of the text, as was the case in other parts of the report.

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 2.1.2 was adopted.

Commentary to guideline 2.1.3 (Formulation of a reservation at the international level)

Paragraphs (1) to (10)

Paragraphs (1) to (10) were adopted.

Paragraph (11)

Paragraph (11) was adopted with a minor editing change in the first footnote.

Paragraph (12)

Paragraph (12) was adopted with a minor drafting change.

Paragraph (13)

8. Mr. TOMKA said that, as it stood, the last sentence of the paragraph could give the impression that the practice in question was accepted in all international organizations other than the United Nations. The word “certain” should be inserted before “international organizations”.

Paragraph (13), as amended, was adopted.

Paragraph (14)

9. Mr. TOMKA said that, whereas paragraphs (11) and (12) dealt with the formulation of reservations, paragraph (14) related to their transmission. There was an important difference between the two procedures. Moreover, the practice of the 1928 Havana Convention on Treaties, referred to in the second sentence, did not differ from that of the United Nations. He would be in favour of deleting the paragraph.

10. Mr. PELLET (Special Rapporteur) said that, according to his understanding, a permanent representative to the United Nations could not transmit an act of ratification unless it had been signed by another authority. If Mr. Tomka was correct, however, the comparison with the Convention could be problematic; he would check the situation. On the first point, Mr. Tomka was mistaken: paragraphs (11) and (12) dealt with exactly the same procedure, so far as the practice of the Secretary-General was concerned. He would therefore prefer to retain paragraph 14. If United Nations practice was not compared with that of other organizations, then the guideline itself would be called into question.

11. The CHAIR said that, since the arguments of both Mr. Tomka and the Special Rapporteur were based on the Convention, which had not yet entered into force, deletion of the paragraph might be acceptable.

12. Mr. PELLET (Special Rapporteur) suggested that the paragraph should be truncated to read: “Thus, it seems, for example, that the Secretary-General of OAS and the Secretary-General of the Council of Europe accept reservations ‘recorded’ in letters from permanent representatives.”

13. Mr. TOMKA confessed himself still exercised over the word “transmitted”. Whereas the Council of Europe practice was perfectly clear, that of the 1928 Havana Convention on Treaties was not. He wondered, for example, whether a permanent representative could make a reservation and, if so, whether he could do so in a document signed by himself. Perhaps the Latin American members of the Commission could confirm that the procedures of the Convention were followed. Any mistake by the Commission would be pointed out by the Sixth Committee.

14. Mr. PELLET (Special Rapporteur) said that he could guarantee that the practice was as he had described: a member of the Secretariat had been given oral information to that effect by the OAS Secretariat. Confirmation could also be found in his sixth report on reservations to treaties.³

15. Mr. OPERTTI BADAN said that the normal practice in Latin America was for a reservation to be transmitted by the minister for foreign affairs or, on the minister’s instructions, by his or her representative.

Paragraph (14), as amended by the Special Rapporteur, was adopted.

Paragraphs (15) and (16)

Paragraphs (15) and (16) were adopted.

Paragraph (17)

16. Mr. TOMKA said that, in the interests of consistency with paragraph (13), the word “certain” should be inserted before “international organizations” in the first sentence.

Paragraph (17), as amended, was adopted.

Paragraph (18)

17. Mr. GAJA noted that two article numbers of the 1969 and 1986 Vienna Conventions had been left blank in the English version. The blanks should be filled with the numbers 10 and 12 respectively.

Paragraph (18), as amended, was adopted.

The commentary to guideline 2.1.3, as amended, was adopted.

Commentary to guideline 2.1.4 [2.1.3 bis, 2.1.4] (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Paragraph (3) was adopted with a minor drafting change.

Paragraphs (4) to (10)

Paragraphs (4) to (10) were adopted.

³ See 2719th meeting, footnote 10.

Paragraph (11)

18. Mr. KAMTO said it was too categorical to declare that a State should never be allowed to claim that a violation of the provisions of internal law had invalidated a reservation it had formulated, since the analysis had shown that, although the rules governing the formulation of reservations did not appear in national constitutions, they might be established in other provisions of internal law. Accordingly, he proposed that the word “never” should be replaced by “not”.

Paragraph (11), as amended, was adopted.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were adopted.

The commentary to guideline 2.1.4, as amended, was adopted.

Commentary to guideline 2.1.5 (Communication of reservations)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

19. Mr. MOMTAZ questioned the use of the word “puzzling” in the footnote and also why the quotation to which the footnote referred appeared in English in the French version of the draft report, even though the quotation was taken from the *Yearbook ... 1951*.

20. Mr. PELLET (Special Rapporteur) said that the *Yearbooks* from 1949 to 1951 had not been published in French. The word “puzzling” had been used because the wording of the provision cited was unusual, since it was descriptive rather than normative. However, he agreed that the second sentence of the footnote could be eliminated.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Paragraph (7) was adopted with a minor editing change.

Paragraphs (8) to (12)

Paragraphs (8) to (12) were adopted.

Paragraph (13)

Paragraph (13) was adopted with minor editing changes.

Paragraphs (14) to (26)

Paragraphs (14) to (26) were adopted.

Paragraph (27)

21. Following a discussion on the European Community and whether it had a Secretary-General, in which Mr. TOMKA, Mr. SIMMA and Mr. DAOUDI took part, Mr. PELLET (Special Rapporteur) proposed that the second sentence of the paragraph should be amended to read “In the case of the European Community, for example, the collegial nature of the Commission might raise some problems.”

Paragraph (27), as amended, was adopted.

Paragraph (28)

Paragraph (28) was adopted with a minor editing change.

Paragraph (29)

Paragraph (29) was adopted.

