

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

2007

Volume I

*Summary records
of the meetings
of the fifty-ninth session
7 May–5 June and
9 July–10 August 2007*

UNITED NATIONS



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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 2007*).

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-ninth session of the Commission (A/CN.4/SR.2914–A/CN.4/SR.2955), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/2007

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Chairperson of the Drafting Committee: Mr. Chusei YAMADA

Rapporteur: Mr. Ernest PETRIČ

Mr. Nicolas Michel, Under-Secretary-General of Legal Affairs, United Nations Legal Counsel, represented the Secretary-General. Ms. Mahnoush Arsanjani, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the United Nations Legal Counsel, represented the Secretary-General.

AGENDA

The Commission adopted the following agenda at its 2914th meeting, held on 7 May 2007:

1. Organization of the work of the session.
2. Shared natural resources.
3. Responsibility of international organizations.
4. Reservations to treaties.
5. Effects of armed conflicts on treaties.
6. The obligation to extradite or prosecute (aut dedere aut judicare).
7. Expulsion of aliens.
8. Programme, procedures and working methods of the Commission and its documentation.
9. Date and place of the sixtieth session.
10. Cooperation with other bodies.
11. Other business.

ABBREVIATIONS

AALCO	Asian–African Legal Consultative Organization
CAHDI	Committee of Legal Advisers on Public International Law
CIA	Central Intelligence Agency
CODEXTER	(Council of Europe) Committee of Experts on Terrorism
GRECO	Group of States against Corruption
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILO	International Labour Organization
INTERPOL	International Criminal Police Organization
KFOR	International Security Force in Kosovo
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
OAU	Organization of African Unity
OPCW	Organization for the Prohibition of Chemical Weapons
PCIJ	Permanent Court of International Justice
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	Office of the United Nations High Commissioner for Refugees
VRS	Republika Srpska Army
WTO	World Trade Organization

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AJIL	American Journal of International Law
<i>I.C.J. Reports</i>	ICJ, Reports of Judgments, Advisory Opinions and Orders
ILM	International Legal Materials (Washington, D.C.)
ILR	International Law Reports
<i>PCIJ, Series A</i>	PCIJ, Collection of Judgments (Nos. 1–24: up to and including 1930)
<i>PCIJ, Series A/B</i>	PCIJ, Judgments, Orders and Advisory Opinions (Nos. 40–80: beginning in 1931)
UNRIAA	United Nations, Reports of International Arbitral Awards

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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.

CASES CITED IN THE PRESENT VOLUME

Case	Nature and source of the decision
<i>Ahmadou Sadio Diallo</i>	<i>(Republic of Guinea v. Democratic Republic of the Congo)</i> , Preliminary Objections, Judgment, <i>I.C.J. Reports 2007</i> , p. 582.
<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide</i>	<i>(Bosnia and Herzegovina v. Serbia and Montenegro)</i> Judgment, <i>I.C.J. Reports 2007</i> , p. 43.
<i>Armed Activities on the Territory of the Congo</i>	<i>(Democratic Republic of the Congo v. Uganda)</i> , Judgment, <i>I.C.J. Reports 2005</i> , p. 168.
	<i>(New Application: 2002) (Democratic Republic of the Congo v. Rwanda)</i> , Jurisdiction and Admissibility, Judgment, <i>I.C.J. Reports 2006</i> , p. 6.
<i>Arrest Warrant</i>	<i>Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)</i> , Judgment, <i>I.C.J. Reports 2002</i> , p. 3.
<i>Avena</i>	<i>Avena and Other Mexican Nationals (Mexico v. United States of America)</i> , Judgment, <i>I.C.J. Reports 2004</i> , p. 12.
<i>Barcelona Traction</i>	<i>Barcelona Traction, Light and Power Company, Limited, Second Phase</i> , Judgment, <i>I.C.J. Reports 1970</i> , p. 3.
<i>Behrami and Behrami v. France</i>	<i>Grand Chamber decision of 2 May 2007 (Admissibility)</i> , Application no. 71412/01, European Court of Human Rights, available from the Court's HUDOC database, http://hudoc.echr.coe.int .
<i>Ben Tillett</i>	<i>Ben Tillett Arbitration (Great Britain v. Belgium)</i> , C. G. Fenwick, <i>Cases on International Law</i> , Chicago, Callaghan and Company, 1935, p. 181.
<i>Boffolo</i>	1903, UNRIIAA, vol. X (Sales No. 1960.V.4), p. 528.
<i>Bustani v. Organization for the Prohibition of Chemical Weapons</i>	Judgment No. 2232 of 16 July 2003, Administrative Tribunal of the International Labour Organization. The text of the judgement is available at www.ilo.org/judgements of the Administrative Tribunal).
<i>Certain Expenses of the United Nations</i>	(Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, <i>I.C.J. Reports 1962</i> , p. 151.
<i>Chorzów Factory</i>	Case Concerning the Factory at Chorzów, Claim for Indemnity, Merits, Judgment No. 13 of 13 September 1928, <i>PCIJ, Series A</i> , No. 17.
<i>Claude Reyes et al. v. Chile</i>	Reparations and Costs, Judgment of 19 September 2006, Inter-American Court of Human Rights, Series C, No. 151.
<i>Čonka v. Belgium</i>	Judgment of 5 February 2002, Application no. 51564/99, European Court of Human Rights, Reports of Judgments and Decisions, 2002-I.
<i>Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights</i>	Advisory Opinion, <i>I.C.J. Reports 1999</i> , p. 62.
<i>Effect of awards of compensation made by the United Nations Administrative Tribunal</i>	Advisory Opinion of 13 July 1954, <i>I.C.J. Reports 1954</i> , p. 47.
<i>Ethiopia/Eritrea</i>	Eritrea–Ethiopia Claims Commission, Partial Award: Civilian Claims–Eritrea's Claims 15, 16, 23 and 27–32, 17 December 2004, UNRIIAA, vol. XXVI (Sales No. E/F.06.V.7), p. 195.
<i>Falla-Nataf and brothers v. Germany</i>	<i>Recueil des décisions des tribunaux mixtes institués par les traités de paix</i> , Paris, Recueils Sirey, 1928, vol. VII, p. 653.
<i>Fisheries</i>	<i>(United Kingdom v. Norway)</i> , Judgment of 18 December 1951, <i>I.C.J. Reports 1951</i> , p. 116.
<i>Gabčíkovo–Nagymaros Project</i>	<i>(Hungary/Slovakia)</i> , Judgment, <i>I.C.J. Reports 1997</i> , p. 7.
<i>Hissène Habré</i>	Senegal, Cour de Cassation, <i>Souleymane Guengueng et autres v. Hissène Habré</i> , decision No. 14 of 20 March 2001, available at http://www.asser.nl/upload/documents/20121105T123352-Habre,%20Cassation%20Court,%20Senegal,%2020%20March%202001.pdf (accessed 13 February 2014).
	Senegal, Dakar Court of Appeals, opinion of 25 November 2005, available at www.asser.nl/upload/documents/20120419T034141-Habr%C3%A9_Cour_Appel_Avis_Extradition_25-11-2005%28Extraits%29.pdf (accessed 27 June 2012).
	<i>Souleymane Guengueng et al. v. Senegal</i> , Communication No. 181/2001, Report of the Committee against Torture, <i>Official Records of the General Assembly, Sixty-first session, Supplement No.44 (A/61/44)</i> , p. 160.
	African Union, Decisions, Assembly/AU/3 (VII) of 2 July 2006 and Assembly/AU/Dec.103(VI) of 25 January 2006.

<i>Interights</i>	(on behalf of Pan African Movement and Inter Africa Group) v. <i>Eritrea</i> , Communication 234/99, African Commission on Human and Peoples' Rights, 33rd Ordinary Session, 15–29 May 2003, Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2002–2003.
<i>International Technical Products Corporation, et al. v. the Government of the Islamic Republic of Iran</i>	Award of 19 August 1985, <i>Iran–United States Claims Tribunal Reports</i> , vol. 9 (1985-II), p. 10.
<i>International Tin Council</i>	<i>J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and others</i> , England, High Court, Queen's Bench Division (Commercial Court), 24 June 1987, ILR, vol. 77, p. 55.
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<i>Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt</i>	Advisory Opinion, <i>I.C.J. Reports</i> 1980, p. 73.
<i>Italian South Tyrol Terrorism</i>	Decision of 8 October 1968, Supreme Court of Austria, ILR, vol. 71 (1968), p. 235.
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<i>LaGrand</i>	(<i>Germany v. United States of America</i>), Judgment, <i>I.C.J. Reports</i> 2001, p. 466.
<i>Land and Maritime Boundary between Cameroon and Nigeria</i>	(<i>Cameroon v. Nigeria: Equatorial Guinea intervening</i>), Judgment of 10 October 2002, <i>I.C.J. Reports</i> 2002, p. 303.
<i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory</i>	Advisory Opinion, <i>I.C.J. Reports</i> 2004, p. 136.
<i>Legality of the Threat or Use of Nuclear Weapons</i>	Advisory Opinion, <i>I.C.J. Reports</i> 1996, p. 226.
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<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> , Provisional Measures, Order of 14 April 1992, <i>I.C.J. Reports</i> 1992, p. 3.
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	<i>Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)</i> , Provisional Measures, Order of 14 April 1992, <i>I.C.J. Reports</i> 1992, p. 114.
	Preliminary Objections, Judgment, <i>I.C.J. Reports</i> 1998, p. 115.
<i>Loizidou v. Turkey</i>	Preliminary Objections, Judgment of 23 March 1995, Application no. 15318/89, European Court of Human Rights, Series A: Judgments and Decisions, vol. 310.
<i>Military and Paramilitary Activities in and against Nicaragua</i>	(<i>Nicaragua v. United States of America</i>), Merits, Judgment, <i>I.C.J. Reports</i> 1986, p. 14.
<i>Minority Schools in Albania</i>	Advisory opinion of 6 April 1935, <i>PCIJ, Series A/B</i> , No. 64, p. 4.
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<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> , Advisory Opinion, <i>I.C.J. Reports</i> 1971, p. 16.
<i>Nottebohm</i>	(<i>Liechtenstein v. Guatemala</i>), Second Phase, Judgment of 6 April 1955, <i>I.C.J. Reports</i> 1955, p. 4.
<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, ILR, vol. 119 (1999), p. 135.
<i>Pulp Mills on the River Uruguay</i>	(<i>Argentina v. Uruguay</i>), Provisional Measures, Order of 13 July 2006, <i>I.C.J. Reports</i> 2006, p. 113.
	<i>Pulp Mills on the River Uruguay (Argentina v. Uruguay)</i> , Provisional Measures, Order of 23 January 2007, <i>I.C.J. Reports</i> 2007, p. 3.
<i>Reparation for Injuries</i>	<i>Reparation for Injuries Suffered in the Service of the United Nations</i> , Advisory Opinion, <i>I.C.J. Reports</i> 1949, p. 174.

<i>Case</i>	<i>Nature and source of the decision</i>
<i>Reservations to the Convention on Genocide</i>	<i>Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide</i> , Advisory Opinion, <i>I.C.J. Reports 1951</i> , p. 15.
<i>Saramati v. France, Germany and Norway</i>	<i>Grand Chamber decision of 2 May 2007 (Admissibility)</i> , Application no. 78166/01, European Court of Human Rights, available from the Court's HUDOC database, http://hudoc.echr.coe.int .
<i>SS "Wimbledon"</i>	Judgments, 1923, <i>PCIJ, Series A</i> , No. 1.
<i>Stewart v. Canada</i>	Communication No. 538/1993, Decision of 1 November 1996, <i>Report of the Human Rights Committee, Official Records of the General Assembly, Fifty-second Session, Supplement No. 40 (A/52/40)</i> , vol. II, annex VI.G.
<i>Tadić</i>	<i>Prosecutor v. Duško Tadić a/k/a "Dule"</i> , Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, International Tribunal for the Former Yugoslavia, United Nations, <i>Juridical Yearbook 1995</i> , Part Three, p. 501. See also ILM, vol. 35 (1996), p. 35. <i>Prosecutor v. Duško Tadić</i> , Case No. IT-94-1-A, Judgement of 15 July 1999, Appeals Chamber, International Tribunal for the Former Yugoslavia, <i>Judicial Supplement No. 6</i> , June/July 1999. See also ILM, vol. 38 (1999), p. 1518.
<i>Territorial Dispute (Libyan Arab Jamahiriya/Chad)</i>	Judgment, <i>I.C.J. Reports 1994</i> , p. 6.
<i>United States v. Álvarez-Machain</i>	504 U.S. 655 (1992), ILM, vol. 31 (1992), p. 902.

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Source

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Protocol No. 4 to the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (Strasbourg, 16 September 1963) *Ibid.*, vol. 1496, No. 2889, p. 263.

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 22 November 1994) *Ibid.*, vol. 1525, No. 2889, p. 195.

International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965) *Ibid.*, vol. 660, No. 9464, p. 195.

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Source

- Convention on the nationality of married women (New York, 20 February 1957) *Ibid.*, vol. 309, No. 4468, p. 65.
- Convention on the reduction of statelessness (New York, 30 August 1961) *Ibid.*, vol. 989, No. 14458, p. 175.
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- Convention on the settlement of investment disputes between States and nationals of other States (Washington, 18 March 1965) United Nations, *Treaty Series*, vol. 575, No. 8359, p. 159.
- North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (Mexico City, Ottawa and Washington D.C., 17 December 1992) Washington D.C., United States Government Printing Office, 1993.

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- Convention for the suppression of unlawful seizure of aircraft (The Hague, 16 December 1970) United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105.

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- International Convention for the Suppression of Counterfeiting Currency (Geneva, 20 April 1929) League of Nations, *Treaty Series*, vol. CXII, No. 2623, p. 371.
- European Convention on the suppression of terrorism (Strasbourg, 27 January 1977) United Nations, *Treaty Series*, vol. 1137, No. 17828, p. 93.
- Protocol amending the European Convention on the Suppression of Terrorism (Strasbourg, 15 May 2003) Council of Europe, *European Treaty Series*, No. 190.
- Inter-American Convention against Corruption (Caracas, 29 March 1996) E/1996/99.
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- Vienna Convention on succession of States in respect of treaties (Vienna, 23 August 1978) *Ibid.*, vol. 1946, No. 33356, p. 3.
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations*, vol. II (United Nations Publications, Sales No. E.94.V.5).

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Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (Montevideo, 26 December 1933)	<i>Ibid.</i> , vol. CLXV, No. 3802, p. 19.
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The Antarctic Treaty (Washington D.C., 1 December 1959)	<i>Ibid.</i> , vol. 402, No. 5778, p. 71.
Inter-American Democratic Charter (Lima, 11 September 2001)	OEA, <i>Official Documents</i> , OEA/Ser.G/CP-1. See also, ILM, vol. 40, No. 5 (September 2001), p. 1289.

CHECKLIST OF DOCUMENTS OF THE FIFTY-NINTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/576	Provisional agenda	Mimeographed. The definitive agenda is reproduced on p. vii.
A/CN.4/577 and Add.1–2	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat	Mimeographed.
A/CN.4/578 [and Corr.1]	Third report on the effects of armed conflicts on treaties, by Mr. Ian Brownlie, Special Rapporteur	Reproduced in <i>Yearbook ... 2007</i> , vol. II (Part One).
A/CN.4/579 and Add.1–4	The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>): comments and information received from Governments	<i>Idem.</i>
A/CN.4/580	Fourth report on shared natural resources: transboundary groundwaters, by Mr. Chusei Yamada, Special Rapporteur	<i>Idem.</i>
A/CN.4/581	Third report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur	<i>Idem.</i>
A/CN.4/582	Responsibility of international organizations: comments and observations received from international organizations	<i>Idem.</i>
A/CN.4/583	Fifth report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur	<i>Idem.</i>
A/CN.4/584 [and Corr.1]	Twelfth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/585 [and Corr.1]	Second report on the obligation to extradite or prosecute (<i>aut dedere aut judicare</i>), by Mr. Zdzislaw Galicki, Special Rapporteur	<i>Idem.</i>
A/CN.4/586	Reservations to treaties: Note by the Special Rapporteur on draft guideline 2.1.9 (Statement of reasons for reservations)	<i>Idem.</i>
A/CN.4/L.705	Reservations to treaties: Titles and texts of the draft guidelines adopted by the Drafting Committee on 9, 10, 11 and 22 May 2007	Text reproduced in the present volume. See the 2930th meeting, <i>infra</i> , at p. 104.
A/CN.4/L.706 and Add.1–3	Draft report of the Commission on the work of its fifty-ninth session: chapter IV (Reservations to treaties)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)</i> . The final text appears in <i>Yearbook ... 2007</i> , vol. II (Part Two).
A/CN.4/L.707/Rev.1	<i>Idem</i> : chapter VI (Expulsion of aliens)	<i>Idem.</i>
A/CN.4/L.708 [and Corr.1] and Add.1	<i>Idem</i> : chapter VII (Effects of armed conflicts on treaties)	<i>Idem.</i>
A/CN.4/L.709 and Add.1	<i>Idem</i> : chapter V (Shared natural resources)	<i>Idem.</i>
A/CN.4/L.710	<i>Idem</i> : chapter I (Organization of the work of the session)	<i>Idem.</i>
A/CN.4/L.711	<i>Idem</i> : chapter II (Summary of the work of the Commission at its fifty-ninth session)	<i>Idem.</i>
A/CN.4/L.712	<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.713 and Add.1–3	<i>Idem</i> : chapter VIII (Responsibility of international organizations)	<i>Idem.</i>
A/CN.4/L.714 and Add.1	<i>Idem</i> : chapter IX (The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>))	<i>Idem.</i>
A/CN.4/L.715 and Add.1	<i>Idem</i> : chapter X (Other decisions and conclusions of the Commission)	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.716	Programme, procedures and working methods of the Commission, and its documentation: report of the Planning Group	Mimeographed. See also the summary record of the 2951st meeting, <i>infra</i> , paras. 65–81.
A/CN.4/L.717	Shared natural resources: report of the Working Group	Mimeographed. See also the summary record of the 2947th meeting, <i>infra</i> , paras. 114–117.
A/CN.4/L.718	Effects of armed conflicts on treaties: report of the Working Group	Mimeographed. See also the summary record of the 2946th meeting, <i>infra</i> , paras. 50–60.
A/CN.4/L.719	Most-favoured-nation clause: report of the Working Group	Mimeographed. See also the summary record of the 2944th meeting, <i>infra</i> , paras. 29–38.
A/CN.4/L.720	Responsibility of international organizations: Titles and texts of draft articles 31 to 45 [44] adopted by the Drafting Committee on 18, 19, 20 and 25 July 2007	Mimeographed. See also the summary record of the 2945th meeting, <i>infra</i> , paras. 57–113.
ILC(LIX)/RT/CRP.1	Meeting with human rights bodies (15 and 16 May 2007): report by Mr. Alain Pellet, Special Rapporteur	Mimeographed.
A/CN.4/SR.2914–A/CN.4/SR.2955	Provisional summary records of the 2914th to 2955th meetings	Mimeographed. The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

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

Held at Geneva from 7 May to 5 June 2007

2914th MEETING

Monday, 7 May 2007, at 3.10 p.m.

Acting Chairperson: Mr. Giorgio GAJA

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Opening of the session

1. The FIRST VICE-CHAIRPERSON OF THE FIFTY-EIGHTH SESSION declared open the fifty-ninth session of the International Law Commission, the first session of a new quinquennium, and welcomed the members of the Commission. In view of the fact that about half the members were new and were not necessarily conversant with the Commission's methods of work, he gave a brief outline of how the Commission functioned and how the Bureau was made up. He then invited the members of the various regional groups to consult regarding the candidates they might wish to put forward.

The meeting was suspended at 3.15 p.m. and resumed at 3.35 p.m.

Election of officers

Mr. Brownlie was elected Chairperson by acclamation.

Mr. Vargas Carreño was elected first Vice-Chairperson by acclamation.

Mr. Comissário Afonso was elected second Vice-Chairperson by acclamation.

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

Mr. Petrič was elected Rapporteur of the Commission by acclamation.

Mr. Brownlie took the Chair.

2. The CHAIRPERSON, after extending a welcome to all members, especially the new members, said that the strength of the Commission lay in the contribution brought to it by its members, their intellectual rigour and capacity, their technical knowledge, their vision, their respect for each other's views, their ability to engage in dialogue with one another and their discipline and hard work in bringing the programme of work to a successful conclusion. He hoped that, with the valuable assistance of the Secretariat, the Commission would once again show how effective and productive it could be.

3. Under its Statute, the Commission's general mandate was the progressive development of international law and its codification, but the fact that it concerned itself primarily with public international law should not preclude it from considering questions of private international law. It observed certain tacitly accepted limits, however; thus, for example, some considered that the question of the expropriation of foreign property had been tacitly left aside. The question of human rights was more troubling, since some groups extraneous to the Commission had at times indicated that it was not appropriate for it to deal with legal questions relating to human rights. Of course, no such limitation appeared in the Statute of the International Law Commission and no other United Nations body had a mandate to codify human rights standards. It might be useful, in that connection, to recall the Commission's earliest projects, such as the draft Declaration on Rights and Duties of States.¹ In 1996, the Commission had carried out a detailed survey of its long-term programme of work, including a general scheme of classifications² and an analysis of its work methods.³ The criteria for the selection of topics to be included in the long-term programme of work appeared in the recommendation

¹ *Yearbook ... 1949*, p. 287.

² *Yearbook ... 1996*, vol. II (Part Two), Annex II, pp. 133 *et seq.*

³ *Ibid.*, chap. VII, pp. 85–97, paras. 149–243.

adopted by the Commission in 1997, which stated that a topic should reflect the needs of States with regard to the progressive development and codification of international law; it should be sufficiently advanced to enable it to be codified; and it should be concrete and suitable for progressive development.⁴ In addition, the Commission should not restrict itself to traditional topics but should also consider those that reflected new developments in international law and the pressing concerns of the international community. The consolidated list of the long-term programme of work since the forty-fourth session in 1992 included the law and practice of the following topics: reservations to treaties;⁵ nationality of natural and legal persons in relation to the succession of States;⁶ diplomatic protection;⁷ ownership and protection of wrecks beyond the limits of national maritime jurisdiction;⁸ unilateral acts of States;⁹ responsibility of international organizations;¹⁰ shared natural resources of States;¹¹ fragmentation of international law: difficulties arising from the diversification and expansion of international law;¹² effects of armed conflicts on treaties;¹³ expulsion of aliens;¹⁴ the obligation to extradite or prosecute (*aut dedere aut judicare*);¹⁵ the immunity of State officials from foreign criminal jurisdiction;¹⁶ jurisdictional immunity of

international organizations;¹⁷ protection of persons in the event of disasters;¹⁸ protection of personal data in trans-border flow of information;¹⁹ and extraterritorial jurisdiction.²⁰ Agreement had not emerged on the inclusion of the topic of “The most-favoured-nation clause” and the Commission had decided to seek the views of Governments as to the utility of the topic.²¹

4. During the past quinquennium, the Commission had been particularly productive. It had completed the second reading of draft articles on diplomatic protection and recommended to the General Assembly the elaboration of a convention on the basis of the draft articles.²² On 8 August 2006, it had also recalled that, at its forty-ninth session, it had decided to divide its consideration of the topic “International liability for injurious consequences arising out of acts not prohibited by international law” into two parts.²³ At its fifty-third session, in 2001, it had completed the first part of its work on that topic and recommended to the General Assembly the elaboration of a convention on the basis of the draft articles on prevention of transboundary harm from hazardous activities,²⁴ since, in view of existing State practice, it was a topic that lent itself to codification and progressive development. It had then completed the second part of its work on the topic by adopting the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. It had recommended that the General Assembly endorse the draft principles by a resolution and urge States to take national and international action to implement the resolution.²⁵

5. The Commission had first taken up the topic of unilateral acts of States in 1998²⁶ and work on the topic had continued until 2006, with the assistance of a working group. Following its consideration of the report of the Working Group at its fifty-eighth session, in 2006, the Commission had adopted a set of 10 guiding principles applicable to unilateral declarations of States capable of creating legal obligations and had commended the guiding principles to the attention of the General Assembly.²⁷

6. The Commission had worked on the topic “Fragmentation of international law: difficulties arising from the diversification and expansion of international law” since 2002. In 2006, the Study Group on the topic had submitted its final report, which contained 42 conclusions that had to be read in conjunction with the analytical study

⁴ *Yearbook ... 1997*, vol. II (Part Two), pp. 71–72, para. 238.

⁵ The Commission included the topic in its programme of work under the title “The law and practice relating to reservations to treaties” at its forty-fifth session (1993), see *Yearbook ... 1993*, vol. II (Part Two), pp. 96–97, paras. 427–430 and 440, and in its agenda in 1994, *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 386. The title of the topic was amended in 1995 to read “Reservations to treaties”, *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (a).

⁶ See *Yearbook ... 1993*, vol. II (Part Two), pp. 96–97, paras. 427 and 431–440. The topic was on the agenda of the Commission in 1994, see *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 386. The title of the topic was later amended to read “Nationality in relation to the succession of States”, *Yearbook ... 1996*, vol. II (Part Two), p. 75, para. 83.

⁷ See *Yearbook ... 1995*, vol. II (Part Two), p. 110, para. 501. See also *Yearbook ... 1996*, vol. II (Part Two), Annex II, addendum 1. The topic was included in the Commission’s agenda at its forty-ninth session (1997), *Yearbook ... 1997*, vol. II (Part Two), p. 60, paras. 169–171.

⁸ See *Yearbook ... 1996*, vol. II (Part Two), pp. 97–98, para. 248, and Annex II, addendum 2.

⁹ *Ibid.*, p. 133 and Annex II, addendum 3. The Commission included this topic in the agenda at its forty-ninth session (1997), *Yearbook ... 1997*, vol. II (Part Two), p. 64, paras. 191–194.

¹⁰ See *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729 and Annex. The Commission included this topic in the agenda at its fifty-fourth session (2002), *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 517 (b).

¹¹ *Yearbook ... 2000*, vol. II (Part Two), para. 729 and Annex. The Commission included this topic in the agenda at its fifty-fourth session, *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 518 (a).

¹² *Yearbook ... 2000*, vol. II (Part Two), para. 729 and Annex. The Commission included this topic in the agenda at its fifty-fourth session (2002), *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 518 (b). The title was later amended to read “The fragmentation of international law: difficulties arising from the diversification and expansion of international law”, *ibid.*, para. 494.

¹³ *Yearbook ... 2000*, vol. II (Part Two), para. 729 and Annex. The Commission included this topic in the agenda at its fifty-sixth session (2004), *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.

¹⁴ *Yearbook ... 2000*, vol. II (Part Two), para. 729 and Annex. The Commission included this topic in the agenda at its fifty-sixth session (2004), *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.

¹⁵ *Ibid.*, paras. 362–363 and Annex. The Commission included this topic in the agenda at its fifty-seventh session (2005), *Yearbook ... 2005*, vol. II (Part Two), para. 20.

¹⁶ *Yearbook ... 2006*, vol. II (Part Two), para. 257 and Annex I. See also *Yearbook ... 2007*, vol. II (Part Two), para. 376.

¹⁷ *Yearbook ... 2006*, vol. II (Part Two), para. 257 and Annex II.

¹⁸ *Ibid.*, and Annex III. See also *Yearbook ... 2007*, vol. II (Part Two), para. 375.

¹⁹ *Yearbook ... 2006*, vol. II (Part Two), para. 257 and Annex IV.

²⁰ *Ibid.*, and Annex V.

²¹ *Ibid.*, para. 259. See also *Yearbook ... 2007*, vol. II (Part Two), para. 377.

²² *Yearbook ... 2006*, vol. II (Part Two), pp. 24 *et seq.*, paras. 43–46 and 49. See also *ibid.*, vol. I, 2909th meeting, pp. 289–290, paras. 36–41.

²³ *Yearbook ... 2006*, vol. I, 2910th meeting, para. 22. See also *Yearbook ... 1997*, vol. II (Part Two), p. 59, para. 165.

²⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 145–148, paras. 91 and 94–97.

²⁵ *Yearbook ... 2006*, vol. II (Part Two), pp. 57, paras. 63 and 66.

²⁶ *Yearbook ... 1998*, vol. II (Part Two), pp. 50–59, paras. 111–201.

²⁷ *Yearbook ... 2006*, vol. II (Part Two), pp. 160 *et seq.*, paras. 170 and 173–176.

finalized by the Chairperson of the Group. The Commission had taken note of the conclusions and commended them to the attention of the General Assembly.²⁸

7. In addition to the work completed during the quinquennium, other projects were continuing. In 2006, the Special Rapporteur on reservations to treaties, Mr. Pellet, had submitted the second part of his tenth report.²⁹ The text of the guidelines provisionally adopted to date appeared in paragraphs 158 to 159 of the report of the Commission on the work of its fifty-eighth session.³⁰ Work was also continuing on the topic of shared natural resources. At its previous session, the Commission had adopted on first reading 19 draft articles on the law of transboundary aquifers.³¹ It had also provisionally adopted draft articles 17 to 30 on responsibility of international organizations,³² following its adoption of the first 16 draft articles between 2003 and 2005.³³

8. The second report of the Special Rapporteur on the effects of armed conflicts on treaties³⁴ had been considered in 2006. No new draft articles had been presented. The third report (A/CN.4/578 and Corr.1) had recently been distributed. Together with the first two reports, it was intended to prepare the ground for future work, possibly with the assistance of a working group.

9. Lastly, in 2006, the Commission had considered the preliminary report of the Special Rapporteur on the obligation to extradite or prosecute (*aut dedere aut judicare*).³⁵ It had also had before it the second report of the Special Rapporteur on the expulsion of aliens³⁶ and a memorandum on the subject by the Secretariat,³⁷ which it hoped to consider during the current session.

10. After briefly recalling the procedural modalities of the Commission's debates, the Chairperson informed the Commission of the death of Mr. Igor Ivanovich Lukashuk, a member of the Commission from 1995 to 2001.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence in memory of Mr. Lukashuk.

11. On behalf of the Commission, the CHAIRPERSON wished a speedy recovery to Mr. Dugard, who had

²⁸ *Ibid.*, pp. 176 *et seq.*, paras. 239 and 241–251. See also the report of the Study Group (A/CN.4/L.682 [and Corr.1] and Add.1, mimeographed, available on the Commission's website; the final text will appear as an addendum to *Yearbook ... 2006*, vol. II (Part One).

²⁹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2. The eleventh report of the Special Rapporteur is reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

³⁰ *Yearbook ... 2006*, vol. II (Part Two).

³¹ *Ibid.*, para. 75.

³² *Ibid.*, para 91.

³³ Draft articles 1–3 were adopted at the fifty-fifth session of the Commission (*Yearbook ... 2003*, vol. II (Part Two), p. 18, para. 49), draft articles 4–7 at the fifty-sixth session (*Yearbook ... 2004*, vol. II (Part Two), p. 46, para. 69), and draft articles 8–16[15] at the fifty-seventh session (*Yearbook ... 2005*, vol. II (Part Two), p. 40, para. 203).

³⁴ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570.

³⁵ *Ibid.*, document A/CN.4/571.

³⁶ *Ibid.*, document A/CN.4/573.

³⁷ A/CN.4/565 and Corr.1, mimeographed, available on the Commission's website.

recently been taken ill. He also informed the Commission that Mr. Mikulka had relinquished his role as Secretary to the Commission, having been appointed Director of the Division for Ocean Affairs and the Law of the Sea of the United Nations Office of Legal Affairs. Mr. Mikulka had been a member of the Commission from 1992 to 1998 and had served as Special Rapporteur on the topic "Nationality in relation to the succession of States", before becoming Director of the Codification Division and Secretary to the Commission. His deep knowledge of and commitment to the Commission had enabled him to guide its work most effectively over the years. He had been replaced by Ms. Arsanjani, previously Deputy Secretary to the Commission, who also had extensive experience with the Commission. It was heartening to know that the Secretariat, which played a crucial role in the Commission's work, would be in her capable hands.

Adoption of the agenda (A/CN.4/576)

The agenda was adopted.

The meeting was suspended at 4.10 p.m. and resumed at 4.53 p.m.

Organization of the work of the session

[Agenda item 1]

12. The CHAIRPERSON drew attention to the work plan for the following two weeks, which had been distributed. The Commission would begin by considering the topic "Reservations to treaties". In connection with that topic, four meetings would be held with experts from the human rights treaty bodies. Members interested in participating in the Drafting Committee on the topic were invited to contact the Chairperson of the Drafting Committee. Those members wishing to participate in the Planning Group should contact the first Vice-Chairperson.

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

Reservations to treaties³⁸ (A/CN.4/577 and Add.1–2, sect. C,³⁹ A/CN.4/584,⁴⁰ A/CN.4/586⁴¹ and A/CN.4/L.705⁴²)

[Agenda item 4]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR

13. The CHAIRPERSON invited the Special Rapporteur, Mr. Pellet, to present his eleventh report on reservations to treaties.⁴³

³⁸ For the text of the draft guidelines and the commentaries thereto provisionally adopted so far by the Commission, see *Yearbook ... 2006*, vol. II (Part Two), pp. 138 *et seq.*, para. 158.

³⁹ Mimeographed, available on the Commission's website.

⁴⁰ Reproduced in *Yearbook ... 2007*, vol. II (Part One).

⁴¹ *Idem.*

⁴² Mimeographed, available on the Commission's website. See also the summary record of the 2930th meeting, below.

⁴³ Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

14. Mr. PELLET (Special Rapporteur) congratulated the Chairperson and the members of the Bureau on their election and also extended a welcome to the new members of the Commission. He felt obliged to point out, however, that some excellent former members had failed to be re-elected solely because of their nationality. Such unjustness exposed the defects of the system for electing the Commission and the fiction that the General Assembly voted for individuals and not for States. It was thus all the more important that the Commission should adhere to its obligation of independence from States.

15. The topic of reservations to treaties was far from new. The Commission had taken it up as far back as 1950, at the express request of the General Assembly, which had, at the same time, requested the ICJ to give an advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.⁴⁴ Those difficult questions had subsequently been the subject of detailed reports by successive special rapporteurs on the law of treaties⁴⁵ and long debates that had culminated in the adoption of articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties (hereinafter the “1969 Vienna Convention”).⁴⁶ Those articles had been retained almost in their entirety in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the “1986 Vienna Convention”). Generally speaking, he used the provisions of the 1986 Convention as the reference text in his reports, since it had the advantage of relating both to States and to organizations.

⁴⁴ General Assembly resolution 478 (V) of 16 November 1950.

⁴⁵ For the reports of J. L. Briery, see *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 222 ([preliminary] report); *Yearbook ... 1951*, vol. II, document A/CN.4/43, p. 70 (second report) and *Yearbook ... 1952*, vol. II, document A/CN.4/54, p. 50 (third report).

For the reports of H. Lauterpacht, see *Yearbook ... 1953*, vol. II, document A/CN.4/63, p. 90 ([preliminary] report) and *Yearbook ... 1954*, vol. II, document A/CN.4/87, p. 123 (second report).

For the reports of G. G. Fitzmaurice, see *Yearbook ... 1956*, vol. II, document A/CN.4/101 p. 104 ([preliminary] report); *Yearbook ... 1957*, vol. II, document A/CN.4/107, p. 16 (second report); *Yearbook ... 1958*, vol. II, document A/CN.4/115, p. 20 (third report); *Yearbook ... 1959*, vol. II, document A/CN.4/120, p. 37 (fourth report) and *Yearbook ... 1960*, vol. II, document A/CN.4/130, p. 69 (fifth report).

For the reports of H. Waldock, see *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 27 (first report); *Yearbook ... 1963*, vol. II, document A/CN.4/156 and Add.1–3, p. 36 (second report); *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 5 (third report); *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 3 (fourth report); *Yearbook ... 1966*, vol. II, documents A/CN.4/183 and Add.1–4 p. 1 (fifth report); and *ibid.*, document A/CN.4/186 and Add.1–7, p. 51 (sixth report). For the final articles adopted by the Commission and the commentaries thereto, see *ibid.*, document A/6309/Rev.1, pp. 169–278, especially articles 16–20 (pp. 202–209), which became articles 19–23 of the 1969 Vienna Convention on the Law of Treaties.

⁴⁶ See *United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, Official Records, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11)*, United Nations publication, Sales No. E.68.V.7), 21st–25th meetings, pp. 106–138; *ibid.*, *Second session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11/Add.1)*, United Nations publication, Sales No. E.70.V.6), 10th–11th meetings, pp. 26–44, and 85th meeting, p. 218. See also, *ibid.*, *First and second sessions, Vienna, 26 March–27 May 1968 and 9 April–22 May 1969, Official Records, Documents of the Conference (A/CONF.39/11/Add.2)*, United Nations publication, Sales No. E.70.V.5), *passim*.

16. In 1962, the last Special Rapporteur on the law of treaties, Sir Humphrey Waldock, had abandoned the overcautious position adopted by his predecessors and aligned himself with the view taken by the ICJ in its 1951 advisory opinion. As a result of that change of direction, the 1969 Vienna Convention had provided for a flexible regime on reservations.

17. The regime established by the 1969 and 1986 Vienna Conventions was both very satisfactory and deficient in many respects. It was very satisfactory in that it could apply to all situations and all treaties, as the Commission had recognized in its preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, adopted at its forty-ninth session in 1997.⁴⁷ Indeed, the Commission had found the Conventions satisfactory from the outset of its work on the topic, in 1995, since it had decided that “there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions”.⁴⁸ The Vienna regime provided the basis for all the Commission’s work on reservations. It was therefore essential that no attempt should be made to change that approach: it was a sensible approach, to which the Commission had adhered rigorously, and to call it into question would cause the collapse of the whole edifice—admittedly incomplete, but already substantial—that had been patiently erected over the past 12 years, namely the set of provisions comprising the Guide to Practice.

18. The treatment of reservations to treaties under the Vienna Conventions, however, was by no means entirely satisfactory. States complained that it did not provide the necessary guidance on how to react to unilateral declarations formulated by the contracting parties, either because the 1969 and 1986 Conventions were silent on the subject or because they were open to contradictory interpretations. That was why, at the beginning of the 1990s, States had invited the Commission to take up the topic again in order to eliminate the ambiguities in the Vienna rules on reservations.

19. He would not enumerate all the uncertainties surrounding articles 19 to 23 of the 1969 and 1986 Vienna Conventions, since he had set them out in a detailed survey in his preliminary report in 1995,⁴⁹ but the fact was that they were very numerous and related to important points. For example, it was hard to see how article 19 of the Vienna Conventions, which set out the grounds for the invalidity of reservations, tallied with article 20, which stated the conditions under which a State or an international organization could object to a reservation and what the practical effects of an objection to a reservation were. Moreover, the Vienna Conventions contained no rule applicable to one particular category of unilateral declarations which were not, strictly speaking, reservations but which resembled them in many respects, namely, interpretative declarations. The Commission had included such declarations in its Guide to Practice, in which, taking its cue from an important

⁴⁷ *Yearbook ... 1997*, vol. II (Part Two), p. 56, para. 157.

⁴⁸ *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (d).

⁴⁹ *Ibid.*, vol. II (Part One), document A/CN.4/470, pp. 121 *et seq.*, especially pp. 142–150, paras. 96–149.

article published by Mr. McRae in 1978,⁵⁰ it distinguished between simple interpretative declarations and conditional interpretative declarations. The latter category of declarations had, however, given rise to some problems in cases where, practically speaking, they “behaved like” reservations. That had led a majority of the Commission to doubt whether it was necessary to formulate draft guidelines specifically relating to conditional interpretative declarations; members had deemed it sufficient to include a general provision stating that the rules on reservations applied also to conditional interpretative declarations. In principle, he shared that view but thought it premature to take a definitive position on the matter, since the Commission had not yet debated the fundamental question of the effects of reservations. Furthermore, that was what it had decided in 1999, in the commentary to draft guideline 1.2.1. Although the 1969 and 1986 Vienna Conventions, along with the 1978 Vienna Convention on succession of States in respect of treaties (hereinafter the “1978 Vienna Convention”)—where succession to reservations was concerned—must remain a sort of compass, they did not resolve all the problems, and the more deeply one delved into the topic, the more complex it appeared. Although he had already produced 11 reports on the topic of reservations to treaties,⁵¹ he recognized that his task was far from complete, particularly because he—and the Commission with him—had seriously underestimated the difficulties and the very specific problems involved. Despite criticisms of his slowness, he considered, however, that it was more worthwhile to conduct a meticulous, in-depth investigation leading to a complete and useful result for all future users of the Guide to Practice, than to do the job within an allotted time but leave various questions in abeyance. Nonetheless, he gave a solemn assurance that his study of the topic would be complete at the end of the current quinquennium.

20. In 1995, the Commission had adopted another fundamental decision, which he appealed to his colleagues to accept as it stood. That decision had been to adopt a practical guide on the subject of reservations, which would take the form of draft articles that could provide guidance for the practice of States and international organizations in that area.⁵² The Commission had thus determined from the start what the result of its work would be: not a treaty, nor even a protocol to the Vienna Conventions, but a set of guidelines that would not, in themselves, be binding in nature.

⁵⁰ D. M. McRae, “The legal effect of interpretative declarations”, *BYBIL*, 1978, vol. 49, p. 155.

⁵¹ First report: *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470; second report: *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478; third report: *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6; fourth report: *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/499 and A/CN.4/478/Rev.1; fifth report: *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4; sixth report: *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3; seventh report: *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3; eighth report: *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1; ninth report: *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/544; tenth report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2; and eleventh report: *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

⁵² *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (b).

21. On that basis, the Commission had, to date, adopted 76 draft guidelines, along with fairly detailed commentaries,⁵³ but only three draft model clauses, which accompanied draft guideline 2.5.8. The general plan of the Guide to Practice appeared in the second report, which he had presented to the Commission in 1996.⁵⁴ If the Commission continued to follow that plan, the Guide should comprise four parts: definition of reservations and interpretative declarations; formulation, withdrawal and acceptance of reservations and interpretative declarations, and objections thereto; effects of reservations, interpretative declarations, acceptances and objections; and the fate of reservations in the event of State succession. There might also be a fifth part relating to the settlement of disputes arising out of the reservations regime.

22. The first part—on the definition of reservations—had now been completed and, in his view, there was no need to reconsider it until the second reading of the Guide to Practice. The second part, although it already contained 41 draft guidelines, was not yet finished, but it should be completed during the current session. At the previous session, the Commission had also adopted five draft guidelines concerning, not the effects of reservations—the subject of the third part—but the validity of reservations and interpretative declarations.⁵⁵ In his view, that issue, which was a prerequisite for the consideration of the effects of reservations, was of sufficient importance to merit a separate part to itself, but that meant that in all likelihood the Guide to Practice would consist of not five but six parts. The five draft guidelines adopted in 2006, which reproduced or complemented subparagraphs (a) and (b) of the celebrated but highly obscure article 19 of the Vienna Conventions, related to the question of what was meant by the terms “prohibited” and “specified” reservations. All the draft guidelines already adopted, which would not be reviewed again before the second reading, appeared in paragraph 158 of the report of the Commission to the General Assembly on the work of its fifty-eighth session.⁵⁶

23. The hardest part of the task still lay ahead. In his tenth report (A/CN.4/558 and Add.1–2), he had proposed a definition of the object and purpose of the treaty, together with a set of draft guidelines relating to the competence to assess the validity of a reservation and the consequences of its non-validity.⁵⁷ The Commission had decided to defer a decision on draft guidelines 3.3.2 (Nullity of invalid reservations), 3.3.3 (Effect of unilateral acceptance of an invalid reservation) and 3.3.4 (Effect of collective acceptance of an invalid reservation) and not to refer them to the Drafting Committee, in principle until such time as the effect of objections to or acceptance of reservations had

⁵³ *Yearbook ... 2006*, vol. II (Part Two), pp. 138 *et seq.*, paras. 158–159.

⁵⁴ *Yearbook ... 1996*, vol. II (Part One), pp. 50–51, para. 37.

⁵⁵ Draft guidelines 3.1 (Permissible reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2 (Definition of specified reservations), 3.1.3 (Permissibility of reservations not prohibited by the treaty) and 3.1.4 (Permissibility of specified reservations), *Yearbook ... 2006*, vol. II (Part Two), p. 134, para. 104. The text of the draft guidelines and the commentaries thereto are reproduced in *ibid.*, pp. 143 *et seq.*, para. 159.

⁵⁶ *Ibid.*

⁵⁷ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, pp. 160–189, paras. 72–208.

been considered. It had, however, decided at its previous session to refer to the Drafting Committee all the other draft guidelines that appeared in the tenth report, namely draft guidelines 3.1.5 to 3.1.9, relating to the object and purpose of the treaty; 3.2 to 3.2.4 on competence to assess the validity of reservations; 3.3 (Consequences of the non-validity of a reservation); and 3.3.1 (Non-validity of reservations and responsibility), which stated—although it probably went without saying—that an invalid reservation “shall not, in itself, engage the responsibility of the State or international organization which has formulated it”. Those were the draft guidelines that the Drafting Committee had been invited to consider without delay. It was therefore essential to establish the composition of the Committee. He also urged members who wished to take part in the Drafting Committee’s deliberations on reservations to treaties to acquaint themselves with the relevant passages in his tenth report, particularly paragraphs 72 to 92 and paragraphs 147 to 194, as well as the summary of the relevant debates, which appeared in paragraphs 375 to 388 and 411 to 428 of the report of the Commission to the General Assembly on the work of its fifty-seventh session,⁵⁸ and in paragraphs 108 to 157 of the report on the work of its fifty-eighth session.⁵⁹ The note by the Special Rapporteur contained in document A/CN.4/572 and Corr.1 contained a new alternative version of draft guideline 3.1.5, drafted in the light of the Commission’s discussions in 2005.⁶⁰

24. Lastly, he urged members of the 2007 Drafting Committee not to go back on the spirit of the 14 draft guidelines that the Commission had referred to the Drafting Committee in 2005 and 2006 but rather to concentrate entirely on the wording. It would be most regrettable—and, indeed, counterproductive—if, as a result of the change in the membership of the Commission, the Drafting Committee’s discussions were used as a pretext to reconsider the approach agreed by the plenary.

25. On a more general note, he commended the quality of a study on reservations to treaties in the context of State succession that the Secretariat of the Commission had recently placed at his disposal. In his view, however, it would be premature to broach that matter at the current session. He also noted that, following the General Assembly’s approval of the Commission’s recommendation to that effect, a meeting would be held on 15 and 16 May 2007 between the Commission and experts from the United Nations human rights treaty monitoring bodies to discuss reservations to human rights treaties.⁶¹

26. Turning to the presentation of his eleventh report on reservations to treaties (A/CN.4/574), he explained that he was in the process of completing the second part, which would, for administrative reasons, perhaps be issued as the twelfth report. The first part, which had already been distributed, contained a total of 24 draft guidelines and he would begin by discussing the first set, draft guidelines 2.6.3 to 2.6.6. In paragraphs 1 to 57, he described the reception given to his three latest reports and provided

some information on recent developments in international practice and case law with regard to reservations. As far as those three reports were concerned, there were several elements that would repay discussion during the current session. He had in mind factors such as the difficulties encountered in defining objections to reservations, in view of the fact that the definition in question (draft guideline 2.6.1, which appeared in paragraph 58 of the eleventh report) had been adopted only in 2006. Another matter was a terminological problem that had given rise to considerable debate, namely whether, in ascertaining whether a reservation met the conditions set out in article 19 of the Vienna Conventions, the French text should use the word *licéité*, *recevabilité*, *admissibilité* or *validité*, and the English text the word “permissibility”, *admissibility* or “validity”. In the end, the Commission had opted for the word “validity” (*validité*), at least for the purposes of the third part of the Guide to Practice. Lastly, he drew attention to paragraphs 44 to 56 of his eleventh report (“Recent developments with regard to reservations to treaties”) and, in particular, to the judgment by the ICJ of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo*, which contained some extremely interesting observations on reservations to treaties, as did the joint separate opinion by several judges of the Court in the same case (paras. 44–53). Members of the Commission would be well advised to have the texts concerned before them during the consideration of draft guideline 3.1.13. Lastly, paragraphs 53 to 55 of the eleventh report related to work on reservations to human rights treaties, which members should bear in mind at the forthcoming meeting with experts from the human rights treaty bodies.

The meeting rose at 6 p.m.

2915th MEETING

Tuesday, 8 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

ELEVENTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. PELLET (Special Rapporteur), continuing the general introduction to his eleventh report on reservations

⁵⁸ *Ibid.*, vol. II (Part Two), pp. 67–68 and 69–70.

⁵⁹ *Yearbook ... 2006*, vol. II (Part Two), pp. 134–138.

⁶⁰ *Ibid.*, vol. II (Part One).

⁶¹ General Assembly resolution 61/34 of 4 December 2006, para. 16.

to treaties,⁶² recalled that the texts of the 76 draft guidelines on reservations to treaties adopted so far, together with the footnotes referring the reader to the commentaries thereto, were to be found in the Commission's report to the General Assembly on the work of its fifty-eighth session.⁶³ Draft guideline 2.6.1 (Definition of objections to reservations), adopted on first reading after lengthy deliberations by the Commission and its Special Rapporteur, provided a definition of objections which should remain unaltered until the draft was considered on second reading.⁶⁴ The crucial part of that definition was the reference to statements whereby a State or organization purported to exclude or to modify the legal effects of the reservation, or the application of the treaty as a whole, in relations with the reserving State or organization. Draft guideline 2.6.2 (Objection to the late formulation or widening of the scope of a reservation), likewise immutable until it came up for consideration on second reading, identified a completely different category of statements which, to his profound regret, the Commission had decided to describe as also being objections, namely statements whereby a State or international organization opposed the late formulation of a reservation or the widening of the scope of a reservation.⁶⁵

2. The four new draft guidelines, 2.6.3 to 2.6.6, concerned what he had called, after some hesitation, the freedom (“*faculté*”) to make objections, not to the late formulation of a reservation, but to the reservation itself. His hesitation regarding the title was attributable to the fact that, like Sir Humphrey Waldock in the 1960s, he had wondered whether the formulation of reservations was not in fact a right, and an unlimited one at that, rather than a simple “*faculté*”.⁶⁶ That view was all the more justifiable in that the Commission, in its consideration on second reading of the draft articles on the law of treaties, had declined to make the freedom to formulate objections to a reservation contingent upon the reservation's being incompatible with the object and purpose of the treaty.⁶⁷ The ICJ, in its advisory opinion of 1951 on the question concerning *Reservations to the Convention on Genocide*, had appeared to take the view that objections could be made to a reservation only if the reservation was incompatible with the object and purpose of the treaty [see page 18 of the advisory opinion]. The Commission, however, had done away with that linkage, and the United Nations Conference on the Law of Treaties had upheld that stance, despite the doubts voiced by some delegations.

3. That approach had been the sole means of remaining faithful to the spirit of consensualism that permeated the entire law of reservations. As Sir Humphrey Waldock

had affirmed during the Vienna Conference in 1968, the answer to the question whether a contracting State could lodge an objection other than on the grounds of incompatibility with the object and purpose of the treaty was surely in the affirmative,⁶⁸ since a State could not impose unilaterally on other contracting States a modification to a treaty that was binding upon them.

4. As Daniel Müller had pointed out in his commentary on article 20 of the 1969 Vienna Convention, in a remarkable work edited by Olivier Corten and Pierre Klein, *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, limiting the freedom to make objections to reservations to those that were incompatible with the object and purpose of the treaty would render the mechanism of acceptances and objections provided for in article 20 null and void.⁶⁹

5. While States had the discretionary freedom to make objections to reservations, “discretionary” did not mean “arbitrary”, and that freedom was subject to procedural and form-related constraints covered in draft guidelines that he would introduce at a later meeting. As for the statement of reasons, dealt with in draft guideline 2.6.10, the freedom to make objections was unlimited, and the reasons could be legal in nature, for example alleged incompatibility of a reservation with the object and purpose of the treaty, or might be purely political or opportunistic reasons that the State was free to assess at its discretion. The State was not obliged to cite incompatibility with the object and purpose of the treaty in order to make an objection. He was thus at a loss to understand why States persisted in justifying their objections on the often far-fetched grounds of incompatibility of the reservation with the object and purpose of the treaty. Perhaps States or their legal advisers were simply unaware that the freedom to make objections was entirely discretionary, in which case the Commission should remind them of that fact.

6. To repeat: no State could unilaterally impose upon another contracting State a modification to a treaty that the latter had signed of its own free will, and to limit in any way the freedom to raise objections to reservations would be to permit just such a unilateral imposition of modifications. Hence the need for draft guideline 2.6.3 on the freedom to make objections, which read: “A State or an international organization may formulate an objection to a reservation for any reason whatsoever, in accordance with the provisions of the present Guide to Practice.”

7. Logically, the objecting State could conclude that by objecting to the reservation, it was conveying the message that it did not intend to be bound by the treaty *vis-à-vis* the reserving State. To establish any other rule would be to accept that the reserving State could oblige the author of the objection to be bound by a treaty different from the one it had signed. Indeed, the Commission's Special Rapporteurs had initially considered that an objection had the automatic effect of preventing the treaty from entering into force as between the objecting

⁶² Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

⁶³ *Yearbook ... 2006*, vol. II (Part Two), pp. 138–158, paras. 158–159.

⁶⁴ See the commentary to this draft guideline in *Yearbook ... 2005*, vol. II (Part Two), pp. 77–82, para. 438. For the report of the Drafting Committee and the adoption of this draft guideline, *ibid.*, vol. I, 2842nd meeting, pp. 88–89, paras. 51–62.

⁶⁵ *Idem.*

⁶⁶ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 60, art. 17, para. 1 (a) and pp. 62–66, paras. 1–12 of the commentary.

⁶⁷ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 202–208, paras. 1–23 of the commentary of the section on reservations to multilateral treaties.

⁶⁸ *United Nations Conference on the Law of Treaties, First session...* (see footnote 46 above), 25th meeting, 16 April 1968, p. 133, para. 3.

⁶⁹ *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, vol. I, O. Corten and P. Klein (eds.), Brussels, Bruylant, 2006, p. 837.

and the reserving States. That was logical for advocates of the time-honoured system of unanimity, but illogical in a flexible system. It was accordingly understandable that Mr. Waldock, who had initially been in favour of an automatic effect, had subsequently taken the line adopted by the ICJ, which in its advisory opinion of 1951 had considered that an objecting State was free to draw its own conclusions regarding the consequences of its objection for the continuance or severance of its treaty relations with the reserving State [see page 15 of the advisory opinion]. In that respect, the 1951 advisory opinion constituted an advance that had often been overlooked.

8. Even if one accepted the reasoning in the advisory opinion, however, what was the presumption if the objecting State or international organization said nothing about the consequences of its objection? In the draft article adopted in 1966, the Commission, in keeping with previous practice, had retained the principle that unless a contrary intention had been expressed by the objecting State, an objection precluded the entry into force of the treaty as between the objecting and the reserving State.⁷⁰ The presumption, therefore, was that the treaty did not enter into force as between the two States. That presumption was all the more logical in that it applied only in cases in which the objection was based on the incompatibility of the reservation with the object and purpose of the treaty. If, in the view of the objecting State, a reservation vitiated the treaty, it made no sense for that State to continue to be bound *vis-à-vis* the reserving State by a treaty that it deemed to have been emasculated. Under the 1966 system, States could draw whatever conclusions they wished from objections, but if they remained silent yet considered the reservation to be incompatible with the object and purpose of the treaty, then the two States were no longer bound thereby.

9. While the 1966 system may have been logical, that had not prevented the then-Soviet Union from pressing for a reversal of the presumption at the Vienna Conference. It had ultimately achieved that goal with the adoption of a thoroughly illogical amendment that established the presumption that even though the reservation was deemed to be incompatible with the object and purpose of the treaty, the treaty, minus the reservation, nevertheless entered into force as between the reserving State and the objecting State.⁷¹ Article 20, paragraph 4 (b), and article 21, paragraph 3, of the 1969 Vienna Convention, which reflected that new presumption, were arguably the most unsatisfactory provisions of the Vienna Conventions where reservations were concerned—so much so that he had even wondered whether that logical aberration might justify the application of the exception that the Commission had envisaged to its general principles of 1985, by proposing an amendment of the Vienna Conventions in that regard.⁷²

⁷⁰ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 207, para. 21 of the commentary to article 17.

⁷¹ See *United Nations Conference on the Law of Treaties, First and second sessions ...* (footnote 46 above), document A/CONF.39/L.3, pp. 265–266.

⁷² *Yearbook ... 1985*, vol. II (Part Two), p. 35, para. 198.

10. After much hesitation, he had decided that it should not do so. Unfortunately, Cartesian logic was not a rule of *jus cogens*, and even though article 20, paragraph 4 (b), was an inane provision, it nevertheless reflected contemporary practice. States regularly objected to reservations by declaring them to be contrary to the object and purpose of the treaty, yet almost always indicated that this did not prevent the treaty from entering into force as between themselves and the reserving State. The Soviet Union's presumption regarding article 20, paragraph 4 (b), was thus consistently reaffirmed. The explanation by States that reservations were contrary to the object and purpose of the treaty but that the latter nevertheless entered into force was totally superfluous, since article 20, paragraph 4 (b) incorporated that presumption. The fact that States confirmed the presumption revealed, however, that the provision was useful to them, since it opened the door to the famous "reservations dialogue", in other words, to discussions with the reserving State. A number of States had in fact defended the presumption, despite the criticisms that might be levelled against it, during the debates in the Sixth Committee in 2005.⁷³

11. All things considered, therefore, it seemed reasonable for the Commission to endorse that practice by reproducing the principle set out in article 20, paragraph 4 (b), and article 21, paragraph 3, which allowed the author of an objection to state that the objection did not prevent the treaty from entering into force as between it and the reserving State, without its having to justify that decision. Such was the purpose of draft guideline 2.6.4, which read:

"2.6.4 Freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation"

"A State or international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the reserving State or international organization for any reason whatsoever, in accordance with the provisions of the present Guide to Practice."

12. One important question that draft guideline 2.6.1 on the definition of objections to reservations had deliberately not resolved was who had the freedom to make objections. The draft guideline stated that an objection could be formulated by a State or an international organization, but failed to specify which categories of States or international organizations could do so. Article 20, paragraph 4 (b), of the 1986 Vienna Convention provided some guidance on that matter: it referred to "an objection by a contracting State or by a contracting organization". One might conclude that contracting States or organizations were entitled to formulate objections, yet the phrase could not be construed to mean that only contracting States or contracting international organizations could do so.

13. Account must, however, be taken of the context and the object of the provision, which concerned the effect of an objection by a contracting State or a contracting international organization, the "effect" of an objection meaning

⁷³ See the Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixtieth session, prepared by the Secretariat (A/CN.4/560, mimeographed, available on the Commission's website), paras. 213–225.

that it was assumed that the objection would immediately produce consequences. Nonetheless, that did not rule out the possibility that other States or international organizations could also object. Article 21, paragraph 3, of the Vienna Conventions did not incorporate such a limitation. In particular, he did not see why article 23, paragraph 1, should require the communication of reservations to contracting States *and* to “other States [and international organizations] entitled to become parties to the treaty”, if those States were unable to react to them. If all States entitled to become parties to a treaty must be notified of the reservations, that implied that those States or international organizations had the power to react, and thus were entitled to object.

14. In his view, not only contracting States and contracting international organizations, but also all other States or international organizations entitled to become parties to the treaty, could *formulate*—as opposed to *make*—an objection to a reservation, the difference being that to “formulate” was to state a proposal or a position, whereas to “make” meant that the formulation of a reservation or objection had immediate effects and consequences. Thus, contracting States could make an objection to a reservation, whereas States entitled to become parties to the treaty could formulate such an objection. As long as the objecting State or international organization had not become a party to the treaty, its objection was merely a declaration of intent and would not produce effects until it became a party.

15. Those were the considerations which had led him to propose, in his eleventh report (para. 84), draft guideline 2.6.5, which read:

“2.6.5 Author of an objection

“An objection to a reservation may be formulated by:

“(a) any contracting State and any contracting international organization; and

“(b) any State and any international organization that is entitled to become a party to the treaty.”

16. In the absence of practice, draft guideline 2.6.6, on joint formulation of an objection, fell within the realm of progressive development of international law. It took account of a growing trend and was the counterpart, in the area of objections, to draft guidelines 1.1.7 (Reservations formulated jointly) and 1.2.2 (Interpretative declarations formulated jointly).⁷⁴ States increasingly consulted before making a reservation, and especially before making an objection. It was sensible to anticipate that development and to provide that objections could be formulated jointly, on the understanding, as pointed out by the Special Rapporteur in paragraph 86 of his eleventh report, that the unilateral nature of the objection was not called into question. A joint objection would be a kind of unilateral declaration by several parties directed at the author of the

reservation. In such a case, the objecting States would be acting unilaterally, even though they did so together. With that presentational trick, draft guideline 2.6.6 would safeguard the definition of objections to reservations in draft guideline 2.6.1. The text read: “The joint formulation of an objection by a number of States or international organizations does not affect the unilateral nature of that objection.”

17. Once the Commission had concluded its discussion of draft guidelines 2.6.3 to 2.6.6 and they had been referred to the Drafting Committee, as he hoped they would be, he would be ready to begin consideration of draft guidelines 2.6.7 to 2.6.15, which covered the form and procedure for the formulation of reservations.

18. Mr. GAJA said that the Special Rapporteur’s eleventh report contained a thorough analysis of relevant practice, a wealth of interesting points and a number of proposals, most of which did not call for further comment. He would like, however, to make a few critical remarks regarding the part of the report currently under discussion.

19. In his view, the letter and spirit of the 1969 Vienna Convention justified draft guideline 2.6.3, according to which a State or an international organization could formulate an objection to a reservation for any reason whatsoever. That was also confirmed by most State practice. Moreover, contrary to what was stated in paragraph 63 of the report and by the Special Rapporteur in his introductory remarks, the 1951 advisory opinion of ICJ concerning *Reservations to the Convention on Genocide* acknowledged the possibility of making objections which did not necessarily relate to compatibility with the object and purpose of the treaty. The advisory opinion noted that “[f]inally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it” [p. 16 of the advisory opinion]. Later in the same passage, the Court seemed to suggest that the effects of what might be called a “minor” objection were not necessarily the same as those provided for in the case of objections concerning the compatibility of a reservation with the object and purpose of the treaty. The Court envisaged that, in the case of a “minor” objection, the reserving State and the objecting State could allow the treaty to enter into force in their mutual relations, “except for the clauses affected by the reservation” [*ibid.*].

20. Admittedly, the Vienna Convention did not explicitly distinguish between, on the one hand, objections concerning the compatibility of a reservation with the object and purpose of the treaty and, on the other, minor objections, namely those which did not relate to the “validity” of the reservation, to use the term agreed on by the Commission at its fifty-seventh session.⁷⁵ However, the regime of objections which had emerged from the Vienna Convention was not necessarily uniform. It could be argued, as had Judge Bruno Simma in his 1998 article in the *Festschrift* for Ignaz Seidl-Hohenveldern entitled “Reservations to human rights treaties—some recent

⁷⁴ See the commentaries to these draft guidelines in *Yearbook ... 1998*, vol. II (Part Two), pp. 106–107, and *Yearbook ... 1999*, vol. II (Part Two), pp. 106–107, respectively.

⁷⁵ See *Yearbook ... 2005*, vol. II (Part Two), p. 64, paras. 353–358 and pp. 70–71, paras. 430–431.

developments”, that the Vienna Convention did not regulate objections relating to the validity of reservations.⁷⁶ Articles 20 and 21 thus referred only to minor objections. If objections relating to compatibility with the object and purpose of the treaty had the same effects as objections which did not call into question the validity of a reservation, it might be asked what purpose was served by a provision such as article 19 of the Convention, which set out three cases in which a reservation could not be formulated and was thus invalid.

21. The distinction between the two types of objections might raise questions as to the very purpose of objections when they related to the validity of reservations, a matter that would be dealt with at a later stage, when the question of the consequences of a reservation that had been perceived as incompatible with the object and purpose of a treaty was discussed. For present purposes, the distinction between the two types of objections would appear to have consequences for the regime governing objections and the effects of such objections.

22. It might be doubted whether the presumption in article 20, paragraph 4 (b), of the 1969 Vienna Convention applied to any objection. According to that provision, an objection “does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State”. That solution seemed justifiable only in the case of a minor objection, i.e., one that did not relate to validity.

23. That diversity of regimes for objections could also help explain, at least in part, the somewhat contestable practice of some States, which declared that an objection formulated because a reservation was incompatible with the object and purpose of the treaty did not preclude the entry into force of the treaty *vis-à-vis* the reserving State. That practice might seem odd, as was noted in paragraph 74 of his eleventh report, but it probably reflected the conviction that the presumption set forth in article 20, paragraph 4 (b), did not apply when an objection concerned the validity of the reservation. If the objection affected the validity of the treaty, and the objecting State nevertheless intended the treaty to enter into force in its relations with the reserving State, it could not rely on that presumption and should say so. That was perhaps the reason why States did not simply refer to the presumption in the Vienna Convention, but specified that the objection did not have the effect of preventing the entry into force of the treaty *vis-à-vis* the reserving State.

24. Article 20, paragraph 4 (b), was not consistent with article 19 unless it referred solely to minor objections. The same applied to the presumption set out in article 21, paragraph 3, according to which, if the objecting State did not oppose the entry into force of the treaty in its relations with the reserving State, “the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation”. That was a provision which, if it did not presuppose the validity of the reservation,

⁷⁶ B. Simma, “Reservations to human rights treaties—some recent developments”, in G. Hafner *et al.* (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday*, The Hague, Kluwer Law International, 1998, pp. 659 *et seq.*, at p. 663.

would scarcely be consistent with the regime established in article 19. Accordingly, he agreed with Judge Simma’s view that articles 20 and 21 could not have as general a scope as might seem at first glance to be the case, and that it might be possible to generalize by saying that articles 20 and 21 concerned reservations which had overcome the initial hurdle and thus were deemed to be valid.

25. If the idea that the effects of objections were not uniform was accepted, the fact that such a distinction between two types of objection existed should be specified in the draft guideline concerning their formulation. Above all, the Commission should not adopt texts which appeared to imply the existence of a uniform regime, as draft guideline 2.6.4 did in its current form.

26. Mr. PELLET (Special Rapporteur) said that the distinction drawn by Mr. Gaja between minor objections and objections relating to validity had its attractions. If retained, it would be of great importance for future work on the topic. However, he remained sceptical, because ultimately that opposition was based on scanty and superfluous practice, which consisted—for States that considered that a reservation was incompatible with the object and purpose of the treaty—in not basing themselves on the presumption in article 20, paragraph 4 (b). That was not a very weighty justification for a distinction of such importance. Moreover, it was a practice which States did not always apply; usually, they deemed a reservation to be incompatible but nevertheless remained bound by the treaty. Nothing in article 20, paragraph 4 (b), in the *travaux préparatoires* of the United Nations Conference on the Law of Treaties or in the Soviet Union’s proposals to reverse the presumption seemed to justify that opposition. He would not object if the Commission decided that it could use such flimsy criteria. That would be an elegant solution to the problems posed by the effects of objections. However, he was not certain whether there was sufficient legal basis for introducing a distinction which he personally did not see in the Vienna Convention.

27. Mr. GAJA said that perhaps further thought should be given to what decision should be taken. His suggestion had been based not only on practice but also, more decisively, on the logic of the Vienna Convention and the fact that article 19 set out categories of reservations which were not valid and that articles 20 and 21 were not suited to those reservations. Article 20, paragraph 5, with its presumption of acceptance, could be accepted for reservations which overcame the hurdle of validity, but it would be difficult to claim that the presumption applied even where validity was at issue.

28. Mr. McRAE congratulated the Special Rapporteur on his monumental contribution to the understanding of reservations and, more broadly, to the law of treaties.

29. Generally speaking, he was in agreement with the four draft guidelines presented, but wished to reflect further on Mr. Gaja’s comments on distinctions between objections and, in particular, on objections that appeared to have no consequences.

30. The Special Rapporteur distinguished between reservations, whose effect depended on the response to the

reservation, and objections, which took effect simply by virtue of the State making them, so that on that basis a reservation was “formulated”, whereas an objection was “made”. It was not clear, however, why the draft guidelines on reservations referred to the *formulation* of reservations and the title of draft guideline 2.6.3 spoke of the freedom to *make* objections, whereas the body of the draft guideline addressed the *formulation* of objections, which was also the term used throughout the draft guidelines on objections. The Special Rapporteur had contended that in the case of States or international organizations not yet parties to a treaty, it was inappropriate to use the word “make”, since such objections could only be “formulated” and could not be “made” until the State or international organization became a party to the treaty. The Special Rapporteur recognized that objections were made by a unilateral act of their authors if they were already parties to the treaty. If the wording “make an objection” were to be used consistently, draft guideline 2.6.5 would have to be divided between objections “made” by parties to the treaty and those “formulated” by potential future parties. In any event, it would be useful to have some clarification from the Special Rapporteur on that terminological question.

31. His second comment related to the scope of draft guideline 2.6.3, where the freedom to make an objection was expressed in terms of freedom to object to a reservation. As the Special Rapporteur had pointed out, that freedom must be exercised in accordance with the procedural and formal requirements of the draft guidelines. However, the question arose whether there were any other limitations on that freedom and, specifically, whether States were free to make an objection to a reservation which was in fact authorized by the treaty. He did not think that they were, and if that was the case, he wondered whether there might be a need to say so explicitly. The Special Rapporteur touched upon the matter in paragraph 65 of his eleventh report and had observed in his introductory remarks that a reservation was a proposal to modify the terms of the treaty and that the rationale for the freedom to make objections was that no State was obliged to accept that proposal for modification. However, in paragraph 65, he then qualified that remark by saying “except for those resulting from reservations expressly authorized by the treaty”. There, he seemed to be suggesting that States were not free to make an objection to a reservation expressly authorized by the treaty. To call derogations which were authorized by the treaty “reservations” caused some confusion. However, there were examples in State practice of such terminology being employed. For instance, the North American Free Trade Agreement (NAFTA) did not permit reservations as such; the three signatory States must apply all the provisions of the Agreement. However, NAFTA did make provision for specific derogations which States could make at the time of acceding to the Agreement, derogations which it referred to as “reservations”. It seemed to make no sense to think of those derogations as reservations to which objections could be made. Nor did it seem possible to consider that those expressly permitted reservations would ever be contrary to the object and purpose of the treaty, although in paragraph 65 the Special Rapporteur contemplated that eventuality. It would be useful to have some clarification on that point. The definition of reservations in draft guideline 1.1 did not seem on the face of it to exclude permitted reservations.

32. Regarding draft guideline 2.6.5, he endorsed the principle that an objection could be formulated by any State or international organization that was entitled to become a party to a given treaty. The report made a compelling case for the value of having advance warning of objections by States that might or would become parties to the treaty. Paragraph 81 of the eleventh report, however, related to the intention to become a party to the treaty, whereas draft guideline 2.6.5 related to the entitlement to become a party, regardless of whether a given State or international organization intended to do so. The formulation of the draft guideline, although it might be undesirable, was unavoidable: there was no realistic way of insisting that a State that had not yet become a party to the treaty should demonstrate its intention to do so. Moreover, the outcome of the domestic processes that would permit a State to ratify a treaty might not be predictable enough to indicate whether it intended to become a party to such a treaty. A change of government or political alignments within a State might subsequently enable the treaty to be ratified. For those reasons, entitlement was, on balance, preferable as a criterion to intention.

33. Mr. GAJA said that Mr. McRae’s concern about the conflicting criteria of entitlement or intention was based on a misapprehension: the French text made no reference to “intention”. A mistranslation might be to blame.

34. Mr. GALICKI said that draft guidelines 2.6.3 and 2.6.4 might contain inconsistencies, based, as they were, on article 20, paragraph 4 (b), of the 1969 Vienna Convention, the wording of which as originally proposed was preferable to the final version decided on by States.⁷⁷ In the case of draft guideline 2.6.3, the title was inconsistent with the content: the former referred to “making” objections, whereas the latter used the word “formulate”, which was a far weaker word. The inconsistency should be eliminated, or at least explained. The text as it stood left too much scope for interpretation.

35. The draft guideline was, moreover, inconsistent with draft guideline 2.6.4, according to which, in a clear reflection of article 20, paragraph 4 (b), of the Convention, a State or international organization that formulated an objection to a reservation could oppose the entry into force of the treaty as between itself and the reserving State or international organization for any reason whatsoever. That meant that an objection might be made on relatively minor grounds, with the result that an objection to a reservation deemed incompatible with the object and purpose of the treaty did not necessarily preclude the entry into force of that treaty as between the reserving and objecting States. He wondered whether the Special Rapporteur agreed with him that the original wording of article 20, paragraph 4 (b), under which an objection by a contracting State to a reservation automatically precluded the entry into force of the treaty concerned, was preferable to the current wording, and whether draft guideline 2.6.4 adequately covered all eventualities.

⁷⁷ For the discussion of article 17, paragraph 4 (b) of the draft articles adopted by the Commission at its eighteenth session and the changes thereto, see *United Nations Conference on the Law of Treaties, First and second sessions ...* (footnote 46 above), documents A/CONF.39/14, pp. 132–138, paras. 172–189, and A/CONF.39/15, pp. 239–240, paras. 50–57.

36. Mr. HASSOUNA asked whether, in view of the hope that the important and complex topic of reservations to treaties would be finalized by the end of the current quinquennium, the Special Rapporteur could give some indication of what could be achieved and within what time frame. Such a “road map” would be preferable to an open-ended agenda. He also wished to know how State practice or legal opinion relating to the formulation of objections to reservations had evolved over recent years. It would be useful to learn whether the procedure had become stricter or more flexible over the long term. Lastly, draft guideline 2.6.5 raised an interesting question regarding the rationale for giving the same legal rights to a State that had only signed a given treaty as to a State that had both signed and ratified it. He could identify no conclusive trend in State practice in that regard: some but not all States that had merely signed a treaty occasionally made objections to reservations.

37. The CHAIRPERSON, responding to proposals by Mr. PELLET (Special Rapporteur), said he would take it that the Special Rapporteur’s response to the points raised and his presentation of the next group of draft guidelines would be deferred to the next meeting.

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

[Agenda item 1]

38. Mr. YAMADA (Chairperson of the Drafting Committee) said that the following members had expressed their willingness to serve on the Drafting Committee on the topic of reservations to treaties: Mr. Candioti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Singh and Ms. Xue. Mr. Petrič would participate *ex officio* in his capacity as Rapporteur. Mr. Yamada would welcome more volunteers, especially from the African and the Latin American and Caribbean States. All members of the Commission, however, were of course entitled to attend meetings of the Drafting Committee.

The meeting rose at 11.25 a.m.

2916th MEETING

9 May 2007, at 10.07 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume consideration of the topic of reservations to treaties, and in particular draft guidelines 2.6.3 to 2.6.6 in the eleventh report of the Special Rapporteur.⁷⁸

2. Ms. ESCARAMEIA welcomed the eleventh report on reservations to treaties, which was well researched and highly analytical. The summary of past work and recent developments was very useful. She wondered, however, whether the reference to the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)* really supported draft guideline 3.1.13, as was stated in paragraph 48, because the reservation in question had referred only to dispute settlement mechanisms and not to treaty monitoring bodies, whereas draft guideline 3.1.13 covered both. Moreover, several judges of the ICJ had expressed the opinion that a reservation to dispute settlement clauses could be incompatible with the object and purpose of the treaty [see paragraph 21 of the joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma]. In general, a reservation concerning the very existence of a treaty body was also contrary to the object and purpose of the treaty. Draft guideline 3.1.13 should therefore be reconsidered in the light of those points.

3. She then drew the Commission’s attention to recommendation No. 5 of the Working Group on Reservations set up at the request of the Fourth Inter-Committee Meeting of Human Rights Treaty Bodies to study the practice of treaty bodies in that area.⁷⁹ According to that recommendation, the treaty bodies were competent to assess the validity of reservations and the implications of a finding of invalidity of a reservation. Recommendation No. 7 gave the impression that the consequences of invalidity—that the State could be considered as not being a party to the treaty, or as a party to the treaty but that the provision to which the reservation had been made would not apply, or as a party to the treaty without the benefit of the reservation—could be determined by the treaty bodies (besides judicial organs). It would be useful to know whether the Special Rapporteur agreed with her interpretation of that recommendation.

4. Turning to the new draft guidelines presented in the eleventh report, she said that the word “freedom” in the title of draft guideline 2.6.3 (Freedom to make objections) seemed inappropriate. The Special Rapporteur justified his choice by saying that freedom was not unlimited, but a right was also subject to restrictions. The Special Rapporteur himself also used the word “right” several times, for example in paragraphs 63 and 66. Nor did the

⁷⁸ Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

⁷⁹ Report of the meeting of the Working Group on Reservations (HRI/MC/2006/5), para. 16.

argument that a State could not object to a reservation which it had previously accepted transform a “right” into a “freedom”, it was merely a consequence of the principle of good faith. She also thought that the phrase “for any reason whatsoever” in the text itself needed to be qualified, at least by a reference to the 1969 and 1986 Vienna Conventions, if not to general international law, because the Guide to Practice could not include objections that were incompatible with the principle of good faith or *jus cogens*. That would also respond to the question raised by Mr. McRae on the subject of objections to an expressly authorized reservation, which were also contrary to the principle of good faith.

5. The same problems arose with regard to draft guideline 2.6.4 (Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation). There again, the word “right” seemed more appropriate than “freedom”. The phrase “for any reason whatsoever” not only opened the door to all objections, even those contrary to *jus cogens*, but also gave the impression that the State *must* give a reason. It would be preferable to say “without any justification, in accordance with international law and the provisions of the present Guide to Practice”.

6. Mr. Gaja’s proposal to distinguish between “major” objections (made on grounds of incompatibility of the reservation with the object and purpose of the treaty) and “minor” objections (made for political or other reasons) would certainly be useful when the Commission came to address the effects of objections, but at the present juncture she did not see the point of that distinction, another disadvantage of which was that it gave prominence to “major” objections, although an objection made for political reasons might be much more important for the objecting State.

7. With regard to draft guideline 2.6.5 (Author of an objection), she wondered whether it was really possible to speak of an “objection” by a potential party, because that was merely a unilateral act which did not produce any effects if the State in question did not become a party to the treaty. Draft guideline 2.6.6 (Joint formulation of an objection), for its part, seemed satisfactory.

8. In conclusion, she recommended that all the draft guidelines should be referred to the Drafting Committee.

9. Mr. FOMBA said he agreed with the Special Rapporteur’s line of reasoning, which was based on a critical analysis of the relevant provisions of the Vienna Conventions and a rigorous analysis of the practice of States and international organizations and the jurisprudence of the ICJ.

10. With regard to draft guideline 2.6.3, he endorsed the Special Rapporteur’s interpretation of the scope of the reason for the objection in paragraph 68 of his eleventh report. The reminder of the difficult gestation of the relevant provisions of the Vienna Conventions (para. 69) was useful, as was the description of State practice (para. 74). The Special Rapporteur’s conclusions (para. 75) were important, logical and acceptable.

11. With regard to draft guideline 2.6.4, he subscribed to the conclusions which the Special Rapporteur had

formulated in paragraph 77 on the basis of a broad interpretation of the relevant provisions of the Vienna Conventions. The distinction which the Special Rapporteur made between the freedom to react of States that were entitled to become parties to the treaty and the specific effects of those reactions (para. 78) was pertinent.

12. Draft guideline 2.6.5 did not pose any particular problem. Its justification (para. 82) was logical, coherent and relevant. The proposed distinction between “objections formulated” and “objections made” (para. 83) was also appropriate. However, in paragraph 84, the word “and” at the end of subparagraph (a) should perhaps be replaced by “as well as” or “but also” to show that, despite appearances, the door was not closed.

13. As to draft guideline 2.6.6, he also agreed with the Special Rapporteur’s conclusions (para. 86): technically, there was nothing to prevent the joint formulation of an objection, which, however, still maintained its unilateral nature. Yet it was unfortunate that the practice cited by the Special Rapporteur was essentially that of the member States of the Council of Europe (para. 85). In that connection, he wondered whether there was a difference between a joint objection formulated by a number of States and “objections formulated in identical terms” by a number of States (para. 85) and whether in such cases they were parallel, intersecting or joint objections. That said, he considered that the set of draft guidelines 2.6.3 to 2.6.6 was satisfactory and could be referred to the Drafting Committee.

14. Mr. KOLODKIN commended the Special Rapporteur’s outstanding report. With regard to draft guideline 2.6.3, he wondered, like Mr. McRae, why the Special Rapporteur employed the words “make objections” in the title and “formulate an objection” in the actual text of the draft guideline. He also subscribed to the comments by Ms. Escameia on the word “right”, which was more appropriate than “freedom”. However, that matter could be addressed at the second-reading stage. As to the phrase “for any reason whatsoever”, he was not opposed to it, as long as it expressed the key idea of the draft guideline, namely that an objection might be made not only on grounds of the incompatibility of the reservation with the object and purpose of the treaty, but also for other reasons.

15. Draft guideline 2.6.4 concerned the presumption of non-entry into force of a treaty as between the author of an objection to a reservation and the author of the reservation. As had been proposed by Mr. Gaja, a distinction could be drawn between the effects of objections, depending on whether they were “major” (because of incompatibility with the object and purpose of the treaty) or “minor” (for any other reason), the presumption being that the treaty would not enter into force as between the author of the objection and the author of the reservation in the first case but that it would do so in the second case. The latter case was the one envisaged in article 20, paragraph 4 (b), of the 1969 Vienna Convention. However, it was also possible to proceed from the principle that a reservation could not be formulated if it was incompatible with the object and purpose of the treaty; it was considered to be null and void and thus did not produce legal effects for the State that had opposed it. If that was so, the treaty entered into force between the two States, as in the second case.

Hence, there was no need to draw a distinction between the reasons for objections. It should, however, be noted that article 20, paragraph 4 (b), of the Vienna Convention also stated that the treaty entered into force as between the two States “unless a contrary intention is definitely expressed by the objecting State”. Draft guideline 2.6.4 developed that provision, because it provided that the author of the objection could oppose the entry into force of the treaty; that went further than a declaration of intention. But it was important to be more specific, particularly in a Guide to Practice. A more direct formulation might be to say that if the reserving State did not withdraw the reservation and if the objecting State did not withdraw the objection, the treaty would not enter into force.

16. Draft guideline 2.6.5 was formulated too broadly. It provided in its subparagraph (b) that an objection to a reservation could be formulated by “any State and any international organization that is entitled to become a party to the treaty”; that wording encompassed the States that had signed the treaty but had not ratified it, States that did not intend to become parties to the treaty and even those that had declared that they had no intention of becoming parties to it. It might be asked whether it was justifiable that those States should have the same right to formulate objections as did contracting parties. It was also unfortunate that the Special Rapporteur had made virtually no reference to practice in his comments. Only the practice of the Secretary-General was cited in paragraph 80, and that practice was not representative. It would be useful to analyse the practice of States, as well as that of regional organizations, whose treaties might be open to signature by non-member States. That analysis would enable draft guideline 2.6.5—and perhaps even draft guideline 2.1.5 adopted on first reading at the fifty-fourth session of the Commission⁸⁰—to be considered in a new light.

17. Draft guideline 2.6.6, which was the exact counterpart of draft guideline 1.1.7, did not seem necessary in a guide to practice. It would be necessary if its purpose was to specify that a number of States or organizations could formulate an objection jointly. However, in its present drafting, it stressed the unilateral nature of joint objections, a point that could more appropriately be made in the commentary.

18. With regard to the example cited in paragraph 56 of the eleventh report, on an initiative by the Council of Europe to encourage its member States to adopt a common approach to reservations, he pointed out that the Russian Federation had not made a reservation to the International Convention for the Suppression of the Financing of Terrorism. What the Council of Europe had regarded as a problematic reservation was a general statement of policy, of the sort referred to in draft guideline 1.4.4. That example showed that the depositaries of treaties must exercise the greatest caution with regard to reservations.

19. Mr. SABOIA congratulated the Special Rapporteur on the enormous task he had accomplished and said he would begin by making a number of general comments on the eleventh report.

20. The Special Rapporteur had indicated that the Commission’s task was not to modify the 1969 and 1986 Vienna Conventions, but to prepare a non-binding Guide to Practice to fill the gaps and address the ambiguities of those instruments in the area of reservations. Although he endorsed that approach, he pointed out that, when they made reservations or formulated objections, States were quite often guided by a logic that was more political than legal in nature, hoping thereby to reap the benefits of becoming parties to a given instrument while avoiding its inconveniences. Sometimes their actions were motivated by domestic political factors. It should also be borne in mind that the gaps and ambiguities in the Vienna Conventions had perhaps been intentional, the aim being to facilitate the adoption of those instruments. He agreed, however, that the obligations entered into by States when they became parties to international treaties must be as clear as possible, and must be implemented with due regard for the principle of good faith. Moreover, some of the reasons that had underlain the ambiguities and gaps in the Vienna Conventions might no longer be valid. Nevertheless, to try to fill those gaps completely would perhaps go beyond what was expected of a Guide to Practice.

21. Turning to the draft guidelines proposed, he endorsed the distinction drawn by Mr. Gaja between reservations which were not valid because they fell under the general prohibitions set forth in article 19 of the 1969 Vienna Convention, and other reservations. The point needed to be examined further. The same applied to the comment by Mr. McRae on draft guideline 2.6.3 and the phrase “in accordance with the provisions of the present Guide to Practice”. He wondered whether it might not be useful, as suggested by Ms. Escameia, to insert a reference to the Vienna Conventions and to general international law. He also agreed with Ms. Escameia’s comment on paragraph 48 concerning treaty monitoring bodies. Human rights treaties did not establish reciprocal relations between contracting States; rather, they committed them to comply with and promote the rights of individuals or groups. That characteristic explained the special impact of reservations, particularly as States would rarely formulate objections to them.

22. On draft guideline 2.6.4, he said that the objections likely to be formulated by States or international organizations which were not parties to a treaty would produce legal effects only when those States or organizations became parties to the treaty in question.

23. Ms. XUE said that the definition of objections to reservations, which was the subject of draft guideline 2.6.1, was, in the opinion of the Special Rapporteur himself, deliberately incomplete, in that it did not specify who could formulate an objection, or when. Thus, at the procedural level, the draft guideline was not very useful in its current version. Perhaps the Drafting Committee might consider the question.

24. Draft guideline 2.6.3 focused on the freedom of States to make objections to reservations. According to paragraph 65 of the Special Rapporteur’s eleventh report, a State was “never bound by treaty obligations that are not in its interests”. In her view, what mattered was not whether the reservation was in the interests of a State

⁸⁰ See the text of this draft guideline and the commentary thereto in *Yearbook ... 2002*, vol. II (Part Two), pp. 34–38.

party, but when it consented to accept the obligation. With regard to the question of authorized or permitted reservations, if the reservation authorized was clear-cut, for instance concerning acceptance of the compulsory jurisdiction of the ICJ, the answer was relatively simple. If a State (or an international organization) formulated such a reservation, other States did not have the freedom to formulate an objection. If, on the other hand, the reservation related to the discretionary power to choose the manner in which treaty obligations were implemented, could other States object to such a reservation if they disapproved of the choice? In her opinion, in such a case the criterion of the object and purpose of the treaty should not come into play, because once the treaty allowed such reservations, the presumption was that they were not incompatible with the object and purpose of the treaty, and thus other States did not have the freedom to make objections. As she understood it, that was also the Special Rapporteur's position.

25. Another important issue was the limits on the freedom to make objections. If the Special Rapporteur's proposition was correct, namely that "a State or international organization that has accepted a reservation loses its right to formulate an objection later to the same reservation", must the act of acceptance be explicit and formal, or could it also be implicit, through acquiescence? The Guide to Practice should also shed some light on other forms of acceptance, because it was important for the reserving State to ascertain its treaty relations precisely. The Special Rapporteur had placed rather too much emphasis on the freedom to make objections, with a view to restricting reservations, and had paid less attention to the importance of maintaining the certainty of treaty relations.