Paragraph (30)

22. Mr. SIMMA questioned whether the word “trickiest” was an appropriate translation of *la plus délicate*.

23. Mr. BROWNLIE said that “trickiest” was slightly demotic, but it was a perfectly straightforward word. It was not slang and it was not offensive; therefore, he saw no need to change it, even though it was a little unusual in the bureaucratic context.

24. Mr. PELLET (Special Rapporteur) said that each time a French-speaking member of the Commission questioned wording in the French text the matter was referred to the Secretariat. Consequently, that was the most appropriate way to proceed in the present case.

25. Mr. SIMMA, seconded by Mr. KATEKA (Alternate Rapporteur), said that, if a member of the Commission wanted a word changed, it was not as simple as asking the Secretariat to add a comma or a full stop. It was a question of substance and not merely of form, and members of the Commission should have an opportunity to express their views.

26. Mr. PELLET (Special Rapporteur) said that he had taken note of the matter and would remind Mr. Brownlie, Mr. Kateka, Mr. Simma and the Chair when the French-speaking members of the Commission had problems with the French language. There should not be a double standard.

27. Mr. TOMKA proposed that in the paragraph’s second footnote the word *américaine* should be replaced by the words *des États-Unis*.

Paragraph 30, as amended, was adopted.

Paragraphs (31) to (33)

Paragraphs (31) to (33) were adopted.

The commentary to guideline 2.1.5, as amended, was adopted.

Commentary to guideline 2.1.6 [2.1.6, 2.1.8] (Procedure for communication of reservations)

28. Mr. SIMMA pointed out that there was an error in paragraph 3 of the English version of the draft guideline. The words “an objection to” should be inserted after “The time period for formulating”.

Paragraphs (1) to (20)

Paragraphs (1) to (20) were adopted.

Paragraph (21)

29. Ms. ESCARAMEIA proposed that the phrase “Although some members had a different opinion,” should be inserted in the antepenultimate sentence, before the words “the Commission nevertheless took the view that”.

Paragraph (21), as amended, was adopted.

Paragraph (22)

Paragraph (22) was adopted.

Paragraph (23)

30. Mr. GAJA said that the paragraph gave the impression that the date on which a reservation was made was the date on which it was communicated to the other contracting parties; whereas, when there was a depositary, it was the date on which it was communicated to the latter.

*The meeting was suspended at 10.55 a.m.
and resumed at 11 a.m.*

31. Mr. PELLET (Special Rapporteur) said that the problem raised by Mr. Gaja had initially seemed fairly complex, but that, after informal consultations, it seemed less so. In drafting paragraph (23), he now realized, he had probably had in mind draft guideline 2.1.6 as a whole, not just paragraph 2. Mr. Daoudi had brought up another point during the consultations. To take account of both, he proposed the following revision to paragraph (23): to end the second sentence with the words “by the depositary”; to delete the first part of the third sentence, up to and including the words “received the communication”; and to insert the following in place of the deleted text: “The expression ‘as the case may be’ covers a situation in which there is a depositary. In such a case, the communication of the reservation to the depositary may produce effects directly, if only in respect of the depositary himself, who is required to transmit it ‘as soon as possible’, a period of time that can be assessed only in terms of the date on which he himself has received the communication.” The

rest of the third sentence, “moreover ... as from that date” (*de plus ... de cette date*), would remain unchanged, and the last sentence would be deleted.

32. Mr. DAOUDI said that, as originally worded, paragraph (23) gave the impression that, according to article 79 of the 1986 Vienna Convention and draft guideline 2.1.6, a reservation was made once it was received by the depositary—in other words, the time period applying to the reservation began then. In reality, however, according to both article 79 of the Convention and draft guideline 2.1.6, the time period could begin only when the reservation was received by the other State to which it was addressed. Many treaty provisions, it was true, set the time period as starting from the receipt of the communication by the depositary, but they described special situations. The general situation was that the time period for entering an objection could begin only once the communication was received by the State concerned. The second sentence of paragraph (23) addressed a situation in which, for example, the depositary sat on a communication for a given period of time. In such a case, the depositary’s responsibility certainly came into play, but the fact remained that the reservation had not been received by the State to which the reservation was addressed, and the time period for lodging an objection to the reservation could not begin.

33. The text had been greatly improved by the change proposed by the Special Rapporteur, but the last part, “a period of time that can be assessed only in terms of the date on which he himself has received the communication”, left the problem unresolved and could create misunderstandings. It should, therefore, be deleted.

34. Mr. PELLET (Special Rapporteur) said he could not accept Mr. Daoudi’s latest proposal as it detracted from the clarity of the text. It had to be stated that the time period for assessing whether the communication had been made as soon as possible had to start from the date of the communication of the reservation to the depositary. Mr. Daoudi’s concerns had been very largely met by the revision he had just read out.

35. Mr. DAOUDI, responding to a suggestion by the CHAIR, said he would agree to the addition of a phrase at the end of paragraph (23) to sum up the views that he had just expressed.

Paragraph (23), as amended, was adopted.

Paragraph (24)

Paragraph (24) was adopted with a minor editing change.

The commentary to guideline 2.1.6, as amended, was adopted.

Commentary to draft guideline 2.1.7 (Functions of depositaries)

Paragraphs (1) to (14)

Paragraphs (1) to (14) were adopted.

The commentary to guideline 2.1.7 was adopted.

Commentary to guideline 2.1.8 [2.1.7 bis] (Procedure in case of manifestly [impermissible] reservations)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

36. Mr. GAJA said that, as a result of an oversight on the part of the Commission as a whole, the reference to the need to “bring the question to the attention of ... where appropriate, the competent organ of the international organization concerned”, contained in paragraph 2 (b) of draft guideline 2.1.7, appeared to have been omitted from the text of draft guideline 2.1.8. A reference to that case should be inserted in paragraph 2 of the latter guideline.