26. Draft guideline 2.6.4 was acceptable because it was in conformity with the provisions of the 1969 and 1986 Vienna Conventions, but it lacked the reference to the criterion of object and purpose of the treaty. The words "for any reason whatsoever" might well lead to a situation in which a State would have the unconditional freedom to oppose the entry into force of a treaty as between itself and the reserving State; that was not in line either with the Vienna Conventions or with the general principles of treaty law. Thus, objections with "minimum effect" might well become objections with "maximum effect".

27. She shared the concern expressed by some members of the Commission with regard to subparagraph (b) of draft guideline 2.6.5, according to which a reservation could be formulated by "any State and any international organization that is entitled to become a party to the treaty". First, that did not reflect the settled practice of States, in accordance with which only States parties were notified of the reservation. Secondly, the practice of the member States of the European Union, referred to in paragraph 85, did not represent universal practice, and thus the example was not convincing. Thirdly, the words "entitled to become" were also problematic in the case where a State made it very clear that it had no intention of becoming a party to a treaty. Admittedly, a change of government might lead to a change in policy, but intention would still have to be expressed. Moreover, if there was no possibility for a State to enter into contractual treaty relations with other States, why should it have the right to

question the contractual intention of other States by making an objection to a reservation? That totally contradicted the principle of consent and good faith. It was desirable to maintain the integrity of treaty regimes by restricting reservations, but such restrictions must be reasonable if treaty regimes were to be preserved.

28. Subject to those comments, she had no objection to referring draft guidelines 2.6.1 to 2.6.6 to the Drafting Committee.

29. Mr. NOLTE said he agreed with the general thrust of the eleventh report, but had doubts about the phrase "for any reason whatsoever" in draft guidelines 2.6.3 and 2.6.4, which seemed to open the door to arbitrariness. Although he understood why the Special Rapporteur had chosen it and agreed with him that the principle of free consent underlay the whole reservations regime, he nevertheless wondered whether there were substantive limits to the formulation of reservations. Perhaps it would be possible to find a formulation that echoed draft guideline 3.1.9 (Reservations to provisions setting forth a rule of *jus cogens*), which excluded objections that would have the effect of creating treaty relations that violated peremptory norms of general international law. While not easy to imagine, such a situation was nevertheless possible. Suppose, for example, that a reservation to a treaty excluded a certain part of the territory of a State from the scope of the treaty. It was unclear whether that reservation was incompatible with the object and purpose of the treaty and whether the reserving State was bound by the entire treaty, regardless of the reservation. Another State formulated an objection to the reservation, whereby it did not accept the territorial limitation, but only where the exclusion of a certain racial group was concerned. At first glance, the effect of such an objection would be to produce a treaty relation which violated a peremptory norm of international law, namely the prohibition of racial discrimination. Such a possibility, albeit theoretical, should not be excluded.

30. The first sentence of paragraph 65 of the report was misleading and could be misquoted for illegitimate purposes. Sometimes States failed to properly identify their own interests, and those interests could change; thus, it was perfectly possible for a State to be bound by treaty obligations that were not in its interests. What the Special Rapporteur probably intended to say was that a State could never be forced to enter into a treaty relation which it did not consider to be in its interests.

31. With regard to the freedom to make objections, he thought, like other members of the Commission, that it would be preferable to speak of a "right" rather than a "freedom". The nuance could largely be explained by differences in the respective legal systems.

32. As to draft guideline 2.6.5, he agreed with Mr. Saboia, who drew a distinction between two types of objections: objections in the strict sense, which only contracting parties could make, and conditional objections, which could be formulated by States that were entitled to become parties to the treaty. Like Ms. Xue, he was of the view that States parties to a treaty and non-States parties could not be treated in the same way. He therefore suggested that the

Drafting Committee come up with a formulation to distinguish between those two types of objections, depending on the status of the State concerned.

33. Mr. WISNUMURTI said that the formulation proposed by the Special Rapporteur for draft guideline 2.6.3 clearly reflected the principle of consent embodied in the 1951 advisory opinion of the ICJ on *Reservations to the Convention on Genocide*.

34. The Special Rapporteur had examined the link between objections to reservations to a treaty and reservations incompatible with the object and purpose of the treaty by referring to the *travaux préparatoires* of the 1969 Vienna Convention.⁸¹ The reference to that link had been omitted from draft guideline 2.6.3, and the Commission should consider including it for the sake of clarity and adding that the discretionary right to formulate an objection existed irrespective of whether a reservation was or was not compatible with the object and purpose of the treaty.

35. While the phrase “for any reason whatsoever” was essential as a subjective criterion, the criterion of compatibility was equally essential as an objective criterion; they were mutually complementary. Moreover, a reference to the compatibility criterion in the draft guideline would highlight the importance of the principle of consent.

36. He fully shared the views of other members of the Commission on the terms “freedom” and “right” and was in favour of employing the latter term in draft guidelines 2.6.3 and 2.6.4. He did not have any specific comments on draft guidelines 2.6.4 to 2.6.6, except to say that the Commission should adopt the approach which he had described, with a view to strengthening the principle of consent in draft guideline 2.6.4.

37. Mr. GAJA said that Mr. Nolte’s point with regard to peremptory norms seemed to imply that the objection helped to shape the contents of the rights and obligations under the treaty, so that, in the bilateral relations between the reserving State and the objecting State, account should be taken not only of the reservation, but also of the objection. The objection might indicate that the reservation was acceptable up to a certain point, beyond which the treaty should be applicable as adopted, as though there were a sort of agreement between the parties to modify the treaty to that effect. That was not the way he understood the effects of objections. The Vienna Conventions did not give any definition of an objection, while the Commission had adopted one, which was based on the idea that the objecting State usually tried to persuade the reserving State to withdraw or modify its reservation. Pursuant to article 21, paragraph 3, of the Vienna Convention, either the objection ruled out bilateral relations, or the treaty did not apply between the two States to the extent of the reservation.

38. Mr. PELLET (Special Rapporteur), referring to Mr. Wisnumurti’s comment that the link with the object and purpose of the treaty should be reintroduced, wondered whether he envisaged a wording such as: “A State

or an international organization may formulate an objection to a reservation even if it does not invoke the incompatibility of the reservation with the object and purpose of the treaty.”

39. Mr. WISNUMURTI said the point he had been making was that if the words “for any reason whatsoever” were used in draft guideline 2.6.3, the phrase “irrespective of the validity of the reservation” should be added in order to place even greater emphasis on the principle of consent.

40. Mr. CANDIOTI, referring to a number of comments made on draft guideline 2.6.3, said that the word “*facultad*” in the Spanish version did not mean the same thing as “freedom” in the English version. The confusion was probably due to a translation problem. Referring to subparagraph (b) of draft guideline 2.6.5, he said he did not see why a State that was entitled to become a party to the treaty and that had been notified of the reservation, the express acceptance of a reservation or the objection to a reservation, in conformity with article 23, paragraph 1, of the 1969 Vienna Convention, could not have the freedom to make an objection. For that reason, he fully endorsed the draft guideline.

41. Mr. HASSOUNA, referring to the problem of translation raised with regard to draft guideline 2.6.3, proposed using the word “option” in English to render the idea of “*faculté*” and “*facultad*”.

42. Mr. YAMADA said that, generally speaking, he supported the Special Rapporteur’s approach in draft guidelines 2.6.3 to 2.6.6, which were based on a logical interpretation of the 1969 and 1986 Vienna Conventions, and that consequently he was in favour of referring those draft guidelines to the Drafting Committee. He would merely like to have some clarification on paragraph 67, which, referring to the discretionary right of States and international organizations to make objections to reservations, began with the following words: “However, ‘discretionary’ does not mean ‘arbitrary’ and, even though this right undoubtedly stems from the power of a State to exercise its own judgement, it is not absolute. Above all, it must be exercised within the limits arising from the procedural and form-related constraints that are developed in greater detail later in this report.” At the beginning of the second sentence, the words “above all” did not seem to be a correct translation of “*notamment*”. Was he to understand that there were no constraints on the freedom to formulate objections apart from those of a procedural and form-related nature? In his introduction to the report, the Special Rapporteur had said that objections based on political motivation were permissible. Moreover, in paragraph 106 of the report, he even spoke of “purely political” reasons, and his intention seemed to be very clear. He therefore wondered whether a State could take advantage of a reservation formulated by another State to refuse the treaty relation *vis-à-vis* the reserving State by formulating an objection based on purely political reasons.

43. Mr. PELLET (Special Rapporteur) drew attention to an error in the text at the end of paragraph 106: it should read: “without any gain to the reserving State” (not “without any gain to the objecting State”).

⁸¹ See footnote 46 above.

44. Mr. VÁZQUEZ-BERMÚDEZ, after congratulating the Special Rapporteur on the quality of his eleventh report, said that on the whole he endorsed the content of draft guidelines 2.6.3 to 2.6.5. With regard to the title of draft guideline 2.6.3, he thought, like Mr. Candiotti, that there was a translation problem in the English version, whereas the Spanish word “*facultad*” was perfectly appropriate. With regard to the freedom to make objections, it should be noted that it was discretionary, but not arbitrary, because it must be exercised within the limits of international law and the provisions of the Vienna Conventions, and not only with reference to the guidelines in the Guide to Practice to be adopted by the Commission. Hence the need to insert in draft guideline 2.6.3 an explicit reference to the provisions of the Vienna Conventions or perhaps a more general reference to international law, as suggested by Ms. Escameia. The freedom to make objections could be exercised for any reason whatsoever, without any need for an explanation. Of course, that left open the possibility of opposing the entry into force of the treaty *vis-à-vis* the author of the reservation, as was indicated in draft guideline 2.6.4. There again, a reference to the provisions of the Vienna Conventions or to international law should perhaps be added.

45. As to draft guideline 2.6.5, the Drafting Committee should insert—at any rate, when the time came to consider the effects of objections—a few words in subparagraph (b) to make it clear that an objection formulated by a State or international organization that was entitled to become a party to the treaty would produce legal effects only once the State or organization in question had actually become a party to the treaty. In concluding, he said he was in favour of referring draft guidelines 2.6.3 to 2.6.5 to the Drafting Committee.

46. Mr. HMOUD said he could go along with either the term “freedom” or the term “right” (to make objections): whether a freedom or a right was concerned, the authors could not misuse it. On the other hand, the phrase “for any reason whatsoever” should be deleted, because it might well complicate the implementation of draft guideline 2.6.3. He was opposed to the idea of giving a State that was not a party to a treaty the right to formulate objections. The idea was not to be found anywhere in the 1969 and 1986 Vienna Conventions, which the Guide to Practice was not meant to amend; furthermore, nothing was gained thereby. He was in favour of referring draft guidelines 2.6.1 and 2.6.3 to 2.6.6 to the Drafting Committee.

47. Mr. PELLET (Special Rapporteur) said he was pleased that a considerable number of members had spoken, and he thanked them for confining their remarks strictly to draft guidelines 2.6.3 to 2.6.6, as he had requested: that made it easier to have a well-ordered discussion.

48. Introducing draft guidelines 2.6.7 to 2.6.15, on the form and procedure for formulating objections (paragraphs 87 to 144 of the eleventh report), he said that, as to the form, article 23, paragraph 1, of the Vienna Conventions was very clear, because it specified that objections “must be formulated in writing”. In the event of a counter-claim, for example regarding the time period in which the objection had been formulated, the written form was

a very useful element of clarification, as in the case of reservations. Thus, draft guideline 2.6.7 reproduced that wording. He pointed out for the benefit of new members that the Commission had decided systematically to incorporate the provisions of the Vienna Conventions in the Guide to Practice so that the Guide constituted a self-sufficient whole, obviating the need to refer to the Convention. With the benefit of hindsight, he considered that the order he had adopted in the eleventh report was not very logical and that the Drafting Committee should renumber the draft guidelines. Beginning with the question of the time at which an objection might or must be made, he recalled that draft guideline 2.6.1, which defined objections, made no mention of that time, as had been noted by Ms. Xue. That omission contrasted with the definition of reservations in article 2, paragraph 1 (d), of the Vienna Conventions, which was used in draft guideline 1.1 of the Guide to Practice. He had always been of the view that it was completely illogical to make reference to the time at which a reservation could be formulated in the definition, because the time was unrelated to the definition and had to do instead with the reservation’s formal validity. However, he had used the provisions of the Vienna Convention with regard to reservations. That said, the Commission, for its part, had not made the same mistake in its definition of objections in draft guideline 2.6.1 adopted by the Commission at its fifty-seventh session in 2005, the commentary to which (para. (4)) expressly referred to a later guideline the question of the time at which an objection could be made or formulated.⁸²

49. Since he had just referred to that commentary, he wished to say parenthetically that he was very dissatisfied with the French version of the report of the Commission to the General Assembly on the work of its fifty-seventh session, in which the Secretariat had systematically replaced the present indicative by a ridiculous and unacceptable imperfect tense.

50. Returning to substantive questions, he observed that while, in giving the definition of objections, the Commission had not made the same mistake as the one to be found in the definition of reservations, since it had not referred to the time at which the objection could or must be formulated or made, it had made another mistake by including, in the circumstances recounted in paragraph 127 of the eleventh report, a partial indication of that time in the third paragraph of draft guideline 2.1.6 (Procedure for communication of reservations). Although that draft guideline concerned reservations and not objections, the third paragraph stated that “[t]he period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation”. The confusion was particularly unfortunate in that he did not see why, in the context of the procedure for the formulation of reservations, one should suddenly come upon a provision concerning the procedure for the formulation of an objection and the time at which the objection could be formulated. The two should not have been lumped together; furthermore, the third paragraph of draft guideline 2.1.6 by no means exhausted the question of the time at which an objection

⁸² See the text of this draft guideline and the commentary thereto in *Yearbook ... 2005*, vol. II (Part Two), pp. 76–82, para. 438.

could or must be formulated, because it established the *dies a quo* but not the *dies ad quem*, which was just as important for States in determining when they could formulate or make an objection. As to the *dies a quo*, he had no substantive criticism of the third paragraph: in setting the *dies a quo* at the date at which the objecting State had received notification of the reservation, it drew the necessary conclusion from article 20, paragraph 5, of the 1986 Vienna Convention, pursuant to which “a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation”. However, although the paragraph did not pose substantive problems as to the principle, its wording had the disadvantage of not mentioning the other possibility envisaged in article 20, paragraph 5, of the 1986 Vienna Convention, which specified that an objection was also possible until the date on which the State or international organization wishing to make an objection had expressed its consent to be bound by the treaty, if that date was subsequent to the notification of the reservation. It would therefore be easiest to follow the wording of the relevant part of that provision as closely as possible, which would result, for draft guideline 2.6.13, in the wording proposed in paragraph 128 of the report. If, as he hoped, the Commission agreed to his suggestion, if need be with drafting improvements, a problem of duplication with the third paragraph of draft guideline 2.1.6 would inevitably arise. As he had noted in paragraph 129 of the report, the Commission could either decide to delete the third paragraph of draft guideline 2.1.6, which would have the advantage of consistency but would present the difficulty of reverting to a provision in principle already definitively adopted on first reading, or else it could leave matters as they stood and perform the necessary tidying up during the second reading. It would be useful if the members of the Commission could indicate which solution they preferred.

51. The question of the *dies a quo* posed another problem. A practice had developed whereby States indicated in advance that they would object to certain categories of reservations even before those reservations were actually formulated. Many examples of that practice, which was “extra-treaty” in the sense that it had no basis in the Vienna Conventions (although it was not ruled out either), were cited in paragraphs 131 to 133 of the eleventh report. The Guide to Practice should confirm that practice for at least two reasons. First, strong arguments would be needed to condemn or at least disregard a widespread practice that had never posed any particular problem, even though the conduct of States which resorted to such pre-emptive objections was not always consistent, because some confirmed objections of that type when the reservations contemplated by the pre-emptive objections were actually formulated. Secondly, pre-emptive objections were a perfect response to one of the most important functions of objections—perhaps their main function—which, as the ICJ had observed in its 1951 advisory opinion on *Reservations to the Convention on Genocide*, cited in paragraph 122 of the report, was to serve as a warning to the author of the reservation. That opinion was the beginnings of a reply to the objections raised by members of the Commission to subparagraph (b) of draft guideline 2.6.5. Warnings could be issued without

the objection producing its full effects: to formulate an objection, even if it could not yet produce its full effects, was to give such a warning. Of course, the warning would not produce concrete effects until a reservation that was the subject of the pre-emptive objection had actually been formulated. That was why, as an exception to the general rule, a pre-emptive objection was “formulated” and not “made”, a point rightly made by Mr. McRae. It was clear that pre-emptive objections were only “formulated”: they would not be “made” and would not produce effects until the reservations envisaged had actually been formulated. That was why he had proposed draft guideline 2.6.14 on pre-emptive objections (paragraph 135 of the report).

52. That led him to ask whether, just as it was possible to formulate an objection in advance, it could also be formulated late—even though the word irritated some members of the Commission, who grew indignant at the very thought that the period of time specified either in the Vienna Conventions or in the Guide to Practice might not be respected. That was an unduly rigid approach, because it was hardly wise to oppose realistic practices which imparted some flexibility to the law and which States readily accepted. Although widespread, as was noted in paragraph 137 of the report, the practice of late objections could not run counter to the provisions of the Vienna Conventions; in particular, late objections could not produce effects which the Conventions subordinated to their timely formulation, for the Commission was not mandated to amend the Vienna Conventions. It also followed from article 20, paragraph 5, of the Vienna Conventions that if a State had raised no objection within one year after the formulation of the reservation or at the time at which it became a party, the reservation was considered to have been tacitly accepted by the State, and one could not, and must not, go back on that provision. Consequently, a late reservation could not obliterate an implicit acceptance. Why, then, make provision for the possibility of a late objection if it was not the equivalent of a refusal of acceptance? In a strictly positivist perspective, that would not serve any purpose, but it was a different matter when seen from a pragmatic standpoint. As indicated earlier, one (if not *the*) main function of an objection was to warn, and there was no reason why a State or international organization which had allowed the period of time to lapse should not want to warn the author of the reservation that in its view, the reservation could not or should not have been formulated. That way, the author of the objection set a date, and if a dispute subsequently arose either between it and the reserving State or between the reserving State and a third party, the judge or arbitrator could take account of the opinion thus expressed. Such late objections were perhaps not unilateral acts, but they were declarations which, although maybe falling more within the regime of interpretative declarations than that of reservations, nevertheless fell within the framework of the draft guidelines. That *faculté*—a word perhaps incorrectly translated in the English version as “freedom”—to formulate objections, even if too late for them to produce normal effects, was particularly important for small States that did not have a legal service large enough to monitor all the reservations formulated by their partners and that were often unable to keep to the time periods, since it did at least allow them to voice their opinion.

53. For those reasons, he asked the Commission to confirm that useful practice, without tying its hands with regard to the potential effects of late objections, the main point being not to discourage the latter. He therefore suggested for draft guideline 2.6.15 the wording to be found in paragraph 143 of the report, which could certainly be improved, in particular by deleting the word “*cependant*” in the French version, which was superfluous. That formulation would probably give rise to criticism, but the principle of the guideline was indispensable if the law and States were to be left a little “breathing space”.

54. There was one case in which the time when the objection was formulated was of particular importance: namely, when the State or international organization intended its objection to prevent the treaty from entering into force as between it and the author of the reservation. Article 20, paragraph 4 (b), of the Vienna Conventions specified that such an intention must be “definitely expressed by the objecting State [or international organization]”, which was very much in the spirit of the reversal of the presumption that had taken place at the United Nations Conference on the Law of Treaties in 1968. The practice described in paragraphs 100 and 101 of the report showed that this was not always the case. However, little could be derived from such practice in drafting the Guide to Practice, which should do no more than repeat article 20, paragraph 4 (b). Moreover, it seemed more or less clear, although the Vienna Conventions were silent on the point, that such intention must be expressed in the objection itself and within the period of time in which the objection could produce its full effects. As he would try to explain in greater detail when introducing draft guideline 2.7.9, and as could be seen from paragraphs 176 to 179 of the report, once an objection was *made*, its author could no longer widen its scope. In other words, the effect of a simple objection which did not give rise to the non-entry into force of the treaty in the relations between the two partners was to allow the entry into force of the treaty, minus the reservations, in the relations between the two States. It would probably be disastrous for legal certainty if the objecting State were able to go back on its position once it had indicated that the treaty had in fact entered into force as between it and the reserving State. That was all the more true if the objecting State sought to formulate an objection once the period of time under article 20, paragraph 5, of the Vienna Conventions had lapsed, because to admit that a State could put an end to treaty relations after the period of one year specified in that provision would be tantamount to opening the door to arbitrariness and denying the simple rule of *pacta sunt servanda*.

55. Those considerations had led him to propose draft guideline 2.6.8, although, on rereading the text, which appeared in paragraph 104 of the report, he had had the impression that the wording had not fully attained its objective. It would need to be specified that the intention must be clearly expressed “when [the State or the international organization] formulates the objection”, provided that the formulation was made within the period of time provided in article 20, paragraph 5, of the Vienna Conventions and in draft guideline 2.6.13. Thus, the central idea in draft guideline 2.6.8 must be retained, but a phrase along the lines of “in conformity with draft guideline 2.6.13” should be inserted to deal with that minor problem.

56. For the rest, the procedure with regard to objections differed little, if at all, from that relating to reservations themselves, and it was certainly no accident that it was described in part in article 23 of the Vienna Conventions, entitled “Procedure regarding reservations”. That stemmed from a parallel treatment intentionally chosen by the Commission during its *travaux préparatoires*, as was noted in paragraphs 89 and 90 of the report. Thus, the Commission might consider systematically replacing the word “reservations” by “objections” in all the draft guidelines it had already adopted on the procedure for the formulation of reservations (cited in paragraph 94 and reproduced in footnotes 190 to 194 of the report). However, it would be sufficient and much more economical to proceed by simple reference, as the Commission had already done on many occasions, as was indicated in footnote 195. Draft guideline 2.6.9 could thus read: “Draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.”

57. Paragraphs 105 to 111 of the report were devoted to the very sensitive question of the statement of reasons for an objection, for which he suggested that the Commission, rather than fixing a rule, which would not have any basis either in the Vienna Conventions or in State practice, should instead adopt the text for draft guideline 2.6.10 set out in paragraph 111 of the report, and perhaps replace the word “*faite*” by “*formulée*” in the French version. That would not be the first time that the Commission had included in the Guide a recommended practice with an intentionally soft wording—a “soft law” provision was appropriate, because it would be difficult in the present case to go much further. As pointed out, the freedom to “formulate” objections and, in most cases, to “make” objections, was discretionary and could be based on political reasons which the objecting State did not necessarily wish to make public, *inter alia*, so as not to make its relations with the author of the reservation more difficult. Nonetheless, it was useful to make the reasons known, both for the reserving State and for third parties called upon to assess the validity of the reservation, at least when the objection was based, for example, on compatibility with the object and purpose of the treaty. Paragraph 108 of the report thus gave several examples of cases in which human rights bodies had taken account of the objections of States when deciding on the validity of reservations. It would be all the more reasonable to include in the Guide to Practice a guideline modelled on draft guideline 2.6.10 since, in practice, States often explained the reasons for their objection and increasingly sought to justify their assertion of incompatibility with the object and purpose of the treaty.

58. He was convinced of the need to appeal to States for transparency and truth, but he had asked himself, when drafting the report, why the Commission had not included some such recommendation in the corresponding provisions on reservations, and he had not come up with an answer. It seemed to him that the question of the reasons for reservations arose in more or less the same terms as that of the reasons for objections: the freedom of States and international organizations to formulate reservations, although not unlimited, was great and was restricted only by the provisions of article 19 of the 1969 and 1986 Vienna Conventions, which were reproduced in draft guideline 3.1.

Although it would be out of the question to oblige States to give reasons for the reservations which they formulated, even if they did so relatively often, nothing prevented the Commission from recommending that they should indicate the reasons for their reservations, out of a concern for transparency which would be to their credit. He acknowledged that he had not given any thought to that point during the consideration of the question of the formulation of reservations, and he would be pleased if the members of the Commission expressed their views on the matter during the debate and indicated whether they deemed it useful to add a draft guideline along those lines. If that suggestion met with support, he would submit a formal note so that the omission could be addressed.

The meeting rose at 1.05 p.m.

2917th MEETING

Thursday, 10 May 2007, at 10.10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

ELEVENTH REPORT OF THE SPECIAL RAPPOREUR (*continued*)

1. Mr. PELLET (Special Rapporteur), introducing draft guidelines 2.6.11 and 2.6.12 presented in his eleventh report,⁸³ said that, with respect to the confirmation of reservations, according to article 23, paragraph 2, of the 1986 Vienna Convention, a reservation formulated at the time of the signature of a treaty subject to ratification, in other words, one that would enter into force only after that ratification, had to be formally confirmed when the State or international organization in question expressed its consent to be bound by the treaty. Conversely, paragraph 3 of the same article stated that confirmation was not required in the case of objections to a reservation made prior to confirmation of the reservation.

2. The report of the Commission to the General Assembly on the work of its eighteenth session did not explain the obvious reasons for the difference in treatment of

objections and reservations,⁸⁴ namely, as he had indicated in paragraph 114 of his eleventh report, that the formulation of a reservation concerned all contracting States or contracting international organizations, or those entitled to become parties to the treaty, whereas objections mainly or exclusively affected bilateral relations between the reserving State and the objecting State. Once the reserving State had been notified of the objecting State's intention, which happened as soon as the objection had been formulated and communicated in accordance with article 23, paragraph 1, of the Vienna Convention, the reserving State knew that an objection had been, or would be, entered to its reservation which displeased the objecting State. The commonsensical rule set forth in article 23, paragraph 3, should be incorporated as it stood in the Guide to Practice, but should be confined to objections, as acceptance would be dealt with at a later date. Draft guideline 2.6.11 would thus read:

“2.6.11 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation

“An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.”

3. Although the Commission had always hitherto incorporated the pertinent provisions of the 1986 Vienna Convention in the Guide to Practice, draft guideline 2.6.11, which was unlikely to give rise to any difficulties, called for two comments. First it was self-evident that, while an objection made before the formal confirmation of a reservation did not require confirmation, that formality, albeit superfluous, was not prohibited. In fact, there were instances in which States had confirmed such objections even though that confirmation was unnecessary. The wording he proposed for draft guideline 2.6.11, which was calqued on article 23, paragraph 3, of the Vienna Convention, allowed full scope for that possibility.

4. His second comment was that, while the draft guideline concerned solely the non-requirement of confirmation of an objection made prior to formal confirmation of a reservation, neither the draft guideline nor article 23, paragraph 3, of the Vienna Convention answered the question whether a State which had formulated an objection before becoming a party to the treaty in question had to confirm that objection on acceding to that treaty. The Vienna Convention was silent on that issue despite the fact that, during the United Nations Conference on the Law of Treaties, the delegation of Poland had put forward a proposal with a view to filling that gap.⁸⁵ State practice was all but non-existent, although, as he pointed out in paragraph 118, the United States, which was not a party to the Vienna Convention, had announced its intention

⁸⁴ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 208, para. (5) of the commentary to article 18.

⁸⁵ Comments and amendments to the final draft articles on the law of treaties submitted in 1968 in advance of the Conference in accordance with General Assembly resolution 2287 (XXII) (A/CONF.39/6/Add.1), mimeographed, pp. 17–18.

⁸³ Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

to confirm at least one of its objections to certain reservations to the Convention if or when it became a party thereto.

5. The ICJ, in a passage of its advisory opinion of 1951 on the question concerning *Reservations to the Convention on Genocide* cited in paragraph 119, had apparently taken the view that objections made by States not parties to a treaty would become final on ratification. Hence, on the grounds he had outlined in paragraph 120, it would seem necessary to interpret the 1969 Vienna Convention's deliberate silence on the matter as being indicative of the absence of a confirmation requirement. Moreover, objections could perform their warning function more effectively if no formal confirmation was required in such cases.

6. For all those reasons, he believed that the idea underlying draft guideline 2.6.11 should be echoed in draft guideline 2.6.12, which would therefore read:

“2.6.12 Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty

“If an objection is made prior to the expression of consent to be bound by the treaty, it does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound.”

7. He would present the remaining draft guidelines on the withdrawal and modification of objections to reservations once what would undoubtedly be a somewhat technical debate on the nine draft guidelines he had already introduced had been completed.

8. Mr. GAJA said that, in the statement he had made at the 2915th meeting, he had drawn a distinction between objections concerning the validity of reservations and other objections. He had termed the latter “minor objections” since, although he was not implying that they had little political significance, their consequences were normally minor in comparison with those of objections relating to the validity of reservations. That distinction also had implications for some aspects of the procedure for formulating objections and therefore for the subject matter of some of the draft guidelines under discussion, in particular the one dealing with the question of the period of time within which an objection might be raised. In that connection, it could be submitted that article 20, paragraph 5, of the Vienna Convention, which provided that objections had to be raised by the end of a period of 12 months after notification of the reservation, did not apply to objections relating to the validity of reservations, because articles 20 and 21 of the Convention had not been intended to cover objections to the reservations mentioned in article 19.

9. Even if, contrary to the argument he had put forward at the 2915th meeting, it were to be held that articles 20 and 21 of the Vienna Convention applied to all objections and therefore to “minor” objections, the distinction between the two categories of objections should not be systematically disregarded. For cases in which it

was impossible to determine from the text of an objection whether it concerned the validity of the reservation, an additional draft guideline should specify that, in the absence of any express or tacit indication to the contrary, an objection was presumed not to relate to the validity of the reservation. Since that presumption was true in most cases, a draft guideline along the lines he had suggested would be the most reasonable solution.

10. Apart from the distinction between the two categories of objections, most of the draft guidelines presented in the eleventh report called for little comment and he therefore had only two remarks to make on the guidelines currently being examined.

11. The first remark pertained to pre-emptive objections, which draft guideline 2.6.14 deemed admissible. While there was merit in allowing a State to announce its stance on certain reservations in advance, it was hard to maintain that a pre-emptive position would produce legal effects after the subsequent formulation of a reservation, as envisaged in the draft guideline. Such a position could not automatically be transformed into an objection; a State would have to react to an actual, rather than a hypothetical, reservation before one could speak of an objection. The 1969 Vienna Convention presupposed the communication of a reservation before an objection was raised. Article 23, paragraph 3, of the Convention referred to objections relating to reservations made or formulated at the time of signature of a treaty and subject to ratification, acceptance or approval. It went no further than that. A State which had adopted a pre-emptive position had ample time and opportunity to react once the reservation had been notified. On receiving notification of a reservation, it would be free not to make the objection of which it had given notice if it had changed its mind or did not wish to raise an objection with respect to certain States, to make the objection, or to widen the scope of that objection. He noticed in passing that, although the Special Rapporteur had not yet introduced his draft guideline on that subject, it would be strange if a State, having given notice of a particular objection, were unable to widen the scope thereof when the reservation was actually formulated, as currently provided for in draft guideline 2.7.9.

12. His second comment was more in the nature of a reply because paragraph 127 of the eleventh report suggested that he had been responsible for persuading the Special Rapporteur to add a third paragraph to draft guideline 2.1.6 as adopted by the Commission in 2002.⁸⁶ That paragraph had not lost its *raison d'être* in the long intervening period. Obviously its purpose had not been to settle the question of the deadline for formulating an objection—most of the language of the third paragraph of the guideline had been drawn from article 20, paragraph 5, of the 1986 Vienna Convention. Its purpose had been to prevent the conclusion being drawn from paragraph 2 of the draft guideline that notification of the reservation by a State to the depositary had the same value as a communication to the other contracting States and international organizations. Paragraph 2, which stated

⁸⁶ See the text of this draft guideline and the commentary thereto in *Yearbook ... 2002*, vol. II (Part Two), pp. 38–42; see in particular paragraph 24 of the commentary, p. 42.

that “[a] communication related 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”, might have created the impression that, in the absence of a depositary, a reservation would be transmitted directly to the other contracting States and international organizations but that, in the converse case, it was sufficient to transmit the reservation to the depositary. In fact, the purpose of paragraph 3 was to make it clear that communication of a reservation by its author to the depositary was one thing and that communication of a reservation to the other contracting States or international organizations was another and that the time period for raising an objection began only from the communication of a reservation to the contracting States or international organizations. While the author State had done all that was necessary by communicating the reservation to the depositary, in order that the other States might be in a position to raise an objection within the requisite 12 months, the depositary would have to fulfil its duty of notifying the contracting States and international organizations of the reservation.

13. It went without saying that the Commission could re-examine draft guideline 2.1.6, not simply in order to delete paragraph 3, as the Special Rapporteur had proposed, but rather in order to amend paragraph 2 with a view to removing the ambiguity to which he had just drawn attention and to make it quite plain that the mere transmission of a reservation to the depositary did not mark the start of the period for raising an objection. The same idea could also be expressed in the draft guideline currently under examination, which did not sufficiently elucidate the distinction between the two moments in time, namely that of the communication being made to the depositary and that of the receipt of the communication by each contracting State or international organization.

14. Mr. KOLODKIN said that, as far as draft guideline 2.6.15 on late objections was concerned, he was not prepared to divide objections to reservations into major and minor objections, as proposed by Mr. Gaja. He agreed with the Special Rapporteur’s view that objections to reservations formulated after the end of the prescribed period did not produce all the legal effects of an objection that had been made within that time period. However, the phrase “does not produce all the legal effects” was extremely vague: the reader could gather only that there were such effects, and that they were not identical with those of an objection made within the specified period, but what precisely those effects were could be conjectured only after reading the commentary.

15. In his own view, late objections as such did not produce legal effects; the fact that they might possibly be taken into consideration by treaty monitoring or dispute settlement bodies was not a basis for regarding this as the legal effects of late objections. Moreover, in general the statements that the Special Rapporteur called “late objections” were not objections within the meaning of the term as defined in the Guide to Practice.

16. The Special Rapporteur had noted that the definition of “objection” contained in draft guideline 2.6.1 was

incomplete, especially as it did not specify the time at which an objection might be made. Consequently draft guideline 2.6.1 had been supplemented by draft guideline 2.6.13 and it had now been made clear that an objection was a statement made within the specified period. The question was whether it was possible to regard late objections, in other words statements which had not been made within the specified period and which did not therefore fall within the definition of an objection, as genuine objections.

17. The Russian Federation’s so-called late objections to which the Special Rapporteur referred in footnote 265 had been deliberately formulated in such a way that they could not be deemed formal objections to the reservations in question. Those statements had been intentionally formulated late. Moreover, when transmitting those statements to the United Nations Secretariat, the Permanent Representative of the Russian Federation had specifically drawn the Secretariat’s attention to the fact they were not formal objections intended to produce legal effects. The Secretary-General, acting in his capacity as depositary, was therefore right to circulate so-called late objections not as objections but as communications, thus retaining an absolutely neutral attitude. Should the Commission not take the same path and abandon the term “late objections”? In any event, it was necessary to indicate in draft guideline 2.6.15 that such “objections” did not produce legal effects.

18. The Guide to Practice offered alternatives to reservations. It said that a State might make a variety of political or interpretative declarations which did not constitute reservations. Would it not be advisable to formulate a guideline which would reflect the right of a State to react to a reservation in a manner other than by raising an objection? Such a guideline would mirror current practice.

19. Mr. McRAE said that broadly speaking he endorsed the draft guidelines under discussion. Concerning the recommendation that Governments should provide reasons for their objections, it was obviously desirable to encourage Governments to explain their objections to a reservation, even though there was clearly no legal requirement under the 1969 Vienna Convention to do so. The Special Rapporteur had said that, on reflection, he felt that perhaps the Commission should go further and encourage Governments to provide reasons for their reservations as well, something which the draft guidelines had so far not done. In fact, however, he was not sure there was really a parallel between reservations and objections when it came to providing reasons. A reservation was in a sense self-explanatory: provided that it was not expressed in vague and general language, it was clear which provisions of the treaty it addressed. While it might be interesting to know what the domestic motivation had been for making the reservation, understanding those reasons would not necessarily help one to understand the ambit, scope or meaning of the reservation; indeed, in many instances there was no relationship between the reasons and the meaning of the reservation itself.

20. Objections were different. An objection could be something as opaque as a simple statement by a State that it objected to a reservation, in which case a statement of

reasons could help to provide an insight into what the State believed to be the legal problem with the reservation: for example, why it was perceived to be contrary to the object and purpose of the treaty. Such reasons might make it easier for the appropriate authority or interpreting body to make the necessary determination as to compatibility. The case for giving reasons for objecting to a reservation was therefore much stronger than the case for giving reasons in respect of the reservations themselves. States might be reluctant to provide reasons for their reservations, viewing them as individual or domestic considerations which gave no insight into the meaning of the reservation. By contrast, they might be more ready to disclose their reasons for an objection, which often derived from a legal analysis of the provisions of the treaty. A guideline calling for an indication of reasons for reservations might thus be less likely to be observed than one calling for an indication of reasons for objections, and accordingly, for both practical reasons and reasons of principle, he was not convinced that the Commission should add to the draft guidelines a recommendation that States should give reasons for their reservations.

21. As drafted, draft guideline 2.6.10 encouraged States to provide reasons for their objections, but was right not to impose an obligation on them to do so, since in his view there was no such obligation. He was not sure, however, that the phrase “whenever possible” was the best formulation; that was perhaps a matter for the Drafting Committee.

22. On the confirmation of objections, addressed in draft guideline 2.6.11, the proposition that an objecting State did not need to confirm its objection to a reservation after confirmation of the reservation itself was simply a consequence of the Vienna Convention rule, and seemed appropriate. On the other hand, draft guideline 2.6.12, which provided that confirmation by an objecting State was not required at the time that this State expressed its consent to be bound by the treaty, might need further consideration. It raised the same concern that members of the Commission had voiced regarding draft guideline 2.6.5, namely that the rights of States that were entitled to become parties to the treaty were assimilated with the rights of contracting parties.

23. To recognize that States that were entitled to become parties to the treaty could make objections was a corollary of article 23, paragraph 1, of the 1969 Vienna Convention, and the Special Rapporteur had pointed out the practical benefits of such recognition, but as Mr. Kolodkin had pointed out at the previous meeting, the practice of depositaries other than the Secretary-General of the United Nations was not to do so. Thus, the basis in practice for granting objecting rights to States entitled to become parties to a treaty might be less strong. However, even if one accepted the freedom of such a State to object to reservations, he wondered whether absolving it of any need to confirm objections was perhaps going too far. When a State that had signed the treaty objected to a reservation and then shortly afterwards became a party to the treaty, the case for not having to confirm the objection was very strong. But what happened when a State entitled to sign a treaty had not done so, and was in fact hostile to the treaty? Draft guideline 2.6.5 gave

that State the right to object to reservations. If it did so, and then 20 years later decided to become a party to the treaty, would the objections it had originally formulated, which had remained dormant, automatically become effective? Was there not a case for saying that there was an obligation to confirm such objections, or at least that objections made more than a specified number of years previously had to be confirmed? The matter seemed to require further consideration.

24. The final issue he wished to address was late objections. Draft guideline 2.6.15 stated that late objections did not produce all the legal effects of timely objections, but he shared Mr. Kolodkin’s doubts as to what legal effects they produced. The Special Rapporteur had pointed out that they had certain practical effects, such as leading to a reservations dialogue or assisting consideration by an interpretative body, but those were not legal effects. It was not clear that the late objection had any of the legal consequences of a timely objection.

25. Perhaps a late objection’s significance was that it served as an indication by the objecting State of how it interpreted the treaty. The objection had no legal effect in the present, because it was late, but it did provide some guidance for the future. The closest parallel to a late objection would then be an ordinary—rather than a conditional—interpretative declaration.

26. Mr. CAFLISCH said that the Special Rapporteur’s clear and thorough eleventh report would facilitate the Commission’s arduous task, which resembled a mathematical exercise as much as an exercise in the codification of practice on reservations.

27. Concerning draft guideline 2.6.15, he had no problem either with the text or with the comments on it in the report or even with the use of the word “formulated”. The important point was that practice tended to attribute either no effect or else only a limited one to late expressions of opposition to a reservation. He agreed with the Special Rapporteur that some effect must be attributed to them, particularly with regard to the views—and they were only views—that the State might express about the reservation’s validity or lack thereof. Members would have noted that he was carefully avoiding the term “late objections” because such expressions of opposition did not have the effects of objections and accordingly did not deserve that denotation. The draft guideline should be worded so as to indicate that an objection to a reservation formulated after the end of the time period specified in draft guideline 2.6.13 was to be treated as a communication that did not produce all the legal effects of an objection made within that time period. The term “communication” was appropriate, and was to be found in paragraph 139 of the report. The point made by Mr. McRae about interpretative declarations was interesting: that might indeed be a good description of the effect of a late objection (see the 2914th meeting, above, para. 19).

28. Draft guideline 2.6.14, on pre-emptive objections, differed from draft guideline 2.6.15 in that the objections covered were true objections, had all the effects of objections and consequently deserved to be described as such.

They differed from normal objections in that they became operational only once the prerequisites cited, namely formulation and notification of the reservation, had been fulfilled. The practice might be useful for its deterrent effect on potential reserving States; for that reason the draft guideline should be retained.

29. Draft guideline 2.6.13 was described by the Special Rapporteur as duplicating the third paragraph of draft guideline 2.1.6, and two avenues were open to the Commission: either to delete that paragraph and the relevant portion of the commentary,⁸⁷ or to retain both provisions and delete one on second reading. While in principle, texts that had already been adopted should be left untouched, no principle should be regarded as immutable. That was why he favoured resolving the matter straightaway if that was possible.

30. It was a good thing that the Special Rapporteur had had belated second thoughts regarding draft guideline 2.6.10. Notwithstanding what Mr. McRae had just said, he thought it appropriate to invite States to give reasons not only for their reservations but also for their objections thereto. The draft guideline, being simply a recommendation, seemed acceptable.

31. Drawing a distinction, as Mr. Gaja wished to do, between objections to the validity of reservations and other objections was undoubtedly useful, but care should be taken with the language to be used. He was not sure it was appropriate to speak of minor and major reservations, or of primary and secondary reservations. What was important, and what secondary, in that context? The merits of the terms “freedom” (*liberté* or *faculté*), “possibility” (*possibilité*) and “right” (*droit*) to formulate reservations and objections thereto had been hotly debated. The French texts were perfectly acceptable: it was essentially a right, rather than a freedom, that was involved. On the other hand, he was not sure that the distinction between “making” and “formulating” objections was a useful one. Would that terminological nuance make the draft guidelines clearer, or simply create confusion in the reader’s mind? Perhaps it would be best to use the term “formulate” throughout.

32. Subject to those remarks, he was in favour of referring draft guidelines 2.6.7 to 2.6.15 to the Drafting Committee.

33. Mr. PELLET (Special Rapporteur) drew attention to an error in the mimeographed French version of his eleventh report: the draft guideline numbered 2.6.9 (para. 111) was in reality draft guideline 2.6.10.

34. Ms. XUE said that in general she agreed with the analysis in the eleventh report concerning the draft guidelines under discussion. The report made clear the Special Rapporteur’s intention with regard to the requirement of confirmation of an objection, but the ordinary reader of draft guideline 2.6.12 might find the language misleading. The phrase “prior to the expression of consent to be bound” was fairly vague, since it might be construed as referring to any time before the treaty entered into force

for the party; yet according to treaty law and practice, the period of negotiation prior to signature could not be taken into account. There were two ways for a treaty to enter into force for States: either through definitive signature, or through signature subject to ratification, approval or acceptance. In the former case, mere signature would be sufficient for the treaty to enter into force for the State; in the latter case, the treaty entered into force only subject to subsequent ratification, approval or acceptance. In the former case, if a State made an objection to a reservation at the time of signature and the treaty then entered into force, the objection was acceptable; but if it did so only prior to signature, then there was a legal requirement for the State to repeat that objection at the time of signature. But in a situation in which signature was subject to ratification or approval, if a State made an objection prior to signature and at the time of signature did not repeat its objection, then it must confirm its objection at the time of submission of the instrument of ratification, approval or acceptance.

35. The purpose of draft guideline 2.6.14 was not clear; the text provided no real guidance to States parties regarding treaty practice and it might create confusion between two categories of action: political or policy positions on legal matters relating to a treaty, and the legal procedures to be observed by the potential State party.

36. With regard to draft guideline 2.6.15, she agreed with the concerns expressed by a number of members, and Mr. Kolodkin in particular. Article 20, paragraph 5, of the 1986 Vienna Convention, laid down a strict time period for the submission of objections in order to provide certainty in treaty relations. If the Commission wished to give States some leeway to raise late objections, it should specify what legal effects that could produce. The reference to “all the legal effects” of an objection, and, in paragraph 144, the indication of its not producing the “normal” effects, were extremely vague; what needed to be made clear was whether a late objection was allowed. If it was, it had to produce all the legal effects, and if it was not allowed, it did not produce legal effects. To allow States to make late objections would create additional legal rights for them. She was unaware of any provision to that effect in the Vienna Convention. As the practice showed, if late objections to a reservation were allowed to prevent the entry into force of a treaty, enormous difficulties might ensue.

37. Mr. GALICKI said that while draft guidelines 2.6.14 and 2.6.15 were very important from a practical point of view, he agreed with Ms. Xue that they could not be treated in the same way as the other draft guidelines. The Commission should consider how it might reflect the more political nature of those two draft guidelines. Both went beyond the temporal boundaries laid down for formulating or making reservations under the Vienna Convention, and both were to a large extent justified. They were not simply an invention of the Special Rapporteur, as the inconsistent practice of States showed. The Commission must take note of State practice, but should make it clear that such practice did not have a legal basis stemming from the Vienna Convention. Otherwise, the false impression would be given that the Commission supported such practice.

⁸⁷ See footnote 86 above.

38. Mr. CANDIOTI, endorsing Mr. Galicki's comments, said that the Commission should bear in mind the philosophy underlying the topic. The point was not to provide rules to supplement the 1969 and 1986 Vienna Conventions in the area of reservations or a restatement of what could or could not be done pursuant to those instruments, but to produce a Guide to Practice and promote better practice in the future. The issue of reservations was very complex and at times chaotic. The Special Rapporteur had rightly raised a number of aspects of reservations which the Guide to Practice should address. He agreed that pre-emptive and late objections were actually communications, but those communications were useful and might well be included in the Guide to Practice because they contributed to facilitating the dialogue on reservations, promoting wider participation in treaties and dealing with reservations and objections in a more orderly manner. The same applied to the Special Rapporteur's recommendation about giving reasons for objections, which would help the Guide to Practice specify how reservations should be made. Likewise, it would be useful if at a later stage a guideline on providing reasons for reservations could also be elaborated.

39. Mr. PELLET (Special Rapporteur), summing up the debate on draft guidelines 2.6.3 to 2.6.6, said he was pleased to note that there seemed to be a broad consensus for referring those draft guidelines to the Drafting Committee. However, before addressing the comments made on those provisions, he would like first to respond to two points which Ms. Escarameia had raised in connection with his introductory remarks. Ms. Escarameia had argued that, contrary to what was stated in paragraph 48 of his eleventh report, the judgment of the ICJ of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)* did not confirm draft guideline 3.1.13, which he had proposed in his tenth report on reservations to treaties;⁸⁸ Mr. Saboia had endorsed her viewpoint. The Special Rapporteur had some difficulty in understanding Ms. Escarameia's argument. Paragraph 67 of the Court's judgment in *Armed Activities on the Territory of the Congo (New Application: 2002)*, cited in paragraph 47 of the report, clearly confirmed the position it had taken in the orders of 2 June 1999 concerning the *Legality of Use of Force (Yugoslavia v. Spain)* and *Legality of Use of Force (Yugoslavia v. United States of America)* cases cited in footnote 103. The Court had concluded in 2006 that, in the circumstances of the case, Rwanda's reservation to the jurisdictional clause in article IX of the Convention on the Prevention and Punishment of the Crime of Genocide was not incompatible with the object and purpose of that Convention [*Armed Activities on the Territory of the Congo (New Application: 2002)*, para. 67 of the judgment]. That confirmed what was stated in draft guideline 3.1.13. He found it hard to imagine that things should be any different with regard to the lower monitoring threshold exercised by human rights bodies, or that the joint separate opinion of five judges should reach a different conclusion. Paragraph 21 of the joint separate opinion stressed that "the fact that a reservation relates to jurisdiction rather than substance [does not] necessarily* [result] in its compatibility with the object and purpose

of a convention". It followed *a contrario* that a reservation relating to a jurisdictional clause or a monitoring clause was not necessarily incompatible with the object and purpose of the treaty; that, too, was exactly what draft guideline 3.1.13 stated. In introducing that consideration, the five judges had in fact cited his tenth report, which contained draft guideline 3.1.13 [see paragraph 14 of the joint separate opinion].

40. Ms. Escarameia had also asked how he interpreted recommendation 7 of the report of the working group on reservations, established by the fourth inter-committee meeting of chairpersons of the human rights treaty bodies,⁸⁹ in light of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties, including human rights treaties, adopted by the Commission at its forty-ninth session.⁹⁰ In the view of the working group, there was a rebuttable presumption that the author of an invalid reservation would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded. It was clear that this presumption was incompatible with the preliminary conclusions of 1997, because at that time, the Commission had taken the view that there was no such presumption, and that it should be left to the reserving State to decide.⁹¹ At the most recent meeting with the human rights treaty bodies, he had indicated that he had changed his mind on that question, and the position which he had put to the human rights treaty bodies had been precisely the one which the working group had adopted in January 2006 in its conclusions. The recommendation in paragraph 7 of the report of the working group was perfectly acceptable to him, and he intended to reiterate it at the meeting with the human rights treaty bodies scheduled to take place the following week.

41. On a further comment concerning his introductory remarks, he said he found Mr. Saboia's point regarding constructive ambiguity persuasive. However, it must be borne in mind that States expected the Commission to dispel the ambiguities in the 1969 and 1986 Vienna Conventions regarding reservations, which had been shown to have a number of drawbacks.

42. Turning to the individual draft guidelines, he said he wished to begin with the most difficult problem, one which had been raised by Mr. Gaja concerning draft guidelines 2.6.3 and 2.6.4, but which went well beyond the scope of those two provisions. Mr. Gaja had drawn a distinction between major objections, based on the incompatibility of the reservation with the object and purpose of the treaty, and minor objections, which basically concerned matters of political expediency. The distinction clearly existed, at least on an intellectual plane. In its 1951 advisory opinion on *Reservations to the Convention on Genocide*, the Court had touched on minor objections in passing and had alluded briefly to the possibility of a separate legal regime for such objections [see page 13 of the advisory opinion]. However, he did not think that was decisive: neither the Vienna Conventions nor their

⁸⁸ Report of the meeting of the Working Group on Reservations (HRI/MC/2006/5), para. 16.

⁸⁹ *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

⁹¹ *Ibid.*, p. 57, para. 10 of the preliminary conclusions.

⁸⁸ *Yearbook ... 2005*, vol. II (Part One), A/CN.4/558 and Add.1–2, para. 99.

travaux préparatoires contained the slightest indication of two separate regimes. That stood to reason. Certain States, which had eventually succeeded in exercising a predominant influence at the United Nations Conference on the Law of Treaties, at least where reservations were concerned, had been obsessed with the idea of making it as easy as possible to formulate reservations, thereby limiting the effects of objections as much as possible and placing major and minor objections on an equal footing. The result was not very cogent, because the unfortunate decision to reverse the presumption in article 20, paragraph 4 (b), had been wrested from the Conference at the eleventh hour, and the consequences of that reversal for the remainder of the text had not been taken into account. Mr. Galicki and Mr. Kolodkin had alluded to these problems of consistency. The fact remained that the 1969 Vienna Convention made no distinction between major and minor objections, and in particular it contained no correlation between objections with a maximum effect and “major” objections, on the one hand, and normal objections with a minimum effect and “minor” objections on the other. Moreover, Mr. Gaja had later acknowledged that this distinction had no basis in State practice either.

43. Nor was he personally convinced by the article by Bruno Simma in the *Liber Amicorum* in honour of Professor Seidl-Hohenveldern,⁹² cited by Mr. Gaja. The only relevant passage, which was very brief, read:

Regarding these very consequences, we encounter a major gap in the Vienna Convention regime. The Convention does provide rules on acceptance of and objections to reservations as well as on the legal effects of such acceptances or objections (art. 20 *ff.*). But what it does not say is whether these rules are then applicable to all reservations, be they admissible or inadmissible, or only to those which in the view of other States parties have passed the ‘object and purpose’ test ...⁹³

What Simma had qualified as a “major gap” was either a major silence, no doubt in order to maintain the constructive ambiguity dear to Mr. Saboia, or else it simply resulted from the undue haste with which a major change in the presumption had taken place. Although that justified the Commission’s raising questions in that regard, it did not justify making a distinction between major and minor objections. The Vienna Convention made a distinction between objections, but in terms of the effect sought by their author, and not in terms of the author’s analysis of the reservation.

44. He had the impression that Mr. Gaja was testing the water, because even though the distinction he suggested was intellectually well founded, the question of whether it had concrete effects would not arise until the Commission examined the effects of reservations on that point. He agreed fully with Ms. Escarameia in that regard. Moreover, as Mr. Kolodkin had clearly shown, doubts were warranted as to the actual scope of the distinction. The presumption in article 20, paragraph 4 (b), could come into play only in the case of a minor objection. If the objection was major, the reservation could not in any event enter into force, on account of article 19 (c). In other words, in

such cases a reservation would not be established and the distinction would not work, even when the Commission took up the question of effects. Although he did not rule out the possibility that it might do so, his instinct was to endorse Mr. Kolodkin’s view. He did not think that the Commission would be able to construct positive rules on that distinction, intellectually attractive though it was.

45. He fully agreed with the point made by Mr. McRae on draft guideline 2.6.3, one to which attention had also been drawn by Mr. Galicki and Mr. Kolodkin, and he confessed to being guilty as charged: it was of course unacceptable that the title should refer to the freedom to *make* objections, whereas the body of the text spoke of *formulating* objections. The title should be brought into line with the text, and not the other way round, because even though in most cases—namely those in which a contracting State objected to a confirmed reservation—the objection was made and not simply formulated, occasionally there had been instances in which the objection had not produced its full effects at the time of the formulation, and in such instances, the objection was formulated before being made.

46. He acknowledged the validity of the argument put forward by Mr. McRae—and a similar point made by Ms. Xue—that the freedom to formulate objections was restricted not only by procedural requirements but also by the terms of the treaty itself, where it authorized certain specified reservations. He wondered, however, whether there was any need to say as much in the text, since the Guide to Practice was no more than a set of voluntary guidelines. States were free to include in any given treaty provisions on reservations that diverged from the recommendations of the Guide to Practice. Although the exception was merely implied, it might justify Mr. McRae’s concern.

47. There was another reason why such cases should not appear in draft guideline 2.6.3. Ms. Escarameia had suggested that the phrase “for any reason whatsoever” should be toned down by the addition of a statement that the freedom—or right—to formulate an objection could be exercised only within the framework of the 1969 and 1986 Vienna Conventions, and/or general international law and/or the Guide to Practice itself. That suggestion had been supported by several speakers, including perhaps Mr. Kolodkin and Mr. Nolte, and certainly Mr. Saboia, Mr. Vázquez-Bermúdez and Mr. Hmoud. He fully supported the spirit of the suggestion, but with one important caveat.

48. With regard to the question raised by Mr. Yamada, he had no absolutely no doubt that an objection could serve purely political ends: a State could simply inform another that it objected to a reservation. As he indicated in paragraph 67 of his eleventh report, however, the freedom to formulate an objection, though “discretionary”, was not arbitrary, inasmuch as it was circumscribed by law. The suggestion made by Ms. Escarameia and others had the great merit of emphasizing that legal framework. He was therefore all in favour of the Drafting Committee giving some thought to working out a text that would indicate that objections must be formulated in accordance with general international law or, better still, with the provisions of the

⁹² B. Simma, “Reservations to human rights treaties—some recent developments”, in G. Hafner *et al.* (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday*, The Hague, Kluwer Law International, 1998, pp. 659 *et seq.*

⁹³ *Ibid.*, at p. 663.

Guide to Practice. However, he was resolutely opposed to including any reference to the Vienna Conventions in the Guide to Practice. Although it systematically reflected all the provisions of the Vienna Conventions on reservations, the Guide must be capable of standing alone. Direct references to the Vienna Conventions would fly in the face of that approach.

49. He hoped that this would help allay the fear expressed by Mr. Nolte that the expression “for any reason whatsoever” could lead to the formulation of unlawful objections that were contrary to *jus cogens*. He found Mr. Nolte’s reasoning hard to understand. Although there was a risk of unlawful reservations, the same was not true of objections, as Mr. Gaja had pointed out. Mr. Nolte had also criticized the first sentence of paragraph 65 of the report, which stated that: “A State (or an international organization) is, therefore, never bound by treaty obligations that are not in its interests.” The choice of words was indeed unfortunate and he suggested that the final phrase should be replaced by the phrase “to which it has not given its consent”. However, that change did not affect the wording of draft guideline itself.

50. Mr. Wisnumurti had suggested including in draft guideline 2.6.3 a link with the validity of the reservation concerned, with a text indicating that the freedom or right to formulate a reservation could be exercised whether or not the reservation was compatible with the object and purpose of the treaty, or whether or not the reservation was valid. The idea underlying that suggestion was perfectly acceptable, but he feared that any such addition would either lead the Commission into uncharted waters or else prove tautological. The Drafting Committee could, however, give the question some thought.

51. With regard to the title of the draft guideline, Mr. Kolodkin, Mr. Nolte and Mr. Wisnumurti had followed Ms. Escameia in criticizing the expression “freedom to make objections”. As Mr. Candioti had pointed out, however, the problem was largely a matter of translation: the word “freedom” did not convey all the nuances of the French “*faculté*”. The same strictures applied to draft guideline 3.1; Mr. Kolodkin had rightly drawn attention to the fact, noted in paragraph 40 of the eleventh report, that the United Kingdom had expressed the view that the term “freedom” should be changed to the term “right”. Clearly, it would be desirable to find a more satisfactory term for the English text; Mr. Hmoud’s suggestions at the 2916th meeting should be taken into account. As several speakers had said, the mere fact that such a possibility was not unlimited did not prevent one from speaking of a right, since the exercise of a right was invariably limited by legal rules.

52. As Mr. Kolodkin had pointed out, the problem relating to objections was, in general terms, the same as that relating to reservations. In paragraphs 10 to 16 of his tenth report,⁹⁴ he had explained in some detail why Sir Humphrey Waldock, had—rightly, in his view—preferred the word “freedom” to the word “right”, bearing in mind that that freedom was the freedom to formulate reservations

as opposed to making them. In the title of draft guideline 2.6.3, therefore, the word “make” should be replaced by the word “formulate”. As for the word “*faculté*”, it was for English-speakers to find the right term. The Drafting Committee might also wish to discuss the question.

53. On the subject of corrections, he also wished to draw attention to a mistake in the French version of the report of the Commission to the General Assembly on the work of its fifty-eighth session, where the title of section 3 of the draft guidelines and the title of draft guideline 3.1 had become conflated.⁹⁵ The French text should be brought into line with the English.

54. Much of what he had said about draft guideline 2.6.3 applied also to draft guideline 2.6.4, especially as concerned the distinction between “minor” and “major” objections. He was less sure, however, that his remarks about the word “*faculté*” applied equally to draft guideline 2.6.4, since there was no similar link with the notion of formulating an objection. The Drafting Committee should give careful consideration to the title of draft guideline 2.6.4. On the other hand, everything that he had said concerning the phrase “for any reason whatsoever”, and the associated safeguards, applied equally to both draft guidelines; and to delete the phrase, as suggested by Mr. Hmoud, would vitiate both provisions. Draft guideline 2.6.4, which was, as Ms. Xue had pointed out, a faithful reflection of the corresponding provision in the Vienna Conventions, had not given rise to any particular comment. Mr. Kolodkin had expressed interest in the practical consequences of the draft guideline, but it was premature to take up that point, which should be discussed in the section of the Guide to Practice relating to the effects of reservations, acceptances and objections.

55. Draft guideline 2.6.5 had been the subject of far more comment. The criticisms of subparagraph (b) had, he believed, again been based on a linguistic misunderstanding. English-speaking members, starting with Mr. McRae and including Ms. Xue, Mr. Nolte and Mr. Hmoud, had expressed concern at the suggestion in paragraph 81 of the eleventh report that intention to become a party to the treaty was a sufficient criterion for entitlement to formulate an objection to a reservation. The French text, however, contained no reference to intention, either expressly or by implication, as Mr. Gaja had pointed out. Nor was the French text a product of the Special Rapporteur’s own fertile imagination, as Mr. Hmoud seemed to think; it was based on article 23, paragraph 1, of the 1969 Vienna Convention and, as Mr. Candioti had said, it was hard to see why a State should accept a reservation if it had no means of reacting to it. Mr. Kolodkin’s observation that regional organizations did not communicate reservations to States outside the region, even if such States were entitled to become parties to the treaty, was interesting, but the only inference to be drawn was that depositary States did not, in that case, comply with the provisions of article 23, paragraph 1, of the Vienna Convention, which were well established and repeated in draft guideline 2.1.5. Such an omission did not, however, affect the entitlement of such

⁹⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2.

⁹⁵ *Yearbook ... 2006*, vol. II (Part Two), p. 143. For the Drafting Committee’s comments on this topic, see *Yearbook ... 2006*, vol. I, 2883rd meeting, pp. 105–106, paras. 2–4.

potential addressees to formulate an objection. An objection formulated by a non-contracting State was, as it were, a “proposed objection”, and he agreed with those members, including Ms. Escameia, Ms. Xue, Mr. Saboia, Mr. Nolte and Mr. Vázquez-Bermúdez, who had said that such an objection would produce an effect only after the State in question had expressed its consent to be bound by the treaty concerned. Until that point, an objection could only be formulated, not made.

56. Accordingly, Mr. Fomba was surely right to have pointed out that the two categories of authors referred to in the draft guideline were not placed on an equal footing, and to have suggested highlighting the fact by replacing the word “and” between the two subparagraphs by the words “as well as” or “but also”. Such an amendment could be considered, but, in his view, it would be out of place in the draft guideline. It might be better to deal with the point in the commentary.

57. With regard to draft guideline 2.6.6, Mr. Fomba had also asked whether similar objections formulated by several States could not be considered to be objections formulated jointly. In his opinion, the answer was definitely in the negative. Undoubtedly, there was a need to accept objections formulated jointly, but current State practice was to regard them as separate, parallel objections, formulated separately by each objecting State.

58. The draft guideline had not aroused much other comment. Mr. Kolodkin had said that, rather than emphasizing the unilateral nature of objections formulated jointly, it was more important simply to indicate the existence of the freedom to formulate an objection. He endorsed that approach; the unilateral nature of such objections should merely be mentioned in the commentary. The Drafting Committee should, however, deliberate very carefully before taking any definitive decision on the wording, because, as it stood, the text was very similar to that of draft guidelines 1.1.7 and 1.2.2, dealing respectively with reservations and interpretative declarations formulated jointly, which had already been adopted by the Commission. Any change to draft guideline 2.6.6 must take that into account.

59. Apologizing for the length of his statement, he said he considered it a special rapporteur’s duty to respond fully to all comments. While it was not customary to reopen the debate after a special rapporteur had delivered his concluding remarks, any members to whose comments he had neglected to respond could console themselves with the knowledge that those comments had been fully reflected in the summary records. He presumed that there would be no objection to draft guidelines 2.6.3, 2.6.4, 2.6.5 and 2.6.6 being referred to the Drafting Committee, which would be able to give them due consideration and propose improvements.

60. The CHAIRPERSON said he took it that the Commission wished to refer draft guidelines 2.6.3, 2.6.4, 2.6.5 and 2.6.6 to the Drafting Committee.

It was so decided.

The meeting rose at 12.50 p.m.

2918th MEETING

Friday, 11 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the topic of reservations to treaties, in particular draft guidelines 2.6.7 to 2.6.15 proposed by the Special Rapporteur in his eleventh report.⁹⁶

2. Ms. ESCARAMEIA observed that the Special Rapporteur was suggesting that the procedural rules for the formulation of objections, which constituted the subject of draft guideline 2.6.9, should be the same as those for reservations set out in the 1969 Vienna Convention. However, she pointed out that the reference to draft guideline 2.1.6 might be problematic because the situations were not identical: whereas the date of notification of a reservation marked the beginning of a 12-month period during which objections could be formulated, the notification of an objection did not have that effect.

3. Like many other members of the Commission, she viewed draft guideline 2.6.10 (Statement of reasons) solely as a recommendation and consequently endorsed it.

4. While she likewise agreed with the contents of draft guideline 2.6.11 (Non-requirement of confirmation of an objection made prior to the formal confirmation of a reservation), the statement in paragraph 114 of the eleventh report that objections “affect primarily the bilateral relations between the author of a reservation and each of the accepting or objecting States or organizations” was too categorical: objections might affect the whole treaty and all parties, especially if they prevented the entry into force of the treaty between the reserving and the objecting State. Moreover, it might be important for the other parties to the treaty to know that an objection had been formulated and whether or not the treaty was in force between two States.

⁹⁶ Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

5. As to draft guideline 2.6.13 (Time period for formulating an objection), she concurred with Mr. Cafilisch that it would be preferable to delete paragraph 3 of draft guideline 2.1.6, which duplicated the draft guideline under consideration.

6. She shared the doubts expressed by several Commission members with regard to draft guideline 2.6.14 (Pre-emptive objections), since she did not understand how early objections would automatically become objections upon notification of the reservation, or how that could be enforced in practice. She wondered in particular whether pre-emptive objections had to be sent to the depositary for forwarding to the other parties and how they could in fact be called objections if no reservation had yet been formulated. Mr. Candiotti had proposed that they should be termed “communications”, but she would prefer to call them “conditional objections”. In any event, further explanations would be required on that point.

7. She shared the view of a number of other Commission members regarding draft guideline 2.6.15 in that she did not approve of the phrase “does not produce all the legal effects of an objection that has been made within that time period”. She agreed with Mr. Kolodkin that a late objection was not an objection, since it did not produce any legal effects. Nor was it an interpretative declaration, as Mr. McRae had suggested; rather, it was a simple statement. All in all, she preferred to speak of “communications” rather than “objections”.

8. Having said that, she supported the referral of all the draft guidelines under consideration to the Drafting Committee.

9. Mr. FOMBA said that draft guidelines 2.6.7 (Written form) and 2.6.9 (Procedure for the formulation of objections) did not call for any particular comments. He believed that greater clarity was required in draft guideline 2.6.8 (Expression of intention to oppose the entry into force of the treaty) and that the time period for formulating an objection should perhaps be specified.

10. Draft guideline 2.6.10 was acceptable for the reasons set out in paragraphs 108 and 110 of the eleventh report. It did seem that a statement of the reasons for an objection would have more advantages than disadvantages, since such a provision was no more than a recommendation intended to guide State practice, a fact that should allay any anxieties. Draft guideline 2.6.11 was also acceptable, for it was based on State practice and its purpose was to entrench the Vienna regime by repeating the rule expounded in article 23, paragraph 3, of the 1969 and 1986 Vienna Conventions.

11. Turning to the “non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty”, the subject of draft guideline 2.6.12, he considered that the Special Rapporteur’s arguments in support of the guideline were well founded and acceptable, especially the fact that the non-confirmation of an objection posed no problem of legal security, as he had explained in paragraph 123 of his report. As for draft guideline 2.6.13, which to some extent duplicated paragraph 3 of draft guideline 2.1.6, he was personally

in favour of the second of the two possible solutions proposed by the Special Rapporteur, namely allowing the two guidelines to coexist, rather than deleting paragraph 3 of draft guideline 2.1.6. With regard to draft guideline 2.6.14, he considered that a separate guideline on pre-emptive objections, as proposed by the Special Rapporteur, was preferable to a commentary supplementing draft guideline 2.6.13.

12. Turning to draft guideline 2.6.15 (Late objections), he said that the phrase “even when the reservation was formulated more than 12 months earlier” in paragraph 138 of the report was rather vague and ought to be clarified. He also thought that he detected an inherent contradiction in the phrase “even if these late objections do not produce any immediate legal effects” in the same paragraph and wished to know what the difference between legal and practical effects might be. He wondered, too, what was meant by the expression “all the effects” in the phrase “does not produce all the legal effects of an objection” in the text of the draft guideline. Was it necessary to conclude *a contrario* that such an objection did produce effects and, if so, what effects? Lastly, he endorsed the reasons put forward by the Special Rapporteur for employing the verb “formulate” rather than “make” in that particular case, and he agreed that draft guidelines 2.6.7 to 2.6.15 should be referred to the Drafting Committee.

13. Ms. JACOBSSON congratulated the Special Rapporteur on his excellent report. She nevertheless sought clarification with respect to the wording used in draft guideline 2.6.13, namely the phrase “a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it is notified of the reservation”. She wondered what was meant by “notified” and whether the word referred to the formal technical notification addressed to the depositary of the treaty, who was obliged to inform the other parties to the treaty thereof in accordance with article 77, paragraph 1 (e) of the 1969 Vienna Convention, or simply to general knowledge of the existence of a reservation that had been reported by the press or media. Depositaries did not always fulfil their obligation to inform, and it was sometimes hard to know which States were entitled to become parties to a treaty; that difficulty had arisen in the case of Iceland when it had sought to accede to the Treaty concerning the Archipelago of Spitsbergen, of which France was the depositary. The meaning of the word “notification” should therefore be clarified by the Drafting Committee or explained in the commentary.

14. She shared Ms. Escarameia’s views on draft guidelines 2.6.14 and 2.6.15 and also supported referral of the draft guidelines to the Drafting Committee.

15. Mr. WISNUMURTI said that in draft guideline 2.6.8 the Special Rapporteur rightly reaffirmed the presumption of article 20, paragraph 4 (b) of the 1969 and 1986 Vienna Conventions that if an objection was not accompanied by a declaration opposing the entry into force of the treaty between an objecting State or international organization and the receiving State or international organization, the treaty would enter into force. He therefore agreed with the conclusion in paragraph 103 of the eleventh report that the objecting State must necessarily formulate the declaration

in question at the same time that it formulated the objection. As far as terminology was concerned, sometimes the draft guidelines spoke of “making an objection”, while at other times they used the word “formulate”. The Drafting Committee should ensure consistency in that regard.

16. As indicated in the eleventh report, State practice showed that Governments very much wished to have the option of raising an objection for pre-emptive purposes, for they could thus ensure to the fullest extent possible the legal effects of the provision they considered to be essential. He agreed that a pre-emptive objection would produce the legal effects of an objection only when the reservation had been actually formulated and notified, as proposed in draft guideline 2.6.14, and he considered that the term “objection” should be used in preference to “communication”, which seemed to be more an indication of form.

17. The wording of draft guideline 2.6.15 (Late objections) was somewhat unclear. In paragraph 138 of his report, the Special Rapporteur said that “late objections do not produce any immediate legal effects”; however, late objections did not produce any legal effects, immediate or otherwise, since they had not been made within the 12-month period established in article 20, paragraph 5, of the Vienna Conventions. Later on, in paragraph 140, the Special Rapporteur wrote that a late objection could not “produce the normal effects of an objection made in good time”. It was unclear what was meant by “normal effects”. The same was true of the draft guideline itself, which stated that a late objection did not “produce all the legal effects of an objection made within [the specified] time period”. In order to dispel any uncertainty, it would be more appropriate simply to say that late objections had no legal effect.

18. Similarly, paragraph 139 of the report affirmed that

it follows from article 20, paragraph 5, of the Vienna Conventions on the Law of Treaties that if a State or international organization has not raised an objection by the end of a period of 12 months following the formulation of the reservation, or by the date on which it expressed its consent to be bound by the treaty, it is considered to have accepted the reservation with all the consequences that that entails.

He was uncertain whether that interpretation was correct. Given that the principle of consent was one of the underlying principles of the law of treaties, acceptance of a reservation could not be imposed on the author of a late objection against its will. The sole consequence of the late formulation of an objection was that it had no legal effect.

19. Mr. NOLTE, referring to draft guidelines 2.6.14 and 2.6.15, said that although he understood the need to deal with such communications in order to take account of significant State practice in the area, it was going too far to speak of pre-emptive and late “objections”. Doing so might blur the distinction between the formal treaty-making process and related political statements. It was true that “pre-emptive” communications could discourage the formulation of reservations and contribute to the interpretation of the treaty and to the “reservations dialogue”, but there was no need to call them “objections”. The question of substance was whether a State that had made a pre-emptive communication should be forced to confirm its

position once a reservation had actually been formulated. In his view, that should be the case. The objection could then be formulated with full knowledge of its effects, which would be better for legal certainty. Likewise, “late” communications could contribute to the interpretation of the treaty and to the reservations dialogue without their being termed “objections”, although that was more debatable than in the case of “pre-emptive” communications. One solution might be to speak of “other objecting communications”, which could be made before a reservation had been formulated and after the time period for formulating objections had expired. It might also be envisaged that the depositary should transmit such communications as though they were real objections.

20. Mr. VÁZQUEZ-BERMÚDEZ, referring to draft guideline 2.6.10 (Statement of reasons), said that he shared the view of the Special Rapporteur, who in paragraph 110 of the report wrote that “[i]n view of ... the absence of an obligation in the Vienna regime to state the reasons for objections, it would seem useful to include in the Guide to Practice a draft guideline encouraging States ... to expand and develop the practice of stating reasons”. An objection giving reasons was in fact more likely to promote a dialogue on the reservation. With regard to the wording of the draft guideline, it would be preferable to replace the words “whenever possible” by “in general” so as not to imply that in some cases it might be impossible to explain the reasons for an objection.

21. Draft guideline 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation) should be read together with draft guideline 2.6.13 (Time period for formulating an objection). As with reservations, the question of the time at which an objection could be formulated was part of the definition of objection, as the Special Rapporteur recognized in paragraph 59 of his eleventh report, where he added that, in order for the definition to be complete, it must specify which categories of States or international organizations could formulate an objection. Yet if an objection made before the expression of consent to be bound did not produce legal effects, there was no reason to call the expression of an opposition to a reservation an “objection”. Similarly, “late objections”, which could have practical effects by facilitating the reservations dialogue, did not have any legal effect, and the words “does not produce all the ... effects” in draft guideline 2.6.15 were misleading. Given that, as the Special Rapporteur pointed out, draft guideline 2.6.13 reproduced part of draft guideline 2.1.6, paragraph 3 of the latter and the part of the commentary relating to it should perhaps be deleted.

22. Mr. YAMADA said that he generally supported the contents of draft guidelines 2.6.7 to 2.6.15. With regard to the general approach, the primary objective of the Commission’s work, as Mr. Candioti had pointed out, was to elaborate practical guidelines for States and international organizations, taking into account practice since the adoption of the 1969 and 1986 Vienna Conventions. When State practice was not entirely consistent with the Vienna regime, the Commission should avoid an excessively rigid interpretation of those instruments, which it had been careful to do in the draft guideline on late objections. When State practice was not sufficient, the Commission

should take the needs of States and international organizations fully into account to ensure that its guidelines really were adapted to them.

23. He noted that State practice in the area covered by draft guideline 2.6.12 (Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty), was all but non-existent, as the Special Rapporteur pointed out. In paragraph 119 of his report the Special Rapporteur quoted the 1951 advisory opinion of the ICJ on *Reservations to the Convention on Genocide* with regard to the signatory's right to formulate an objection. In the subsequent paragraphs of the report he also seemed to be referring to cases in which signatory States could make objections prior to the expression of consent to be bound by a treaty. The phrase "prior to the expression of consent to be bound by the treaty" implied that the guideline was referring to an objection formulated by a signatory State. If that was the case, he agreed with the content of the draft guideline: when a signatory State formulated an objection upon or after the signature of a treaty, confirmation of the objection should not be required. On the other hand, the language of draft guideline 2.6.12 was somewhat ambiguous and might be interpreted to include cases in which a non-signatory State entitled to become a party to the treaty formulated an objection in accordance with draft guideline 2.6.5 (b). If that was not the case, it should be made clear in a footnote or in the commentary. However, he would have some difficulties if the draft guideline also covered objections formulated by non-signatory States, although it was hard to imagine a concrete example of such an objection. If a State formulated an objection to a reservation made by another State even before signing a treaty and did not become a party to the treaty until much later without confirming its objection, it would be difficult for the reserving State to know that an objection had been made long before. Accordingly, the Guide to Practice should indicate that a State or international organization that had formulated an objection to a reservation to a treaty before having signed the treaty should confirm the objection when it actually became a party to the treaty.

24. With regard to draft guideline 2.6.14 (Pre-emptive objections), he sought clarification of the phrase "exclude the application of the treaty as a whole". In the objection which it had formulated to reservations to article 66 of the 1969 Vienna Convention, cited in paragraph 131 of the report, Japan had not excluded the application of the treaty as a whole, but only of Part V of that Convention, which included article 66. Other States, such as Denmark and Finland, had formulated similar objections at that time.⁹⁷ Thus, in formulating an objection to a reservation, a State or an international organization could exclude the application of a particular part of a treaty that was not necessarily limited to the article to which the reservation was made but did not amount to the entire treaty. As he understood it, the Special Rapporteur did not intend to exclude that possibility, but he would appreciate it if he could clarify his intention.

25. With those comments, he said that he was in favour of referring draft guidelines 2.6.7 to 2.6.15 to the Drafting Committee.

26. Mr. HMOUD, referring to draft guideline 2.6.12, said he continued to believe that an objection could be made only by a contracting party. If an objection by a State or international organization that was not yet a contracting party did not produce legal effects at the time it was "made" or "formulated", there was no reason to permit it. Paragraph 122 of the report contained no legal argument to justify the granting of such a right. Nothing prevented a State or international organization that was not yet a contracting party from making a statement expressing its concerns about a reservation, but on no account could that be termed an objection.

27. As to draft guideline 2.6.15, he pointed out that late objections had no legal effect and that the wording was ambiguous on that point. Once again, a State could make a statement in which it expressed its opposition to a reservation, but such a statement could not produce the legal effects of an objection. He recommended that the other draft guidelines should be referred to the Drafting Committee.

28. Mr. PELLET (Special Rapporteur) recalled that the Commission still had to consider draft guidelines 2.7.1 to 2.7.9, on withdrawal and modification of objections to reservations (paras. 145–180 of the eleventh report). Of course, the Guide to Practice must contain guidelines on the subject, but he did not think that there was much to discuss: practice was more or less non-existent, and in general there was little question that the guidelines must be modelled to a greater or lesser degree on those relating to the withdrawal and modification of reservations. Within the framework of the traditional system of "unanimity" on reservations, the question of the withdrawal of an objection to a reservation had not arisen because the objection had produced both an immediate and radical effect in that it had prevented the reserving State from becoming a party to the treaty. The "flexible" system, which had been established first by the 1951 advisory opinion of the ICJ on *Reservations to the Convention on Genocide* and then by the 1969 and 1986 Vienna Conventions, was necessarily different. It had therefore been perfectly normal that in his first report of 1962, which had marked the beginning of the Commission's belated shift to the flexible system, Sir Humphrey Waldock had included a provision on the procedure for the withdrawal of objections.⁹⁸ The provision, cited in paragraph 147 of the report before the Commission, reproduced *mutatis mutandis* the corresponding rules on the withdrawal of reservations. Although the provision seemed necessary and logical, it had vanished from the Commission's final draft of 1966 in circumstances that he had been unable to ascertain. Not until the United Nations Conference on the Law of Treaties had the problem of the withdrawal of objections been reintroduced, in the same spirit. Although the provisions of the 1969 Vienna Convention offered few details in that regard, there was every reason to take the provisions on reservations as a model and

⁹⁷ See *Multilateral Treaties Deposited with the Secretary-General—Status as at 31 December 2006*, vol. II (United Nations publication, Sales No. E.06.V.3) chap. XXIII; available at <http://treaties.un.org>.

⁹⁸ *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 62 (para. 5 of draft article 19).

simply to adapt to objections the rules applicable to reservations included in the Guide to Practice in 2003 (draft guidelines 2.5.1 to 2.5.11).

29. Draft guidelines 2.7.1 (Withdrawal of objections to reservations) and 2.7.2 (Form of withdrawal of objections to reservations) merely reproduced article 22, paragraph 3, and article 23, paragraph 4, respectively, of the 1969 and 1986 Vienna Conventions. The title of draft guideline 2.7.1 might be misleading, and the Drafting Committee should perhaps change it. Although draft guideline 2.7.1 introduced all the subsequent draft guidelines on the question of withdrawal or modification of an objection, in reality it dealt only with the time at which a reservation could be withdrawn. Draft guideline 2.7.3 (Formulation and communication of the withdrawal of objections to reservations) simply recalled that draft guidelines 2.5.4, 2.5.5 and 2.5.6 were applicable *mutatis mutandis* to the withdrawal of objections to reservations.

30. The Commission had considered the effects of the withdrawal of reservations when it had studied the withdrawal procedure. Although rather formal procedural problems were involved, the Commission had considered, no doubt rightly, that it would be preferable to group everything on withdrawal together. Indeed, regardless of the effects of reservations, the effects of withdrawal could be dealt with in a manner vague and flexible enough to obviate the need to wait until the Commission had addressed the question. The same considerations should apply to the withdrawal of objections to reservations, and the effects of withdrawal should be considered in the part of the Guide to Practice currently under discussion. On the other hand, it was surely not possible to refer to the guidelines dealing with the effects of the withdrawal of reservations because there the problems arose in very different—and not always simple—terms. It was true that to withdraw an objection to a reservation was tantamount to accepting the reservation (and that was a partial response to the problem raised by Mr. Wisnumurti), but did that mean that the reservation had full effect on account of the withdrawal of the objection? The phrase “the reservation has full effect” in paragraph 159 of the eleventh report seemed logical, but it was not self-evident, if only because the effects of an objection were by no means unequivocal. If one adhered to the terms of the 1969 Vienna Convention, an objection could, depending on whether or not the reserving State made the declaration provided for in article 20, paragraph 4 (b), prevent entry into force of a treaty in the relations between two States. However, the effects of withdrawal were no more unequivocal than the effects of the objection. Withdrawal of the objection could also permit the entry into force of the treaty between all the parties. Just as an objection could block entry into force in certain specific cases, so could its withdrawal have the radical effect of facilitating it, and not only because the reservation would produce effects. In view of the complexity of the question, it would be preferable to consider that the withdrawal of an objection amounted to acceptance of the reservations. That was implicitly done in draft guideline 2.7.4 (Effect of withdrawal of an objection), which appeared in paragraph 160 of the report and which seemed adequate, once the Commission had defined the effects of acceptance.

31. It was possible, however, to be more specific with regard to the date on which withdrawal of an objection took effect. That was the purpose of draft guidelines 2.7.5 (Effective date of withdrawal of an objection) and 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation), the first paragraph of which was taken from article 22, paragraph 3 (b), of the 1986 Vienna Convention. The logic of that rule was not necessarily irrefutable, as explained in paragraphs 163 and 165 of the eleventh report, but in effect the resulting drawbacks were so limited and improbable that they surely did not justify rejecting an express rule contained in the Vienna Conventions. The rule set out in draft guideline 2.7.5 was obviously not imperative: not only could States set it aside, but it could also be paralysed by a unilateral declaration by the author of the objection, whom nothing prevented from setting as the effective date of withdrawal of its objection a date later than that corresponding to the presumption in the draft guideline. On the other hand, for the reasons indicated in paragraph 168 of the report, it was hardly acceptable that the author of the objection should set the effect of withdrawal of the objection at an earlier date, because then the reserving State, without being aware of it, would be bound by obligations that had been previously offset by the reservation, a situation which could hardly be contemplated. Of course, in principle the author of the reservation had every reason to welcome the withdrawal of the objection, because he thus obtained satisfaction, but in order to be able to welcome the withdrawal, he would still have to receive notification thereof.

32. It was also possible to consider—or to imagine, as practice was lacking—that a State or international organization might not withdraw its objection in full, but only in part, either by withdrawing the declaration provided for in article 20, paragraph 4 (b), of the Vienna Convention, which had prevented the treaty from entering into force in the relations between the reserving State and the objecting State, or by limiting the content of the objection, which would then concern only a specific part of the reservation. Those two possibilities were covered by the first paragraph of draft guideline 2.7.7 (Partial withdrawal of an objection), which appeared in paragraph 173 of the report and in which the phrase “on the treaty as a whole” was an implicit reference to draft guideline 1.1.1. The second paragraph avoided a repetition of the text of draft guidelines 2.7.1, 2.7.2 and 2.7.3, the latter having already referred to other draft guidelines.

33. The text of draft guideline 2.7.8 (Effect of a partial withdrawal of an objection) was modelled on that of draft guideline 2.5.11 (Effect of a partial withdrawal of a reservation) contained in footnote 320 of the report.⁹⁹ However, for the reasons set out in paragraph 175, he had deemed it unnecessary to adopt such detailed provisions and thus proposed the text at the end of the paragraph.

34. Draft guideline 2.7.9 (Prohibition against the widening of the scope of an objection to a reservation) specifically contemplated the case in which a State that had made

⁹⁹ For the text of this draft guideline and commentary thereto, see *Yearbook ... 2003*, vol. II (Part Two), pp. 91–92.

a simple objection—i.e., without also making the declaration under article 20, paragraph 4 (b), of the Vienna Conventions, which made it possible to prevent the treaty from entering into force in the relations between the reserving State and the objecting State—wanted to widen its scope. He had already said what he thought about that procedure when he had introduced draft guideline 2.6.13. Just as the widening of the scope of a reservation, which draft guideline 2.3.5 addressed, must be regarded as a late formulation of a new reservation, the widening of the scope of an objection must be taken to be a new objection which not only did not produce effects if it was formulated after the period of time stipulated in article 20, paragraph 5, of the Vienna Conventions but also could not be formulated after the initial objection made within that time period, even if the time period had not yet expired. That was tantamount to repudiating acceptance of the entry into force of the treaty between the two States concerned in the terms resulting from the interplay of reservation and objection, and it was out of the question, both for reasons of good faith and because the reserving State would not have the chance to take a position, and thus the objecting State would impose its will, although it had already made it known that it was in agreement with the entry into force of the treaty in the relations between the two States. That was the reason for the rather radical drafting of the draft guideline contained in paragraph 180 of the eleventh report.

35. Admittedly, the draft guidelines responded more to a logical and even mathematical necessity, as one member of the Commission had observed, although their potential practical utility could not be completely ruled out. He welcomed the Commission's clear instructions to the Drafting Committee and hoped that all the draft guidelines would be referred to it. He thanked the members of the Commission for their positive response to most of his proposals and said that he was convinced by the arguments put forward by nearly all those who had proposed changes to two of the draft guidelines.

Organization of the work of the session (continued)*

[Agenda item 1]

36. Mr. VARGAS CARREÑO said that the Planning Group, which he would chair as first Vice-Chairperson and of which Mr. Petrič had been appointed Rapporteur, would be composed of the following members of the Commission: Mr. Al-Marri, Mr. Caflisch, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue and Mr. Yamada.

37. Mr. PELLET said that he would also like to join the Planning Group.

38. Mr. VARGAS CARREÑO said that Mr. Pellet's presence in the Planning Group would be most welcome.

The meeting rose at 12.30 p.m.

2919th MEETING

Tuesday, 15 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (continued) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. PELLET (Special Rapporteur), summing up the debate on draft guidelines 2.6.7 to 2.6.15, on the procedure for the formulation of objections, contained in paragraphs 87 to 144 of his eleventh report,¹⁰⁰ said that the discussion on the draft guidelines had been calm, disciplined, serious and conclusive. As Special Rapporteur, he had been gratified to note that there had been a ready consensus that the draft guidelines should be referred to the Drafting Committee. All too often in the past, the Commission's discussions had strayed from the point and the Drafting Committee, deprived of clear guidance, had been forced to depart from its role and tackle questions of principle. It was clear from the current debate, by contrast, that most of the draft guidelines had, by and large, given rise to few difficulties. The exceptions were draft guidelines 2.6.14 and 2.6.15, which clearly merited closer consideration. An important problem—albeit one that was more or less resolved—also arose in connection with draft guideline 2.6.12 (Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty). He had, on the whole, been convinced by the criticisms that had been put forward.

2. To begin with the draft guidelines that had presented little or no difficulty, he noted that few members of the Commission had commented on draft guideline 2.6.7 (Written form), but that of those who had, most had approved. They were right to do so, because it simply reflected article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions. Much the same could be said of draft guideline 2.6.8 (Expression of intention to oppose the entry into force of the treaty), although Mr. Fomba had wondered whether it might be appropriate to introduce a reference to a time limit. Such a reference was, however, probably unnecessary, because it appeared in other draft guidelines. Mr. Wisnumurti had asked whether, notwithstanding its reflection of article 20, paragraph 4 (b), of the

* Resumed from the 2915th meeting.

¹⁰⁰ Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

Vienna Conventions, it was logical for the draft guideline to refer both to the “making” and to the “formulating” of an objection to a reservation. While that comment was perhaps justified, in which case the verb “make” was preferable; there was a precedent in the Vienna Conventions. Some words of explanation might be inserted in the commentary.

3. Everyone had been satisfied with draft guideline 2.6.9 (Procedure for the formulation of objections), except for Ms. Escarameia, who had pointed out that the situation of reservations was not identical to that of objections, particularly because no time limit was established. It seemed, however, that she could accept the draft guideline as currently worded. A reference might be inserted in the commentary, pointing out that the phrase “*mutatis mutandis*” took account of the concerns expressed by Ms. Escarameia.

4. Rather to his surprise, given that it reflected no rule of positive law and took the form of a recommendation, draft guideline 2.6.10 (Statement of reasons) had been the subject of mostly favourable comment, from which one might perhaps conclude that the Commission, in its current composition, was “cautiously daring”. The most revolutionary proposal had—unsurprisingly—come from Mr. Gaja, and even that proposal did not relate directly to draft guideline 2.6.10, though it could most usefully be inserted in it. The proposal, which followed on from the distinction that Mr. Gaja had drawn between major and minor objections to reservations, was that the Commission should establish a presumption, one way or the other, in the frequent cases in which an objecting State did not explain the reasons for its objection. Although he had already explained why the distinction between major and minor objections was not clear to him or, he believed, to others, it might conceivably be useful to establish the presumption that, in the absence of a statement of reasons, an objection had been made on the basis of the reservation’s incompatibility with the object and purpose of the treaty (a “major” objection); alternatively, the opposite presumption could be made. His own view, however, was that there was not much point in such a presumption, unless the effects of the two kinds of objection were different, which he doubted. If it was decided that such a presumption would be a useful addition to the draft guidelines, he would prefer—as would Mr. Gaja—that the objection be presumed to be a minor one.

5. A number of speakers, including Ms. Escarameia and Mr. Fomba, had approved the suggestion that the draft guideline should take the form of a recommendation, although there had been some doubts about the wording. Mr. McRae and Mr. Vázquez-Bermúdez had considered that the phrase “whenever possible” should be deleted. It was disappointing that only seven members had seen fit to respond to the question he had put to the Commission when introducing the debate, namely whether it would be appropriate to draft a guideline parallel to draft guideline 2.6.10, under which reservations, too, should indicate the reasons why they were being made. Of those who had commented, Mr. McRae had expressed concern that States might be more reluctant to disclose their reasons publicly than in the case of objections, but that argument did not hold water, since States would be

free to ignore the guideline, which would take the form of a mere recommendation. The important question was not whether States would follow such a recommendation but whether such a guideline was or was not desirable. Mr. Caffisch, Mr. Candioti, Ms. Escarameia, Mr. Fomba and Mr. Vázquez-Bermúdez had all replied in the affirmative. There thus seemed to be considerable support for a new guideline along those lines. He was inclined to take it that the silence on the part of other members meant that they too were well disposed to the idea, but perhaps the Commission should break with tradition and let members who had not yet spoken comment on his suggestion. If sufficient support was forthcoming, he would prepare a note justifying the drafting of such a guideline.

6. Draft guideline 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation) had aroused little comment, understandably, since it simply repeated article 23, paragraph 3, of the 1986 Vienna Convention. Ms. Escarameia had, however, pointed out that, contrary to the assertion in paragraph 114 of the report, an objection could have effects for the other contracting States. What she had said about treaties that did not enter into force as the result of an objection was correct, but only with regard to the plurilateral treaties provided for in article 20, paragraph 2, of the Vienna Conventions. The same did not apply to multilateral treaties in general. Although her comments would not affect the wording of the draft guideline, they would need to be reflected in the commentary.

7. Draft guideline 2.6.12 (Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty) had been the subject of several comments, the most detailed of which had come from Ms. Xue, who had rightly pointed out that the guideline—which she did not oppose—applied only to formal treaties, namely those which entered into force only when a State deposited its instrument of ratification or the equivalent, as opposed to those that entered into force after signature alone. That principle was certainly very strong in francophone doctrine, and he accordingly welcomed the importance attached to it by Ms. Xue, but he wondered whether it should be mentioned in the draft guideline itself or whether a discussion in the commentary would suffice.

8. Mr. McRae, Mr. Yamada and Mr. Hmoud had been concerned at the excessive time that was likely to elapse between the formulation of an objection and the time when it produced effects. Their concerns were similar to those expressed with regard to draft guideline 2.6.5 (b) (Author of an objection). He recognized that such a risk existed, but did not see how it could be avoided. It was to be hoped that the Drafting Committee would come up with a solution. He could not support the radical suggestion made by Mr. Hmoud, since he thought it neither logical, practical, nor in line with current practice to restrict the freedom to formulate objections to contracting States. However, the line that the Drafting Committee decided to take on draft guideline 2.6.5 (b) would inevitably have an impact on the wording of draft guideline 2.6.12.

9. The main problem arising from draft guideline 2.6.13 (Time period for formulating an objection), which largely

reproduced article 20, paragraph 5, of the 1986 Vienna Convention, related to the fact that, as he had pointed out in the report and in his introductory statement, it repeated much of the third paragraph of draft guideline 2.1.6 (Procedure for communication of reservations), which the Commission had, rather surprisingly, decided to retain, even though it related to the procedure for the communication of reservations rather than of objections. He had asked how the situation should be tackled: whether the repetition could be accepted for the first reading of the draft guidelines or whether either draft guideline 2.6.13 or the third paragraph of draft guideline 2.1.6 should be deleted, with consequential adjustments to the commentary. All those members who had spoken had favoured the deletion of the third paragraph of draft guideline 2.1.6. Surprisingly, Mr. Cafilisch had said that principles were dangerous and had advocated taking immediate action. In less picturesque language, Ms. Escarameia, Mr. Fomba and Mr. Vázquez-Bermúdez had supported that position. Mr. Gaja's view seemed to be that, once the third paragraph of draft guideline 2.1.6 had been deleted, the text of the second paragraph of the same guideline and the text of draft guideline 2.6.13 should also be amended. The answer to Ms. Jacobsson's question about the phrase "after it is notified of the reservation" was that the phrase was, as explained in paragraph 125 of the report, taken from article 20, paragraph 5, of the Vienna Conventions. He drew attention to the fact that the procedure for communication of reservations, covered by draft guidelines 2.1.5 and 2.1.6, was the subject of a lengthy commentary to be found in the Commission's report to the General Assembly on its fifty-fourth session.¹⁰¹

10. As he had said at the outset, draft guidelines 2.6.14 (Pre-emptive objections) and 2.6.15 (Late objections) had been the subject of the most criticism. The fact that the criticisms had been constructive and broadly similar in tenor would greatly facilitate the Drafting Committee's work. He accepted the general thrust of the comments made, if not necessarily all the proposed textual amendments. Although the two draft guidelines were, obviously, different, they also had much in common. In both cases, the author of an objection wanted to express opposition to a reservation outside the time frame established by the Vienna Conventions. He had, he believed, managed to give both draft guidelines real legal force, but perhaps he had allowed himself to be carried away by his flexible conception of what could be categorized as a legal concept, which went beyond what most people would call positive law. Most speakers, however, had obviously thought that the draft guidelines assumed objections formulated outside the established time limits to have effects that in fact they lacked. Indeed, some, including Mr. Cafilisch, Mr. Candioti, Ms. Escarameia, Ms. Jacobsson and Mr. Kolodkin, had questioned whether such a procedure could be termed an objection, and had suggested that it should be called a "communication". Mr. Wisnumurti, however, had—rightly, in his view—said that the term "communication" related only to the form that such a reaction took; it did not convey its negative nature. Mr. Nolte had suggested the phrase "objecting communications", for which, although it was acceptable in English, it was hard to find a satisfactory equivalent in French. His

own preference would be for the phrase "objecting declarations", since that would highlight the close relationship between unilateral and interpretative declarations that he had mentioned in his introductory statement. Although similar to such declarations, however, objecting declarations, whether made early or late, belonged in a category of their own.

11. Mr. Gaja seemed to deny that pre-emptive objections had any legal effect, maintaining that an objecting State should be free to widen the scope of its objection when—though he personally would prefer to say "until"—the scope of the reservation was widened. It was an important point: a pre-emptive objection had legal effects only once the reservation had actually been formulated and notified. That, incidentally, showed that such an objection did have a potential or delayed effect. Until that time, a State could withdraw it or widen its scope without any adverse consequences. The text should, as Mr. Gaja said, be carefully reviewed.

12. In Mr. Cafilisch's view, such objections were real objections but did not take effect until the reservation itself was formulated. That seemed a sufficient response to the point raised by Ms. Xue, who had expressed doubts as to the usefulness of such "warning" objections, even though they were common practice. In his view, they were extremely useful: it was very important for States to have some idea of what kind of reaction a reservation was likely to provoke. As for a point raised by Ms. Escarameia, it went without saying that potential objections, like real objections, must be communicated to the other parties to a treaty. Otherwise, there would be no point in formulating such "warning" objections.

13. Mr. Yamada had asked how the draft guideline would affect "intermediate" objections, such as that made by Japan, which was discussed in paragraph 131 of the report. It was a difficult question, but two points could be made. First, although he strongly doubted the validity of reservations with "super-maximum" effect, those having an intermediate effect, which accepted the entry into force of a treaty as between the reserving and the objecting State while excluding treaty relations to an extent going beyond the provisions to which the reservation related, seemed compatible with the Vienna Conventions, which provided for minimum and maximum effects in the case of reservations. The second point was that, on closer inspection, the Japanese reservations in question proved to be simple declarations which the Government of Japan had then modified as it saw fit. That analysis provided further confirmation of the fact that there was nothing to prevent a State from reconsidering its pre-emptive objections.

14. All in all, it seemed that the main objection to draft guideline 2.6.14 was terminological rather than really substantive; many members were plainly of the opinion that it was misleading to describe such declarations as objections and that the term needed some qualification.

15. The criticism of draft guideline 2.6.15 had been more far-reaching, extending beyond mere terminological questions. Mr. Kolodkin, supported by Mr. Cafilisch, Ms. Escarameia, Mr. Fomba, Mr. Hmoud, Mr. McRae, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Ms. Xue had

¹⁰¹ *Yearbook ... 2002*, vol. II (Part Two), pp. 34–42.

submitted that late objections did not fall within the definition of objections to reservations supplied in draft guideline 2.6.1 as supplemented by draft guideline 2.6.13. On that point, he was unsure whether he had been convinced by Mr. Kolodkin's line of argument or that of the members who held similar views. First, draft guideline 2.6.1 had deliberately—and wisely—not defined an objection in terms of the time at which it was entered. Secondly, he continued to be of the view that the questions of definition and validity should not be confused. An objection which was not valid for temporal reasons would nevertheless constitute an objection, just as a late reservation, or a reservation incompatible with the object and purpose of a treaty, while not being valid, would still be a reservation, since definition and validity were separate issues. Objections, like reservations, could be valid or invalid. It could not be averred that a reservation was not a reservation because it was invalid, or that a late objection, being invalid, was not an objection. On the contrary, it was first necessary to determine whether a declaration could be described as a reservation or an objection, before going on to ascertain whether the reservation or objection was or was not valid.

16. It was therefore not on the basis of the argument put forward by Mr. Kolodkin and those who had supported him that he had ultimately come to agree with those members' basic position, but rather because, from a strictly positivist point of view, it was incorrect to say that what, for want of a better expression, he termed "late objections" produced "not all" the legal effects of an objection, as in point of fact they produced none of those effects. That conclusion would obviously entail a comprehensive recasting of draft guideline 2.6.15.

17. Mr. McRae's development of Mr. Kolodkin's argument and his explanation of why such declarations had practical, but no legal, effects raised a fundamental question. The refusal to characterize the real effects produced by a declaration of a legal nature as "legal effects" bespoke a debatable and somewhat narrow conception of what constituted "law". Sometimes a little general philosophy did not go amiss; his own notion of law was certainly broader than that of the vast majority of other members. While he did not share that highly positivist conception of law, he respected it and acknowledged that it was too widespread to warrant any attempt to oppose it. Despite his doctrinal regrets, he therefore conceded defeat, and in the Drafting Committee would support the idea that "late objecting declarations", to use the infelicitous term, did not produce any legal effects. But after all, as Mr. Candioti and Mr. Yamada had pointed out, the members were not meeting in order to defend doctrinal stances, but to help States, international organizations, courts, diplomats and even the academic community to put the law into practice.

18. He therefore recommended that draft guidelines 2.6.7 to 2.6.15 should be referred to the Drafting Committee in their entirety.

19. The CHAIRPERSON said he took it that the Commission wished to refer draft guidelines 2.6.7 to 2.6.15 to the Drafting Committee.

It was so decided.

20. The CHAIRPERSON invited members to turn to the discussion of draft guidelines 2.7.1 to 2.7.9, contained in paragraphs 145 to 180 of the eleventh report of the Special Rapporteur.

21. Ms. ESCARAMEIA said that while draft guideline 2.7.1 (Withdrawal of objections to reservations) followed the wording of article 22, paragraph 2, of the 1986 Vienna Convention, that article dealt with other procedural issues not covered by the draft guideline in question which, as the Special Rapporteur had emphasized, was concerned only with the time at which an objection to a reservation might be withdrawn. She therefore wondered why it had not been entitled "Time of withdrawal of objections to reservations".

22. She concurred with the contents of draft guidelines 2.7.2 (Form of withdrawal of objections to reservations) and 2.7.3 (Formulation and communication of the withdrawal of objections to reservations). However, the title of draft guideline 2.7.4, "Effect of withdrawal of an objection", was too broad. Although the provisions of article 20, paragraph 5, of the Vienna Convention were applicable to objections, withdrawal of the latter could have several additional effects, which the Commission had yet to consider. For that reason, it might be advisable to amend the title to a wording such as "Acceptance of reservation by the withdrawal of an objection", to make it more consonant with its contents.

23. While she endorsed draft guidelines 2.7.5 (Effective date of withdrawal of an objection), 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation) and 2.7.7 (Partial withdrawal of an objection), she considered that the title of draft guideline 2.7.8 (Effect of a partial withdrawal of an objection) was also too broad.

24. She did not agree with the suggestion, in paragraph 171 of the report, that the arguments for allowing a partial withdrawal of a reservation might be transposed to the case of a partial withdrawal of objections. In fact, reservations often undermined the integrity of the treaty and should clearly be discouraged if they were incompatible with its object and purpose, whereas objections promoted and sought to preserve the integrity of a treaty since they were intended to persuade the reserving State to change its opinion. They thus fulfilled an important role and could even draw attention to the invalidity of a reservation. No exact parallel could therefore be drawn between the partial withdrawal of reservations and of objections.

25. As for the widening of the scope of an objection, she had been surprised to note that, in paragraph 178 of the report, concerning draft guideline 2.7.9 (Prohibition against the widening of the scope of an objection to a reservation), the Special Rapporteur seemed to infer from the lack of State practice that such widening was prohibited. In other cases, however, the Commission had not cited a dearth of State practice as grounds for concluding that such a practice was forbidden.

26. It was also hard to accept the strict prohibition contained in that draft guideline against any widening of the

scope of an objection to a reservation, even within the 12-month period prescribed by the 1969 Vienna Convention for the formulation of an objection, especially in view of the fact that the opposite presumption applied in the case of reservations. The reason given for prohibiting the widening of the scope of an objection was that it was inconsistent with the principle of good faith. No such argument had, however, been advanced when the Commission had agreed to the widening of the scope of reservations. Clearly, other members' conception of a treaty was rather more contractual than her own, which was more concerned with preventing attacks on the integrity and validity of a treaty. She failed to see why an objection should not be widened within the 12-month period. Even after that period, some form of statement, which might not be termed an objection but which had the effect of giving warning of a party's dissatisfaction with the reservation, ought to be permitted. Draft guideline 2.7.9 was therefore too rigid, especially when compared with the regime applicable to reservations. The Commission should draft a different guideline permitting the widening of the scope of an objection when it occurred within the 12-month period.

27. The provisions on reservations in the 1969 Vienna Convention clearly indicated the time period within which reservations could be made, a matter of such importance that it was even an element of the definition of a reservation: under article 2, paragraph 1 (*d*), reservations could be made only up until the time the State became a party to a treaty. Draft guideline 2.3.1 had, however, permitted the late formulation of reservations, provided that no other contracting party objected.¹⁰² The Commission had also allowed the widening of the scope of a reservation, if no contracting party objected, in draft guideline 2.3.5.¹⁰³ In Ms. Escarameia's view, those draft guidelines conflicted with the Vienna Convention and sanctioned a practice that was undesirable.

28. Article 20, paragraph 5, of the 1986 Vienna Convention provided that a State or international organization could raise an objection to a reservation within 12 months of being notified of the reservation, but did not specify how many objections could be made to the same reservation within that period and was silent on the possibility of widening the scope of an objection to a reservation within those 12 months. While she conceded that such action might constitute abuse of a right and would not always be consonant with good faith, that was not true in all circumstances. Since draft guideline 2.7.9 categorically prohibited any such widening, the Commission seemed to be applying more favourable treatment to reservations than to objections. She could not agree with that approach.

29. While draft guidelines 2.7.1 to 2.7.8 could be referred to the Drafting Committee, draft guideline 2.7.9 deserved further consideration, and might need to be supplemented with a further guideline.

30. Mr. GAJA said that, if he had understood correctly, the reason the Special Rapporteur was of the opinion that the scope of an objection to a reservation could not be widened was that, once an objection had been made, the treaty entered into force as between the reserving State and the objecting State, unless the latter opposed the entry into force of the treaty in their bilateral relations. Hence a subsequent objection to the reservation, even within the period prescribed by the Vienna Convention, would not produce any effect, as the reservation would be deemed to have already been accepted.

31. That argument could apply only if the reservation to which the objection was made was the only one to be formulated by a State or international organization. In the event of several reservations being made, there was nothing to prevent a State from raising an objection first to one reservation, then to another, within the time period mentioned in article 20, paragraph 5, of the Vienna Convention. That possibility was not excluded by the Vienna Convention. While all reservations had to be made, or confirmed, at the time of ratification or of any other act of acceptance of the treaty, there was nothing to indicate that objections must all be made at the same time. It would be helpful to make that point in a draft guideline, or at least in the commentary.

32. Similarly, it would be advisable to specify, at least in the commentary, that if a reservation had been completely withdrawn, the objection pertaining to it automatically ceased to have effect and required no withdrawal. In the event of the partial withdrawal of a reservation, the situation was more complicated and should be elucidated in the commentary.

33. Mr. PETRIČ began by thanking the Secretariat, and in particular Ms. Arsanjani, Secretary to the Commission, for their friendly and effective assistance in the preparation of the Commission's work, and in enabling new members to integrate into the Commission and resolve the many practical problems associated with their stay in Geneva.

34. The topic of reservations to treaties was both intellectually stimulating and of great practical importance. The highly diversified and sometimes controversial practice of States and international organizations with regard to reservations and objections thereto called for the formulation of guidelines on those matters. The Special Rapporteur's proposals were well grounded in existing practice, the conclusions of previous special rapporteurs, and the relevant jurisprudence and doctrine.

35. He concurred with the Special Rapporteur's views, conclusions and proposals concerning the withdrawal and modification of objections to reservations, as set forth in paragraphs 145 to 180 of his eleventh report. He endorsed the conclusion set forth in paragraph 150 that, although the withdrawal of a reservation and the withdrawal of an objection had different effects on the life of a treaty and differed in their nature and their addressees, they were similar enough to be governed by comparable rules and procedures. The Special Rapporteur had been wise to focus on the form of, procedure for and effects of withdrawing an objection to a reservation, the time at which

¹⁰² For the text of this draft guideline and the commentary thereto, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 185–189.

¹⁰³ For the text of this draft guideline and the commentary thereto, see *Yearbook ... 2004*, vol. II (Part Two), pp. 106–108.

such a withdrawal produced effects, and the issues raised by partial withdrawal and the widening of the scope of an objection to a reservation.

36. The 1969 and 1986 Vienna Conventions provided clear answers to some of those issues. Draft guidelines 2.7.1 and 2.7.2 reproduced the wording of the Vienna Conventions and therefore required no amendment or in-depth discussion. Similarly, draft guideline 2.7.3 was both logical and acceptable in that it proposed that guidelines 2.5.4, 2.5.5 and 2.5.6 should be applicable *mutatis mutandis* to the withdrawal of objections to reservations.

37. He endorsed the Special Rapporteur's view that the withdrawal of an objection produced more effects than the withdrawal of a reservation. For that reason, the complicated questions discussed in paragraphs 158 to 160 of the report regarding draft guideline 2.7.4 would clearly have to be revisited in due course. As for draft guideline 2.7.5 (Effective date of withdrawal of an objection), the Special Rapporteur's proposal to reproduce the wording of article 22, paragraph 3 (b), of the 1969 Vienna Convention in the draft guideline was sensible. Any attempt to reflect all the problems and considerations set out in paragraphs 161 to 167 of the report would probably only render the draft guideline less clear.

38. Draft guideline 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation) and the reasoning behind it should not give rise to any major difficulties at the present stage. However, the question of the partial withdrawal of objections (draft guideline 2.7.7) was extremely complex, especially if one accepted the premise that a distinction must be drawn between different categories of objections according to their effects, ranging from super-maximum, to maximum, to normal. Although, in the Special Rapporteur's opinion, the need for a rule was hypothetical, since there were no real cases of a partial withdrawal of an objection, draft guideline 2.7.7 did not provide any answers to the main queries raised in paragraph 172 as to the legal effects of such a partial withdrawal, and further consideration of that topic would therefore be required. The superfluous word "that" in the last line of the first paragraph of draft guideline 2.7.7 was probably indicative of drafting difficulties, and should be deleted.

39. The structure of draft guidelines 2.7.7 (Partial withdrawal of an objection) and 2.7.8 (Effect of a partial withdrawal of an objection) should be more logical. Draft guideline 2.7.7 should be confined to the right to make a partial withdrawal and to the procedure for doing so, while draft guideline 2.7.8 should be concerned with the legal effects of a partial withdrawal. As a result, the second sentence in draft guideline 2.7.7 should be transposed to draft guideline 2.7.8.

40. Draft guideline 2.7.9 (Prohibition against the widening of the scope of an objection to a reservation) was interesting, because no mention had been made of the possibility of such a practice, either in the Commission's previous work, or in the Vienna Conventions (including the *travaux préparatoires* thereto). The Special Rapporteur had been right to conclude in paragraphs 176 to 180

of his report that such action was simply not possible. Draft guideline 2.7.9 reflected that fact and was therefore acceptable. It was, however, necessary to consider whether there was any need for such a guideline, since it would be inadvisable to give States the impression that widening the scope of an objection to a reservation might become admissible at some time in the future.

41. With that proviso, he was in favour of referring draft guidelines 2.7.1 to 2.7.9 to the Drafting Committee.

The meeting rose at 11.10 a.m.

2920th MEETING

Wednesday, 16 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

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

[Agenda item 1]

1. The CHAIRPERSON announced that the Bureau, which had agreed on the work plan for the following three weeks, had concluded that the Commission could complete its consideration of the reports of Special Rapporteurs currently before it by 5 June and therefore recommended that the first part of the session should be shortened by three days. That recommendation was consistent with the repeated request made by the General Assembly in its resolutions encouraging the Commission to take "cost-saving measures". If he heard no objection, he would take it that the Commission agreed with the Bureau's recommendation.

It was so decided.

Reservations to treaties (*continued*) (A/CN.4/577 and Add.-21, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

2. The CHAIRPERSON invited the members of the Commission to continue their consideration of the topic of reservations to treaties and in particular draft guide-

* Resumed from the 2918th meeting.

lines 2.7.1 to 2.7.9 proposed by the Special Rapporteur in his eleventh report.¹⁰⁴

3. Mr. GALICKI asked whether the draft guidelines concerning withdrawal and modification of objections to reservations also covered pre-emptive and late objections and, if so, to what extent. He endorsed the comment made by a number of members that it would be preferable to speak of pre-emptive or late “communications”. Given that the draft guidelines were based on both the 1969 and the 1986 Vienna Conventions, they should all include a reference to international organizations; that was not currently the case in draft guidelines 2.7.4 and 2.7.6, and they ought to be changed accordingly.

4. Mr. CAFLISCH said that he had a number of comments on draft guidelines 2.7.6 and 2.7.7 considered together with draft guideline 2.7.8 and also on draft guideline 2.7.9. Draft guideline 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation) was an exception to the principle set out in draft guideline 2.7.5 which held that the withdrawal of an objection to a reservation became operative when notification of the withdrawal had been received by the author of the reservation. That allowed the author of the objection to set the time at which withdrawal took effect. That time, unilaterally decided by the author of the objection, must nevertheless be later than the time of notification of withdrawal. If that was not the case, *i.e.* if withdrawal of the objection could become operative prior to notification, an objection could be withdrawn without the author of the reservation being notified. That would be contrary to the fundamental principle of mutuality inherent in the law of treaties. At a practical level, since withdrawal of the objection could, pursuant to draft guidelines 2.7.7 and 2.7.8, be complete or partial and might also have very diverse effects, a situation of great legal uncertainty would occur, at least between the time at which the withdrawal, unilaterally determined by the State or international organization, took effect and the time withdrawal was notified. That being said, the author of the objection was also its master and, by limiting the scope of the objection, rendered a service to the author of the reservation. The author of the objection could set the time at which the withdrawal of the objection took effect provided that the author of the reservation was notified—in other words, provided that the withdrawal did not become operative before notification. Thus, draft guideline 2.7.6 went in the right direction.

5. With regard to draft guidelines 2.7.7 (Partial withdrawal of an objection) and 2.7.8 (Effect of a partial withdrawal of an objection), he noted that in his commentary the Special Rapporteur had clearly illustrated the difficulties posed by the possibility of partial withdrawal of objections as well as the lack of State practice in that area (para. 170 of the report), and thus the need to elaborate simple guidelines, which the two draft guidelines seemed to be. Draft guideline 2.7.7 was meant to cover the actual possibility of partial withdrawals of objections, whereas draft guideline 2.7.8 was supposed to specify the effects

of such partial withdrawals in a very general way, as Mr. Petrič had pointed out. The difference was not clear-cut, however, and that was somewhat awkward. The second sentence of the first paragraph of draft guideline 2.7.7 specified that “[t]he partial withdrawal limits the legal effects of the objection on the treaty relations between the author of the objection and ... the author of the reservation or on the treaty as a whole”. That statement was correct, but it had to do with the effects of partial withdrawal and might—in fact, ought to—appear in draft guideline 2.7.8 rather than in draft guideline 2.7.7.

6. Draft guideline 2.7.9 (Prohibition against the widening of the scope of an objection to a reservation), the last one in the eleventh report, prohibited the widening of the scope of objections to reservations “under way”. He believed that a parallel did and should exist with the problem of widening of the scope of reservations. If the widening of the scope of reservations or of objections were permitted, this would be prejudicial to article 19 and article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions. The possibility of widening the scope of an objection “under way” might, depending on its terms and the terms of the initial objection, allow the author of the objection to evade, entirely or partly, treaty obligations towards the author of the reservation. In other words, the text of draft guideline 2.7.9 was indispensable. It would stifle, *a fortiori*, any temptation on the part of a State or international organization to formulate an objection, withdraw it and then formulate an objection with a wider scope, although it seemed that if a widening of scope were permitted, it would at least presuppose that the initial objection was valid when the scope was widened.

7. He was in favour of referring draft guidelines 2.7.1 to 2.7.9 to the Drafting Committee.

8. Mr. FOMBA said, with regard to the question of withdrawal and modification of objections to reservations, that the Special Rapporteur, having noted that the Vienna provisions contained not only a number of certainties but also, and most importantly, several uncertainties, that the Commission’s work on the withdrawal of objections was very modest, that State practice was virtually non-existent and that the Vienna provisions needed to be explained and made more specific, had rightly and logically concluded in paragraph 151 of his eleventh report that it was necessary to follow the example of the draft guidelines on withdrawal and modification of reservations. Given that, as indicated in footnote 294, the central question of the effects of reservations, acceptances and objections would be the subject of a later report, the Special Rapporteur had been correct in saying that it would be premature to assert that the consequence of withdrawing an objection was that “the reservation had full effect” and had rightly underscored the manifold and complex nature of the effects of withdrawal of an objection, which he illustrated eloquently with examples (paras. 159 and 160 of the report). He himself therefore endorsed draft guidelines 2.7.4, 2.7.5 and 2.7.6, which did not pose any particular problem.

9. As to the partial withdrawal of objections and the effects thereof, he said that the terminology used in

¹⁰⁴ Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

paragraph 169 of the report might well be confusing to the inexperienced reader because it covered “maximum”, “super-maximum”, “intermediary” and “minimum” effects, as well as “normal” or “simple” objections. However, a closer look revealed that there was a certain, not to say definite, logic in that terminology because it at least made an understanding possible. He also agreed with the Special Rapporteur when he said in paragraph 170 that the fact that no case of a partial withdrawal of an objection had occurred in State practice did not appear to be sufficient grounds for ruling out that hypothesis. Personally, he thought that it would be more appropriate in paragraph 171 to say “to give greater effect” rather than “to give full effect” so as to keep the same logic and consistency throughout the line of reasoning. He also agreed with the Special Rapporteur that, in view of the complexity of the effects of objections, it was wise and sufficient to adopt a draft guideline 2.7.7 worded in general terms, as the Special Rapporteur proposed in paragraph 173. With respect to draft guideline 2.7.8, he considered it logical and relevant to adopt a text sufficiently broad and flexible to cover all possible cases. On draft guideline 2.7.9, he shared the Special Rapporteur’s conclusion that it seemed necessary to specify firmly that it was not possible to widen the scope of an objection to a reservation. To allow such a possibility would open a Pandora’s box with regard to legal certainty and treaty relations. On that point, the argument which the Special Rapporteur developed in paragraph 176 of the report was sound, relevant and consistent.

10. He, too, was in favour of referring draft guidelines 2.7.1 to 2.7.9 to the Drafting Committee.

11. Mr. McRAE said that as he was in broad agreement with the tenor of draft guidelines 2.7.1 to 2.7.9, he would confine himself to commenting on draft guideline 2.7.9, relating to the widening of the scope of an objection. At the previous meeting, Ms. Escarameia had pointed out the inconsistency between allowing the widening of a reservation but not the widening of the scope of an objection to a reservation. If, as was contemplated in draft guideline 2.3.5, a widened reservation was treated in the same category as a late reservation, it took effect as a reservation only if no other contracting party objected. He was thus not certain whether there was an exact parallel between widening the scope of a reservation and widening the scope of an objection, if only because there was no such thing as an objection to an objection. The broader argument put forward by the Special Rapporteur in paragraph 178 of the report was that if the scope of objections could be widened, the treaty relations with the reserving State could constantly be changed by the objecting State if it continually engaged in such widening. Ms. Escarameia had rightly noted that there was a built-in restraint, namely the 12-month time period for making objections. An objecting State should be allowed to widen the scope of its objection during that period. For example, it might have been convinced by objections by other States that its own objection was too narrow. There was therefore no reason why a State should not be able to modify its position, provided that it did so within the 12-month period. Perhaps that point should be made explicit in draft guideline 2.7.9.

12. He suggested the inclusion of a recommendation that reasons should be given for withdrawal of an objection. Some members might find it odd that he should formulate such a recommendation on withdrawal of an objection when he had been reluctant to call for an explanation of reasons for reservations, but he had been impressed by the arguments put forward at the meeting with human rights treaty body experts, at which it had been explained that encouraging States to give reasons for their reservations would promote the “reservations dialogue”. He could understand why it might not be necessary to provide reasons for the withdrawal of a reservation, because the specific intent there was to end the reservations dialogue, but withdrawal of an objection was different because the treaty relations, including the reservation, continued to exist, and the reservation still had to be dealt with in the context of the treaty as a whole. Giving reasons for the withdrawal of an objection might help the treaty body understand why the reservation was now viewed in a different light, and that might facilitate the dialogue between the treaty body and the reserving State. Moreover, if the treaty body had to make a determination of the validity of a reservation, knowing the reasons for the withdrawal of the objection could only be helpful. He therefore suggested that the Special Rapporteur should add a draft guideline recommending that reasons should be given for the withdrawal of an objection. With that addition, he agreed with those who had suggested that the draft guidelines should be referred to the Drafting Committee.

13. Mr. YAMADA said that he did not have any problems with draft guidelines 2.7.1 (Withdrawal of objections to reservations), 2.7.2 (Form of withdrawal of objections to reservations) or 2.7.3 (Formulation and communication of the withdrawal of objections to reservations). With regard to draft guideline 2.7.4 (Effect of withdrawal of an objection), he had difficulty grasping the manifold and complex nature of the withdrawal of an objection but agreed with the Special Rapporteur’s conclusion, which was reflected in the text of the draft guideline. Draft guidelines 2.7.5 (Effective date of withdrawal of an objection) and 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation) did not present any problems.

14. As to draft guidelines 2.7.7 and 2.7.8, which related to the legal effects of the partial withdrawal of an objection, he said that it was premature to discuss the legal effects of reservations and objections to those reservations before the Special Rapporteur had presented his report on the question. The Commission had not dealt with the legal effects of an objection except in the case of draft guideline 2.6.4 (Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation). Draft guideline 2.6.1 (Definition of objections to reservations) only defined the intention of the author of an objection, while draft guideline 2.6.4 specified the legal effects of an objection when the author of an objection opposed the entry into force of the treaty—the sole case, in his view, where an objection had legal effects. It was, of course, dangerous to simplify that complex matter. However, if a reservation sought to exclude the legal effect of certain provisions of a treaty, regardless of what the objecting

State did (remain silent, accept the reservation or object to the reservation), the reservation formulated by a reserving State remained valid *vis-à-vis* an objecting State as long as the objecting State did not oppose the entry into force of the treaty between itself and the reserving State. In other words, an objection in such a case was tantamount to a policy statement; accordingly, the only case in which a partial withdrawal of a reservation had legal effect was when the objecting State sought to restore treaty relations with the reserving State. However, he was not opposed to draft guidelines 2.7.7 and 2.7.8 as drafted by the Special Rapporteur, even though there was some duplication between the second sentence of draft guideline 2.7.7 and draft guideline 2.7.8; the matter could be dealt with in the Drafting Committee.

15. With regard to draft guideline 2.7.9, he had understood that, according to the Special Rapporteur, the widening of the scope of an objection was prohibited even within the 12-month period during which an objection could be formulated. That was a rather sweeping statement, and he shared Ms. Escarameia's point of view in that regard. In paragraph 177 of the eleventh report, the Special Rapporteur cited the case in which a State had formulated an initial objection that had not precluded the entry into force of the treaty as between itself and the reserving State and had later widened the scope of its objection, thereby precluding treaty relations. If the application of draft guideline 2.7.9 was limited to that case, it would not pose any problem, but if a State wished to widen the scope of an objection without altering the treaty relations, why was it necessary to be so strict as to prohibit such a step? As he had said earlier, such an objection was a policy statement, and the Commission should be more flexible. There was also another case, that in which a signatory State formulated an objection to a reservation before formally becoming a party to the treaty and then wished to formulate an additional objection upon becoming a party to the treaty within the prescribed 12-month period.

16. He supported the referral of all the draft guidelines to the Drafting Committee, which should be asked to take into account the views expressed in plenary.

17. Mr. AL-MARRI commended the Special Rapporteur and said that his report, which dealt with the past five years of the Commission's work on the topic, covered the main problems raised by reservations to treaties. The question was a very technical one, on which the Special Rapporteur had conducted thorough research, leading him to formulate excellent proposals based on the many existing norms and customs. The eleventh report addressed several issues relating to the law of treaties, notably the question of who could decide on the validity of reservations and the question of reservations to human rights treaties. The draft guidelines that had been presented were a good starting point for legal experts, academics and students of international law. Several of the guidelines had to do with the formulation and withdrawal of reservations and had a clear basis. However, the Commission needed to consider one very important question, namely the freedom to formulate objections, because objections sometimes had no legal effect when the treaty entered into force. They could also have no effect on relations between the objecting

State and the reserving State, and there was thus no need to elaborate a draft guideline on that aspect.

18. The CHAIRPERSON invited the Special Rapporteur to summarize the debate on his eleventh report on reservations to treaties.

19. Mr. PELLET (Special Rapporteur) said that reservations were not an absolute or even a necessary evil; although they had certain disadvantages, including that of having an effect on the integrity of a treaty (and there the dialectic between integrity and universality came up again), they also had advantages, a fact which some members of the Commission seemed to overlook, in particular the advantage of allowing States which otherwise would not do so to become parties, since reservations were based on the State's consent and sometimes conditioned it. He had had the impression that Ms. Escarameia had proceeded from the fundamentally flawed principle that reservations were inherently bad, whereas he had started from the much more historical and formal premise that the procedure for objections had always been treated in the same way as the procedure for reservations.

20. Notwithstanding the firm "philosophical" stance he had taken on reservations, he was not insensitive to the criticism of draft guideline 2.7.9 voiced by Ms. Escarameia and supported by Mr. McRae and Mr. Yamada. He did in fact believe that widening the scope of an objection to a reservation could be accepted if it really took place within the 12-month period, as Mr. Caffisch had stressed, and provided that such widening did not have the effect of modifying treaty relations, Mr. Gaja and Mr. Yamada having suggested the proper course to take in that regard. That tied in with Mr. Gaja's comment that a distinction should be drawn between the case in which the reserving State formulated a reservation and the much more complex one in which it formulated several reservations. It was certainly not necessary for draft guideline 2.7.9 to enter into all those details, since the situation had never presented itself and perhaps never would. However, it would be a good idea to refer it to the Drafting Committee, which, bearing the notion of the plurality of reservations in mind, might perhaps clarify the problem of the *ratione temporis* and add at the end a phrase such as "if the effect of the objection is to modify treaty relations" or "if withdrawal does not have the effect of modifying treaty relations". On Mr. Galicki's question as to whether the draft guideline covered later or pre-emptive objections, he maintained that preemptive objections were potential objections that were subordinated to an act conditioning the entry into force of the reservation, and thus his reply was in the affirmative in the current case, whereas late objections, which did not have legal effects, were not concerned.

21. Ms. Escarameia was right to say that draft guideline 2.7.1 (Withdrawal of objections to reservations) should specify the time of withdrawal. Draft guidelines 2.7.2, 2.7.3 and 2.7.5 had not been the subject of comments or endorsed by speakers. As to draft guideline 2.7.4 (Effect of withdrawal of an objection), the title of which Ms. Escarameia considered too broad and proposed to reword to read "Acceptance of reservation by the withdrawal of an objection", it would probably be preferable to leave the matter to the Drafting Committee, which should also reintroduce the

words “international organizations”, wrongly omitted in draft guidelines 2.7.4 and 2.7.6, as Mr. Galicki had pointed out. Mr. Yamada had asked why draft guideline 2.7.4, whose wording he had not criticized, was so complex, and he had answered his own question by commenting on draft guideline 2.7.7: those draft guidelines were complex because they dealt with complex questions. That said, he had been imprudent to say that a simple objection was merely a policy statement. Although Mr. Al-Marri seemed to be in agreement, he himself was hesitant and could not subscribe to that idea at present. He had tried to elaborate the draft guidelines, and draft guidelines 2.7.7 and 2.7.8 in particular, which Mr. Yamada had commented on at length, so as not to prejudice the question. On the other hand, Mr. Petrič and Mr. Yamada, supported by Mr. Cafilisch, had probably been right to say that the second sentence of draft guideline 2.7.7 should be moved to draft guideline 2.7.8, in connection with which Ms. Escarameia had argued that objections should be encouraged and reservations discouraged.

22. He noted, however, that all members of the Commission were in favour of referring the draft guidelines to the Drafting Committee, on the understanding that draft guideline 2.7.9 was most in need of recasting, bearing in mind the issue of the 12-month period. He welcomed the dialogue that had taken place and stressed that the topic was indeed complex because it had given rise to a protracted debate on purely procedural problems. Once it had completed its considerations of problems of formulation and procedure, the Commission would be able to resume its elaboration of the third part of the Guide to Practice, in particular questions of validity, the effects of possible invalidity and the effects of reservations and objections.

23. Mr. PETRIČ said that he firmly supported Mr. McRae’s proposal and thought that something should be added about explaining the reasons for objections. The discussion which the Commission had had with human rights experts had highlighted the full significance of the question, and he had been persuaded by the experts’ approach to reservations.

24. The CHAIRPERSON, noting that the Special Rapporteur and several other members had recommended that draft guidelines 2.7.1 to 2.7.9 should be referred to the Drafting Committee, said that if he heard no objection, he would take it that the Commission agreed to that proposal.

It was so decided.

Organization of the work of the session (continued)

[Agenda item 1]

25. In conformity with the wish expressed by Mr. Yamada, Special Rapporteur on shared natural resources, the CHAIRPERSON proposed that a working group on the topic should be reconvened, to be chaired by Mr. Candiotti. He took it that the Commission approved that proposal.

It was so decided.

The meeting rose at 11.10 a.m.

2921st MEETING

Friday, 18 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comisário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Shared natural resources¹⁰⁵ (A/CN.4/577 and Add.1–2, sect. A, A/CN.4/580,¹⁰⁶ A/CN.4/L.717¹⁰⁷)

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited Mr. Yamada, Special Rapporteur on shared natural resources, to introduce his fourth report on the topic (A/CN.4/580).

2. Mr. YAMADA (Special Rapporteur) said that the topic of shared natural resources, which had been included in the programme of work of the Commission since 2002,¹⁰⁸ was generally perceived to cover three kinds of natural resources: groundwaters, oil and natural gas. The Commission had decided to take a step-by-step approach and to focus first on groundwaters.¹⁰⁹ At the previous session, it had adopted on first reading a set of 19 draft articles on the law of transboundary aquifers, which it had transmitted to the United Nations General Assembly together with the commentaries thereto. The text of the draft articles and the commentaries were reproduced in Chapter VI of the report of the Commission on the work of its fifty-eighth session.¹¹⁰

3. In the discussions held in the Sixth Committee of the General Assembly at its sixty-first session in 2006, the delegations had welcomed the timely adoption of the draft articles on first reading and had expressed generally favourable responses to them. Those responses were reflected in section A of the topical summary of the discussion in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat (A/CN.4/577 and Add.1–2). He was expecting to receive Governments’ written comments and observations on the draft articles by 1 January 2008, as requested by the

¹⁰⁵ For the text of the draft articles on the law of transboundary aquifers adopted on first reading by the Commission and the commentaries thereto, see *Yearbook ... 2006*, vol. II (Part Two), chap. VI, sect. C, pp. 91 *et seq.*, paras. 75–76.

¹⁰⁶ Reproduced in *Yearbook ... 2007*, vol. II (Part One).

¹⁰⁷ Mimeographed, available on the Commission’s website. See also below the summary record of the 2947th meeting, paras. 114–117.

¹⁰⁸ *Yearbook ... 2002*, vol. II (Part Two), p. 100, paras. 518–519.

¹⁰⁹ *Ibid.*, p. 101, para. 520.

¹¹⁰ *Yearbook ... 2006*, vol. II (Part Two), chap. VI, sect. C, pp. 91 *et seq.*, paras. 75–76.

Commission.¹¹¹ Accordingly, the Commission should defer consideration of the draft articles on second reading until its sixtieth session in 2008, by which time those comments and observations would have been submitted.

4. UNESCO, which had rendered valuable assistance to the Commission for the past five years as the United Nations coordinating agency on the global water issue, was holding regional seminars in association with a number of regional organizations to brief Governments on the draft articles adopted on first reading, in order to assist them in formulating their comments. The first such seminar, for European Governments, was scheduled to take place in Paris at the end of May 2007. UNESCO also planned to hold a seminar in Canada for North American Governments and another in Argentina for Latin American and Caribbean Governments, both in the summer of 2007.

5. There was, however, one aspect of the topic that the Commission must address at the present session, namely the relationship between the work on transboundary aquifers and possible future work on oil and natural gas. The first time the Commission had dealt with shared natural resources had been when it had formulated draft articles on the law of the non-navigational uses of international watercourses,¹¹² which had eventually resulted in the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter the “1997 Watercourses Convention”). Article 2 of the Convention defined “watercourse” as “a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus”. Thus, the 1997 Watercourses Convention covered international surface waters, i.e. rivers and lakes, and only such groundwaters as were hydraulically linked to international surface waters. The last Special Rapporteur for the topic, the late Robert Rosenstock, had wanted to have the Convention also cover transboundary groundwaters that were not linked to surface waters, and he had called such groundwaters “confined groundwaters”.¹¹³ However, most members of the Commission had felt that confined groundwaters were more akin to oil and gas and that separate studies were required for them. Ultimately, the Commission had adopted a resolution recommending that the General Assembly should apply the draft articles *mutatis mutandis* to confined groundwaters, and that studies should be initiated on the subject of confined groundwaters.¹¹⁴ The new topic of shared natural resources in the Commission’s programme of work was thus the follow-up to the Commission’s recommendation and had been adopted on the basis of the syllabus prepared by Robert Rosenstock, in which he had proposed that studies on confined groundwaters, oil and natural gas should be undertaken.¹¹⁵ A formal decision on the final scope of the topic had not yet been taken.

¹¹¹ *Ibid.*, p. 91, para. 73.

¹¹² *Yearbook ... 1994*, vol. II (Part Two), p. 89, para. 222.

¹¹³ *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/451 (first report), para. 11. See also *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/462 (second report), pp. 113–115, paras. 1–11, and annex, pp. 123–128.

¹¹⁴ *Yearbook ... 1994*, vol. II (Part Two), p. 135 (resolution on confined transboundary groundwater).

¹¹⁵ *Yearbook ... 2000*, vol. II (Part Two), Annex, pp. 147–148.

6. The matter had often been raised during the consideration on first reading of the draft articles on the law of transboundary aquifers, because the proposed measures relating to aquifers might have implications for future work on oil and natural gas while, conversely, existing State practice and norms relating to oil and natural gas might have implications for the current work on transboundary aquifers. At the previous session, he had been instructed to present a report on the question at the present session; delegations had also commented on the issue during the debate in the Sixth Committee (A/CN.4/577 and Add.1–2, para. 24). The majority of the delegations that had commented had taken the view that the Commission should proceed with a consideration of the draft articles on the law of transboundary aquifers on second reading, independently of any work it might undertake on oil and natural gas.

7. His fourth report was rather brief and was intended only to assist members in taking a decision on that issue. Chapter I of the report described the origin, formation and exploitation of oil and natural gas (paras. 6–12). It also dealt with the similarities and dissimilarities between aquifers on the one hand and oil and natural gas on the other, not only with regard to their scientific and technical features, but also with regard to political, economic and environmental considerations (paras. 13–15). To summarize, there was a close similarity between the physical features of a non-recharging aquifer and those of the reservoir rock of oil and natural gas. The similarities between groundwaters on the one hand and oil and natural gas on the other ended there; in all other respects they were different.

8. It would perhaps suffice to highlight some particularly important characteristics of groundwaters. Fresh water was a life-supporting resource vital for human life and for which no alternative resource existed. It was vital to human hygiene and indispensable for food production, and it was the essential component of natural ecosystems and of organic life on the planet. For those reasons alone, the management policy for groundwaters must be completely different from that for oil and natural gas.

9. He also wished to emphasize the risk of a future global water crisis. Hundreds of millions of people, in particular in the developing world, might suffer from a shortage of clean and healthy fresh water. It was the Commission’s urgent task to formulate a legal framework for international cooperation on reasonable and equitable management of water resources and thereby avert international disputes over water.

10. In his view, the Commission should proceed with consideration of the draft articles on the law of transboundary aquifers on second reading at its sixtieth session and should endeavour to complete that second reading as expeditiously as possible, independently from any possible future work on oil and natural gas. He looked forward to hearing members’ views on that approach at the next few plenary meetings.

11. He was pleased that the Commission had approved his request to re-establish the Working Group on shared

natural resources, to be chaired by Mr. Candiotti. His proposal for the Working Group was for it to begin by formulating a recommendation on the future programme of work on groundwaters, oil and natural gas, taking into account the views expressed in the plenary meetings; he then hoped to receive members' input for the preparation of his fifth report, which he would submit early in 2008. He planned to propose the complete set of draft articles for consideration on second reading. It would be very useful if members, and in particular new members, could express their views on the draft articles adopted on first reading and make suggestions for improvements. He would also like to hear whether they thought that the final product should take the form of a convention or of guidelines, as that would clearly affect the drafting.

12. He would hold an informal meeting, immediately following the end of the plenary, to brief the new members on the background to the draft articles on the law of transboundary aquifers adopted on first reading.

13. Mr. CANDIOTTI (Chairperson of the Working Group on shared natural resources) announced that the Working Group was currently composed of Mr. Brownlie, Mr. Comissário Afonso, Ms. Escarameia, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Ms. Xue and himself, together with Mr. Yamada (Special Rapporteur).

The meeting rose at 10.30 a.m.

2922nd MEETING

Tuesday, 22 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

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

[Agenda item 1]

1. The CHAIRPERSON informed the members of the Commission that the Special Rapporteur on the expulsion of aliens, Mr. Kamto, had been delayed and would not be able to introduce his report as planned. Consideration of the item would thus be postponed until a later meeting.

2. Before adjourning the meeting, he wished to inform the Commission that in keeping with tradition, he had extended an invitation to the current President of the International Court of Justice, Judge Rosalyn Higgins, to visit the Commission to hold a discussion with the members. Judge Higgins had accepted the invitation and had suggested 10 July 2007 as the date for her visit; the Commission would therefore receive her on that day.

3. It had been brought to the attention of the Bureau that in the past several years successive Presidents of the International Tribunal for the Law of the Sea had expressed an interest in being invited to the Commission for an exchange of views. That interest had been informally reiterated in connection with the current session. The Bureau had discussed the matter and had decided to invite the current President of the Tribunal, Judge Rüdiger Wolfrum, during the second part of the session on the clear understanding that the invitation did not create a precedent and would not necessarily be renewed on an annual basis, something which would be made clear to Judge Wolfrum when he came to the Commission. He had thus extended an invitation to Judge Wolfrum, and the Commission would be informed of the latter's response.

4. Lastly, he said that, at the request of the General Assembly, the Secretariat had prepared a compilation of decisions of international courts, tribunals and other bodies in which reference had been made to the draft articles on responsibility of States for internationally wrongful acts, a topic which the Commission had completed in 2001.¹¹⁶ As some members of the Commission had expressed an interest in receiving that document, the Secretariat had issued the compilation as documents A/62/62 and Add.1; comments and observations by Governments on the subject had been issued as document A/62/63 and Add.1.¹¹⁷

The meeting rose at 10.10 a.m.

2923rd MEETING

Wednesday, 23 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

¹¹⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

¹¹⁷ Mimeographed, available at www.un.org.

* Resumed from the 2920th meeting.

Expulsion of aliens¹¹⁸ (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581¹¹⁹)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. KAMTO (Special Rapporteur), introducing his second report on the expulsion of aliens,¹²⁰ drew attention to a number of editorial corrections to be made to the French text.

2. He reminded members that in his preliminary report¹²¹ he had outlined his understanding of the subject. During its consideration of that report, the Commission had endorsed most of his choices and, broadly speaking, the draft work plan annexed to the report. During the consideration by the Sixth Committee of the Commission's report on the work of its fifty-seventh session, representatives of several States had emphasized the importance, interest and topicality of the subject, but also its complexity and difficulty.¹²² On the whole, there had been clear support for the general approach he had proposed. The varied and, at times, contradictory suggestions made on the content and especially the scope of the topic were set out in paragraphs 12 and 13 of his second report. The questions and doubts that had been raised would be answered in the second and subsequent reports.

3. It could safely be asserted that the topic indisputably lent itself to codification, for a number of reasons. Rules of customary law existed on the matter, together with a large corpus of treaties, extensive State practice, legal writings dating back to the nineteenth century, and international and, in particular, regional jurisprudence that, while relatively recent, was nevertheless well established. The subject was without question of topical relevance, and the dramatic and often chaotic upsurge in the phenomena of refugees and illegal immigration lent some urgency to it. The question of expulsion of aliens was further complicated by the complex problem of combating terrorism. States seemed at a loss to cope and had a tendency to give scant consideration to the rights of individuals scheduled for expulsion. The recent practice of a number of States, especially member States of the European Union, included the implementation of policies on the compulsory return of aliens, and even the organization of Community charter flights or "pooled flights" and

the conclusion of "readmission agreements" and "transit agreements" with certain countries said to be the source of illegal immigration. Clearly, the expulsion of aliens, as the concept was envisaged in the second report, was becoming a major issue in contemporary international relations.

4. Although the General Assembly had addressed the question of international migration in general terms,¹²³ the report of the Global Commission on International Migration established to address the phenomenon did not even touch on the problem of expulsion of aliens, instead noting the extent of migration and its significance for the economies of developing countries and recommending some solutions.¹²⁴ The conclusions of the Euro-African Ministerial Conference on Migration and Development held in Rabat on 10 and 11 July 2006 adopted a similar approach.¹²⁵ Hence, for the time being at least, the Commission was competing with no other international body in addressing the topic.

5. The preliminary report of the Special Rapporteur had concentrated on presenting methodological issues with a view to seeking guidance from the Commission as to how the topic could be discussed in the most suitable and comprehensive manner. He believed that this objective had been attained. While the preliminary report had sketched out the broad outlines of the topic, the second report, by way of embarking on a study of the general rules on expulsion of aliens, would seek to determine the scope of the topic more precisely, and also to propose definitions of its constituent elements.

6. First, as to the scope of the topic, he had tried to narrow it down by indicating the various categories of persons affected by expulsion, within the meaning of the term as used in paragraphs 187 to 193 of the second report. There was a consensus within the Commission and in the Sixth Committee that the topic should include persons residing in the territory of a State of which they did not have nationality, with a distinction being made between persons in a regular situation and those in an irregular situation, including those who had been residing for a long time in the expelling State; and also refugees, asylum seekers, stateless persons and migrant workers.

7. The consensus went no further, however, since some members of the Commission and representatives in the Sixth Committee were of the view that it would be difficult to include denial of admission to new illegal immigrants or those who had not yet become established in the receiving country, persons who had changed nationality following a change in the status of the territory where they were resident, particularly in the context of decolonization, or nationals of a State in armed conflict with the receiving State.

¹¹⁸ For the discussion of the Special Rapporteur's preliminary report, see *Yearbook ... 2005*, vol. II (Part Two), paras. 242–274. For the preliminary report, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554. At its fifty-eighth session, the Commission had before it the Special Rapporteur's second report (reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573) as well as a memorandum by the Secretariat on the subject (A/CN.4/565 and Corr.1, mimeographed, available on the Commission's website), that it decided to discuss at the subsequent session (*Yearbook ... 2006*, vol. II (Part Two), para. 252).

¹¹⁹ Reproduced in *Yearbook ... 2007*, vol. II (Part One).

¹²⁰ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

¹²¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554.

¹²² *Ibid.*, vol. II (Part Two). See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixtieth session, prepared by the Secretariat (A/CN.4/560), sect. E (mimeographed, available on the Commission's website, documents of the fifty-eighth session).

¹²³ See the report of the Secretary-General on international migration and development (A/60/205) of 8 August 2005.

¹²⁴ Report of the Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action*, Switzerland, SRO-Kundig, 2005.

¹²⁵ See the Rabat Plan of Action of the Euro-African Ministerial Conference on Migration and Development, 11 July 2006, available at www.unhcr.org.

8. While he agreed that non-admission should not be covered, he was not convinced that the other situations should be excluded, for the reasons provided in paragraph 41 of the second report. In his view, the topic should include expulsion of aliens residing lawfully in the territory of a State, aliens with irregular status, refugees, displaced persons, asylum seekers and asylum recipients, stateless persons, former nationals of a State, persons who had become aliens through loss of nationality following the emergence of a new State, nationals of a State engaged in armed conflict with the receiving State, and migrant workers. The third report, on the other hand, would address the expulsion of nationals, an act that was, in principle at least, prohibited. Falling outside the scope of the topic were several categories of aliens, listed in paragraph 46 of the second report, the conditions and procedures for whose expulsion were governed by special rules.

9. On the basis of those considerations, he had proposed a draft article 1 entitled “Scope”, which was set out in paragraph 122 of the second report and read:

“(1) The present draft articles shall apply to any person who is present in a State of which he or she is not a national (*ressortissant*).

“(2) They shall apply, in particular, to aliens who are present in the host country, lawfully or with irregular status, to refugees, asylum seekers, stateless persons, migrant workers, nationals (*ressortissants*) of an enemy State and nationals (*ressortissants*) of the expelling State who have lost their nationality or been deprived of it.”

10. As for the definition of key terms, great care must be taken when determining their exact content, since their meanings differed in ordinary and legal usage, the latter itself varying depending whether the terms were construed in a restrictive or a broad sense and whether expulsion was seen exclusively as a legal event or as also including the behaviour of States. For example, instead of defining the concept of alien on the basis of the link of nationality, through a distinction between a “national” (*national*) and a “non-national” (*non-national*), he had chosen to construe the concept from the standpoint of *ressortissant* and *non-ressortissant*, the two French terms “*national*” and “*ressortissant*” both being translated into English as “national”. The term “*ressortissant*”, when compared with others such as “national”, “citizen” and “subject”, seemed to be the broadest, and its opposite, “*non-ressortissant*”, seemed best suited to designate the entire range of aliens covered under the topic.

11. However, the term “*ressortissant*” could itself be used in several different senses. The plentiful case law of the PCIJ and, subsequently, of the ICJ gave it a restrictive interpretation, in which it had the same meaning as the word “*national*” and meant “possessing the nationality of”. Such was the conclusion that could be drawn from the *LaGrand* and *Avena* cases, to cite two recent examples.

12. The term “*ressortissant*” could also be very broad in meaning, especially when used in conjunction with the adjective “enemy”. According to the *Dictionnaire de droit international public*, edited by Jean Salmon, the term “*ressortissant ennemi*” [enemy alien] denotes a natural or

legal person believed by a belligerent to be subject by law to the authority of an enemy Power, based on criteria used to determine that connection which may vary in domestic law from one State to another.¹²⁶ Those criteria could be based on totally disparate elements, as in the *Nottebohm* case, namely “nationality, residence, personal or business associations as evidence of loyalty or inclusion in the Black List”.¹²⁷

13. In between the very narrow and broad senses of the term “*ressortissant*”, there was an intermediate meaning, broader than the term “*national*” yet also more precise. According to that definition, the term “*ressortissant*” applied not only to nationals but also to persons who were subject to the authority of a given State as the result of a particular legal connection, for example the status of refugee or asylum seeker, the legal relationship resulting from a situation of statelessness, or even a relationship of subordination, such as that created by a mandate or protectorate. That conception was set out in a note dated 12 January 1935 by the French Ministry of Foreign Affairs, cited in paragraph 148 of the report. However, the precise sense in which the term was to be used in the context of the topic was conveyed in the award rendered by the French–German Mixed Arbitral Tribunal on 30 December 1927 in the *Falla-Nataf and brothers v. Germany* case: the full wording was to be found in paragraph 149 of the report.

14. As for the term “expulsion”, he had attempted first of all to distinguish it from certain related concepts such as “deportation”, “extradition”, “removal”, “escort to the border” (*reconduite à la frontière*), “*refoulement*”, “non-admission”, “transfer” (*transfert* or *transfèrement*), and “surrender”. He had concluded that for the purposes of the topic, the word “expulsion” covered all the other concepts, with the sole exception of “non-admission”, since they all described the same phenomenon, namely an alien compelled to leave the territory of a State. The main question was how the crucial element of compulsion leading to expulsion was exercised. In the preliminary report, he had defined expulsion solely in terms of a unilateral act. However, taking account of the discussion in the Commission during its consideration of that report and of the relevant international case law, he had now acknowledged the need to extend the concept to cover the behaviour of State authorities. Such were the lessons to be learned from the awards by the Iran–United States Claims Tribunal in *International Technical Products Corporation, et al. v. the Government of the Islamic Republic of Iran* and in the case of *Jack Rankin v. the Islamic Republic of Iran*, cited in paragraphs 190 and 191 of the report.

15. It was also noteworthy that in a case brought before the African Commission on Human and Peoples’ Rights in 2003, *Interights (on behalf of Pan African Movement and Inter Africa Group) v. Eritrea*, the complainant had alleged that in the second quarter of 1998, a period during which an international armed conflict had broken out between Eritrea and Ethiopia, “thousands of persons of Ethiopian nationality were expelled from Eritrea, either directly or constructively by the creation of conditions in

¹²⁶ Brussels, Bruylant, 2001, at p. 1001.

¹²⁷ Response of the Government of Liechtenstein, in *Pleadings, Oral Arguments, Documents, Comprising Texts, Maps and Charts*, vol. I, p. 411, para. 99.

which they had no choice other than to leave” [see paragraph 2 of the decision]. Unfortunately, the African Commission on Human and Peoples’ Rights had not rendered a decision in that case, but the awards by the Iran–United States Claims Tribunal were unequivocal precedents.

16. Lastly, it had seemed to him that since the expulsion of an alien could be viewed solely in relation to the territory of the expelling State, and since the crossing of the territorial frontier of that State was necessarily involved, those two concepts needed to be defined in the context of the topic under consideration. He had accordingly proposed definitions, not only of “alien”, “expulsion” and “*ressortissant*”, but also of “frontier” and “territory”.

17. A draft article on those definitions figured in paragraph 194 of the report, and read:

“For the purposes of the draft articles:

“(1) The expulsion of an alien means the act or conduct by which an expelling State compels a *ressortissant* of another State to leave its territory.

“(2) (a) An alien means a *ressortissant* of a State other than the territorial or expelling State;

“(b) Expulsion means an act or conduct by which the expelling State compels an alien to leave its territory;

“(c) Frontier means the zone at the limits of the territory of an expelling State in which the alien no longer enjoys resident status and beyond which the national expulsion procedure is completed;

“(d) *Ressortissant* means any person who, by any legal bond including nationality, comes under [the jurisdiction] [the personal jurisdiction] of a State;

“(e) Territory means the domain in which the State exercises all the powers deriving from its sovereignty.”

18. He also wished to propose an alternative to the definition of “*ressortissant*” in paragraph (2) (d) of draft article 2. Unlike the current definition, which deemed nationality to be merely one of a number of legal links that determined who was a *ressortissant* of a State, the alternative definition would make nationality the principal legal link, which might be supplemented by other links. A *ressortissant* would accordingly be taken to mean “any person who has the nationality of a State or who, by any other legal bond, comes under [the personal jurisdiction] [the jurisdiction] of a State”. That question of wording was perhaps a matter for the Drafting Committee to resolve if, as he hoped, the draft articles were referred to it for consideration.

19. Ms. ESCARAMEIA said that the Special Rapporteur had produced a well-researched, up-to-date, comprehensive and clear report. The topic posed two main problems. First, as expulsion of aliens was not covered as a separate chapter in the classic textbooks on international law, the Special Rapporteur had had to do a great deal

of research to furnish material for the report. The focus was on results that actually affected people, rather than on some broad conceptual framework. Second, the use of terminology was quite difficult because the reality being described was constantly and rapidly evolving. Moreover, it depended to a great degree on internal laws, which often used different terms to refer to the same thing, or similar terms to refer to different things.

20. With regard to the scope of the topic, the Special Rapporteur was right to insist on the need to include as many aspects of the question as possible. Having heard the Special Rapporteur’s introduction, she was pleased to note that he was now in favour of excluding denial of entrance from the topic, since it was not a case of expulsion.

21. She agreed with the Special Rapporteur that expulsion in situations of armed conflict should be included. The Commission needed to fill the lacuna that, despite the existence of practice, existed in that area. Like the Special Rapporteur, she was in favour of including the case of persons who had become aliens as a result of losing their citizenship.

22. The extremely helpful memorandum by the Secretariat on the topic¹²⁸ stressed the importance of addressing collective or mass expulsions, which differed from individual cases in that they might be more heavily influenced by political factors. She also agreed that expulsion of aliens with a special privileged status and of nationals should not form part of the topic.

23. She had questions about some of the categories to be included. With regard to the concept of aliens with irregular status (paragraphs 54–56 of the second report), she sought clarification on the difference between the illegal stay and the illegal residence of an alien, referred to in paragraph 55. She supported a broad definition of refugees (paras. 57–71), which reflected recent developments in law, especially at the regional level, and she appreciated the Special Rapporteur’s effort to distinguish asylum seekers and asylum recipients from refugees (paras. 96–99), the two cases having often been conflated.

24. The assertion, in paragraph 106 of the second report, that loss of nationality resulted from a voluntary act was not always true, as, for instance, in the cases of women required to abandon their nationality in favour of their husband’s when they married a foreigner. The Commission had debated the issue when it dealt with diplomatic protection, and both the International Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the nationality of married women dealt with the question.

25. With regard to deprivation of nationality (para. 107), she was not certain whether a person could be legally deprived of his or her nationality for failure to comply with the laws on nationality of the State of which he or she had become a national. That seemed to be a conditional conferral of nationality. She would welcome clarification from the Special Rapporteur on that question.

¹²⁸ A/CN.4/565 and Corr.1, mimeographed, available on the Commission’s website.

26. She also had problems with the reference in draft article 1, paragraph (2) (para. 122 of the second report), to aliens present in the host country “lawfully or with irregular status”; did “irregular status” mean “unlawfully”, or did it mean something else? As it stood, the phrase seemed vague; she suggested replacing it by “independently of the lawfulness of their status”, to show that the issue of lawfulness or unlawfulness was irrelevant.

27. As to the definitions, she found it surprising—albeit hardly crucial—that, in paragraph 133 of his second report, the Special Rapporteur distinguished between citizens and subjects, depending on whether the form of government was a republic or a monarchy. In her view, the point was whether an individual had rights *vis-à-vis* the political system, regardless of what that political system might be. To cite one example, the Constitution of Spain used the word “citizen”. Thus, the word “subject” was not automatically used wherever the form of government was a monarchy.

28. On the term “*ressortissant*” (paras. 136–152), the Special Rapporteur explained that it was synonymous with “national” and had repeated that assertion in his introduction. She noted, however, that the English version of draft article 1 rendered *ressortissant* as “national (*ressortissant*)”, and also that in paragraph 150 it was stated that the term was broader and was understood to mean “any person who, as the result of any legal relationship, including nationality, comes under the authority of a given State”. Such a definition would include not only refugees and migrant workers, but even private investors who concluded a bilateral investment treaty or contract with a State. Thus, the reference in the definition to a “legal relationship” with a State was too broad. She thought that the term “national” should be used instead of “*ressortissant*”.

29. When discussing the definition of expulsion, the Special Rapporteur dealt with a number of related concepts. In his consideration of extradition (paras. 159–161), he should have made it clear that a criminal procedure was always involved, and that it was based on agreements between two States, which was not necessarily the case with expulsion and the other related concepts.

30. It might also be useful to include other concepts and to distinguish them from expulsion. For instance, the Commission should perhaps reflect on the defining characteristics of the concept of rendition, now commonly used in the context of the fight against terrorism. In that connection, she drew attention to an oversight in the penultimate sentence of paragraph 175 of the English version of the second report: the reference should be to the Rome Statute of the International Criminal Court, not to the Statute of the International Court of Justice.

31. Turning to the concept of territory, which in draft article 2, paragraph (2) (e), was defined as the domain in which the State exercised all the powers deriving from its sovereignty (para. 194 of the second report), she asked whether, in the Special Rapporteur’s view, that also applied to territories under administration. As, in an era of self-determination, a State was probably no longer permitted to divest itself of such territories, she was not certain whether the exercise of sovereignty was an appropriate criterion for defining that term.

32. Nor did she understand why the Special Rapporteur defined “frontier” (draft art. 2, para. (2) (c)) in terms of the resident status of an alien. In her view, the concept of “frontier” also applied to other categories of persons who might not have the status of resident alien, such as migrant workers, refugees or asylum seekers. As for the definitions given for “expulsion of an alien” and “expulsion” (draft art. 2, paras. (1) and (2) (b)), they covered expulsion in terms of the act itself but not in terms of the consequences. For expulsion to be completed, the person must actually be expelled. Thus, reference should also be made to the enforcement and completion of the expulsion order.

33. On the definition of “alien” (draft art. 2, para. (2) (a)), she would be grateful if the Special Rapporteur could cite instances in which the territorial State was not the expelling State. In her view, it would be preferable to have a simpler definition, along the lines of: “an alien means any individual who is not a national of the State in which he or she is present”. That was the definition given by the General Assembly Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.¹²⁹ Some years previously, the Institute of International Law had come up with a definition the gist of which was that an alien was a person who was not a national of the State where that person was present, without distinguishing between the different categories.¹³⁰ Such a simple definition would greatly simplify matters.

34. On the definition of “*ressortissant*” (draft art. 2, para. (2) (d)), she noted that the Special Rapporteur had offered an alternative definition of that term. However, a person could be under a State’s jurisdiction in respect of an act that took place on just one occasion, such as an investor or a contractor. On the difference between “jurisdiction” and “personal jurisdiction”, she asked whether, given the change just proposed by the Special Rapporteur, personal jurisdiction, like nationality, had to do with the personal status of the individual.

35. In her opinion, other concepts, such as “refugee”, “migrant worker” and “asylum seeker” would probably also have to be defined. Nonetheless, she was in favour of referring draft articles 1 and 2 to the Drafting Committee, taking into account the comments made in plenary.

36. Mr. VARGAS CARREÑO said that the Special Rapporteur’s second report was a good introduction to the topic, one that was important and of undeniable topical interest but also complex and difficult. He agreed with the predominant view in both the Commission and the Sixth Committee that the subject should be dealt with in a general, broad manner. However, caution should be exercised, because, strictly speaking, a number of issues related to the topic did not form part of it and should therefore be excluded from the process of codification and progressive development.

¹²⁹ General Assembly resolution 40/144 of 13 December 1985.

¹³⁰ See article 1 of the “Règles internationales sur l’admission et l’expulsion des étrangers proposées par l’Institut de droit international et adoptées par lui à Genève, le 9 Septembre 1892” (International regulations on the admission and expulsion of aliens proposed and adopted by the Institute of International Law at Geneva on 9 September 1892), *Annuaire de l’Institut de droit international*, 1892–1894, vol. 12 (Geneva session), Paris, Pedone, p. 218 (available only in French).

37. He agreed with the Special Rapporteur about the methods and sources to be used, but believed that in addition to looking at national legislation, the Commission should also consider national jurisprudence. Not many national laws had dealt with the subject, and of those that had, most recognized the right of the State to expel aliens. However, in some cases—as was the recent practice of Latin American countries—judicial decisions had not accepted the absolute, unconditional right of the State to expel aliens and had set a number of conditions so as to ensure that such persons were not treated in an unjust or arbitrary manner. The codification process must take account of those recent judicial decisions and the relevant rules of international law, which, admittedly, were not very numerous either. One such rule, which was embodied in article 22, paragraph 9, of the 1969 American Convention on Human Rights (“Pact of San José, Costa Rica”), was the prohibition on the collective expulsion of aliens. That provision, which had been adopted against the background of an armed conflict between El Salvador and Honduras and the collective expulsion by Honduras of Salvadoran nationals from its territory, had universal validity and might perhaps be incorporated in the draft articles under consideration.

38. Like the Special Rapporteur, he thought it necessary to bear in mind the international jurisprudence that had recently begun to emerge. The starting point for the consideration of the subject should be that it was of great importance not only for international relations, but also because of the topicality of issues such as terrorism and the problem of the illegal entry, particularly into Western Europe and the United States, of economic refugees. The United States Congress was currently considering some highly controversial legislation on immigration, and it would have been useful for it to have had rules of international law to which to refer. Thus, the Commission would be filling a significant gap in that area.

39. However, despite its importance for international relations, the topic continued by and large to be governed by internal law. In principle, just as the State had the right to admit an alien, it also had the right to expel such a person, but that should not be an absolute, arbitrary and unconditional right, and must be subject to certain criteria which it was up to the Commission to establish. In formulating those criteria, the Commission should bear in mind article 22, paragraph 6, of the American Convention on Human Rights (“Pact of San José, Costa Rica”), which provided that an alien lawfully in the territory of a State party to the Convention could be expelled from it only pursuant to a decision reached in accordance with law. Thus, a State did not have full jurisdiction arbitrarily to expel an alien.

40. He also commended the Special Rapporteur’s efforts to define the scope of the topic and to distinguish the expulsion of aliens from other cases. That approach was the correct one, and every category of alien needed to be examined separately. The case of aliens residing legally in the territory of the expelling State was different from that of aliens with irregular status, refugees, displaced persons and beneficiaries of territorial asylum (as opposed to the Latin American phenomenon of diplomatic asylum), not to mention that of stateless persons, former nationals and migrant workers, all of whom should probably not be included in the topic.

41. It was also important to define the term “expulsion” carefully and precisely and to distinguish it from other situations which, in his view, should be excluded from consideration. Subject to some qualifications, he agreed with the Special Rapporteur’s approach. Expulsion could also take the form of deportation, removal or “escort to the border” (*reconduite à la frontière*), but a number of other situations were completely extraneous to the topic and should not be included, although they might perhaps become the subject of separate codification work. Those situations included extradition, the legal basis for which did not reside solely in the domestic legislation of the State that granted extradition, but also in the law of the State requesting extradition. As Ms. Escameia had rightly noted, extradition presupposed the initiation of criminal proceedings, which was not the case with the expulsion of aliens. *Refoulement* was likewise an entirely different case from the right of a State to expel an alien. Indeed, the principle of *non-refoulement* was an achievement for human rights protection embodied in the 1951 Convention relating to the Status of Refugees and the 1969 American Convention on Human Rights. Moreover, the 1984 Cartagena Declaration on Refugees¹³¹—which, although adopted on the basis of regional problems, had universal validity—established that the principle of *non-refoulement* was a rule of *jus cogens*. Nor did he believe that transfer, regardless of whether it was in conformity with international law or, as in the case of the transfer of persons to the Guantanamo Bay detention camp, contrary thereto, should be included in the topic.

42. The second report provided an excellent starting point for the codification process upon which the Commission was embarking. The two draft articles would, however, need further discussion; it was important that the introductory articles on the topic be compatible both with other international instruments and with other rules that the Commission might go on to incorporate in the draft articles. It would therefore be appropriate to refer them to the Drafting Committee, which should, however, defer their consideration until progress had been made with the rest of the text. Draft articles 1 and 2 should, without prejudice to any future developments, reflect the substantive rules that would gradually be adopted.

43. Mr. SABOIA, after commending the second report and the Secretariat memorandum on the expulsion of aliens,¹³² which provided full information on the legal background, case law and State practice, noted that the topic had always been a source of controversy. The arbitrary expulsion of aliens was the cause of suffering, hatred among peoples and violence, and even a legal body such as the Commission should not lose sight of the manifold topical aspects of the question. The undisputed sovereign right of States to exercise control over the presence of aliens in their territory should

¹³¹ Adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, 19–22 November 1984; the text of the conclusions of the declaration appears in OEA/Ser.L/V/II.66 doc. 10, rev.1. OAS General Assembly, fifteenth regular session (1985), resolution approved by the General Commission held at its fifth session on 7 December 1985.

¹³² A/CN.4/565 and Corr.1, mimeographed, available on the Commission’s website.

be tempered by respect for the rules of international law that prohibited practices such as mass and collective expulsion, and by the recognition that all persons, including illegal aliens, were entitled to respect for their human rights and should not be subjected to humiliating treatment or arbitrary separation from their families. The rules of humanitarian law must also be strictly applied to the expulsion of aliens in situations of armed conflict. Special consideration should be given to the situation of particularly vulnerable groups, such as children, women and elderly, disabled or sick persons.

44. He welcomed the reference in paragraphs 17 to 19 of the second report to the continuing growth of the phenomenon of expulsion as a consequence of policies adopted by States in combating terrorism. Although the prevention of terrorism and the prosecution of its perpetrators must be priorities for the international community as well as for individual States, some policies had resulted in unduly generalized and arbitrary action being taken against persons—and particularly aliens—of specific ethnic, cultural or national origins or religious affiliation. States had sanctioned torture and inhuman or degrading treatment, indefinite detention and even the summary execution of innocent persons on the pretext of protecting national security. The practice of secretly transferring aliens for interrogation in other countries—so-called “extraordinary rendition”—was a serious breach of international human rights law and possibly of the law relating to the expulsion or transfer of aliens. The Special Rapporteur should examine that practice.

45. The report also described the arbitrary treatment suffered by aliens as a result of policies adopted to stem illegal migration flows. Notwithstanding the right of States to regulate and control immigration, it should be recognized that increasing flows of migrants from poor countries as a result of globalization had led to a tightening of immigration policies and practices. Countries of origin or transit had often been pressed to enter into agreements on the early return of aliens, which greatly reduced their access to protection in the form of asylum or admission as a migrant. The Special Rapporteur should, however, make an effort not to appear selective by singling out certain countries—mostly in Western Europe—as the source of policies that caused difficulties for aliens. Examples could also be found in other regions.

46. With regard to the scope of the topic, he generally endorsed the proposals made in paragraphs 36 to 41 of the second report, particularly with regard to the situation of persons who had changed nationality following a change in the status of the territory in which they were resident. Such changes of nationality were often imposed on persons who had lawfully resided in the territory concerned for a long time. He also agreed that the question of the prohibition of expulsion of nationals fell outside the scope of the topic, although a reference to the question might be made in the introduction or in the commentary.

47. With regard to the issue of refugees and asylum seekers, it was important to take into account not only the relevant principles and rules of the refugee conventions and protocols but also the decisions and recommendations of the Executive Committee of UNHCR. The language

proposed for draft article 1 would therefore appear to be adequate.

48. With regard to the chapter on definitions, he had doubts as to the usefulness of relying on old jurisprudence that distinguished between nationals and members of minorities, such as the 1935 advisory opinion concerning *Minority Schools in Albania* mentioned in paragraph 141. The test of nationality and equality before the law should reflect contemporary rules of international law that had emerged since the establishment of the United Nations, such as article 15 of the Universal Declaration of Human Rights¹³³ and articles 12 and 13 of the International Covenant on Civil and Political Rights.

49. With regard to *refoulement*, international legal instruments on refugees and decisions and principles adopted by the Executive Committee of UNHCR should be taken into account and treated as *lex specialis* in relation to persons who might be defined as refugees or asylum seekers. *Non-refoulement* was a basic principle ensuring that persons in danger of persecution or displaced persons were not deprived of essential safeguards or the minimum right to have their claim heard by the appropriate authorities, which should include representatives of UNHCR. Mass movements of people caught up in armed conflict were a cause of particular concern. The definitions of the terms “expulsion” and “refusal of admission”, and the commentary thereto, must therefore not be such as to jeopardize the principle of *non-refoulement*.

50. He endorsed the statement contained in paragraph 176 of the second report regarding the illegality of the practices of extrajudicial transfer and extraordinary rendition, from which the rule of law was totally absent.

51. The practice referred to in paragraph 185 of the second report, whereby States established so-called “international areas” in airports, where aliens were considered to be still outside the national territory, could give rise to abuse. Indeed, such areas could not be considered to be outside the jurisdiction of the State concerned, whose laws and international obligations—including the right to consular assistance—must be respected. There had been cases in which, having served their sentence, aliens were sent back not to their country of habitual residence but to the last port of transit.

52. Lastly, while he found the text of draft article 2 provisionally acceptable, he hoped that the Special Rapporteur would take account of the points he had raised in the follow-up provisions dealing with the legal circumstances delimiting States’ action in the field of expulsion of aliens.

53. The CHAIRPERSON, speaking in his capacity as a member of the Commission, said that the discussion so far had been two-dimensional, dealing only with the meaning of various terms. No headway would be made until the Commission was clear what the topic was actually *about*. The term “expulsion of aliens” conveyed little, unless accompanied by what common lawyers called “causes of action” or what the ICJ called “basis of claim”. Thus, in some cases, expulsion of aliens was accompanied by

¹³³ General Assembly resolution 217/III of 10 December 1948.

general ill-treatment or torture, or by expropriation, in which case the question of damage to the rights of the State of origin might arise and the issue of diplomatic protection become relevant. Another possibility was that such expulsion might occur quite lawfully in principle but might, for example, involve the expulsion of pregnant women from a remote frontier post in a desert region. That would obviously represent a breach of general international human rights law. If State responsibility arose as a result of an expulsion, the responsibility could arise under general international law or, frequently, under a friendship, commerce and navigation treaty, which might well contain a compromissory clause—a reference to the jurisdiction of the court—and which might therefore be more relevant than general international law. He was confident that the Special Rapporteur would deal with all such matters in due course, but there was little evidence that the Commission had confronted the difficulty yet. As it stood, the definition of scope in the second report was somewhat limited.

54. Mr. KAMTO (Special Rapporteur), responding to Mr. Brownlie's comments, said that the issues raised had been covered in the preliminary report¹³⁴ and would be dealt with systematically in future reports, as was made clear in the draft work plan annexed to that document. Thus, the Commission was not in danger of losing sight of the overall picture. For the present, members should concentrate on the two draft articles contained in the second report and, if they deemed appropriate, refer them to the Drafting Committee, which, for its part, could defer their consideration until the thrust of the other draft articles became clear.

55. Mr. HMOUD said that the scope of the topic, as currently defined, dwelt too much on the relationship between the individual and the State. He would favour a more general scope, which concentrated on the legality of a given action and the results of that action. The human rights focus of the present report made it more suitable for consideration by other international bodies. The Commission, however, should take a broader view.

56. Mr. CANDIOTI said that the draft articles represented the mere beginnings of a text, which would need fleshing out. Clearly, the scope of the draft articles could not be restricted to the experiences of individuals but must ultimately deal with the whole regime of the expulsion of aliens. Draft article 1 was a first attempt to determine the scope of a much wider subject.

57. Mr. COMISSÁRIO AFONSO, after paying tribute to the academic distinction of the Chairperson and the competence and professionalism of the Secretary to the Commission, Ms. Arsanjani, commended the second report on the expulsion of aliens, which built on the preliminary report, a document which had also been well received by the Commission and the Sixth Committee. He fully endorsed the Special Rapporteur's methodology and urged him to follow the draft work plan contained in annex I of the preliminary report, making the necessary adjustments as the work progressed. In that connection, he noted that, although detailed and exhaustive, the second report appeared to be silent on

some of the concepts contained in the work plan, such as the concept of population exodus, which was surely still relevant to the topic.

58. He accepted the Special Rapporteur's decision to reverse the order in which the scope and the definitions were considered, as indicated in paragraph 43 of the report. It did not seem of fundamental importance which was treated first. The Commission had, in the past, adopted both approaches, and both were equally justifiable.

59. The Special Rapporteur had, in his view, been too cautious in his approach to draft article 1, in paragraph (1) of which the expressions "alien" and "expulsion" that were at the core of the topic did not appear at all. The use of the word "*ressortissant*" in the first paragraph and the word "alien" in the second made the scope seem more like a definition, which would come under draft article 2. A simpler approach would be to state clearly that "the present draft articles shall apply to the expulsion of aliens". The business of defining those concepts would come under the heading "Use of terms", possibly in draft article 2.

60. Secondly, the report in general and the draft articles in particular paid little attention to the concept of the presence of an alien in the territory of a State. A clear definition of the word "presence" would seem to be important, not just because it was linked to the territory but also because it was implicit in and had some connection with the concepts described in paragraphs 154 to 177 of the report, including deportation, extradition, removal and *refoulement*. Indeed, a connection could also be found between presence and non-admission. Although the report rightly considered that non-admission did not fall within the scope of the topic, some caution and prudence were needed in the interests of a broader view. The draft articles should help to clarify the extent to which non-admission was compatible with the concepts enumerated in the report. One example might be the principle of *non-refoulement*, as applied to refugees, whose situation came under the scope of draft article 1, paragraph (2). Granted, the right to admit or not to admit an alien into its territory—like the right to expel or not to expel—was inherent to the sovereignty of a State. There should, however, be restrictions to both. In the case of a person seeking refuge, non-admission by a State would be tantamount to a breach of the principle of *non-refoulement* if there was a well-founded threat to the life or freedom of that person. *Non-refoulement* could, after all, apply even before refugee status had been granted. A closer look at the issue might well be warranted.

61. There was also a more practical dimension to the issue; recent events had borne out the findings of the Secretariat memorandum¹³⁵ that States were increasingly resorting to the practice of intercepting illegal aliens who were attempting to reach their shores by sea. At the same time, the developments in the field of irregular immigration and expulsion, which the Special Rapporteur had outlined so well in paragraph 20 *et seq.* of his second report, testified to the need to pay greater attention to the concept of non-admission.

¹³⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554.

¹³⁵ A/CN.4/565 and Corr.1, mimeographed, available on the Commission's website.

62. Although the report had demonstrated that the expulsion of aliens was indeed an act, or conduct, which could be attributed to a State, “conduct” appeared to be too general and too broad a term to form a constitutive element of the definition of expulsion, and should be regarded as the exception rather than the rule. Basically expulsion should be defined as an act, in other words a concrete measure taken by the expelling State and effected on the basis of law or of administrative procedures. State responsibility might be a better context in which to deal with conduct by a State which compelled an alien to leave its territory.

63. He was in favour of referring the draft articles to the Drafting Committee with the recommendation that the definitions should follow as closely as possible those already adopted in various international legal instruments.

64. Mr. PELLET said that, although he had always maintained that the expulsion of aliens was not an appropriate subject for the Commission, the Special Rapporteur’s excellent preliminary report, which had set the scene, and his clear second report which had, in accordance with good practice, begun with the formulation of definitions, had almost persuaded him to the contrary.

65. The basic reason why, in his view, the topic did not lend itself to progressive development or codification was that the Commission would be required to steer a course between two almost unavoidable pitfalls. The first was that of being over-academic: despite the very substantial human dimension and emotionally charged nature of the subject matter, there was a danger that it might be treated too blandly, in order to avoid arousing opposition. The second was that an excessively militant pro-human rights stance might lead the Commission to adopt well-intentioned draft articles which would be unacceptable to States and therefore completely unrealistic.

66. It was very difficult to strike the right balance because there was no legal reason for choosing between the two alternatives of a bland and sanitized codification exercise and political and moral advances which would quickly be consigned to the graveyard of good intentions. Progress could be achieved on the subject only by making political choices, which was not the Commission’s remit. In fact the subject called for negotiation among Governments rather than codification by experts possessing no political legitimacy. The wise opinion reflected in footnote 55 of the second report therefore continued to hold good.

67. For the record, he had been disappointed that the subject had been included rather hastily in the Commission’s programme of work,¹³⁶ while a much more attractive and useful topic proposed by the Special Rapporteur, that of international protection of persons in critical situations, seemed to have been consigned to oblivion.

68. Despite those grumbles, he commended the Special Rapporteur’s presentation of two clear, sound and, on the whole, convincing reports. As to the question raised in paragraph 30 of the preliminary report, namely, how to

deal with existing treaty rules on the issue, the Commission should not confine itself to attempting to bridge legal gaps in existing treaty rules or to take those rules up again in the draft articles, but should study the existing rules on the subject, compare them and endeavour to identify general rules, while retaining treaty rules as *lex specialis*.