37. Mr. PELLET (Special Rapporteur) said he was not sure that guidelines 2.1.7 and 2.1.8 covered the same cases. If the problem was truly one of substance, it would affect the text of the guideline itself, to which he was loath to revert at the present stage, except where there was found to be a manifest omission, which did not seem to be the case with draft guideline 2.1.8.

38. Mr. GAJA said the omission could be rectified by stating in the commentary that normally the depositary would be the secretary-general of the same organization, and that consequently there was no need to cover that case in the text of the draft guideline. But the Commission should not say it had covered that case, since it had not done so.

39. The CHAIR proposed deferring consideration of paragraph (4) pending informal consultations.

It was so decided.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph 4 (conclusion)

40. Mr. GAJA said that, following informal consultations, it had been decided to suggest something rather unprecedented in order to solve the problem he had raised with regard to draft guideline 2.1.8. To remedy a simple but unfortunate omission, the text of the guideline should be aligned with that of guideline 2.1.7, thereby obviating the need to alter the commentary to guideline 2.1.8. Accordingly, he proposed that in paragraph 2 of guideline 2.1.8, the words “and, where appropriate, the competent organ of the international organization concerned” should be inserted before the word “indicating”.

It was so decided.

Paragraph 4 was adopted.

The commentary to guideline 2.1.8 [2.1.7 bis] was adopted.

2.4 Procedure for interpretative declarations

Paragraph (1)

Paragraph (1) was adopted.

Commentary to guideline 2.4.1 (Formulation of interpretative declarations)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Paragraph (4) was adopted with a minor drafting change.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to guideline 2.4.1 was adopted.

Commentary to guideline [2.4.2 [2.4.1 bis] (Formulation of an interpretative declaration at the internal level)]

Paragraph (1)

41. Mr. TOMKA said that, as a result of the submission of inaccurate information to him, the Special Rapporteur stated in paragraph (1) that in two cases, namely Estonia and Slovakia, only the Parliament had competence to formulate an interpretative declaration at the internal level. In point of fact, Slovakia was one of the States in which such competence was shared between the executive branch and the Parliament. Accordingly, the words “In two cases” should read “In one case”; “In thirteen cases” should read “In fourteen cases”, and the mention of Slovakia should be moved to the following footnote.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

The commentary to guideline [2.4.2 [2.4.1 bis]], as amended, was adopted.

Commentary to guideline [2.4.3 [2.4.2, 2.4.9] (Formulation and communication of conditional interpretative declarations)]

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

42. The CHAIR, speaking as a member of the Commission, proposed amending the word “identical” to read “substantially similar”.

43. Mr. PELLET (Special Rapporteur) said that in that case consideration would have to be given at some point in the future to the question of how the differences between the systems should be treated in the text of the guidelines themselves.

Paragraph (5), as amended, was adopted.

The commentary to guideline [2.4.3 [2.4.2, 2.4.9]], as amended, was adopted.

Section C.2, as amended, was adopted.

A. Introduction (A/CN.4/L.618)

Paragraphs 1 to 16

Paragraphs 1 to 16 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.618 and Add. 1 and 4)

Paragraphs 17 and 18 (A/CN.4/L.618)

Paragraphs 17 and 18 were adopted.

Paragraph 19

44. Mr. PELLET (Special Rapporteur) objected to the use of the phrase “provisionally adopted” in paragraph 19, pointing out that it applied only to the last two of a whole series of draft guidelines listed in that paragraph and that it might create the impression that the draft guidelines could be revisited. In addition, he would like the Secretariat to include a paragraph to report the adoption of the commentaries to the draft guidelines, together with the relevant date and meeting number.

45. The CHAIR suggested that the words “provisionally adopted” should be replaced by “adopted on first reading”. As for mentioning the adoption of the commentaries, when text was adopted, the commentaries thereto were assumed to be adopted as well.

46. Mr. PELLET (Special Rapporteur) said that, as could be seen from the last paragraph of the introduction to section B of chapter V of the Commission’s report on diplomatic protection, there was indeed a precedent for including a separate paragraph on the adoption of the commentaries to texts.

47. After additional comments by the CHAIR, Mr. PELLET (Special Rapporteur) and Mr. TOMKA, the CHAIR said that the necessary addition would be made, paralleling what had been done in the part of the report on diplomatic protection.

Paragraph 19, as amended, was adopted on that understanding.

A/CN.4/L.618/Add.1

Paragraph 1

48. Mr. PELLET (Special Rapporteur) said that the word “retain”, in the last sentence, was incorrect. The point of the paragraph was that the human rights treaty bodies were quite flexible, that they refrained from taking a categorical stance on the validity of reservations. He accordingly proposed that the words “to retain them” should be replaced by “to take a decision on their validity”.

Paragraph 1, as amended, was adopted.

Paragraphs 2 to 29

Paragraphs 2 to 29 were adopted.

A/CN.4/L.618/Add.4

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

49. Mr. GAJA said that the phrase “which raised the question of contradictory obligations”, in the second sentence, was superfluous and incorrect and should be deleted.

50. Mr. PELLET (Special Rapporteur) said that the paragraph recorded remarks that he himself had made, and, although they might well be incorrect and he might accordingly be deserving of censure, the remarks should nevertheless remain in the text.

Paragraph 6 was adopted.

Paragraphs 7 to 12

Paragraphs 7 to 12 were adopted.

Paragraph 13

51. Mr. GAJA suggested that, in the footnote, the word “new” should be inserted between “gives rise to” and “questions”.

Paragraph 13 was adopted, with the amendment to the footnote.

Paragraphs 14 to 20

Paragraphs 14 to 20 were adopted.

Section B, as amended, was adopted.

C. Draft articles on reservations to treaties provisionally adopted so far by the Commission (concluded) (A/CN.4/L.618/Add.2 and 3)

1. TEXT OF THE DRAFT ARTICLES ON RESERVATIONS TO TREATIES (A/CN.4/L.618/Add.2)

Section C.1, with the amendment to draft guideline 2.1.8 agreed earlier, was adopted.

Section C, as amended, was adopted.

Chapter IV, as amended, was adopted.

The meeting rose at 1 p.m.

2749th MEETING

Thursday, 15 August 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fourth session (continued)

CHAPTER VI. Unilateral acts of States (A/CN.4/L.620 and Add.1 and 2)

1. The CHAIR invited the members of the Commission to continue their consideration of the draft report, starting with chapter VI on unilateral acts of States.

A. Introduction (A/CN.4/L.620)

Paragraphs 1 to 11

Paragraphs 1 to 11 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.620 and Add. 1 and 2)

Paragraph 12 (A/CN.4/L.620)

2. Mr. SIMMA said that there was no addendum 2 to document A/CN.4/525 and that the words “and 2” in parentheses should be deleted.

Paragraph 12, as amended, was adopted.

Paragraph 13

3. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) proposed that, following paragraph 13, a new paragraph 13 *bis* should be added to indicate that informal consultations had been held during which two particular aspects of the question had been considered and that, at the preceding meeting, the coordinator of the consultations had reported to the Commission. He would give the secretariat the text of the new paragraph.

Paragraph 13 was adopted, subject to the addition of the said new paragraph.

Paragraphs 14 to 20

Paragraphs 14 to 20 were adopted.

Paragraph 21

4. Mr. BROWNLIE proposed that the word “general” should be added before the word “international” in the second sentence.

Paragraph 21, as amended, was adopted.

Paragraphs 22 to 27

Paragraphs 22 to 27 were adopted.

Paragraph 28

5. Mr. RODRÍGUEZ CEDEÑO proposed that the word “literature” should be replaced by the word “doctrine”.

Paragraph 28, as amended, was adopted.

Paragraphs 29 to 33

Paragraphs 29 to 33 were adopted.

Paragraph 34

6. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) proposed that the words “under Chapter VII of the Char-

ter of the United Nations” should be added after the words “Security Council”.

Paragraph 34, as amended, was adopted.

Paragraphs 35 to 45

Paragraphs 35 to 45 were adopted.

A/CN.4/L.620/Add.1

Paragraph 1

7. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the word “regretfully” in the second sentence of the paragraph should be deleted.

Paragraph 1, as amended, was adopted.

Paragraph 2

Paragraph 2 was adopted.

Paragraphs 3 to 13

8. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the English and Spanish texts should be brought into line with the French text because the opinion referred to in paragraph 3 and in the following paragraphs was that of one member.

9. Mr. KOSKENNIEMI said it was his opinion that was being referred to and that he had expressed it during a lengthy statement.

10. Mr. DAOUDI, supported by Mr. SIMMA, said it should be indicated that the opinion of one member was being referred to, because it was a negative opinion of the codification of unilateral acts of States and the Commission must not give the impression that it shared that opinion.

11. Mr. CANDIOTI proposed that, in paragraph 3, the words “by a member” should be added after the words “the point was made”; in paragraph 4, the words “a practitioner’s” should be replaced by the word “this”; the words “According to this view” should be added at the beginning of paragraph 5; in the first sentence of paragraph 6, the words “by the same member” should be added after the words “it was stated”; and the following new paragraph 13 *bis* should be added after paragraph 13: “Some other members agreed with various aspects of the views described above.”

12. Following a discussion in which Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), Mr. KOSKENNIEMI, Mr. KAMTO, Mr. OPERTTI BADAN, Ms. ESCARAMEIA, Mr. GAJA, Mr. MANSFIELD, Mr. KATEKA, Mr. PAMBOU-TCHIVOUNDA, Mr. KEMICHA and the CHAIR took part, it was decided that the proposal by Mr. Candiotti should be adopted.

Paragraphs 3 to 13, as amended, and the new paragraph 13 bis were adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

13. Mr. KAMTO said that, as the author of the views summarized in the paragraph, he would like the words *entité juridique* in the second sentence of the French version to be replaced by the words *être juridique*, which he had used in his statement.

14. Mr. CANDIOTI, supported by Mr. OPERTTI BADAN, said that the translation of those words into Spanish might give rise to problems. The word *fenómeno* or the word *hecho* should be used instead.

15. Mr. BROWNLIE, supported by Mr. SIMMA, proposed that, in the last sentence, the words “to create institutions”, which were confusing, should be replaced, especially in the languages other than English, by the words “to create intellectual concepts”.

16. Mr. KOSKENNIEMI said that paragraph 15 referred to paragraph 6, which expressed the idea that unilateral acts did not exist as a legal institution. In his opinion, it might be confusing if an expression other than “legal institution” was used in paragraph 15. He would nevertheless not insist that it should be retained.

Paragraph 15, as amended by Mr. Brownlie, was adopted.

Paragraph 16

17. Mr. KATEKA proposed that the word “Members” should be replaced by the words “Some members”.

Paragraph 16, as amended, was adopted.

Paragraphs 17 to 20

Paragraphs 17 to 20 were adopted.

Paragraph 21

18. Mr. GAJA noted that the question of which body was competent to make a promise did not relate only to parliaments or Governments. It could also concern, for instance, governors of federate States when the decision not to carry out a death sentence came within their competence.