69. The Special Rapporteur’s disquisition on refugees and stateless persons, in paragraphs 57 to 71 and 100 to 104, respectively, of his second report had provided some useful insights and, like Ms. Escameia, he had particularly appreciated the elucidation of the difference between asylum and refugee status. Nevertheless he still wondered how the Special Rapporteur intended to deal with the question of stateless persons in his study and in future draft articles. Notwithstanding the express reference to them in draft article 1, paragraph (2), it would seem from the definition contained in draft article 2, paragraph (2) (d), that the Special Rapporteur deemed refugees to be *ressortissants* of their countries of residence. While in any case they would certainly not lose the nationality of the country from which they had fled, it seemed difficult to contend that refugees had no personal legal bond with their former country even if, simultaneously, they had a link with the receiving country which was not solely territorial. He therefore concluded that the Special Rapporteur’s obsession with the term “*ressortissant*” merely created additional complications and did nothing to resolve the problem. Hence he agreed with several previous speakers, who had doubtless read the report in English or Spanish, that the differentiation between “*ressortissant*” and “national” should be abandoned in favour of the much simpler distinction between the nationality or non-nationality of the person expelled.

70. A further reason why the question of the expulsion of stateless persons and refugees should not be included as such in the study was that both categories of persons had a very special status which was clearly and fully determined by positive international law, one with which it would be unwise to meddle. Moreover, the inclusion of stateless persons and refugees in the draft articles would lead the Commission to repeating what was already laid down in existing treaties or, worse, to amending their provisions, something which it had not been asked to do.

71. On similar grounds, he would be less categorical than the Special Rapporteur had been in paragraph 41 of his second report about including the expulsion of aliens in situations of armed conflict within the scope of the topic. In that connection, he dissociated himself from the comments made by some speakers. Humanitarian law, whose well-established rules governed the law of armed conflict, covered expulsion in those circumstances. While the separation between the law of war and the law in time of peace was less marked than it had been in the past, he feared that, if the Commission embarked on the question of expulsion during wartime occupation, it would confuse the two issues and depart too far from a reasonable conception of the topic. On that point he disagreed with Ms. Escameia.

72. Ethnic cleansing was, however, a different matter. It was regrettable that the term appeared solely in paragraph 114 and that the Special Rapporteur’s interest in

¹³⁶ *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.

the notion and in its relationship with the subject had been confined to a few sparse allusions, for example in paragraph 156. In his own opinion, ethnic cleansing fell within the scope of the topic only when the persons who had been the victims of such cleansing were aliens, which had certainly not been the case in the principal instances of ethnic cleansing in recent years in Europe, namely in Bosnia and Herzegovina. Leaving aside his own hesitations, he considered that the Commission should certainly discuss whether to include ethnic cleansing under the heading of expulsion of aliens.

73. His foregoing remarks did not detract in any way from his generally favourable opinion of the second report and he therefore saw no reason why draft articles 1 and 2 should not be referred to the Drafting Committee. They did, however, require substantial recasting and to that end he would go on to suggest some amendments.

74. Like Mr. Comissário Afonso, he thought that the first paragraph of draft article 1 on scope encroached too far on the definitions contained in draft article 2. Moreover the two draft articles did not appear to be entirely consistent with one another. In draft article 1, the second half of paragraph (2) should be moved to paragraph (1) and paragraph (2) should be worded to read: “The present draft articles shall apply to aliens who are present in the host State/territorial State, lawfully or with irregular status”. Nevertheless, he was dubious about the expression “host State” since expulsion was hardly a hospitable action, and, for that reason, “territorial State”, “State of residence” or “State in which they are present” might be more suitable terms.

75. Secondly, paragraph (1) of draft article 1 must state whether or not the draft articles applied in the event of an armed conflict. It might be prudent to exclude such a possibility and to concentrate on the law in time of peace, but either way it was necessary to explain which option had been chosen.

76. Thirdly, it must be clearly indicated that the draft articles concerned only natural persons. Perhaps that was axiomatic and it would be sufficient to include an unambiguous statement to that effect in the commentary. Fourthly, he was not opposed to attempting to list in a second paragraph of draft article 1 individual categories to which the draft articles would apply, provided that it was made clear that the list was not exhaustive, as had been done through the inclusion of the phrase “in particular”. He was, however, of the opinion that refugees and stateless persons should be expressly excluded by wording to that effect which could form a third paragraph.

77. As for draft article 2, despite the Special Rapporteur’s lengthy explanations, he was still convinced that there was nothing to be gained by preferring the term “*ressortissant*” to “national”, since it would give rise to confusion and complicate the Commission’s deliberations, without offering any countervailing advantages. As the Special Rapporteur had demonstrated, the two words were very often interchangeable, and even in French the distinction between them was far from self-evident. Furthermore, not only did he fail to see any justification for the Special Rapporteur’s *cri du coeur* at the beginning

of paragraph 129 that “[i]n any case, we will refrain in the context of the present topic from defining ‘alien’ by invoking the criterion of nationality” but, what was more, that assertion could lead the Commission onto dangerous ground. It would be much simpler to state that, for the purposes of the draft articles, an alien was understood to mean a natural person who did not have the nationality of the expelling State, or of the State in which he was present, or of the State of residence. He really could not fathom the underlying reasons for the much more complicated solution proposed by the Special Rapporteur.

78. He also had reservations about the definition of “*ressortissant*” in paragraph (2) (d) of draft article 2. First, the formulation in French was rather dated. According to paragraph 149 of the second report, it had been taken from the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), or from an arbitral award of 1927 (*Falla-Nataf and brothers v. Germany*), but such terminology was no longer used in French at the beginning of the twenty-first century. The phrasing “*par quelque lien juridique ... relève de la compétence*” (“by any legal bond ... comes under the jurisdiction”) was old-fashioned and somewhat precious. Obviously, if that had been his only complaint, the Drafting Committee could easily have found a remedy, but he had a more radical suggestion—simply not to employ the word “*ressortissant*”, which served no useful purpose in the context of the topic, thus obviating the need for a definition of the term in the draft articles. An alien was certainly a non-national and the wording proposed by Ms. Escarameia seemed entirely apt, especially as the wording in square brackets put forward by the Special Rapporteur in paragraph 194 was evidence of his difficulties and neither of the notions he had suggested—“*jurisdiction*” or “*compétence personnelle*” (“jurisdiction” or “personal jurisdiction”) was very convincing. He would personally favour deleting paragraph (2) (d) and replacing the term “*ressortissant*” in articles 1 and 2 with wording such as “a State compels a person not possessing its nationality to leave its territory” or “an alien is a person not possessing the nationality of the territorial State/expelling State/State of residence/State in which he is present”, whichever was considered to be more suitable. If the notion of residence was used, it would also be necessary to include that of presence. The decisive proof that the term “*ressortissant*” was inappropriate and that “national” must be used instead was that the French word had been retained in italics in the English version of the report, because it had proved impossible to find any equivalent term in English. Hence the linguistic subtlety of the French expression had been entirely lost, although even in French the precise definition of “*ressortissant*” was doubtful and the more usually accepted term was “national”. In fact, the judgments of the ICJ cited by the Special Rapporteur in his second report used the two terms interchangeably [paras. 136–152].

79. As they stood, paragraphs (1) and (2) (b) duplicated each other. It would be necessary either to draw a distinction between the two definitions by adopting a more general definition of “expulsion”, or to delete subparagraph (b). Subparagraph (a) referred to the “territorial or expelling State”, but there was no mention of “territorial State” elsewhere. The terminology must therefore be unified.

80. His comments might seem indicative of substantial disagreement but, apart from those relating to the Special Rapporteur's infatuation with the word "*ressortissant*", they were only points of detail which the Drafting Committee ought to be able to solve easily. It was to be hoped that the Drafting Committee could meet in the very near future to consider the two draft articles proposed by the Special Rapporteur. He disagreed with the proposal by Mr. Vargas Carreño to defer the Drafting Committee's consideration of the draft articles and he regretted that the Special Rapporteur was apparently resigned to such a postponement. It was the task of the Drafting Committee to refine special rapporteurs' proposals and, furthermore, rapid agreement on firmer, more rigorous definitions and on a field of study was essential, since it would be impossible to draft further articles if the Commission did not know whether it was talking about "*ressortissants*" or "nationals", whether stateless persons and refugees were to be included within the scope of the topic, or whether armed conflicts should be taken into consideration. He therefore not only supported the referral of the two draft articles to the Drafting Committee, but also hoped that the Drafting Committee would examine them the following week.

81. Mr. CANDIOTI said he shared Mr. Pellet's reservations about the use of the word "*ressortissant*" in the Special Rapporteur's otherwise magnificent report. The word "*ressortissant*" had no direct equivalent in Spanish. The expression employed in the Spanish version of the second report, namely "*natural*", was incorrect, since it referred only to a person who had been born in a given place and did not cover the much wider concept of "*ressortissant*" as it was understood in French.

82. Mr. PELLET suggested that members who spoke Arabic or Chinese should indicate how the word "*ressortissant*" had been translated. If the concept existed only in French, that would be a decisive argument in favour of abandoning the term.

83. Mr. HMOUD said that the term "*ra`aya*" used in the Arabic version of the report was almost synonymous with "national", but *stricto sensu* meant persons who were protected by the State. It was an old notion dating back to the time when States which had dominions also extended their protection to the subjects of the occupied States.

84. Mr. KEMICHA confirmed that Arabic, unlike Spanish or English, had a term, namely "*ra`aya*", which was exactly synonymous with "*ressortissant*".

The meeting rose at 12.55 p.m.

2924th MEETING

Thursday, 24 May 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comisário Afonso, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto,

Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

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

[Agenda item 1]

1. The CHAIRPERSON welcomed Mr. Michel, Under-Secretary-General for Legal Affairs, Legal Counsel. He expressed the Commission's appreciation to the Codification Division for the assistance it provided to the Commission in its work and welcomed the frank dialogue which the Commission maintained with the Legal Counsel.

The meeting was suspended at 10.05 a.m. and resumed at 12.10 p.m.

Expulsion of aliens (*continued*) (A/CN.4/577 and Add.1-2, sect. E, A/CN.4/581)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. The CHAIRPERSON invited the members of the Commission to continue their consideration of the second report on the expulsion of aliens,¹³⁷ which had been introduced the previous day by the Special Rapporteur on the topic, Mr. Kamto.

3. Mr. FOMBA welcomed the second report on the expulsion of aliens, a topic which he regarded as particularly important and interesting, given that the diaspora of his own country had often been confronted with the problem. He subscribed to the line of reasoning and conclusions of the Special Rapporteur, who had rigorously analysed a number of concepts that often gave rise to differing views insofar as their legal justification and meaning were concerned.

4. With regard to the feasibility and utility of the study, Mr. Pellet had noted during the debate at the previous meeting that the topic was more a matter of negotiation than of codification. Did that mean, then, that the Commission should elaborate a practical guide to negotiation with guiding principles, guidelines or recommendations? Personally, he would prefer formal draft articles.

5. According to Mr. Hmoud, the Commission was not competent to consider the topic if it was only going to consider the link between the individual and human rights without addressing the problem of illegality. Yet that aspect was included right in the Special Rapporteur's proposed work plan. Moreover, the Commission's competence was no longer questioned.

* Resumed from the 2922nd meeting.

¹³⁷ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

6. Some members had criticized the Special Rapporteur for not directly tackling the real questions of substance, but that criticism was unwarranted because he had clearly expressed his intention of elaborating a legal regime as comprehensive as possible on the topic of the expulsion of aliens. Nor was it justified to take the Special Rapporteur to task for delving immediately into the conceptual basis of the topic—it would be illogical and impossible to claim to be elaborating the legal regime of such a topic without first trying to clarify its key terms.

7. With regard to the changes in the structure of the study to which the Special Rapporteur referred in paragraph 43 of his second report, Mr. Fomba said that he was not opposed to having definitions precede the scope, but the latter should go beyond mere *ratione personae*, as suggested by Mr. Candioti. It remained to be seen whether the list of categories of aliens concerned was adequate. Mr. Pellet had suggested excluding refugees and stateless persons from the list for reasons of *lex specialis*, which was perhaps appropriate, provided that their current legal status was clear. In the case of refugees, it would be necessary to choose between a restrictive definition, such as the one in the 1951 Convention relating to the Status of Refugees, or an extensive one, such as in the 1969 OAU Convention governing the specific aspects of refugee problems in Africa. As to how to define the legal situation of applicants for refugee status between the time of submission of the application and the time of receipt of a response, he shared the Special Rapporteur's view that the answer depended on national law and would be duly considered when the conditions for expulsion were studied.

8. The Special Rapporteur proposed initially to make no distinction between the various categories of aliens residing lawfully in a State. He himself wished to know whether that question would be addressed later (given that the length of stay could have implications for the consequences of expulsion) and, if so, to what extent it might be taken up in the definitions.

9. The question of expulsion in the event of armed conflict was governed by international humanitarian law, which was why some members had argued that it should be left out; however, an in-depth study of practice might be useful before a decision was taken on the matter. With regard to migrant workers, he agreed with the suggestion that legal instruments of relevance from the standpoint of the principle of prohibition of collective expulsion should be given consideration at a later time, and he endorsed the Special Rapporteur's criteria for identifying aliens whose expulsion was likely to be of relevance to the topic.

10. Turning to the two draft articles proposed by the Special Rapporteur, he said that in draft article 1 (Scope), the *ratione materiae* should be clarified before the *ratione personae*, and a new paragraph 1 should therefore be inserted in the proposed text indicating that the draft article applied to the expulsion of aliens; the two existing paragraphs would be maintained and renumbered accordingly. He also noted that in the French version, paragraph 2 referred to “*asilés*”, whereas the body of paragraph 122 spoke of “*exilés*” (in both cases rendered

as “asylum seekers” in the English version). Those terms should be standardized, or else the Special Rapporteur should explain what the difference was, assuming there was one.

11. In draft article 2 (Definitions), the problematic term was “*ressortissant*” (of another State), which Mr. Pellet had proposed replacing with “non-national”. The basis for that proposal was that “alien” was defined as the opposite of “national”, but practice showed that “national” and “*ressortissant*” were regarded as interchangeable. Moreover, the Special Rapporteur's standpoint did not necessarily contradict Mr. Pellet's, because in paragraph 148 of his report he proposed that “*ressortissant*” should apply not only to nationals but also to persons who were subject to the authority of a given State as the result of a particular legal connection, such as refugees and stateless persons. Thus, it remained to be seen whether refugees and stateless persons should be included. If they were not, the scope of the topic would be confined to “non-nationals”, and that would settle the question, but it presupposed recasting the wording of the entire draft article 2, in which case the Commission would need to give the Special Rapporteur specific instructions.

12. Some members had felt that the word “conduct” was inappropriate when defining expulsion and that it alluded to the question of responsibility. That might be the case, provided that the type of conduct contemplated actually constituted an internationally wrongful act. It had also been rightly noted that paragraph 1 and paragraph 2 (b) duplicated each other, but it might not be a bad idea to dissect the definition of expulsion, even at the risk of repetition.

13. The triple function given to “frontier” in paragraph 2 (c) was useful and interesting. He welcomed the Special Rapporteur's new version of paragraph 2 (d), although it remained subject to the decision on “*ressortissant*”.

14. In conclusion, he believed that the Commission should give the Special Rapporteur clear instructions on the scope of the key concepts to be defined, and he was in favour of referring the two draft articles to the Drafting Committee.

15. The CHAIRPERSON, speaking as a member of the Commission, reiterated the reservations that he had already expressed on the scope of the topic. The sequence in which the various aspects of the question were discussed did not sufficiently reflect the importance of one of its main aspects, namely legality and the reasons for the expulsion of aliens by States. In the work plan proposed in the preliminary report,¹³⁸ the question of the responsibility of the expelling State was addressed only in Part 3, on legal consequences of expulsion. By taking such an approach, the Special Rapporteur neglected the heart of the matter and focused chiefly on categories of aliens likely to be expelled, such as refugees or migrant workers, or on types of expulsion, such as extradition; that did not seem to be particularly useful, since those questions were already covered by international law.

¹³⁸ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554.

16. In defining the scope of the topic, it was important to bear in mind that expulsion was intrinsically linked to the duty of the State to control public order throughout its territory. That was why it would have been useful to include the question of non-admission, which, like expulsion, addressed the need of States to control the presence and movements of aliens for reasons of security. The topic raised not only the question of the human rights of expelled persons, but also that of the duty of a State to prevent the presence in its territory of aliens who might, for example, cause harm to its nationals. That should be the starting point of the study. It was unfortunate that the Special Rapporteur had addressed the topic from the standpoint of respect for human rights, thereby creating some confusion as to the legality of the expulsion of aliens, which was *a priori* perfectly lawful. In giving priority to human rights to the detriment of the rights and duties of States, the Commission was going about things in the wrong way. He reserved the right to return to the question at a later date.

17. Mr. McRAE said that, broadly speaking, he had no objection to the Special Rapporteur's approach, which recognized the sovereign right of States to expel aliens from their territory but also acknowledged that, in exercising that right, States must respect a number of rules, in particular the norms of international human rights law and international humanitarian law. It was unfortunate that the Special Rapporteur had not gone all the way with his logic and specified the content of those rules as well as the context in which States were usually led to order the expulsion of aliens, namely the maintenance of public order, as rightly pointed out by Mr. Brownlie. However, Mr. Brownlie's doubts about the utility of an analysis of the legal consequences of expulsion for different categories of aliens did not seem to be well founded: on the contrary, it was an inescapable aspect of the topic that had perhaps been addressed too hastily by the Special Rapporteur. It should be borne in mind that the Commission was only at the beginning of its work on the expulsion of aliens and that it must therefore remain focused on the definition of the subject. Perhaps the Commission could agree that the main question under consideration was the expulsion by a State from its territory of persons who were not its nationals. That was the Special Rapporteur's point of departure, as could be seen to a certain extent from the wording of his proposed draft article 2, paragraphs 1 and 2 (b). However, in defining the meaning of "alien" for the purposes of the draft article, the Special Rapporteur referred to the notion of "*ressortissant*", which seemed unnecessary; it was sufficient to say that an alien was any person who was not a national of the expelling State. The wording of paragraph 1 should be modified along those lines, and the current paragraph 2 (a) should be deleted.

18. The idea that the expulsion of aliens concerned the expulsion of persons "physically" present in the territory of the expelling State should also be expressed more clearly, and draft article 1, paragraph 1, should thus be modified. Although the distinction drawn in draft article 1, paragraph 2, between categories of aliens on the basis of whether or not their presence in the territory of the expelling State was legal was definitely useful in analysing the legal consequences of expulsion, it should not be made at the current stage of work, when the scope

of the draft article was at issue. Physical presence in the territory of the State expelling the person who was the subject of expulsion should be the sole criterion in defining the term "alien". There should be no need to determine whether there was a link of nationality between the expelled person and a State other than the territorial or expelling State. The application of such a criterion would also settle the question of whether to include non-admission in the scope, which Mr. Brownlie favoured doing, since logically only persons seeking admission who were not physically present in the territory of the State concerned would be excluded from the scope of draft article 1. The idea that the only category of aliens of prime concern to States—and which should thus be given full attention by the Commission—was that of aliens physically present in the territory of the expelling State should also serve as the basis for a discussion on whether or not some forms of expulsion, such as extradition, or some categories of non-nationals, such as refugees, ought to be excluded from the scope of the draft article. The inclusion of those aliens might make it possible to close any existing gaps in international norms concerning them.

19. With regard to draft article 2, Mr. McRae said that he agreed with Ms. Escarameia, who had argued that the definition of the term "territory" in paragraph 2 (e) needed to be improved. To that end, the Special Rapporteur should rely more on the line of reasoning followed in paragraph 179 of his second report. While Mr. Brownlie's proposal to include a study of expropriation in the consideration of the impact of expulsion on the right to own property abroad could be considered, that should be done only after a thorough assessment of whether that option was of interest. The Commission would then have to exercise great caution to ensure that an examination of that important branch of law did not distract it from its main subject of study.

20. Much still needed to be done to clarify the exact scope of the topic, but the two draft articles proposed by the Special Rapporteur were a useful starting point, and he had no objection to their being referred to the Drafting Committee.

21. Mr. CAFLISCH commended the Special Rapporteur for the quality of his second report, which prepared the ground for the Commission's consideration of the particularly complex topic of the expulsion of aliens. Although he endorsed the thrust of the report, the concept of "*ressortissant*", which at first glance did not pose any special problem, was defined in such general terms in draft article 2, paragraph 2 (d), that categories of persons other than "nationals" in the strict sense might be regarded as "aliens" within the meaning of the draft article. The scope of the definition of "*ressortissant*" should be restricted in order to avoid that trap. Perhaps the safest way of dealing with the problem would be simply to abandon the notion in favour of "nationality". He drew attention to paragraph 174 of the report and said that it was perhaps inappropriate to employ the word "transfer", which was also used to mean the surrender to their State of nationality of persons already sentenced abroad to have them serve all or part of their sentence. Draft articles 1 and 2 were a useful starting point for the Commission's future work on the topic, but the question of the various

regimes governing expulsion should probably be considered in greater depth before a decision was taken on the definition of the terms “alien” and “expulsion”. Although he did not have a clear-cut opinion on the matter, he was not at all certain that he agreed with Mr. Pellet that the question of the expulsion of foreign nationals in situations of armed conflict should not be included.

The meeting rose at 1 p.m.

2925th MEETING

Friday, 25 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens (*continued*) (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON, responding in his capacity as a member of the Commission to the opinion expressed at the previous meeting by Mr. McRae that it would not necessarily be appropriate to take up the subject of expropriation even in passing, explained that his earlier reference to expropriation had been made within the context of his more general point that, if the Commission were going to discuss the illegality of expulsion in certain circumstances, it would have to identify the causes of action, or the basis of claim, to enable it to discuss State responsibility issues not in the abstract, but in relation to particular categories of illegality.

2. In that connection, he had mentioned violations of friendship, commerce and navigation treaties, other bilateral treaties, and possibly human rights treaties; and, alongside those categories, one would also have to include international crimes including genocide, and the minimum international standard for the treatment of aliens. In fact, the overall point he had wished to convey was that the rubric “expulsion of aliens” was inadequate in that it amounted to no more than a convenient label and, for that reason, the Commission would have to take great care when defining the scope of the topic. He had alluded to expropriation only because, in real life, cases of expulsion were often part of a situation imposed on aliens and their property. Expropriation frequently accompanied expulsion of the individual concerned and, as the case of

Loizidou v. Turkey had shown, individuals were sometimes not permitted to repossess property even when there had been no expropriation. He was not, however, proposing that the Commission should take up the subject of expropriation; he had merely been attempting to illustrate the fact that various legal categories and causes of action were relevant to the issue of legality.

3. One of his objections to adhering to a narrow conception of expulsion was that, if it were to be accepted that the Commission was examining control over the presence of aliens in the territory of a State, and that such control was *prima facie* part of statehood, *prima facie* part of title to territory and *prima facie* lawful, premises which seemed to him quite acceptable, the question of controlling the presence of aliens would not be confined to the mechanics of expulsion, but would be further complicated by the wide variety of factors involved: first, illegal presence; secondly, informal migrants, e.g. unlicensed foreign traders; and thirdly, changes in domestic law relating to the licensing of individuals and their activities which meant that lawful visitors were reclassified as unlawful visitors. If the Commission was dealing with the question of the control of presence, it should logically also include refusal of entry among the situations it examined.

4. Mr. GAJA said that the Special Rapporteur’s very useful second report¹³⁹ constituted a further step in the right direction. Given that the topic referred, not to expulsion in general, but to expulsion of aliens, it was understandable that the Special Rapporteur should endeavour to provide a definition of “aliens” when determining the scope of the topic; draft articles 1 and 2 were thus plainly linked. A difficulty inherent in that approach, however, was that, if the status of a person were to be considered in terms of that person’s relation with a State other than the expelling State, as was done in draft article 2, paragraph (1), no weight would be given to his or her possible ties with the expelling State. If he or she were a dual national with the nationality of the expelling State, expulsion would not be lawful, if one agreed, as he did, with the opinion expressed in paragraph 47 of the report, to the effect that the expulsion of nationals was prohibited. Since the scope of that prohibition might be uncertain in the case of dual nationals, that question should be addressed in order to ascertain to what extent the rules on expulsion of aliens were intended to apply to those persons, even though, strictly speaking, the prohibition of the expulsion of nationals did not form part of the topic.

5. Although draft article 1, paragraph (1), would seem to exclude dual nationals, draft article 2, paragraph (1), gave the contrary impression. Draft article 2 should mention not only persons with dual nationality, but also stateless persons, since they were definitely not encompassed by the concept of “*ressortissants* of another State”.

6. In practice, expulsion was closely bound up with the often difficult question of establishing the nationality of the person to be expelled, as the State of nationality was the only State obliged to admit him or her to its territory. While the statement in paragraph 152 of the second report to the effect that it was the responsibility of national

¹³⁹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

authorities to provide official documents attesting to such persons' status was correct, more often than not, any such documents would be withheld by aliens threatened with expulsion, because once their nationality had been established, expulsion became easier as the national State could be requested to admit them.

7. Aside from that difficulty, which probably did not affect the scope of the topic, he was pleased to note that there was no indication that the State of destination was necessarily the State of nationality. There might be other States of destination and it would be necessary to examine whether and, if so, to what extent, the alien to be expelled was entitled to choose the destination when a State other than the State of nationality was willing to admit him or her. It was one thing to compel someone to leave a territory; it was altogether another matter to compel that person to enter a country that he or she might have good reason to wish to avoid entering.

8. He agreed with the Special Rapporteur that the draft articles should not deal with extradition. Draft article 2, paragraph (1), should be amended to make that clear, because, as it stood, it appeared to include extradition, since the latter normally implied compulsion to leave the territory. However, the draft articles should cover disguised extradition, in other words the use of expulsion as a means of handing over a person facing criminal proceedings in a foreign country. That form of expulsion, which was not infrequent, raised the question of whether it was prohibited by international law, given that it might impair the entitlement of the alien to an appropriate procedure when criminal proceedings were pending or envisaged in the State of destination.

9. In his opinion, extraordinary rendition also came within the scope of the topic. The argument for excluding extraordinary rendition, which was put forward in paragraph 177 of the second report, namely that it sometimes concerned nationals, was unpersuasive, because in reality the practice mostly affected aliens and constituted a form of compulsion to leave a territory, and a fairly unpleasant one at that. The definition in draft article 2, paragraph (1), encompassed both disguised extradition and extraordinary rendition and should continue to do so, even if the draft articles also stated that extradition proper was covered by special rules which did not need to be addressed in that context.

10. As the Special Rapporteur had noted, the concept of *refoulement* had a variety of meanings. The term appeared to be used mainly in the context of non-admission. Although draft article 2 did not say as much explicitly, in paragraph 172 of his second report the Special Rapporteur apparently took the view that the term "expulsion" did not cover the situation of those who had not left an international zone or centre where candidates for admission were detained, as there would be a phase during which the alien would be physically present in the territory, but somehow separate from it. If one concurred with what seemed to be the view of the Special Rapporteur, although it was not reflected in draft articles 1 and 2, that the rules on the expulsion of aliens should concern aliens irrespective of whether they were or were not regularly resident, it would be difficult to differentiate between residents with irregular

status and persons who were in a sort of limbo awaiting admission, as persons in the latter category had often entered the territory irregularly and were being detained pending admission or *refoulement* to another State. Moreover, that detention could be protracted either because it was necessary to determine, first their State of nationality, and then whether that State was willing to admit them; or else because some of them might have claimed refugee status, and that claim would require consideration before *refoulement* or expulsion could be carried out. Even if the draft articles differentiated between *refoulement* and expulsion on the basis that *refoulement*, being related to non-admission, was an issue which should be left aside, it would be necessary to indicate that certain basic principles set forth in the draft articles also applied to persons not covered by the draft articles.

11. Although the distinction drawn between act and conduct in the definition of expulsion of an alien given in draft article 2, paragraph (1), might appear Byzantine, it was useful because it highlighted the fact that the existence of a formal act (usually an administrative act) providing for expulsion might not necessarily be required and that compulsion might take other forms in the absence of such an act. As the result was identical, the same sort of protection should be afforded in both cases. Furthermore, while an administrative act of expulsion was designed to compel the alien to leave the territory, its execution might be left in abeyance for some time. It should therefore be made clear that the draft articles applied not only to actual expulsion, but also to acts designed to bring about expulsion, and that their purpose was to forestall some of those acts and, if possible, to provide for remedies.

12. Mr. NIEHAUS commended the Special Rapporteur's excellent and highly topical report on a crucial subject which raised a wide range of practical and theoretical legal issues. It was necessary first to determine exactly what was meant by "expulsion" and to define it as clearly and simply as possible. In that respect, the relevant provision of the International Covenant on Civil and Political Rights was pertinent.

13. On the structure of the two draft articles, he noted that it would be logical to define "expulsion" without reference to the term "alien". A clearer definition than that contained in draft article 2, paragraphs (1) and (2) (b), might be: "Expulsion, whether collective or individual, means the act or omission of a State authority with the intention and effect of ensuring the removal of a person or persons, against their will, from the territory of that State". The inclusion of the words "against their will" was vital.

14. Article 13 of the International Covenant on Civil and Political Rights established a universally accepted principle whereby aliens lawfully present could be expelled only in accordance with law and, although it did not cover aliens unlawfully present, it had become an international standard or benchmark. The Special Rapporteur was quite correct in saying that a State had the sovereign right to expel an alien from its territory, yet that right obviously had to be exercised in accordance with international law. That meant that a State could not expel an alien arbitrarily, but must comply with the standards of public international law, human rights law and humanitarian law in general.

15. As to the scope of the topic, it should be as wide-ranging as possible. The Commission should—though perhaps at a later stage—also examine situations such as refusal of admission and expulsion in the event of armed conflict, since the treatment of the subject would be incomplete if they were ignored.

16. Although the inclusion of legal persons within the scope of the topic was likewise controversial, since there was a risk that the Commission might be distracted by the issue of expropriation, the important role of expropriation or confiscation in the context of expulsion of aliens suggested that the issue should somehow be included in the study.

17. Since the title of the topic was “expulsion of aliens”, a clear definition was obviously required not only of “expulsion” but also of the term “alien”. That definition should be kept as simple as possible: an alien was someone who was not a national of the expelling State. Hence the starting point for the Commission’s deliberations was plainly the expulsion of individuals who were not the nationals of the expelling State and draft article 1, paragraph (1), on scope was therefore correct as currently worded. As a result of that provision, the following paragraph (2), listing the various categories of aliens, was unnecessary and possibly confusing. However, it should somewhere be specified that the draft articles applied to non-nationals present in the host State whether lawfully or with irregular status.

18. The question of nationals of the expelling State who had lost that nationality or been deprived of it should be debated when the Special Rapporteur presented his third report, in which he intended to discuss that issue.

19. Still on the subject of draft article 1, paragraph (1), he supported Mr. McRae’s proposal that the word “physically” should be inserted before “present”. He agreed with earlier speakers’ criticism of the expression “*ressortissant*”. The difficulty of translating that term into Spanish was further evidence that its use would be totally inappropriate and he was therefore in favour of the deletion of the whole of paragraph (2) (d) of draft article 2.

20. Like Ms. Escameia, he believed that a correct definition of “territory” would obviate the need for a definition of “frontier” and would render draft article 2, paragraph (2) (c) obsolete. In general, he agreed with the main thrust of the report, but concurred with Mr. Vargas Carreño that further in-depth discussion of the contents of the draft articles in the plenary was needed before they were referred to the Drafting Committee.

21. Mr. KOLODKIN said that the substantial second report presented by the Special Rapporteur was a logical continuation of his preliminary report. The Secretariat memorandum¹⁴⁰ had been most informative.

22. As to the scope of the topic and the persons to be included within it, he was only partly in agreement with the Special Rapporteur. Obviously the draft articles should

cover persons who were not citizens of the expelling State, in other words foreign citizens and stateless persons, but it was important not to forget persons whose status had been altered as a result of a change in status of the territory in which they were residing, in particular persons who had become aliens because a new State had come into being. As the Special Rapporteur had proposed, it was appropriate to examine the situation of persons lawfully present in the expelling State, separately from that of persons with irregular status, including those who had long been resident in the State intending to expel them.

23. On the other hand, he was doubtful whether it was advisable to include refugees within the scope of the topic. It would at least be necessary carefully to consider whether existing international legal norms did not already provide them with sufficient protection, given that refugee law was already well developed. Persons with special status, in particular those possessing privileges and immunities, should certainly not be included in the Commission’s examination of expulsion of aliens.

24. The expulsion of a State’s own nationals lay outside the scope of the subject. The legislation of many States and several international agreements prohibited their expulsion and any reference to it in the commentary would therefore have to be correctly worded. He took issue with the Special Rapporteur’s statement in paragraph 47 of his second report that, in his personal view, international law did not authorize the expulsion of a State’s own citizens. No State was in need of such authorization, since expulsion from its territory was a sovereign prerogative. If international law did not prohibit such acts, a State had a right to perform them. If the Commission was of the opinion that such a prohibition had become, or was in the process of becoming, a norm of general international law, an indication to that effect could be included in the commentary.

25. During the debate on the preliminary report,¹⁴¹ he had expressed his opposition to the inclusion of the expulsion of aliens in situations of armed conflict within the scope of the topic,¹⁴² and he was still of the opinion that it was and should remain a matter to be dealt with under humanitarian law. He therefore agreed with Mr. Pellet that the draft articles should contain a specific provision in that regard. It might be wise to include in the draft articles a provision listing the persons to whom they did not apply.

26. The draft articles should focus on persons who were not citizens of the expelling State and who were physically present in its territory. It was impossible to expel someone who was not in the State’s territory; such a person could only be refused entry. Hence, he agreed with the Special Rapporteur that refusal of entry ought not to be examined and that the difference between refusal of entry and expulsion should be explained in the commentary.

27. Expulsion itself should not be defined solely in relation to any given act, whether legal or non-legal. While there were grounds for considering extending the definition to cover a series of acts or a conduct on the part

¹⁴⁰ A/CN.4/565 and Corr.1, mimeographed, available on the Commission’s website.

¹⁴¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554.

¹⁴² *Yearbook ... 2005*, vol. I, 2850th meeting, p. 132, para. 36.

of a State, he agreed with Mr. Comissário Afonso on the need for caution. The conduct in question had to conform to certain criteria in order to be covered by the concept of expulsion, and those criteria had to be identified and specified.

28. The Commission should focus on considering the regime relating to expulsion, including such issues as the right of States to expel individuals, when and how that right could be restricted, and the rights of persons subject to expulsion. If expulsion involved the commission of an internationally wrongful act, that brought into play relations in the ambit of international responsibility, diplomatic protection and the exercise of other human rights mechanisms established in international agreements to which the expelling State was a party. Since such relations were covered by other rules of international law, they should not fall within the scope of the draft articles.

29. The draft should reflect general considerations regarding the scope. The two draft articles proposed essentially delineated the parameters of the topic. The use of the concept of *ressortissant* in both articles was problematic, in his view. A Russian equivalent, *urozhenets*, did not appear in the translation of draft article 1, and the prescience of the translators might have been applauded, but for the fact that the term appeared in draft article 2, suggesting that the translators had simply been careless.

30. He could have understood the use of the term "*ressortissant*" if, as in the decision of the ICJ in the *LaGrand* case, it had simply been the translation into French of the word "national". But as defined in draft article 2, the term was not a synonym of "national". In fact, the definition of *ressortissant* was not clear, and the lack of clarity extended to all the provisions in which the term appeared. In the report, it was translated into Russian as *urozhenets*: an *urozhenets* of a State was an individual who had been born in that State, the closest English equivalent probably being "native". But *ressortissant* could also be translated into Russian as *vykhodets*, someone who originated from a State. Neither word, to his knowledge, had any specific legal connotations in Russian.

31. The Russian language also had the term *sootchestvennik za rubezhom* (compatriot abroad), a broad concept covering people originally from the Russian Federation—former citizens of the Russian Federation who lived permanently in other countries and had become foreign citizens or stateless persons. The term was used in a Russian legislative act of 1999 on compatriots. Hungary had a similar piece of legislation dating from 2001, the Hungarian law on Hungarians living in neighbouring countries ("Magyars"). The law had been considered by the Parliamentary Assembly of the Council of Europe;¹⁴³ it referred to Hungarian or Magyar nationals who were citizens not of Hungary but of the State in whose territory they resided. The term "citizens" was used in the Council of Europe to describe the national affiliation of such individuals.

¹⁴³ See Resolution 1335 (2003) of the Parliamentary Assembly of the Council of Europe, adopted on 25 June 2003 (20th sitting).

32. He had raised those points merely to illustrate the terminological complexity of the topic and to show that by introducing the term "*ressortissant*" as distinct from "national" or "citizen", the Commission might only be exacerbating an already complicated situation. Hence, he urged the Special Rapporteur, for the purposes of the draft, to go back to defining the term "alien" on the basis of the concept of nationality.

33. The two draft articles raised other questions as well. Mr. Comissário Afonso might be right in suggesting that draft article 1, paragraph (1), should be formulated in a more straightforward fashion, stating simply that the draft articles applied to the expulsion of aliens. And was paragraph (2) really necessary? As drafted, it contained a non-exhaustive, illustrative list of persons to whom the draft articles applied, although the phrase "nationals ... who have lost their nationality or been deprived of it" was not particularly well worded. Perhaps the draft articles should begin with the definitions, simply doing away with the provision on the scope. In the final analysis, the scope emerged clearly from the title of the draft, and the definitions helped to clarify it.

34. He agreed with many of the earlier comments about draft article 2: for example, on the duplication in paragraphs (1) and (2) (b), on the term "frontier" and on the phrase "territorial or expelling State" in paragraph (2) (a). He would also not rule out the idea of including definitions of other terms.

35. It was possible that all the problems could be resolved by the Drafting Committee, which was a very capable body. It might be better, however, if the Special Rapporteur worked on the draft a little longer in the light of the discussion and, in particular, in light of the problems arising with the term *ressortissant*, so that the two draft articles could be referred to the Drafting Committee together with additional draft articles to be submitted to the plenary at a later date.

36. Lastly, Mr. Gaja had raised an important question that had practical significance: did an expelled person have the right to choose the receiving State—in other words, was that person's consent necessary in order for him or her to be repatriated to a State of which he or she was a national? The question was faced by States that concluded readmission agreements. His own country had such agreements, and the question had often been discussed when they were concluded. In practical terms, the expelled person had to be given documents on the basis of which he could enter the State of nationality, which was obliged to admit him. However, the person might deliberately withhold the documents or even refuse to take possession of them. That was a real problem that the Commission must consider.

37. Mr. YAMADA commended the Special Rapporteur's report, which was full of valuable analysis and reflected his deep understanding of the topic. The Special Rapporteur was making steady progress on the basis of the draft work plan contained in annex I to his preliminary report. The Secretariat was to be thanked for its memorandum, which also provided material indispensable to an understanding of the topic.

38. He still had some conceptual and methodological difficulties with the topic, perhaps because the problem of expulsion of aliens had not yet arisen in his part of the world. The Commission should be addressing systematic phenomena that had grave political, social, economic and human rights implications. The report and the Secretariat memorandum gave examples of numerous categories of expulsion of aliens, but whether rules relating to all those categories could be formulated and applied across the board was open to question. Perhaps the Commission could look at them category by category and through that exercise make an informed decision on which should be chosen for study.

39. Concerning draft article 1 on scope, he thought that paragraph (1) was formulated in somewhat sweeping terms and went beyond the scope of the topic, basically stating that the draft articles applied to all foreigners. More than 3 million foreigners were present every day in Japan: treaty merchants and their dependents under friendship, commerce and navigation treaties; students under government scholarship and exchange programmes; trainees under Japanese development assistance programmes; members of the United States armed forces under the Status of Forces Agreement;¹⁴⁴ and also tourists. It was difficult to imagine the draft articles applying to all those foreigners. The Commission was not dealing with foreigners in general, but rather with specific categories of foreigners: those who had been expelled, were being expelled or were at risk of being expelled.

40. Paragraph (2) was an illustrative, non-exhaustive list of the categories of foreigners to be covered by the draft articles. If it was to be retained, it should be incorporated into paragraph (1), but he would prefer to see it relegated to the commentary.

41. If, as was his understanding, the substantive articles were to regulate the rights and duties of expelling States *vis-à-vis* foreigners who had been or were to be expelled, there should be a subparagraph relating to the expelling State in the draft article on scope. If, in the substantive articles, the rights and duties of the destination State *vis-à-vis* the person expelled or about to be expelled and *vis-à-vis* the expelling State were to be regulated, then there should be a subparagraph relating to the State of destination in that draft article. On the other hand, a simpler approach could be used, as Mr. Comissário Afonso had proposed: there could be a single paragraph on scope saying that the draft articles applied to the expulsion of aliens.

42. On draft article 2, clearly, the terms “alien” and “expulsion” must be defined, and he accordingly had no problem with its paragraphs (2) (a) and (b), although some drafting refinements were called for. He saw no need for paragraph (1), because it merely duplicated paragraphs (2) (a) and (b). It was premature to try to define the terms in paragraphs (2) (c), (d) and (e), because the context in which they were to be used in the substantive articles was not yet known.

¹⁴⁴ Agreement under article VI of the Treaty of Mutual Co-operation and Security between Japan and the United States of America, regarding facilities and areas and the status of United States armed forces in Japan, signed at Washington D.C. on 19 January 1960, United Nations, *Treaty Series*, vol. 373, No. 5321, p. 207.

43. While he had no intention of opposing the referral of the two draft articles to the Drafting Committee, he thought it would be difficult for the Committee to begin a drafting exercise without clear instructions from the plenary as to what elements should be included in the articles and without having before it several of the substantive draft articles that the Special Rapporteur was proposing to submit in his third report.

44. Mr. HMOUD said that the expulsion of aliens was a fairly complicated issue involving many aspects of international law. The rules, whether arising from treaties, custom or judicial precedents, were limited, and those that existed should accordingly be codified and new ones developed to cover certain loopholes in the legal regime or regimes.

45. The Special Rapporteur’s work plan was satisfactory at the present stage, pending new developments in the Commission’s work on the topic. The Special Rapporteur appeared to consider that the starting point for that work was the contention that expulsion of aliens was a right of the expelling State, subject to limitations under international law—a contention supported by existing State practice. Work on the topic should proceed on the basis of that premise. Although some scholars viewed the subject of States’ rights and obligations in relation to expulsion of aliens from the perspective of the individual and human rights, the Commission should take an approach that did not emphasize advocacy and instead concentrated on strictly legal issues.

46. On the scope of the topic, he said that the draft articles should be the legal regime on expulsion of aliens but should not rewrite or amend existing *lex specialis* on matters already regulated by treaty law. The issue of refugees came to mind in that connection. The second report proposed a broad definition of the term “refugee” which differed from that found in the 1951 Convention relating to the Status of Refugees in that it included not only war refugees but also refugees who had escaped generalized violence—something that had not yet been settled under international refugee law. While that definition was used for the purpose of the draft articles, the legal regime would necessarily overlap with existing legal regimes on refugees, while having different legal effects. Accordingly, it should be made clear that the draft articles were without prejudice to existing obligations under international law.

47. Draft article 1 on scope indicated that the draft articles applied to stateless persons, yet under draft article 2, paragraph (2) (a), which defined an alien as a *ressortissant* of a State other than the territorial or expelling State, stateless persons could not be considered aliens, and would thus be excluded from the scope. Draft article 1 should therefore be revised to include in the scope the expulsion of all aliens present in the territory of the expelling State.

48. An alien should be defined as a person who was not a national of the expelling State. That approach avoided the unintended consequence of excluding from the application of the draft those individuals who did not have the nationality of any State. As the Special Rapporteur pointed out in paragraph 134 of his report, the term

“*ressortissant*” dated back to colonial times, when States had dominions and colonies whose peoples did not necessarily possess the nationality of the colonial State but might be under that State’s protection. Since the end of the colonial era, international law had evolved and the term now meant merely “nationality”, as was indicated in the report. Accordingly, the term “nationality” was preferable to “*ressortissant*”, which, as defined in draft article 2, paragraph (2) (d), meant a person under the authority of a State. If that definition was used, permanent residents would be considered *ressortissants* of the expelling State and as such would be excluded from the scope of the draft articles.

49. In conclusion, he said that draft articles 1 and 2 should be referred to the Drafting Committee.

50. Ms. JACOBSSON said that the report was valuable and thought-provoking. The 664-page memorandum produced by the Secretariat was also an impressive achievement.

51. She welcomed the inclusion of the topic: it was an important one, and even if the same issues were addressed in other spheres of international law, such as international humanitarian and refugee law, there remained grey areas and lacunae that needed to be dealt with in the context of the topic. She agreed that there should be some kind of “without prejudice” clause saying that the Commission was not rewriting international humanitarian or refugee law, but attempting to identify those grey areas and tackle real problems faced by States in their day-to-day management of aliens.

52. It was important to continue to discuss the terms used: for example, there was much uncertainty as to what was meant by “entry” or “presence”. To cite one concrete instance, if a person was on board a vessel in the territorial or archipelagic sea or the internal waters of a coastal State, that State was likely to argue that the person was not present in its territory and hence could not be expelled as he or she had not been admitted to the territory. That then raised the question of denial of entry. Nevertheless, the person concerned would probably argue that he or she had entered the territory and was eligible to seek refugee or asylum status. That had been well illustrated by the case of a Norwegian vessel, the *MV Tampa*, which had taken on board about 430 refugees, most but not all of whom had been asylum seekers. As was well known, Australia had refused to admit the persons concerned to the territory of Christmas Island and had instead decided to take them on board an Australian vessel and remove them from Australia’s territorial waters. The debate in international law circles continued as to whether the persons concerned had been present in the territorial sea of Australia. The issue was one that the Commission needed to look at, even if it decided to exclude denial of entry from the scope of its work.

53. A few other concepts needed to be fleshed out more clearly. One was neutrality, which the report seemed to equate with non-participation in a conflict. That was not entirely correct. The treatment of aliens in a situation of armed conflict was addressed in the context of international humanitarian law, but even there some grey areas existed.

54. As to the draft articles themselves, she was very attracted to Mr. McRae’s idea that article 1, paragraph (2) might be unnecessary. If it was to be retained, what was meant by “present in” a State and “enemy State” must be better defined or more clearly explained. What was meant by the terms “territory”, “frontier”, “border” and “boundary” needed to be defined, or at least discussed.

55. Ms. XUE expressed her appreciation to the Special Rapporteur for a well-researched report that had been submitted in a timely manner, and to the Secretariat for the rich resources it had provided as a basis for the Commission’s work. In his analysis of the concepts of alien and expulsion, the Special Rapporteur had clearly demonstrated that the Commission must take into account the existing regimes with regard to each of the categories of aliens. He had posed the right questions and identified the areas that the Commission should consider, and she generally endorsed his approach.

56. Concerning the scope of the draft articles, she noted that paragraph 40 of the second report contained a lengthy discussion of the non-admission, or “expulsion”, of illegal immigrants. She agreed with the Special Rapporteur’s position that the question could not be excluded from the scope of the topic without severely limiting it. As the Representative of the Republic of Korea in the Sixth Committee had pointed out, to do so would not only unduly limit the scope of the Commission’s work but would also leave unaddressed the interests and concerns of many illegal residents around the world.¹⁴⁵ She would go further and say that the same would be true of the interests and concerns of illegal immigrants in general.

57. She agreed with the Special Rapporteur that removal of an illegal immigrant who was at the border was strictly speaking non-admission, not expulsion. It was by virtue of that judicious distinction that non-admission did not, in the opinion of the Special Rapporteur, fall within the scope of the topic. In principle he was right, but the conclusion was rather too sweeping. The topic, as many members had pointed out, differed from the traditional legal subject of alien expulsion in that it was not related only to non-admission *per se* and the criteria therefore. The purpose and objective, as the Special Rapporteur had stated in his preliminary report, was to consider the minimum international standard of treatment for a special category of persons, characterized as refugees, displaced persons, asylum seekers, stateless persons and the like, in accordance with international law, and particularly international human rights law. The Commission thus recognized that there were existing international regimes addressing each type of person, but that as a general principle, whether to admit a foreign national or stateless person into its territory or grant the person the right to stay and live in its territory was a sovereign decision of the receiving or host State. The issue was not admission, or the criteria for admission, but rather, proper treatment of such persons while they were under the control or in the custody of the host country. What must be determined was, not what legal status a person had, but how a non-national who

¹⁴⁵ *Official Records of the General Assembly, Sixth Committee, Sixtieth session*, summary record of the 11th meeting (A/C.6/60/SR.11), p. 17, para. 89.

happened to be in the territory or under the jurisdiction or direct control of the receiving State should be treated before being expelled or allowed to stay in the country.

58. During the discussion on the preliminary report, she herself had raised the *MV Tampa* case¹⁴⁶ to which Ms. Jacobsson had referred. Strictly speaking, the persons on board a ship in the territorial waters of a coastal State were not under the direct control of that State, but were indeed under its jurisdiction. An additional issue was that the jurisdiction of the flag State of the ship and that of the coastal State overlapped. However, the decision as to the final destination of those persons was not a matter for the Commission, but a sovereign decision of the States concerned. The question was how to ensure that such persons were properly treated in accordance with international law. The case cited by Ms. Jacobsson was more complicated than the more frequent situation referred to by Mr. Gaja, where the persons concerned were already physically in the territory, albeit in the international zone delimited by the host country.

59. To exclude illegal immigrants or aliens who were at the border or had just crossed it from the scope of the draft articles would be to exclude a large group of persons. Aliens who were “present in a State” pursuant to draft article 1 were already physically present in the country, regardless of how the term “zone” was defined. Moreover, such persons did not all have the same status. Some might be asylum seekers, others might be applying for refugee status, and yet others would need to be held until their nationality could be ascertained and it was decided to which country they should be returned. As Mr. Gaja had pointed out, and as she knew from her own experience, often such persons were not in possession of proper documents, and some had even destroyed them to avoid being returned. Sometimes they stayed in the international zone for weeks, months or even years. Such vulnerable groups must be included when addressing the question of the treatment of aliens, especially since international law had few rules on their treatment. If international law failed to protect them, their rights would easily be abused.

60. The Special Rapporteur contended that a State’s obligations in the case of expulsion and in the case of non-admission were not identical. That was true in many instances, but in some respects, and particularly in terms of international minimum human rights standards, the proposition was arguable. In cases involving illegal stay, persons might be held for long periods in the detainment area. Thus, it was difficult to see what distinction the Special Rapporteur was making.

61. As to the draft articles themselves, she shared the view that draft article 1 was problematic. To begin with, French legal terms did not have the same currency as Latin ones. It would, for instance, be very difficult to find an equivalent Chinese term for the term “*ressortissant*”. Moreover, it was unclear whether the list in draft article 1, paragraph (2), was exhaustive or illustrative. Doubtless the Special Rapporteur was trying to narrow down the category of persons concerned. The case of foreign troops

stationed in a country, such as United States troops in Japan, should not be included, because their presence was based on a special agreement which ensured their rights and privileges. She agreed with the suggestion that the commentary should explain which categories of persons were to be protected. The words “in particular” in paragraph (2) were confusing and even illogical, given that, pursuant to paragraph (1), the draft articles applied to *any* person present in a State who was not a national of that State. Perhaps it would be best to have only one paragraph.

62. With regard to the discussion on expulsion and related concepts (paras. 153–194 of the second report), she endorsed the Special Rapporteur’s clear analysis, but had a question about draft article 2 itself. A number of members had already pointed to problems with the terms “frontier” and “territory”. The category of persons to which she had referred earlier should also be included, because such persons were physically present in the frontier zone. To dispel confusion between the two terms, their definitions needed to be refined. She had no objection to referring the two draft articles to the Drafting Committee, but shared the view that at the present stage it would be difficult to pursue the drafting exercise, because the Drafting Committee first needed to know which aspects of the protection of aliens during the expulsion process the Special Rapporteur intended to include in his next report. As an example of the types of issue that might need to be considered, she recalled a case of expropriation in which the host country had maintained that the person concerned was not naturalized but a Chinese national, yet at the same time would not allow him consular protection from the Chinese side, had confiscated all the property which he had accumulated in the host country over many years, and had compelled him to leave the country a pauper. That was the kind of problem that arose in practice. At the present stage it was difficult to envisage the final scope of the draft articles merely on the basis of the draft article on definitions.

63. Mr. WISNUMURTI commended the Special Rapporteur’s in-depth second report on the expulsion of aliens. The presentation and analysis of State practice had provided the Commission with a clear picture of the issues involved and the direction of further work.

64. The expulsion of aliens was an important issue and a matter of urgent national and international concern. The Special Rapporteur had noted that the war on terror had led to a growing tendency to expel aliens suspected of being a threat to the security of the State in the territory of which they were present and to stricter restrictions being imposed by some countries on persons wishing to enter or stay in those countries.

65. Another new phenomenon was the increasing number of expulsions of immigrants or other aliens with an irregular status. As rightly pointed out by the Special Rapporteur in paragraph 30 of his second report, that practice was driven by socio-economic imbalances, aggravated by globalization and the rapid impoverishment of developing countries, and in some cases compounded by the consequences of repeated conflicts and political intolerance. However, it should be recognized that the influx of irregular immigrants had also been generated by the need

¹⁴⁶ See *Yearbook ... 2005*, vol. I, 2850th meeting, pp. 134–135, para. 59, and 2852nd meeting, p. 151, para. 60.

for cheaper labour to support rapidly growing economies, including those of developing countries. Thus, the phenomenon of irregular immigration should be addressed in a comprehensive manner, and not only from the vantage point of illegal presence. A State had the right to expel, but it also had the responsibility to exercise restraint, avoid over-hasty, arbitrary or mass expulsions and, above all, ensure the protection of the human rights and security of such persons. The Commission should endorse Mr. Yamada's suggestion to include an article or provision on the responsibilities and obligations of the expelling State. He welcomed the Special Rapporteur's expressed intention of accorded particular attention to respect for the fundamental rights and dignity of the aliens concerned. Territorial States should not rely solely on the unilateral measure of expulsion; they should also elaborate a legal framework with the so-called "illegal immigration countries".

66. The Special Rapporteur had proposed a list of different categories of persons to be included in or excluded from the scope of the topic. He endorsed the list of categories to be included. It should be noted, however, that legal instruments already existed for dealing with some of those categories, such as refugees, asylum seekers and asylum recipients. The Special Rapporteur should explore categories of persons not already covered by existing legal instruments.

67. With regard to the proposed draft article 1, on scope (para. 122), he shared the view that the term "national" should be used rather than "*ressortissant*". The term "national" was commonly employed and easy to understand, whereas "*ressortissant*" was too abstract and was interpreted as being wider in meaning than "national". He was also of the view that there was no justification for having two paragraphs: paragraphs (1) and (2) should be merged. That could be discussed in the Drafting Committee. The words "in particular" in paragraph (2) were unclear and should not appear in the merged text of paragraphs (1) and (2).

68. As to definitions, he shared the Special Rapporteur's doubts about the relevance of extradition, a concept which was different from expulsion. Extradition referred to the surrender of a fugitive to a requesting State and was based on a bilateral agreement, whereas expulsion was a unilateral act of a State in whose territory the alien was present. The same applied to non-admission.

69. Turning to draft article 2 (para. 194), he noted that paragraphs (1) and (2) (b) overlapped; paragraph (1) was redundant, and should be replaced by paragraph (2) (b). He also had difficulty with the term "*ressortissant*" in paragraph (2) (a) and (d), for the reasons indicated earlier. It would be preferable to define the term "alien" along the lines of the definition which appeared in paragraph 124, i.e. a person who was under the jurisdiction of another State and did not hold the nationality of the forum State. Consideration should also be given to improving the definition of the term "territory" in draft article 2, paragraph (2) (e) by including land territory and the airspace above it as well as the territorial sea, internal waters and archipelagic waters. A clear definition of "territory" was essential in order to avoid situations such as the one referred to by Ms. Jacobsson.

70. He associated himself with the remarks made by the Chairperson at the previous meeting on the structure of the draft articles. The Commission would have a clearer picture of the topic once the Special Rapporteur had covered expulsion regimes and the legal consequences of expulsion in a future report.

71. Mr. KAMTO (Special Rapporteur), on a point of clarification, said that he had referred to a number of concepts not in order to include them in the topic but to show that they were unrelated to it. That was the case with non-admission and extradition.

72. The question raised on draft article 1 needed to be given close consideration in plenary. There had been proposals to delete paragraph (2). If that were to be done, the definition would be very broad and would include all aliens, even those whom he had intended to exclude because they benefited from special regimes, such as diplomats, armed forces on mission and official personnel. Either, as proposed by Mr. Wisnumurti, paragraphs (1) and (2) should be merged to produce a definition of the scope which would still indicate its limits, or else the two paragraphs should be retained, with a paragraph (1) posing the general rule and a paragraph (2) giving precise indications of the scope for the purposes of the draft articles. If no limits were set, the draft articles would be impossible to elaborate, and in any case inapplicable. He would welcome more precise suggestions from members on the question.

73. With regard to draft article 2, he agreed with Mr. Fomba's remark at the previous meeting that the global definition of the topic in paragraph (1) was redundant; it would be better to launch directly into a definition of the various constituent concepts. As to the terms "national" and "*ressortissant*", it would suffice to specify that they were used synonymously, which would be consistent with the jurisprudence of the ICJ.

74. Mr. HASSOUNA said that, despite the complexity of the issue and the fact that it had political as well as legal ramifications, the Commission was clearly right to attempt to codify the legal rules on the subject, since the subject was ripe for codification in the light of customary law, State practice, domestic legislation and case law. That necessary task should not be left to the politicians, who often complied with legal rules only under pressure from the courts and public opinion in their countries.

75. The Special Rapporteur was to be commended for the clear and comprehensive analysis contained in his preliminary and second reports, which he had produced despite his very demanding national responsibilities. Having first introduced the concept and methodology, together with a work plan which the Commission had endorsed, the Special Rapporteur was now ready to embark on a more comprehensive approach. That was the right way to proceed. He also commended the Secretariat's very useful, lengthy and comprehensive memorandum.

76. The topic was of great importance in a world of globalization, interdependence and the free movement of people in free trade areas, but which was also a world of human trafficking, transnational organized crime and

international terrorism. The Commission should not shirk the difficult issues involved. Thus, while terrorism was a scourge affecting all societies, Governments everywhere had, in their concern for security, been responsible for serious violations of civil liberties and human rights, including forcible transfers, extraordinary rendition and profiling of ethnic and religious groups. Such actions often strengthened extremism rather than weakening it. Terrorism must be countered through international cooperation—whether bilateral, multilateral or under the aegis of the United Nations and other forums—and any action must be in full accordance with the rule of law.

77. The Commission must adopt a comprehensive approach to the topic, dealing with the whole legal regime of expulsion, in its broadest sense, since that was the best contribution it could make to the codification of international law. At the same time, its approach should be balanced: it should take into account a State's right to protect its citizens and its duty to ensure law and order, but also the right of a non-national of a State to be treated in accordance with the minimum standards for the treatment of aliens.

78. The report, while mentioning recent developments relating to the topic in the United Nations, the European Union and the United States of America, omitted any mention of developments in the Arab region. The Arab Charter on Human Rights, originally adopted by the League of Arab States in 1994¹⁴⁷ and revised and updated at the Sixteenth Summit Conference of the League of Arab States held in Tunisia on 22–23 May 2004, contained a provision very relevant to the topic of expulsion of aliens. Article 26, paragraph 2 of the Charter provided that: “No State party may expel a person who does not hold its nationality but is lawfully in its territory, other than in pursuance of a decision reached in accordance with law and after that person has been allowed to submit a petition to the competent authority, unless compelling reasons of national security preclude it. Collective expulsion of aliens is prohibited under all circumstances”. The main elements of the provision seemed to be, first, that nationality was the criterion; secondly, that due process must be adhered to; and, thirdly, that collective expulsion, which constituted a form of collective punishment, was prohibited in all circumstances.

79. With regard to draft articles 1 and 2, he concurred with the proposal that the physical presence of an alien should be emphasized. Thus the issue of refusal of admission should be excluded, but other categories of alien should be included, as should the very important phenomenon of rendition. Refugees, for example, even though they had their own legal status and their own legal regime—both under conventional law and under customary international law (which he took to include United Nations resolutions)—should be referred to in the Commission's proposed legal framework, so as to close any existing loopholes. The fact that a given group had its own legal regime was no reason to exclude it from what he hoped would be comprehensive draft articles. For the same reason, the expulsion of aliens in situations of armed

conflict also needed consideration and special attention should be paid to the phenomenon of ethnic cleansing.

80. With regard to definitions, the term “alien” could surely be defined more simply as “a non-national in relation to the expelling State”. As for the term “*ressortissant*”, it was clear that it had caused some confusion, particularly for Spanish-speakers. The Special Rapporteur's proposal to use the phrase “person under the jurisdiction of a State” was an improvement, but some further work would be required.

81. He endorsed in principle the proposal that the two draft articles should be referred to the Drafting Committee. It might, however, be preferable to do so after the presentation of the third report, which would provide more material on which to work.

82. Mr. VÁZQUEZ-BERMÚDEZ commended the second report, which was based on thorough research and good legal analysis with a view to determining the scope and the correct approach to the treatment of the topic. The memorandum by the Secretariat was outstanding, backed up as it was by an exhaustive examination of the legal precedents. The expulsion of aliens was undoubtedly a difficult issue but one of great topicality and importance for all States. Indeed, its importance would grow as international migration continued to increase. It was noteworthy that such migration was not all in one direction: it occurred not only from developing to developed countries, but also to and between developing countries, and could bring many benefits to the receiving States.

83. All States had to face the challenge of balancing their sovereign right to expel aliens, in the interests of maintaining internal law and order, with the formal and procedural restrictions imposed by international law, particularly human rights law. No international instrument governing all aspects of the topic existed, however, so it was appropriate that the Commission had embarked on elaborating a set of draft articles reflecting the state of contemporary international law. The Special Rapporteur rightly sought to make the draft articles as exhaustive as possible, without affecting existing multilateral conventions, *lex specialis* rules or standards already established in international law, while filling existing gaps and clarifying grey areas. He could support the main thrust of draft article 1, but not the proposed wording, since mention would need to be made of exceptions such as diplomatic staff. Article 1, paragraph (1), should set forth the general provision, along the following lines: “The present draft articles shall apply to the expulsion of aliens”. The various kinds of aliens referred to could then be listed.

84. With regard to draft article 2, although the definitions could be reviewed when the form of the draft articles as a whole became clearer, it would be as well to decide on some definitions at the outset. As other speakers had said, the word “*ressortissant*” was inappropriate. Mr. McRae had rightly said that an alien should be defined not in relation to the country of origin but in relation to the territorial State in which he or she was present. A possible definition of the word “alien” might thus be: “For the purposes of the draft articles, an alien is a natural person who is not

¹⁴⁷ Cairo, 15 September 1994, *Human Rights Law Journal*, vol. 18, No. 3, pp. 151 *et seq.*

a national of the State in whose territory he or she is present". Such a definition would also support another view that he shared with Mr. McRae, namely that the determining factor in expulsion was the physical presence of an individual in the territory—which did not include the territorial sea—of the expelling State. Accordingly, the term "territory" would need to be defined for the purposes of the draft articles.

85. Paragraph (1) and paragraph (2) (b) of draft article 2 overlapped, since their wording was almost identical, the latter provision being the more accurate. While there might be consensus within the Commission that the "conduct" referred to involved coercion, the text should make it clear that the action concerned gave an alien no option but to leave the territory. Lastly, the terminology used should be consistent throughout: the phrases "territorial State" and "host State" were used interchangeably. The former was preferable, since the concept of "host" seemed incompatible with that of expulsion. He supported the suggestion that the two draft articles could be referred to the Drafting Committee; however, they should be considered along with the next group of draft articles to be proposed by the Special Rapporteur, in order to afford a broader context for analysis.

86. Mr. WAKO congratulated the Special Rapporteur on his comprehensive report and the Secretariat on its excellently researched memorandum on the expulsion of aliens, which had contributed immensely to the quality of the Commission's work. He said that the importance of the issue of aliens throughout history was reflected in the wealth of national, regional and international legislation, conventions and practice on the matter. A comprehensive codification text was therefore long overdue. Two factors had played a major role in modern times, the first being the increase in the number of international migrants—from 82 million in 1970 to 175 million in 2000 and nearly 200 million in 2005—60 per cent of whom lived in the developed world: a significant proportion in relation to their populations. As a result, the developed countries were, as stated in paragraph 20 of the second report, "transforming themselves into impenetrable fortresses".

87. The second factor was the increasing national security concerns of States in response to the threat of international terrorism. Such genuine concerns must be taken into account when the Commission formulated fundamental principles forming the legal basis for the expulsion of aliens under international law. Clearly, there were categories of aliens whose international legal regime was fairly well developed, such as diplomats, refugees, asylum seekers, stateless persons, migrant workers, nationals of an enemy State and nationals of an expelling State who had lost or been deprived of their nationality. Some speakers had suggested that the scope of the topic should encompass those categories. While he stood ready to be persuaded, he was inclined to the view that the Commission should distil the essential principles enshrined in State practice and international conventions so that the end result would be a convention of general application, while the specific needs of each category of alien could be left to the relevant conventions. What the Commission could supply was a text codifying the general principles.

88. The topic should essentially concern itself with two kinds of alien: those residing lawfully and those residing unlawfully or irregularly in a given territory. There was ample international provision for the former, including, first and foremost, article 13 of the International Covenant on Civil and Political Rights. Article 7 of the General Assembly Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, which appeared as an annex to General Assembly resolution 40/144, added an important rider to that provision, to the effect that "[i]ndividual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited". Article 4 of Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) stated: "Collective expulsion of aliens is prohibited". The OAU Convention governing the specific aspects of refugee problems in Africa and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families prohibited collective expulsion and provided for review of individual cases.

89. Slightly different considerations applied to the expulsion of aliens residing irregularly in a given territory. In such cases, mass expulsion was permitted in some circumstances. In that connection, the Commission would need to pay special attention to the issues of international terrorism, drug trafficking and transnational organized crime. It should examine resolutions adopted by the United Nations and regional bodies dealing with the issue. Whereas at the national level, a state of emergency could be declared, derogating from a given human rights commitment, no such power existed at the international level. A middle way would therefore need to be found, allowing States to derogate from certain rights. The clue might lie in Protocol 7 to the European Convention on Human Rights, article 1, paragraph 2, of which stated that: "An alien may be expelled ... when such expulsion is necessary in the interests of public order or is grounded on reasons of national security". More, however, would be needed, given the information contained in paragraphs 17 to 19 of the second report.

90. The Commission would also need to address the question of whether non-admission should be covered by the draft articles. In that connection, article 5, paragraph 1 (f), of the European Convention on Human Rights would be relevant, as would the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. Migrants were liable to prosecution under that Protocol. The Commission would therefore need to consider that category of alien, but it might well be that non-admission should fall within the scope of the topic.

91. With regard to the wording of the draft articles, he would favour a simple but comprehensive definition, which was served by draft article 1, paragraph (1), with the possible addition of the words "physically" and "whether lawfully or unlawfully"; draft article 1, paragraph (2), could then be deleted. He agreed, however, with those who believed that it was premature to send the two draft articles to the Drafting Committee, because no consensus had yet been reached on the scope of the exercise.

One possibility would be to await the submission of the Special Rapporteur's third report; another would be to set up a working group to crystallize some of the principles involved before the draft articles were referred to the Drafting Committee.

The meeting rose at 1.10 p.m.

2926th MEETING

Tuesday, 29 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Later: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comisário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue.

Expulsion of aliens (*continued*) (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur on the expulsion of aliens to reply to Commission members' comments on his second report¹⁴⁸ and to present his conclusions.
2. Mr. KAMTO (Special Rapporteur) thanked Commission members for their contribution to the debate; some of their observations had been most pertinent and he had taken careful note of them. It was, however, regrettable that the debate had not focused exclusively on his second report on the expulsion of aliens; the new members of the Commission had expressed views on his preliminary report¹⁴⁹ and in so doing had made general comments on questions on which the Commission had already supplied very clear guidance, which had been endorsed by the Sixth Committee of the General Assembly (see paragraphs 10–14 of the second report) and to which there therefore seemed little point in returning.
3. As for the choice of topic, he was convinced that it was both useful and timely and, above all, more amenable to progressive development and codification than some other topics. Although he welcomed Mr. Pellet's overall support for the report under consideration, he did not quite grasp the distinction he had drawn between subjects which, like the expulsion of aliens, were allegedly

a matter for political negotiation alone and those which were supposedly a matter for expert deliberation. In reality it seemed that every subject called for both. In every case, whether the 1969 and 1986 Vienna Conventions, the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction or the Rome Statute of the International Criminal Court, it was the experts who had proposed legal or technical standards and the States which had undertaken political negotiations on the final text. Generally speaking, each topic on the Commission's agenda raised legal problems to which the members, in their capacity as experts, had to find answers. In that context, he particularly wished to thank Mr. Fomba, whose lucid, measured replies to most of the general comments on the second report had evidenced a real understanding of the report's approach.

4. Turning to the scope of the topic, he noted that Mr. Yamada had wondered if it would be advisable to formulate rules applicable to all the categories of aliens listed in draft article 1, paragraph 2, or whether it would not be better to consider each category separately. The draft work plan in annex I to the preliminary report indicated very plainly that in Part 1, Chapter II, on general principles, he would endeavour to identify the general rules applicable to various categories of aliens before studying the more specific rules making up the particular regime for each category in Part 2, on expulsion regimes. Proceeding in that manner would obviate any risk of repeating either the grounds for expulsion or the legal consequences thereof.

5. He wished to reassure the Chairperson of the Commission, who had insisted that the legal consequences of expulsion, including the possible expropriation of the expellee and the question of the admission of aliens, should be included in the scope of the topic, that he firmly intended to study the various legal consequences of expulsion for aliens, and the means of redress available not only to aliens, but also to the State of which they were nationals. The work of the Institute of International Law¹⁵⁰ and the award in the *Ben Tillett* case had prompted some reflection on that question, which he would certainly examine at a later stage. Contrary to what Mr. McRae held, there was no *a priori* obstacle to mentioning the issue of expropriation from that angle, which would not interfere with the relevant national legislation. The Commission could simply remind States that they were bound to rigorously apply their law on the subject in good faith, or to adapt the principles embodied in international case law on the expropriation of foreign companies to natural persons. The notion of the responsibility of the expelling State and its corollary, compensation, to which reference was made in the draft work plan in annex I to the preliminary report, met those concerns. Nevertheless, it appeared unnecessary to spell out in draft article 1 that the draft articles would apply also to the legal consequences of expulsion. Otherwise, it would also be necessary to say that they likewise applied to the procedure and reasons for

¹⁴⁸ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

¹⁴⁹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554.

¹⁵⁰ See "Projet de déclaration internationale relative au droit d'expulsion des étrangers" (Draft international declaration on the right to expel aliens), *Annuaire de l'Institut de droit international*, 1888–1889, vol. 10 (Lausanne session), Brussels, Librairie européenne Muquardt, p. 244 (available only in French), and "Règles internationales sur l'admission et l'expulsion des étrangers..." (footnote 130 above).

expulsion, which did not seem sensible. The idea that the subject under examination was not confined to relations between the individual and the State could be conveyed by simplifying the wording of draft article 1.

6. For the reasons stated in his preliminary report and reiterated in his second report, he did not agree with Mr. Brownlie, Mr. Wako and Ms. Xue that non-admission should be included in the scope of the topic. His viewpoint had been endorsed by almost all of the Commission members when the preliminary report had been considered in 2005 and by States' representatives in the Sixth Committee, apart from the Representative of the Republic of Korea (see paragraph 12 of the second report). Expulsion concerned aliens legally or illegally present in the territory of a State, whereas non-admission concerned aliens who were not yet present. It was impossible to expel a person from a territory before he or she had been admitted to it. Admission and non-admission were indubitably matters that fell within the scope of State sovereignty and thus not matters for international law. Furthermore, to develop rules on admission or non-admission would be contrary to the principle, to which Mr. Brownlie had rightly drawn attention, that it was the duty of every State to create the conditions for security and public order in its territory. As Mr. Gaja had said, the dividing line between *refoulement* and non-admission was fine, but when *refoulement* occurred in a border area, before an alien had settled in any way in the territory of a State, it might arguably be tantamount to a refusal of admission, which lay within the discretion of a State. Nevertheless, that did not signify that an international zone in which the alien was seeking admission or awaiting expulsion was a legal vacuum. Wherever they were, the persons concerned enjoyed fundamental human rights and were entitled to the protection afforded by existing international legal instruments and the relevant national laws. He did not therefore intend to create new rules in a sphere where legal instruments were in fact tending to proliferate. When considering the rules on expulsion, it would be sufficient to draw attention to the principles which an expelling State must respect in waiting zones.

7. Some Commission members had proposed that refugees, stateless persons and nationals of an enemy State should be excluded from the scope of the topic on the grounds that their expulsion was already governed by specific texts; he personally was unable to concur with that opinion for a number of reasons, which would be set out in paragraphs 60 to 79 and 81 to 94 of his forthcoming third report on the expulsion of aliens (A/CN.4/581). It should, however, be noted that the 1951 Convention relating to the Status of Refugees merely laid down the principle of the non-expulsion of refugees and the circumstances in which derogations were permitted. That text rested on a restrictive, obsolete conception of the term "refugee" and did not encompass new notions generated by practice, such as "temporary protection" or "subsidiary protection". Moreover, neither the 1969 OAU Convention governing the specific aspects of refugee problems in Africa, the 1984 Cartagena Declaration on Refugees¹⁵¹ nor the 1954 Convention relating to the Status of Stateless Persons dealt comprehensively with the expulsion of

refugees. Furthermore the anti-terrorist dimension of the expulsion of aliens, which had been reflected in Security Council resolution 1373 (2001) of 28 September 2001, was absent from those texts, and that alone justified a re-examination of the expulsion of refugees and stateless persons in the light of current law and practice. It was surprising that some members of the Commission, in particular Ms. Jacobsson and Mr. Pellet, had argued that the expulsion of the nationals of an enemy State should be excluded from the scope of the topic because it was already covered by international humanitarian law, in particular by the 1949 Geneva Convention relative to the protection of civilian persons in time of war (Convention IV), considering that that instrument did not in fact contain any provisions concerning the expulsion of that category of aliens. That question would be dealt with in greater detail in paragraphs 125 to 127 of his third report. An examination of State practice with regard to the expulsion of nationals of an enemy State revealed that it was highly disparate, to say the least. Nevertheless, much theoretical discussion had surrounded the subject, and the decision issued in 2004 by the Eritrea–Ethiopia Claims Commission had paved the way for further reflection, even if that decision had disregarded some aspects of prevailing practice.¹⁵² For all those reasons, he personally believed that it was imperative to include the nationals of an enemy State within the scope of the topic in order to fill the gaps in international law dealing with the matter.

8. Taking up a number of detailed points made about the scope of the subject, he agreed with Mr. Pellet that the commentary to article 1 should explain that the aliens in question were natural persons. Dual nationality and disguised extradition, two questions raised by Mr. Gaja, could be addressed in the fourth report on the expulsion of aliens, which would deal with the *ratione materiae* principles of expulsion, and in the sixth report, which would be devoted to grounds for expulsion. In addition, Mr. Gaja had advocated the inclusion of a provision stipulating that the rules proposed in the draft articles were without prejudice to other rules which might be established with a view to protecting aliens' rights, but he personally wondered whether the insertion of such a clause might not preclude any consideration of the legal consequences of expulsion. At all events, if that proposal was retained, that clause should be introduced at the beginning of part 3 of the study, which would in fact be devoted to the legal consequences of expulsion.

9. He was not opposed to the suggestion of Mr. Saboia and Mr. Vargas Carreño that the principle of *non-refoulement* should be included in the draft articles, provided that the principle was mentioned within the context of consideration of the rules governing the expulsion of refugees. On the other hand, it seemed unnecessary to include the question of transfer or surrender within the scope of the topic, as Mr. Hassouna had suggested, since it was covered by international criminal law and came under the heading of cooperation in combating national and transnational crime. Responding to his request for information in early May 2007, officials of the INTERPOL General Secretariat

¹⁵¹ See footnote 131 above.

¹⁵² Permanent Court of Arbitration, Eritrea–Ethiopia Claims Commission, *Partial award, 17 December 2004, Civilians Claims, Eritrea's Claims 15, 16, 23 and 27–32*, UNRIIAA, vol. XXVI (Sales No. E/F.06.V.7). See also www.pca-cpa.org.

had clearly indicated that if transfer or surrender was made subject to the normative constraints associated with the expulsion of aliens, the work of INTERPOL would be hampered and the whole system of international cooperation in combating crime rendered ineffective. Furthermore, such a move would seriously undermine the effectiveness of the fight against terrorism. For those reasons, it would be better to exclude that subject from the scope of the topic. If, however, the Commission felt otherwise, the Secretariat could ask INTERPOL directly for fuller information on the question. In any case, expulsion in connection with terrorism would be duly analysed in the third report (A/CN.4/581).

10. With reference to some terminological points raised by Commission members, he noted that Ms. Escarameia had wondered whether it might not be better to speak of aliens who were present in the host country “independently of the lawfulness of their status”, rather than of aliens who were present lawfully or with irregular status. An examination of practice revealed that either expression could be employed equally well, and he therefore had nothing against the consistent use of the phrase “alien present lawfully or unlawfully”. Ms. Escarameia had also commented that, contrary to the assertion made in paragraph 106 of the second report, the loss of nationality was not always voluntary, and she had cited the case of women who lost their nationality when they married a foreigner. Yet marriage was the result of a choice, and any choice constituted a voluntary act. Turning to Mr. Fomba’s proposal to replace the words “*se trouvant sur le territoire*” (“present on the territory”) with “*se trouvant dans le territoire*” (“present in the territory”) in the French version, he explained that he had chosen the former wording in order to bring out the fact that, for the purposes of the topic under consideration, an alien was considered to be a person who had crossed the border of the State concerned. However, since both phrases seemed to mean the same thing, he could accept that proposal. Mr. Pellet had asked about the origin of the term “territorial State”, which was in fact frequently used in legal writings and could also be found in studies by the Institute of International Law going back to the nineteenth century. He had thought it wise to employ that notion for there were situations in which it seemed impossible to speak of the “host State”, especially in the case of a State which was expelling an alien, or of an “expelling State” when the expulsion decision was still pending. Nevertheless he was not opposed to the use of different terms when they reflected real practice. Lastly, he wished to assure Mr. Wako that he would distinguish between lawfully and unlawfully resident aliens when analysing expulsion regimes, but that this distinction would not constitute the backbone of the study. He recalled that in 2005 the Commission had given clear guidance on the topic,¹⁵³ which had been approved by the Sixth Committee, namely that he should elaborate a legal regime as comprehensive as possible on the expulsion of aliens and not just a set of residual principles.¹⁵⁴

11. Turning to the two proposed draft articles, he noted that some Commission members had recommended the outright deletion of paragraph (2) of draft article 1, which

would completely thwart his aim of precisely defining the scope of the future draft articles. If draft article 1 was reduced to its current paragraph (1) alone, the scope of the topic would be limitless, with the result that the draft articles could then apply to the expulsion of all types of aliens, including foreign diplomats or the military personnel of multilateral forces—in other words to categories which, it was generally agreed, must be excluded from the topic. It seemed that a simpler wording of paragraph (1) highlighting the terms “expulsion” and “aliens” would meet the justified concerns expressed by Commission members, while paragraph (2) must be worded in such a way as to clarify the general statement contained in paragraph (1). He therefore proposed recasting paragraph (1) of draft article 1 to read: “The present draft articles shall apply to the expulsion by a State of the aliens listed in paragraph 2 of this article who are present in its territory”. Another possible formulation might be: “The present draft articles shall apply to the expulsion of the aliens listed in paragraph (2) who are present in the territory of the expelling State”. Paragraph (2) might read: “They shall concern aliens lawfully or unlawfully present in the expelling State, refugees, asylum seekers, stateless persons, migrant workers, nationals (*ressortissants*) of an enemy State and nationals (*ressortissants*) of the expelling State who have lost their nationality or been deprived of it”.

12. The repetition in draft article 2, paragraphs (1) and (2) (b), was probably due to his keen but unnecessary concern to be didactic and clear. Some members had proposed the deletion of paragraph (2) (b), as a way of solving the problem, but it would be preferable to delete paragraph (1), as Mr. Yamada had suggested, so that article 2 would have just one paragraph, the current paragraph (2), which would be redrafted. The debate on that paragraph had centred mainly on the definition of the term “*ressortissant*” and strong opposition, led by Mr. Pellet, had been voiced, with one Commission member going so far as to say that he did not see why the French language should have such a hold over the Commission’s work. That linguistic controversy had obscured the real reasons for his choice of the term “*ressortissant*”.

13. The first point to be made was that special rapporteurs worked in one of the official languages of the United Nations and that the reports that they drafted in that language constituted the authentic text, the other versions being translations. Secondly, translation problems, which were not new to the Commission, did not arise solely from French into other languages, which in the case at hand was English; it had often been hard to find the equivalent of an English word in French, yet that had not caused the term in question to be rejected. For example, the words “liability” and “responsibility” were translated by the single word “*responsabilité*”, while “boundary” and “frontier” were rendered as “*frontière*”. It was therefore surprising that Mr. Pellet had yielded so easily to the argument that there was no equivalent in other languages. Thirdly, his mother tongue was not Arabic, Chinese, English, French, Russian or Spanish, and he felt that one day some thought should be given to introducing an African language as a working language of the United Nations, even though that language would surely not be his own. That being so, he had tried, in paragraphs 147 to 149 of his second report, to explain why he did not think that it was enough to say

¹⁵³ See *Yearbook ... 2005*, vol. II (Part Two), Chap. VIII.

¹⁵⁴ See paragraphs 10–14 of the Special’s Rapporteur second report, *Yearbook ... 2006*, vol. II (Part One), document A/CN.3/573.

that, for the purposes of expulsion, an alien was a person who did not have the nationality of the host State. In some cases a person who did not have the nationality of the host State was still not treated by that country as an alien and could not therefore be expelled. From that point of view, that person was in the same situation as a national. Mr. Kolodkin's comments regarding Russian and especially Hungarian practice confirmed that argument. The Commission would see that paragraph 46 of the third report mentioned the 1968 *Italian South Tyrol Terrorism* case, in which the Supreme Court of Austria had decided that Italian nationals born in the South Tyrol could not be expelled from Austria, because Austrian law required that they should be treated as nationals. Given that the ICJ, including in its most recent case law—which he had cited in his second report—used the terms “national” and “*ressortissant*” without distinction, and taking due account of the position of almost all Commission members who had spoken on the second report, he would in future use the term “*ressortissant*” as a synonym for “national”. In order to solve the problem raised by the situation of certain non-nationals who enjoyed the same rights and protection as nationals, he proposed that an alien should be defined as a “person who does not have the nationality of the State in whose territory he or she is present, unless otherwise provided by the law of that State”.

14. The members who had voiced criticism of the term “frontier” had obviously not given careful consideration to either the exact content of the definition proposed or the problem he had been trying to solve. In the context of expulsion, a frontier could not be regarded merely as a line. It appeared in fact to be a zone: a port or airport zone, a customs zone or a zone delimiting maritime areas constituted frontier zones as far as immigration was concerned. Furthermore, all airports of the world had an “international zone” where police formalities for entry into the country were completed. It was not a line, it was a zone. As long as one had not left that zone, one was certainly in the territory of the State concerned, but one could not be expelled from it. One could only be sent back, denied entrance. The case of the *MV Tampa* cargo vessel, apart from the human drama involved, had shown that as long as a person was on a boat offshore, that person was considered to be in the immigration zone at the limits of the State's territory. That was the nuance he had wished to introduce into his definition of the term “frontier”.

15. As for the word “territory”, he had merely used the classic definition unanimously accepted by legal writers, and in paragraphs 179 to 182 of his second report he had explained what it meant in physical terms. There was therefore nothing to discuss. Admittedly, one Commission member had proposed that maritime areas should not be included in the notion of territory, but he did not think that a clearly accepted definition could be truncated in that way. In point of fact, the concern expressed by that member could be dispelled by his definition of frontier in the context of expulsion.

16. He endorsed the suggestion made by Mr. Gaja and supported by Mr. Kolodkin and others that the criterion for the notion of “compulsion” contained in the definition of the term “expulsion” should be specified. That is what he had tried to do in the new version of article 2, which read:

“For the purposes of the draft articles:

“(a) *Expulsion* means a legal act or conduct by which a State compels an alien to leave its territory;

“(b) *Alien* means a person who does not have the nationality of the State in whose territory he or she is present, except where the legislation of that State provides otherwise;

“(c) *Conduct* means any act by the authorities of the expelling State against which the alien has no remedy and which leaves him or her no choice but to leave the territory of that State;

“(d) *Territory* means the domain in which the State exercises all the powers deriving from its sovereignty;

“(e) *Frontier* means the zone at the limits of the territory of an expelling State in which the alien does not enjoy resident status and beyond which the expulsion procedure is completed.”

17. Apart from Mr. Niehaus, who had said that the two draft articles were not yet ready to be referred to the Drafting Committee, and Mr. Wako, who considered such referral to be premature and had even proposed that a working group be set up, all the Commission members who had participated in the debate were in favour of sending the draft articles to the Drafting Committee. Mr. Kolodkin had requested that the Commission should work on them a little longer, but that had already been done—he hoped to Mr. Kolodkin's taste. He informed Mr. Wako that it was the Commission's usual practice to set up a working group only when there was a deadlock on a topic, when debates in plenary had not provided any indication of the exact direction work should take, or when one aspect of the topic presented particular difficulties and the Commission was divided on that issue or on the topic as a whole. That did not seem to be the case as far as the expulsion of aliens was concerned, and the Drafting Committee ought to be able to settle some of the minor points which had been raised.

18. Two strands of opinion had emerged among the many proponents of referring the two draft articles to the Drafting Committee. Some would like the Drafting Committee to examine the two draft texts at a later stage, while others would like it to do so immediately. Initially he had had no objection to the principle of deferring consideration of the two draft articles by the Drafting Committee, but Mr. Pellet, supported by Mr. Fomba and the Chairperson of the Drafting Committee, Mr. Yamada, had convinced him that it would be better for the Commission's work on the topic if such consideration took place without delay. Accordingly, he had reworked the two draft articles in question since the previous meeting of the Commission.

19. The CHAIRPERSON said that if he heard no objection he would take it that the Commission accepted the proposal to refer draft articles 1 and 2 to the Drafting Committee.

It was so decided.

Effects of armed conflict on treaties¹⁵⁵ (A/CN.4/577 and Add.1–2, sect. D, A/CN.4/578,¹⁵⁶ A/CN.4/L.718¹⁵⁷)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

Mr. Vargas Carreño took the Chair.

20. The CHAIRPERSON invited the Special Rapporteur to introduce his third report on the effects of armed conflicts on treaties (A/CN.4/578).

21. Mr. BROWNLIE (Special Rapporteur) said that the circumstances in which he was introducing his third report were unusual in that a quinquennium had just ended and the Commission had 16 new members.

22. For practical reasons, neither his first nor his second reports¹⁵⁸ had been given full consideration. The draft articles he had proposed had not been referred to the Drafting Committee, partly because they had given rise to a considerable amount of controversy, but mainly because priority had been given to other topics that had absolutely had to be finished before the end of the quinquennium. In addition, as he had had to honour other professional commitments, the second report had been very succinct—in essence, a summary of the debate on the topic thus far, especially in the Sixth Committee. The first report was therefore still the foundation of the third, the more significant part of which was devoted to the commentary to draft article 7. In it he outlined examples of State practice and case law relating to the categories of treaties set forth in that article, which *prima facie* were not suspended or terminated as a result of an armed conflict. He drew attention to paragraphs 18 to 28—and especially paragraphs 22 and 23—of his second report, which listed municipal court decisions where emphasis had been placed on the criterion of the object and purpose of the treaty.

23. He also wished to draw attention to what he considered to be some very difficult problems which were in a sense related to sources. Since a number of delegations had pointed out that some of the categories listed as candidates for inclusion in draft article 7 had not found much support in State practice and that it would be very difficult to identify relevant State practice in that sphere, it would be inappropriate to insist that the categories admitted to draft article 7 should all be deemed to constitute part of existing general international law. He had explained that in more detail in paragraphs 46 to 48 of his third report.