19. Mr. CHEE said that the words “its parliament or its Government” were not appropriate.

20. Mr. SIMMA said that the paragraph reflected one of his statements in which he had raised the problem of the extradition to Turkey of persons in Germany. The legal question that arose was whether it was enough for the Turkish Government to undertake not to execute the persons who would be extradited or whether the Turkish Parliament should also make such a promise. He therefore did not want the first sentence to be amended. The second sentence did not clearly reflect what he had said, and he proposed that it should be amended to read: “This demonstrated that the articles proposed by the Special Rapporteur on the representation of States in the formulation of unilateral acts corresponded to particular needs.”

Paragraph 21, as amended, was adopted.

Paragraphs 22 to 24

Paragraphs 22 to 24 were adopted.

Paragraph 25

21. Mr. SEPÚLVEDA said that he would like reference to be made to some of the views which he had expressed and which were not reflected in the draft report. He had stated, for example, that the practice of the recognition of States was no longer in force because, when the United Nations admitted a new Member State, there was in a sense no need for the official recognition of that State. He had also indicated that, in the case of some States, the recognition of States had ceased to be a unilateral act because Governments were no longer recognized. It was quite simply decided that diplomatic relations should either be maintained or broken off. He had also referred to the conditions for the collective recognition of a State laid down by the European Union. He had pointed out that the addressees of unilateral acts of States could be not only States and international organizations but also national liberation movements. He had expressed a number of views on promise and the invalidity of some acts, which were also not reflected in the report. He would submit a text to the Commission summarizing all those points.

Paragraph 25 was adopted, subject to the addition of the text to be submitted by Mr. Sepúlveda.

Paragraphs 26 to 28

Paragraphs 26 to 28 were adopted.

Paragraph 29

22. Mr. KOSKENNIEMI proposed that, in the second sentence, the word “inability” should be replaced by the word “failure”, and that the other language versions should be amended accordingly.

23. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that, in the first sentence of the Spanish text, the word *clasificar* should be replaced by the words *incluirse en la clasificación*.

Paragraph 29, as amended by Mr. Koskenniemi and Mr. Rodríguez Cedeño, was adopted.

Paragraphs 30 to 32

Paragraphs 30 to 32 were adopted.

Paragraph 33

24. Ms. ESCARAMEIA proposed that, in the first sentence, the word “although” should be replaced by the words “even if”, which better reflected the idea expressed.

Paragraph 33, as amended, was adopted.

Paragraph 34

Paragraph 34 was adopted.

Paragraph 35

25. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), supported by Mr. OPERTTI BADAN, said that the Spanish word *trampas* was unacceptable. He proposed that the sentence should be amended to read: *...medios a los que los Estados recurrían...*

26. Mr. PELLET said that he wanted to keep the word *piège*, which he had used deliberately. It would be absurd to say that States resorted involuntarily to voluntary acts.

27. Mr. CANDIOTI proposed that the third sentence should be amended to read: “Unilateral acts, like treaties, could lead to situations in which States were caught against their will.”

28. Mr. PELLET said that he could accept that proposal, although it watered down the text.

Paragraph 35, as amended by Mr. Candioti, was adopted.

Paragraphs 36 and 37

Paragraphs 36 and 37 were adopted.

Paragraph 38

29. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the word *inacceptable* (unacceptable) in the first sentence was too strong. The wording of the sentence should be brought into line with that of the French text.

Paragraph 38, as amended, was adopted on the understanding that the Spanish version would be changed as indicated.

Paragraphs 39 to 42

Paragraphs 39 to 42 were adopted.

Paragraphs 43 and 44

30. Mr. KOSKENNIEMI said that, in order to make the text more logical, the first sentence of paragraph 44 should be moved to the beginning of paragraph 43.

Paragraphs 43 and 44, as amended, were adopted.

Paragraphs 45 to 66

Paragraphs 45 to 66 were adopted.

Paragraphs 67 and 68

31. Mr. GAJA said that the second sentence of paragraph 67 did not mean anything and should be deleted. The first sentence of paragraph 68 should be amended to read: "It was stated that invalidity should be regarded as invocable by any State, not only when a unilateral act was contrary to a peremptory norm of international law, but also in the event of the threat or use of force."

Paragraphs 67 and 68, as amended, were adopted.

Paragraph 69

Paragraph 69 was adopted.

Paragraph 70

32. Mr. SIMMA said that the last part of the sentence was badly designed because it might imply that decisions of the Security Council were invalid, something that was not the case.

33. The CHAIR proposed that paragraph 70 as a whole should be deleted.

It was so decided.

Paragraphs 71 to 83

Paragraphs 71 to 83 were adopted.

A/CN.4/L.620/Add.2

Paragraph 1

34. Mr. TOMKA proposed that, in the second sentence, the words "to codify unilateral acts" should be replaced by the words "to codify the rules relating to unilateral acts".

35. Ms. ESCARAMEIA said that, if the proposal was accepted, the end of the sentence would have to be amended, for example, by replacing the words "they did not exist

as such in international law" by the words "such acts did not exist as such in international law".

36. Mr. MANSFIELD said that the end of the sentence should simply be deleted. The sentence would thus end with the words "unilateral acts".

37. Mr. KAMTO, supported by Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), said that the sentence should be retained because it faithfully reflected what had been stated during the debate.

38. Following a discussion in which Mr. TOMKA, Mr. KOSKENNIEMI, Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) and the CHAIR took part, it was decided that the second sentence should be retained, with the amendments proposed by Mr. Tomka and Ms. Escarameia.

Paragraph 1, as amended, was adopted.

Paragraphs 2 to 20

Paragraphs 2 to 20 were adopted.

Section B, as amended, was adopted.

Chapter VI, as amended, was adopted.

CHAPTER VIII. *The responsibility of international organizations* (A/CN.4/L.624)

39. The CHAIR, replying to a question by Mr. Pellet, said that no change could in principle be made to the text of the document under consideration because it contained the report of a working group, which had already been adopted by the Commission. He therefore proposed that sections A and B should be considered together, followed by section C.

A. Introduction; B. Consideration of the topic at the present session

Sections A and B were adopted.

C. Report of the Working Group

Section C was adopted.

Chapter VIII was adopted.

CHAPTER IX. *The fragmentation of international law: difficulties arising from the diversification and expansion of international law* (A/CN.4/L.625)

40. The CHAIR invited the members of the Commission to consider chapter IX in the same way as chapter VIII.

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

Paragraph 4 was adopted.

Paragraph 5

41. Mr. SIMMA said that, in the corresponding footnote, Mr. Mansfield's name should be included among those of the members of the Study Group.

Paragraph 5, as amended, was adopted.

Paragraph 6

42. The CHAIR said that, since the report of the Study Group had been amended, the words "as amended" should be added after the words "Study Group" in the second line.

*Paragraph 6, as amended, was adopted.**Section B, as amended, was adopted.***C. Report of the Study Group**

Paragraphs 7 to 9

Paragraphs 7 to 9 were adopted.

Paragraph 10

43. Mr. SIMMA said that the square brackets around the sixth sentence in the English text should be deleted.

Paragraph 10, as amended, was adopted.

Paragraphs 11 to 25

*Paragraphs 11 to 25 were adopted.**Section C, as amended, was adopted.**Chapter IX, as amended, was adopted.*

CHAPTER VII. 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.621)

A. Introduction

Paragraphs 1 to 11

*Paragraphs 1 to 11 were adopted.**Section A was adopted.***B. Consideration of the topic at the present session**

Paragraph 12

*Paragraph 12 was adopted.**Section B was adopted.***C. Report of the Working Group**

Paragraphs 13 to 28

*Paragraphs 13 to 28 were adopted.**Section C was adopted.**Chapter VII was adopted.*

CHAPTER X. Other decisions and conclusions of the Commission (A/CN.4/L.626 and Add.1)

A. Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/L.626 and Add.1)

Paragraphs 1 and 2 (A/CN.4/L.626)

Paragraphs 1 and 2 were adopted.

Paragraph 3

Paragraph 3 was adopted, on the understanding that it would be completed by the Secretariat.

44. The CHAIR invited the members of the Commission to consider the remainder of section A of chapter X, as contained in document A/CN.4/L.626/Add.1.

1. NEW TOPICS

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.***2. WORK PROGRAMME OF THE COMMISSION FOR THE REMAINDER OF THE QUINQUENNIAL**

Paragraph 4

Paragraph 4 was adopted.

Paragraph 5

45. Mr. TOMKA said that, in the work programme for 2005, reference was made, in connection with unilateral acts of States, to the "Eighth report of the Special Rapporteur on rules applicable to unilateral acts not referred to in the second part", but the eighth report was also in the second part. The words "the second part" should therefore be replaced by the words "the seventh report".

Paragraph 5, as amended, was adopted.

3. LONG-TERM PROGRAMME OF WORK

Paragraph 6

Paragraph 6 was adopted.

4. PROCEDURES AND METHODS OF WORK

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

5. COST-SAVING MEASURES

Paragraph 9

Paragraph 9 was adopted.

6. HONORARIA

Paragraphs 10 to 14

Paragraphs 10 to 14 were adopted.

Paragraph 15

46. Following a discussion in which Mr. SIMMA, Mr. PELLET and Mr. CANDIOTI took part on the question whether the word "honoraria" should be in the singular to show how usual a symbolic honorarium was or whether it should be kept in the plural, it was decided that the plural should be used and that the words "collect it" should be replaced by the words "collect them".

Paragraph 15, as amended, was adopted.

Paragraph 16

Paragraph 16 was adopted.

Section A, as amended, was adopted.

The meeting rose at 1.05 p.m.

2750th MEETING

Friday, 16 August 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Oportti Badan, Mr. Pellet, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fourth session (*concluded*)

CHAPTER X. *Other decisions and conclusions of the Commission (concluded)* (A/CN.4/L.626 and Add.1)

B. *Date and place of the fifty-fifth session* (A/CN.4/L.626)

Paragraph 4

Paragraph 4 was adopted.

Section B was adopted.

C. *Cooperation with other bodies*

Paragraphs 5 to 9

Paragraphs 5 to 9 were adopted.

Section C was adopted.

D. *Representation at the fifty-seventh session of the General Assembly*

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

1. The CHAIR said that it was the recommendation of the Bureau that Mr. Dugard, who had produced a number of articles that would, he hoped, be discussed in some detail, should be chosen to represent the Commission, together with the Chair, at the fifty-seventh session of the General Assembly.

It was so decided.

Paragraph 11 was adopted.

Section D was adopted.

E. *International Law Seminar*

Paragraphs 12 to 24

Paragraphs 12 to 24 were adopted.

Section E was adopted.

Chapter X, as amended, was adopted.

CHAPTER II. *Summary of the work of the Commission at its fifty-fourth session* (A/CN.4/L.616)

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

2. Mr. TOMKA said that the title of the topic of risks ensuing from the fragmentation of international law should be amended to include the words “and expansion”.

3. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that the title should be cited in the first sentence of paragraph 6, as it had originally been worded, and in the second, as amended at the current session. In the second sentence, the word “thus” before the words “*inter alia*” should be deleted.

Paragraph 6, as amended, was adopted.

Paragraphs 7 to 11

Paragraphs 7 to 11 were adopted.

Chapter II, as amended, was adopted.

CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.617 and Add.1)

A/CN.4/L.617

Paragraph 1

Paragraph 1 was adopted with a minor editing change.