24. He noted that the topic had been deliberately left out of the 1969 and 1986 Vienna Conventions and added that it was important to read the draft articles, particularly draft articles 3 to 7, as a coherent whole.

25. Taking up draft articles 1 to 7 in greater detail, he said that, given the nature of the subject matter and the issues which had emerged during the consideration of the first two reports, he thought that it was essential to set up a working group. He agreed with Mr. Kamto that the establishment of a working group must not be an automatic process, but he was convinced that in the context of the effects of armed conflicts on treaties there were a number of key issues on which the Commission had to reach a collective decision, one good example being whether the definition of armed conflict for the purposes of the draft articles should include internal conflicts. That question had given rise to strong differences of opinion in both the Commission and the Sixth Committee. A working group would permit progress on that point and on other important points.

26. One of the overall goals of his third report was to clarify the legal position, a task which was far from easy because the literature was quite varied, covered a very broad period of time and merely highlighted the uncertainty of the law in that connection. The general line he had taken in making choices had been to promote the security of legal relations between States. That was the whole point of draft article 3, which had essentially been borrowed from the work of the Institute of International Law between 1983 and 1986.¹⁵⁹ The main message of the draft article was that the outbreak of an armed conflict did not, as such, result in the termination or suspension of a treaty. He hoped that the Commission's work on the topic would encourage States to supply examples of their practice in that field, since direct evidence thereof had been quite limited to date. He was further of the opinion that the giving of executive advice to courts should be included in State practice.

27. Although he had deemed it simpler to present a complete set of draft articles, the Commission must not assume that he had been rushing to judgement, or that he was proposing a definitive and dogmatic set of solutions. While he had adopted a normative format, he had deliberately left issues open until the Commission had formed a collective opinion, which he was prepared to accommodate. Moreover, since some of the draft articles were simply expository in nature, it would be premature to send them to the Drafting Committee. As he had explained in paragraphs 47 to 49 of his first report, it was essential to take account of policy considerations. As to the current relevance of that question, one legal adviser from a Western country had said that he hardly ever had to deal with it in practice, while another had said that he encountered it constantly. For example, it had been central to the hearings of the Eritrea–Ethiopia Claims Commission in 2005,¹⁶⁰ during which his first report had been much cited.

28. Returning to his third report and the draft articles proposed therein, he said that, with reference to draft article 1 (Scope), he concurred with the opinion expressed by

¹⁵⁵ For the discussion of draft articles 1 to 7 proposed by the Special Rapporteur in his second report, see *Yearbook ... 2006*, vol. II (Part Two), Chap. X, pp. 167–171, paras. 181–211. For the second report, *ibid.*, vol. II (Part One), document A/CN.4/570.

¹⁵⁶ Reproduced in *Yearbook ... 2007*, vol. II (Part One).

¹⁵⁷ Mimeographed, available on the Commission's website. See also the summary record of the 2946th meeting, below, paragraph 50.

¹⁵⁸ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552 and *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570.

¹⁵⁹ See Institute of International Law, *Yearbook*, vol. 61, Session of Helsinki (1985), Part I (preparatory works), pp. 25–27, and Part II, pp. 278–283 (article 2 of the resolution on the effects of armed conflicts on treaties, of 28 August 1985).

¹⁶⁰ The partial awards of the Eritrea–Ethiopia Claims Commission rendered on 19 December 2005 are available on the website of the Permanent Court of Arbitration (www.pca-cpa.org).

the United Kingdom in the Sixth Committee to the effect that the proposed expansion of the draft articles' scope to encompass treaties concluded by international organizations raised difficulties which had been underestimated and which required in-depth consideration. The arguments relating to that question, which would be examined by the Working Group, were set out in greater detail in paragraphs 8 to 10 of the report.

29. In draft article 2 (Use of terms), subparagraph (a), which was preceded by the introductory phrase "For the purposes of the present draft articles", used the definition of the term "treaty" found in the 1969 Vienna Convention. In connection with subparagraph (b), he drew attention to the commentary contained in paragraphs 16 to 24 of his first report¹⁶¹ and 8 to 13 of his second report,¹⁶² which was supplemented by paragraphs 12 to 15 of his third report. Opinions in both the Commission and the Sixth Committee were widely divided on whether or not to include internal armed conflicts in the definition of "armed conflict", and policy considerations pointed in different directions. The Commission was engaged in the progressive development of the law and not its mere codification, to which the topic was not at all suited. It was a fact that in recent decades a number of armed conflicts had been fuelled by State agents located outside the territory of the State in which the armed conflict was taking place. Moreover, it would probably be unrealistic to pretend that a neat distinction could be made between internal armed conflicts in the strict sense and those which had foreign connections and causes. Acceptance of the view that a large number of armed conflicts were partly internal and partly external would cause greater harm to the integrity of treaty relations, because then any number of excuses with some sort of factual basis could be invoked to allege the existence of an armed conflict within the meaning of draft article 2, and that might have the effect of suspending or terminating treaty relations. For that reason, he again thought that collective work culminating in the formation of a collective opinion was essential. He gathered that there was a consensus for having armed conflicts include situations in which an invasion was so effective that it very rapidly resulted in an armed occupation of a State without any armed conflict in the conventional sense, situations that had been mentioned by the delegation of the Netherlands.¹⁶³

30. Draft article 3 (Non-automatic termination or suspension) was central to the whole set of draft articles. Paragraphs 16, 17 and 19 of the third report retraced the background of that draft article and reminded the reader that the phrase "*ipso facto*" had been deleted from the title and replaced by "necessarily" in the body of the text. In draft article 4 (The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict), the reference to the intention of the parties had attracted considerable attention in the Sixth Committee, where nine States had been in favour of that criterion and eight had regarded it as problematical. The Commission's debates

had revealed similar divergences of opinion, which were reflected in greater detail in paragraphs 22 and 23 of the report. Opposition to reliance upon intention was usually grounded in the difficulty of ascertaining the parties' intention with certainty, but that was also true for many legal rules, including legislation and constitutional provisions. In any event, the existence and interpretation of a treaty was not a matter of intention as an abstraction, but of the intention of the parties "as expressed in the words used by them and in the light of the surrounding circumstances". The ultimate consideration was the aim of interpretation. Surely that aim was to discover the intention of the parties and not something else.

31. In connection with draft article 5 (Express provisions on the operation of treaties) he drew attention to the commentary contained in paragraphs 55 to 58 of the first report and in paragraphs 29 to 31 of the second report. The draft article was redundant from the point of view of the drafting process, but it should be retained for the sake of clarity. The former paragraph 2 of the draft article formed the subject of a new draft article 5 *bis* (The conclusion of treaties during armed conflict), in which the term "competence" had been replaced by "capacity". The draft article reflected the fact that, in practice, belligerents did conclude treaties between themselves during an armed conflict. He had withdrawn draft article 6 and replaced it with draft article 6 *bis* (The law applicable in armed conflict), which sought to provide useful clarification of the relationship between human rights and the law applicable in armed conflicts, as indicated in paragraphs 30 to 31 of the third report.

32. Lastly, he drew attention to the commentary to draft article 7 (The operation of treaties on the basis of necessary implication from their object and purpose), which was to be found in paragraphs 62 to 118 of the first report; the draft article had attracted fairly numerous and very varied comments, which were summarized in the third report. It had been argued that article 7 was redundant because the criteria set out in draft article 4 permitted a classification of treaties susceptible to termination or suspension, so that there was no need for an indicative list. Others had taken the view that the principle of an indicative list was acceptable, but that further study should be devoted to the items to be included in it. His own opinion was that such a list must be kept in some form or other, although the sources posed a problem, for some items on the list were clearly not supported by State practice. Others, like permanent regimes, did have such support, and he had garnered what State practice was available. If the indicative list was not adopted, it would then be best to draw up an annex containing an analysis of State practice and case law. As the topic was extremely difficult and fraught with uncertainties, the Commission must be prepared to examine those categories that were not corroborated by State practice in the conventional form, but which did find backing in reputable legal sources: doctrinal material, some State practice and the decisions of municipal courts. The memorandum by the Secretariat¹⁶⁴ contained some very helpful suggestions in that respect. Whether or not draft article 7 survived in its current form, which created

¹⁶¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

¹⁶² *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570.

¹⁶³ *Official Records of the General Assembly, Sixth Committee, Sixty-first session*, summary record of the 18th meeting (A/C.6/61/SR.18), para. 33.

¹⁶⁴ A/CN.4/550 and Corr.1-2 (mimeographed, available on the Commission's website, documents of the fifty-seventh session).

a set of weak presumptions as to the types of treaty that did not necessarily entail termination or suspension, some other vehicle would still have to be found for recording legal practice that supported those categories.

33. The CHAIRPERSON thanked the Special Rapporteur for his introduction and invited members of the Commission to make comments.

34. Mr. PELLET recalled that in his first report in 2005 the Special Rapporteur had proposed a complete set of draft articles accompanied by commentaries, which had not been very well received. In his second report in 2006, he had confined himself to seven draft articles without proposing any modification of the previous year's work and without taking account of the Commission's substantive criticism, which had appeared only in the commentaries. It was scarcely surprising that the second report had not gone down any better than the first. What was surprising was that the third report simply reproduced the first, without any fundamental modification apart from the new draft article 6 and the splitting of draft article 5, which were in fact welcome changes. At least the observations made in the Sixth Committee and, to a lesser extent, those made in the Commission, had been reproduced after each provision. He had already commented at length on the first two reports and, given that the proposals contained in the third report were essentially unchanged, his observations also remained unchanged. However, it seemed useful at the beginning of a new quinquennium to outline in broad terms what he considered to be the difficulties raised, not by the draft articles themselves, but by the overall conception underlying them. Those problems could be divided into six categories.

35. First, generally speaking, it emerged from draft article 4, paragraph 1, that the whole set of draft articles was built on the criterion of the intention of the parties to the treaty, and the Special Rapporteur seemed unwilling to review that approach, despite the numerous critical remarks it had prompted. Even if it was one of the possible criteria for deciding the fate of a treaty in the event of an armed conflict, it should not be the only one, especially as it was plain that when parties concluded a treaty they did not usually contemplate the possibility that a conflict might break out. Although—as draft article 4, paragraph 2 (b), acknowledged—the nature and extent of the armed conflict could not be ignored, there was no reason to subsume them under intention. Similarly, while the object and purpose of a treaty, which were of fundamental importance, were related to intention, the meaning of “intention” would have to be spelled out. A mere reference to article 31 of the 1969 Vienna Convention was not sufficient. Furthermore, while he personally did not oppose the principle of a list as proposed in draft article 7, he thought that such a list must be based on a set of criteria and on an analysis of both international and domestic practice.

36. Secondly, it was inconceivable that the topic under consideration be studied without any reference whatsoever to the prohibition of the use of armed force in international relations, which had gradually taken shape over the past century. Yet the draft articles did not take account of that crucial development.

37. Thirdly, the Special Rapporteur contended that the topic was governed by the law of treaties. That was certainly one of its essential components, but its interest lay in the very fact that it was situated at the crossroads of several bodies of rules: the law of treaties, of course, but also the law of armed conflicts and the law of responsibility. In that connection, it was a pity that the Special Rapporteur had not drawn more on the Secretariat's remarkable memorandum on the question.

38. Fourthly, it was absolutely vital to decide whether to include non-international armed conflicts. He himself was convinced that, owing to their frequency and intensity, such conflicts should be addressed and that they actually constituted one of the main reasons for reopening the subject at the beginning of the twenty-first century; if they were ignored, the 1969 Vienna Convention alone might suffice. He did not see why it would be harder, as the Special Rapporteur asserted, to distinguish between non-international armed conflicts and other forms of violence in the context of the topic under consideration. The Rome Statute of the International Criminal Court in fact established a distinction between non-international armed conflicts and other forms of internal violence not coming under its article 8.

39. Fifthly, he thought that a distinction should be drawn between the status *vis-à-vis* a treaty of States that were a party to a conflict and States that were neutral. The effects of armed conflicts on treaties could not be examined in the abstract: the status of the States concerned was a crucial factor.

40. Sixthly, the draft articles did not differentiate clearly enough between highly disparate situations. Further distinctions must be made in order to delimit the scope of the topic before starting to draw up draft articles proper: for example, between treaties which had entered into force and treaties which had only been signed but had not yet entered into force owing to an insufficient number of ratifications; between the impact of an armed conflict on the contracting parties and the impact on mere signatories; and between treaties concluded between States alone and treaties concluded by States and/or international organizations whose members were parties to the conflict. Contrary to the Special Rapporteur's contention, that would by no means amount to an expansion of the topic, whose title on no account implied that it was confined to treaties between States. Lastly, a distinction should be drawn between provisions that were grouped together in the draft articles, since an armed conflict might very well affect only certain categories of provisions. It might even be possible to go a step further and to differentiate also between the obligations resulting from a treaty. In any case, that was a question that merited consideration.

41. He was pleased that the Special Rapporteur was receptive to the idea of referring the subject to a working group, which could solve the various problems before they reached the Drafting Committee stage. The working group should be mandated to formulate specific proposals so that the Commission could take a definitive position on the following questions: whether the topic should cover non-international armed conflicts; whether it was necessary to tackle the issue of treaties to which

international organizations were parties to consider only treaties between States; and what implications the interdisciplinary nature of the various branches of international law—law of treaties, law of armed conflicts, law of responsibility—and the prohibition of the use of force in international relations had for the Commission's consideration of the topic. Lastly, the working group should investigate the essential question of the divisibility of treaty provisions.

42. In addition to considering those major questions of principle, the working group should endeavour to develop a classification for criteria to be taken into account in determining the effects of armed conflicts on treaties (intention of the parties, nature of the conflict, object and purpose of the treaty, etc.), the treaty situations concerned (whether or not the treaty was in force), and the treaty parties' status *vis-à-vis* the conflict (belligerents or neutral), among others. It should also identify questions requiring clarification, taking as its starting point the comments already made by three Commission members on that subject¹⁶⁵ and also the memorandum by the Secretariat. Then and only then, on the basis of the replies obtained and the classification established, would the Commission, under the guidance of the Special Rapporteur, doubtless be able to formulate and adopt a genuinely useful set of draft articles very quickly.

43. Ms. ESCARAMEIA said that, owing to a lack of time, she would deliver her observations at the following meeting; however, she wished to know if the plan was to consider all the draft articles contained in the third report, or only the first seven.

44. Mr. BROWNLIE (Special Rapporteur) reminded Mr. Pellet that the question of the lawfulness of the use of force had been duly addressed in the first and third reports. He informed Ms. Escarameia that the plan was initially to discuss only the first seven draft articles.

The meeting rose at 12.55 p.m.

2927th MEETING

Wednesday, 30 May 2007, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO
(Vice-Chairperson)

Present: Mr. Brownlie, Mr. Cafisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. D, A/CN.4/578, A/CN.4/L.718)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCARAMEIA commended the clarity of the third report (A/CN.4/578) and of the Special Rapporteur's approach, which left no doubt as to what the draft articles were to cover and made it easier to see what needed to be done. She had already commented on earlier versions of some of the draft articles, so would try to avoid repetition.

2. Her statement would fall into three parts. The first would consider some underlying problems of a structural nature in the draft articles; the second would consist of comments on the draft articles themselves; and the third would focus on action to be taken.

3. With regard to the structural problems, some issues needed to be addressed before the Commission could proceed with its work. First, a clearer distinction must be drawn between the effects of treaties on the conflicting parties and on third parties. Secondly, the differing effects of armed conflict on different provisions of the same treaty should be clarified. Thirdly, a distinction should be drawn between the suspension and the termination of a treaty; the Commission had tended to consider them as a single process, but in reality they might be quite different. Another question was the difference between the effects on a treaty of an international and of an internal conflict (assuming that both were to be covered by the draft articles). The same question arose as to the different effects of large-scale and small-scale conflicts. The "extent" of a conflict was mentioned in draft article 4, paragraph 2 (*b*), but only in relation to the question of determining the intention of the parties, which was a different issue altogether. A further question related to the differing effects of armed conflicts, and of termination or suspension, on bilateral and on multilateral treaties, particularly those multilateral treaties that had a large number of parties. Lastly, the legality of a State's position in relation to a given armed conflict needed further consideration. The issue was partially dealt with in draft article 10, but she would not comment in detail until that draft article had been introduced by the Special Rapporteur.

4. Another question was under which chapter of international law the draft articles belonged. The Special Rapporteur continued to assume, as in previous reports, that they formed part of the law of treaties. That, however, was to overlook the importance of other chapters, including the law of war. Draft article 10 had been added in recognition of that fact. Nonetheless, the criterion of the intention of the parties, which was typical of the law of treaties, was, along with the object and purpose of the treaty, cited as decisive. That was also the reason why so little attention had been devoted to internal conflicts—given that no treaty had been concluded between the parties to the conflict—or to the legality of a State's position in a situation of war, although draft article 10 did address the question of self-defence. The law of war was, however, important in assessing such legality, while the law of

¹⁶⁵ See *Yearbook ... 2006*, vol. I, 2896th meeting, p. 190, paras. 30 and 36, and 2897th meeting, p. 199, para. 46.

State responsibility could apply when assessing the consequences of non-compliance with treaties suspended or terminated. The draft articles thus related to several areas of law. One possible explanation for the exclusion under article 73 of the 1969 Vienna Convention of situations of armed conflict might be that the drafters of the Convention had considered that armed conflict was covered by a special regime to which the law of treaties did not necessarily apply.

5. The issue that she found most problematic was that of the criterion for susceptibility to termination or suspension. Under draft article 4, the essence of the treaty lay in the presumed intention of the parties, which would determine whether the treaty remained in force in the case of armed conflict. As the *presumed* intention was, self-evidently, not expressed, the criterion given in draft article 4, paragraph 1, was the intention of the parties at the time the treaty was concluded, as determined by articles 31 and 32 of the 1969 Vienna Convention (draft article 4, paragraph 2 (a)) and by the nature and extent of the armed conflict in question (draft article 4, paragraph 2 (b)). Article 31 of the Vienna Convention, with its reference to the object and purpose of the treaty, seemed to provide the link to draft article 7, which gave the object and purpose of the treaty as a criterion for determining the types of treaties that were to continue in operation in the event of armed conflict. It was a complex chain of reasoning, which ended up with a mixture of criteria: not only intention in draft article 4 and object and purpose in draft article 7 but also, in the latter, a list of categories of treaty. Even if the presumed intention of the parties were the only criterion—which it was not—she did not believe it to be a fruitful point of departure, since account had to be taken of the future development of the treaty itself, particularly in circumstances as dramatic as the outbreak of war. In her view, a more satisfactory criterion would be the viability of the continued operation of the various provisions of the treaty in armed conflicts. That would make it possible to deal with the provisions separately, taking into account the type of conflict involved and the legality of the position of a given party. Moreover, as had been suggested by several members over the past few years, including Mr. Mansfield, Mr. Matheson, Mr. Pellet and herself, a list of factors or criteria could be drawn up, indicating whether the provisions of the treaty continued to apply. Such factors could include the object and purpose of the treaty; any textual reference to armed conflict in the treaty; the magnitude of the conflict; the number of parties to the treaty; the importance at the international level of the treaty's continued applicability in time of war; and the question of whether there was a high or a low probability of the treaty being applied in time of war. A list of categories of treaty likely to remain applicable in time of war could be appended in an indicative article. The Secretariat memorandum¹⁶⁶ offered a wealth of useful material in that regard. The intention of the parties could also be included, but as just one factor among many. She was aware that her suggestion did not provide a definitive solution; however, it was preferable to reliance on the intention of the parties.

6. Turning to the text of the draft articles themselves, she concurred with the Special Rapporteur that the scope of the draft, as set out in draft article 1, should not, for purely practical reasons, extend to treaties concluded by international organizations; the Commission's task was onerous enough as it was. The question of treaties provisionally applied between parties was more problematic: article 25 of the 1969 Vienna Convention, referred to in paragraph 7 of the report, could not resolve the issue, given that article 73 stated that the provisions of the Convention did not prejudice any question that might arise in regard to a treaty from the outbreak of hostilities between States. Further thought should be given to the issue.

7. With regard to the definition of armed conflict given in draft article 2, Ms. Escameia could not tell from the Special Rapporteur's comments whether he intended it to include internal armed conflict; the definition could be read either way. Given that internal conflicts were more common than international conflicts, and that the draft articles aimed to be of practical use, the scope should indeed include internal armed conflict. Situations of military occupation should be included for the same reasons. She would therefore prefer a definition of armed conflict that combined the wording used in 1995 by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case [decision on the defence motion of interlocutory appeal on jurisdiction, para. 70] and elements of article 18, paragraph 2, of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. The definition would thus read:

“For the purposes of the draft articles, armed conflict means:

“(a) resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State;

“(b) situations of military occupation, even if there is no organized armed resistance.”

If it was decided that the scope of the draft articles would not extend to internal armed conflict, the current definition should, of course, be retained.

8. With regard to draft article 3, she recalled that when, at its fifty-eighth session, the Commission had discussed replacing the expression “*ipso facto*”, she had suggested the word “automatically” as an alternative.¹⁶⁷ The Special Rapporteur had replaced “*ipso facto*” with “non-automatic” in the title, but had opted for the word “necessarily” in the text itself. In the interests of securing consistency between title and text, the stronger word “automatically”—which was also closer in meaning to the term “*ipso facto*”—was preferable.

9. With regard to draft article 4, she could not accept the assumption that the interpretation of a treaty depended ultimately on determining the intention of the parties at the time that the treaty was concluded. That was not an

¹⁶⁶ A/CN.4/550 and Corr.1–2 (see footnote 164 above).

¹⁶⁷ *Yearbook ... 2006*, vol. I, 2911th meeting, p. 303, para. 5. See also the 2895th to 2898th meetings (*ibid.*).

easy or, indeed, always a practicable task, especially when an unforeseen event such as war between the parties occurred.

10. New draft article 6 *bis* gave rise to a number of problems, most notably the statement that the application of standard-setting treaties was determined “by reference to” the applicable *lex specialis*, namely, the law applicable in armed conflict. The law of armed conflict was not, however, necessarily the applicable *lex specialis* in human rights or environmental matters in which other law might well take precedence. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (paras. 102–113), the ICJ had referred to the advisory opinion of 1996 on the *Legality of the Threat or Use of Nuclear Weapons* and concluded that the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the rights of the child continued to apply in times of war. The law of armed conflict could thus not be considered *lex specialis* in relation to human rights law and did not always prevail over it. Perhaps the Special Rapporteur could clarify the situation and redraft the article.

11. With regard to draft article 7, a difficult and controversial provision, she was opposed to its being annexed to the draft. The provision acted as a useful counterbalance to the criterion of the intention of the parties, which was contained in draft article 4, and to which she was opposed; relegating it to an annex would diminish its force. With regard to draft article 7, paragraph (2) (b), she did not understand the Special Rapporteur’s reasons for excluding treaties codifying *jus cogens* rules. True, such rules might be difficult to determine, but there would be no need to do so, and in any case the Commission had already tested them in its commentaries to the draft articles on responsibility of States for internationally wrongful acts¹⁶⁸ and the topic of fragmentation of international law: difficulties arising from the diversification and expansion of international law.¹⁶⁹ Moreover, paragraph 31 of the memorandum by the Secretariat on the effect of armed conflict on treaties¹⁷⁰ cited treaties or treaty provisions codifying *jus cogens* rules as exhibiting a very high likelihood of applicability in case of armed conflict. For all those reasons, she considered that the draft article should remain in the body of the text.

12. She would refrain from commenting on the remaining draft articles until they had been introduced by the Special Rapporteur. As to what action should be taken, some of the less problematic draft articles, such as draft articles 1, 3, 5, 5 *bis* and 10 to 14, could be referred to the Drafting Committee. The basic structural issues affecting the other draft articles would need to be discussed further. She commended the Special Rapporteur’s openness to the idea of setting up a working group with a mandate

to settle questions relating to the scope of the draft articles and the criteria to be employed.

13. Mr. McRAE said that the three reports on the effects of armed conflicts on treaties all evidenced the commitment to thorough analysis for which the Special Rapporteur was reknowned in academic circles. As the Special Rapporteur had pointed out, there was no agreed or settled position on the topic in the literature and thus there would clearly continue to be lively debate on the direction to be taken. The lack of any single solution or approach in the literature was reflected in State practice, as shown in the Secretariat’s excellent memorandum on the practice and doctrine.

14. He wished to set out his concerns about certain aspects of draft articles 4 and 7. The issues had been touched on by Mr. Pellet the previous day, and developed by Ms. Escameia; and, as a new member of the Commission, he wished to take a different approach, in an effort to ensure that he fully understood the implications of the Special Rapporteur’s own approach.

15. The Special Rapporteur’s starting point, as expressed in draft article 4, was that the effect of armed conflict on treaties was to be derived from the intention of the parties to the treaty at the time that it was concluded. In that, the Special Rapporteur was adopting the view of Sir Cecil Hurst in his classic article in the *British Year Book of International Law*,¹⁷¹ proposing an alternative to the view that it was the nature or character of the treaty provision itself that determined the consequence in the event of armed conflict. As an abstract proposition, there could be no quarrel with the idea that, where the parties to a treaty had expressed their view on whether the treaty or a provision thereof was to be terminated or suspended in the event of the outbreak of war, that view should govern. The problem was that this situation would seldom occur. In the vast majority of cases, the parties would not have expressed any opinion on the matter, as was evident from the Secretariat’s memorandum. Hurst had been aware of that, because he had said that the task of the international lawyer was to form a series of presumptions to determine the outcome, where the parties had not clearly expressed their intention in the treaty.¹⁷²

16. A general rule based on the intention of the parties would thus be of very limited application or utility, because the parties would generally have said nothing in the treaty about the consequences for the treaty of the outbreak of war. In effect, the general rule would become the exception, and another general rule would be needed. The problem was not resolved by the reference in the draft article to the use of articles 31 and 32 of the 1969 Vienna Convention as the touchstone for determining the intention of the parties. True, if there were words in the treaty that had to be interpreted, then articles 31 and 32 provided a framework for doing so; indeed, the Special Rapporteur linked the criterion of intention with the words of the treaty when he quoted from McNair, in paragraph 24 of the third report, that interpretation was not a matter of

¹⁶⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76, especially the commentary to draft article 26, pp. 84–85.

¹⁶⁹ See the conclusions of the Study Group in *Yearbook ... 2006*, vol. II (Part Two), p. 177, para. 251. The report of the Study Group (A/CN.4/L.682 [and Corr.1] and Add.1) can be found in its entirety on the Commission’s website. The final text will appear as an addendum to *Yearbook ... 2006*, vol. II (Part One).

¹⁷⁰ A/CN.4/550 and Corr.1–2 (see footnote 164 above).

¹⁷¹ C. J. B. Hurst, “The effect of war on treaties”, *BYBIL*, 1921–1922, vol. 2, pp. 37–47.

¹⁷² *Ibid.*, p. 40.

intention as an abstraction, but an intention of the parties “as expressed in the words used by them”.¹⁷³ Articles 31 and 32 of the 1969 Vienna Convention provided no basis, however, for ascertaining an abstract intention of the parties where the treaty was silent about the effect of armed conflict and there were no words to be interpreted. Interpretation under article 31 proceeded from the ordinary meaning of the terms of the treaty, in their context and in the light of the object and purpose of the treaty. The United Nations Conference on the Law of Treaties had, however, rejected the idea that intention could be determined independently of the words used in the treaty.

17. It was interesting to note that, in positing an intention test in his 1922 article, Hurst had relied on a domestic contract-law analogy. As quoted in paragraph 32 of the first report,¹⁷⁴ he had written that “just as the duration of contracts between private persons depends on the intention of the parties, so also the duration of treaties between States must depend on the intention of the parties”.¹⁷⁵ In saying that, he had been reflecting the nineteenth-century view of English contract law, which regarded the intention of the parties as the governing consideration. He might well have changed his mind if he had seen the development of English contract law in the twentieth century, when the common-law judges had come to reject the idea that the intention of the parties was the guide to determining the effect of impossibility or frustration on contracts, and had instead looked to the practical effect of the supervening event on the carrying out of the contract. The Special Rapporteur had made it clear that he viewed impossibility or the occurrence of supervening events as different from the effect of armed conflict, but that was nevertheless what Hurst had had in mind when drawing an analogy with domestic contract law. The problem with the current basis for draft article 4 was therefore that it relied for a general rule on what was essentially a fiction: the idea that, at the time they concluded the treaty, the parties must have thought about and decided upon the effect of armed conflict on the treaty, even though they had said nothing about it in the treaty.

18. He made that criticism with some hesitation because, in general, he agreed with the Special Rapporteur’s endeavours to counter the theory that armed conflict abrogated treaties, a theory that was of little utility, since it was, at the very least, contradicted by the practice outlined in the Secretariat memorandum. He therefore supported the objective of draft article 3, which was based on a theory of continuation, even though he was not convinced that there was any need to replace an inadequate abrogation theory with an intention theory. Nevertheless he could accept draft article 5, whose purpose, at least in part, was to indicate that, where the parties had expressed their intention with respect to armed conflict, that intention should prevail.

19. Since, in practice, the intention of the parties would rarely provide any guidance in determining whether the treaty should be terminated or suspended in the event of

armed conflict, the *de facto* general rule under the draft articles would not be intention, but the object and purpose of the treaty, as provided for in draft article 7, paragraph (1). An object and purpose test could certainly be viewed as an intention-based test: obviously the purpose of examining the object and purpose of a treaty was to discern the intention that the parties had had in mind. That was probably the opinion of the Special Rapporteur, because he indicated in paragraph 34 of his third report that in the Sixth Committee he had raised the possibility of deleting draft article 7. It was, he had said, merely “indicative and expository”—in other words, simply an application of the draft article 4 “intention” test.

20. However, if draft article 7, paragraph (1), was regarded as an intention-based test, then there were two different intention-based tests in the draft articles: one in draft article 4, which sought to establish intention by reference to all of the elements set out in articles 31 and 32 of the 1969 Vienna Convention, of which object and purpose were only a part; and the other in draft article 7, paragraph (1), under which intention was determined solely by reference to object and purpose without the other supporting elements of articles 31 and 32 of the 1969 Vienna Convention. Once again, it seemed that relying on the fiction of intention resulted in some confusion.

21. It therefore seemed that, apart from those cases where the parties had expressed their intention as to the effect of armed conflict on the treaty, it was necessary to make a pragmatic appraisal of that effect. The Commission would therefore have to move towards a compatibility test to ascertain whether the operation of the treaty could survive armed conflict. The answer would vary from one treaty to another and perhaps from one provision of a treaty to another. If the armed conflict made it permanently impossible to carry out the essential objectives of the treaty, then termination seemed to be the most probable course of action, but if it made carrying out those objectives only temporarily impossible, then suspension seemed likely. If continuation was theoretically possible, but to do so would make no sense in the light of the essential objectives of the treaty (an object and purpose test), then again termination or suspension might seem to be the logical consequence.

22. When, however, the logical consequence of the object and purpose was that the treaty should continue in the event of armed conflict then, obviously, it should continue. To that extent, there was some merit in the test put forward by the Special Rapporteur in draft article 7, paragraph (1). At that point, it might seem that an intention test and an object and purpose test had merged, because the consequences that flowed from the object and purpose could be characterized as presumed intent. Nonetheless, presuming intent was simply another way of applying a fictional intention test.

23. Hence there would be some basis for starting with an object and purpose approach viewed broadly and, as Ms. Escameia and Mr. Pellet had suggested, possibly a range of factors should be borne in mind. An object and purpose test which looked at the essential objectives of a treaty seemed to be a more appropriate approach to continuance than relying on some fictional intention.

¹⁷³ A. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, p. 365.

¹⁷⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

¹⁷⁵ Hurst, *loc. cit.* (footnote 171 above), p. 40.

24. Even if the question of the general rule were to be resolved, he would still have some reservations about an approach involving listing categories of treaties that were presumed to continue. The whole treaty might continue or might be suspended in the event of armed conflict, but in some cases particular treaty provisions might be more susceptible to continuation than the treaty as a whole. Treaties of friendship, commerce and navigation might be an example of the latter. As the Secretariat memorandum pointed out, the fact that compromissory clauses in such treaties had been held to continue notwithstanding armed conflict had been the basis for establishing the jurisdiction of the ICJ. Indeed, it seemed to be a matter of common sense that such clauses would continue. Would that nonetheless be true of all provisions of a friendship, commerce and navigation treaty? Would the right of establishment, for example, which was a common provision in early treaties of that kind, not be at least suspended, if not abrogated, in the event of armed conflict? The Special Rapporteur had also pointed out in paragraph 83 of his first report¹⁷⁶ that modern bilateral investment treaties should be treated like treaties of friendship, commerce and navigation in that regard. But would an investor-State dispute settlement procedure under a bilateral investment treaty continue in the event of armed conflict between the contracting parties? Would it not at least be suspended, given that there was a conflict between those provisions of the treaty and any rights a State might have in respect of enemy aliens?

25. All of the foregoing suggested that categorizing entire treaties for the purpose of determining continuation might be too blunt an instrument and that, instead, much closer attention should be devoted to particular provisions, or types of provisions, of treaties. That might perhaps be more usefully done in the commentary than in the text of the draft articles.

26. Mr. VÁZQUEZ-BERMÚDEZ said he supported the Special Rapporteur's proposal that a working group should be set up. Such a move would help the Commission to make substantive progress on the topic.

27. On the definition of "armed conflict" for the purposes of the draft articles, he pointed out that the considerable rise in the number of internal armed conflicts in the last 10 or 20 years meant that they currently accounted for the majority of such conflicts. If they were excluded from consideration, the treatment of the topic would therefore be incomplete and the draft articles would not apply to most of the armed conflicts actually taking place. At the same time, he took note of the Special Rapporteur's word of warning with regard to potential damage to contractual obligations and treaty relations and the numerous additional excuses that could be proffered for suspending or terminating contractual relations.

28. For that reason, the draft articles should tender the principle of the continuity of treaties in the event of armed conflicts more categorical and decisive in content. In his first report the Special Rapporteur had presented a draft article 3 which read: "The outbreak of an armed conflict does not *ipso facto* terminate or suspend

the operation of treaties...". That formulation had been a replication of article 2 of the resolution adopted by the Institute of International Law in 1985,¹⁷⁷ which reflected the fact that legal writers had come to hold the opposite view to the one that had prevailed up until and during the nineteenth century, namely that war *ipso facto* terminated treaties. In his third report, the Special Rapporteur had altered the title of the article to "Non-automatic termination or suspension" and in the text itself the words "*ipso facto*" had been replaced by "necessarily". While draft article 3 constituted a major step towards upholding the principle of continuity, even as amended it did not sufficiently reinforce that principle. In the interests of treaty-based legal relations and the principle of *pacta sunt servanda*, all treaties bound the parties, who must comply with them in good faith.

29. In its current form, draft article 3 might be interpreted to mean that an armed conflict did not always terminate or suspend the operation of a treaty. In other words, it established a presumption, or general principle, in favour of termination or suspension. For that reason, it would be better for the draft article to be entitled "Principle of continuity", and worded: "In general, the outbreak of an armed conflict does not lead to the termination or suspension of the operation of treaties...". The phrase "in general" would indicate that continuity was the general rule, but that in some cases treaties might be terminated or suspended. In that connection, the Secretariat memorandum, on the basis of an exhaustive examination of the pertinent legal precedents, had yielded the surprising finding that few treaties had been suspended during the Second World War and that only in a few exceptional cases had treaties been terminated on the grounds of the conflict.¹⁷⁸ Most recent practice also bore out the presumption of the continuity of treaties.

30. As for draft article 4, the central element for determining the susceptibility to termination or suspension of treaties in case of an armed conflict was indeed the intention of the parties to the treaty. In many or most cases, however, no clearly discernible intention existed. On some occasions, that presumed intention could amount to a fiction. Hence the Working Group ought to consider not only the intention of the parties, but also alternative criteria, including, as suggested by Mr. McRae, the compatibility of the object and purpose of the treaty with the pursuit of the armed conflict. A further important factor to be borne in mind when considering the suspension or termination of treaties was the compatibility of the treaty with the exercise of the right to individual or collective self-defence in accordance with the Charter of the United Nations and with the use of force in general. The Special Rapporteur had referred to that matter in draft article 10. Of course, the nature and scope of an armed conflict also had a bearing on the determination of the susceptibility to termination or suspension of treaties.

31. Although draft article 7 already contained a useful list of treaties the object and purpose of which involved the necessary implication that they would continue in

¹⁷⁷ Institute of International Law, *Yearbook*, vol. 61, Part II, Session of Helsinki (1985), p. 278.

¹⁷⁸ A/CN.4/550 and Corr.1-2 (see footnote 164 above), paras. 79-81.

¹⁷⁶ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

operation during an armed conflict and whose operation would not be inhibited by the outbreak of armed conflict, the Working Group should perhaps consider the addition of some further categories to the list and should also investigate the termination and suspension of specific provisions of treaties, rather than the termination or suspension of treaties as a whole.

32. Mr. COMISSÁRIO AFONSO said that by revisiting some thorny issues the Special Rapporteur's third report had provided members with ample opportunity to ponder those issues more thoroughly. The excellent idea of setting up a working group to consider them in greater depth bore testimony to the Special Rapporteur's openness and flexibility. He hoped that an informal working paper would be prepared by way of guidance for members of the Working Group.

33. He stressed his continued support for draft article 1; the scope of the topic must be confined to States and, as the Commission had maintained from the outset, should exclude non-State actors, including international organizations, the reason being that two separate conventions governed the law of treaties: one applying exclusively to States, the other covering legal relations between States and international organizations, or between international organizations themselves. The same distinction had been drawn in the field of responsibility for internationally wrongful acts. The Commission should therefore honour that practice with respect to the topic under consideration.

34. The Commission should likewise be consistent when it came to the term "armed conflict" used in draft article 1 and defined in draft article 2 (*b*), in that it should be understood to refer solely to international, or inter-State, conflicts. Both logically and from a policy point of view, it seemed inappropriate to extend the concept of a treaty applying as between States to cover conflicts involving non-State actors. Any attempt to include the idea of non-international conflicts within the term could indirectly widen the scope of the topic, thereby undermining draft article 1. Furthermore, if that approach were to be adopted, the security and homogeneity of treaty relations between States would no longer be guaranteed. As a middle way, the Commission could, however, possibly suggest that the Working Group explore the viability of introducing a provision similar to that contained in article 3 of the 1969 Vienna Convention, which dealt with international agreements not within the scope of the Convention.

35. Draft article 3 required strengthening: it should not be just a point of departure, but a logical corollary of the fundamental principle of modern-day international relations that under the Charter of the United Nations the threat or use of force was prohibited. Accordingly, the life or death of a treaty should not be dependent on the outbreak of an armed conflict, but on the likelihood of compatibility of the conflict not only with the object and purpose of the treaty, but also with the Charter of the United Nations. As it stood, the article did not go far enough in that respect, particularly when read in conjunction with draft articles 4 and 7, as the report recommended.

36. The Special Rapporteur had asked whether there was any need for draft article 7 indicating that treaties, the object and purpose of which involved the necessary implication that they continued in operation during an armed conflict, were not terminated or suspended on the outbreak of such a conflict. In his view, the answer was that the provision was needed in order to strengthen draft article 3. The underlying idea could, however, be expressed more clearly.

37. Article 4 was problematic on at least two counts. First, the relationship between the principle of non-automatic termination or suspension of treaties and the relevance of the indicia of susceptibility to termination or suspension of treaties in cases of armed conflict should be more closely scrutinized. Moreover, in the past he had voiced his concern that the term "indicia of susceptibility" was too vague, and its intended meaning unclear. Secondly, while there could be no denying the importance of interpreting intention—indeed, articles 31 and 32 of the 1969 Vienna Convention set forth the golden rules of interpretation as they applied to all treaties without exception—it was not clear why the Special Rapporteur chose to highlight the important role of intention in draft article 4, rather than in draft article 3 or, for that matter, throughout the other draft articles.

38. He fully agreed with draft article 5 *bis*, since it had the merit of reaffirming the contents of article 6 of the 1969 Vienna Convention which provided that "[e]very State possesses capacity to conclude treaties".

39. Even though much progress had been made during the discussion of the three reports, much work remained to be done. In particular, the Commission had not yet resolved all the issues raised by the resolution adopted by the Institute of International Law at its Helsinki session in 1985. The 1969 Vienna Convention contained no provisions on the effects of conflicts on treaties; accordingly, consideration of the topic provided the Commission with an opportunity to address that matter in a comprehensive and satisfactory manner.

40. Mr. SABOIA said that the draft articles presented by the Special Rapporteur, combined with his lucid analysis of the topic, greatly contributed to the elucidation of a difficult and complex subject.

41. With reference to the conceptual background outlined in paragraphs 4 through 10 of the first report, it seemed particularly significant that, when elaborating the commentaries to the draft articles which had later become the 1969 Vienna Convention, the Commission had expressly opted to leave aside the question of the effect of armed conflicts on treaties since, as explained in paragraph 7 of the first report, "the study of this topic would inevitably involve a consideration of the effect of the provisions of the Charter [of the United Nations] concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question".¹⁷⁹ That position had been even more clearly stated in the commentary to draft article 69 set forth in the Commission's report to the

¹⁷⁹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, p. 214.

General Assembly on the work of its eighteenth session¹⁸⁰ and quoted by the Special Rapporteur in paragraph 9 of his first report. The omission from the 1969 Vienna Convention of any reference to the effects of armed conflicts on treaties therefore appeared to have been a deliberate attempt to preserve the stability of legal obligations contained in treaties and to avoid including a specific provision enabling States parties involved in a conflict to modify their obligations on sole account of that conflict.

42. The occurrence of an armed conflict might indeed have effects on the operation of treaties. On the one hand, the nature of those effects might stem from the parties' disinclination to continue to abide by their contractual obligations on account of the hostilities, in which case they could, when legally possible, avail themselves of the means provided for in the law of treaties for the termination or suspension of treaties. On the other, factual circumstances, including the outbreak of an armed conflict of a non-international nature, might render a treaty totally or partially inoperative, irrespective of the will of the State or States. In that event, those circumstances might be invoked either to justify the partial or total suspension of the treaty or, in accordance with the law of responsibility of States, to exempt the State from responsibility for non-compliance with its legal obligations under the treaty.

43. He was in favour of including non-international conflicts in the definition of armed conflict in draft article 2, for most of the reasons given by the Special Rapporteur in his first report and for those mentioned by Mr. Pellet in his statement at the previous meeting. Those armed conflicts, which had perhaps become more frequent than traditional conflicts between States, might well have effects on the operation of treaties. However, when hostilities involved States, the effects on treaties probably reflected the unwillingness of enemy States to continue to be bound by the obligations they had contracted, whereas in the case of non-international armed conflicts it was more probable that the conditions created by the conflict would affect the ability of the State concerned to ensure that all or part of the treaty remained operational. At first sight, the alternative wording proposed by Ms. Escameia was appealing.

44. If the intention to which reference was made in draft article 4, paragraph (2), was the intention when the treaty was concluded, it was unclear how "the nature and extent of the armed conflict in question" referred to in subparagraph (b) could be used to measure that intention, because the possibility of a conflict might not have been foreseen when the treaty was concluded, and also because the intensity of a conflict did not necessarily have any particular impact on certain treaties.

45. It was unnecessary to make specific reference to the law of armed conflicts as the applicable *lex specialis* in draft article 6 *bis*, since the principle of *lex specialis* would apply in any case if a specific situation warranted it. The explicit mention of the law of armed conflict might even undermine the standards set by the categories of treaty mentioned in that draft article.

46. He concurred with the Special Rapporteur that the non-exhaustive list of categories of treaties to be found in draft article 7, paragraph (2), contained the most significant examples of categories of treaties not susceptible to suspension or termination on account of an armed conflict and that it was helpful in establishing a *prima facie* presumption of the object and purpose of a treaty. He had taken particular note of the statement in paragraph 69 of the first report to the effect that the wording of paragraph 2 (b) of that draft article, namely "treaties declaring, creating, or regulating permanent rights or a permanent regime or status" involved treaties relating to boundaries.

47. In concluding, he supported the Special Rapporteur's suggestion that a working group should be established in order to expedite progress on the topic.

48. Mr. GAJA said that the Special Rapporteur's introductory remarks had been helpful, not only for new members of the Commission, but also as a summing-up of the work done on the topic so far. He himself had initially been surprised to see that a complete set of draft articles had been submitted in the first report, but it had soon become clear that the purpose was to provide a general overview of the topic, including a preliminary assessment of the various issues. It had been an unusual way of proceeding, but not without merit. Novelty was welcome in that it prompted a reassessment of the traditional manner of examining issues.

49. He had expected to see in the second report a detailed analysis, based as far as possible on State practice, of the questions that had been touched on in the first report. In his introductory remarks at the previous meeting, the Special Rapporteur had explained why such an analysis had been impossible. It was less clear, however, why the third report simply whetted the appetite for the next course.

50. At previous sessions he had raised points that he continued to see as important, so he would raise them again in the hope of putting them more persuasively than in the past. First, concerning the scope of the draft articles, article 73 of the 1969 Vienna Convention stated that the provisions of the Convention "shall not prejudice any question that may arise in regard to a treaty ... from the outbreak of hostilities between States". The Convention left open questions relating to the possible existence of special rules that would apply with regard to a treaty as a consequence of the outbreak of hostilities between States. Had those consequences been identical to those that generally applied, for example, in the event of a fundamental change of circumstances or supervening impossibility of performance, there would have been no need for the "without prejudice" clause: the general rules in articles 61 and 62 of the 1969 Vienna Convention would simply apply. If any special rule existed with regard to termination or suspension of a treaty in the case of outbreak of hostilities, it was likely to affect only the relations of a State that was a party to an armed conflict with another State that was also a party to that conflict. It was the armed conflict between them that, as article 73 of the 1969 Vienna Convention suggested, might trigger special consequences and create a need to devise special rules.

¹⁸⁰ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 267–268.

51. An armed conflict which a State party to a treaty might have with a third State should produce only the consequences generally provided by the 1969 Vienna Convention—in particular, fundamental change of circumstance or impossibility of performance. The same could be said of an internal armed conflict within a State party to a treaty. One would not have to look for special rules: the rules generally set for termination or suspension of treaties would simply have to be applied. His difficulty with the proposed text was that it was not possible to deal with international and internal conflicts affecting States parties to a treaty as if they all raised the same kind of problems. While he could sympathize with the case for dealing with internal conflicts, since they were more common than international ones, it would not be possible to devise special rules for such conflicts. On the other hand, the Commission could study the relationship between the application of treaties involving States in which internal conflicts were taking place and other obligations that States might have, in particular, the obligation of neutrality towards States involved in conflicts, whether internal or international. In other words, the Commission could reconsider the case regarding the *Kiel Canal* regime (*SS “Wimbledon”*) and see which obligation prevailed, and to what extent. That was a different kind of problem from the identification of special rules when two States parties to a treaty were directly involved in a conflict.

52. Having been the first to speak on the first report on the topic, he had been the first to voice criticism of the use of intention as the main criterion for establishing whether termination or suspension would take place. He had since realized that what was really envisaged was not intention, a concept that had been commonly used in the 1920s, but rather the interpretation of a treaty, hence the references in draft article 4 to articles 31 and 32 of the 1969 Vienna Convention. He could accept that reference, although it did not offer a solution in all cases. As Mr. McRae had said, it could not be a general rule, but it might be an exception. In addition, the words in draft article 4, paragraph (1), “at the time the treaty was concluded” should be deleted, since the phrase could not be fully reconciled with the rules of interpretation. Thus, rather than reconstruction of a fictitious and subjective intention, it was interpretation of a treaty that was involved, and draft article 4 then became coherent with draft article 7.

53. Although he would not quarrel with the approach taken by the Special Rapporteur in favour of stability in treaty relations, he would hesitate to state that an outbreak of hostilities between the parties to a treaty never entailed suspension of the treaty. True, the text of draft article 3—unlike the title, as had helpfully been pointed out by Ms. Escarameia—no longer indicated as much, but only that an armed conflict did not “necessarily” terminate or suspend the operation of treaties as between the parties to a conflict. He found that position acceptable, although the wording proposed by Mr. Vázquez-Bermúdez better captured the idea that it could not be taken for granted that termination or suspension never took place. However, he disagreed with the assertion in paragraph 18 of the third report that there was no evident difference of meaning between the terms “necessarily” and “*ipso facto*”. That was not true: the latter meant “automatically”. He likewise disagreed with the indication in paragraph 57 that

suspension or termination did not take place *ipso facto*. There were certainly instances in which a treaty could be regarded as automatically suspended because of the outbreak of an armed conflict between the parties—that was a regrettable but inevitable conclusion.

54. At the previous session he had given an example similar to the one just given by Mr. McRae, of a bilateral trade agreement, which was unlikely to be applied once an armed conflict had begun between the parties to it: goods could hardly be exchanged simultaneously with shellfire. Another example would be that of multilateral law-making treaties, which were included in the list in draft article 7 of categories of treaties that should continue in operation during an armed conflict. In paragraphs 101 to 103 of his first report,¹⁸¹ the Special Rapporteur had given three instances of State practice with regard to multilateral treaties of a non-political or technical nature. The views expressed in the texts cited showed that the treaty provision in question was not terminated because of the outbreak of hostilities; however, they also indicated that certain provisions of the treaty were automatically suspended.

55. He did not mean to suggest that any of the categories listed in article 7 should be deleted. He simply wished to express the hope that whatever relevant practice existed with regard to each of the categories would be collected and thoroughly analysed by the Special Rapporteur, who might, at the end of the day, conclude that practice was insufficient or not clear, or that it should be disregarded for other reasons. The Special Rapporteur had pointed out that the Commission must not be tied to old practice and should be free to develop other rules. Still, it would be interesting to look at practice first.

56. He welcomed the proposal to establish a working group, which might help the Commission to reach a consensus on the scope of the study and possibly also recommend a road map, but real progress would mostly depend on the Special Rapporteur, in whose ability to bring the study to a successful conclusion he had the fullest confidence.

57. Mr. PERERA thanked the Special Rapporteur for his reports on the topic and for his comprehensive introductory remarks. His approach of presenting a complete set of draft articles helped one to gain an understanding of the overall nature and scope of the topic. The Secretariat had provided very useful input into the Commission’s work, particularly in the memorandum entitled “The effect of armed conflict on treaties: an examination of practice and doctrine”,¹⁸² a comprehensive compendium which would make an invaluable contribution to the study of the topic.

58. Draft articles 4 and those following adopted the test of the intention of the parties at the time the treaty was concluded to determine the effect of armed conflict on treaties. While the use of the intention criterion was certainly supported by doctrine, that should not rule out the use of other criteria that could help discover the intention of the

¹⁸¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

¹⁸² A/CN.4/550 and Corr.1–2 (see footnote 164 above).

parties, particularly in dealing with the difficulties inherent in armed conflict situations. Mr. McRae had pointed out that in such situations, in assessing the intention of the parties, the intention criterion could well become the exception rather than the rule.

59. The Secretariat memorandum pertinently observed that modern consideration of the topic generally used a combination of the subjective test of the intention of the parties towards the treaty and an objective test of the treaty's compatibility with national policy during an armed conflict. The compatibility test could be particularly useful where there were difficulties in inferring the intention of the parties. He would accordingly support the resort to a range of criteria, as suggested by several speakers.

60. His second point related to the fact that in draft article 7, paragraph (2), the Special Rapporteur had presented an indicative list of treaties, the object and purpose of which involved the necessary implication that they would continue in operation during an armed conflict. There was a substantial degree of convergence between the categories set out in draft article 7, paragraph (2), and those in the Secretariat memorandum. Although the support provided for some of those categories by State practice and legal doctrine varied considerably, he agreed with the Special Rapporteur that the draft article as currently formulated provided a useful starting point for further debate. The system of categorization employed in Chapter III of the Secretariat memorandum would also be an extremely useful guide in the Commission's further deliberations on the issue. He agreed with other speakers such as Mr. McRae that a distinction between specific provisions of a treaty—as opposed to broad categories of treaties—should be considered, with particular regard to dispute settlement provisions in treaties of friendship, commerce and navigation and investment treaties.

61. Accordingly, he supported the maintenance of draft article 7 in its present form pending further discussion. If, however, it was deleted, he agreed with the Special Rapporteur that an annex, which would constitute a valuable repository of existing State practice and case law on the subject, should be prepared. As Mr. Gaja had said, the Commission should compile additional practice for further analysis by the Special Rapporteur.

62. His third point related to the impact of domestic hostilities on treaties, a subject raised in relation to the use of the term “armed conflict” in draft article 2 (b) and in Chapter VII, Section B of the Secretariat memorandum. The applicability of international humanitarian and human rights law to non-international or internal armed conflicts and their role in affording maximum protection to the victims of such conflicts was now well established, both in practice and doctrine. However, it would take a substantial leap to conclude that such conflicts involving States and non-State actors or non-State actors *inter se* would have a substantial impact on treaties concluded between States. The thrust must be on the impact on treaties between States parties to a conflict. The crucial question was whether such conflicts, by their nature or extent, were likely to affect the operation of treaties between a State party to an internal armed conflict and

another State party or a third State. That, rather than the prevalence of internal conflicts in the contemporary world, should be the central consideration. Chapter VII, Section B of the Secretariat memorandum cited illustrations given by certain authors of hypothetical and concrete situations in which domestic conflicts could have an impact on treaties. However, there was some doubt as to whether they could be viewed as constituting significant State practice or established doctrine. As was pointed out in paragraph 146 of the memorandum, “[i]f the effect of armed conflict on treaties remains a vague area of international law, the effect of domestic hostilities on treaties is even more so”. He was therefore of the view that it would be premature to include the issue at the present stage, and that doing so could lead to further ambiguities and problems in the treatment of a complex topic. A decision on its inclusion should await the further evolution and precise identification of norms and principles concerning the effect of international armed conflicts on treaties concluded between States parties to an armed conflict or between such States parties and third States.

63. Lastly, he supported the proposal to constitute a working group to further consider those and other key issues that had been raised in the course of the plenary debate on the item.

64. Mr. KOLODKIN thanked the Special Rapporteur for his third report, which reflected some points raised in the debate in the Sixth Committee. He welcomed the replacement of the expression “*ipso facto*” by “necessarily” in draft article 3. While he also welcomed the withdrawal of draft article 6, he was not convinced that the new draft article 6 *bis* was a viable text in view of the two categories of treaties singled out therein and the inclusion of draft article 7. The phrase “but their application is determined ... in armed conflict”, was taken from paragraph 25 of the 1996 advisory opinion of the ICJ on the *Legality of the Threat or Use of Nuclear Weapons*, but it had been used there in a very specific context. The Court had been clarifying how article 6 of the International Covenant on Civil and Political Rights, concerning the right to life, was applied in situations of armed conflict. On the application in situations of armed conflict of human rights treaties and humanitarian law in general, however, the ICJ had given a more recent ruling in paragraph 106 of the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. If draft article 6 *bis* was retained, the model for its formulation should be drawn from the 2004 advisory opinion, not that of 1996.

65. Although the Special Rapporteur himself did not place much emphasis on its importance, the major innovation in the third report was the new draft article 10. Even though that draft article had not yet been introduced, he nevertheless wished to say a few words about it. The earlier text had been a neutral formulation that had drawn criticism, not least from himself. The new text clearly indicated that the consequences of a conflict for a treaty differed for an aggressor State and for a State exercising its right of self-defence. That was a step in the right direction. The only question was whether it was a big enough step.

66. Reverting to draft articles 1 to 7, he said that a few fundamental problems remained. He remained opposed to the inclusion in the draft of a definition of “armed conflict”, even for the sole purposes of the draft articles. The concept must be left to the sphere of humanitarian law. The definition to be found in draft article 2 (b) itself raised doubts. First, it was circular: a conflict was defined as a conflict. Secondly, the basic emphasis was on the nature and extent of armed operations. In other words, a conflict was one whose nature and extent were such that they might entail consequences for treaties. But the application of the 1949 Geneva Conventions for the protection of war victims, for example, did not require ascertaining the nature and extent of an armed conflict, or at least that was not envisaged in common article 2, which, in essence, simply said that the Conventions applied to cases of war or any other armed conflict.

67. Another aspect of the definition problem was that draft article 4, paragraph (2), said that the intention of the parties to a treaty relating to its susceptibility to termination or suspension was to be determined in accordance with the nature and extent of the conflict. If its nature and extent had to be assessed in each case when determining whether a treaty was susceptible to termination or suspension, then what need was there for a definition of “armed conflict”, a definition in which the nature and extent of the conflict featured as key elements?

68. He was likewise opposed to the inclusion of non-international armed conflicts in the scope of the draft. Incidentally, he noted that the Russian Federation did not appear among the States listed in paragraph 12 of the report as being opposed to the inclusion of internal armed conflict in the scope. Having consulted the statement made on 3 November 2005 by his country’s Representative in the Sixth Committee, Mr. Kolodkin had found that she had indeed spoken against defining armed conflict for the purposes of the draft articles and against the inclusion of internal conflicts in the scope.¹⁸³ The tally of States opposed to and in favour of inclusion was thus at least even. The argument frequently voiced that internal conflicts were proliferating and that they frequently became intermingled with international conflicts did not deserve the importance accorded to it. What mattered was quality, not quantity.

69. As he saw it, the basis of the topic was the objective fact that armed conflict changed the quality of relations between States, and consequently, depending on a variety of circumstances, might have consequences for the treaties regulating such relations. It was precisely international armed conflicts *per se* that changed the quality of relations between States and accordingly could have a direct influence on international treaties between them. Non-international conflicts *per se* did not have that qualitative influence on relations between States and accordingly on international treaties between them. They could create preconditions for invoking the impossibility of fulfilling treaties and other grounds for termination or suspension of treaties envisaged in general international

law and the 1969 Vienna Convention. But that was only an indirect influence on the operation of the treaty and should not be the subject of the Commission’s study.

70. Regarding the criterion of intention, the Special Rapporteur referred not only to the intention of the parties but also to their intention at the time the treaty was concluded. The Special Rapporteur had staunchly defended that criterion, but he himself continued to have doubts about its being used as the basic or sole criterion. Those doubts were confirmed by a reading of the draft. Only in draft article 4, paragraph (1), was it indicated that the intention of the parties at the time the treaty was concluded was the sole criterion to be applied for determining the fate of treaties in case of an armed conflict. Indeed, the second paragraph referred only to the intention of the parties, not to their intention at the time the treaty was concluded. Draft article 5 referred to treaties applicable to situations of armed conflict in accordance with their express provisions, not in accordance with the intention of the parties at the time the treaty was concluded. Draft article 7, which listed the categories of treaties that continued in operation during an armed conflict, identified such treaties on the basis of their object or purpose, not of the intention of the parties at the time the treaties were concluded.

71. One could of course legitimately say that the intention of the parties was reflected in the provisions of the treaty, its object and purpose and its nature. But why establish as a criterion something that was at times so difficult to determine and that had sometimes occurred many years previously? When the parties specifically formulated provisions of a treaty to deal with cases of armed conflict, problems in determining their intention should not arise. But in the modern-day world, the use of force was prohibited, and situations of armed conflict were an anomaly. In concluding treaties, States were generally not thinking about what would happen to the treaty’s provisions in case of armed conflict. It was therefore hard to see how it would be possible to determine their intentions as to the fate of the treaty provisions in the event of conflict.

72. Of course, the role of the intention of the parties should not be underestimated. It was important for determining the actual content of the treaty’s provisions, the rights and obligations of the parties and their expressed will. In most cases, however, armed conflicts arose irrespective of the treaty or the intention of the parties in concluding it. The context was entirely different. To take the intention of the parties at the time the treaty was concluded as a basis for determining its fate in a situation of armed conflict would be artificial in most cases.

73. In his view, the intention of the parties at the time the treaty was concluded could be only one of the circumstances to be taken into account in determining the fate of a treaty, or of some of its provisions, in the event of an armed conflict. The subject matter of draft articles 5 and 7, namely the nature of the treaty or its express provisions and the object and purpose of the treaty, and also the nature and extent of the conflict itself and the legality or illegality of the use of force by the parties thereto were of greater importance in determining the fate of the treaty or its individual provisions. Perhaps it would be useful to discuss the set of criteria, rather than singling out just one.

¹⁸³ *Official Records of the General Assembly, Sixth Committee, Sixtieth session, summary record of the 20th meeting (A/C.6/60/SR.20), para. 42.*

74. He had been referring to the fate of the treaty or of its individual provisions because he believed that treaties should not be considered only in their entirety. In many cases they were clearly divisible. Some provisions of a treaty could be terminated in the event of a conflict, while others remained in force.

75. He did not share the general hostility to the inclusion of treaties with international organizations. As in the case of the topic of responsibility of international organizations, he did not fully understand why the wide diversity of international organizations should be an obstacle to the elaboration of a few general minimum rules. He would need to hear more convincing arguments before he could conclude that treaties with international organizations should not be included.

76. He continued to believe that it was correct to analyse separately the effects of an armed conflict on the operation of treaties between States parties to the armed conflict and its effects on the operation of treaties between States parties to the conflict and third States. As yet, the reports of the Special Rapporteur had not undertaken any such analysis.

77. Lastly, he supported the Special Rapporteur's proposal that a working group be established.

78. Mr. PELLET said that Mr. Kolodkin's argument against the inclusion of non-international conflicts—namely that, unlike international conflicts, they did not affect the quality of relations between the parties, although they could have an indirect effect on the operation of the treaty—was true only of States that were parties both to the treaty and to the armed conflict, but not of relations between States parties to the armed conflict (and of course to the treaty) and third States. There was a much stronger case for third parties terms than for participants in non-international armed conflicts, and it would be unwise to exclude them from the scope of the topic. In any case, even if Mr. Kolodkin's argument on the change in the nature of the relations between the parties to the conflict might at first glance seem appealing, it did not justify the exclusion of non-international armed conflicts.

79. Mr. HMOUD thanked the Special Rapporteur for his third report, which reflected a scholarly and practical approach to a topic on which there was no settled State practice or consistent jurisprudence.

80. In his first report,¹⁸⁴ the Special Rapporteur had produced a defensible set of draft articles covering various aspects of the topic, in the expectation that they would be further amended on the basis, *inter alia*, of comments from States and authoritative sources. However, account must be taken of the fact that States' interests played a major role in the application or non-application of treaty provisions during war, hence the inconsistency of State practice. National interests were one reason why States were reluctant to put forward concrete views on key factors determining their approach to the draft articles and might be unwilling to commit themselves to positions

which they would be unable to adhere to if they became involved in an armed conflict. Thus, it was vital for the Commission to make its position clear on areas in which there were differences among States, while at the same time providing sufficient grounds for *opinio juris* to develop around the draft articles.

81. On draft article 1, he noted that, while State practice and national and international judicial decisions on the subject had usually concerned treaties between States, international organizations had increasingly become parties to multilateral treaties with States, a circumstance which should be taken into account in the approach to the topic. The Commission should consider whether the termination or suspension of treaties between States as a result of war was to be treated identically or differently when an international organization was a party. Complex issues were involved, but international organizations, like neutral States, were affected by the termination or suspension, as a result of war, of a treaty to which they were parties. The Commission should consider the effect of war on that growing number of treaties, even if it eventually decided not to include them.

82. With regard to the definition of armed conflict, the Special Rapporteur had rightly pointed out that in practice the distinction in international law between international and non-international armed conflict was sometimes blurred. That was especially true of the thin dividing line between wars of liberation and wars involving other non-State actors who had effective control on the ground in their battles against Government forces. The nature of the difference between international and non-international armed conflicts sometimes needed to be asserted by the international community.

83. The effect on treaty obligations of the increasing number of non-international armed conflicts must not be ignored. The definition of armed conflict in draft article 2 avoided dwelling on the international character of the conflict, thus allowing the articles to be applied flexibly, depending on the nature and intensity of the conflict. On the face of it, that approach seemed reasonable, pending a decision on whether to include treaties to which international organizations were parties.

84. Doctrine was perhaps the most important factor in guiding the Commission's work. What determined the effects of armed conflict on treaties? A consensus appeared to be emerging that the abrogation doctrine had been discarded, although some support remained in the literature and in recent State practice in favour of treaty abrogation in times of war. However, the general trend was in favour of maintaining treaty integrity during armed conflict. That principle had been reflected in the draft articles, beginning with draft article 3, pursuant to which treaties were not necessarily terminated or suspended during an armed conflict. While more assertive wording might be needed, the members of the Commission appeared to support the draft article's general thrust. A test was needed to determine the susceptibility of treaties to termination or suspension. Therein lay the major challenge, bearing in mind the differing tests that had been applied in national courts or accepted by legal scholars. The literature suggested that the starting point was the intention test. United States

¹⁸⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

courts and legal scholars had begun to adopt a supplementary test, namely whether the application of all or part of a treaty was incompatible with pursuit of the war. That approach allowed national courts to refer to what the State regarded as national policy to determine the susceptibility of a treaty or some of its provisions to continue in operation in time of war. The problem with that approach was that it would allow bodies other than the State which invoked national policy to decide whether the measure of abrogation was in conformity with national defence interests. Thus, for instance, one commentator had considered that the closure of the Suez Canal by Egypt in 1948 had exceeded national defence needs. The Commission must therefore decide whether intention was the appropriate test or whether another test was also required.

85. There was support for such a test in international practice, but the issue was the presumption of intention at the time of the conclusion of a treaty. If the Commission could not establish it through the methods of interpretation set forth in articles 31 and 32 of the 1969 Vienna Convention, it needed to find another solution. It could be said that the parties' presumed intention was its indefinite application, unless otherwise indicated in the treaty. That could be grounds for asserting the security of treaty relations and the continuation of the treaty's application during armed conflict, but it would not be helpful if States and scholars did not accept the notion of presumed intention when the treaty was silent and intention could not be established. That approach remained the most valid, but other factors might have to be taken into account, such as the nature and extent of the conflict, which he viewed as a separate factor. That factor was also helpful in determining whether a given treaty was terminated or suspended and whether certain provisions continued to apply even though other parts of the treaty had been suspended or terminated. National courts had often determined which provisions applied and which did not on the basis of the nature and extent of the conflict. There had also been support by some scholars and courts for deciding whether certain treaty provisions continued in operation on the basis of the nature of the obligation.

86. He welcomed the extensive list of treaties in draft article 7, the object and purpose of which implied the presumption that they continued in operation during an armed conflict. He understood that not all those treaties had the same sustainability in time of armed conflict. Further work was needed to establish which treaties or treaty provisions were presumed by virtue of their object and purpose to remain applicable. The Special Rapporteur took the object and purpose test into account in draft article 7, but that did not conflict with the draft article 4 test. There were several instances in the literature in which the object and purpose test was not viewed as separate from the intention test. That being the case, there was no reason why draft articles 4 and 7 should not be read together. The list of treaties the object and purpose of which created the presumption of applicability during armed conflict helped States develop their practice and understand their obligations before they embarked on suspension or termination or before applying a test which might be more theoretical and produce detrimental results for States, were they to opt for a wrong application of the test during armed conflict.

87. Mr. CANDIOTI said he agreed that the topic should be included as part of the subject of the law of treaties. However, the impact of other important branches of law, such as the law of armed conflict, the prohibition of the threat or use of force and the law of international responsibility for wrongful acts, must also be borne in mind.

88. On draft article 1, he did not believe that it was justified to exclude from the scope the effects of armed conflicts on treaties to which international organizations were parties. In that regard he agreed with the comments by Mr. Hmoud and Mr. Kolodkin : as a working hypothesis, the Commission should begin by analysing the classic topic of the legal effects of war on treaties. However, the rules which the Commission was elaborating could perhaps also apply to treaties to which international organizations were parties, which in many cases might be affected by an armed conflict, whether between States or of a non-international nature. The question should be left in abeyance and the working group should bear in mind the possibility of including treaties to which international organizations were parties.

89. He endorsed the definitions of the terms "treaty" and "armed conflict" in draft article 2. The latter definition was sufficiently comprehensive to reflect present international circumstances.

90. Draft article 3 clearly formulated the fundamental principle of continuity of the operation of treaties in the event of armed conflict, although the drafting could be improved, as could that of draft article 4. Whereas draft article 3 established the principle of continuity, draft article 4 established the exceptions to it, rightly focusing on the two elements that must without fail be borne in mind, namely the provisions of the treaty itself and the nature and extent of the armed conflict in question.

91. In the debate between those who were in favour of looking for the intention of the parties to the treaty at the time of its conclusion and those who favoured the object and purpose test, he preferred the latter criterion, which was used in draft article 7, paragraph (1), for inferring the continuity of certain treaties.

92. He had no objection to the inclusion of draft article 5 for the sake of clarity, although strictly speaking it was unnecessary. He endorsed the inclusion of draft article 5 *bis*, and also the deletion of draft article 6 and inclusion of the reference to the applicable *lex specialis* in the new draft article 6 *bis*.

93. On draft article 7, he had already expressed doubts about the wisdom of establishing strict general categories of treaties which, by virtue of their object and purpose, would necessarily entail the continuity of their operation. The great diversity of treaty law militated against the formulation of absolute positions. He was not opposed to the inclusion of an illustrative or indicative list; however, rather than referring to categories of treaties, the examples should cite types of treaty provisions which established rights and obligations that could not be suspended, interrupted or terminated in the event of armed conflict.

94. He supported the suggestion by the Special Rapporteur to set up a working group, with a view to facilitating the Commission's work on an important topic.

95. Mr. HASSOUNA said that the topic under consideration dealt with a difficult and controversial area of law, in which there was little consistent State practice. He welcomed the Special Rapporteur's cautious approach and his presentation of the various options available, and also wished to congratulate the Secretariat on its excellent memorandum on the subject.

96. He agreed that the Commission should not try to revise the 1969 Vienna Convention. That said, the Vienna Convention was not written in stone, and although the Commission should not contradict it, there was no reason it could not try to supplement it.

97. With regard to draft article 1, he was in favour of also including treaties involving international organizations. While that might cause problems if they were all to be enumerated, given the wide diversity of such treaties, the Commission should at least seek to define the broad issues and draw a distinction between treaties to which international organizations were parties and those concluded between States only.

98. In draft article 2 and elsewhere in the draft articles, reference was often made to "a state of war". Given the evolution of international law and the fact that war was prohibited under the Charter of the United Nations, he wondered whether it would be more appropriate to speak of "a state of belligerency". He supported the inclusion of some aspects of internal armed conflicts, in view of their growing frequency, their prevalence and the difficulty of distinguishing them from international armed conflicts. It would be short-sighted to exclude them completely. He also favoured the inclusion of situations of military occupation.

99. On draft article 3, he welcomed the changes made by the Special Rapporteur to the title and the replacement of the words "*ipso facto*" by "necessarily". He also favoured the insertion of wording which stressed the importance of continuity and stability in treaty relations.

100. With regard to draft article 4, the reference to the criterion of intention at the time the treaty was concluded might be insufficient and controversial. The concept of intention should be broadened to include all the circumstances surrounding the conclusion of the treaty, including its object and purpose.

101. He welcomed the deletion of draft article 6. Although he supported draft article 6 *bis*, it lacked clarity as currently worded.

102. As to draft article 7, he endorsed the identification of factors of relevance in determining whether a given treaty should continue in operation in the event of armed conflict, including the object and purpose of the treaty and the intention of the parties. The list of treaties in draft article 7, paragraph (2), should be indicative, rather than exhaustive.

103. He agreed with the Special Rapporteur's proposal to establish a working group to consider the topic. The Commission should address the potentially controversial issues of the composition, chairpersonship and mandate of the working group. Its mandate should cover basic practical issues and not open the door to a whole range of possible theoretical options and situations.

104. Mr. NOLTE said he agreed with the proposal that the draft articles should be referred to a working group for further consideration.

105. The Commission should try to steer a middle course between the competing goals of clarity and simplicity on the one hand, and comprehensiveness on the other. His sense was that the differences between the approach of the Special Rapporteur and that of Mr. Pellet and others originated, at least in part, in the different emphasis they placed on those two respective goals. Thus, whether to include treaties involving international organizations and non-international armed conflicts and whether to address substantive questions on the use of force and State responsibility should also depend on striking a balance, for each particular issue, between the competing goals of clarity and comprehensiveness.

106. With regard to draft article 3, the choice between the words "necessarily" and "*ipso facto*" (or "automatically") was an important one. "Necessarily" implied that armed conflicts might, under certain circumstances, have the effect of automatically and directly terminating or suspending a treaty, whereas "*ipso facto*" or "automatically" would mean that armed conflicts as such would never have such an effect and that, in order to suspend or terminate a treaty, the procedure under draft article 8 would have to be followed.

107. He shared the doubts of those who thought that draft article 4 placed too much emphasis on the intention of the parties. The formulation in article 31 of the 1969 Vienna Convention, in all its aspects, should provide the point of departure, rather than earlier formulations dating back to the 1920s. Otherwise, there would be a tension between the subjective general principle in draft article 4 and the much more objective approach in draft article 7.

108. He wondered whether draft article 6 *bis* should not reaffirm the *lex specialis* rule, namely the law applicable in armed conflict, in more general terms, rather than restricting it to standard-setting treaties.

109. There was a marked contrast between the strong language used in draft article 7 and the explanation in the report that draft article 7, paragraph (2), contained an indicative list of weak rebuttable presumptions. If it was retained, draft article 7 should be reformulated to reflect its stated purpose more clearly. As to the options available regarding draft article 7, he would favour combining the Special Rapporteur's approach with a list of relevant factors or criteria, bearing in mind that those factors or criteria should not create undue uncertainty and thereby undermine the usefulness of the articles.

Organization of the work of the session (continued)*

[Agenda item 1]

110. Mr. GAJA (Chairperson of the Working Group on the external publication of International Law Commission documents) said that the following members had expressed their willingness to participate in the working group: Mr. Candioti, Ms. Escarameia, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Nolte and Ms. Xue. He encouraged other members to put their names forward.

*The meeting rose at 1 p.m.***2928th MEETING***Thursday, 31 May 2007, at 10 a.m.*

Chairperson: Mr. Edmundo VARGAS CARREÑO
(*Vice-Chairperson*)

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Effects of armed conflicts on treaties (continued) (A/CN.4/557 and Add.1–2, sect. D, A/CN.4/578, A/CN.4/L.718)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON reminded the Commission that the Special Rapporteur's suggestion that a working group be set up had been supported by all the members who had taken part in the discussion on the topic at the two previous meetings and that, following consultations, it had been suggested that the working group should be chaired by Mr. Caflisch. If he heard no objection, he would therefore consider that the Commission approved the creation of a working group on the topic of effects of armed conflicts on treaties, chaired by Mr. Caflisch.

It was so decided.

2. The CHAIRPERSON invited the Commission to comment on draft articles 1 to 7.

3. Ms. JACOBSSON said that the presentation of a whole set of draft articles facilitated analysis of the topic, since it enabled the Commission to understand how the Special Rapporteur himself viewed the topic in its entirety.

She also expressed appreciation of the open-minded spirit in which the Special Rapporteur had presented his third report, and endorsed the four objectives that he had set out.

4. With regard to draft article 1 (Scope), she agreed that both international and non-international armed conflicts should be covered, for the reasons given by the Special Rapporteur. In modern times, the distinction between the two had indeed been blurred and the analytical framework was often further complicated by the involvement of so-called "external elements". It was not unusual for States involved in the same international operation to be in disagreement as to whether the conflict was of an international or non-international nature. In fact, within a single country a conflict could have various different characters, depending on the situation on the ground where the operations took place, as in Afghanistan or Iraq. The distinction between international and non-international armed conflict was, therefore, artificial and theoretical rather than a reflection of reality. In the most recent regulations on *ius in bello*, moreover, the trend was clearly to regulate situations in all types of armed conflict without making such a distinction. It was a development that enhanced protection for both civilians and combatants and should be reflected in the Commission's work.

5. Moreover, she believed that the draft articles should deal with occupation, not only because it was covered by the various Hague Conventions respecting the Laws and Customs of War on Land (1899 and 1907), the fourth Geneva Convention and the first Protocol Additional thereto, as well as the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, but also because occupation fell within the scope of the law of armed conflict and could put the validity of a treaty to the test. A State under occupation might find that its ability to fulfil its treaty obligations was affected. Such a risk arose in particular when an occupying power had to deal with commercial agreements relating to State-owned natural resources, such as oil and gas. National and international legal practice that existed in that connection had not yet been reflected in the Special Rapporteur's report, but it might prove useful for further analysis of the subject.

6. She doubted whether it would be wise to include in the scope of the topic treaties involving international organizations. In that connection, she endorsed the arguments put forward by the United Kingdom delegation in the Sixth Committee,¹⁸⁵ but there were other arguments against such a move. Above all, the inclusion of such treaties was likely to raise difficult questions, such as where to draw the line between different types of organizations, whether only governmental organizations should be covered, as Mr. Hassouna had suggested, or whether non-governmental organizations or mixed organizations could also be covered and, if so, which ones. There was also the question of what kind of treaties would be involved. Moreover, it was not always easy to define what constituted an international organization; it was worth noting that the Charter of the United Nations referred to "regional

¹⁸⁵ *Official Records of the General Assembly, Sixth Committee, Sixty-first session, summary record of the 19th meeting (A/C.6/61/SR.19)*, para. 44.

* Resumed from the 2924th meeting.

arrangements or agencies” rather than regional organizations. Lastly, given the close connection between the topic of effects of armed conflicts on treaties and that of responsibility of States and, *mutatis mutandis*, of organizations, to which Mr. Pellet had drawn attention, and the fact that the Commission’s work on the responsibility of international organizations was not yet concluded, it would seem premature to include treaties concluded by international organizations.

7. With regard to draft article 2 (Use of terms), she had no problem with the definition of the term “treaty”, although she wondered how agreements concluded by parties to a conflict that were not States should be handled. As for the definition of the term “armed conflict”, however, she not only wholeheartedly agreed with the Special Rapporteur’s view that it was not the business of the Commission to find an all-purpose definition of the term, but she felt it was risky to try to come up with a definition even for the sole purpose of the consideration of the topic. The Commission was an important organ in the international legal field and its work, discussions and conclusions were widely circulated, read and used. Any definition that it adopted was likely to be used both within and outside the parameters determined by the Commission, and that could have negative side effects in other areas of international law, and principally international humanitarian law.

8. If the Commission decided, all the same, to take another look at the definition, it would have to conclude that the definition in draft article 2 was very wide, embracing as it did situations that could not necessarily be characterized as armed conflicts, such as territorial disputes or responses to territorial infringements. The qualifying statement in the definition—that it related to “armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States”—was useful but not sufficient. The Special Rapporteur seemed to have dismissed the concerns expressed at the previous sessions of the Commission, but they remained a problem, as noted by Mr. Kolodkin. Even so, she did not think that the definition proposed by the Special Rapporteur could be taken as intended to cover police enforcement operations, despite the fact that such operations might be of a semi-military nature or that it was sometimes difficult to determine whether an operation was one governed by the law of armed conflict or a police law enforcement activity. Such problems were not new, but they were made more complicated by the modern phenomenon of mixed conflicts. They also underlined the difficulty of defining the term “armed conflict”, which she doubted could be overcome by any tinkering with the definition. A reference to the formula in the Convention for the Protection of Cultural Property in the Event of Armed Conflict and the *Tadić* case was a step in the right direction, even though the definition given in the latter had been criticized. States involved in an operation had to deal with the categorization of a given conflict at a very practical and detailed level, since the rules of engagement for their troops had to be adjusted, depending on whether they perceived the situation as an armed conflict. Modern international humanitarian law treaties refrained from defining the term “armed conflict”. The Commission

should seek a definition of the term only if there was a clear need for one, and she remained to be convinced of such a need.

9. She would appreciate clarification of what was meant by the statement in paragraph 16 of the first report¹⁸⁶ that “[p]olicy reasons indicate the inclusion of a blockade even in the absence of armed actions between the parties”. Such an inclusion was, in her view, in fact justified for legal reasons, since a blockade was an act of aggression, governed by special requirements with regard, *inter alia*, to its establishment, its notification, its application and its maintenance. The Special Rapporteur might perhaps be intending to refer to an embargo, but it was important to distinguish between the two concepts.

10. With regard to draft article 3 (Non-automatic termination or suspension), she agreed with Mr. Vázquez-Bermúdez that the principle of continuity should be clearly spelled out, in order to show clearly that it should act as the starting point. The phrase “parties to the armed conflict” should be replaced by the phrase “States parties to the armed conflict”, since, whereas non-State actors could be parties to a conflict, only States could be parties to a treaty, according to the definition in draft article 1.

11. With regard to draft article 4 (The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict), she agreed with other members, including Mr. McRae and Mr. Perera, that the intention criterion should not exclude other criteria.

12. As for draft article 5 *bis* (The conclusion of treaties during armed conflict), the reference there, too, should be to “States parties to the armed conflict” and not to “parties to the armed conflict”, since not all the latter had the capacity to conclude a treaty.

13. With regard to draft article 6 *bis* (The law applicable in armed conflict), she said that she was slightly concerned by one aspect of the debate. She had the feeling that the law of armed conflict, including international humanitarian law, was viewed by some members as an enemy to be kept at bay. She did not share that assumption. International humanitarian law frequently offered a higher degree of protection of humanitarian values than “general” rules of international law. While it might be possible to derogate from human rights treaties, it was not possible to derogate from international humanitarian law. A person sentenced to death in time of war who was protected by the rules and provisions of international humanitarian law enjoyed stronger legal safeguards than a person sentenced to death (outside the European legal context) in time of peace. The same applied to some environmental protection provisions under international humanitarian law. It would undoubtedly be safer to rely on the detailed provisions of the Convention on the prohibition of military or any other hostile use of environmental modification techniques than on a general reference by the ICJ to the need to protect the environment in times of armed conflict [see *Legality of the Threat or Use of Nuclear Weapons*, paras. 27–32 of the advisory opinion].

¹⁸⁶ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

14. Draft article 7 (The operation of treaties on the basis of necessary implication from their object and purpose) contained a useful indicative list, on which she intended to comment further when it was discussed in the working group that was to be set up.

15. Although she was fully aware that her statement should focus on draft articles 1 to 7, she could not refrain from making some comments about draft article 12 (Status of third States as neutrals). There was, in her view, a problem with the way that the term “neutrals” was used in the draft article: she wondered whether it referred to States that had declared themselves neutral when an armed conflict broke out or only to States that enjoyed permanent neutrality. If the reference was only to the latter, the provision was not, as pointed out by the Special Rapporteur, strictly necessary, since a State’s neutral status could never be altered by the draft articles. Few States were currently neutral, which was probably why the draft article had received general support in the Sixth Committee. That did not, however, solve the problem of neutrality versus non-belligerency. When the 1907 Hague Conventions respecting the Laws and Customs of War on Land had been concluded—and even earlier—it had been assumed that, if a war broke out, States that were not parties to the conflict were automatically neutral. The situation had changed, however, particularly after the establishment of the United Nations. First of all, there were situations in which neutrality was not possible, the prime example being those on which the Security Council had taken a decision. Secondly, the practice was that States declared themselves to be non-belligerent, as Sweden had done during the war between Finland and the Union of Soviet Socialist Republics in 1939. The distinction between neutral and non-belligerent States was thus highly relevant in the context of the current discussion, since there was a connection between neutrality and third States. Third States were not automatically neutral and neutral States were not automatically third States. Such concepts and their role in the wider context undoubtedly merited further consideration by the Commission.

16. Lastly, she expressed appreciation of both the method used by the Special Rapporteur and the reports that he had produced. She looked forward to taking part in a working group on the topic.

17. Ms. XUE congratulated the Special Rapporteur on his third report and said that, after listening to his detailed presentation, she had gained a better understanding of all three reports submitted to date. On the key issues, the Special Rapporteur’s comments were helpful, and the set of draft articles he proposed could serve as a basis for the Commission’s deliberations.

18. With regard to the scope of the draft articles and the definition of the term “armed conflict”, she noted that in draft article 2 (b) the Special Rapporteur had taken account of the variety of opinions within the Sixth Committee and tactfully avoided defining the term. Indeed, as some members of the Commission and some delegations to the Sixth Committee had pointed out, the nature and modalities of armed conflict had changed considerably, particularly over recent decades, and international theory on the use of force had also developed significantly since

the end of the Second World War. Nevertheless, the question of whether the topic should cover non-international armed conflicts deserved serious consideration. In her view, it was clear, as she had stated on previous occasions, that internal armed conflicts should not be covered, first and foremost because the topic related rather to the law of treaties than to the law of armed conflict. In other words, it concerned treaty relations between States in the context of armed conflict and not the rules of State conduct in armed conflict, even though the two areas were related.

19. That point was particularly important if it was agreed that the principle of continuity and stability set out in draft article 3 should be the starting point. In the case of internal armed conflict, the normal operation of treaties might be interrupted, but treaty relations under the law of treaties were quite different from those prevailing in the case of international armed conflict, particularly when such conflicts remained purely internal in nature, as they most often did. In internal armed conflict, the State remained responsible for its treaty obligations at the international level, unless and until the conditions for the suspension or termination of the treaties concerned were met in accordance with treaty law. Draft article 3 was important because it clarified the treaty relations between States in international armed conflict. In internal armed conflict, the belligerent party or local rebel forces were not bound by treaty obligations undertaken by their Government, either at times of ceasefire or at any other time. To what extent a Government should be held responsible for the discharge of treaty obligations entered into by such bodies was another question. In Asia, for example, there had long existed local armed forces, with internal armed conflict occurring from time to time. Treaties concluded by the countries concerned, for example in relation to judicial assistance, applied, in law, to the whole territory of the country but in practice were not operational in areas beyond Government control. To recognize the specific nature of internal armed conflict would help to preserve the integrity of the law of treaties and the law of State responsibility. In paragraphs 18, 21 and 22 of his first report,¹⁸⁷ the Special Rapporteur, while confirming that there was a consensus in the doctrine on the basic character of the distinction between international and non-international armed conflict, had said that two factors should be taken into consideration, namely the nature or extent of the armed conflict, on the one hand, and the content of the treaty concerned and the intention of the parties, on the other. Although such indicators were practical and useful, they could not address the difference in the treaty relations in the two types of armed conflict.

20. With regard to the criterion of intention, she noted that views were divided as to its applicability in determining treaty status in the case of armed conflict. In principle, she agreed with the Special Rapporteur that the criterion of presumed intent was the most appropriate for the purposes of the draft articles. Having listened carefully to all the arguments, particularly the eloquent statement by Mr. McRae at the previous meeting, her view was that there was not much difference in substance between the various positions, since the wording of draft article 4, paragraph (2), actually included all the elements, apart

¹⁸⁷ *Idem.*

from the subjective intention of the parties, including the object and purpose of the treaty, subsequent circumstances and the nature and extent of the armed conflict. There were, however, two problems with the draft article. The first arose from the phrase “at the time the treaty was concluded” in paragraph (1). The report drew attention to the content of article 31 of the 1969 Vienna Convention, which contained all the elements relevant to the interpretation of a treaty, including its object and purpose, subsequent agreements between the parties and subsequent practice in its application. It was well known, however, that rules of interpretation were normally applied not at the time of the conclusion of the treaty but at the time of its execution. The phrase “at the time the treaty was concluded” therefore conflicted with article 31 or, at least, was likely to give rise to dispute or misunderstanding. If the phrase was deleted, the term “intention of the parties” would be left in general terms and the detailed provisions contained in paragraph (2) of draft article 4 would gain in meaning. Of the two criteria, that of the object and purpose of the treaty and that of intention, with all its attendant elements, the latter was the more reliable. The second problem arising out of draft article 4 was the relationship between the criterion of intention and the criterion of the object and purpose of the treaty. In other words, when the criterion of intention included the object and purpose of the treaty, in line with article 31 of the 1969 Vienna Convention, it seemed that another criterion had been created. The problem might, perhaps, relate rather to draft article 7 than to draft article 4.