Diplomatic protection

Paragraph 2

4. Mr. KAMTO proposed that, in the first sentence, the word “diplomatic” should be deleted. It had been generally agreed that the *M/V “Saiga” (No. 2)* case had been not about diplomatic protection but about protection of a different nature.

5. Mr. BROWNLIE said that he agreed with that point but found the remedy to be inadequate. The decision of ITLOS in the *M/V “Saiga” (No. 2)* case had hinged on direct injury, but paragraph 2 dealt with a different issue.

6. Ms. ESCARAMEIA pointed out that, in the informal discussions held on the subject, some members of the Commission had stated that the protection referred to in the *M/V “Saiga” (No. 2)* case was a form of diplomatic protection. The word “diplomatic” should be retained in the first sentence and, in the second sentence, States should be invited to give their views on whether diplomatic protection was involved or not.

7. Mr. CANDIOTI said he agreed that the first sentence should be worded in neutral terms and refer to “protection”, not to “diplomatic protection”. The second sentence raised the question whether the protection referred to was diplomatic protection or not.

8. Mr. DUGARD (Special Rapporteur) said that he accepted the suggestion made by Mr. Kamto, which left the question open for States to answer.

9. Mr. BROWNLIE said that the first sentence inaccurately quoted ITLOS as suggesting that the *M/V “Saiga” (No. 2)* case had involved diplomatic protection. It had not done so: it had regarded the matter as one of direct injury under the provisions of the United Nations Convention on the Law of the Sea.

10. Mr. KAMTO suggested that the Commission might request ITLOS to clarify its decision in the *M/V “Saiga” (No. 2)* case. That would be the most effective way of determining whether the Tribunal considered that the case involved diplomatic protection or some other kind of protection.

11. Mr. GAJA suggested that the Secretariat should be requested to incorporate the exact wording of the decision in paragraph 2.

12. Mr. TOMKA recalled that that decision had been studied in detail during the informal consultations, following which the Special Rapporteur had interpreted the position of ITLOS as being that the issue was not one of diplomatic protection and that it was covered by the relevant rules of the United Nations Convention on the Law of the Sea. He proposed that, as a compromise, the first two sentences of paragraph 2 should read: “Some members of ITLOS suggested in the *M/V “Saiga” (No. 2)* case that the State of nationality of a ship might give diplomatic protection to crew members who hold the nationality of a third State. The Commission would welcome the views of Governments on whether the protection under the United Nations Convention on the Law of the Sea is sufficient or whether there is a need for the recognition of a right to diplomatic protection vested in the State of nationality of the ship in such cases.”

13. Mr. PELLET said that, in view of the Commission’s uncertainty as to whether the words “diplomatic protection” had actually been used in the *M/V “Saiga” (No. 2)* decision, Mr. Gaja’s proposal seemed to be the best solution. He did not agree with Mr. Kamto’s proposal that ITLOS should be requested to clarify its decision; after all, it was the Commission’s job to interpret judicial decisions.

14. Mr. KAMTO said he was absolutely certain that ITLOS had not referred to diplomatic protection in its decision. Guinea’s argument had been precisely that diplomatic protection had been involved, but that argument had been rejected by the Tribunal. Mr. Tomka’s proposal was a departure from practice because it put the views of “some members” of the Tribunal before that of the body as a whole, thus giving pride of place to dissenting or individual opinions. He had suggested that the Tribunal should be asked for an interpretation of its decision in accordance with the practice of authenticated interpretation in international law, not in any way to disparage the Commission.

15. Mr. DUGARD (Special Rapporteur) said the best solution would be to adopt Mr. Gaja's proposal and use the same wording as the Tribunal.

16. Mr. PELLET said that, according to paragraphs 103 to 105 of its decision, ITLOS had rejected Guinea's argument and had based its decision on considerations other than diplomatic protection.

17. Ms. ESCARAMEIA pointed out that, after paragraph 105, the decision referred in detail to the reasoning of ITLOS, showing that it had not based its decision solely on the application of the United Nations Convention on the Law of the Sea. She remained opposed to the deletion of the word "diplomatic", as it would suggest that the decision said something different from what it actually did say, because it could not be questioned that the tribunal considered that there was "protection".

18. Mr. CHEE said that the implication of the *M/V "Saiga" (No. 2)* case was that a registering State was entitled to extend diplomatic protection to crew members, regardless of their nationality. The port State was responsible for any offence committed offshore.

19. Mr. BROWNLIE said that, as currently worded, the paragraph gave the impression that a majority of the Commission could not distinguish between direct injury and cases of diplomatic protection. It would be most unfortunate if that were the case. The text of the decision by ITLOS was totally clear: diplomatic protection had not been the point at issue, and the Tribunal had simply applied the idea of direct injuries on the basis of specific provisions of the United Nations Convention on the Law of the Sea. The fact that it had added one or two policy statements to support its general approach did not affect the fact that the *ratio decidendi* was clearly not based on diplomatic protection. Nor would matters be helped by removing the word "diplomatic", since the Commission was not concerned with matters of substance but with diplomatic protection itself.

20. Mr. KAMTO said that what was really needed was to look at the whole decision, with all the arguments and counter-arguments, but that time was too short now. Mr. Brownlie was correct, however: the decision by ITLOS had clearly been in accordance with article 94 of the United Nations Convention on the Law of the Sea relating to the duties of the flag State. There had been no indication in the decision that ITLOS had had diplomatic protection in mind. He trusted that in the future, when citing a case, members would be able to give chapter and verse.

21. Mr. DUGARD (Special Rapporteur) said that the Commission was embarking on the kind of debate that should last several days during the next session. For the time being, however, the question was how the sentence should be framed so as to entice Governments to express their views. The decision by ITLOS was by no means as clear as Mr. Brownlie and others claimed; the Commission's discussion and the doctrine on the subject were witness to the fact that opinions were divided. He suggested that the first sentence might be reworded to read: "The *M/V 'Saiga' (No. 2)* case has been interpreted by some as giving diplomatic protection to crew members who hold the nationality of a third State."

22. The CHAIR suggested that, in the amended phrase, the word "protection" could be followed by the following words in parentheses: "although arguably not necessary in this case", to protect the position of those such as Mr. Brownlie who held an opposite view.

23. Mr. CANDIOTI said that there was no need to shroud an essential question in a controversial reference to case law. In order to avoid a lengthy discussion, he suggested that the first sentence of the paragraph should be deleted altogether. The paragraph would then start: "The Commission would welcome the views of Governments as to whether the protection given by the State of nationality of a ship to crew members who hold the nationality of a third State is already adequately covered by the United Nations Convention on the Law of the Sea..."

24. The CHAIR suggested that the sentence might also contain a reference to the *M/V "Saiga" (No. 2)* case, as a pointer to Governments.

Paragraph 2, as amended by Mr. Candiotti and the Chair, was adopted.

Paragraph 3

25. Mr. GAJA said that, in order to fully reflect the decision in the *Barcelona Traction* case, the word "incorporated" should be followed by the words "and where the registered office is located". Also, some of the exceptions listed in the second sentence were controversial, and he would therefore advocate the insertion, after the word "except", of the word "possibly", in order to show that the Commission did not endorse a particular interpretation of the decision.

Paragraph 3, as amended, was adopted.

Unilateral acts of States

Paragraph 4

26. Mr. PELLET said that he regretted having to say, in the absence of the Special Rapporteur, that he was far from impressed by the lack of questions in the paragraph. Granted, many Governments had not replied to the Commission's questionnaire, but surely the questions put to States should have been more specific.

Paragraph 4 was adopted.

The responsibility of international organizations

Paragraph 5

Paragraph 5 was adopted.

The fragmentation of international law: difficulties arising from the diversification and expansion of international law

Paragraph 6

27. Mr. MANSFIELD said that his feelings about the paragraph were similar to those of Mr. Pellet about paragraph 4: the request for comments and observations was too broad, almost as if it were an essay question. States would be more likely to provide substantive comments if they had a written report to which they could react.

28. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that, surprising though it might seem, he concurred. Indeed, States might register their doubts about the whole undertaking if addressed in such vague terms. He would write a first study and provide States with material that they could assess. He therefore proposed that the section should be deleted altogether.

29. Mr. PELLET said that the more specific part of the paragraph could be retained: States could be asked whether they agreed with the concept of “self-contained regimes” and whether they found it acceptable under international law. He pointed out that the French translation *régime autonome* was meaningless.

30. Mr. KATEKA said that Governments already had enough trouble answering the Commission’s questions; they should not be overloaded. It would be wise to delete the section.

31. Mr. TOMKA said that he agreed. Moreover, the Commission should first define “self-contained regime”. Governments should not be asked to do work that the Commission should do itself.

32. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that the phrase “self-contained regime” had been used by ICJ in the *United States Diplomatic and Consular Staff in Tehran* case, so a French version must exist. The way the Court used the expression was, however, problematic. He also noted that there might be problems with timing if Governments responded to his invitation. He would need to submit his report shortly, so he would not want to receive replies greatly at odds with the content of his paper.

Paragraph 6 was deleted.

The section was deleted.

Reservations to treaties (A/CN.4/L.617/Add.1)

Paragraphs 1 and 2

33. Mr. TOMKA said that he preferred the following wording for the first phrase: “The Commission would welcome comments on...”.

34. Mr. PELLET pointed out that the numbering of paragraphs 1 and 2 should be corrected. Paragraph 1 should consist of the current paragraph 1 (a), and paragraph 2

should consist of paragraph 1 (b) and the existing paragraph 2.

Paragraphs 1 and 2, as amended, were adopted.

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)

The section was adopted.

Chapter III, as amended, was adopted.

CHAPTER I. Organization of the session (A/CN.4/L.615 and Corr.1)

Paragraphs 1 to 11

Paragraphs 1 to 11 were adopted.

Paragraph 3 bis

35. Mr. PELLET said that the words *s’est félicitée* should be replaced by the words *s’est déclarée satisfaite* in the French text.

36. Mr. SEPÚLVEDA said that the text in Spanish, and perhaps in English also, did not place enough emphasis on the fact that the new women members had been elected. The following wording in Spanish would be better: *...hecho de que hubiera mujeres entre los nuevos miembros elegidos...*

37. The CHAIR said that an equivalent change could be made in the English text: “that elections for the new quinquennium had included women as members.”

Paragraph 3 bis, as amended, was adopted.

Paragraph 12

38. The CHAIR said that the item “Shared natural resources” had been mistakenly omitted from the draft agenda.

Paragraph 12 was adopted, subject to the inclusion of the omitted agenda item.

Chapter I, as amended, was adopted.

The draft report of the Commission on the work of its fifty-fourth session, as a whole, as amended, was adopted.

Closure of the session

39. The CHAIR said he believed that the new quinquennium was off to a good start with a meaningful agenda. He urged special rapporteurs not merely to continue to

provide excellent reports and proposals, but to follow the example of Mr. Dugard and do so in a timely fashion. The secretariat had surpassed his expectations. Mr. Mikulka, the Secretary, had proved to have a firm grasp of every aspect of the Commission's work. The Secretary had been

backed up by a superb team, which had contributed enormously to the success of the session. He declared the session closed.

The meeting rose at 11.10 a.m.