21. Draft article 7, which was related to draft articles 3 and 4, had a twofold aim: one was to further clarify the criterion for the automatic operation of treaties in case of armed conflict, and the other was to consider the potential issue of severability. The treaties listed in the draft article did not, however, seem to fall into any particular category and the criterion of the object and purpose of the treaty was rather vague for the purposes of the draft article. Some of the treaties listed should be automatically operative in the case of armed conflict, either by their very nature or by their object and purpose. Since international law was not clear in that regard, the issue could provide material for its progressive development and codification. For instance, the legal regimes established by the law of the sea, the Antarctic Treaty, the outer space conventions and the Charter of the United Nations, among others, should by their very nature continue to apply in the case of armed conflict. Draft articles 3 and 7 would be useful and relevant with regard to diplomatic protection. When NATO had bombed the Chinese Embassy in Belgrade in 1999, she had, as a legal adviser, given it as her opinion that, in invoking the international responsibility of the wrongdoer, China should base its claim both on the Geneva Convention relative to the protection of civilian persons in time of war (Convention IV) and on the Vienna Convention on Diplomatic Relations, since article 22 of the latter, relating to the inviolability of diplomatic premises, applied both in time of peace and in time of armed conflict, as did the rule on the protection of diplomatic agents. It constituted consistent and general State practice, supported by *opinio juris*. As codified customary international law, treaty provisions should have the same legal status. In that regard, the principle of continuity was also

important. In draft article 7, the treaties listed in paragraph 2, subparagraphs (a), (b), (g), (j) and (k), could easily be identified as treaties of automatic application. As for the other categories, one of two situations might apply: either the treaty was wholly operative even in time of armed conflict, as was, in the human rights field, the Convention on the Prevention and Punishment of the Crime of Genocide; or else certain of its provisions might be suspended, as was the case with the International Covenant on Economic, Social and Cultural Rights. The same went for treaties on the environment, such as the 1977 Watercourses Convention, some provisions of which continued to apply even during armed conflict.

22. The question of severability inevitably arose in connection with the topic under consideration. In practice, if the Commission wished to ensure legal stability and security, it should allow partial suspension or termination of treaties in time of armed conflict. What was needed, therefore, was not an indicative list—such lists did not provide much guidance, as a rule—but a qualitative provision indicating which types of treaties should automatically continue to operate and to what extent a treaty could operate partially. Since the Commission was still at the initial stage of drafting, it was too soon to tell where such a provision should be inserted. Once the criterion on the susceptibility to suspension or termination had been defined or refined, the issue should become clearer.

23. Lastly, she supported the proposal that a working group should be set up to discuss such key issues before the draft articles were referred to the Drafting Committee. She also wished to thank the Special Rapporteur for his valuable contributions to the study of the topic.

24. Mr. SINGH thanked the Special Rapporteur for his lucid and detailed presentation of the complex topic of the effects of armed conflicts on treaties; the decision to present a full set of draft articles enabled the Commission to get an overview of the topic. He also thanked the Secretariat for the very useful memorandum it had prepared,¹⁸⁸ which contained a comprehensive examination of practice and doctrine in that regard. While the topic was generally part of the law of treaties, it was also closely related to other domains of international law, such as international humanitarian law, State responsibility and the peaceful settlement of disputes.

25. With regard to draft article 1, the scope of the topic should be limited to treaties concluded between States and should not include those concluded by international organizations. In that regard, he supported the arguments put forward by the Representative of the United Kingdom to the Sixth Committee,¹⁸⁹ as quoted by the Special Rapporteur in his third report.

26. In draft article 2, the term “armed conflict” should be limited to conflicts between States parties to the conflict and should not extend to internal conflicts, in view of the fact that treaties were entered into by States and

¹⁸⁸ A/CN.4/550 and Corr.1–2 (see footnote 164 above).

¹⁸⁹ See footnote 185 above.

internal conflicts did not directly affect treaty relations. Although, as stated in paragraph 17 of the first report,¹⁹⁰ “[c]ontemporary armed conflicts have blurred the distinction between international and internal armed conflicts”, the involvement of “other States” in such conflicts in varying degrees was significant. The definition of the term “armed conflict” given in draft article 2 (b) appeared to make the existence of an armed conflict contingent on its likely effect on the operation of treaties between the States parties to the conflict. The nature and extent of the conflict were already factors to be taken into account under draft article 4 in determining the intention of the parties and the question of whether an armed conflict had occurred should be considered independently of its effects on treaties.

27. Draft article 3 was useful, since it promoted the continuity and certainty of treaty relations. As for draft article 4, while the intention of the parties was relevant to the interpretation of a treaty, such intention should be determined on the basis of the text and the context of the treaty. It was highly unlikely that, at the time of the conclusion of the treaty, the parties would have contemplated or provided for the likelihood of a situation of armed conflict between them. Accordingly, all the relevant circumstances—the object and purpose of the treaty, the nature and extent of the conflict or the situation arising therefrom, the nature of the treaty obligation itself, the subsequent actions of the parties in relation to the treaty and the legality of the actions of each of the parties to the conflict—should be taken into account in determining whether the treaty or some of its provisions could continue in force in the context of an armed conflict.

28. In the new draft article 6 *bis*, the listing of standard-setting instruments needed further consideration and elaboration in the light of comments made by other members of the Commission. Moreover, although the Special Rapporteur had indicated, in paragraph 10 of the first report, that the topic fell within the law of treaties, the only *lex specialis* identified was “the law applicable in armed conflict”.

29. In draft article 7, it would be useful to identify some general criteria for determining the type of treaties that would continue to apply, whether in whole or in part, during an armed conflict. In particular, treaties that expressly applied in case of or during an armed conflict, or those, such as boundary treaties, that created a permanent regime and could therefore in no circumstances be terminated by an armed conflict, might be considered separately. It might also be possible to identify categories of treaty that could be considered to be suspended or terminated during an armed conflict, including treaties that operated through the cooperation and interaction of States parties, whether at the governmental level or through individuals and companies, such as treaties of trade and commerce.

30. In concluding, he supported the Special Rapporteur’s proposal that the draft articles should be referred to a working group.

31. Mr. FOMBA said that it was not clear from draft article 1 whether the question of the effect of armed conflicts related to treaties which were being provisionally applied as well as to those already in force. At first sight, that did not appear to be the case. As for the question of extending the scope of the topic to treaties concluded by international organizations, he had two comments on the view expressed in paragraph 9 of the third report: first, there was no reason to suppose that their situation was qualitatively different and, secondly, the difficulties mentioned by the Special Rapporteur were not necessarily real or insuperable.

32. He noted that while the title of the topic contained three key concepts—“treaty”, “armed conflict” and “effect”—draft article 2 covered only the first two. He asked whether the reason no mention was made of the word “effect” was that it was not problematic in the particular context of the topic. In paragraph 48 of the third report, however, the Special Rapporteur took pains to draw a distinction between “the effect of armed conflict on treaties as a precise legal issue” and the effects of other circumstances. The question therefore arose whether such situations were really all that different from situations of armed conflict, and, if so, to what extent. Surely the debate had not been definitively concluded on that point. As for the question whether the term “armed conflict” also applied to non-international armed conflicts, there was a real possibility that, in non-international armed conflicts *stricto sensu*, treaty relations between a State party and a third State would be changed. The matter should therefore be given further serious consideration, perhaps along the lines that Mr. Gaja had interestingly indicated.

33. With regard to draft article 3 and the replacement in the text of the words “*ipso facto*” by “necessarily”, he concurred with the Special Rapporteur’s view that there was no fundamental difference between the two terms, although “*ipso facto*” conveyed more faithfully the idea that there was no automatic termination or suspension following the outbreak of an armed conflict.

34. With regard to draft article 4, he noted that the plural word “indicia” was used, although it denoted only the criterion of intention, which was to be determined or identified in accordance with articles 31 and 32 of the 1969 Vienna Convention. To that criterion the Special Rapporteur added the nature and extent of the armed conflict in question. Several questions arose in that connection: whether the intention to suspend or terminate the application of a treaty in a situation of armed conflict was, as a rule, clearly indicated by the parties to the treaty; what the practice was in that regard; and to what extent it could be said that the nature and extent of an armed conflict constituted indicia of intention. Surely the two were different. It was also worth asking how far articles 31 and 32 were relevant in the particular context of the topic or, in other words, whether all the provisions they contained were valid and applicable to the effects of armed conflicts on treaties—which presupposed that all the criteria were evaluated. If the explicit reference in the draft article to articles 31 and 32 of the 1969 Vienna Convention was inadequate, as some States and members of the Commission believed, paragraph 2 (a) should perhaps be reformulated to contain a reference to

¹⁹⁰ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

the text of the treaty or to its object and purpose. As for the problem of establishing the intention of the parties with certainty, the Special Rapporteur had rightly stated that it should be seen in context, since the 1969 Vienna Convention contained effective methods for determining the meaning of a treaty. As for the legal consequences of the termination or suspension of treaties, which were governed by articles 70 and 72 of the Convention, the question arose whether the general regime should apply or whether some specific aspect of the effect of armed conflicts could or should justify a change in those articles and a different approach.

35. With regard to draft article 5 *bis*, he said that treaties could and should also play an important role in the process of settling armed conflicts. The relevant factor, in his view, was not so much the “competence” or “capacity” to conclude a treaty, which remained intact, as the “faculty” or the “need” to do so, or the “opportunity” of doing so.

36. With regard to draft article 7, he supported the proposal by the United States of America that the Commission should enumerate the factors that might lead to the conclusion that a treaty should continue,¹⁹¹ be suspended or be terminated in the event of armed conflict, the identification of which would be of practical use to States. He wondered, however, whether the United States and the Special Rapporteur attached the same meaning to the word “factors”, since the latter seemed to consider that they already appeared in the proposed list of treaties. As for the question whether the concept of State practice should also encompass the case law of domestic jurisdictions and the opinions relating thereto issued by the executive, of which the Special Rapporteur claimed to have found no trace in State practice, as traditionally understood, he believed that all sources that might throw light on the issue should be taken into account. In that regard, he noted that, in 2003, the French Society for International Law had organized a symposium in Geneva on practice and international law, during which an interesting discussion had been held on the concept of “practices” in international law.¹⁹² As for the categories of treaty to be included in draft article 7, the current wording was, in his view, a useful starting point and he was in favour of the principle of classifying treaties, so long as such a classification was made on the basis and in the light of a whole range of criteria or factors to be determined. Of the four possible options set out in paragraph 56 of the third report, his preference was for the one appearing in subparagraph (c), according to which the list would rely not upon categories of treaties but upon relevant factors or criteria.

37. Lastly, he expressed support for the establishment of a working group and supported Mr. Pellet’s proposal regarding the working group’s terms of reference, which would cover practically all the important underlying issues.

¹⁹¹ *Official Records of the General Assembly, Sixth Committee, Sixtieth session, summary record of the 20th meeting (A/C.6/60/SR.20)*, para. 34.

¹⁹² Société française pour le droit international, *Colloque de Genève: la pratique et le droit international*, Paris, Pedone, 2004.

38. Mr. WISNUMURTI said that he had no difficulty with the formulation of draft article 1 on scope. He had an open mind as to the proposal to expand the scope by including treaties entered into by international organizations and was prepared to listen to the views of other members of the Commission in plenary and in the working group to be established.

39. Draft article 2, paragraph 1, on the definition of “treaty”, seemed to be adequate, as it virtually reproduced article 2 (a) of the 1969 Vienna Convention. Nevertheless, the question whether the definition of “armed conflict” should include “internal armed conflict” was a serious issue that had proved to be divisive and on which the Commission should take a decision. As stated by the Special Rapporteur in paragraphs 17 of his first report¹⁹³ and 14 of his third report, internal armed conflict could affect the operation of treaties, and sometimes there was no distinction between international and non-international armed conflicts. Indeed, while some internal armed conflicts escalated to such a degree that they affected treaty relations between the State party involved in them and another State party, not all internal armed conflicts affected treaties. In his view, the effects of an internal armed conflict on treaties depended on the nature and gravity of the conflict: if it affected the strategic interests of another State party, that might prompt the State party in question to become involved—directly or indirectly—in the conflict, thereby creating a hostility between the two countries that provided grounds for suspension or termination of a treaty by one or both of the States parties. It was essential, however, not to draw the over-hasty conclusion that the definition of “armed conflict” should include internal armed conflict. That would entail venturing into the very sensitive terrain of national sovereignty, since it would imply that one State party was involved in the internal armed conflict of another State party. For those reasons, the definition proposed by the Special Rapporteur in draft article 2 (b) was adequate to accommodate a situation where an internal armed conflict affected the operation of a treaty.

40. He welcomed the fact that, in draft article 3, the term “*ipso facto*” had been replaced with “necessarily”, which better conveyed the meaning of the *chapeau*. It might also be better to replace the word “non-automatic”, in the title, by “non-automaticity of”.

41. Regarding draft article 4, he said that while he agreed in principle that the test of the intention of the States parties was an important factor in the interpretation of a treaty, the use of that criterion in article 4, paragraph (1), seemed to him to be unrealistic. The paragraph referred to the intention of the parties “at the time the treaty was concluded”. The fundamental reason for States to conclude a treaty was to promote friendship and cooperation in various fields of common interest or to settle a problem or dispute. To include a provision expressing their intention regarding the operation of the treaty in case of armed conflict would run counter to that aim. If the Commission really wanted to retain draft article 4, extensive redrafting would be needed.

¹⁹³ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

42. On draft article 5, he welcomed the Special Rapporteur's decision to split it into two separate articles, a change which reflected the views expressed earlier in the Commission and in the Sixth Committee. Draft article 5 *bis* stated the accepted legal principle that it was not juridically impossible for two belligerents to conclude treaties during the course of a war—for instance, an armistice agreement or an agreement on exchange of prisoners.

43. Regarding draft article 6 *bis*, he said that the principle of continuity of the application of standard-setting treaties, including treaties on human rights and environmental protection, was an essential part of the draft articles. However, he had doubts about the viability of the reference to the applicable *lex specialis*, as that might undermine the purpose of the draft article. After all, standard-setting treaties were also *lex specialis*. On the other hand he could endorse draft article 7, and welcomed the adoption of the object and purpose of a treaty as a test for the treaty's continued operation during an armed conflict. He also agreed with the Special Rapporteur's approach of including an indicative list of treaties that fell within the meaning of draft article 7, paragraph (1), and with his decision as stated in paragraph 44 of his third report to maintain the original approach to draft article 7, reflected in option (b) in paragraph 56 of the report. That did not preclude the need for a review of the indicative list of treaties that had the character of permanent regimes. In that connection, he proposed that the indicative list should include treaties or agreements delineating land and maritime boundaries, which by their nature also belonged within the category of permanent regimes.

44. In conclusion, he thanked the Special Rapporteur for his excellent work and welcomed the idea of continuing the task in a working group to be chaired by Mr. Cafisch.

45. Mr. WAKO, referring to draft article 1, said that if the Commission decided to include non-international armed conflicts in the scope of the topic, it would be necessary to amend the draft article to include treaties entered into between States and international organizations. That change would also constitute recognition that the topic was based on the law of treaties but also cut across other domains of international law such as international humanitarian law, the law of warfare and the law of the responsibility of States.

46. In draft article 2, the definition of "armed conflict" had remained the same as in the first report and opinion was divided as to whether to include internal armed conflicts. Some members, such as Mr. Comissário Afonso, Mr. Kolodkin and Ms. Xue, believed, for good reason, that doing so would entail the danger of including non-State actors. What was not in dispute was that traditional warfare, which had begun with official proclamations and denunciations, was on the wane, while the number of internal armed conflicts was increasing. It was also recognized that those conflicts could and usually did affect the operation of treaties as much as, if not more than, international armed conflicts. Many internal conflicts had been ended by the conclusion of a peace treaty between the State and non-State actors directly involved that was guaranteed by or entailed certain duties or obligations for other States, either individually or through regional, international,

intergovernmental or non-governmental organizations. The issue that arose was whether the peace treaty could be suspended or even abrogated in the event of renewed hostility, and, if so, what was the required level of intensity of hostilities. One might also ask whether the suspension or abrogation of a treaty, in whole or in part, by a State, non-State actor or organization triggered its responsibility.

47. Other issues arose if internal armed conflict was to be included in the scope of the topic. For example, in most international human rights instruments, States undertook to ensure that their people enjoyed human rights. Some internal armed conflicts were caused by the State's failure to fulfil those obligations. The issue then was whether a State that could be blamed for an internal armed conflict could use that conflict to abrogate or suspend a treaty or a provision of a treaty. It was doubtful whether a State could cite an internal civil war for which it was responsible as grounds for abrogating its responsibility in respect of treaty obligations. At most, it could suspend its fulfilment of those obligations on the grounds that it was unable to perform them, but even then other States and actors could hold it accountable. On the other hand, a State whose territory was the theatre of an internal armed conflict caused by other States or non-State actors could probably abrogate or suspend the application of a treaty. In any event, whether to include internal armed conflicts was a question of immense consequences to which the Commission must give due consideration and which, given that opinion on it was divided, should indeed be referred to the working group. An in-depth study by the Secretariat on the question would also be of benefit. The remarks made by Ms. Escameia and Ms. Jacobsson should likewise be taken into account.

48. In article 3, the question was whether the word "necessarily", which had replaced the term "*ipso facto*" used in the first report, should be retained. He was not sure that it adequately reflected the impact of prohibition of recourse to the use of force. Clearer and stronger language would be preferable: perhaps the word "necessarily" could be deleted in the first part of the draft article and the words "save in exceptional circumstances where the armed conflict is 'lawful' or 'justified' under international law" added at the end.

49. Draft article 4 should definitely be referred to the Working Group. Despite the differing views on it, it had not been changed since the first report; the Special Rapporteur had simply given additional explanations to justify his approach. For those of the common law tradition, however, the differences were not as wide as it might seem. Any interpretation of a text, whether a constitution, legislation or contract, aimed to arrive at the "intention" of the authors. Even if the "intention" might not have been contemplated by the parties at the time the text was drafted, the authors would be presumed to have had it if that was the conclusion reached by following the established rules of interpretation. It was true, as Ms. Xue had pointed out, that the phrase "at the time the treaty was concluded" was confusing. If it was to be retained, it should be made clear that it was the "express" intention, as opposed to the "presumed" or "implied" intention, that was meant. The first two paragraphs could then refer to "express intention", which was defined by a reading

of the treaty itself and by the rules set out in articles 31 and 32 of the 1969 Vienna Convention. Paragraph (2) (b) could become paragraph (3) and deal with the factors to be taken into account in arriving at the “implied” or “presumed” intention, such as the nature and extent of the armed conflict, the object and purpose of the treaty (which it would be useful to cite even though the phrase “express intention” took it into account), bilateral or multilateral treaties, and the international standards to be applied. Lastly, the current draft article 7 could become paragraph (4) of draft article 4. That idea might seem controversial, but it could be considered by the Working Group. The content of draft article 7 was important enough not to be relegated to an annex. Even if the Special Rapporteur considered that its current placement was logical in view of the sequence of the draft articles, it could also form a part of draft article 4.

50. Mr. NIEHAUS said that the third report on the effects of armed conflict on treaties was clear and structured logically, but offered little that was new in comparison with the two previous reports. Some members reproached the Special Rapporteur for working at a slow pace, but it must be borne in mind that the topic was extremely complex and controversial, requiring painstaking analysis. The Secretariat study was particularly useful in that regard.¹⁹⁴ Having already spoken on the two previous reports, he would limit himself to recalling his position on certain specific points, especially as the Special Rapporteur’s comments were so comprehensive that any additional remarks were likely to be superfluous. The topic obviously fell under the law of treaties, but its connections to other issues such as the law of war, the prohibition of the use of force and the law of responsibility should not be overlooked.

51. Concerning draft article 1, on the scope of the topic, he said that while the Commission’s task was not to redefine the relevant provision of the 1969 Vienna Convention, nothing prevented it, as Mr. Hassouna had pointed out, from engaging in codification that might supplement the Convention without contradicting it. Not to do so would be to go against the development of international law. He did not agree with those members who opposed the inclusion of treaties concluded by international organizations because of the difficulties involved, but he could accept that the idea might be considered at a later stage if at some point the Commission was asked to look into that category of treaties, even though the problems posed by armed conflicts for international organizations were quite different from those posed for States. That fact was self-evident, but it must not be overlooked, even if the matter was considered later.

52. Regarding draft article 2, he endorsed Mr. Hassouna’s proposal to replace the term “state of war” in subparagraph (b) with the term “state of belligerency”, which was more compatible with the Charter of the United Nations and the development of international law. He also endorsed the inclusion of internal conflicts in the scope of the topic, particularly since they had become the most common kind and because it was sometimes difficult to distinguish between international and non-international armed conflicts, not to mention situations of military occupation.

53. Draft article 3, as Mr. Comissário Afonso had pointed out, was particularly important in that it by and large formed the basis for the whole draft. That was why it might be better couched in more categorical terms. The replacement of “*ipso facto*” by “necessarily” was no improvement, since the phrases were not synonymous and, as had been pointed out in the Sixth Committee, the latter was weaker than the former. The most appropriate term might be “automatically”, as someone had suggested, since it had the advantage of being both more emphatic and more coherent with the title of the draft article, at least in the English and Spanish versions.

54. Draft article 4 was in principle satisfactory, although its wording should perhaps be revised to delineate more clearly the two fundamental concepts of intention and object and purpose of the treaty. The criterion of object and purpose of the treaty was perhaps preferable, given that intention was generally difficult to identify.

55. The new draft article 5 was clearer for having been broken into two articles and presented no particular problems. Similarly, the reference to *lex specialis* in the new draft article 6 *bis* provided welcome clarification.

56. Draft article 7, on which the Special Rapporteur had commented more extensively than on any other, was in no way superfluous and provided a good counterweight to the element of the intention of the parties, as Ms. Escarameia had pointed out. The link it created with the element of the object and purpose of the treaty was extremely apposite, and the list it contained should be retained, even if it was not possible to endorse all the categories listed. In that connection, he failed to understand why the Special Rapporteur had chosen not to include treaties that codified rules of *jus cogens*. He believed that this category of treaties ought in fact to be included at the beginning of the list.

57. In conclusion, he endorsed the establishment of a working group that would surely, under the guidance of its chairperson and the Special Rapporteur, bring the study of an important and interesting topic to fruition.

58. Mr. KEMICHA endorsed the Special Rapporteur’s decision to propose a full set of draft articles with commentary, as that provided the Commission, and States, with a finished product—a “package”. The discussions since the first report nevertheless revealed that there was still a need for consensus on the overall approach and that substantive problems remained.

59. Regarding draft article 1, there were diverging views on the proposal to extend the scope of the topic to treaties concluded by international organizations. With all due respect for the reservations expressed on that point by the Special Rapporteur and the arguments put forward in the Sixth Committee by the Representative of the United Kingdom, he believed that such an extension was justified or at least merited thorough consideration before it was rejected, should that prove necessary.

60. The inclusion of internal armed conflicts in the definition of “armed conflict” in draft article 2 (b) had likewise given rise to a significant divergence of views. It would be difficult to settle for a combined reading of that text and

¹⁹⁴ A/CN.4/550 and Corr.1–2 (see footnote 164 above).

draft article 3, as the Special Rapporteur suggested should be done, in order to cover a situation that was supposed to form part of a definition of “armed conflict”, even if that definition was proposed solely “[f]or the purposes of the present draft articles”. As to matters relating to the legality of the use of force, the Special Rapporteur would surely have to take them into account, just as he would the resolution adopted on 28 August 1985 by the Institute of International Law.¹⁹⁵

61. He welcomed the improvements made to the wording of draft article 3 by the Special Rapporteur and agreed with others that it helped to consolidate the principle of continuity.

62. Draft article 4 raised another fundamental issue: the excessive and exclusive emphasis given to the intention of the parties. In determining the susceptibility of a treaty to termination or suspension in case of an armed conflict, it was erroneous to look for “the intention of the parties at the time the treaty was concluded”. The criterion of intention needed to be supplemented with presumptions relating to the nature and the object and purpose of the treaty. That was what the Special Rapporteur had done in draft article 7, where he had proposed a list of treaties whose object and purpose necessarily implied that they would continue to operate. A rewording of draft article 4 that incorporated all the various criteria would better reflect the current state of affairs and State practice.

63. The changes made to draft article 5 were welcome, as was the new draft article 6 *bis* on the law applicable in armed conflict, which had been proposed in response to comments made by members of the Commission.

64. Lastly, he noted that many members had drawn attention to the dangers and limitations of the list proposed in draft article 7. Since such a list was inevitably problematical, he thought that an effort should be made to incorporate the relevant criteria in paragraph 1 of that article. The other option, which he preferred, was to keep the list by way of illustration and have it preceded by a revised paragraph (1) that would define the “factors to be taken into account when determining whether a treaty should remain in force in case of an armed conflict”. In paragraph 56 of his third report the Special Rapporteur himself had put forward four options in order to take account of the problems and questions raised by the draft article. It would be for the Working Group to consider all the options and help the Commission settle the outstanding substantive problems.

65. The CHAIRPERSON invited the Special Rapporteur to introduce the seven other draft articles (8 to 14) contained in his third report on the effects of armed conflict on treaties.

66. Mr. BROWNLIE (Special Rapporteur) said that draft articles 8 to 14 dealt with matters that inevitably had strong connections with other areas of international law such as the law of armed conflict or State responsibility, but that it was not easy to define *jus cogens* as part of the present draft. The draft articles were purely expository

and were not strictly necessary, especially draft article 8 (Mode of suspension or termination), which referred to the 1969 Vienna Convention. If, as many members of the Commission had suggested, the Working Group on the effects of armed conflict on treaties wished to define the modes of suspension and termination of a treaty, he saw no problem with that, even though it did not seem to be the best way forward.

67. Draft article 9 (The resumption of suspended treaties) was unchanged from the earlier version and further developed the general criterion of intention laid down in draft article 4. Draft article 12 (Status of third States as neutrals) was also not strictly necessary and referred back to the law of neutrality, an especially complex area of international law that was also difficult to define in the draft articles. Despite the reservations expressed by some members of the Commission, he thought that the criterion of intention, linked with the general rules of interpretation set out in article 31 of the 1969 Vienna Convention, should be applied in the draft articles. Draft articles 13 (Cases of termination or suspension) and 14 (The revival of terminated or suspended treaties) were not strictly necessary either and were expository in nature.

68. Turning to draft article 10 (Effect of the exercise of the right to individual or collective self-defence on a treaty), he said first of all that it was not true, as certain members of the Commission had suggested, that he had said nothing about the illegality of the use of force by States: he had referred to it in his first report and had reverted to it in paragraphs 59 to 62 of his third report. It was after having examined the relevant sources of law, including the resolution adopted by the Institute of International Law in 1985, that he had taken the view that the legality of the use of force did not affect the outcome of suspension or termination of a treaty, and that what was needed was simply the strict application of draft article 3. That analysis was correct, because at the time an armed conflict broke out it was impossible to know who the aggressor was. However, he had tried to take account of the criticism voiced by members of the Commission and to show more clearly in the wording of the new draft article 10 that the question of the illegality of certain forms of the use of force was not being overlooked. Similarly, it was to show that the Commission was conscious of the work of the Security Council and to address the criticism that had been voiced in that connection that he had included draft article 11 (Decisions of the Security Council), which remained as initially drafted. An understanding of his analysis was to be found in paragraphs 59 to 62 of his third report, wherein he explained that the outbreak of an armed conflict did not in itself entail termination or suspension of a treaty, whether or not the armed conflict was lawful. Only at a later stage, when the facts had been established, could one determine which rules on the use of force were applicable and then say that a State engaging in self-defence could not be viewed in the same light as an aggressor State.

69. Mr. PELLET said it was surprising to see that the entire set of draft articles submitted by the Special Rapporteur consisted of “without prejudice” clauses, except for the new version of draft article 10, which meant that the practical issues that actually lay at the core of the topic and raised the most complex and interesting problems

¹⁹⁵ Institute of International Law, *Yearbook*, vol. 61, Part II, Session of Helsinki (1985), p. 278.

had been ignored. As to draft article 10, its new wording represented a marginal improvement over the “without prejudice” clause contained in the first report, but he was not convinced that it fully met the concerns he and other members of the Commission had raised about the need to take account of the fundamental principle of prohibition of the use of force in international relations when considering the topic. While indifference to that principle had now been replaced by its being taken partially into account with the incorporation of article 7 of the 1985 resolution of the Institute of International Law, the Special Rapporteur should have selected article 9 of that resolution, which precluded the possibility that an aggressor State might take advantage of the situation by terminating or suspending a treaty and would seem to be more essential. In his view, the question whether the principle of prohibition of the use of force in international relations had an impact on the handling of the topic—and, if so, what kind of impact—must be addressed comprehensively and discussed in depth by the Working Group. The Special Rapporteur seemed to think that that was not the case, given the explanations he gave in paragraph 61 of the third report, which stated that the new version of draft article 10 was a clarification of the earlier version, whereas it actually went further towards taking account of the prohibition of the use of force and differed considerably from the previous version. In addition, the point made in paragraph 62 was not clear to him, and he wished to be enlightened on that subject. In any case, he remained convinced that the topic’s relationship to the principle of prohibition of the use of force deserved more extensive consideration and that much more detailed conclusions should be drawn therefrom with reference, on the one hand, to the fate of treaties in force between the parties to the conflict and between those parties and third parties, and, on the other hand, to the fate of treaties that parties to the conflict might conclude with third parties during the armed conflict. The question of the effect of armed conflict and of the prohibition of the use of force on the conclusion of treaties in the course of a conflict, which presupposed the drawing of a distinction between treaties connected with the hostilities and treaties totally extraneous to them, could not be ignored, for that would amount to dismissing an important aspect of the topic.

70. He found draft article 11 (Decisions of the Security Council), whose wording was unchanged, particularly perplexing, since in drafting it the Special Rapporteur had drawn on article 75 of the 1969 Vienna Convention. While it had been logical to include in that instrument a “without prejudice” clause on something of marginal importance in the context of the law of treaties, the legal effects of decisions taken by the Security Council under Chapter VII of the Charter of the United Nations, namely in the event of a breach of the peace or act of aggression, and thus of armed conflict, were central to the topic under consideration. In a sense, draft article 11 amounted to a statement that the draft articles on the effects of armed conflicts on treaties were without prejudice to the law of the Charter of the United Nations applicable to armed conflicts, and that was not acceptable. Then there was the question of whether the topic under consideration encompassed peacekeeping operations carried out under Chapter VII of the Charter of the United Nations, which the Working Group would also have to consider. In his view, that

line of reasoning showed how difficult it was to define the boundaries of the topic and to distinguish between international armed conflicts and non-international armed conflicts. The Working Group might wish to refer in that connection to paragraphs 143 to 145 of the excellent study prepared by the Secretariat entitled “The effects of armed conflicts on treaties: an examination of practice and doctrine”, even though the question was touched on only superficially. In most instances, peacekeeping operations under Chapter VII of the Charter of the United Nations that had a large international component and arguably constituted international armed operations were authorized in connection with internal armed conflicts, and that was a major argument in favour of including that question within the topic under consideration, contrary to what had been said by a number of members of the Commission.

71. Mr. BROWNLIE (Special Rapporteur) said that he had no objection to the Working Group studying various aspects of the law relating to the use of force by States or peacekeeping operations. Nevertheless, the Commission should not lose sight of the fact that, as he sought to explain in paragraph 62 of his report, at the time an armed conflict broke out, the principle of continuity enunciated in draft article 3 was applied, since very little was known about the nature of the conflict. It was only later, when an authorized body made findings as to which State was the aggressor and which was acting in self-defence, that draft article 10 came into play, bringing in the applicable law, which might be the Charter of the United Nations, a previous set of Security Council resolutions or a regional arrangement. There was thus a chronology to the application of draft articles 3 and 10; moreover, regardless of what the provisions on the legality of the use of force might be, draft article 3 continued to apply and could not be ignored, something that Mr. Pellet did not seem to take sufficiently into account.

72. Mr. PELLET, returning to the question of the relationship between draft articles 3 and 10, said that, in his view, draft article 3 was not chronological in nature; if that had been the case, he would not have supported it. The article did not state merely that treaties were not necessarily terminated or suspended at the “start” of an armed conflict but that treaties remained in force *a priori* between the parties to the conflict. That starting point was indisputable, but then exceptions to that principle should be identified, contrary to the views of the Special Rapporteur, for whom draft article 10 matched up with draft article 3. In reality, draft article 10 said that a State could be acting in self-defence and that that situation might have consequences for determining which treaties remained in force and which were suspended or terminated. However, it should be made clear just what a State acting in self-defence had the right to do with regard to treaties and what its adversary, the aggressor State, did not have the right to do. The fact that it was not possible to know which State was the aggressor until the Security Council had made a determination was indeed an additional complication, but that should not preclude a more thorough consideration of the vast and complex issues which draft article 10 only began to answer.

The meeting rose at 12.55 p.m.

2929th MEETING

Friday, 1 June 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Later: Mr. Edmundo VARGAS CARREÑO
(Vice-Chairperson)

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comisário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Organization of the work of the session (continued)*

[Agenda item 1]

1. The CHAIRPERSON announced that the Enlarged Bureau had met to consider a number of matters and make recommendations to the Commission. With the completion of the Commission's work on four topics at the end of the previous quinquennium, the Enlarged Bureau had agreed that it should select further topics to be included on the Commission's agenda. Following consultations, the Enlarged Bureau recommended the appointment of Mr. Valencia-Ospina as Special Rapporteur for the topic "Protection of persons in the event of disasters". Consultations were continuing on the appointment of further special rapporteurs.

2. The Enlarged Bureau also recommended the establishment of a working group chaired by Mr. McRae to examine the possibility of considering the topic "Most-favoured-nation clause". Members would recall that the Working Group on the Long-term Programme of Work, reporting through the Planning Group, had made no final recommendation on that topic, and that the Commission had decided to seek the views of Governments.¹⁹⁶ Only three Governments had commented; it was thus for the Commission to make a decision as to what course of action should be followed. In the view of the Enlarged Bureau, a working group should be established to reconsider the issue and report back to the plenary.

3. If he heard no objection, he would take it that the Commission agreed with the recommendations of the Enlarged Bureau.

It was so agreed.

Mr. Vargas Carreño (Vice-Chairperson) took the Chair.

Effects of armed conflicts on treaties (continued) (A/CN.4/557 and Add.1–2, sect. D, A/CN.4/578, A/CN.4/L.718)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

4. The CHAIRPERSON invited the Commission to resume consideration of the Special Rapporteur's third report on the effects of armed conflicts on treaties (A/CN.4/578).

5. Ms. ESCARAMEIA said she had a number of comments to make on several of the draft articles, above all as they related to the 1969 Vienna Convention.

6. In presenting draft article 8, the Special Rapporteur had argued that it was, strictly speaking, superfluous, since under draft article 3, treaties continued to apply. In her view, however, there was a very considerable difference between the assertion that the principle of continuity of treaties applied and the statement that the provisions of the 1969 Vienna Convention would also apply in time of armed conflict. While the principles contained in articles 42 to 45 of the Convention should in general be applied, the usefulness of some of the provisions was debatable. For example, it was questionable whether article 44, paragraph 2, of the 1969 Vienna Convention could be applied, since it provided that the suspension or termination of the treaty might be invoked only with respect to the whole treaty, the exceptions where separability of the provisions was possible being set out in paragraph 3. She wondered whether the opposite were not in fact the case, namely that the so-called exceptions actually constituted the rule. In any case, the Commission should take a closer look at article 44, paragraph 2, of the 1969 Vienna Convention.

7. That provision established the general principle that the suspension or termination of a treaty could take place only as a result of the application of the provisions of the treaty or of the 1969 Vienna Convention. Yet draft article 10 gave an additional ground for suspension or termination, namely self-defence. Thus, the Commission would be going beyond the grounds recognized in the Convention. Perhaps some adjustments were required.

8. Her main problem with the reference to the articles of the 1969 Vienna Convention was that it was not clear what procedure the Special Rapporteur was suggesting for suspension or termination of the treaty. The procedure laid down in articles 65 *et seq.* of the Convention was slow and cumbersome. Article 65, paragraph 2, for example, set a deadline of not less than three months for making objections to the notification of termination or suspension, except in cases of special urgency. However, all such cases were urgent, and a different formulation was needed. Further, the subsequent procedure for the peaceful settlement of disputes if objections were raised by another party (art. 65, para. 3) could not be easily applied in situations of armed conflict. Simple notification followed by automatic termination or suspension, where applicable, seemed a more attractive option. Those questions should be discussed in the Working Group.

* Resumed from the 2927th meeting.

¹⁹⁶ *Yearbook ... 2006*, vol. II (Part Two), p. 186, para. 259.

9. She welcomed the Special Rapporteur's decision to draw up a new draft article 10. Like Mr. Pellet, she had difficulty in understanding his reluctance to include it, which was apparently based on the reasoning that, pursuant to draft article 3, the question of legality was irrelevant, because the treaty would in any case continue in operation. She disagreed: there were some very important instances in which that would not be the case. For example, a State exercising self-defence had the right to denounce the treaty. She would appreciate some further explanation by the Special Rapporteur as to why he was so opposed to the inclusion of draft article 10.

10. Draft article 11 was not—unfortunately, in her view—a reproduction of the corresponding articles of the 1985 resolution of the Institute of International Law.¹⁹⁷ Instead, it was a simple “without prejudice” clause. That was not sufficient; in her view, it was very important to tackle those questions head-on. Articles 8 and 9 of the 1985 resolution of the Institute of International Law should be included in the draft articles so that the issue of the termination or suspension of a treaty incompatible with a Security Council resolution was addressed. In keeping with article 9 of the resolution, some wording should also be included in draft article 11 to the effect that the aggressor State could not terminate or suspend a treaty if it would benefit that State. In the context of draft article 10, perhaps the Working Group should also discuss the situation of bilateral treaties between the aggressor State and the State acting in self-defence; there again, it should be possible to envisage a speedier procedure which enabled a State to terminate or suspend the operation of a treaty incompatible with that State's right of self-defence.

11. She had a less important concern with regard to draft article 13, which was another “without prejudice” clause. Two of the situations listed, namely supervening impossibility of performance and a fundamental change of circumstances, seemed to be closely bound up with situations of hostilities. While those situations could arise for other reasons in situations of armed conflict, the initial outbreak of hostilities undoubtedly constituted a fundamental change of circumstances. The 1969 Vienna Convention had probably not considered it as such, because its article 73 addressed the outbreak of hostilities in another context, but it would nevertheless be useful to discuss the matter. Under article 61, paragraph 1, of the Convention, supervening impossibility of performance resulted from the “disappearance or destruction of an object indispensable for the execution of the treaty”, a situation so common in armed conflict that perhaps the Working Group should discuss the relationship between those two grounds for terminating or suspending a treaty and those same grounds in a situation of war or armed hostilities.

12. In short, she did not see how draft article 3, in enunciating the principle of continuity, could go so far as to assert that the 1969 Vienna Convention regime applied to all situations of armed conflict; as articles 73 and 75 of the Convention made clear, it did not; hence the need to draw some distinction with regard to the 1969 Vienna Convention regime.

13. Mr. YAMADA, welcoming the proposal to establish a working group on the topic, said that he had already had occasion to express his views on most of the proposed draft articles in 2005. He would now like to explain how he saw the scope of the topic and the purpose of the exercise.

14. In his view, treaties could be divided into three categories. Treaties belonging to the first category were those which operated only in time of armed conflict. They were rules of warfare and were outside the scope of the topic. Treaties in the second category operated only in time of peace and ceased to operate in time of armed conflict. Classic examples were the 1922 Treaty for the Limitation of Naval Armament between France, Great Britain, Italy, Japan and the United States and the 1930 International Treaty for the Limitation and Reduction of Naval Armament, regulating the number of warships and subsidiary naval vessels which each party could have. Those treaties ceased to operate as soon as armed conflict broke out among the contracting parties. Many disarmament treaties were in that category. For example, if an armed conflict broke out between a NATO State and a non-NATO State, what would be the status of the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (Partial Test-Ban Treaty)? Under the NATO policy of flexible response, even if an adversary used only conventional weapons, NATO retained the right to use nuclear weapons. Clearly, under such circumstances it could not be said that the adversary State was bound to honour the Partial Test-Ban Treaty. If the conflict developed into a nuclear war, it would be absurd to say that nuclear weapons could be employed, but not tested. Thus, treaties in that category were also outside the scope of the topic. He was not, however, suggesting any changes to draft article 1, but merely engaging in a conceptual exercise.

15. The treaties in the third category operated in time of peace and continued to operate as a whole or in part in time of armed conflict. That was the category which the Commission was addressing. The draft articles must provide practical and useful criteria for determining which provisions of such treaties continued in operation in time of armed conflict. He entirely agreed with the Special Rapporteur that the intention of the contracting parties at the time the treaty was concluded was the decisive factor. The problem was that in many cases, it was very difficult to obtain evidence that the parties had the intention to apply a given provision in time of armed conflict.

16. The object and purpose test was also important in that context and should be developed further. Citing an example, he recalled that he had been closely involved in the negotiation of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, which was a mixture of disarmament elements and rules of war. He had opposed the inclusion in that Convention of the provision on the prohibition of the use of chemical weapons, on the grounds that that prohibition was well established in treaty law, for example in the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, and in customary law, and that to include it

¹⁹⁷ Institute of International Law, *Yearbook*, vol. 61, Part II, Session of Helsinki (1985), p. 278.

in the Convention would complicate its interpretation. Unfortunately, that had been a minority view, and ultimately he had had to bow to the political mood of the time. The negotiating history of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction contained no indication as to whether the parties had had any intention to apply provisions other than the prohibition on the use of such weapons in time of armed conflict. If asked whether the Convention's prohibition on the production or possession of chemical weapons applied in time of armed conflict, his reply would be that he did not know, because production and possession were regulated in the same article that prohibited the use of chemical weapons. On the other hand, if asked whether its verification provision applied in time of armed conflict, he would answer confidently that it did not. He did not believe that the contracting parties would allow an intrusive inspection in time of armed conflict. Thus, there was a fine dividing line, and Governments would need to know what criteria would help to pinpoint it. Perhaps the Commission could use some of the treaties listed in draft article 7, paragraph (2), for the purposes of an in-depth study to identify factors relevant to determining which provisions would apply in time of armed conflict.

17. Those comments should not be construed as a criticism of the Special Rapporteur's excellent work. His suggestion was to build on the Special Rapporteur's proposals.

18. Mr. McRAE said that the concerns he had expressed at the 2927th meeting about a general rule of intention as the foundation for determining whether a treaty was terminated or suspended in the event of armed conflict under draft article 4 also applied to draft article 9 relating to the resumption of suspended treaties. Intention in respect of resumption after suspension was just as much a fiction as intention in respect of suspension, if not more so. Nor would the problem be resolved by deleting the words "at the time the treaty was concluded", as Ms. Xue and others had suggested in respect of draft article 4. It was true that, by taking account of a variety of factors, it might be possible to make an objective assessment of whether a treaty should or should not be terminated or suspended. Fixing the critical date for that determination at a time later than the time the treaty was concluded seemed sensible, and he therefore had no objection to deleting the words "at the time the treaty was concluded". His point had been that to characterize the determination of the effect of the armed conflict on the treaty as a gauge of intention was, in most instances, fictional. However, he shared with Mr. Wako, Ms. Xue and others the desire to find objective criteria for that determination, and in that sense their views might not be so far apart.

19. His second comment related to draft article 10, which was the only one to affirm a right to suspend a treaty, applicable to States exercising a right of individual or collective self-defence. According to draft article 8, the applicable "mode of suspension" would be that set out in articles 42 to 45 of the 1969 Vienna Convention. Under that Convention, the process for suspension could involve a three-month notice period and the possibility of

arbitration or judicial determination. None of that seemed remotely likely to happen in the case of suspension due to armed conflict. The protagonists were highly unlikely to give notice of suspension, let alone wait three months before suspending. In many instances, there might be a *de facto* suspension of the treaty, which was contrary to the spirit, at least, of draft article 3. If such a *de facto* automatic suspension occurred in some cases, he wondered whether the Working Group should not discuss the possibility of considering termination, which was generally not likely to occur, separately from suspension, which was a much more likely outcome.

20. Secondly, if the process for suspension under the 1969 Vienna Convention applied to parties exercising their individual or collective right of self-defence, he wondered whether the draft articles really provided any recognition at all of the illegality of armed conflict. After all, in the absence of a provision in the draft articles equivalent to article 9 of the resolution of the Institute of International Law adopted in 1985, prohibiting an aggressor State from suspending or terminating a treaty, the aggressor State was equally entitled to invoke draft article 8 and follow the 1969 Vienna Convention procedure for suspending the treaty. So, although draft article 10 appeared to distinguish between the aggressor and the victim of armed conflict—the State exercising the right of self-defence—perhaps all it really did was to recognize explicitly in the case of the victim State a right that the aggressor State implicitly had in any case. He therefore wondered whether the revised draft article 10 really addressed the concerns raised in the Sixth Committee.

21. His third and final comment related to the "without prejudice" provisions, namely the draft articles that simply preserved the law in certain areas and, as the Special Rapporteur pointed out, while not strictly necessary, were useful for expository purposes. The expository function was indeed useful, but so many of the draft articles had been characterized by the Special Rapporteur as expository and not strictly necessary that it seemed legitimate to ask which of the provisions *were* necessary, and what the draft articles achieved, apart from preserving the existing law in certain areas. In his view, the answer was that the draft articles performed at least two functions. First, they affirmed the principle of continuity of treaties in the event of armed conflict (draft article 3), and, secondly, they established a test of intention combined with object and purpose, together with some presumptions about, or an indicative list of, continuing treaties (draft articles 4 and 7). It might also be said that they performed the third function of affirming the right to suspend in the case of States exercising a right of individual or collective self-defence, but, as he had said earlier, that was just an explicit affirmation of a right that existed in any case. Further, as Ms. Escameia had suggested, it was possible that draft article 8 set out a process for suspension that might not otherwise be apparent.

22. The other draft articles were essentially expository. Perhaps that was all that was necessary, but the Working Group might wish to reflect on whether the two areas on which the law had been identified and clarified constituted a sufficient output on the topic, or whether the draft articles should be more ambitious in scope.

23. Mr. KAMTO said that, in deciding whether non-international armed conflicts ought to be covered by the draft articles, the Commission should take account of an intermediate category, namely the familiar phenomenon of internationalized internal armed conflict. Such conflicts should be covered by the draft articles, but internal conflicts *stricto sensu* should not, as they did not produce the same kind of effects on treaties as international armed conflicts. Even though they could lead to non-execution of the treaty—for instance, as a result of fundamental change of circumstances—they did not fall within the scope of the topic.

24. On the indicia of susceptibility to termination or suspension of treaties, he believed that the criterion of intention was not sufficient, even in the context of draft article 4; there were numerous other possible criteria. That draft article was, however, interesting on account of its focus on the nature and extent of the armed conflict: the less intense the conflict, the fewer the consequences for the treaty. That reference hinted at the need, to which several speakers had adverted, for a provision expressly dealing with situations of aggression (as opposed to small-scale conflicts such as border skirmishes). Draft article 10 went some way towards meeting that need, but not far enough. A fundamental distinction needed to be drawn between wars of aggression and other types of armed conflict that could have an impact on the principle of continuity of treaties. The distinction between the two forms of conflict should also go hand in hand with a distinction between suspension and termination of the treaty. Perhaps a war of aggression, the most serious form of armed conflict, would automatically entail suspension – unless the State that was victim of the aggression decided to continue the application of the treaty—without necessarily leading to the termination of the treaty. Termination would occur only if the victim State took the initiative in notifying the aggressor State thereof. As a number of members had noted, a provision reflecting article 9 of the 1985 resolution of the Institute of International Law, covering States committing aggression, should be included in the draft.

25. A provision along the lines of draft article 7 was also well worth including. He was, however, concerned at the illustrative way in which it was worded, particularly in the list of types of treaty given in paragraph (2), the effect of which was to diminish rather than strengthen the normative authority of the draft article. The list should be retained, but in the commentary rather than the draft article itself.

26. With regard to draft article 12, he wondered whether “third States” were necessarily “neutral”, in the sense of that word under international law. If the two terms were not synonymous, it would suffice to omit the phrase “as neutrals”, since third States were by definition not involved in the armed conflict. On draft article 13, he wondered whether a material breach was indeed a traditional cause for the termination of a treaty. As for draft article 14, the wording of the French-language version should be tightened up.

27. Lastly, he welcomed the Special Rapporteur’s proposal to establish a working group on the topic, and

supported Mr. Pellet’s proposals on the working group’s mandate and the questions that required clarification or further study.

28. Mr. VÁZQUEZ-BERMÚDEZ, referring to draft article 9, said that in accordance with the principle of continuity of treaties, the aim of which was to create stability for treaties as a corollary of the principle *pacta sunt servanda*, if the effect of an armed conflict had been the suspension of the treaty, it must be presumed that, once the conflict was over, the treaty must be automatically resumed, unless it specifically provided otherwise. Under draft article 9, however, the resumption of a treaty suspended as a consequence of an armed conflict was made to depend on the intention of the parties at the time the treaty was concluded, and that intention was to be determined in accordance with the provisions of articles 31 and 32 of the 1969 Vienna Convention and with the nature and extent of the armed conflict in question. The provision, however, brought the same problems that affected draft article 4: where the treaty contained no explicit reference to the intention of the parties, it would be necessary to determine first whether there had been such an intention with regard to suspension or termination, and, secondly, whether there had been an intention for a suspended treaty to be resumed. He had already pointed out that, in some cases, a presumed intention might be fictitious. Draft article 9, paragraph (2), and draft article 4 should specify that the intention was to be determined, not in accordance with the nature and extent of the armed conflict in question, but in the context of that armed conflict, particularly if draft article 9 referred to the intention of the parties at the time the treaty was concluded. In that context, he wondered why draft articles 4 and 9 referred to the “nature and extent” of the armed conflict, whereas draft article 2 (b) referred to the “nature or extent” of armed operations.

29. Draft article 8 referred the reader to articles 42 to 45 of the 1969 Vienna Convention. Article 44, paragraph 1, of that Convention, in turn, referred the reader to article 56, paragraph 1 (b) of which referred to the “nature of the treaty”. The point was that, under article 56, two criteria were given for determining whether a treaty containing no provision regarding termination, denunciation or withdrawal was subject to denunciation or withdrawal, namely the intention of the parties and the nature of the treaty. In his view, “nature” referred to the subject matter of the treaty. The 1969 Vienna Convention thus contained two complementary criteria—one subjective and the other objective—that should also be applied to the susceptibility to suspension or termination of a treaty in the event of armed conflict.

30. That being so, the title of draft article 7 should read: “Continued operation of treaties on the basis of necessary implication from their nature”. The indicative list of treaties appearing in paragraph (2) of the draft article would thus be based on the second criterion, the nature of the treaty, although the object and purpose test would, of course, remain, since the object and purpose of the treaty was part of the process for determining the intention of the parties.

31. In draft article 14, the word “competence” should be replaced by “capacity”, in line with the text of draft

article 5 *bis*. In draft articles 3, 5 and 14, the term “parties” [to the armed conflict] should be replaced by “States parties”, as the former concept had a wider sense in international humanitarian law. If the omission of the word “States” was intentional, he would like to hear the reason why.

32. When considering draft articles 10 and 11, which constituted a step in the right direction, the Working Group should pay particular attention to the question of the right to individual or collective self-defence and the legitimate use of force under the Charter of the United Nations. In particular, it should, in considering the role of the Security Council in determining whether an act of aggression had taken place under Article 39 of the Charter of the United Nations, also take into account the fact that the Security Council—which was a political body *par excellence*—had, on a few occasions, indeed determined that a State was an aggressor. Perhaps the Institute of International Law had had that situation in mind when including in article 9 of its resolution of 1985 a reference to General Assembly resolution 3314 (XXIX) of 14 December 1974.

33. Mr. KAMTO said that, if draft article 10, or a similar provision, were to be retained, it would be essential to discuss the last phrase regarding a later determination by the Security Council of a State as an aggressor. Admittedly, under the Charter of the United Nations, the Security Council was the sole United Nations body which had jurisdiction to determine the existence of an act of aggression, but in fact other United Nations bodies were also competent in that respect. For example, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the ICJ had found that the United States had breached its obligation under international customary law not to use force against another State. Similarly, other instances of the use of force had been termed “aggression” in some General Assembly resolutions. Draft article 10 should not therefore refer only to the Security Council in that connection.

34. Mr. CAFLISCH said that the mandate of the Working Group would not be to present draft articles. It would try to determine what direction the Commission’s debates should take and would tackle some substantive issues. If the Working Group attempted to address in depth all the numerous subjects raised by various speakers, it would still be meeting six months later. It would therefore have to concentrate on certain concerns, on which it would then submit a report which would, he hoped, have the approval of the Special Rapporteur. While the question raised by Mr. Vázquez-Bermúdez was undeniably of great significance, it was a moot point whether it should be considered in the Working Group.

35. Mr. FOMBA, endorsing the comments made by Mr. Pellet at the 2926th meeting, said that in draft articles 10 and 11, it would be better to focus on the impact of the principle that the use of force was prohibited. To that end, the content and structure of draft article 10 could be reconsidered, with a view to emphasizing the main adverse consequence for the aggressor State, as outlined in article 9 of the resolution adopted by the Institute of International Law in 1985, and the main beneficial consequence for the State which, as the victim of aggression,

was exercising its right to either individual or collective self-defence, as described in article 7 of the same resolution. Nevertheless, the Commission should then examine the contents of articles 7 and 9 of the resolution in order to ascertain whether all the elements thereof were still entirely necessary and justified. Some thought should likewise be devoted to the subsidiary consequences to be inferred from the two main consequences.

36. The content and structure of draft article 11 should be reviewed and the “without prejudice” formula dropped. As Mr. Pellet had suggested, in that context some consideration should also be given to the question of peacekeeping operations under Chapter VII of the Charter of the United Nations.

37. The CHAIRPERSON, speaking in his capacity as a member of the Commission, said that the very rich debate had shown not only that the excellent report presented by the Special Rapporteur had been rigorous, methodical and the fruit of thorough research, but also that there was agreement on many points. Differences remained as to whether it was appropriate to include articles on other subjects already covered by existing standards or provisions of international law. Like the Special Rapporteur, he thought that those areas should be covered in the draft articles.

38. The Working Group was also faced with the arduous task of reconciling wide differences of opinion on a number of other issues, especially in draft article 10. It was clear that, although Article 51 of the Charter of the United Nations gave a State the immediate or automatic right to respond to an armed attack, neither the Charter of the United Nations nor any other international instrument had regulated the legal consequences of that unilateral act of a State. Hence it was up to the Security Council to determine the consequences of that armed attack or act of aggression. Yet, as Mr. Vázquez-Bermúdez and Mr. Kamto had pointed out, Security Council practice in that respect was relatively scarce. It was even possible that the Security Council might not take any action, either on account of the complexity of the matter, or because the victim or the aggressor State was one of its permanent members. Moreover, he shared the concerns of the United Kingdom that the unilateral right of a State to suspend a treaty might be inimical to the stability of treaty relations.¹⁹⁸

39. Nevertheless, since the Institute of International Law had passed its resolution on the effects of armed conflicts on treaties in 1985 a number of developments had occurred, one of them being the adoption of instruments and conventions on weapons of mass destruction, a matter of growing importance in the twenty-first century. All 33 States of the region had become parties to the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (“Treaty of Tlatelolco”), which had in turn inspired similar treaties in the South Pacific, South-East Asia, Africa and Central Asia. Nevertheless, if such treaties were to be effective, the nuclear powers must undertake to respect the nuclear disarmament process and not to use nuclear weapons against the States parties. In the years following the adoption of the Treaty of Tlatelolco, various States including France had signed Additional Protocol I to the Treaty, in which they

¹⁹⁸ A/C.6/60/SR.20 (see footnote 191 above), para. 1.

undertook to maintain the denuclearized status of the territories for which they were internationally responsible in Latin America and the Caribbean—which, in the case of France, were French Guiana, Guadeloupe and Martinique. In the 1970s, China, France, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America had signed Additional Protocol II, in which they undertook not to use nuclear weapons against the parties to that instrument. Nevertheless, on signing the additional protocols, France had issued interpretative declarations to the effect that, if one of the parties to the treaty attacked its territories with conventional weapons, it would no longer consider itself bound by the treaty and reserved the right to use nuclear weapons in those circumstances. That was a matter of concern to the Latin American and Caribbean States, which were striving to bring about general and complete disarmament.

40. It was therefore all the more disquieting that, according to one possible interpretation of draft article 10, a country would be entitled to use nuclear weapons. While he was pleased that Mr. Yamada had raised the issue, he disagreed with the view he had expressed. His own personal belief was that in times of armed conflict, it was possible to suspend certain clauses, such as the inspection clauses, of treaties prohibiting weapons of mass destruction, but that their substantive provisions should remain in operation. One solution might be to replace draft article 10 with article 9 of the 1985 resolution of the Institute of International Law. The other solution, proposed by Mr. Yamada, would be to include in the list in draft article 7 a reference to instruments or conventions on weapons of mass destruction, possibly distinguishing between the substantive and procedural aspects of those treaties. In any event, that was a matter that merited the scrutiny of the Working Group.

41. Mr. BROWNLIE (Special Rapporteur), summing up the debate, said that it had highlighted areas, such as the status of internal armed conflicts, in which members of the Commission held converging views. While he confessed to having felt some intellectual resentment at having to redraft article 10, since he considered that draft article 3 should apply anyway, he was willing to “go with the flow” and to bow to social pressure by reformulating that draft article.

42. He had approached the topic from three overlapping perspectives. First, like a research student embarking on a thesis, he had delved into the literature on the subject. The Secretariat had greatly assisted him by locating the substantial amount of material which existed. Although some monographs and articles dated back to the First World War or earlier, he considered that they were still of relevance. His three reports were largely based on State practice and what knowledge could be gleaned from learned authors. The commentary to draft article 7 in his first report¹⁹⁹ summarized much of the State practice, by which he meant State practice based on *opinio juris* concerning the effect of armed conflicts on treaties, rather than on related subjects such as fundamental change of circumstances or material breach.

43. Secondly, the draft articles constituted a clear but careful reflection of the fact that he had adopted the principle of stability, or continuity, as a policy datum. One of the difficulties shared by all the members of the Commission was that of understanding what was actually entailed by that principle. The Commission should not appear to espouse the view that an armed conflict never had any effect on treaties. A delicate balance was required between the principle of the integrity of treaties and the realities of different situations. His policy prejudice in favour of the principle of continuity was therefore qualified by the need to reflect the evidence in State practice that, to some extent, armed conflict did indeed result in the suspension or termination of treaties.

44. The third—and quite important—perspective was an attempt to protect the project by carefully segregating other, controversial areas that probably lay outside the scope of the topic as approved by the General Assembly. His dilemma was therefore not merely one of presentation. The drawing of a boundary between the topic selected and adjacent areas of international law was a problem frequently encountered in the issues considered by the Commission; the expulsion of aliens, for example, was also linked to other topics. Nevertheless, that problem was compounded by a semi-constitutional issue. It had always been his understanding that the Commission, along with many other bodies, faced a glass ceiling which prevented it from dealing with matters of law which might lead to the amendment of the Charter of the United Nations. The 1974 definition of aggression in General Assembly resolution 3314 (XXIX), for example, had been adopted only after strenuous efforts. That was why he had used “without prejudice” clauses. When a former member of the Commission, Mr. Economides, had, for good reasons, suggested that the Commission should place the use of force by States on its long-term programme of work, the reaction had been an uneasy silence, the feeling being that it was not for the Commission to tackle such issues, the consideration of which would not be acceptable to the General Assembly. Indeed, when it had approved the current topic for consideration by the Commission, the General Assembly had probably never supposed that the Commission would venture so close to the borderline with the law relating to the use of force by States.

45. Turning to the issues brought up during the debate, he said that in discussing draft article 1 on the scope of the subject, Mr. Fomba had raised the question of the status of treaties that were provisionally applied. He himself had raised it in both the first and third reports and had no strong position on it. It was quite a detailed and technical matter, however, and a collective view needed to be developed on whether such treaties should be included.

46. The question of the treaties of international organizations would no doubt be one of the issues of principle to be considered by the Working Group. Some members seemed not to have made a clear distinction between the question of whether the effects of armed conflict on treaties of international organizations was a viable subject—which it probably was—and the very different question of whether it could be grafted on to the topic that the General Assembly had requested the Commission to study. With all due respect to those who wished to see it included, he

¹⁹⁹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

did not think the General Assembly had envisaged that possibility; he himself certainly had not.

47. Draft article 2 (b) on the definition of armed conflict was central to the Commission's endeavour, yet it also came perilously close to the borderline with other areas of international law. The debate had revolved around the question of whether internal armed conflict was to be included, but the article was not drafted in those terms. It described armed conflict as a state of war or conflict which involved armed operations which by their nature or extent were likely to affect the operation of treaties. A number of speakers had made the point that the intensity of the armed conflict was of great relevance, but the present drafting covered that point, with the use of the phrase "by their nature or extent". Armed conflict should not be defined in quantitative terms; everything depended on the nature not only of the conflict but also of the treaty provision concerned. At least one speaker had also made the point that the Commission's definition would inevitably be cited in the world at large. Draft article 2 (b) was not, however, a categorical definition, but was quite flexible.

48. He had always considered draft article 3 to be problematical, and had said as much in paragraph 28 of his first report. There were three interrelated aspects of the provision. The first was the temporal aspect: the treatment was deliberately chronological. The main thrust of the resolution adopted by the Institute of International Law in 1985 had been that the incidence of armed conflict, lawful or unlawful, did not as such terminate or suspend the operation of a treaty, and that was all draft article 3 said. At a later stage, when the legality of the situation came to be assessed on the basis of the facts, the question of the applicable law might arise, and that law might not be the Charter of the United Nations. It could be a Security Council resolution under Chapter VII of the Charter of the United Nations or any one of several other applicable laws relating to the use of force.

49. The second aspect was that of continuity. Several speakers had said that draft article 3 stated the principle of continuity, and some had urged that this principle should be stated even more strongly. The difficulty was, however, that the draft article was deliberately not formulated in terms of the principle of continuity. One might say that it stated that principle indirectly, and that was probably true, but the idea came out much more clearly, though again mainly by inference, in draft articles 4, 7 and 9.

50. The third aspect of draft article 3 was that it was precisely the text that the Institute of International Law had adopted, after a great deal of discussion, in 1985. It had been a major historical advance in expert opinion that a significant majority of members of the Institute, from different nationalities and backgrounds, had been willing to move to that position. Thus, draft article 3 had a certain monumental significance that the Commission should try to retain. It was also necessary to preserve a proper relationship between draft articles 3 and 4, the first being a preventive principle and not strictly substantive, as he pointed out in paragraph 28 of his first report.

51. In draft article 4, he had carefully avoided saying that intention was the test or using the term in the abstract.

The issue was one of interpretation in accordance with articles 31 and 32 of the 1969 Vienna Convention. Moreover, draft article 4 also referred to the nature and extent of the armed conflict. Some speakers had suggested that a more direct reference was needed to specific criteria of compatibility, but he believed that those criteria were already covered, and that adding the phrase "principles of compatibility" would not make things easier. Relabelling might work in the world of politics, but it did not work in international law. Ms. Xue had pointed out that the reference to intention at the time the treaty was concluded must be qualified in the light of articles 31 and 32 of the 1969 Vienna Convention, which referred, *inter alia*, to the subsequent practice of the parties as evidence of intention.

52. Furthermore, in judicial practice, when discussing other topics of the law of treaties, intention was constantly referred to. It was sometimes called consent. Standard dictionaries, for example the *Dictionnaire de la terminologie du droit international* edited by Jules Basdevant, had an entry on intention in which the PCIJ was quoted.²⁰⁰ A more modern source, Jean Salmon's *Dictionnaire de droit international public*, contained a whole series of quotations on intention, from the ICJ and other sources.²⁰¹ Intention should accordingly not be dismissed as some kind of unsophisticated and outdated aberration. Besides, if intention were to be set aside, what would happen when there was direct evidence of it? Should that evidence be ignored? Mr. Yamada had given a number of examples of such evidence, to which one might add notes of diplomatic conferences—records kept by individual delegations or jointly. It was simply not true that States never envisaged what would happen in the event of an armed conflict. In the *Gabčíkovo–Nagymaros Project* case, the Court had relied upon a set of treaty provisions that were derelict and that neither party had been applying, but had done so to avoid having to declare a *non liquet*.

53. True, intention was often constructed—in that sense, it was fictitious. But did that matter? If intention was deliberately disregarded, there would often be no legitimate basis for approaching a problem. The real difficulty was proving intention, and the treaty must always be linked with the nature of the armed conflict concerned. That created another factual challenge and possible difficulties in establishing proof.

54. Draft article 6 *bis* had attracted a good deal of valid criticism and would need further work. His instructions had been to take into account what the ICJ had said in its advisory opinion in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, yet he now realized that the text should also refer to the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

55. Draft article 7, which he hoped would be retained in one form or another, had an important function. While State practice was not as plentiful as might be desired, in certain categories such as treaties creating a permanent status it was still fairly abundant. Draft article 7 was the vehicle for expressing that State practice in an orderly way.

²⁰⁰ Paris, Sirey, 1960, p. 341.

²⁰¹ Brussels, Bruylant, 2001, pp. 593–594.

It put the principle of continuity to work in the text without actually spelling it out. The Commission had to decide whether to include in the list in paragraph 2 treaties codifying *jus cogens* rules. The Secretariat memorandum²⁰² had suggested that such treaties should be included, but that raised the problem of borderlines with other subjects. He was not sure that it was even technically correct to include such treaties, and if they were to be included, yet another “without prejudice” clause would be necessary. Throughout its work on State responsibility, the Commission had carefully avoided straying into the sphere of *jus cogens*.

56. On draft article 10, the general view might be that the references to the law relating to the use of force should be strengthened. In its new, redrafted version, the draft article was a fairly careful compromise, and to go any further might be to venture into uncharted juridical territory.

57. One general problem was the question of the extent to which the draft articles should refer to other fields of international law such as neutrality or permanent neutrality. Armed conflict was self-evidently an ineradicable part of the topic, but other areas like neutrality were genuine borderline cases. As to other aspects of the law of treaties, draft article 13 simply made the obvious point that the draft was without prejudice to the provisions already set forth in the 1969 Vienna Convention. As in the law of torts, there might be several overlapping causes of action. Thus, the effect of war on treaties might be paralleled by other types of fundamental change of circumstances. Separability had not been overlooked, but deliberately left aside, although it could be argued that it was a subset of the whole question of evidence of intention.

58. There was also the problem of sources of law, which arose in the context of draft article 7. In categories such as the law relating to diplomatic relations, there was very little explicit or direct evidence of the effect of armed conflict. However, one could to some extent draw safe inferences from the literature, as could be seen from the Secretariat memorandum. Thus, although there was little or no State practice supporting the inclusion of some of the categories in draft article 7, there were some reputable legal sources that could be relied on.

59. He apologized to Mr. Kolodkin for the omission from paragraph 12 of the third report of the Russian Federation as one of the States opposed to inclusion of internal armed conflict in the scope of the draft. The tally now was 10 States opposed to inclusion and 10 in favour.

60. The expository style of drafting would, he hoped, be maintained. If the draft were couched in the language of a diplomatic conference involving two not very friendly parties, the result would be a very mathematical or very political text that would not really be helpful to the Commission's end users. Draft articles 3 to 7 were meant to be read together and sequentially, not in isolation from one another.

The meeting rose at 12.40 p.m.

2930th MEETING

Monday, 4 June 2007, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO
(*Vice-Chairperson*)

Present: Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*)*(A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the report of the Drafting Committee on the topic “Reservations to treaties” (A/CN.4/L.705).

2. Mr. YAMADA (Chairperson of the Drafting Committee) said that at its 2891st meeting, on 11 July 2006, the Commission had decided to refer draft guidelines 3.1.5 to 3.1.13, 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee.²⁰³ The draft guidelines fell into four general clusters, namely: (a) draft guidelines concerning various ways of addressing the definition of the object and purpose of the treaty (draft guidelines 3.1.5 and 3.1.6); (b) draft guidelines concerning different kinds of reservations that would help to elucidate the notion of incompatibility with the object and purpose of the treaty (3.1.7 to 3.1.13); (c) draft guidelines concerning competence to assess the validity of reservations (3.2 and 3.2.1 to 3.2.4); and (d) draft guidelines concerning the consequences of the invalidity of a reservation (3.3 and 3.3.1). The Drafting Committee had considered the draft guidelines in question for eight meetings but had so far managed to complete only those in the first two clusters. He wished to pay a tribute to the Special Rapporteur, whose mastery of the subject and spirit of cooperation had greatly facilitated the Drafting Committee's work, and to thank the members of the Drafting Committee for their active participation.

3. Introducing the first cluster of draft guidelines (3.1.5 and 3.1.6), he said that the Committee had had before it three alternative texts for draft guideline 3.1.5. The first two, entitled “Definition of the object and purpose of the treaty”, had been based on the proposals made by the Special Rapporteur in his tenth report²⁰⁴ and in the note presented by the Special Rapporteur in 2006.²⁰⁵ The third

* Resumed from the 2920th meeting.

²⁰³ *Yearbook ... 2006*, vol. I, 2891st meeting, p. 151, para. 44.

²⁰⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2.

²⁰⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/572.

²⁰² A/CN.4/550 and Corr.1–2 (see footnote 164 above).

alternative had also been based on a proposal by the Special Rapporteur in paragraph 8 of his note and had been entitled “Incompatibility of a reservation with the object and purpose of the treaty”. While the Drafting Committee had chosen the third alternative, which it considered to be in line with the language of the 1969 and 1986 Vienna Conventions, the text had nevertheless been the subject of lengthy discussion. First, it had been pointed out that the phrases “serious impact” on “essential rules, rights or obligations” “indispensable to the general architecture of the treaty” virtually established a three-tiered threshold of seriousness, essentiality and indispensability that was considered to be too high by some members. The Drafting Committee had finally compressed the wording by adopting the notion of “essential element”. The commentary would clarify that the essential element transcended a treaty provision and contextually embraced a rule, right or obligation as well as the terms of the treaty as a whole. The unduly strong term “indispensable” had been replaced by “necessary”. Secondly, it had been considered that the English expression “general architecture” posed difficulties in terms of scope and meaning. The Drafting Committee had therefore replaced “architecture” by “thrust”, which was closer to the original French “*économie générale*”, although it remained mindful of the legal imprecision of that phrase, which might have to be reviewed on second reading. Thirdly, on the question of whether a treaty had a “*raison d’être*”, some members had requested that the reference to that concept should be deleted as it was too general and demanding, especially since it was not always possible to indicate just what the “*raison d’être*” of a treaty was. The commentary would reflect that viewpoint. Lastly, the Committee had decided to replace the phrase “thereby depriving it of its *raison d’être*”, seen as too demanding, by “in such a way that the reservation impairs the *raison d’être* of the treaty”.

4. In the case of draft guideline 3.1.6, whose title, “Determination of the object and purpose of the treaty”, remained unchanged, the Drafting Committee had had before it a proposal submitted by the Special Rapporteur in his tenth report. Several changes had been made to the text. First, the two paragraphs that had comprised the original draft guideline had been collapsed into one, the first sentence being a simplified version of the original paragraph 1. The reference to the preamble and annexes in the original paragraph 2 had been deleted, on the understanding that they were covered by the first sentence and that the commentary would offer an appropriate clarification. The rest of that paragraph was now captured in the second sentence of the draft guideline, in which the words “the title of the treaty” had been moved to the beginning and the phrase “the articles that determine its basic structure” had been deleted. That matter would be addressed in the commentary. The Drafting Committee had moved away from the structure and language of article 31 of the 1969 Vienna Convention, thus accentuating the focus on guidelines while remaining faithful to the Commission’s practice of avoiding the reproduction of texts of conventional articles in separate guidelines. Some members had felt that the reference to the “subsequent practice” of the parties should be addressed in the commentary because subordinating reservations to such practice might give rise to complications that would have a bearing on the equality of the parties. Others, however, had felt that such

inequality was a remote possibility and that, in practice, parties to a treaty took subsequent practice into account. In the final analysis, the Drafting Committee had considered that the phrase “where appropriate” was sufficiently flexible to allow the inclusion of subsequent practice in the text.

5. The draft guidelines in the second cluster (3.1.7 to 3.1.13) were intended to constitute examples of the type of reservations that could be interpreted as incompatible with the object and purpose of the treaty. In that sense, they contributed to the understanding and further refinement of the notion of “object and purpose of the treaty”.

6. The title originally proposed for draft guideline 3.1.7, “Vague, general reservations”, had been retained, the comma having simply been replaced by “or”. It was anticipated that the terms “vague” and “general” would be explained in the commentary. During the course of the discussion it had been suggested that the draft guideline should be framed in positive terms and placed in the second part, dealing with questions of form. However, it was soon recognized that vague or general wording could be used deliberately in a reservation in order to sidestep the object and purpose of the treaty. Accordingly, it had been deemed necessary to mention compatibility with the object and purpose of the treaty, in order to bring the draft guideline within the realm of the part under consideration. It should be noted that “shall” had been used instead of “should”; the inclusion of the phrase “in particular” was aimed at accommodating the possibility of determination for other purposes, such as “effect” and “meaning” which, while essential, were not the subject matter of the draft guideline. The term “worded” had been preferred to “formulated”, as it placed emphasis on the content of the reservation.

7. The original title of draft guideline 3.1.8, “Reservations to a provision that sets forth a customary norm”, had been replaced by “Reservations to a provision reflecting a customary norm” as a consequence of changes made to the text of the guideline. During the discussion, the Drafting Committee had sought to respond to some views expressed regarding the wording of paragraph 1, which had been inverted to focus on the treaty provisions that were subject to reservation rather than on the customary nature of the norm. The verb “reflects” rather than “sets forth” was intended to accentuate, as it did in the *dictum* of the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case, the independent existence of a customary law, irrespective of its codification or embodiment in a treaty provision, without taking any position on the form or the substance. The commentary would address the time element by noting that treaty provisions reflected a customary norm at the time a reservation was made. In addition to providing for the formulation of a reservation to a treaty provision that reflected a customary norm, the Drafting Committee had considered it useful to add a positive element, namely that the customary character of a treaty provision was a pertinent factor for the assessment of the validity of the reservation. The logical consequence of the proposition in paragraph 1 in relation to a customary norm was intimated in paragraph 2. The words “in relations between” had been replaced by “which shall continue to apply as such between” in order to give the text clarity and emphasize the continuing effect of the

customary norm, irrespective of whether a reservation had been made to a treaty provision. The phrase “which are bound by that norm” at the end of the paragraph sought only to emphasize that the customary norm continued to apply in situations where the reservation related to a dispute settlement provision of the treaty in question.

8. The title of draft guideline 3.1.9, “Reservations to a provision setting forth a rule of *jus cogens*”, had been changed to “Reservations contrary to a rule of *jus cogens*”. It had been changed as a result of the discussions on the substance of the draft guideline which had reflected the doctrinal difficulties of the subject as well as the inconclusiveness of the debate in plenary. The first issue had been to decide whether a different guideline on *jus cogens* was necessary, since draft guideline 3.1.8 dealt with a customary norm and provided a solution which logically, but not necessarily ideologically, was equally applicable to *jus cogens*. The view had been expressed that such a guideline was necessary not only because of the distinct characteristics of a *jus cogens* norm but also in the light of the recent judgment of the ICJ in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. Another issue that the draft guideline as originally formulated did address was a situation in which a treaty had nothing to do with a *jus cogens* norm but a reservation made to that treaty did have a bearing on such a norm. It had been stressed that the making of a reservation did not necessarily constitute a breach of an obligation and that an alteration of an obligation should not affect the peremptory norm. The Drafting Committee had subsequently decided to approach the matter from the perspective of the reservation itself, since the reservation could not, through its legal effects, affect a treaty in a way contrary to *jus cogens*. Consequently, it had been decided to track more closely the definition of a reservation found in the Vienna Convention, but in a more simplified version, and the result was the text set out by the Drafting Committee in its report.

9. Draft guideline 3.1.10, whose title, “Reservations to provisions relating to non-derogable rights”, remained unchanged, had been the subject of extensive discussion. First, there had been a consensus on the need to give the first sentence a negative formulation to emphasize the exceptional nature of the possibility of formulating a reservation to a non-derogable right. The words “may formulate a reservation ... providing” had thus been replaced by “may not formulate a reservation... unless”. The Drafting Committee had then discussed whether a reservation should relate to a treaty provision or to the treaty as a whole, including the regime that it established. That problem could be solved by deleting the words “treaty provision” and leaving only a reference to “treaty” or by replacing the word “provision” with “treaty” wherever it appeared in the text. Thirdly, after deciding on the change to a negative formulation, the Drafting Committee had discussed which phrase—“compatible with the essential rights and obligations arising out of that treaty” or “preserves the essential rights and obligations arising out of the treaty”—was preferable in the second part of the first sentence. It had been noted that while the two alternatives could be used interchangeably, the former flowed more logically from the language in the second sentence. That had led the Drafting Committee to consider whether the “essential rights and obligations”

arising out of the treaty, mentioned in the first sentence, were coterminous with the “object and purpose of the provision” cited in the second sentence. Some members saw a disconnect between the two sentences and stressed the need for better coherence. Others considered that the two sentences addressed separate issues and thought that they should be separated into two paragraphs, while retaining the test of incompatibility with the object and purpose of the treaty in the second sentence. That minority view would be reflected in the commentary. The majority, however, had felt that the draft guideline dealt with a single issue. Since the guideline, like others in the same cluster, already dealt with matters of compatibility or incompatibility with the object and purpose of the treaty, it had been considered that the deletion of the reference to object and purpose in the second sentence would not obscure the intention. In fact, for a derogation to be made to a non-derogable right, it had to be compatible with the essential rights and objections arising out of the treaty. The term “shall” had been used in preference to “must”.

10. Draft guideline 3.1.11, whose original title—“Reservations relating to the application of domestic law”—had been simplified to read “Reservations relating to internal law”, constituted another illustration of a reservation that could be incompatible with the object and purpose of the treaty if it purported to make application of the treaty subject to the integrity of domestic law. It had been pointed out that the draft guideline was related to draft guideline 3.1.7 in the sense that vague or general reservations very often referred to unspecified provisions of international law, including a State’s constitution. In any event, a reservation could belong to more than one category. The Drafting Committee had opted, for clarity’s sake, to delete the double negative in the final part of the guideline and to replace the phrase “only if it is not incompatible” with the phrase “only insofar as it is compatible”. It had also been observed that while the French expression “*droit interne*” could be used both for States and international organizations, the English equivalent, “domestic law”, could only be applied in respect of States and was seldom used in an international setting. The Drafting Committee, recalling that the expressions “internal law of a State” and “rules of an international organization” were used in article 46 of the 1986 Vienna Convention, had decided to use similar wording in the English text of the draft guideline. Since some members had also felt that the guideline had to be more precise, the Drafting Committee had added the words “specific norms” after “integrity of” in order to broaden the scope to include case law or even unwritten rules. The Drafting Committee had also decided that it would be better to repeat the expression used in the definition of reservations (draft guideline 1.1.1, “Object of reservations”) and to replace the phrase “the application of a provision of a treaty” with “the legal effect of certain provisions of a treaty or of the treaty as a whole”. Lastly, there had been some question as to whether the title ought to be modified in order to reflect the content of the draft guideline more accurately, but the Drafting Committee had ultimately felt that the phrase “*droit interne*”, which would be rendered in the English text as “internal law” rather than “domestic law”, was sufficient, it being understood that when read in conjunction with the text of the draft guideline it would be considered to include rules of international organizations as well.

11. Draft guideline 3.1.12, whose title—“Reservations to general human rights treaties”—had not been changed, dealt with reservations to general human rights treaties, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and not with reservations to treaties relating to specific rights, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Although it was sometimes difficult to make that distinction, the draft guideline was meant to be applied only to general human rights treaties, and an analysis of that distinction would appear in the commentary. There was a wide range of practice in that area, and the draft guideline had been worded in a flexible way to allow sufficient leeway for interpretation. The Drafting Committee had also considered whether it could expand the term “indivisibility” used in the original version by adding terms often used in human rights discourse such as “impartiality” and “non-selectivity”. It had thought, however, that it should be cautious and use only terms that were fairly general and relevant to reservations to human rights treaties. In the final analysis, it had drawn on the Vienna Declaration and Programme of Action adopted in 1993 by the World Conference on Human Rights,²⁰⁶ paragraph 5 of which provided that “[a]ll human rights are universal, indivisible and interdependent and interrelated”, and inserted the words “interdependence and interrelatedness” in the draft guideline to describe the rights in respect of which a reservation might be incompatible with the object and purpose of the treaty. The Drafting Committee had also decided to add the words “or provision” after the words “that the right” in order to broaden the scope of the draft guideline. In the English text the phrase “account should be taken” had been replaced by “account shall be taken” and “rights set out therein” had been replaced by “rights set out in the treaty” for the sake of clarity, while the expression “general structure” had been replaced by “general thrust of the treaty” in order to bring the wording into line with draft guideline 3.1.5. Lastly, the word “seriousness” had been replaced by “gravity”.

12. Draft guideline 3.1.13, entitled “Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty”, also gave examples of reservations incompatible with the object and purpose of the treaty. In the English text, the title had been changed, with the word “clauses” replaced by “provisions” in order to take account of a change to the *chapeau*, while in subparagraph (b) the words “its author” had been replaced by “the reserving State or international organization” for the sake of clarity. The discussion had focused on two main points: first, some members had wondered whether the statement in subparagraph (a) that the provision to which the reservation related constituted the *raison d’être* of the treaty put the threshold too high. There were not many treaties in which the dispute-settlement or monitoring mechanism provisions constituted the *raison d’être*. Other members had wondered whether a reservation relating to such provisions could be incompatible with the object and purpose of the treaty, bearing in mind the desirability of more universal participation. It had been pointed out, however, that the subparagraph was meant

to cover exactly that category of treaties, most of which were optional protocols whose main object was a commitment to a compulsory dispute-settlement or monitoring mechanism. It had been proposed that the word “constitutes” should be replaced by “is an expression of”, “participates in”, “contributes to” or “is an integral element of”. Ultimately, the Drafting Committee had decided that the simplest solution would be to use the words “essential to”, a choice that was sufficiently clear, neutral and flexible. However, it had decided to modify slightly the beginning of subparagraph (a) so that it started with the words “The reservation” and to use a phrase taken from the definition of reservations (draft guideline 1.1), so that the subparagraph would read: “The reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d’être*”. Secondly, the Drafting Committee had wondered whether draft guideline 3.1.13 ought to be followed by an additional draft guideline that would deal with reservations to provisions relating to the implementation of the treaty, such as those that provided for its application in internal law, which were essential to the effective implementation of the treaty. It had been pointed out that such provisions, although not very common, might become more frequent. The Drafting Committee, however, had been of the view that at the current stage there was no need for such an additional guideline. That category of reservations could be covered either by the general draft guideline 3.1.5 or by draft guideline 3.1.11, on reservations relating to internal law. The commentary to either of those guidelines should mention that specific category of reservations. The text of an additional draft guideline relating to reservations to provisions for implementation of a treaty drafted by a member of the Commission had been provided to the Drafting Committee, but the proposal had not been formally referred to it by the plenary. The Drafting Committee had taken no action on the proposal, on the understanding that it would be mentioned in the commentary.

13. In conclusion, the Chairperson of the Drafting Committee commended the draft guidelines contained in the report of the Drafting Committee to the Commission (A/CN.4/L.705) for provisional adoption on first reading.

14. The CHAIRPERSON thanked the Chairperson of the Drafting Committee for his statement and invited the members of the Commission to consider the draft guidelines one by one before adopting the report of the Drafting Committee as a whole.

DRAFT GUIDELINES 3.1.5 TO 3.1.11

Draft guidelines 3.1.5 to 3.1.11 were adopted.

DRAFT GUIDELINE 3.1.12

15. Mr. WAKO pointed out that draft guideline 3.1.12 was the only one that applied to a special group of treaties—human rights treaties—which often protected non-derogable rights. Such was the case, for example, with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights. One might then wonder whether draft guideline 3.1.10 adequately covered the treatment of non-derogable rights in those treaties, since it stipulated that a reservation must be compatible

²⁰⁶ A/CONF.157/24 (Part. I), chap. III.

with the obligations arising out of a treaty. Where human rights treaties were concerned, however, no such a window of escape was possible: no reservation could be compatible with obligations relating to non-derogable rights. Clarification on that point would thus be welcome. More generally he thought it would be useful if members could be provided with a copy of the statement by the Chairperson of the Drafting Committee.

16. Mr. YAMADA (Chairperson of the Drafting Committee) said that his statement would be distributed to all members of the Commission. He regretted that the Special Rapporteur was not present, as he was better qualified to reply to Mr. Wako's question. In general, when a reservation was made to a provision in a human rights treaty, it was not only draft guideline 3.1.12 but also draft guideline 3.1.10 that would apply. The draft guidelines must be taken together. Draft guideline 3.1.12 had been added to specify the factors that made it possible to assess a reservation's compatibility with the object and purpose of a human rights treaty.

17. Ms. ESCARAMEIA said that, in her view, the non-derogable nature of the rights concerned was not in doubt. Draft guideline 3.1.10, which contemplated the possibility of formulating a reservation to a provision relating to non-derogable rights, was addressed to provisions relating to the regime of such rights and not to their content. There might be several provisions in a single treaty relating to the regime of a non-derogable right and one could thus formulate a reservation to them without disputing the right as such.

18. The CHAIRPERSON said he took it that Mr. Wako had been simply requesting clarification and was not opposed to the adoption of draft guideline 3.1.12.

Draft guideline 3.1.12 was adopted.

DRAFT GUIDELINE 3.1.13

19. Mr. CANDIOTI pointed out that in the French text of subparagraph (b) the words "*La réserve n'ait pour effet*" should be replaced with "*La réserve ait pour effet*", as agreed with the Special Rapporteur.

With that amendment to the French text, draft guideline 3.1.13 was adopted.

The draft guidelines contained in document A/CN.4/L.705 as a whole, as amended, were adopted.

Shared natural resources (continued)* (A/CN.4/577 and Add.1-2, sect. A, A/CN.4/580, A/CN.4/L.717)

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

20. The CHAIRPERSON invited the members of the Commission to continue their consideration of the fourth report on shared natural resources and to make comments thereon.

21. Mr. KOLODKIN welcomed the very short but useful fourth report on shared natural resources, which dealt among other things with the relationship between the work on groundwaters and that on oil and natural gas. Like the Special Rapporteur, he thought that those two aspects of the topic called for very different approaches. The Commission should therefore continue with and even complete its consideration of the draft articles on the law of transboundary aquifers on second reading and then, and only then, look into whether it should take up oil and natural gas. For that purpose, an in-depth analysis of State practice and applicable instruments should be carried out. Many treaties, including those on maritime delimitation, contained provisions relating to hydrocarbons. Some were in fact reproduced in the *Handbook on the Delimitation of Maritime Boundaries* prepared by the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs.²⁰⁷ It would be useful if the Secretariat drew on that document to prepare a study for the Commission in order to help it in making its decision.

22. Mr. CANDIOTI said that, as he understood it, the Commission already had a mandate to consider the question of oil and natural gas. At best it could consider what form to give to its future work and whether it was advisable to first complete its consideration on second reading of the draft articles on the law of transboundary aquifers, but it could not go back on its decision to address that aspect of the topic.

23. Ms. ESCARAMEIA recalled that the Commission had a mandate to consider "shared natural resources", which included oil and natural gas.²⁰⁸ If, as Mr. Kolodkin suggested, it undertook a study of that aspect of the topic before deciding whether it should deal with it or not, it would behave as if there were no mandate from the Sixth Committee. It seemed logical to first complete the consideration of transboundary aquifers and then to continue working on oil and natural gas, as had been agreed.

24. Mr. KOLODKIN said he thought that the Commission was sufficiently autonomous to decide, after a preliminary consideration of oil and gas, whether it needed to pursue work on that aspect of the topic.

25. Mr. SABOIA said that the comments by States on the draft articles on the law of transboundary aquifers adopted by the Commission needed careful consideration, in view of the complexity of the discussion on the subject at the previous session of the General Assembly. He welcomed the fact that in its work on the topic of shared natural resources, the Commission had succeeded in preserving a crucial balance between recognition of a State's permanent sovereignty over its natural resources and of its right to carry out activities relating to those resources on the one hand and, on the other hand, its duty not to cause significant harm to other States. The work

²⁰⁷ United Nations publication, Sales No.: E.01.V.2.

²⁰⁸ See *Yearbook ... 2002*, vol. II (Part Two), pp. 100-102, paras. 518-520. The General Assembly, in paragraph 2 of its resolution 57/21 of 19 November 2002, took note of the Commission's decision to include in its programme of work the topic "Shared natural resources". See also the topical summary of the discussion in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat (A/CN.4/577 and Add.1-2), para. 24.

* Resumed from the 2921st meeting.

in progress could help foster much-needed cooperation among aquifer States in obtaining equitable and reasonable utilization of aquifers.

26. In his fourth report, the Special Rapporteur asked the Commission to take a position on the future course of its work, particularly whether it should consider the question of transboundary resources in oil and natural gas without awaiting completion of the work on transboundary aquifers. At the most recent session of the General Assembly, some delegations had expressed their views on the advisability of taking up the issue of oil and gas, but no clear trend had been discernible on that issue. According to paragraph 24 of the topical summary of the discussion held in the Sixth Committee, prepared by the Secretariat (A/CN.4/577), it had been suggested that consideration of that issue would be complex and that there might be opposition from oil- and gas-producing States that recognized those resources as sovereign property. That opinion seemed to imply that when the Commission dealt with transboundary groundwaters and transboundary aquifers it was not dealing with resources subject to the sovereignty of the States in which those resources were located. It was precisely because those resources were transboundary and therefore fell under the jurisdiction of different States that guidelines were useful in promoting cooperation and adequate protection of the resources without affecting the sovereignty of the aquifer State over the part of the resource that lay in its territory. The use of the word “shared” in the title of the topic should not be construed as qualifying in any way the sovereignty of the State over the natural resources in its territory.

27. After having outlined in paragraphs 13 to 15 of his fourth report the important differences between groundwaters and oil and natural gas, particularly with regard to the location and the form of exploitation of those two types of natural resources, the Special Rapporteur then arrived at the conclusion that the majority of regulations to be worked out for oil and natural gas would not be directly applicable to groundwaters, which meant that a separate approach was required for oil and natural gas, and that the Commission should therefore proceed with and complete the second reading of the law of transboundary aquifers. He agreed with that recommendation.

28. Mr. FOMBA said that the idea of postponing the consideration of comments and observations by States on the draft articles on the law of transboundary aquifers until January 2008 was reasonable: it followed from the idea of gaining fuller information on their points of view. As to the fundamental question of the relationship between the work on groundwaters and that on oil and natural gas, in his fourth report the Special Rapporteur had built a solid case based on the following main arguments: the existence of a dialectical link between the two subjects in terms of the implications of the proposed measures (para. 3); the need for in-depth study of the scientific and technical aspects as well as the political and economic aspects of the question of oil and natural gas (para. 5); the non-renewable nature of oil and natural gas as a resource, based on an analysis of the processes of their formation and accumulation and the implications of the fluid nature of oil and natural gas for the exploitation of transboundary oilfields (para. 11); the identification

of certain specific aspects of pollution involving oil and natural gas (para. 12) which would make it necessary to take a different approach when considering environmental problems of oil and gas; the need to treat oil and gas as a single resource because they coexisted in the same geological formation (para. 13); and the similarities and differences between groundwaters and oil and natural gas, particularly from the standpoint of their extraction and commercial value (paras. 13–14).

29. From that generally coherent line of argument, the Special Rapporteur drew a number of conclusions that were set out in paragraph 15 of his report, chief among which was that the Commission should proceed with and complete the second reading of the law of transboundary aquifers independently from its future work on oil and natural gas. He fully agreed, but would like clarification on a number of points. For example, paragraph 10 of the report contained the statement that “[i]n general, States or their political subdivisions retain the right to lease oilfields under their jurisdiction”. He wished to know if this meant that it was not always the case, and if so, what became of the principle of permanent sovereignty of States over their natural resources. In any event, it would be better to amend the first sentence in that paragraph to read: “By virtue of the principle of permanent sovereignty of States over their natural resources, they have the right to lease oilfields under their jurisdiction”. The use of the phrase “It seems” at the beginning of paragraph 11 reflected uncertainty as to the existence of transboundary oilfields: he wished to know when the necessary information would be available. He would also like to know if oil and gas always coexisted in the same reservoir rock, as stated in paragraph 13, and whether survey and extraction of groundwaters took place only on the land or, if submarine groundwaters existed, in which case the wording of the fourth sentence in paragraph 14 should be slightly revised by changing the phrase “take place on the land” to read “generally take place on land”. The paragraph also indicated that groundwater was not internationally traded, with a few exceptional cases, and it would have been useful to give at least one example thereof, if only in a footnote.

30. Mr. COMISSÁRIO AFONSO said that, as a member of the Working Group on shared natural resources, he welcomed the General Assembly’s favourable reaction to the draft articles on the law of transboundary aquifers adopted on first reading by the Commission at its fifty-eighth session.²⁰⁹ It was now for the Commission to decide on the future course of its work on the topic. In that connection, he supported the Special Rapporteur’s proposal to deal with the question of oil and natural gas separately and suggested that the Commission should establish a fixed timetable for that purpose in order to give the question priority consideration. The fact that transboundary aquifers and oil and natural gas were being treated separately in no way meant that one or the other was being neglected. Some members of the Commission had expressed concern on that subject, but since the Commission had already embarked on that route, it should go all the way.

²⁰⁹ *Yearbook ... 2006*, vol. II (Part Two), Chap. VI, sect. C, pp. 91 *et seq.*, paras. 75–76.

31. He was firmly convinced that the Commission should seek, insofar as possible, to establish a comprehensive legal regime for shared natural resources. Of course, one might think that since water was the central element linking the 1997 Watercourses Convention and the law of transboundary aquifers, the Commission should not extend its work on the topic of shared natural resources to cover oil and natural gas, yet it would seem that the “shared” nature of the resources should be the primary consideration. Even if oil and natural gas were not indispensable to human life, they held strategic importance for States, and elaborating rules of law on the subject would promote greater stability in international relations. It was after all the lack of rules that caused uncertainty and, at times, conflicts. The Commission should look into the issue of energy, but given that it was currently a particularly sensitive question, it must take a cautious approach.

32. For the time being, it was difficult to know what the content and structure of the work on oil and natural gas were to be. Nevertheless, despite the definite differences between that question and the question of transboundary aquifers, one could find links between the two subjects, including in terms of the general principles that applied, such as the principle of State sovereignty, the obligation not to cause damage, the obligation to cooperate and respect for environmental protection rules. The Commission should, of course, expect to run into technical or other problems, but that should not prevent it from addressing that aspect of the topic.

33. Mr. WISNUMURTI said that the issue of whether the Commission should also take up the question of oil and gas had indeed been contentious, as reflected in the debate in the Sixth Committee. In his report, the Special Rapporteur had diligently explained the respective characteristics of groundwaters and oil and gas, noting their similarities and dissimilarities. He agreed that groundwaters were a life-supporting resource for which there was no alternative, whereas oil and natural gas were important resources but were not essential to human life and could be replaced by various alternative resources.

34. With regard to future work, he was of the view that priority should be given to transboundary aquifers in order not to divert the Commission from that topic, on which much progress had been made. The question of oil and natural gas deserved separate study, given its complexity and the specific characteristics of that type of natural resource as compared with groundwaters. He agreed with the Special Rapporteur that the Commission should proceed with and complete the second reading of the law on transboundary aquifers independently from its future work on oil and natural gas. In the meantime, the Secretariat should be tasked with preparing a study on that question in order to facilitate its consideration when the Commission decided to take it up.

35. Mr. McRAE said that in his fourth report the Special Rapporteur clearly set out the differences as well as some similarities between groundwaters on the one hand and oil and natural gas on the other; he also showed that there was no basis for linking the work on the two subjects or delaying the final consideration of the draft articles on transboundary aquifers.

36. He agreed with the idea put forward by Mr. Gaja in the Working Group on the topic that a working group should be established to consider whether and how the Commission should deal with the question of oil and natural gas, especially in view of the differences of view expressed by States in the Sixth Committee on the future work on shared natural resources. The Commission should be cautious and start by considering a variety of issues relating to oil and natural gas, such as the conclusion of agreements between Governments and private parties for the exploitation of oil and gas fields.

37. As to the final form that the draft articles on transboundary aquifers should take, he did not think that they should become a multilateral treaty since the issues raised were essentially settled by regional and bilateral agreements. Assistance for States wishing to conclude such agreements was thus important, and model principles or a model convention might be more appropriate for that purpose.

38. Mr. SABOIA agreed with Mr. McRae that the draft articles on transboundary aquifers should take the final form of a model convention on which States could rely in concluding more specific regional or bilateral agreements. That approach would also help to build cooperation among aquifer States in the sharing of natural resources.

39. Ms. ESCARAMEIA, referring to Mr. McRae’s comments on whether the Commission should proceed with work on oil and natural gas, recalled that a feasibility study on the question had been undertaken by a former member of the Commission, Mr. Rosenstock, who had concluded that the work should be done.²¹⁰ A copy of that document should be distributed to members of the Working Group on shared natural resources, along with the text of the resolution in which the General Assembly had tasked the Commission with considering the topic “shared natural resources”,²¹¹ so that they could see whether the exact nature of the resources was mentioned. She also pointed out that, under article 18, paragraph 3, of the Statute of the International Law Commission, the Commission had to give priority to requests from the General Assembly to deal with any question.

40. Mr. WISNUMURTI said that Mr. McRae should be more specific about Mr. Gaja’s proposal regarding the establishment of a working group to study the question of oil and natural gas. As he recalled it, Mr. Gaja had in fact proposed that the Secretariat should be asked to carry out research on the question, including on the relevant State practice, something that would be perfectly appropriate. For his part, he thought that the Working Group on shared natural resources should continue to consider whether the Commission should take up the question of oil and natural gas. It appeared in fact that its members had reached a consensus on the matter.

41. As to the final form of the draft articles, he agreed with Mr. McRae that the Commission should address that

²¹⁰ *Yearbook ... 2000*, vol. II (Part Two), Annex, pp. 147–148.

²¹¹ General Assembly resolution 57/21 of 19 November 2002, para. 2.

question early on or solicit the views of States on it, since its work would be affected by the decision made.

42. Mr. KEMICHA endorsed both proposals made by Mr. McRae, i.e. that a working group should be established to study the advisability of working on the question of oil and natural gas as “shared” natural resources and that the draft articles should take the final form of a model convention rather than a multilateral treaty.

43. Mr. CANDIOTI said that the Working Group on shared natural resources had not yet decided whether the Commission should undertake work on oil and natural gas, and it did not seem appropriate for the plenary to address matters that were still pending. Mr. Gaja’s proposal had been to request the Secretariat to carry out a preliminary study on State practice and existing agreements on oil and natural gas, but the proposal had not yet been given thorough consideration.

44. As to the final form of the draft articles, he wished to emphasize that on first reading the Commission had adopted a set of general principles whose purpose was precisely to encourage States, particularly transboundary aquifer States, to conclude more specific and detailed supplementary regional or bilateral agreements. The draft that had been adopted thus fully acknowledged the importance of rules established by States at the regional or bilateral levels.

45. Mr. PERERA said first of all that the draft articles on the law of transboundary aquifers carefully preserved the balance between the principle of reasonable and equitable utilization of aquifers and the corresponding obligation not to cause significant harm to other aquifer States and to ensure the protection, preservation and management of transboundary aquifer formations. They also provided for both general and specific measures to enhance international cooperation.

46. On the relationship between the work on transboundary aquifers and possible future work on oil and natural gas, he said that he had read with interest the explanations given by the Special Rapporteur in paragraphs 13 to 15 of his fourth report on shared natural resources. During the debate on that topic in the Sixth Committee some delegations had expressed the view that the Commission should not forgo the opportunity to develop an overarching set of rules for all shared natural resources, including oil and natural gas (see A/CN.4/577 and Add.1–2, para. 24). He therefore broadly agreed with the Special Rapporteur’s view that the Commission should proceed with and complete the second reading of the draft articles on the law of transboundary aquifers. At the same time, he saw merit in the idea that the Secretariat should initiate an independent study on existing State practice and norms relating to oil and natural gas, as such a study could provide guidance that would enable the Commission to take an informed decision on the matter. The work on oil and natural gas could result in an independent set of draft articles, or perhaps a separate chapter of the draft articles on transboundary aquifers, without in any way jeopardizing the valuable work already done by the Commission on groundwaters.

47. Mr. VÁZQUEZ-BERMÚDEZ said that he fully endorsed the idea that the Secretariat should carry out a study on State practice regarding oil and natural gas so that the Commission might have all the information it needed to successfully complete its work on that question within the Working Group on shared natural resources, and that it therefore seemed unnecessary to set up a new working group for that purpose. Nevertheless, as the Special Rapporteur had rightly pointed out, the topic of oil and natural gas raised specific questions related to the location of oilfields, most of which were on the continental shelf, and the particular environmental problems posed by their exploitation, in particular the conservation of the marine environment. The Special Rapporteur stressed that some regulations in the law of non-recharging transboundary aquifers might be relevant to the question of oil and natural gas, but pointed out that the majority of regulations to be worked out in that field would not be directly applicable to groundwaters. The Special Rapporteur accordingly concluded that the Commission should proceed with and complete the second reading of the draft articles on the law of transboundary aquifers independently of its future work on oil and natural gas. He himself endorsed that conclusion.

48. Ms. XUE said it was unfortunate that, in general, States did not give sufficient attention to the question of shared natural resources, as could be seen from the paucity of agreements concluded in that area. The Arrangement on the Protection, Utilization and Recharge of the Franco–Swiss Genevise Aquifer, which had entered into force on 1 January 1978, was merely an isolated case.²¹² As for international regulations on groundwaters, they were largely similar to regulations on international watercourses. Consequently, she thought it of the highest importance that the Commission continue its work in that area.

49. As to the final form of the draft articles on the law of transboundary aquifers, she thought it was a bit too early to consider that question. It was States that would have the final word on that subject, since the Commission could only make proposals. Nevertheless, it seemed appropriate to think in terms of a model agreement. She supported the proposals made by the Special Rapporteur in paragraphs 14 and 15 of his fourth report and thought that a study needed to be carried out on the question of oil and natural gas so that the Commission could make an informed decision on the approach it should take to that subject, as distinct from that of groundwaters.

50. Mr. HMOUD said that there were major differences not only between transboundary aquifers and oil and natural gas, but also in the manner in which States dealt with shared oil and natural gas. That stemmed from the fact that States dealt with oil and natural gas as an economic and industrial necessity and had therefore, in certain cases, entered into bilateral and multilateral

²¹² Signed in Geneva and Saint Julien-en-Genevois on 9 June 1977, L. A. Teclaff and A. E. Utton, *International Groundwater Law*, Oceana Publications, London, 1981, pp. 464–477. For more information on the Franco–Swiss Genevise Aquifer, see the second report of the Special Rapporteur, *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/539 and Add.1, Annex IV, sect. C.

arrangements to regulate cooperation and exploitation. The general principles set out in the draft articles on transboundary aquifers could be pertinent in developing a legal regime on transboundary oil and natural gas, although they had to be adapted to that type of resource. The legal regime should codify existing legal practice and cover areas where no agreement was usually reached among States, without going into issues that raised political and economic tensions among the States that shared such resources.

51. Regarding the Commission's future approach to the topic of shared natural resources, he supported the proposal that the Commission, after having received the comments of States on the draft articles on the law of transboundary aquifers adopted on first reading, should undertake the second reading of the draft while at the same time exploring the legal literature and State practice on shared oil and natural gas resources.

The meeting rose at 12.40 p.m.

2931st MEETING

Tuesday, 5 June 2007, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO
(*Vice-Chairperson*)

Present: Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Shared natural resources (*continued*) (A/CN.4/577 and Add.1–2, sect. A, A/CN.4/580, A/CN.4/L.717)

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. HASSOUNA thanked the Special Rapporteur for submitting a concise report clearly setting out the issues on which he wanted members of the Commission to express their views. Those issues had also been discussed intensively in the Working Group on shared natural resources chaired by Mr. Candioti.

2. In presenting his fourth report and during his briefing for new members on the law of transboundary aquifers, the Special Rapporteur had frequently referred to the valuable contribution made by experts on groundwaters, who had helped to enlighten members on the difficult technical aspects of the issue. The inference to be drawn was that, in view of the possibility of having recourse to experts, the Commission need no longer be sceptical about the feasibility and wisdom of its taking up difficult and complex subjects.

3. In his report, the Special Rapporteur had also referred to the role played by UNESCO in organizing regional seminars in Europe, Latin America and North Africa with a view to briefing Governments on the draft articles adopted by the Commission on first reading²¹³ so as to assist them in formulating their comments. Similar seminars should be organized by UNESCO, in association with the regional organizations concerned, in Africa and Asia, in view of the importance of shared natural resources—whether water, oil or gas—for countries in those regions, including those in the Middle East.

4. The draft articles adopted on first reading took a balanced approach to the utilization, protection, preservation and management of transboundary aquifers and aquifer systems. That approach was based on fundamental principles of international law underlying the sovereignty of aquifer States, the equitable and reasonable utilization of a transboundary aquifer or aquifer system, the obligation not to cause significant harm to other aquifer States and the obligation for aquifer States to cooperate and exchange data and information. The decision to draft the text in general terms had been wise, giving States flexibility in devising arrangements to cooperate in managing and protecting aquifers. At the same time, enhanced cooperation and a strengthened system for monitoring among States should be encouraged, since that would ensure better protection and preservation of ecosystems.

5. The fourth report rightly emphasized the similarities and dissimilarities between aquifers on the one hand and oil and natural gas on the other. While there were some physical similarities, there were significant differences as to their political, economic, environmental and human implications, which was why they warranted different approaches. He supported the approach suggested by the Special Rapporteur of proceeding with the consideration of the draft articles on the law of transboundary aquifers on second reading so as to complete that process expeditiously, in view of the urgency of the issue, irrespective of whether any future work was to be undertaken on oil and natural gas. Concurrently with that step, the Commission could seek Governments' and expert opinions on existing State practice and legal instruments pertaining to the issue of oil and natural gas, without prejudice to any future action the Commission might take in dealing with the subject.

6. Lastly, concerning the Special Rapporteur's request for guidance as to whether the final product on the law of transboundary aquifers should take the form of a convention or of guidelines, he noted that the text as currently drafted most closely resembled the substantive provisions of a framework convention. From a legal standpoint, a binding convention would be a more appropriate legal instrument, since it would have stronger legal authority and offer better terms of reference. However, its relationship with other bilateral and regional agreements affecting the management and protection of transboundary aquifers would have to be determined, and that could prove a complex issue. On the other hand, from a practical viewpoint, a declaration

²¹³ *Yearbook ... 2006*, vol. II (Part Two), Chap. VI, sect. C, pp. 91 *et seq.*, paras. 75–76.

of principles embodied in guidelines would be easier to adopt as a first step, while deferring a decision on the final outcome, pending a careful reading of the preferences of States, whose position would eventually determine their willingness to abide by the provisions of a binding convention.

7. Mr. GALICKI said that the Special Rapporteur was to be congratulated for his fourth report on shared natural resources which, though brief, was rich in substance. The report had been prepared at a time of uncertainty, in the interim between the Commission's adoption on first reading of the draft articles on the law of transboundary aquifers in 2006 and the deadline of 1 January 2008 for the submission of comments and observations on the draft articles by States. Faced with the dilemma of whether to wait passively for the reaction of States to the draft articles or to continue the work on the remaining part of the general topic of shared natural resources, the Special Rapporteur had rightly decided to continue the work on unfinished business. Since the question of transboundary groundwaters was just part of the general topic of shared natural resources, and on the basis of opinions expressed both in the Commission and in the Sixth Committee, the Special Rapporteur had turned in the fourth report to other shared natural resources such as oil and natural gas.

8. In paragraph 5 of the report, the Special Rapporteur had raised the crucial question of whether it was appropriate for the Commission to proceed with the second reading of the draft articles on the law of transboundary aquifers independently from the work on oil and natural gas. In paragraph 15, he answered that question in the affirmative. Although in general he himself agreed with the Special Rapporteur's conclusion and the technical and legal justification provided for it, which revealed the many differences between those two categories of shared natural resources, he thought it would be difficult for the Commission to ignore the reciprocal impact that regulations governing the categories of resources would have.

9. He fully agreed that it would not be wise for the Commission to postpone embarking on the oil and natural gas exercise until work on the elaboration of rules on transboundary aquifers was complete. Such a delay would be totally unreasonable and unjustified. On the other hand, there was no certainty that the Commission's future work on legal regulations governing oil and natural gas would be independent of the results of its earlier work on transboundary groundwaters—quite the contrary. Simply by looking at the titles of the draft articles on the law of transboundary aquifers adopted on first reading, one could see that for the most part they could be transposed to form future rules regulating oil and natural gas. There were, of course, some exceptions, deriving mainly from differences in the physical characteristics of those two categories of natural resources. Article 10 dealing with recharge and discharge zones could not be applicable to oil and natural gas. Similarly, questions of prevention, reduction and control of pollution, regulated by article 11, were totally different in the case of oil and natural gas. Groundwaters should be protected against pollution, while oil and natural gas themselves might be dangerous sources of pollution.

10. On the other hand, he did not agree with the view that one of the main reasons justifying different regulation of the two resources was connected with the fact that groundwaters enjoyed the status of "life-supporting" resources, while oil and natural gas were purely energy resources. That seemed to be a simplification that failed to take into account the importance of those energy resources for the improvement of living conditions for ordinary people.

11. In short, the Commission should not dismiss *a priori* all possible links between the two fields of the codification exercise, which should remain two closely related elements of one general topic, namely the legal status of shared natural resources. Without delaying the work on the law of transboundary groundwaters, the Commission could turn that work to the benefit of its future work on oil and natural gas, following, at least in part, previously elaborated rules. The Commission would probably not be able to avoid some obvious duplication of certain rules; such duplication should not be seen in a negative light, but rather as strengthening the status and importance of such regulations.

12. For that reason, Mr. Galicki was in favour of ensuring that both codification exercises took the same final form—either as conventions, including, possibly, framework conventions, or as draft articles. Formal harmonization of the final results of the Commission's work on codifying the legal status of natural resources would undoubtedly enhance the legal significance of the exercise. However, a final decision as to the form to be adopted should not be made in undue haste. The Commission should be flexible and listen carefully to the opinions and comments of States, in order to avoid confusion or dissatisfaction.

13. Mr. SINGH thanked the Special Rapporteur for his informal presentation on transboundary aquifers, which had been extremely helpful for new members of the Commission. The fourth report dealt with the crucial question of how the Commission should proceed in its further consideration of the topic, and in particular with the relationship between the work on groundwaters and that on oil and natural gas. The Special Rapporteur considered that while some of the regulations of the law of the non-recharging transboundary aquifer might be relevant to the question of oil and natural gas, the majority of regulations to be worked out for oil and natural gas would not be directly applicable to groundwaters; furthermore, trying to link the work on groundwaters with the work on oil and natural gas might result in undue delay in the completion of the work on groundwaters. Accordingly, the Special Rapporteur recommended a separate approach for oil and gas.

14. The considerations relating to transboundary oil and gas resources were clearly different from those relating to transboundary aquifers, and he therefore supported the Special Rapporteur's recommendation that the Commission should proceed with and complete the second reading of the law of transboundary aquifers independently from its future work on oil and natural gas. However, issues relating to oil and gas should be studied, and the Secretariat could be asked to look into the relevant State

practice and agreements and to identify suitable experts and institutions which could assist the Commission in its consideration of the topic.

15. Mr. YAMADA (Special Rapporteur), summing up the debate on his fourth report on shared natural resources, said he was grateful to have received almost unanimous approval for his suggested approach of proceeding with and completing the second reading of the law of transboundary aquifers. His fifth report, which he hoped to submit in February 2008, would contain the whole set of draft articles for consideration on second reading, and would take into account the comments and observations to be submitted by Governments by 1 January 2008 and incorporate the necessary improvements to the text adopted on first reading.

16. Although differing views had been expressed on whether it had already been decided that oil and natural gas were to be included in the topic of shared natural resources, there seemed to be a consensus as to the need to conduct some preliminary feasibility studies on oil and natural gas. Several members had proposed that a compilation of relevant State practice, regulations and agreements should be prepared. The Working Group on shared natural resources already had a mandate to consider that issue, and its Chairperson would in due course report to the plenary on its findings.

17. Members had raised the question of the final form of the draft articles: some favoured model principles, others a framework convention. The debate had not been conclusive. As the issue was included in the mandate of the Working Group, the Commission would be well advised to await its report. The text adopted on first reading had been drafted in normative form, but without prejudging the final form, a decision on which must be made during the second reading.

18. He had taken due note of the comments made on the first-reading text. As members would not have an official forum in which to express their views on the text until the start of the second reading, he would be glad to receive their views informally.

19. On the matter of continued dialogue with experts, he informed members that from 29 to 30 May 2007 UNESCO had organized a workshop on transboundary aquifers, held in Paris with the cooperation of the French Water Academy (Académie de l'eau) and the French Geological Survey. About 25 officials from Ministries of Foreign Affairs and the environment and scientists from Western and Eastern Europe had been briefed on the text adopted by the Commission on first reading and requested to urge their Government to submit written comments by the deadline. UNESCO was also planning to organize a workshop in Montreal, Canada, in September 2007 with the participation of officials and experts from the Americas. Mr. Yamada had asked UNESCO to endeavour to organize workshops in Africa and Asia, but it had not yet identified cooperative agencies or organizations in those regions. Meanwhile, the Asian-African Legal Consultative Organization would hold its annual meeting from 2 to 6 July 2007 in Cape Town, South Africa. Forty-six member States from Africa and Asia

would take part in that meeting. One important aspect of that organization's work was dealing with the topics considered by the Commission. He was now consulting with the Secretary-General, Mr. Kamil, to find a way of briefing the members and requesting them to submit their comments in time for the second reading.

20. Mr. Fomba had raised several issues concerning the fourth report. First, regarding paragraph 10, Mr. Fomba had said that States or their political subdivisions always retained the right to lease oilfields under their jurisdiction, and that the words "in general" must therefore be deleted. His own understanding was that in most cases, oil and natural gas were treated as public property and States or political subdivisions had jurisdiction over those resources. However, he had been informed that in exceptional cases, oil and gas were treated as the private property of the owner of the land above the reservoir rock. That was why the words "in general" had been inserted. He would investigate further and try to find some concrete examples.

21. Secondly, Mr. Fomba thought that the words "it seems that", at the beginning of paragraph 11, cast uncertainty upon the description that followed. That was correct. When writing the report, he had been informed by experts that there were transboundary oilfields in many parts of the world, and in particular, on continental shelves. As yet, he had been unable to obtain a world map of transboundary oilfields, and could not make a definitive statement on that subject; however, he would look further into the matter.

22. Thirdly, on paragraph 13, Mr. Fomba had asked whether oil and natural gas were always to be found together. Citing paragraph 6 of the report, Mr. Yamada replied that oil and natural gas often coexisted in the same rock reservoir, natural gas accumulating in the upper zone and oil in the lower zone, but that in some cases only oil and in other cases only natural gas was present.

23. The fourth and fifth questions related to paragraph 14. He could provide no definitive answer to the question whether there were groundwaters under the seabed. Hydrogeologists informed him that there were submarine aquifers, but that they usually consisted of brine. He was not sure whether there were submarine aquifers containing fresh water, but he would look further into the question. As to whether groundwaters were internationally traded, he had not yet heard of the existence of such a trade on a large scale. He had incorporated the phrase "with a few exceptional cases" in the light of cases such as the daily supply of water by Malaysia to Singapore. Water supplied there was mostly surface water but might include some extracted groundwaters.

24. That concluded his summing up of the debate on the fourth report on shared natural resources.

The meeting rose at 10.45 a.m.

SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-NINTH SESSION

Held at Geneva from 9 July to 10 August 2007

2932nd MEETING

Monday, 9 July 2007, at 3 p.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Responsibility of international organizations²¹⁴ (A/CN.4/577 and Add.1–2, sect. B, A/CN.4/582,²¹⁵ A/CN.4/583,²¹⁶ A/CN.4/L.720²¹⁷)

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON declared open the second part of the fifty-ninth session of the International Law Commission and invited members to begin their consideration of the fifth report on responsibility of international organizations (A/CN.4/583).

2. Mr. GAJA (Special Rapporteur), introducing his fifth report, said that the report examined the content of the international responsibility of international organizations and that it corresponded to Part Two of the draft articles on responsibility of States for internationally wrongful acts.²¹⁸ The general model of those draft articles would also be followed in the third and fourth parts of the draft, which would be entitled “Implementation of international responsibility of an international organization” and “General provisions”, respectively.

²¹⁴ For the text of the 30 draft articles provisionally adopted by the Commission and the commentary thereto, see *Yearbook ... 2006*, vol. II (Part Two), chapter VII, section C, paras. 90–91.

²¹⁵ Reproduced in *Yearbook ... 2007*, vol. II (Part One).

²¹⁶ *Idem*.

²¹⁷ Mimeographed; available on the Commission’s website.

²¹⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

3. During the previous quinquennium, the Commission had provisionally adopted 30 draft articles, constituting Part One of the study, entitled “The internationally wrongful act of an international organization”. A few questions relating to that part, mentioned in paragraph 3 of the report, had been left outstanding and a discussion on them should, in his view, be postponed. The need for such postponement was obvious when it came to draft article 19, on countermeasures, which had been left blank until the issue could be considered in the context of the implementation of international responsibility. Other questions could be settled immediately, but it seemed preferable not to consider them until the Commission undertook its final review of the draft articles adopted on first reading. According to the Commission’s practice, that review would take place on second reading, but since the Commission had in fact provisionally adopted all the draft articles on the topic at the same session that they had been proposed, there had been no opportunity for it to respond to the comments made by States and international organizations (see A/CN.4/582). Those comments had been duly noted, but given that they referred to questions already dealt with, having been submitted after the provisional adoption of the texts to which they referred, it seemed reasonable not to wait until the second reading before considering certain key questions.

4. The review of the draft articles should also be based on the practice that had developed since their adoption. After the submission of the fifth report, draft articles 3 and 5 and the related commentary had been quoted *in extenso* by the Grand Chamber of the European Court of Human Rights in the *Behrami and Behrami v. France and Saramati v. France, Norway and Germany* cases. The Commission could acknowledge with satisfaction that an international judicial body had paid close attention to its work, though one should also add that the Court’s conclusion—that the conduct of forces authorized by the United Nations Security Council, such as the NATO-led International Security Force in Kosovo (KFOR), was attributable to the United Nations and not to the States that had sent contingents—was not based on an accurate analysis of the Commission’s views. It had happened that the Commission’s work was sometimes misunderstood, as was illustrated by certain of the impressive series of references to the draft articles on State responsibility collected in the compilation of decisions of international courts, tribunals and other bodies²¹⁹ and the comments and information

²¹⁹ A/62/62 and Add.1.

received from Governments,²²⁰ submitted to the General Assembly at its sixty-second session. Nevertheless, the Commission might welcome the considerable global attention given to the draft articles.

5. Returning to the report itself, he said that he had included some comments often made about the draft articles so that he could provide an appropriate response. For example, with regard to the idea that he had not taken sufficient account of the great variety of international organizations, he noted that the draft articles were worded in terms so general that they could apply to most if not all such organizations. The fact that some articles were only marginally relevant for a number of international organizations did not necessarily mean that the draft articles should not contain a general provision applying to all international organizations. In addition, the final version would certainly contain a provision such as draft article 55 of the draft articles on responsibility of States, to the effect that the “articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State [or, in the current instance, an international organization] are governed by special rules of international law”.²²¹

6. Another criticism mentioned in the report was that the draft articles were insufficiently based on practice. In his view, that criticism rang hollow when it came from States or international organizations that had failed to provide information on their practice, notwithstanding the request made to them by the Codification Division of the United Nations Office of Legal Affairs on behalf of the Commission. The solution lay with the authors of the criticism, or at least with those who had information but did not communicate it, and it was not right for the Commission to refrain from continuing its examination of the topic until such time as further information on practice became available. The Commission’s study would, in any case, provide States and international organizations with a general framework, albeit based on insufficient practice, that would probably assist them in focusing on the main legal issues and disclosing factors in practice that had thus far been unobtainable.

7. A further criticism, the consideration of which could serve as an introduction to the draft articles proposed for Part Two, was that the draft articles mainly reproduced the draft articles on responsibility of States with only minor adaptations. J. E. Álvarez claimed that the Commission’s six years of work on the topic had consisted of replacing the word “State” in the draft articles on responsibility of States with the words “international organization”.²²² In fact, the reports on responsibility of international organizations spoke for themselves; it was clear that all avail-

able practice, whether covered by the draft articles on responsibility of States or not, had been analysed from the point of view of international organizations. It was not surprising that, given the general nature of the provisions, the principles stated in the draft articles on responsibility of States applied equally, in many cases, to international organizations. In those circumstances, it seemed reasonable for the Commission to use the same language as that used in the draft articles on responsibility of States. That had been done with many of the draft articles in the second part of the report, which dealt with the general principles relating to the content of the international responsibility of international organizations.

8. According to Christian Dominicé, draft articles 28 to 39 of the draft articles on responsibility of States should undoubtedly apply to matters relating to the international responsibility of international organizations, including the United Nations²²³ (see paragraph 22 of the report). There seemed little alternative to reproducing the relevant articles relating to State responsibility in drafting articles 31 (Legal consequences of an internationally wrongful act), 32 (Continued duty of performance) and 33 (Cessation and non-repetition). Practice of international organizations with regard to reparation was both limited and not always clear. In that case, the replacement exercise seemed a bit more problematic, even though a few instances of practice could be found that favoured the application to international organizations of most of the rules contained in the draft articles on responsibility of States. Thus the report gave several examples of satisfaction provided by international organizations in practice, in the form of an apology, when they had committed an internationally wrongful act.

9. Two issues specific to international organizations were given special consideration in the report (see paragraphs 27–35). The first, to which the Commission had drawn the General Assembly’s attention in its report on the work of its fifty-eighth session, was whether members of an international organization that were not responsible for an internationally wrongful act of that organization had an obligation to provide compensation to the injured party, should the organization not be in a position to do so.²²⁴ A clear majority of States had expressed the view that the Commission should not state such an obligation, since it did not exist. Why should States that were not held responsible for an internationally wrongful act be held responsible for a subsidiary obligation with regard to the injured party, and on what basis? It had been noted that the question of whether members were required by the rules of the organization concerned to provide it with adequate means to make reparation was a different problem. Even though the existence of such an obligation in the internal rules of most international organizations could be established, there was still no justification for setting out a general rule in the draft articles, since the obligation on members to provide the organization with funds did not mean that they were

²²⁰ A/62/63 and Add.1.

²²¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 30 and 140.

²²² J. E. Álvarez, “International organizations: accountability or responsibility?”, *Responsibility of Individuals, States and Organizations: Proceedings of the 35th Annual Conference of the Canadian Council on International Law, Ottawa, October 26–28, 2006*, Ottawa, Canadian Council on International Law, 2007, pp. 121–134. Available at: www.asil.org.

²²³ C. Dominicé, “The international responsibility of the United Nations for injuries resulting from non-military enforcement measures”, in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Leiden, Martinus Nijhoff, 2005, pp. 363–370.

²²⁴ *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 28 (a).

required to compensate the injured party. In his view, the question should be discussed in the commentary; it should not give rise to a draft article setting forth an obligation the implementation of which the injured party might well be unable to secure.

10. The second specific issue addressed in the part of the report relating to compensation for damage was taken up in paragraphs 32 to 35. Article 32 of the draft articles on responsibility of States for internationally wrongful acts provided that “[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part”.²²⁵ That wording could not simply be transposed to the draft articles on responsibility of international organizations for it might well be that, where relations between an international organization and its members were concerned, the international organization was entitled to rely on the provisions of its internal rules as justification for not giving compensation to its members. If one accepted that point of view, two options were possible: either it should be mentioned in draft article 35 or the Commission could decide that it was not necessary to take it into account, owing to the principle of *lex specialis*, to which express reference would be made in a final provision. In his view, draft article 35 should, for the sake of clarity, contain a proviso that drew attention to the distinction that might exist between rules applicable to relations between an international organization and its members, and those applying to relations with non-members.

11. With regard to the final chapter of Part Two, he recalled that, in chapter III of the 2006 report to the General Assembly, the Commission had also drawn the General Assembly’s attention to the consequences of serious breaches under peremptory norms of international law that might be committed by international organizations. Specifically, the question had been whether in such cases States and other international organizations were under an obligation to cooperate to bring the breach to an end.²²⁶ The idea that international organizations, like States, had such an obligation had enjoyed strong support in the Sixth Committee. However, that should not be taken to imply that an international organization taking such action should act beyond its powers under its constitutive instrument or any other relevant rule. What had been said about the obligation to cooperate in paragraph 1 of article 41 of the draft articles on responsibility of States should apply also to the obligations set out in paragraph 2 of the same article, namely that no State should recognize as lawful a situation created by a serious breach of a peremptory norm nor render aid or assistance when maintaining that breach.²²⁷ In paragraph 64 of his report he referred in that connection to United Nations Security Council resolution 662 (1990) of 9 August 1990, which stated the duty for all international organizations not to recognize the annexation of Kuwait by Iraq. He should perhaps have drawn

²²⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 28 and 94.

²²⁶ *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 28 (b).

²²⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 29 and 113–114. See also paragraphs (2)–(12) of the commentary, *ibid.*, pp. 113–115.

attention in the report also to paragraph 160 of the advisory opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, according to which “the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion”. The advisory opinion, and other examples given in the report, concerned serious breaches committed by States, not by international organizations. Article 41 of the draft articles on responsibility of States ought perhaps to have mentioned the fact that international organizations were, like States, under an obligation to bring a breach to an end, not to recognize as lawful the situation created by a serious breach and not to render aid or assistance in maintaining that situation. Nonetheless, it seemed feasible to mention that both international organizations and States had such an obligation when article 44 of the draft articles on responsibility of international organizations considered the consequences of a serious breach of a peremptory norm of international law.

12. Ms. ESCARAMEIA drew attention to the introduction to the report, particularly the comments appearing in paragraph 7, and said that the difficulty created by the great variety of international organizations could not be settled with a provision along the lines of article 55 of the draft articles on responsibility of States for internationally wrongful acts because the question at issue was not “special rules” but “special international organizations”, which had their own internal rules. The matter ought to be thought through more thoroughly. As for the concept of “objective” personality mentioned in paragraph 8, she wondered why recognition was always limited to injured States and did not include injured international organizations and other entities under international law. The problem was in fact a far more general one, having to do with the scope of international obligations and those to whom they were due. In that regard, the Commission’s last Special Rapporteur on State responsibility, James Crawford, had, in his third report,²²⁸ made a distinction that she still did not understand between Part One of the draft articles on responsibility of States, which related to all wrongful acts, and Part Two, which was restricted to obligations owed to one or more States or to the international community as a whole.

13. Of the proposed provisions, draft articles 31 to 34 and 37 to 43 did not give rise to any problems. Draft article 35, on the other hand, allowed an international organization too much power when it came to determining failure to comply with obligations owed to the international community as a whole or even breaches of *ius cogens*. Ms. Escarameia also questioned the need for the word “pertinent” in the draft article.

14. In draft article 36, the Special Rapporteur had based the provision on the corresponding provision of the draft articles on responsibility of States and thereby excluded any injured parties that were not States, international

²²⁸ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4.

organizations or the international community as a whole. The examples that he gave, however, including those in paragraphs 44, 45 and 46 of the report, concerned reparations made by international organizations to individuals and not to States. She therefore wondered why other subjects of international law could not be covered.

15. With regard to draft article 44, she found it difficult to understand the doubts expressed in paragraph 61 of the report as to whether an international organization, like a State, had the obligation to cooperate to bring to an end breaches of *jus cogens*. International organizations had the same obligations in that regard as States, and not to recognize that obligation was tantamount to treating them as minor subjects of international law. Their internal rules had no bearing on the matter.

16. Mr. GAJA (Special Rapporteur), referring to Ms. Escameia's last point, said that under draft article 44 international organizations were under an obligation, in exactly the same way as States, to cooperate to put an end to a serious breach by an international organization of an obligation arising out of *jus cogens*.

17. Mr. PELLET said that if it had only been a matter of commenting on the draft articles proposed by the Special Rapporteur, his statement would have been extremely brief, since, apart from a translation problem with the French text of draft article 35, he was in agreement with all the proposed draft articles and, for the most part, with the explanations given by the Special Rapporteur. He disagreed with the Special Rapporteur very strongly, however, with regard to what the latter had omitted. Moreover, he was only partially convinced by the methodological proposals made at the beginning of the report.

18. Taking up the last point first, he noted that in paragraphs 3 to 6 of the report the Special Rapporteur described how he intended to continue his consideration of the topic, and despite the rather anodyne description that he gave of them, his methodological intentions could have significant consequences for the way the Commission worked and, indeed, its very nature. Although not categorically opposed to what the Special Rapporteur was suggesting, he wanted to be sure that before it encouraged the Special Rapporteur to go ahead, the Commission fully understood the profoundly innovative nature of the Special Rapporteur's proposals. On the face of it, the Special Rapporteur's proposals bore all the hallmarks of common sense: the Commission could reconsider certain issues already "provisionally" adopted, "in the light of the comments made by States and international organizations". The justification for such a reconsideration seemed to be that, in contrast with what had happened with most of the other topics that it had considered, the Commission had thus far provisionally adopted all the draft articles on the topic at the same session at which the Special Rapporteur had presented them. Moreover, in submitting his report, the Special Rapporteur had added that the Commission had been criticized for not taking sufficient account of outside opinion. In his view, however, the words "most other topics" could only really mean the topic of reservations to treaties. In all other

cases, except on the odd occasion, special rapporteurs submitted their reports more or less on time, and that was how the Commission worked when it decided to refer draft articles to the Drafting Committee: the Drafting Committee considered them the same year and the Commission adopted them immediately upon receiving the report of the Chairperson of the Drafting Committee. That long-standing practice had the obvious drawback that comments by States fell a bit flat and had no real impact on the elaboration of draft articles adopted on first reading, given that the record of the comments by delegations in the Sixth Committee, should they be required, did not become available until the second reading. The only way of avoiding that drawback was to submit reports late so that they could only be considered the following year. Such a delaying strategy might have certain advantages, but it should not be held up as a model. The other option, the one proposed by the Special Rapporteur, was to wait until States had expressed their views before reconsidering draft articles that had already been adopted. That, however, had wide-ranging consequences, two of which should give the Commission pause for thought. First, it amounted to introducing a one "1 bis" reading of the draft articles, between the first and second readings. The Commission would adopt draft articles in year A and then readjust them in the light of comments by States in year A + 1 or A + 2, but in either case, it would still be a first reading, with a subsequent second reading still to come. Thus the Commission would move imperceptibly from two readings to three. The process by which the Commission codified international law was already terribly cumbersome, and if the Special Rapporteur's suggestion was followed it would become even more so. Another result would be a change in the role, or even the very nature, of the Commission, which was in danger of becoming, if not a rubber stamp, then at least a sounding board for the opinions of States, and he was strongly opposed to such an outcome. The Commission should, obviously, be sensitive to what the representatives of States said, because one of the Commission's main assets was the dialogue that developed over time between the political decision makers, i.e. States, and the independent experts making up the Commission. The Commission's task, however, was to set out the ideas of independent experts that made logical and scientific sense rather than political sense. The second reading was the stage at which the Commission took account of the political concerns of States, although even then it was not obliged to submit to those concerns. In any case, since States had the last word, it would be absurd for the Commission to submit texts that were not generally acceptable. The system proposed by the Special Rapporteur, however, was in danger of leading the Commission off in a disturbing direction. He feared that if the Commission followed the Special Rapporteur in that direction, it would ultimately focus more on giving States—or rather, the small number of States that had expressed views—what they wanted rather than on bringing its professional expertise to bear on its texts to ensure their coherence. For that reason he would prefer to adhere as closely as possible to the Commission's traditional practice. The articles adopted on first reading would thus, in principle, have been adopted definitively rather than provisionally and could not be reconsidered until the second reading.

There could, of course, be reasonable exceptions to, or even violations of, any principle, and if on reflection a provision that had been adopted seemed illogical or too obviously out of line with the rest of the text, the Commission should not feel that it was trapped by a principle that had been interpreted too rigidly. The principle itself, however, should be maintained.

19. As far as substance was concerned, he had no real objection to the draft articles being referred in their entirety to the Drafting Committee. In fact he believed that they should be adopted as they stood, since it was hard to see what improvements the Drafting Committee might make. Apart from a very small number of cases, only one of which, in draft article 35, seemed justified, and for which the Special Rapporteur had given an excellent explanation when introducing his report, the Special Rapporteur's proposal was simply to transpose the 2001 draft articles on responsibility of States for internationally wrongful acts to responsibility of international organizations. In his view, that was fully justified and he was totally persuaded by the arguments presented by the Special Rapporteur both in his introduction and in paragraph 2 of the report: there was no reason to depart from the 2001 articles if neither practice nor logic warranted it. He also agreed with the Special Rapporteur's view—not shared by Ms. Escameia—that there was no need to enter into greater detail to adapt the provisions to particular categories of organization. The principles contained in the draft articles were generally applicable and even if, as the Special Rapporteur had noted, some of them, such as self-defence, were of no practical use in the case of some international organizations, that was of no importance.

20. On the other hand, he was not at all convinced by what the Special Rapporteur had chosen not to propose. Paragraph 13 of the report stated that “the current draft is intended to follow the same general pattern as that of the articles on State responsibility”. Again, he had no objection to the principle itself, which seemed quite right to him. The draft articles on responsibility of States had been discussed with great care and at great length on the basis of reports that had been the subject of both political and academic debate, and it would be better not to depart from them any further than was strictly necessary. That did not mean that no additions should be made where such additions were necessary. However, it was absolutely essential, in his view, to add one or several provisions on the role that could or ought to be played by States in the reparation owed by an international organization that was liable for an internationally wrongful act. Of course, there was no question of saying that States were responsible for an act of an international organization, but the fact remained that such organizations were inextricably linked with their member States, and that was bound to have consequences where reparation was concerned.

21. He endorsed the statement in paragraph 22—the most important point made in the report, along with the position of Dominicé cited in footnote 17 of the report—that international organizations were responsible for their acts and their omissions, that they should respond

to any failure to comply with international law for which they were liable and that, except in a few rare cases, States were not and should not be responsible for the actions of international organizations.²²⁹ He had devoted much time in the past to arguing that the legal personality of international organizations was opaque, acting as a screen between them and their member States, and he wrongly suspected the Special Rapporteur of coming down in favour of the transparency of their legal personality.

22. One of the consequences of the principle of the responsibility of international organizations was that they had to make reparation for any injury their unlawful behaviour might have caused to third parties. However, the Commission could not and must not stop there, for, as Álvarez, who was cited in footnote 17, had written, “When it comes to [international organizations], some of which are purposely kept by their members at the edge of bankruptcy, the concept of responsibility-cum-liability seems something only a law professor (or the writer of a Jessup Moot problem) would love”.²³⁰

23. In most major cases, international organizations were unable to discharge their obligation to make reparation because they lacked the resources to do so. That was a basic fact that the Commission could not overlook. In that connection, he was not convinced by the pretext that the Special Rapporteur used in paragraph 30 of the report to sidestep that issue: “Obligations existing for member States or organizations under the rules of the responsible organization need not be recalled here.” In the first place, the problem did not have to do with the “rules of the responsible organization”—it had to do with general international law: if an organization was responsible, did general international law require that its member States provide the organization with the means of discharging its obligations arising from its responsibility? In his view, the answer to that question could only be yes. Moreover, that affirmative response must surely be included in the actual text of the draft articles and not in the commentary. If not, there was no point in undertaking the project; a single article would suffice, which might read: “The provisions of the articles on responsibility of States for internationally wrongful acts shall apply *mutatis mutandis* to responsibility of international organizations for internationally wrongful acts.”

24. In his view, that point lay at the heart of the topic before the Commission. It was imperative that the principle of the exclusive responsibility of international organizations for their internationally wrongful acts should be preserved. At the same time, it was equally imperative that realistic compromises be found that, without calling that fundamental principle into question, would guarantee victims a reasonable likelihood of reparation for the injury they had suffered.

25. Under the leadership of the Special Rapporteur, the Commission should find a way of striking a balance

²²⁹ Dominicé, *loc. cit.* (footnote 223 above), at p. 368.

²³⁰ Álvarez, *loc. cit.* (footnote 222 above), at p. 128.

between the exclusive responsibility of the organization and the means of effectively implementing that responsibility in respect of the victims. The road to take was clear: the Commission must establish principles according to which the organization's member States must allow the organization to discharge its obligation to make reparation, as the Russian Federation had indicated in a statement delivered in the Sixth Committee,²³¹ cited in paragraph 29 of the report.

26. The basis of that obligation was, first of all, practical, as it was the only realistic way that reasonable guarantees of reparation could be given, but it also had to be pragmatic and realistic. In his view, that basis ought to have its underpinnings in jurisprudence as well as in precedents and elements of practice indicating that States realized that if the organization was unable to pay, they must nevertheless allow it to discharge its indisputable obligation to make reparation. He firmly believed that it was not incongruous from a legal standpoint to state that in joining an international organization a State accepted the obligations that resulted from membership, including the obligation to make reparation, which was an inescapable consequence of responsibility. To that end, it was imperative that the Special Rapporteur focus on that key problem in his next report and formulate one or more draft articles that reflected that necessity.

27. He wished to draw the Commission's attention to the unacceptable translation into French of paragraph 35, which meant absolutely nothing at all. The frequency of translation errors in the Commission's texts was, to his way of thinking, becoming quite a problem. The correct translation of the phrase "the relations between an international organization and its member States and organizations" was "*les relations entre une organisation internationale et les États et organisations internationales qui en sont membres*", and not the one given in the report.

28. He wished to make several detailed observations, not on the draft articles themselves, but on some of the justifications for them advanced by the Special Rapporteur. In paragraph 29, for example, the Special Rapporteur's interpretation of the statement of Belgium to the Sixth Committee seemed to him inaccurate. Belgium had said that if member States were required to make contributions in accordance with the rules of the organization, that did not mean that they themselves were required to compensate the party injured by an internationally wrongful act, nor did it mean that the injured party could bring legal action against them.²³² He shared that view, but he disagreed with the interpretation given by the Special Rapporteur when he said: "In other words, the existence of an obligation for member States would entirely depend on the rules of the organization; when the obligation existed, it would benefit the injured party only indirectly" (para. 29). In fact, what the Special Rapporteur was saying was different from what Belgium had said, for the two reasons mentioned earlier. First, the problem was not a problem of the rules of the

organization but one of general international law; furthermore, the Special Rapporteur did not draw the right conclusions from those observations.

29. In paragraph 41, the position of the IAEA as formulated by its Director-General was based on a terminological misunderstanding. In the passage quoted, the IAEA drew a distinction between what it called "reparation properly so called" on the one hand and satisfaction on the other hand, whereas satisfaction was not one of the three possible options for reparation.

30. In paragraph 52, the Special Rapporteur wrote concerning the NATO bombing of the Chinese embassy in Belgrade: "A further apology was addressed ... by the German Chancellor Gerhard Schroeder on behalf of Germany, NATO and NATO Secretary-General ...". That statement left him extremely perplexed; he wished to know whether those apologies had been made by Germany on its own behalf or also on behalf of NATO.

31. The draft articles proposed by the Special Rapporteur, particularly subparagraph (b) of draft article 33, elicited the same criticisms as the provisions of the 2001 draft articles on State responsibility for internationally wrongful acts on which they were based. Moreover, the *chapeau* of article 38 was highly questionable, as it called for the re-establishment of the situation that had existed before there was knowledge of the wrongful act, whereas in order for restitution to be complete, it ought to have called for the re-establishment of the situation that would have existed had the internationally wrongful act never been committed. Lastly, draft articles 39 and 41 were too general. That being said, the 2001 articles on State responsibility did exist, they had been adopted after meticulous and occasionally difficult drafting, and on the whole they were a great success. There was thus no reason to depart from them. Accordingly, he did not think that the criticisms that Ms. Escarameia had made with regard to the Special Rapporteur's draft should lead to its modification. While they were obviously not unfounded from a substantive standpoint, it was too late to go back over the 2001 draft. Observations could perhaps be made in the commentary, but not in the draft article itself.

32. In conclusion, he was in favour of sending the draft articles proposed by the Special Rapporteur to the Drafting Committee. That body's work should be largely formal, since it should not lead the Drafting Committee or the Commission to modify text that was directly, and rightly, modelled on the 2001 provisions. However, the Commission could not—and he wished to stress the point—stop there; the Special Rapporteur and the entire Commission must give serious thought to the obligations incumbent on member States *vis-à-vis* the organization to which they belonged deriving from the organization's responsibility.

The meeting rose at 4.40 p.m.

²³¹ *Official Records of the General Assembly, Sixth Committee, Sixty-first session, 18th meeting (A/C.6/61/SR.18)*, para. 68.

²³² *Ibid.*, 14th meeting (A/C.6/61/SR.14), para. 42.

2933rd MEETING

Tuesday, 10 July 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Berúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Cooperation with other bodies

[Agenda item 10]

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON announced that, following a well-established practice, the Commission was to receive the customary visit from the President of a unique institution—the only permanent court of international justice in non-criminal matters with general jurisdiction. He warmly welcomed Judge Rosalyn Higgins, President of the International Court of Justice. Although she saw before her a new Commission, 16 new members having been elected since her previous visit, she was a stranger to none of them. The Court and the Commission had long-established synergies in advancing international law in the service of the international community, and the Court's work had special relevance for the work of the Commission.

2. Ms. HIGGINS (President of the International Court of Justice) said she was delighted to address the Commission and congratulated its new members on their election. For the past decade, the President of the International Court of Justice had been invited to address the Commission and engage in an exchange of views. The Court greatly appreciated those exchanges, and she herself was happy to be with the Commission for that purpose for a second time. She would report on the judgments rendered by the ICJ over the past year, drawing special attention to aspects of its work that had particular relevance for the work of the Commission.

3. The Court had rendered three decisions so far in 2007: an order regarding provisional measures, a judgment on the merits, entailing some important jurisdictional issues, and a judgment on preliminary objections. The three cases had involved States from Africa, Europe and Latin America, and the subject matter had ranged from environmental issues to genocide and to diplomatic protection of shareholders. If any evidence was needed that the topics the Commission examined were of the highest relevance for the Court, it was to be found in the fact that in every one of those cases the parties had relied upon, and the Court had carefully considered, the work of the Commission.

4. She would begin with the request for provisional measures in the case concerning *Pulp Mills on the River Uruguay*. In 2006, the Court had handed down an order for the indication of provisional measures in that case. At that time, Argentina had initiated proceedings against Uruguay regarding alleged violations of the Statute of the River Uruguay,²³³ arguing that Uruguay had not respected the procedures under the Statute when authorizing the construction of two pulp mills and that the construction and commissioning of those mills would damage the environment. In its order of 13 July 2006, the Court had found that the circumstances of the case, as they presented themselves at that moment, were not such as to require the exercise of the Court's power under article 41 of the Statute to indicate provisional measures.

5. Now it was Uruguay that had submitted a request to the Court for the indication of provisional measures—the first time in 61 years that a respondent had taken such a step. It had argued that since 20 November 2006, organized groups of Argentine citizens had been blockading bridges leading to Uruguay, that the action was causing it enormous economic damage and that Argentina had taken no steps to put an end to the blockade. It had asked the Court to order Argentina to take “all reasonable and appropriate steps ... to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two States”; to “abstain from any measure that might aggravate, extend or make more difficult the settlement of that dispute”; and to “abstain from any other measure that might prejudice the rights of Uruguay in dispute before the Court” [para. 13 of the 2007 order]. By that time the owner of one of the two planned pulp mills had already decided to relocate the mill out of the River Uruguay area.

6. With regard to the first provisional measure requested, the Court had found that notwithstanding the blockades, the construction of the Botnia pulp mill had progressed significantly since the summer of 2006 and that work was continuing [para. 40 of the 2007 order]. It was not convinced that the blockades met the test for ordering provisional measures, namely that they represented an imminent risk of irreparable prejudice to the rights of Uruguay in the dispute before it [*ibid.*, para. 41].

7. With respect to the other two provisional measures sought by Uruguay, the Court had recalled that although in several past cases it had indicated provisional measures directing parties not to aggravate the dispute, it had never done so when the measure had not been ancillary to another provisional measure. It had therefore restricted itself to reiterating its call to the parties, made in its earlier order, “to fulfil their obligations under international law”, “to implement in good faith the consultation and co-operation procedures provided for by the 1975 Statute”, and “to refrain from any actions which might render more difficult the resolution of the present dispute” [*ibid.*, para. 53].

8. During the proceedings, Uruguay had argued that the blockades by Argentine citizens could not be justified as countermeasures taken in response to the alleged

²³³ Signed at Salto (Uruguay) on 26 February 1975, United Nations, *Treaty Series*, vol. 1295, No. 21425, p. 331.

violations of the 1975 Statute. Referring to the Commission's draft articles on responsibility of States for internationally wrongful acts, counsel for Uruguay had argued that the dispute fell squarely within the terms of article 52, paragraph 3, the commentary to which explained that "[w]here a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures".²³⁴ In Uruguay's view, if countermeasures were not justifiable where the responsible party was complying with a provisional measures order, then it followed *a fortiori* that they could not be justifiable when the indication of provisional measures had been refused by the ICJ and where the responsible party (Uruguay) was pursuing diplomatic dispute settlement procedures in good faith. In any event, Argentina had not claimed to be taking countermeasures and the Court had not had to resolve that question.

9. One month after the order in the *Pulp Mills on the River Uruguay* case, the Court had delivered its judgment in the first legal case in which one State had made allegations of genocide against another: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The Court had been acutely sensitive to its responsibilities and had, as always, simply but meticulously applied the law to each and every one of the issues before it. It would be impossible to recount, even in summary form, all the legal and factual findings set out in the Court's 171-page judgment. She would simply focus on the aspects of the case that seemed of particular interest, including those parts of the reasoning that had direct relevance to the work of the Commission.

10. The case had been extremely fact-intensive. The hearings had lasted for two and a half months, witnesses had been examined and cross-examined and thousands of pages of documentary evidence submitted. A substantial portion of the judgment was devoted to analysing that evidence and making detailed findings as to whether alleged atrocities had occurred and, if so, whether there was the specific intent on the part of the perpetrators to destroy in whole or in part the protected group, which the ICJ had identified as the "Bosnian Muslims". Given the exceptional gravity of the offence of genocide, the Court had required that the allegations be proved by evidence that was "fully conclusive" [para. 209 of the judgment]. It had made its own determinations of fact based on the evidence before it, but had also greatly benefited from the findings of fact that had been made by the International Tribunal for the Former Yugoslavia when dealing with accused individuals. The Court had termed the Tribunal's working methods rigorous and open, thus enabling it to treat its findings of fact as "highly persuasive" [para. 223].

11. The Court had carefully worked through each element of the definition of genocide in article II of the Convention on the Prevention and Punishment of the Crime of Genocide. With regard to the definition of the protected group, it had shared the view set out by the Commission in its commentary to the articles of the draft

code of crimes against the peace and security of mankind that the intention "must be to destroy at least a substantial part of a particular group" [para. 198].²³⁵

12. As for the question whether the deliberate destruction of the historical, cultural and religious heritage of the protected group could constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group, the Court had agreed with the Commission's conclusion in its report to the General Assembly on the work of its forty-eighth session that the *travaux préparatoires* for the Convention on the Prevention and Punishment of the Crime of Genocide clearly showed that the definition of genocide was limited to the physical or biological destruction of the group.²³⁶ Consequently, the Court had found that the attacks on the cultural and religious property of the Bosnian Muslims could not be considered to be a genocidal act within the meaning of article II of the Convention.

13. The applicant had argued that the specific intent could be inferred from the pattern of atrocities. The Court had been unable to accept that argument. The specific intent had to be convincingly shown by reference to particular circumstances; a pattern of conduct would not be accepted as evidence of the intent's existence unless genocide was the only possible explanation for the conduct concerned.

14. The Court had made 45 pages of findings of fact on various atrocities, and while it had jurisdiction only to make determinations as to genocide, it was clear that it saw those as crimes against humanity. In many cases, Bosnian Muslims had been the victims of those acts, but with one exception, the evidence did not show that those terrible acts had been accompanied by the specific intent to destroy the group as such. The exception was Srebrenica, where, the Court had found, there was conclusive evidence that killings and acts causing serious bodily or mental harm targeting the Bosnian Muslims had taken place in July 1995. Those acts had been directed by the main staff of the Republika Srpska Army (VRS), who had possessed the specific intent required for genocide. That finding had been consistent with the jurisprudence of the International Tribunal for the Former Yugoslavia.

15. Having determined that genocide had been committed at Srebrenica [para. 297 of the judgment], the next step had been for the Court to decide whether the respondent was legally responsible for the acts of the VRS. That question had two aspects, which the Court had considered separately. First, the Court had had to ascertain whether the acts committed at Srebrenica had been perpetrated by organs of the respondent, i.e. by persons or entities whose conduct was necessarily attributable to it because they were in fact the instruments of its action. If that question was answered in the negative, the Court had then to decide whether the acts in question had been committed by persons who, while not organs of the respondent, had nevertheless acted on the instructions of, or under the direction or control of, the respondent. The Commission's draft articles on the responsibility of States had been central to the Court's reasoning [para. 385 of the judgment].

²³⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. (2) of the commentary, p. 136.

²³⁵ *Yearbook ... 1996*, vol. II (Part Two), p. 45 (para. (8) of the commentary to article 17 (Crime of genocide)).

²³⁶ *Ibid.*, pp. 45–46 (para. (12) of the commentary).

16. With regard to attribution on the basis of the conduct of the respondent's organs, the Court had noted that the rule, which was one of customary international law, was reflected in article 4 of the Commission's draft articles on State responsibility for internationally wrongful acts.²³⁷ Applying the rule to the present case, the Court had had to determine whether the acts of genocide committed in Srebrenica had been perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia, as the respondent had been known at the time, under its internal law as it was then in force [para. 386 of the judgment]. Although there had been much evidence of direct or indirect participation by the official army of the Federal Republic of Yugoslavia, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica, the Court had found that it had not been proved before it that the army of the Federal Republic of Yugoslavia had taken part in the massacres at Srebrenica, nor that the political leaders of the Federal Republic of Yugoslavia had been engaged in preparing, planning or carrying out the massacres. Further, neither the Republika Srpska nor the VRS were *de jure* organs of the Federal Republic of Yugoslavia, since none of them had the status of organ of that State under its internal law. There had been no doubt that the Federal Republic of Yugoslavia had been providing substantial support to the Republika Srpska, and that one of the forms that this support had taken was payment of salaries and other benefits to some officers of the VRS; however, after very careful consideration, the Court had determined that "this did not automatically make them organs of the [Federal Republic of Yugoslavia]" [*ibid.*, para. 388].

17. The issue had also arisen as to whether the respondent might bear responsibility for the acts of the paramilitary militia known as the "Scorpions" in the Srebrenica area. On the basis of the materials submitted to it, the Court had been unable to find that the "Scorpions"—referred to in those documents as "a unit of Ministry of Interiors of Serbia"—had been *de jure* organs of the respondent in mid-1995. The Court had further noted that "in any event the act of an organ placed by a State at the disposal of another public authority should not be considered as an act of that State if the organ [had been] acting on behalf of the public authority at whose disposal it had been placed" [para. 389]. That finding recalled the language of article 6 of the Commission's draft articles on responsibility of States for internationally wrongful acts.²³⁸

18. The applicant had raised an argument that required the Court to go beyond article 4 of the Commission's draft article on State responsibility. It had submitted that the Republika Srpska, the VRS and the "Scorpions" must be deemed, notwithstanding their apparent status, to have been *de facto* organs of the Federal Republic of Yugoslavia at the relevant time and that all their acts in connection with Srebrenica had thus been attributable to the Federal Republic of Yugoslavia, just as if they had been organs of that State under its internal law. The Court had addressed that question in its 1986 judgment in the case concerning *Military and Paramilitary Activities in and*

against Nicaragua, where it had held that persons, groups of persons or entities could, for purposes of international responsibility, be equated with State organs, even if that status did not follow from internal law, provided that the persons, groups or entities acted in "complete dependence" on the State, of which they were ultimately merely the instrument [see paragraphs 398–400 of the judgment of the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*]. In the *Genocide* case, the Court had found that while the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, and between the Yugoslav army and the VRS, had been strong and close in previous years, they had, at least at the relevant time, not been such that the Bosnian Serbs' political and military organizations were to be equated with organs of the Federal Republic of Yugoslavia. There had been some differences over strategic options at the time, which provided evidence that the Bosnian Serb leaders had some qualified, but real, margin of independence.

19. The Court had therefore found that the acts of genocide at Srebrenica could not be attributed to the respondent as having been committed by its organs or by persons or entities wholly dependent upon it [para. 413 of the judgment].

20. The Court had then had to address the second question, namely, that of attribution of the genocide at Srebrenica to the respondent on the basis of direction or control. On that subject, the applicable rule, which was also one of customary law, had been laid down in article 8 of the Commission's draft articles on responsibility of States: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."²³⁹ That provision had had to be understood in the light of the Court's jurisprudence on the subject, particularly that in the 1986 *Military and Paramilitary Activities in and against Nicaragua* judgment, which had set out the test of showing that "effective control" had been exercised or that the State's instructions had been given in respect of each operation in which the alleged violations had occurred, and not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations. The applicant had questioned the validity of applying that test by, *inter alia*, drawing attention to the 1999 judgement of the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case. There, the Appeals Chamber had not followed the *Military and Paramilitary Activities in and against Nicaragua* case test and had instead taken the view that acts committed by Bosnian Serbs could give rise to international responsibility of the Federal Republic of Yugoslavia on the basis of the "overall control" exercised by the Federal Republic of Yugoslavia over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts had been committed in breach of international law had been carried out on the instructions of the Federal Republic of Yugoslavia or under its effective control.

²³⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–42.

²³⁸ *Ibid.*, pp. 43–45.

²³⁹ *Ibid.*, pp. 26 and 47.

21. The President of the International Court of Justice wished to step back from the details of the law of State responsibility to reflect for a moment on the fragmentation of international law, a topic that had recently occupied the Commission. The Study Group chaired by Mr. Koskeniemi had completed its work at the previous session, and in its final report it had used the contrast between the *Military and Paramilitary Activities in and against Nicaragua* and *Tadić* cases as “an example of a normative conflict between an earlier and a later interpretation of a rule of general international law”.²⁴⁰ The report stated that such conflicts created two types of problem: first, they diminished legal security because legal subjects were no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly; and secondly, “they put legal subjects in an unequal position *vis-à-vis* each other”.²⁴¹

22. Perhaps the Court’s handling of the “*Nicaragua/Tadić*” issue in its judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* would assuage the concerns of those who saw a normative conflict between ICJ and International Tribunal for the Former Yugoslavia. The former had given careful, and respectful, consideration to the Appeals Chamber’s reasoning but had ultimately decided to follow the *Nicaragua* test. The reasoning had been meticulously laid out in its judgment. First, the Court had observed that International Tribunal for the Former Yugoslavia “was not called upon in the *Tadić* case, nor [was] it in general called upon, to rule on questions of State responsibility, since its jurisdiction [was] criminal and extend[ed] over persons only” [see paragraph 403 of the Court’s decision]. Thus, the Tribunal’s judgement had addressed an issue which was not indispensable for the exercise of its jurisdiction.

23. Secondly, insofar as the “overall control” test was employed to determine whether an armed conflict was or was not international, the sole question which the Appeals Chamber of the International Tribunal for the Former Yugoslavia was called upon to decide, it might well be that the test was applicable and suitable; the ICJ had been careful not to take a position on that point in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, as that was not a question at issue before it.

24. Thirdly, the Court had observed that logic did not require the same test to be adopted in resolving the two issues, which were different: the degree and nature of a State’s involvement in an armed conflict on another State’s territory which was required for the conflict to be characterized as international could very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.

25. Lastly, the Court had noted that the “overall control” test had the major drawback of broadening the scope of

State responsibility well beyond the fundamental principle governing the law of international responsibility: namely, that a State was responsible only for its own conduct, in other words the conduct of persons acting, on whatever basis, on its behalf. In that regard, the “overall control” test was unsuitable, for it stretched too far the connection that must exist between the conduct of a State’s organs and its international responsibility.

26. While deciding to follow its settled jurisprudence on the test of “effective control”, which was also the Commission’s position in its commentary to article 8 of the draft articles on responsibility of States,²⁴² the Court had emphasized that it attached the utmost importance to the factual and legal findings made by the International Tribunal for the Former Yugoslavia in ruling on the criminal liability of the accused before it and had taken the fullest account of the trial and appellate judgements of the Tribunal dealing with the events underlying the dispute.

27. Turning back to the findings on responsibility, Ms. Higgins said the Court had held that there was insufficient proof that instructions had been issued by the federal authorities in Belgrade or by any other organ of the Federal Republic of Yugoslavia, to commit the massacres in Srebrenica, still less that any such instructions had been given with specific genocidal intent. Some of the evidence on which the applicant had relied related to the influence, rather than the effective control, that President Milošević had or had not had over the authorities in Pale. It had not established a factual basis for attributing responsibility on the basis of direction or effective control.

28. The Court had then come to the question of the respondent’s responsibility on the ground of the ancillary acts enumerated in article III of the Convention on the Prevention and Punishment of the Crime of Genocide, including complicity. The Court had referred to article 16 of the Commission’s draft articles on responsibility of States, reflecting a customary rule, which provided that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.²⁴³

29. That provision concerned a situation characterized by a relationship between two States, which was not the precise situation before the Court. Nonetheless, the Court had thought it still merited consideration. The Court had found no reason to make any distinction of substance between “complicity in genocide”, within the meaning of article III (e) of the Convention on the Prevention and Punishment of the Crime of Genocide, and the “aid or assistance” of a State within the meaning of article 16 of the Commission’s draft articles on responsibility of States. In other words, to ascertain whether the respondent was responsible for “complicity in genocide”, the ICJ had had to examine whether organs of the respondent State,

²⁴⁰ A/CN.4/L.682 [and Corr.1] and Add.1 (see footnote 28 above), para. 50.

²⁴¹ *Ibid.*, para. 52.

²⁴² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 47–49.

²⁴³ *Ibid.*, pp. 27 and 65.

or persons acting on its instructions or under its direction or effective control, had furnished “aid or assistance” in the commission of the genocide in Srebrenica. The Court had found that the respondent had supplied quite substantial aid of a political, military and financial nature to the Republika Srpska and the VRS, long before the tragic events at Srebrenica, and that the aid had continued during those events. However, a crucial condition for complicity had not been fulfilled. The Court had felt that it lacked conclusive proof that the respondent’s authorities, when providing that aid, had been fully aware that the VRS had had the specific intent characterizing genocide as opposed to other crimes.

30. The Court had proceeded to consider the duty to prevent genocide enshrined in article I of the Convention on the Prevention and Punishment of the Crime of Genocide. The Court had held that the respondent could and should have acted to prevent the genocide, but that it had not. The respondent had done nothing to prevent the Srebrenica massacres despite the political, military and financial links between its authorities and the Republika Srpska and the VRS. It had therefore violated the obligation in the Convention on the Prevention and Punishment of the Crime of Genocide to prevent genocide. In that regard, the Court had made a clear distinction in law between complicity in genocide and the breach of the duty to prevent genocide. The Court had found it conclusively proven that the leadership of the Federal Republic of Yugoslavia, and President Milošević above all, had been fully aware of the climate of deep-seated hatred that had reigned between the Bosnian Serbs and the Muslims in the Srebrenica region, and that massacres were likely to occur. They might not have had knowledge of the specific intent to commit genocide, but it must have been clear that there had been a serious risk of genocide in Srebrenica. Moreover, the legal issue had not been whether, had the respondent made use of the strong links it had with the Republika Srpska and the VRS, the genocide would have been averted. The Court had referred to article 14, paragraph 3, of the Commission’s draft articles on responsibility of States, a general rule of the law of State responsibility, which provided that:

The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.²⁴⁴

31. That obviously did not mean that the obligation to prevent genocide came into being only as the perpetration of genocide commenced; that would be absurd, since the whole point of the obligation was to prevent, or attempt to prevent, the occurrence of the act. A State’s obligation to prevent, and the corresponding duty to act, arose at the instant the State learned of, or should normally have learned of, the existence of a serious risk that genocide would be committed, which it could contribute to preventing. If the genocide was not ultimately carried out, then a State that had omitted to act when it could have done so could not be held responsible *a posteriori*, since the event which must occur for there to be a violation of the obligation to prevent had not happened.

32. The final obligation that the Court had considered was the duty to punish genocide. The Court had held that the respondent had violated its obligation to punish the perpetrators of genocide, including by failing to cooperate fully with the International Tribunal for the Former Yugoslavia with respect to the handing over of General Ratko Mladić for trial.

33. What the Court had sought to do in its judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case had not only been to answer the claims before it, but also systematically to elaborate and explain each and every element in the Convention on the Prevention and Punishment of the Crime of Genocide, believing, exceptionally, that the latter task was also a necessary contribution to clarity and understanding. The Court regarded as extremely important, for the future, its views on the bases of State responsibility for genocide and the precise circumstances in which the duty of a State to prevent genocide in another State’s territory might arise, as well as the scope of that duty.

34. Six weeks previously, the Court had delivered its judgment on preliminary objections in the *Ahmadou Sadio Diallo* case between Guinea and the Democratic Republic of the Congo, which concerned the diplomatic protection of nationals residing abroad. It was a classical case, perhaps, in the Western context, but somewhat unusual as an intra-African case. Mr. Diallo, a Guinean citizen, had resided in the Democratic Republic of the Congo for 32 years, founding two companies: an import–export company and a company specializing in the containerized transport of goods. Each company was a *société privée à responsabilité limitée* (private limited liability company) of which Mr. Diallo was the *gérant* (manager) and, in the end, the sole *associé* (partner). Towards the end of the 1980s, the two companies, acting through their *gérant*, had initiated various steps, including judicial ones, in an attempt to recover alleged debts from the State and from publicly- and privately-owned companies. On 31 October 1995, the Prime Minister of Zaire (as the Democratic Republic of the Congo was then called) had issued an expulsion order against Mr. Diallo and on 31 January 1996, he had been deported to Guinea. The deportation had been served on Mr. Diallo in the form of a notice of refusal of entry (*refoulement*) on account of “illegal residence” (*séjour irrégulier*).

35. Since only States could be parties to cases before the ICJ, Mr. Diallo’s case had come to the Court by virtue of Guinea seeking to exercise diplomatic protection of Mr. Diallo’s rights. The Court had recalled that under customary international law, as reflected in article 1 of the Commission’s draft articles on diplomatic protection,

diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.²⁴⁵

²⁴⁴ *Ibid.*, pp. 27 and 59.

²⁴⁵ *Yearbook ... 2006*, vol. II (Part Two), p. 26, para. 50.

36. The Court had further observed that “[o]wing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights” [para. 39 of the judgment].

37. The Democratic Republic of the Congo had challenged the Court’s jurisdiction on two bases: first, that Guinea lacked standing because the rights belonged to the two Congolese companies, not to Mr. Diallo; and second, that neither Mr. Diallo nor the companies had exhausted local remedies. The Court had examined whether Guinea had met the requirements for the exercise of diplomatic protection under customary international law in terms of three categories of rights: Mr. Diallo’s individual rights, his direct rights as *associé* in the two companies and the rights of those companies, “by substitution”.

38. In terms of Mr. Diallo’s individual personal rights, the central issue had been that of his expulsion and whether local remedies had been exhausted. The President noted that, in 2004, the Commission had included the topic of “Expulsion of aliens” in its programme of work,²⁴⁶ and that the second²⁴⁷ and third reports (A/CN.4/581) of the Special Rapporteur, Mr. Maurice Kamto, were being considered during the current session. As the third report stated, the right to expulsion was not absolute and must be exercised in accordance with the fundamental rules of international law. The report further observed that a study of national and international treaty practice and case law revealed several general principles that were applicable to the expulsion of aliens, including non-discrimination, respect for the fundamental rights of the expelled person, the prohibition of arbitrary expulsion, the duty to inform and the procedure prescribed by the law in force (para. 27).

39. Such principles were indeed the backdrop to the Court’s consideration of whether local remedies had in the *Ahmadou Sadio Diallo* case been exhausted, or had needed to be exhausted, when the expulsion had been characterized by the Government as a “refusal of entry” when it was carried out. Refusal of entry was not appealable under Congolese law. The Democratic Republic of the Congo had contended that the immigration authorities had “inadvertently” used the term “refusal of entry” instead of “expulsion”, and that the error had not been intended to deprive Mr. Diallo of a remedy. (Under Congolese law, expulsion was subject to appeal.) The Court had decided that the Democratic Republic of the Congo could not rely on its own error to claim that Mr. Diallo should have treated the measure taken against him as an expulsion [para. 46 of the judgment]. Incidentally, the Special Rapporteur’s second report on the expulsion of aliens observed that no real terminological distinction could be drawn among the three terms “expulsion”, “escort to the border” (*reconduite à la frontière*) and “refoulement”.²⁴⁸ The Commission might wish to review that in the light of the particular facts of the *Ahmadou Sadio Diallo* case.

²⁴⁶ *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.

²⁴⁷ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

²⁴⁸ *Ibid.*, pp. 246–247, para. 170.

40. The Democratic Republic of the Congo had maintained that even if the expulsion had been treated as a “refusal of entry”, Mr. Diallo could have asked the competent authorities to reconsider their position, and that such a request would have had a good chance of success. As the commentary to article 14 of the draft articles on diplomatic protection stated, such administrative measures could be taken into consideration for purposes of the local remedies rule only if they were aimed at vindicating a right and not at obtaining a favour. That was not the situation in the present case.²⁴⁹

41. With respect to the second category of rights—Mr. Diallo’s direct rights as *associé* in the two Congolese companies—Guinea had referred to the *Barcelona Traction* case and article 12 of the draft articles on diplomatic protection, which provided that

[t]o the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.²⁵⁰

The Court had thus found that Guinea did indeed have standing with respect to Mr. Diallo’s direct rights as *associé* of the two companies.

42. The most complicated issue in the *Ahmadou Sadio Diallo* case had been the question whether Guinea could exercise diplomatic protection with respect to Mr. Diallo “by substitution” for the two Congolese companies. Guinea had sought to invoke the Court’s dictum in the *Barcelona Traction* case, where the Court had referred to the possibility of an exception, founded on reasons of equity, to the general rule of the protection of a company by its national State, “when the State whose responsibility is invoked is the national State of the company” [para. 92 of the judgment of 1970 in the *Barcelona Traction* case]. In the four decades since the *Barcelona Traction* case, the Court had not had occasion to rule on whether, in international law, there was indeed an exception to the general rule “that the right of diplomatic protection of a company belongs to its national State” [*ibid.*, para. 93], which allowed for the protection of the shareholders by their own national State “by substitution”, and on the reach of any such exception.

43. Guinea had pointed to the fact that various international agreements, such as agreements for the promotion and protection of foreign investments and the 1965 Convention on the settlement of investment disputes between States and nationals of other States, had established special legal regimes governing investment protection, or that provisions in that regard were commonly included in contracts entered into directly between States and foreign investors. After careful consideration, the Court had found that this specific treaty practice could not with certainty be said to show that there had been a change in the customary rules of diplomatic protection; it could equally show the contrary, namely that special arrangements had been made to step outside of those customary rules of diplomatic protection. The Court had further observed that, “[i]n that context, the role of diplomatic protection

²⁴⁹ *Yearbook ... 2006*, vol. II (Part Two), para. (5) of the commentary, p. 45.

²⁵⁰ *Ibid.*, p. 42, para. 50.

somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative” [see paragraph 88 of the judgment in the *Ahmadou Sadio Diallo* case].

44. Ultimately, the *Ahmadou Sadio Diallo* case had not proved to be a second *Barcelona Traction* case. After carefully examining State practice and decisions of international courts and tribunals, the Court had been of the opinion that those did not reveal—at least at the present time—an exception in customary international law allowing for protection by substitution.

45. The Court had then considered the separate question of whether customary international law contained a more limited rule of protection by substitution, such as that set out in article 11, subparagraph (b), of the Commission’s draft articles on diplomatic protection, which would apply only where a company’s incorporation in the State having committed the alleged violation of international law “was required by it as a precondition for doing business there”.²⁵¹ However, that very special case had not seemed to correspond to the one before the Court, as it had not been satisfactorily established that the incorporation of Mr. Diallo’s two companies in the Democratic Republic of the Congo would have been “required” of their founders to enable them to operate in the economic sectors concerned. Therefore, the question of whether draft article 11, subparagraph (b), did or did not reflect customary international law had been, rather deliberately, left open. The Court had thus found Guinea’s application inadmissible insofar as it concerned the protection of Mr. Diallo in respect of alleged violations of the rights of his two companies [para. 95 of the judgment].

46. In terms of pending cases, after an “African year” with cases between the Democratic Republic of the Congo and Uganda, the Democratic Republic of the Congo and Rwanda, and Guinea and the Democratic Republic of the Congo, the Court was now in a “Latin American and Asian year”. It had concluded hearings in two cases involving Nicaragua, and they were both under deliberation: one was a case on the merits concerning a maritime delimitation with Honduras; the other was a case at the preliminary objections stage with Colombia, which concerned territorial sovereignty and maritime delimitation questions. In November 2007, the Court would hear arguments on the merits in a case between Malaysia and Singapore concerning sovereignty over certain areas.

47. Three new contentious cases had been filed with the Court the previous year (one of which had later been withdrawn), as well as two requests for the indication of provisional measures. In April 2007, Rwanda had filed an application relating to a dispute with France.²⁵² Rwanda sought to found jurisdiction on article 38, paragraph 5, of the Rules of Court, which meant that no action would be taken in the proceedings unless and until France consented to the Court’s jurisdiction in the case. The Court’s current docket therefore stood at 12 cases.²⁵³ It had been

making every effort to maximize the throughput of its work. It was committed to a very full schedule of hearings and deliberations, with more than one case in progress at all times. It was also endeavouring to hear cases very shortly after they became ready: there was only one case on the docket which was ready for hearings but yet to be scheduled, the rest of the pending cases still being at the written pleadings stage. In terms of strategic planning, the Court tried to establish a calendar that had a mixture of preliminary objections and merits cases, always bearing in mind that if a request for provisional measures was made, it had priority under the Statute of the International Court of Justice.

48. The agenda of the International Law Commission was also a busy and interesting one. The topics the Commission was examining were of the highest relevance for the Court, which would continue to follow the former’s work with great interest. On behalf of the Court, Ms. Higgins wished the Commission every success in the work of its fifty-ninth session.

49. The CHAIRPERSON thanked the President of the International Court of Justice for her skillful statement. Speaking in his personal capacity as a member of the Commission, he noted that the work of the Court was very much focused on substantial written pleadings. However, at the end of the first round of oral hearings, it was sometimes the practice of the Court to put questions to the parties, which could be answered during the second round of oral hearings or within a few weeks after the closure of the hearings. In the former case, the second round of oral hearings was to some extent guided by the Court and the parties had some notice of where its concerns lay. He asked whether it would be practicable for the Court to put such questions on the basis of the written pleadings prior to the commencement of the oral hearings.

50. Ms. HIGGINS (President of the International Court of Justice) said that the Court had from time to time considered whether it would be possible to request the parties to provide useful information at an earlier stage of the proceedings, and had not yet decided against such a procedure once and for all. However, for the time being, it felt that such a practice might place undue constraints on the way a party wished to present its case and give too early an indication of the Court’s thinking. The working methods of the Court were regularly reviewed by the Rules Committee and she would refer the interesting idea raised by Mr. Brownlie to that body.

51. Ms. ESCARAMEIA, referring to the President’s recent statement in another forum that the International Court of Justice had not taken up regional court judgments invoked by States because the issues involved were not precisely the same, asked how the Court would react to a ruling handed down by a regional or *ad hoc* court if the issue were the same, and whether it would respect such a ruling. She wondered whether the topic had been discussed within the Court. The Commission, in its work on fragmentation of international law, had decided to defer consideration of the relationship between courts for the time being. She asked whether the Court would find any work undertaken by the Commission in that regard useful. Secondly, in view of the criticism from some

²⁵¹ *Ibid.*, p. 39.

²⁵² *Official Records of the General Assembly, Sixty-second session, Supplement No. 4 (A/62/4)*, Report of the International Court of Justice, 1 August 2006–31 July 2007, paras. 87–88.

²⁵³ *Ibid.*, para. 9.

quarters that the Court should have been more active in pursuing documents in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, she wondered whether any consideration had been given to making the Court's procedures more proactive and prosecutorial when criminal issues were at stake.

52. Ms. HIGGINS (President of the International Court of Justice) said it was extremely important that all courts respect each other and avoid any pretensions to exclusiveness or hierarchy. The International Court of Justice must, however, consider technical rules and determine what ruling might or might not apply and in what circumstances. All courts could gain much from each other. It was, therefore, hard to give a generalized answer to Ms. Escarameia's first question. For example, in a series of cases relating to the Vienna Convention on Consular Relations, in which the United States of America had been the respondent, the Court's attention had been drawn to a decision by the Inter-American Court of Human Rights that the right of an individual under article 36 of the Convention to have his or her consul notified in the event of his or her arrest or detention was a human right. The International Court of Justice had not said that the Inter-American Court had erred; it had simply determined that the individual right concerned was contained within a treaty, and whether it was classified as a human right was immaterial. In that case, therefore, the ICJ had made no use of the other court's ruling. On the other hand, in current litigation before the Court between Colombia and Nicaragua, reference was being made to a decision by the Central American Court of Justice relating to a treaty the status of which was open to question. That treaty was currently being translated and studied by the ICJ and it remained to be seen what the outcome would be.

53. With regard to the question whether the Court might change its procedures, she said that the answer was in the negative. The Court would not become more prosecutorial. It was a long-established practice that the parties were required to bring evidence before the Court. They had ample time to gather what material they understood would be needed, as a matter of law, in order to persuade the Court to decide in their favour. She understood that more cases would be coming before the International Tribunal for the Former Yugoslavia, but the ICJ had made it clear that its own decisions had been based on the evidence that had been before it at the time.

54. Ms. XUE, after commending the excellent work by the International Court of Justice over the past year, said that she had been particularly happy to hear of the importance attached by the Court, and the parties to disputes before it, to the Commission's work, which had made a great contribution to the development of international law. Indeed, it would be no exaggeration to say that the Commission's work had been put into practice since the adoption of the draft articles on responsibility of States for internationally wrongful acts, which were extensively quoted in the literature. The Court itself had cited some of the draft's provisions as evidence of customary international law. Ms. Xue wondered how the President viewed that phenomenon.

55. Ms. HIGGINS (President of the International Court of Justice) said it would not be correct to say that the Court regarded the totality of the draft articles on responsibility of States as customary international law; to date, it had had occasion only to pronounce on, agree with and find useful formulations in certain specific articles, to which it had referred as customary international law. Difficulties might arise when the Court came to deal with a provision that might be regarded by scholars as a development of international law rather than a restatement of it. A case in point was article 11, subparagraph (b), of the draft articles on diplomatic protection, regarding which she believed there was general agreement that the provision did not represent customary international law. It would be for the Commission to decide whether it represented a useful development of that area of law. Within limited parameters, however, the draft articles on responsibility of States had at times proved very useful.

56. Mr. DUGARD said he wished to raise the question of the collection and presentation of evidence. There had been a time when the Court had not been called on to deal with complicated factual disputes, but that situation had changed over recent years, with such cases as that concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* or the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case. In the latter case, the Court had been confronted by decisions of the International Tribunal for the Former Yugoslavia, which had had before it evidence gathered over many years, whereas the International Court of Justice had been called on to make a determination largely on the basis of written pleadings, without many oral statements by witnesses. He wondered whether the President thought that the Rules of Court needed to be changed to provide for such cases, or whether she believed it could manage with its somewhat outdated rules on evidence gathering.

57. Ms. HIGGINS (President of the International Court of Justice) said that the Court's procedures were clearly not sufficiently detailed to deal with the whole range of issues before it. In the run-up to the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, there had been a moment when it had seemed that one of the parties might request a very substantial number of witnesses, and the Court had started internal deliberations on drawing up rules covering that specific case in order to give the parties equal time to present their case as they wanted. The issue had lost its urgency when the number of witnesses had reverted to more manageable dimensions, but there were undoubtedly many lessons to be learned with regard to evidence. There might be a case for an initial round of evidence including affidavit evidence, followed by oral evidence at cross-examination. One anomaly had arisen in recent years: technical evidence had come to be deployed as part of a legal team's argument rather than being regarded as expert evidence available to be examined by one side or the other. That approach could give rise to its own problems, particularly if the expert spoke at a late stage of the proceedings, thus giving the opposing side no opportunity to respond. In short, the answer to Mr. Dugard's question was that the situation was not satisfactory and would have to be dealt with.

58. Mr. HASSOUNA said that, over recent years, the Court had issued a number of important judgments in cases of a highly political nature, such as the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case or the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and he wondered whether such rulings had contributed to the settlement of the disputes concerned, and whether the parties—or the United Nations, as the case might be—had implemented them. It was a fundamental issue related to the enforcement of international law.

59. Ms. HIGGINS (President of the International Court of Justice) said that the degree of compliance with the Court's judgments was surprisingly high. Since the Court had come into being, there had been only a handful of cases—a maximum of five—in which the parties' compliance had not been immediately forthcoming. She would prefer to focus on other cases, like the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, in which the Libyan Arab Jamahiriya, having been found not to be lawfully in occupation of the Aouzou Strip for 40 years, had started to withdraw within two months of the Court's ruling. She also recalled with pleasure the sight of the Ambassadors of Cameroon and Nigeria informing the General Assembly of their satisfaction at the successful outcome of the case concerning the *Land and Maritime Boundary Between Cameroon and Nigeria*. She did not recognize a distinction between the bulk of the Court's rulings, which were often very difficult for the parties to comply with, and cases that might generally be thought of as highly politicized. As for the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the Court had made some specific requests especially with regard to the return of General Mladić to the International Tribunal for the Former Yugoslavia, and she would confine herself to saying that she was confident that its findings were playing their part on the diplomatic scene. As for United Nations activity in the context of the advisory opinion cited, the Secretariat had drawn up a list of the property taken and had carried out identifications and evaluations; however, whether that would help in the medium term she was not in a position to say. Ultimately, however, an advisory opinion was just that; the question of compliance did not arise.

60. Mr. CAFLISCH noted that, in its consideration of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the Court had made a distinction between the tests to be applied in criminal international law and other matters. If he understood correctly, the International Tribunal for the Former Yugoslavia had, in the *Tadić* case, applied the "overall control" test, whereas the International Court of Justice had applied the stricter test of direct effective control. In view of the general principles of criminal law, which provide for far stricter standards to be applied, he would have expected the Court's test to be less rather than more strict. He did not seek to criticize the Court's actions but rather to draw attention to a paradox.

61. Ms. HIGGINS (President of the International Court of Justice) said that the Court had at no stage considered

what the respective tests should be for a criminal case and for a major violation of international law in an inter-State case. Rather, it had considered what the test should consist of under contemporary customary international law, in the context of State responsibility. In that connection, it had considered whether it should apply the not unreasonable test applied by another court that was deciding, in a case that was not State-to-State, whether a given conflict was international. The Court was therefore not comparing criminal law with non-criminal law, but instead had been comparing two different issues in international law for which a test was required. In doing so, it had acted according to precedent.

62. The CHAIRPERSON thanked Ms. Higgins, on behalf of the Commission, for her heartening statement and her helpful replies to members' questions.

Responsibility of international organizations (continued) (A/CN.4/577 and Add.1–2, sect. B, A/CN.4/582, A/CN.4/583, A/CN.4/L.720)

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

63. Mr. OJO said he shared the concern of the Special Rapporteur that the draft articles on responsibility of international organizations had not sufficiently taken into account the great variety of such organizations, even though that variety could hardly justify any serious criticism of the draft articles, since, in spite of their differences, all such organizations shared characteristics, values and other attributes which qualified them as international organizations in the first place. Similarly, the differences in size, language, race, culture, resources, wealth and power among States had not inhibited any concerted effort to establish general rules governing their relations with each other.

64. Draft article 2 defined an international organization only in relation to its legal personality. It was silent, however, on the effect of recognition on that personality, which was crucial, particularly where it related to the effect of non-recognition of an organization by an injured State on the organization's responsibility towards that State. It might safely be argued that recognition was presumed as soon as the act or omission of the organization affected the injured State, inasmuch as, even under the now archaic constitutive theory, recognition was a tool employed by a State to confer a benefit, material or otherwise, on the State being recognized. Non-recognition could not be a justification for exposing the non-recognizing State to any form of injury. A more accurate view was that the legal personality of an organization was an objective fact that flowed naturally from its nature, purpose, functions and, sometimes, the size of its membership.

65. Draft articles 31, 32 and 33 emphasized the need to impose on international organizations the duty to continue to perform an obligation even after it had been breached, the justification being that such a duty was a legal consequence not of the breach but of the fact that the original obligation remained. That position was

correct and merely restated the universal principle that a party should not benefit from its own wrongful act. Only when a breach effectively terminated an obligation did the duty of continued performance cease. It might be necessary to insert a proviso to that effect in draft article 32.

66. The duty to make reparation for injury caused by an internationally wrongful act was as well established for international organizations as for States, following the principle that a party was presumed to intend the natural consequences of its act. As a legal person under international law, an international organization should bear full responsibility for its acts or omissions, but such responsibility should not extend to its constituent members, whether States or other international organizations. For the purposes of the organization's responsibility, its members were unknown to international law, even though they themselves were usually international persons. The response by a preponderant number of delegations to the Sixth Committee, as noted in paragraph 28 of the report, that there was no basis for holding members of an international organization liable for injury caused by that organization was therefore a statement of the obvious. Draft article 34 also reflected general practice among States and international organizations.

67. The 1986 Vienna Convention had codified the settled rule that a party could not rely on its internal rules as a justification for the non-performance of its obligations under international law. The Special Rapporteur sought, however, to introduce a departure from that rule in cases where the relations between an organization and its member States and organizations so dictated. If, however, members of an international organization were not liable for an injury caused by that organization, the organization should not rely on internal rules or relations between it and its members to shirk its obligation under international law. The reasons offered by the Special Rapporteur for such a departure from established principles were not convincing and draft article 35 should be reworded accordingly.

68. With regard to draft article 40, there was no justifiable reason why reparation made by an international organization for injury caused by an internationally wrongful act should not follow the form already established by State practice, as reflected in the draft articles on responsibility of States for internationally wrongful acts.²⁵⁴ However, satisfaction by way of an expression of regret, formal apology or other modality was useful, where it was acceptable to the injured party; and there appeared to be no reason why such satisfaction should be given only insofar as an injury could not be made good by restitution or compensation (draft art. 40, para. 1). The draft article should be reworded to make satisfaction a full and final reparation for an injury, even where restitution or compensation would have been appropriate, provided that such satisfaction was acceptable to the injured party.

69. With regard to draft article 41, paragraph 2, although payments of interest on principal sums naturally ran until

the date the obligation to pay was discharged, there was nothing to stop the party entitled to the interest from waiving it. He therefore suggested the addition of a proviso to that effect.

70. Turning to draft article 44, he said that, since no derogation was permitted from peremptory norms of general international law, it was in the interests of the international community to ensure that any derogation from or breach of such norms was terminated as soon as possible. Draft article 44 imposed a duty of cooperation to that end on States, but, since States already had such an obligation under the draft articles on responsibility of States, the draft article should restrict itself to imposing a duty on international organizations to cooperate with States in achieving that end.

71. Mr. McRAE said that, as a new member of the Commission, he found it somewhat difficult to comment on the fifth report on responsibility of international organizations since a thorough understanding of the issues raised in it required familiarity with earlier debates on previous reports. His trepidation was increased by the fact that Mr. Pellet had described his views on reservations to treaties as "positivist", while Mr. Brownlie had characterized his statement on the effects of armed conflict on treaties as "post-modernist heresy". He was therefore unsure how his opinion on the responsibility of international organizations would be perceived.

72. The Special Rapporteur and the Commission were right to embark on the challenging task of establishing rules on the responsibility of international organizations by first determining whether the concepts of responsibility found in the draft articles on responsibility of States were appropriate for international organizations. In the process, the Commission was both building on and contributing to the notion of international legal personality and how it applied to international organizations, by highlighting the way in which that concept had progressed from the somewhat qualified view of the legal personality of international organizations expressed in 1949 in the advisory opinion of the ICJ on *Reparation for Injuries* to the more absolute view propounded in its 1980 advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.

73. Some of the difficulties in that area were connected with the questions of how absolute the legal personality of international organizations should be and also to what extent it was necessary to look behind that personality and to deal not with the organization as such, but with the member States themselves. That question appeared to be implicit in some of the issues discussed at the previous meeting.

74. In paragraph 7 of his fifth report, the Special Rapporteur had responded to criticism that the rules developed to date took insufficient account of the great variety of international organizations by suggesting that this was a minor defect, because most of the rules adopted to date operated at a level of generality that did not make them appropriate only for a certain category of organizations. He had likewise suggested that a provision along the lines of draft article 55 of the draft articles on responsibility

²⁵⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

of States²⁵⁵ could possibly be added in order to exclude circumstances where an organization had particular or special rules governing its responsibility.

75. He agreed with Ms. Escameia that this response required further discussion. While it was true that some rules on responsibility would, in practice, apply only to certain organizations that operated in a narrow sphere of competence, the argument that the rules on responsibility operated only at a level of generality tended to break down when it came to the subject matter of the draft articles currently under consideration, in other words those on reparation and the provision of compensation. Those were obligations of potentially much greater specificity, and since any international organization could potentially violate some international obligation, the rules relating to reparation would potentially apply to any international organization. For that reason, the question whether those rules were appropriate for all organizations was important.

76. The incorporation of an article similar to draft article 55 on responsibility of States would not really go far enough; although it would preserve such particular rules as an organization might have on responsibility, it would not offer an answer to what might be the more problematic case of organizations possessing no rules at all and no procedures or capacity for dealing with the consequences of being held internationally responsible. The Commission might be creating rather than solving problems by treating smaller international organizations with limited capacities and processes for dealing with the consequences of international responsibility in the same way as the United Nations, an organization that could clearly handle issues of responsibility. In fact, the Commission might be formulating rules that would work admirably for some international organizations, but which would be unrealistic for many smaller organizations.

77. In that respect, the approach outlined by Mr. Pellet the previous day illustrated the flaw inherent in the Commission's logic. In starting with the principle that international organizations must be held responsible for their wrongful acts, then adding the principles that responsibility entailed the obligation to provide reparation for the wrongful act and that member States not responsible for the internationally wrongful act of the organization were not responsible for compensating the injured party when the organization was not in a position to do so, the Commission was faced with a dilemma, since some organizations simply might not be in a position, either constitutionally or financially, to provide reparation.

78. If the Commission's model of an international organization was the United Nations, the World Bank, the European Community or even the World Trade Organization, those rules on responsibility and reparation could work, but in the case of a much smaller organization, with less institutional capacity, the likelihood of reparation being provided might be rather remote.

79. Although Mr. Pellet's solution, that of crafting draft articles imposing on member States an obligation

to provide international organizations with the means (which presumably would mean funding in many cases) to allow them to fulfil their international responsibilities, seemed to be a good idea in theory, it was questionable whether it was really practical. What would be the consequences of such an obligation and would it mean that injured parties were more likely to receive compensation for the internationally wrongful acts of organizations? Would a member State that was reluctant to accept an independent obligation to compensate for an international organization's wrongful act for which it was not responsible be willing to achieve what was, in effect, the same result by accepting an obligation to furnish the organization with the means to provide compensation?

80. An approach treating all international organizations in the same way would probably run into problems. It was understandable that member States did not wish to be independently responsible for providing injured parties with compensation for organizations' actions for which they bore no responsibility as a State, and that position seemed all the more defensible in the case of large multi-lateral organizations where the actions of the organization could be more readily distinguished from those of the States themselves and the organization might be in a position to provide redress. That would not, however, be true of many international organizations.

81. The crucial issue was therefore the extent to which States could hide behind the "corporate veil" of an international organization, with the result that a party injured by a wrongful act of the organization went uncompensated. Mr. Pellet's proposal was an attempt to avoid that predicament by imposing on States an obligation to act within the organization to ensure that reparation was provided. A possible alternative solution would be to distinguish between different organizations, or different types of organizations. Would it not be more appropriate to have differing rules on responsibility, at least as far as reparation was concerned, given that organizations themselves differed vastly in scope, mandate and capacities?

82. It might be advisable to revisit the whole question of whether member States bore direct responsibility to provide reparation when the scope, capacity and institutional structure of an organization made the provision of reparation difficult, if not impossible; it could well be that in such cases, the member States should bear an obligation to compensate. Of course that approach conflicted with the notion of legal personality and was contrary to the ideas put forward by the Institute of International Law in 1995, but the Institute's report had been concerned with international organizations as a whole.²⁵⁶ It was questionable whether looking behind the legal personality of a more limited group of organizations would produce undesirable consequences—such as active interference by States in the working of the organization—of the magnitude predicted by the Institute of International Law.

²⁵⁵ *Ibid.*, pp. 30 and 140.

²⁵⁶ "The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties", Institute of International Law, *Yearbook*, vol. 66, Part I, Session of Lisbon (1995), Paris, Pedone, 1995, pp. 251 *et seq.*

83. Another way of tackling the obligation to provide reparation would be in terms of the subject matter of the wrongs committed. The practice of international organizations was a useful guide in that context. He sympathized with the Special Rapporteur, who was dealing with limited practice and with criticism—often from those who were in a position to provide information on practice, but who were not doing so. Two striking facts emerged from the report: first, notwithstanding the lack of practice, Governments seemed to believe that international organizations should be held responsible for their wrongful acts; secondly, the cases where responsibility was most commonly acknowledged involved the treatment of individuals by international organizations, with regard either to the wrongful treatment of employees or to injuries to individuals in the course of peacekeeping operations. Perhaps wrongs committed in relation to individuals formed an identifiable category of responsibility which could itself be subject to some more specific treatment, in the same way as breaches of obligations under contemporary norms, regarding which the Special Rapporteur had formulated specific draft articles.

84. He had raised those questions, not because he was in fundamental disagreement with the Special Rapporteur over the draft articles he had produced in the past, or in his fifth report, but because he thought that the issue of the breadth of application required more debate in the Commission. While one law professor's fantasy about the Commission's approach to the topic, to which the Special Rapporteur had alluded the previous day, did not, unfortunately, reflect reality, the concern that the Commission was ignoring the variety of organizations and the diversity in their abilities to address questions of responsibility, especially the specific problem of reparation, was one that deserved fuller discussion.

85. Mr. PELLET, responding to Mr. McRae's comments, said that the paucity of material supplied by international organizations when they had been requested to illustrate their practice in the field of responsibility was probably due more to the absence of such practice than to any unwillingness to provide examples.

86. Mr. McRae had asserted that some international organizations might be unable to provide reparation for constitutional or financial reasons, but in his own opinion, those were two entirely different matters. There was no need to spend time examining constitutional obstacles, since it was plain that international organizations were responsible for their wrongful acts and had to provide redress. There was no reason why they, any more than States, should find shelter behind their constitutions. His practical and financial concerns were prompted by the fact that no international organization had the resources to offer reparation if it caused substantial injury or damage.

87. He feared that Mr. McRae was indeed a positivist rather than a post-modernist, since it was not the Commission's task to ascertain whether member States were prepared to be held directly or indirectly responsible for the wrongful acts of an international organization to which they belonged. Their responsibility in that event was governed by objective rules of international law.

88. Lastly, he still maintained that treating international organizations differently according to their size and functions was a bad idea. Should States be treated differently depending on whether they were large or small, rich or poor? Of course not; States were responsible because they had legal personality under international law, and when they caused injury through an internationally wrongful act, they therefore had to provide compensation. He failed to see why a different reasoning should be applied in the case of international organizations. Moreover, he was profoundly disturbed by the idea of varying levels of responsibility contingent on the size of the organization. In point of fact, the dangers should not be overstated: a very large organization such as the United Nations, which engaged in intensive practical activity, was far more likely to cause substantial damage than a small organization with one specific function and few resources. Hence he saw no other solution than the one he had outlined the previous day.

89. Mr. GAJA (Special Rapporteur) said he wished immediately to clarify a number of points raised by Mr. McRae. First, the term "special rules", if it were incorporated in a future article along the lines of draft article 55 on responsibility of States, would not refer only to the relevant rules of the organization, but could also refer to special rules developed by international law for certain types of organization such as integration organizations. The real question was whether a reference to something which was as yet unexplored was really helpful.

90. Secondly, when looking at remedies, it was necessary to bear in mind that it could not be taken for granted that member States were never responsible. At the previous session, the Commission had adopted some draft articles which were relevant to some of the issues raised by Mr. McRae. One of those draft articles provided for the responsibility of member States when they had led the injured party to rely on their responsibility, a situation which was likely to arise when the organization causing the injury was very small and member States played a more prominent role in its activities.

91. Mr. NOLTE said it was impossible, at the current stage, to expect the Special Rapporteur to propose more highly differentiated rules given the relative lack of discernible practice. In general, he endorsed the draft articles although, like Mr. McRae, he was uncertain whether future practice would bear out all the abstract rules which had been formulated.

92. He wished to draw the Commission's attention to what he considered to be a lacuna. In 2005, the Commission had provisionally adopted a draft article 16 (now 15), entitled "Decisions, recommendations and authorizations addressed to member States and international organizations",²⁵⁷ which had been based on the Special Rapporteur's third report²⁵⁸ dealing with the responsibility of an international organization in connection with the act of a State or another international

²⁵⁷ *Yearbook ... 2005*, vol. II (Part Two), p. 47, para. 206.

²⁵⁸ *Ibid.*, vol. II (Part One), document A/CN.4/553.

organization. According to that draft article, an international organization incurred responsibility not only if it adopted a decision which bound member States to commit an internationally wrongful act, but also if it issued recommendations and authorizations to do so. That provision raised the obvious question of whether an international organization should bear the same amount of responsibility for wrongful acts committed on the strength of a recommendation or authorization as for those resting on a binding decision. The Special Rapporteur had broached that question in paragraph 43 of his third report, where he had concluded that “since the degree of responsibility concerns the content of responsibility, but not its existence, the question should be examined at a later stage of the present study”.

93. The time had come to deal with that important issue, as the Commission was currently debating the content of responsibility. He would have expected the Special Rapporteur to address the matter in the context of draft article 42 concerning contribution to the injury. That draft article should play a much more important role than its counterpart in the draft articles on responsibility of States, namely, draft article 39,²⁵⁹ because the responsibility of an international organization was often accompanied by the additional or contributory responsibility of another State or international organization, precisely because of the division of labour which international organizations made possible. The draft articles on responsibility of international organizations should therefore include some general guidance as to the distribution of responsibility, at least with respect to acts stemming from such different categories of sources of authority as binding decisions and mere recommendations.

94. Such guidance should bear in mind the fact that States were not generally held responsible for instigating an internationally wrongful act committed by another State. Unless there were pertinent reasons to the contrary, the situation should not be fundamentally different for international organizations. It was doubtful whether there was always justification for holding international organizations responsible for making their recommendations in the first place. If, however, the Commission thought that it could identify such a rule, it should make it clear that the responsibility was relatively limited in comparison to that of the States which had actually committed an internationally wrongful act on the basis of that recommendation. His opinion in that respect had been confirmed by the statement of the President of the International Court of Justice regarding the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, in which she had emphasized that the strict standard of responsibility as formulated in *Military and Paramilitary Activities in and against Nicaragua* meant responsibility for actual acts and not responsibility for some form of general influence or control. There was no reason to impose stricter standards of responsibility on international organizations than on States.

95. Mr. Nolte did not endorse Ms. Escameia’s argument that non-State actors should be covered by the draft articles and he also disagreed with Mr. Pellet’s submission that member States had a duty to provide an international organization with the means to fulfil its obligations arising from its international responsibility. In that connection he, too, had a positivist streak and was of the opinion that the Special Rapporteur had convincingly demonstrated that such a duty had not been accepted in international practice to date, and, indeed, had been openly contradicted thereby. On the other hand, it might be advisable to give some consideration to Mr. McRae’s suggestion that exceptions might be allowed for certain kinds of organization.

96. He recommended that the draft articles should be referred to the Drafting Committee, subject to the reservations he had just expressed.

97. Mr. GAJA (Special Rapporteur) said he wished to make it clear that the text of draft article 15 did not follow the proposal he had put forward in his third report, because the Commission had taken a different view. Draft article 15 made an international organization’s responsibility for an internationally wrongful act committed by a State conditional upon the fact that, when the State had carried out the act in question, it had relied on the organization’s recommendation or authorization. The situation was complicated by the simultaneous responsibility of various subjects. Draft article 42 concerning contribution to the injury would not be the appropriate place to address the question of degrees of responsibility, because it dealt with the contribution of the injured party and not that of the many subjects involved in the commission of the act. As the issue of levels of responsibility had not been covered in the draft articles on responsibility of States in view of its complexity, he would therefore welcome suggestions from other members.

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

[Agenda item 1]

98. Mr. CAFLISCH (Chairperson of the Working Group on effects of armed conflicts on treaties) announced that the Working Group comprised Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue and Mr. Yamada, together with Mr. Brownlie (Special Rapporteur) and Mr. Petrič (Rapporteur), *ex officio*. He invited any other members who wished to join the group to do so.

The meeting rose at 1 p.m.

²⁵⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 29 and 109.

* Resumed from the 2929th meeting.

2934th MEETING

Wednesday, 11 July 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Responsibility of international organizations (*continued*) (A/CN.4/577 and Add.1–2, sect. B, A/CN.4/582, A/CN.4/583, A/CN.4/L.720)

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the fifth report of the Special Rapporteur on responsibility of international organizations (A/CN.4/583).

2. Mr. DUGARD said that he had two brief comments on the draft articles proposed by the Special Rapporteur in his fifth report. The first concerned draft article 40, paragraph 3, on satisfaction, which provided that satisfaction “may not take a form humiliating to the responsible international organization”. That wording, which had not appeared in the provision on satisfaction initially proposed by the Special Rapporteur during the elaboration of the draft articles on responsibility of States, had been introduced at the request of many Commission members who had argued that small States in particular might be compelled to apologize in the most humiliating manner and that this would infringe on their sovereignty.²⁶⁰ It might be asked whether the same considerations were valid for international organizations. In his view, an international organization that acted wrongfully should be required to apologize, even if doing so was humiliating for it. It was in that context that one ought to view the apologies made by the former Secretary-General, Mr. Kofi Annan, in respect of the failure of the United Nations to act in Srebrenica²⁶¹ and Rwanda.²⁶² There was no need for article 40, paragraph 3, but if the Commission decided to retain it, the final proposition should be deleted. In the case of the United Nations, apologies, if they were made, should probably come from the Security

²⁶⁰ See *Yearbook ... 2000*, vol. II (Part Two), pp. 35–36, paras. 154–160. See draft article 37 and the commentary thereto, as adopted on second reading by the Commission, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 105–107.

²⁶¹ See the Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica (A/54/549).

²⁶² See the Letter dated 15 December 1999 from the Secretary-General addressed to the President of the Security Council (S/1999/1257), transmitting the report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda.

Council, the highest executive body of the Organization. In any case, that situation illustrated the need to distinguish between various organizations.

3. Secondly, with regard to draft article 44, paragraph 2, he said that international organizations should be bound by a positive obligation, namely to declare a situation to be unlawful and to call upon States not to recognize it or render aid or assistance in maintaining that situation. That had been United Nations practice on numerous occasions, whether in Katanga in 1960, in Rhodesia in 1965 or with regard to the bantustans of South Africa, the invasion of Cyprus by Turkey, the annexation of Jerusalem by Israel and the invasion of Kuwait by Iraq. It should therefore be indicated that international organizations were under an obligation to declare such a situation unlawful. Silence might be interpreted as approval. Article 44, paragraph 2, must therefore be reconsidered.

4. The CHAIRPERSON, speaking in his capacity as member of the Commission, said that he had reservations about the idea that the Security Council might make apologies or give some form of satisfaction. It was conceivable that, as part of its responsibilities under Chapter VII of the Charter of the United Nations, the Security Council might take positions on the validity of the acts of States, but it would be troubling to see it in a sense applying remedies, because it was not a court of law.

5. Ms. XUE, responding to a comment made by Mr. Dugard regarding article 40, paragraph 3, said that it had been the Chinese member of the International Law Commission who, during the elaboration of the draft articles on responsibility of States, had proposed the insertion, in the provision presented by the Special Rapporteur, of wording stipulating that satisfaction could not take a humiliating form.²⁶³ At the close of the nineteenth century, the representative of China, which had been defeated in a war, had been ordered by representatives of the victorious State to kneel down before that State’s flag. The Chinese people had never forgotten that humiliating episode, yet it could not be said that China was a “small State”. It was inconceivable that someone might wish to impose such a humiliation on the representative of an international organization, and that should not be permitted. Thus article 40, paragraph 3, was not without merit in the context of international organizations.

6. Mr. DUGARD thanked Ms. Xue for her comments, but said that he found it difficult to imagine that a Secretary-General of the United Nations or a high official of the European Union could be compelled to kneel before the flag of any State. A distinction between States and international organizations seemed justified in that regard. As to the comment by the Chairperson, he observed that the Security Council could very well formulate apologies in a situation arising under Chapter VII of the Charter of the United Nations. In any case, the whole question needed to be given further consideration.

7. Mr. PELLET said that if article 44 was changed in line with Mr. Dugard’s wishes to indicate that international

²⁶³ *Yearbook ... 1984*, vol. I, 1865th meeting, statement by Mr. Ni, p. 306, para. 20.

organizations should, when they could, take positive action to put an end to a serious breach stemming from a peremptory norm of international law, it seemed to suggest *a contrario* that article 44, paragraph 1, was being interpreted as meaning that the cooperation required of States pursuant to article 41 of the draft articles on responsibility of States for internationally wrongful acts²⁶⁴ might only be passive. He was therefore opposed to the proposed change, but thought that it should be stressed in the commentary that in such situations international organizations must, like States, take all measures at their disposal to put an end to the breach.

8. Mr. DUGARD said that he fully concurred with Mr. Pellet, but it was precisely because international organizations should be under a positive obligation that article 44, paragraph 2, ought to be reconsidered; in its current form, it implied that international organizations could simply do nothing.

9. Mr. FOMBA said that the Special Rapporteur's methodological approach did not appear to raise any deontological problems, but if it did, it was important to be cautious and realistic. He endorsed paragraph 7 of the report, in which it was noted that "most, if not all, articles that the Commission has so far adopted on international responsibility, whether of States or of international organizations, have a level of generality that does not make them appropriate only for a certain category of entities". As to the definition of an international organization (paras. 8–9 of the report), and in particular its central constituent element in the context of responsibility, namely international legal personality, the Special Rapporteur was perhaps right in his reluctance to embark upon a theoretical or in-depth analysis of the link that existed or might exist between recognition of the international organization, its legal personality and its international responsibility. Thus, the proposal "that the draft articles should consider recognition of an international organization on the part of the injured States as a prerequisite of its legal personality and hence of its international responsibility" (para. 9) was open to criticism and should not be approved. It was enough to recall that such a subordination of the legal personality of an international organization was contrary to the idea that every international organization was endowed with an international legal personality from the moment it came into being, in accordance with the definition proposed during the work on the codification of the law of treaties. The ICJ had upheld that fundamental proposition in its 1949 advisory opinion on *Reparation for Injuries*, and he referred in that connection to the dissenting opinion of Judge Krylov, according to whom "[i]t is true that the non-member States cannot fail to recognize the existence of the United Nations as an objective fact" (p. 48 of that opinion).

10. The question raised in paragraph 27 as to whether States should be required to assist the international organization in providing compensation for damages which the latter caused was not theoretical either. It arose, for example, when the reparation claimed included compensation

exceeding the organization's financial means. The desire to have an effective and functional reparation mechanism was a good justification for such a solution, but no clear-cut policy had been established in that regard. Accordingly, either the Commission should forgo consideration of the question or, conversely, it should take it up but should do so *de lege ferenda*. Such an approach would run counter to the Special Rapporteur's conclusion in paragraph 30 that "no additional obligation should be envisaged for member States". A number of proposals had been made in that connection. Mr. Pellet had suggested a specific approach, namely the obligation of member States to give the international organization the means to meet its obligations in respect of responsibility. Mr. McRae had proposed a case-by-case approach based on a clearly established classification of international organizations. Such an approach was not necessarily easy or useful. Nevertheless, the Commission should consider closely all proposals that might prove relevant.

11. In the note dated 24 June 1970 from the Director General of the IAEA, referred to in paragraph 41 of the fifth report, the distinction made between "satisfaction" and "reparation properly so called" was erroneous, because the former was merely a form of the latter.

12. He shared the Special Rapporteur's view, expressed in paragraph 37 of the report, that it would be unwise and impractical to widen the scope of obligations considered to include obligations towards subjects of international law other than States or international organizations.

13. The draft articles did not pose any particular difficulty. To the extent that they were modelled on the articles on responsibility of States, it would be pointless to look for differences where they did not exist. That would probably facilitate the Drafting Committee's work, which would be limited to a purely formal exercise.

14. A number of questions should be addressed in greater depth, in particular the financial independence of international organizations, which was an important way of ensuring the effectiveness of their legal personality. Specific cases in which international organizations could not meet their financial obligation to make reparation for damages should also be identified. In addition, it was important to consider cases in which the international organization was handicapped by the non-payment or delayed payment of member States' contributions and to look into the legal basis of a possible obligation on the part of member States in such cases. The relationship between a possible differentiated approach to the extent of the international organization's responsibility based on the legal nature of the action that was the origin of the wrongful act and the question of a possible additional responsibility of member States should also be examined.

15. He was in favour of referring all the draft articles to the Drafting Committee.

16. Mr. HMOUD commended the Special Rapporteur on the quality of his fifth report, in which the approach that had been taken to responsibility of States was applied to international organizations. Given the opinions of States and organizations, together with the jurisprudence

²⁶⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 29 and 113–114.

on the question, there seemed to be no reason to follow a different approach and create separate general rules on the consequences of a wrongful act by an international organization. An international organization which committed a wrongful act was responsible for repairing its consequences in the same manner as a State.

17. The question, then, was what happened when an organization was unable to provide reparation to the injured party. Were the member States under a direct obligation to repair the injury on behalf of the organization or to provide sufficient support for it to repair the damage caused? As the organization had a legal personality, it should, as a general rule, be the responsible party, without the responsibility of member States being incurred. Likewise, the organization should not be able to rely on its internal rules to avoid the consequences of its internationally wrongful acts. On the other hand, the injured party should have the chance to cite the rules of the organization that were part of international law if such rules provided that the member States were under an obligation to make reparations. The Commission should look into the possibility of elaborating a draft article to that effect.

18. The proposal that member States should be required to provide sufficient financial support to the international organization to enable it to assume the consequences of its internationally wrongful act would constitute unnecessary interference in the internal affairs of the organization and its relations with member States. The language of draft article 34 made it sufficiently clear that the organization was under an obligation to make reparations in accordance with international law. The organization and its members must find the means to allow the organization to meet its obligations to make reparations; otherwise, the organization's existence and functioning would be jeopardized. On the question of how an organization could meet its financial obligations if it was dissolved, he thought that the same rules should be applied as were applicable when the organization had an obligation *vis-à-vis* any third party.

19. On the subject of serious breaches by international organizations of obligations stemming from peremptory norms of international law, the view appeared to be emerging in the international community that those organizations should be treated as States insofar as the obligation to cooperate to end the breach was concerned. In that connection, paragraph 63 of the report should be taken into account in the commentary to the draft articles. An international organization should not be required to cooperate to bring a serious breach to an end unless such cooperation was in keeping with its mandate and rules.

20. Mr. CAFLISCH endorsed the content of the fifth report and its draft articles. He agreed in particular with the idea that distinctions should not be made between types of international organizations, for example "ordinary" and "supranational" organizations, or between political and technical or universal and regional organizations. He fully concurred with the explanations concerning draft article 34 provided in paragraphs 19 to 31 of the report, and supported in particular draft articles 43 and 44, on serious breaches of international law by international organizations and their consequences. Draft articles 31 to 44 could be referred to the Drafting Committee.

21. He would convey a number of editorial suggestions on draft articles 31 and 35 directly to the Special Rapporteur and also wished to correct the French version of paragraph 25 of the report, which stated the exact opposite of what was meant. The phrase in question should read: "*La pratique des organisations internationales est abondante en matière de réparation des conséquences dommageables d'un fait illicite, encore que cette réparation soit souvent accordée ex gratia ...*".

22. He agreed with Mr. Nolte on the need to resolve the question of responsibility of international organizations in respect not only of their acts and decisions, but also of their recommendations and authorizations. Like Mr. Pellet, he thought that it would be useful to stipulate in one way or another that the States members of an international organization should give the organization the means to bear the consequences of its wrongful behaviour.

23. Mr. SABOIA thanked the Special Rapporteur for his fifth report. He doubted whether it was appropriate to extend the concept of countermeasures to international organizations, a question that had been raised in paragraph 3 of the report. In certain cases expressly foreseen in their rules, international organizations could legally take measures against a State or another organization which was in breach of an international obligation, but such measures would constitute sanctions rather than countermeasures.

24. He took a positive view of the suggestion to reconsider a number of questions during the first reading of the draft articles, since the Commission could benefit from further observations and comments of States, international organizations and other sources; as an independent body of experts, the Commission would not, of course, be bound by such observations and comments.

25. He was in general agreement with the draft articles proposed by the Special Rapporteur and was in favour of their being referred to the Drafting Committee. He agreed with Ms. Escameia and Mr. Ojo that the phrase "Unless the rules of the organization otherwise provide" at the beginning of draft article 35 should be reviewed, because this wording made it too easy for the organization to use its rules as justification for failure to comply. Whereas in a strictly legal sense the responsibility of international organizations was separate from that of their member States, from a broader, more political point of view, member States were usually responsible for most of the policies and decisions that might in some cases lead an international organization to breach an international obligation or even a norm of international law. Mr. McRae and Mr. Pellet had addressed that question in their statements. Mr. McRae had argued that smaller and weaker institutions might find it difficult to comply with rules of responsibility and that in some cases member States should be made directly responsible. He personally thought that it would be very difficult to establish such a typology of international organizations, and he preferred Mr. Pellet's suggestion that a new article should be drafted to reflect the obligation of member States to provide the international organization with the means to compensate the injured party for its internationally wrongful act.

26. The CHAIRPERSON, speaking in his capacity as a member of the Commission, said that he was not opposed to the draft articles being referred to the Drafting Committee. However, he shared the view of members who were uneasy about the way in which the Commission had approached the problem of responsibility of member States in the case of an organization that did not have the means to provide adequate reparation.

The meeting rose at 11 a.m.

2935th MEETING

Thursday, 12 July 2007, at 10.10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Responsibility of international organizations (*continued*) (A/CN.4/577 and Add.1–2, sect. B, A/CN.4/582, A/CN.4/583, A/CN.4/L.720)

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON reminded members that, at the 2932nd meeting, Mr. Pellet had urged the Commission to incorporate in the draft articles an additional provision dealing with the obligation of member States of an international organization to provide the organization with means of effectively carrying out its obligations that might arise as a result of its responsibility. That proposal had now been circulated to the Commission in written form. He suggested that the Commission should first conclude its plenary debate on the fifth report of the Special Rapporteur, who would then sum up the debate. Following the possible referral of all or some of draft articles 31 to 44 to the Drafting Committee, the Commission could then turn to the consideration of Mr. Pellet's proposal.

It was so agreed.

2. Mr. VASCIANNIE commended the Special Rapporteur on the analytical manner in which he had broached the topic of the responsibility of international organizations in his insightful fifth report and on his skill in extracting guidance for the Commission from very limited practice.

3. Notwithstanding the wide variety of international organizations, to which reference was made in paragraph 7 of the report, he could think of five reasons why

they should not be classified in different categories for the purpose of formulating rules on their international responsibility, and why the approach adopted by the Special Rapporteur deserved support.

4. First, the rules on responsibility were pitched at a level of generality that encompassed organizations of varying sizes and forms. Secondly, there was next to no practice in the area of responsibility suggesting that there should be one set of rules for one class of organization and a different set for others. Such a differential approach would amount to progressive development and would be in need of clear policy support. Thirdly, if such an approach were adopted, what criteria would be used for classification? Would the criterion be the number of States members of the organization; the power of the member States; the size of the organization's budget; its longevity; its objectives; whether it aspired to regional or universal membership; or the degree of risk it was likely to incur? Some of those criteria cut in differing directions and would probably make the classification unworkable in practice.

5. Fourthly, since a differential approach had not been adopted in the sphere of State responsibility, the onus was on the proponents of classification to show why the approach adopted with regard to responsibility of States was inappropriate in the case of international organizations. Lastly, there appeared to be no convincing reason of principle for introducing a classification of international organizations for purposes of responsibility. While it had been suggested that such a classification might be helpful in the context of reparation, he was uncomfortable with that idea. Why should a poor organization be able to act without incurring responsibility, by passing on responsibility to its member States, while rich organizations would not be allowed to do so?

6. As for the issue of recognition of an international organization's legal personality by an injured State, discussed in paragraph 8 of the fifth report, he was of the opinion that an international organization owed responsibility to all States and all other organizations and not just to member States, or States which had recognized it. His reasons for reaching that conclusion could again be listed.

7. First, in principle, an international organization should be responsible for all its wrongful acts, irrespective of the political inclination or opinions of the injured State or organization (recognition being a political act). Secondly, it was unclear to whom a State should turn if it was wronged by an international organization it had not recognized. Trying to obtain reparation from the member States might prove problematic if some of them had not been recognized by the victim State. Moreover, member States might refuse to pay reparation to the victim State on the grounds that it had not recognized their organization. Thirdly, in the advisory opinion on *Reparation for Injuries*, recognition had not been a factor in determining objective personality for the purposes of a claim brought by the United Nations. The converse would appear to be logically true, so that recognition should not be a factor in determining objective personality in respect of liability for claims.

8. Lastly, he was uncertain whether the European Commission's comments quoted in paragraph 9 of the report had the implication ascribed to them by the Special Rapporteur. While the European Commission distinguished between member States, third States that recognized the organization and third States that did not to do so, it did not spell out the consequences of that distinction. It might be going too far to interpret the European Commission's position as meaning that "responsibility of an international organization would arise only towards non-member States that recognize it".

9. What would happen if the international organization could not afford to pay compensation for its wrong? In that situation, should international law pierce the institutional veil? Those against such action argued that an organization had its own legal personality and must, by extension, be responsible for its own liabilities, however incurred. They also submitted that it was the organization, as distinct from its members, that had committed the wrongful act and might point to municipal law analogies and the *Barcelona Traction* case in support of their contention that member States were not liable for the wrongful act of the organization.

10. Too much reliance on that line of argument could, however, lead to the evasion of responsibility or, worse, result in the victim being left without recourse. He was therefore inclined to support Mr. Pellet's suggestion that a legal duty should be imposed on States to pay reparation in some circumstances. He had initially considered the possibility of inserting hortatory language encouraging States to facilitate payment when the organization was unable to pay, but had subsequently reached the conclusion that such an approach would be inappropriate, given that States' treasuries rarely responded to soft law. What was important was that the system of responsibility should not leave an international organization's wrongful act unremedied.

11. On the matter of reparation (draft articles 37 to 42), there was a case for offering a victim State a choice between restitution and compensation in some instances. A Government whose embassy had been destroyed in State X might not wish to rebuild it and might prefer compensation. That situation did not appear to be covered by draft article 38 (a) or (b).

12. Moreover, there might also be a case for requiring the victim to take reasonable steps to mitigate the damage. Draft article 42 would take into account the victim's contribution to the injury, but it should be borne in mind that victims sometimes contributed to the level of the damage. Such a position could be justified by analogy with municipal law. Nevertheless, he had reservations about the reference to "omission" in that draft article, because that word implied that the State or international organization had a duty to avoid placing itself in a position where a wrong could be done to it.

13. In draft article 40, a reference to the concept of "abuse of rights" might obviate the need for the express statement that "satisfaction ... may not take a form humiliating to the responsible international organization". The matter of making a formal apology was in the realm of

lex ferenda and, although the Commission might well be guided by the draft articles on responsibility of States for internationally wrongful acts,²⁶⁵ great care would be needed because, almost by definition, if the proffering of a formal apology were to be made a legal requirement, that would not only be humiliating, but also a contradiction in terms, because it would diminish the apparent sincerity or value of the apology.

14. He also wondered whether, in draft article 44, it might be useful to include a provision to the effect that negotiations regarding a situation and the outcome of those negotiations did not constitute recognition of a situation created by a serious breach of an obligation under a peremptory norm of general international law, in order to facilitate solutions in situations where the law was only one of a number of factors to be considered. It might be helpful if the provision were also to indicate that provision of accommodation for individuals in unlawful situations did not necessarily imply that an organization was helping to maintain that situation. He had in mind the well-known case of the bantustan passports.²⁶⁶ If the international organization took the position that since bantustans were illegal, no legal consequences should arise from their actions,²⁶⁷ that placed individuals within the bantustans at a severe disadvantage. The rules on peremptory norms might therefore require some qualification in the context of the draft articles.

15. Mr. NIEHAUS said that the fifth report on responsibility of international organizations was an extremely clear and legally profound study of a topic of particular significance. Since it summarized work on the topic to date and drew attention to outstanding issues requiring further examination, it was also extremely helpful to new members at the beginning of the new quinquennium.

16. He was in agreement with the contents of the report. He, too, considered it vital not to succumb to the temptation of differentiating between various categories of organizations on the basis of whether they were universal, regional, political, technical and the like. The draft articles should maintain their general character in order to encompass all kinds of international organizations.

17. An international organization was emphatically responsible for the wrongful acts it committed and for the consequences of those acts. Draft article 34 was therefore particularly apposite. If an international organization was unable to make full reparation for the injury caused by an internationally wrongful act on its part, its member States or other member international organizations should be placed under an obligation to do so. Mr. Pellet's proposal in that regard therefore offered an appropriate solution which deserved the Commission's support. At some future date, it might also be advisable to consider whether international organizations which were members of other international organizations should be required to provide the latter with the means of meeting their obligations.

²⁶⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76 (see footnote 116 above).

²⁶⁶ See the advisory opinion of the ICJ in the *Namibia* case.

²⁶⁷ See General Assembly resolutions 3411 (XXX) D of 28 November 1975 and 31/6A of 26 October 1976.

18. He supported all the draft articles contained in the fifth report, although he had some difficulty with draft article 35, which would allow an organization to rely on its own rules as justification for failure to comply with obligations deriving from its relations with its members. Since, as Ms. Escarameia had pointed out, that provision would enable an organization to do whatever it liked, it would obviously conflict with the remainder of the draft articles and with the spirit of the report and should therefore be amended.

19. Mr. Nolte's ideas about a broader regulation of an international organization's responsibility were most interesting.

20. In conclusion, he said that in his view draft articles 31 to 44 should be referred to the Drafting Committee.

21. Mr. HASSOUNA said that the fifth report on responsibility of international organizations was clear, precise, comprehensive and informative for new members. The Special Rapporteur's task had been made all the more difficult by the lack of practice and case law on the subject. International organizations had increased in number, jurisdiction and importance in recent years and, for that reason, their comments were of great relevance to the Commission's review of the articles provisionally adopted on first reading, although clearly they should be regarded as merely informative and should not bind the Commission or influence its conclusions in any way. Although a number of provisions relating to the responsibility of States were reproduced in the draft articles on the responsibility of international organizations, he totally agreed with the Special Rapporteur that it should not be assumed that solutions applying to States were generally applicable to international organizations, because of the inherent differences between the former and the latter. While States had general sovereignty and defined rights and obligations, organizations had limited jurisdiction and did not possess sovereign rights and obligations. Despite those differences, it might have been wise, however, for the Commission to deal with the two questions of the responsibility of States and of international organizations together as one subject, since they obviously complemented each other.

22. Uncertainty as to whether the current draft articles took account of the great variety of international organizations had been prompted by legitimate concerns arising from the fact that some of the hundreds of existing international organizations were limited in membership, scope or functions, while others had universal membership, wide scope and broad powers. At the regional level, some organizations were of a mere technical nature, while others were regional arrangements under Chapter VIII of the Charter of the United Nations, with specific powers in the field of preserving regional peace and security. While he agreed that it would be impossible to take full account of such a wide variety of international organizations in the draft articles, he believed that the general rules applicable to all organizations should be combined with clauses making exceptions for certain organizations, such as the United Nations, that had special responsibilities to redress unlawful situations and end serious breaches of an obligation arising under a peremptory norm of general international law, within the meaning of draft article 44.

23. Another important issue that was sometimes overlooked was the responsibility of an international organization as distinct from that of its member States. While an international organization had an independent legal personality and should therefore assume full responsibility for its wrongdoing, in practice the decision-making process raised more complex issues. International organizations' decisions were often subject to the approval or acquiescence of their member States. In the United Nations, for instance, the implementation of Secretariat decisions on a number of sensitive issues, including peacekeeping operations in Bosnia and Herzegovina and Rwanda and sanctions regimes, had been monitored by the Security Council, the organ with primary responsibility for international peace and security. In those circumstances, it might be possible to conclude that all the parties involved bore joint responsibility for an unlawful act, though the nature of that responsibility—legal, political or moral—would certainly remain open to debate.

24. If an international organization was unable to make reparation, in the form of compensation, for the injury caused by an internationally wrongful act it had committed, member States, even those not responsible for the act, might be willing to make voluntary contributions in order to preserve the credibility of their organization. It was, however, doubtful whether member States would be prepared to accept a legally binding obligation to pay compensation for an act for which they were not responsible.

25. In concluding, he recommended that the draft articles contained in the fifth report be referred to the Drafting Committee.

26. Mr. MELESCANU said that the task of drawing up rules on the responsibility of international organizations was an extremely exacting one that would require much effort, notwithstanding the enormous body of work already accomplished on the draft articles on State responsibility for internationally wrongful acts. Although, at first sight, the existence of that text might appear to be an advantage, the Special Rapporteur had had to make a detailed analysis of each provision on responsibility of States in order to ascertain whether the provision in question was also applicable to the responsibility of international organizations. Even if the Special Rapporteur ultimately decided that a given provision should be replicated (and that did not mean simply transposing it), that would entail much more work than might at first sight be supposed. Criticism levelled at the Special Rapporteur on that score was therefore unjust.

27. The second difficulty stemmed from the specific nature of the subject matter of the draft articles. In his view, the responsibility of international organizations was a subject derived from public international law, a sort of halfway house situated midway between the responsibility of sovereign, independent States, which was based on well-established rules of customary law recently codified by the Commission, and the criminal responsibility of individuals. The special nature of the responsibility of international organizations called for specific solutions. That difficulty had been highlighted by Mr. Pellet in his statement and the new proposal he was shortly

to introduce. The fact of the matter was that international organizations had no assets other than those provided by their member States.

28. The third difficulty was that the notion of an international organization encompassed an enormous variety of organizations ranging from integration organizations such as the European Union to entities which amounted to no more than mechanisms for implementing certain international or other agreements. At the current stage of its deliberations, the Commission should concentrate on attempting to formulate general rules covering the responsibility of international organizations as a whole, rather than becoming bogged down in an examination of criteria for determining separate categories of organizations. However, he would not rule out such an approach at some point in the future, should attempts to establish a general regime fail.

29. The difficulties he had just outlined highlighted the importance of the Special Rapporteur's study, and he was in favour of referring the draft articles presented in the fifth report to the Drafting Committee.

30. One key question concerned reparation for injury occasioned by a wrongful act of an international organization. He fully agreed that member States could not be held responsible and that it was for the international organization itself to make reparation for any injury it caused. On the other hand, it had to be acknowledged that an international organization had no assets other than those provided by the contributions assessed from its member States. Even where it did have other sources of income—as in the case of wealthy bodies such as the International Telecommunication Union, or the World Intellectual Property Organization, which gained much revenue from fees for patent registration—the approval of member States through adoption of the budget was necessary in order to determine how financial resources were to be spent. It was all very well to lay down a rule that the international organization, not its member States, bore responsibility, but in practice it might turn out to be a dead letter; the right to reparation would be impossible to implement simply because international organizations had no real means of making reparation unless member States played a role. As usual, Mr. Pellet had put his finger on a truly crucial question. Indeed, it was probably the most important question of all, and the Commission must resolve it. In all other respects, the draft articles appeared to be progressing at a satisfactory pace.

31. One way forward was through Mr. Pellet's proposal. While it was better than nothing, it was not entirely satisfactory; for a start, what would happen if a State voted against an international organization's decision to make reparation? Surely it could not be obliged to contribute? Another possibility would be to recommend that all international organizations should create mechanisms acceptable to member States, providing for reparation for injury, but that was not an entirely satisfactory solution either. It would be difficult—if not impossible—for the United Nations to adopt amendments to the Charter of the United Nations on reparation for injury, and many other organizations would have enormous difficulty in creating such systems.

32. A third option would be to expand the relevant portion of the draft articles on two levels, perhaps with the addition of new provisions: first, provisions on the responsibility of international organizations for injury caused by wrongful acts; and second, on the basis of the Commission's work on international liability for injurious consequences arising out of acts not prohibited by international law, provisions to create an obligation for member States to compensate victims of wrongful acts of international organizations. Unless a generally acceptable scheme for reparation for injury was found, the draft articles would remain a highly stimulating intellectual exercise but one devoid of any practical impact in real life.

33. Mr. PETRIČ congratulated the Special Rapporteur on an excellent report and supported the referral of all the draft articles to the Drafting Committee. He welcomed the fact that the Special Rapporteur had based his conclusions and proposals on an analysis of the materials while keeping carefully in mind the parallel between the responsibility of States and that of international organizations. That had enabled him to strike an excellent balance and to highlight the truly essential differences between States and international organizations in the context of responsibility.

34. Both States and international organizations acted via their agents—physical persons or organs whose wrongful acts might give rise to claims of responsibility. That essential factor had been duly taken into account in the Special Rapporteur's report. He strongly supported the view expressed therein that special rules were needed for the responsibility of international organizations only in those areas where differences really existed; in other matters, the rules on responsibility of States were perfectly adequate.

35. While he fully supported the excellent and well-balanced draft articles on reparation, restitution, compensation and satisfaction, he thought that moral satisfaction should also be covered. There was no persuasive reason whatsoever why international organizations should not be bound, where necessary, to provide moral satisfaction to injured parties.

36. On the capability of international organizations to provide financial compensation for damage, he supported the view that member States should not automatically be liable for the financial obligations resulting from a wrongful act of an international organization. International organizations and member States were entirely different legal personalities and financial entities. Member States were bound by the rules of an international organization or its constituent instrument to secure the financial means necessary for all the activities of the organization. Thus, they were required to provide resources for unexpected expenses, and that would include compensation. Compensation should be treated like any other financial obligation of an international organization that arose unexpectedly and was not foreseen in the regular budget.

37. By way of example, he noted that the IAEA, of which he chaired the Board of Governors, had recently resumed its activities in the Democratic People's Republic of Korea. Inspectors had arrived and begun their work.

That new activity had been totally unforeseen, and the means to carry out those inspections, which had not been provided for in the regular budget, had had to be secured. Various possibilities had been explored—additional funding, reserve funding, and so forth—and ultimately the resources had been found. Paying compensation could constitute a similar challenge for which an organization would have to find the means. To provide for automatic responsibility on the part of member States for finding such financial means would, however, be going too far.

38. He supported the Special Rapporteur's view, set out in paragraph 4 of the report, that decisions on the topics the Special Rapporteur mentioned in paragraph 3 should be postponed. He would even suggest that they should be reconsidered, rather than postponed *ad kalendas grecas*. True, international organizations were varied and numerous, but they should be dealt with as a single category. General rules rather than different rules covering the differing responsibility of the various categories of international organizations should be formulated.

39. Ms. XUE commended the Special Rapporteur's fifth report which, as usual, was comprehensive, clear and enlightening, and reflected his painstaking efforts to collect useful materials and examples of the practice of international organizations. In principle, she endorsed the draft articles as submitted and supported their referral to the Drafting Committee.

40. International organizations, like sovereign States, should be held accountable for breaches of their international obligations, and the draft articles, especially those on the content of international obligations, dealt well with such situations. Yet when they were actually put into practice, difficulties might arise owing to the differences between sovereign States and international organizations.

41. The rule on non-repetition, for example, seemed quite reasonable and clear: if an international organization breached an international obligation, it should give assurances that the act would not be repeated in future. In actual practice, however, things were not so simple. The head of an organization might make such assurances on its behalf but was often not in a position to carry them through because everything was contingent on the organization's decision-making process. That might well be a primary rather than a secondary rule. When a State made assurances of non-repetition of a wrongful act, the way it would prevent such an act from recurring or what domestic measures would be taken were not a matter of international law. In the case of international organizations, though, it was the decision-making process, powers and rules of the organization itself that guaranteed that such an act would not be repeated in the future, and in most cases that was indeed a matter of international law. To take an extreme case, there had been heated debate about whether the United Nations should be held responsible for the genocide in Rwanda. Even if the Secretary-General had made assurances that such serious violations of international law would not be repeated, it was really up to Member States to make good on those assurances, in which political or moral as well as legal considerations might come into play, hence the importance of organizations' institutional decision-making processes.

42. Secondly, as with responsibility of States, consideration of the responsibility of international organizations started with the principles in the *Chorzów Factory* jurisprudence, namely, that full compensation must be provided for the injured party and the situation re-established which would have existed had the act not been committed [p. 47 of the judgment]. That rule was reasonable and should apply to international organizations as well, but the question then arose as to where international organizations were to find the necessary means to comply with it. Paragraphs 27 and 28 of the report indicated that most States did not accept the idea that additional funding should be made available to international organizations by their members to enable them to fulfil their obligation to compensate injured parties. It had since been suggested that States simply lacked the necessary political will. A more likely reason, however, was the complicated institutional decision-making processes that might be involved.

43. In 2003, when Ms. Xue had been accredited to the Organization for the Prohibition of Chemical Weapons (OPCW), she had learned of the recent termination of the appointment of the previous Director-General of the OPCW, Mr. Bustani. The injured party had appealed to the ILO Administrative Tribunal, seeking moral as well as financial damages, and had won his case. He had announced that if he was awarded moral damages, he would donate them to an OPCW technical aid fund, which he had duly done. Consequently, the organization had not had to provide compensation from its own budget and the problem of lack of funding had not had to be addressed.

44. An informal debate had subsequently arisen among member States as to whether those that voted against such a decision or abstained during the voting should have to help pay for the decision to be implemented. It had been argued that since the decision had been adopted by the organization, all members were bound by it, irrespective of their individual positions. In a domestic setting, if a State adopted a certain foreign policy, financial resources had to be mandated to ensure that the policy was carried out. However, it was not clear whether, in the context of an international organization, the member State had to alter its foreign policy position if that position was overruled. More consideration should be given to the differences between the obligations of sovereign States and of member States of international organizations in terms of the decision-making process.

45. In the context of satisfaction, the Special Rapporteur had given a number of examples of specific ways in which an organization could seek to make amends for a wrongful act. A representative of the organization could, for instance, express regret or apologize to the injured party. Very often, however, satisfaction was not sufficient, and compensation or restitution should follow. If the organization did not have the means to fulfil such an obligation, the same practical problem arose, and analogies with sovereign States were not very helpful.

46. In the *Bustani v. Organization for the Prohibition of Chemical Weapons* case she had mentioned earlier, there had been no relevant internal rules, or at least they had not been clear enough to help resolve the problem.

Paragraph 29 of the fifth report of the Special Rapporteur indicated that “the existence of an obligation for member States would entirely depend on the rules of the organization; when the obligation existed, it would benefit the injured party only indirectly”. In theory, that was a very sound and coherent analysis, but in practice, it was difficult to place so much emphasis on the importance of internal rules. Very often no such rules existed. Moreover, the distinction between direct and indirect responsibility of member States was unclear and unhelpful. For instance, paragraph 52 of the report referred to the apology made by the German Chancellor after the NATO bombing of the Chinese Embassy in Belgrade, but it was not clear on whose behalf he had apologized. When the United States had provided compensation for that bombing, it was hardly likely that it had done so pursuant to internal rules of NATO or on behalf of NATO. Rather, it had done so because United States military forces had been directly responsible for the act. That was the sort of problem that arose when the rules were tested by being put into practice.

47. With regard to draft article 36, she agreed in principle that the scope of obligations should be confined to certain categories of subjects of international law. The rules governing the responsibility of States were also very clear in that respect.

48. Ms. Escarameia had appeared to query the usefulness of the draft article. Its purpose was surely to draw a distinction between two types of cases: purely administrative matters, such as labour disputes; and genuine breaches of international obligations. Such a distinction was necessary if the rules governing the responsibility of international organizations were to be truly meaningful. However, it must be made clear in what circumstances such rules should apply. In that connection, paragraph 46 of the report provided a good example for the purposes of a case study.

49. Regarding draft article 40, she agreed that satisfaction should not take a form humiliating to the responsible international organization, but considered it unlikely that representatives of major international organizations such as NATO and the United Nations would ever be subjected to such treatments. She was more concerned about the situation of smaller international organizations. In the light of recent developments in human rights law and international law, clear legal guarantees must be provided to ensure respect for the responsible party which had committed a wrongful act.

50. Further reflection was required on draft articles 43 and 44, which covered the special category of responsibility for a serious breach of an obligation arising under a peremptory norm of general international law. While she was aware that in the area of State responsibility such a special category was an instance of progressive development endorsed by the academic world and States in general, she questioned the need for it in the context of intergovernmental organizations, where member States participated in the decision-making process. It should also be recalled that the United Nations had its own system of collective security as well as special guarantees for the protection of human rights.

51. In conclusion, she thanked the Special Rapporteur for his excellent report. The purpose of her remarks had been to offer a more practical perspective on the issues at stake.

52. Ms. ESCARAMEIA, clarifying her earlier remarks, said she had queried, not the usefulness of draft article 36, but, instead, the absence of a reference in its first paragraph to the obligations of the responsible organization owed to individuals. Several examples of cases of obligations owed to individuals were given in the report; in particular, reference was made to General Assembly resolution 52/247 of 26 June 1998, which dealt exclusively with compensation to individuals. Some mention of individuals should therefore be made in the draft article.

53. Ms. XUE said she understood Ms. Escarameia's concern. However, the draft article did not exclude the possibility of individual parties seeking redress, and thus the rule in question was appropriate.

54. Mr. DUGARD said he tended to agree with Ms. Xue: while there was no reason why major international organizations such as NATO and the United Nations should ever be required to make humiliating statements by way of apology, the situation was more difficult for smaller organizations. That raised the issue of whether the Commission should legislate for the lowest common denominator, namely smaller, less important international organizations, or whether it should be more concerned about the major ones.

55. Mr. PELLET said he failed to understand why it should be more hurtful for a small international organization to issue an apology than for a larger one. He was somewhat surprised that Ms. Xue, having quite rightly cautioned against treating sovereign States and international organizations in the same way, should then proceed to do exactly that. He was at a loss to understand why the issue had been raised in the first place: any international organization—large or small—that committed an internationally wrongful act must bear the consequences.

56. Ms. XUE said that the question at issue was satisfaction in a humiliating form, not an apology. She agreed with Mr. Pellet that small and large international organizations alike should give satisfaction. She was not concerned about the situation of major international organizations such as NATO and the United Nations, since no one would dare to treat them in a humiliating fashion, but about those in a weaker position. Even in the present civilized age, legal guarantees were still needed to protect them. She failed to see the logic of the argument that if there was no need to worry about the large international organizations, there was no need to worry about the smaller ones.

57. Mr. GAJA (Special Rapporteur), summing up the debate on his fifth report on responsibility of international organizations, thanked members of the Commission for their input. He understood how difficult, and sometimes frustrating, it had been for them to comment on the draft articles contained in Part Two only, without being able to touch on matters relating to those

contained in Part One, which had already been provisionally adopted. He hoped there would be an opportunity to discuss at least some of the key issues relating to Part One in the near future. Regrettably, such an opportunity would not be available with respect to the draft articles on responsibility of States, although some interesting suggestions made in the debate on responsibility of international organizations also seemed to be applicable to the responsibility of States. A case in point was Mr. Vasciannie's suggestion concerning mitigation of damage. However, he would be reluctant to take up such a suggestion with regard to the responsibility of international organizations only, while no decision on the ultimate fate of the draft articles on responsibility of States had yet been taken. While he appreciated the comments made relating to general issues, he would confine his remarks to those relevant to draft articles 31 to 44.

58. Mr. McRae had noted that practice relating to reparation by international organizations mainly concerned the treatment of individuals in respect of their employment or conduct during peacekeeping operations. By and large, something similar could be said of State practice relating to reparation. That did not mean, however, that reparation was not also due for other internationally wrongful acts. The purpose of stating the general principle of the *Chorzów Factory* case was to affirm that those who committed wrongful acts could not benefit from them, yet it did not necessarily follow that reparation would be sought or made whenever a wrongful act occurred: in international relations the main consideration was often not reparation, but the cessation of the wrongful act.

59. Mr. Ojo had referred to the possibility of waivers of claims, which was clearly implied and would be dealt with in Part Three, concerning implementation of responsibility.

60. Mr. Nolte had pointed out that the obligation to make reparation should reflect the extent of the international organization's involvement in the wrongful act when the responsibility arose in relation to the wrongful act of a member State. It was a difficult question in view of the number of different subjects that could be involved and their varying degrees of direct or indirect responsibility. The question had been left aside when the Commission had considered similar problems arising in relations between States. Perhaps there were more cases involving international organizations, but he found it difficult to imagine what kind of rules could be established on that issue. He nonetheless took the point that it would be useful to draw attention to the question in the commentary to Part Two and thereafter in Part Three.

61. While sympathizing with Ms. Escameia's view that the draft articles should cover reparation owed to subjects other than States and international organizations, he pointed out that the same argument could have been made for the draft articles on responsibility of States, which contained no such provision. Moreover, problems relating to the implementation of responsibility towards subjects other than States could not be considered separately from the responsibility of such subjects towards States and international organizations, and the time for an

overall consideration of matters relating to international responsibility was not yet ripe. The reason he had provided examples in the report of cases of reparation made to individuals was not only the absence of more directly relevant practice, but also the fact that, in many respects, it was likely that similar solutions would apply irrespective of whether the reparation was owed to a State or an individual.

62. There had been mixed reactions to Mr. Pellet's informal proposal for a new provision made orally at a previous meeting, the implication of which would be that it was an obligation under general international law for member States of international organizations to provide funds when the organizations did not have sufficient means to make reparation as required. There was no practice to support the existence of such an obligation. Furthermore, the overwhelming response of States to a similar question raised in chapter III of the Commission's report to the General Assembly on the work of its fifty-eighth session had been that there was "no basis for such an obligation"; he referred to paragraphs 27 and 28 of his report in that connection, and especially to footnote 24.

63. In his view, too much importance had been attached to the issue. As Mr. Hmoud had pointed out, an obligation to provide funds normally existed under the relevant rules of the organization concerned, although as Ms. Xue had quite rightly added, such an obligation was perhaps not always explicitly stated. There was a general obligation of cooperation and, when necessary, the funds must be found, as was borne out by the example of IAEA activities in the Democratic People's Republic of Korea referred to by Mr. Petrič. Cases in which it was impossible to make reparation were as likely to arise with international organizations as with States.

64. His preference would be to include a recommendation in the commentary to the effect that member States of international organizations should make appropriate arrangements according to their rules, along the lines suggested by Mr. Melescanu. If, however, the Commission decided that a general statement should be made regarding the obligation for member States to provide funds, he would of course follow the majority view, although he was not in favour of that solution. Such a concern might be expressed as a general proposition, although probably not in Part Two, as Mr. Pellet had suggested, because, as Mr. Petrič had pointed out, the situation did not only concern reparation when a breach occurred, but referred more generally to the obligations of organizations. There was no need to wait for a breach to occur before making provision for the funds. Thus, there were alternatives to Mr. Pellet's proposal that warranted consideration.

65. He disagreed with those members who had suggested that the proviso in draft article 35 implied the unlimited power of an international organization to flout its obligation to provide reparation. It was merely a reference to the relevant rules based on the constituent instruments of the organizations concerned. That interpretation should dispel all doubts expressed regarding the supposedly large loophole that the proviso might

open up. Whether or not explicitly stated in draft article 35, the possibility remained that the rules governing reparation could be modified in relations between an international organization and its member States; obligations *vis-à-vis* States which were not members and the international community would clearly not be affected. The difficulties in the decision-making process referred to by Ms. Xue could not be used as justification for failing to provide reparation to non-member States or the international community as a whole. When a breach occurred, there was an obligation to provide reparation which must be fulfilled.

66. While he agreed with Mr. Dugard that it was unlikely that satisfaction taking a form humiliating to the responsible international organization would ever be sought, he did not consider to be a sufficiently valid reason to justify the deletion of text in draft article 40, paragraph 3, particularly since there was a parallel reference in the draft articles on responsibility of States. Moreover, the deletion might lead to the *a contrario* argument that satisfaction in a humiliating form was permissible in the case of international organizations.

67. Contrary to Mr. Ojo's opinion, draft article 44 did not replicate draft article 41 on responsibility of States, which referred to breaches by States only. It should be noted that the Commission had been encouraged by the Sixth Committee to draft a provision on such types of breaches by international organizations. Under draft article 44, paragraph 1, international organizations had a duty to cooperate to bring to an end any serious breach, but as Mr. Hassouna had pointed out, that did not exclude the possibility that a specific international organization, such as the United Nations, might be required to do more under its relevant rules. The matter could be taken up in the commentary to the draft article, thereby perhaps allaying some of the doubts expressed by Mr. Dugard. It should also be noted that draft article 44 went further than the advisory opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, which merely said that "the United Nations ... should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime" [p. 200, para. 160 of the advisory opinion].

68. That concluded his summing up of the debate. He hoped there would be no objection to draft articles 31 to 44 being referred to the Drafting Committee, on the understanding that a new proposal by Mr. Pellet for an additional provision would be discussed separately.

69. The CHAIRPERSON said he took it that the Commission wished to refer draft articles 31 to 44 to the Drafting Committee.

It was so decided.

70. The CHAIRPERSON invited members to consider the text of a new provision proposed by Mr. Pellet, which read: "The member States of the responsible international organization shall provide the organization with the means to effectively carry out its obligations arising under the present Part."

71. Mr. PELLET, introducing his proposal, suggested that, if adopted, the new provision should be inserted either after draft article 42 or after draft article 44. He had already explained the reasons for his proposal at some length at the 2932nd meeting and, encouraged by expressions of support, had resolved to persevere with it. His main concern, shared by several other members, was based on various doctrinal and practical considerations.

72. In theory there was no doubt that, except as provided in draft article 29, international organizations alone bore responsibility for their acts or omissions. They had a legal personality, and it was not possible to "pierce the institutional veil", to use Mr. Vasciannie's words, which acted as a screen between their international responsibility and member States. The main consequence of such responsibility was the obligation to make reparation, and since the organization bore sole responsibility, it was the organization that must make reparation.

73. Nevertheless, those principles could, concretely, lead to an absurd situation: international organizations would have to provide reparation for internationally wrongful acts imputable to them, yet, when the injury in question exceeded the threshold of "normal" damages, for instance following the dismissal of a high-ranking official, they might not have the funds in their ordinary budget to fulfil that obligation. He stressed that, irrespective of whether the member States approved of the internationally wrongful act committed, his proposal was in no way intended to shift the obligation of reparation from the international organization to its member States.

74. The Special Rapporteur was opposed to the proposed draft article, largely on the basis of responses by States to the question put to them in paragraph 28 (a) of the Commission's report on its fifty-eighth session.²⁶⁸ The negative reaction by States was, however, entirely understandable, given the way in which the question was worded, namely: "Do members of an international organization that are not responsible for an internationally wrongful act of that organization have an obligation to provide compensation to the injured party, should the organization not be in a position to do so?" He agreed entirely: clearly, States were not bound to provide compensation to the injured party; their obligation—quite a different one—was to contribute to the budget of the international organization concerned. His proposed draft article did not seek to impose any such obligation on States. Far from being revolutionary, as several speakers had suggested, his proposal was in conformity with both *lex lata* and common sense—the law was not, after all, necessarily incompatible with common sense. All it aimed to do was to underline the fact that member States were obliged, by contributing to its budget, to provide an international organization with the means to discharge its obligations. In freely choosing to join the organization, a State accepted the risks and the advantages of participation and joint action.

75. Some speakers had suggested that his proposal ignored the decision-making process and thereby

²⁶⁸ *Yearbook ... 2006*, vol. II (Part Two), chap. III, p. 21.

undermined the concept of State sovereignty, but, just as national parliaments were obliged to provide the budgetary resources for the country's national obligations to be discharged, so they were bound by the obligations of an international organization of which they were members.

76. Listening to some speakers, he had had the impression of stepping back sixty years into the era of McCarthyism, when the United States had attempted to prevent the General Assembly and the International Labour Conference from honouring the awards of compensation made by the United Nations and ILO Administrative Tribunals to staff members who had been deemed sympathetic to communism. He drew the Commission's attention to three extracts from the advisory opinion by the ICJ, of 13 July 1954, on the *Effect of awards of compensation made by the United Nations Administrative Tribunal*. The Court had stated:

As this final judgment has binding force on the United Nations Organization as the juridical person responsible for the proper observance of the contract of service, that Organization becomes legally bound to carry out the judgment and to pay the compensation awarded to the staff member. It follows that the General Assembly, as an organ of the United Nations, must likewise be bound by the judgment. [p. 53]

Again:

The Court therefore considers that the assignment of the budgetary function to the General Assembly cannot be regarded as conferring upon it the right to refuse to give effect to the obligation arising out of an award of the Administrative Tribunal. [p. 59]

The Court had concluded that:

the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favour of a staff member of the United Nations whose contract of service has been terminated without his assent. [p. 62]

It followed that international organizations were legally obliged to discharge their financial obligations arising in the context of reparation and that member States had no choice but to enable them to do so. That is what would have happened in the *Bustani v. Organization for the Prohibition of Chemical Weapons* case, to which Ms. Xue had referred, but for Mr. Bustani's gracious gesture in returning the compensation he had been awarded to the OPCW. State sovereignty was not infringed in any way: nobody forced States to go through the formal procedure of joining an international organization. To paraphrase the judgment by the PCIJ in the case of the *S.S. "Wimbledon"*, State sovereignty was not encroached upon, but exercised.

77. Contrary to the Special Rapporteur's repeated assertion that there was no practice to support that position, he believed that a solution was always found in such cases. International organizations almost invariably retained funds to cover payment of compensation. He was, however, inclined to concur with the objection by Mr. Niehaus that the proposed draft article was badly worded, inasmuch as it referred to the member States of the organization concerned, whereas, in fact, the onus lay on all its members. He therefore suggested that the word "States" should be deleted.

78. The additional draft article that he had proposed was not the only way of dealing with the issue; there was no reason why there should not also be specific arrangements to provide for compensation. However, in a set of draft articles such as the one with which the Commission was concerned, there needed to be a provision pitched at a sufficient level of generality. That said, if the Commission failed to adopt some provision dealing with the absolutely central problem of reconciling the responsibility of international organizations with the obligation to make reparation, the whole codification exercise would amount to nothing and the Commission would make a laughing stock of itself. He urged members to support his proposal by referring it to the Drafting Committee.

79. The CHAIRPERSON, speaking in his capacity as a member of the Commission, recalled that he had expressed similar views during the discussion on draft article 29, although at that time his position had found little support.

80. Mr. CANDIOTI supported the inclusion of the additional draft article, as orally amended by Mr. Pellet on the basis of a suggestion by Mr. Niehaus. The obligation to provide an international organization with the means to carry out its obligations must indeed lie with all members, not just with States.

81. Mr. HMOUD said that the proposed additional draft article had no place in the body of law that the Commission was trying to codify. The issue of reparation was a matter for international organizations to resolve through their internal rules. Indeed, systems already existed whereby organizations set aside sufficient funds for the payment of compensation. Organizations such as the United Nations levied an assessment on each country, part of which was earmarked for such unexpected payments. It was therefore hard to understand why an additional obligation needed to be imposed on States. As Mr. Pellet had said, States were aware of their obligations when joining an organization, including obligations arising out of a wrongful act of that organization. If the additional draft article was adopted, it would send the message that, ultimately, an international organization's responsibility was mitigated, because member States could be relied on to bail them out. Mr. Pellet's proposal nevertheless warranted further consideration.

82. Ms. ESCARAMEIA said that Mr. Pellet's arguments, persuasive though they were, had not entirely won her over. The phrase "shall provide the organization with the means to effectively carry out" could, as it stood, cover a multitude of different situations. If it referred only to the obligation on States to pay their assessed contributions, thus providing sufficient resources to meet unexpected expenses, no problem arose. The proposed draft article, however, aimed at dealing with situations in which States might have to pay additional sums, and that was where problems might arise, both at the legal level—because the organization's internal rules or constituent instrument might not allow such a procedure—and at the political level, in that a member of a small organization, or of a large organization in which a restricted organ had the power to make decisions, might find itself obliged to pay for the consequences of a wrongful act which it had voted

against or opposed. She was, however, sympathetic to the gist of the proposed text, which would be improved if the onus were placed on the organization rather than its members. A text should be drafted calling upon international organizations to make provision in their budgets for such contingencies, which could then be met without recourse to additional contributions from members.

83. Mr. GALICKI said he was strongly in favour of the proposed additional draft article. Failure to adopt such a provision would make the Commission's text less effective. Draft article 39, for example, would lose all its force if compensation for the damage exceeded an organization's budget or other financial resources. An organization's status as a subject of international law was not original, but derived from the status of its member States as subjects of international law. It followed that its international responsibility also derived from the responsibility of States, and a proper balance should be struck between the two. States establishing an international organization should provide for the organization's ability to be not only fully but also effectively responsible, financially and otherwise. Moreover, some special regimes contained provisions similar to the proposed additional draft article. The 1972 Convention on the international liability for damage caused by space objects contained provisions on joint and several liability for damage caused by an international organization's space activities, liability which was to be shared with member States. A general regime such as that envisaged in the draft articles should not prevent claimants from receiving satisfaction purely owing to the organization's inability to pay compensation. The proposed draft article seemed to meet the basic requirements of common sense and justice. It was also sufficiently general as to give States some leeway in fulfilling their obligations.

84. Mr. PETRIČ, after welcoming Mr. Pellet's assurance that he did not advocate the direct obligation of States to provide compensation, said that, nonetheless, he could not support the proposed additional draft article, on the grounds that it would set the dangerous precedent of relieving international organizations of their legal responsibility, in the belief that States would always act as a safety net. Many different factors were involved in the discharge of liability, and an international organization should not necessarily feel that it could turn to its members for extra funds. As one who in his diplomatic role often had to deal with large budgets, he knew that a political process was involved in an organization's efforts to find ways and means of meeting its financial obligations. How it did so was up to the individual organization. He was absolutely opposed to the establishment of an obligation on member States to make special, separate provision for the possible consequences of an organization's wrongful acts. At the same time, the subsidiary organs and the agents of an organization had to be aware that they themselves bore responsibility. While he did not dismiss the proposed draft article out of hand, he had serious reservations about the current text and urged the Commission to give it further consideration so that a common position could be adopted.

The meeting rose at 1 p.m.

2936th MEETING

Friday, 13 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*)* (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his twelfth report on reservations to treaties (A/CN.4/584).
2. Mr. PELLET (Special Rapporteur) said that his twelfth report dealt with the procedure for acceptances of treaties, which was the subject of 13 draft guidelines. He drew attention to the footnote on page 1, which indicated that the twelfth report in fact constituted the second part of his eleventh report,²⁶⁹ from which it carried on. In producing it, he had proceeded on the basis of a number of provisions of the 1969 and 1986 Vienna Conventions of relevance to the formulation of objections and had analysed their scope, attempted to fill their lacunae and discussed their implications.
3. Logically, the point of departure of the current study was article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions, which draft guideline 2.8 (Formulation of acceptances of reservations) did not reproduce word for word, for the sake of coherence, although it reflected the paragraph's main idea. Draft guideline 2.8 introduced the principle—probably the most important one of the report—that “[t]he acceptance of a reservation arises from the absence of objections to the reservation formulated by a State or international organization on the part of the contracting State or contracting international organization”. That was the principle of the tacit acceptance of reservations. The second paragraph of the draft guideline set out the conditions in which the absence of objections was established, either because the contracting State or international organization had made an express statement in that respect, or because the State or international organization had kept silent.

* Resumed from the 2930th meeting.

²⁶⁹ Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

4. As noted in paragraph 8 [188]²⁷⁰ of the report, there was no need to speak of “early acceptance” in the case of treaty clauses that expressly permitted a reservation. Those were special clauses which precluded the need for acceptance and derogated from the ordinary law of treaties, which was all that was of interest to the Commission. Similarly, he was not convinced by the distinction between tacit and implicit acceptances of reservations. According to some authors, the former resulted from a ratifying State having remained silent, even though the reservation had already been made, whereas implicit acceptances resulted from silence having been kept for 12 months following formulation of the reservation. Although that distinction was of interest at a doctrinal level, it served no practical purpose. In both cases, silence was tantamount to acceptance. Accordingly, the distinction should not be evoked in the Guide to Practice.

5. Questions relating to the time period, which concerned the right to formulate an objection to a reservation, had been the subject of draft guideline 2.6.13, which the Commission had sent to the Drafting Committee during the first part of the current session. For that reason, the second paragraph of preliminary draft guideline 2.8 merely referred to draft guideline 2.6.13. As a precaution, however, he had proposed in paragraph 25 [205] of the report a draft guideline 2.8.1 *bis* (Tacit acceptance of reservations), which reproduced the wording of draft guideline 2.6.13. Since the Commission had referred the latter draft guideline to the Drafting Committee, draft guideline 2.8.1 *bis* appeared to be superfluous.

6. As indicated in paragraph 27 [207] of the report, the advantage of draft guideline 2.8.1 was that it showed that acceptances of and objections to reservations were two sides of the same coin. It might be asked, however, whether the phrase “Unless the treaty otherwise provides” in square brackets should be retained. He had been reluctant to include it, but had eventually decided that it should be kept, first of all for a formal reason, since it was employed in article 20, paragraph 5, of the 1969 Vienna Convention, which should be followed as closely as possible, and secondly because it might prove useful in the current case because it expressly stipulated that the 12-month time period was not immutable and that the States which negotiated the treaty could change it. Paragraphs 33 [213] to 39 [219] of the report showed that the 12-month time period had become a customary rule which could be derogated from. He also stressed the fact that the time period could begin as from notification of the reservation, as from the date of ratification or, more broadly, as from the expression of consent to be bound, if the latter was given subsequently.

7. The system of tacit reservations was acceptable for general multilateral conventions; however, he wondered whether in the case of multilateral conventions with limited participation, referred to in article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions, the principle of tacit acceptance was needed. The question arose because if the requirement of unanimous acceptance was to be interpreted strictly, it would mean that any new

contracting State could undermine the previous unanimity by opposing the reservation. However, two decisive factors would tend to prevent that from happening. First, article 20, paragraph 5, of the Vienna Conventions expressly referred to article 20, paragraph 2 (on limited treaties), which showed that the authors of the Conventions had sought, through the principle of tacit acceptance, to achieve clarity and stability in treaty relations, an objective which, secondly, would not be attained if each new accession to the treaty could call into question the participation of the author of the reservation to the treaty. That was illustrated by draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations), which read: “A reservation requiring unanimous acceptance by the parties in order to produce its effects is considered to have been accepted by all the contracting States or international organizations or all the States or international organizations that are entitled to become parties to the treaty if they shall have raised no objection to the reservation by the end of a period of 12 months after they were notified of the reservation.”

8. The principle of the tacit acceptance of reservations as posed in the 1969 and 1986 Vienna Conventions and specified in draft guidelines 2.8 to 2.8.2 was enormously useful. It had the essential function of preventing any uncertainty in the treaty relations between the reserving State and the other parties from lasting indefinitely. The principle of tacit acceptance thus made it possible to dispel all uncertainty at the end of a reasonable time period, i.e. 12 months.

9. Draft guidelines 2.8.3 to 2.8.6 clearly needed editorial improvements, but they should not give rise to any fundamental opposition. The four cases drew on the principles set out in the Vienna Conventions or the draft guidelines already adopted. Draft guideline 2.8.3 (Express acceptance of a reservation) provided that express acceptance could be formulated at any time before the above-mentioned time period of 12 months but also thereafter. Nothing prevented a State from expressly accepting a reservation even if it had tacitly accepted it earlier.

10. Draft guideline 2.8.5 (Procedure for formulating express acceptances) referred to the relevant provisions that the Commission had adopted on the formulation of reservations themselves.

11. Draft guideline 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation) reproduced, with minor adaptations, the provisions of article 23, paragraph 3, of the 1969 and 1986 Vienna Conventions. He had refrained from providing a draft guideline on potential early acceptances, contrary to what he had done for pre-emptive objections. Article 20, paragraph 5, of the 1969 Vienna Convention virtually ruled out any such possibility. Another disadvantage was that it would encourage the formulation of reservations.

12. The aim of draft guideline 2.8.12, which appeared at the end of the twelfth report, was to establish the definitive and irreversible nature of acceptances of reservations. The 1969 and 1986 Vienna Conventions were silent on

²⁷⁰ The numbers in brackets refer to the original numbering by the Special Rapporteur.

the matter, unlike in the case of objections, but it would be contrary to the object and purpose of article 20, paragraph 5, of the Conventions to permit the accepting State or international organization to go back on its acceptance once it had been established. Two cases could arise. In one, supposing that the reservation had been accepted in writing before the end of the 12-month time period set in article 20, paragraph 5, there was no question that this unilateral act of the State or international organization—express acceptance—had given rise not only to expectations but also to rights for the reserving State, this State could become a party, and its reservation could produce effects. To go back on those rights might constitute an *estoppel*; in any event, it would be contrary to the general principle of good faith. In the other possible case, if the reservation had been the subject of a tacit acceptance by a State or international organization which had kept silent for more than 12 months, the problem would be similar, since, in remaining silent, the State or international organization in question would have created expectations on the part of the reserving State at the very least. In any case, such a withdrawal would be null and void, because an objection did not produce effects once the 12-month time period had ended, as the vast majority of Commission members had argued during the discussion on draft guideline 2.6.14. Thus, whether express or tacit, acceptances of reservations were irreversible.

13. Draft guidelines 2.8.7 to 2.8.11 sought to resolve the particular problems relating to the acceptance of reservations to the constituent instrument of an international organization. Even though the question was a rather marginal one, it must be said that such problems were numerous and not always very simple. For that reason, they were the subject of detailed commentaries in paragraphs 60 [240] to 90 [270] of the twelfth report. The authors of the 1969 Vienna Convention, although reluctant to make distinctions between various types of treaties, had been aware of the specific problems posed by the constituent instruments of international organizations, including with regard to reservations, as article 20, paragraph 3, of the 1969 Convention showed: “When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.” It would in fact be odd to subject reservations to constituent instruments to the entire Vienna regime. The formulation of reservations to constituent instruments clearly posed very serious problems, at least if the reservation related to the composition or functioning of the organization. For example, it would be strange, to say the least, for a State to become a Member of the United Nations, ratify the Charter of the United Nations and make a reservation to Article 23, on the composition of the Security Council, or to Article 17, on the approval of the budget, without the express acceptance—in the latter case, in any event—of the Organization. It was those considerations that had led the International Law Commission to conclude in 1962, during the elaboration of the draft articles on the law of treaties,²⁷¹ which had been at the origin of the 1969 Vienna Convention, and more specifically in its commentary to article 20, paragraph 4, adopted on first reading, that “in the case of instruments which form the constitutions of

international organizations, the integrity of the instrument is a consideration which outweighs other considerations and ... it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable”.²⁷² That was the prevailing practice, as indicated in paragraph 67 [247] of the report. Accordingly, he saw no reason why the entire text of article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions should not be reproduced in the Guide to Practice.

14. As he had explained in paragraph 69 [249], however, that principle was far from solving all the problems that could and did arise. First of all, article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions did not say what was meant by “constituent instrument of an international organization”. It was clear that a constituent instrument was the treaty by which the organization was created, its structure defined, its organs established and the modalities of their functioning determined. However, “pure” constituent instruments according to that definition were rather rare, because most of the time the instrument mixed substantive provisions with provisions of an organic or organizational nature. That was the case, for example, with the Charter of the United Nations, Articles 1 and 2 of which in particular contained substantive provisions unrelated to the functioning of the Organization. An even more striking case was that of the 1982 United Nations Convention on the Law of the Sea, which was the constituent instrument of the International Seabed Authority but which chiefly contained substantive provisions governing the law of the sea. One might be tempted to draw a distinction between rules applicable to reservations to genuinely constituent—i.e. institutional—provisions and rules applicable to reservations to substantive provisions of the same treaty. He was opposed to doing so, more for reasons of convenience than of principle, although it could also be argued that such a distinction should not be made because article 20, paragraph 3, of the Vienna Conventions did not do so. It was, in fact, no easy matter to distinguish between the two types of provisions, which sometimes coexisted in the same article. Thus, he did not propose adopting a draft guideline on that point; it would be sufficient to include a reference to it in the commentary based on the material contained in paragraphs 73 [253] to 77 [257] of the twelfth report.

15. On the other hand, he did not intend to remain silent on another question which the 1969 and 1986 Vienna Conventions had left unanswered: whether the acceptance required by the competent organ of the organization must be express or could be tacit. It might be argued that it would be legitimate to apply the ordinary law of reservations there in the absence of exceptions made in the Vienna Conventions for constituent instruments and simply to say that tacit acceptance was sufficient, so as not to paralyse the exercise of the broad right to formulate reservations, which was what the authors of the Vienna Conventions had wanted. That, however, would be entirely unacceptable for the reason he had just indicated, which had to do with the particular nature of constituent instruments, namely that it would greatly facilitate the formulation of reservations, which was to

²⁷¹ *Yearbook ... 1962*, vol. II, document A/5209, p. 161.

²⁷² *Ibid.*, p. 181 (para. (25) of the commentary).

be avoided, especially in the case of institutional provisions. Moreover, and that in itself seemed to be reason enough, an *a contrario* interpretation of article 20, paragraph 5, would appear to exclude the transposition of the principle of tacit acceptance when the acceptance of reservations to constituent instruments was concerned. That provision referred expressly to article 20, paragraph 2, on limited treaties, and to paragraph 4, i.e. to general cases, but it deliberately refrained from citing article 20, paragraph 3, on constituent instruments. One could thus conclude, as draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument) stipulated, that the acceptance of the reservation by the competent organ of the organization must not be presumed and that draft guideline 2.8.1 on the tacit acceptance of reservations was therefore not applicable to acceptance by the competent organ of reservations to a constituent instrument.

16. Another lacuna in the 1969 and 1986 Vienna Conventions related to the very definition of the “organ competent” to accept the reservation, a term which article 20, paragraph 3, of the Conventions used but did not define. He had been somewhat hesitant to propose a definition because the competent organ might vary considerably from one organization to another; nonetheless, he thought that draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument) might provide useful guidance. It read: “The organ competent to accept a reservation to a constituent instrument of an international organization is the one that is competent to decide whether the author of the reservation should be admitted to the organization, or failing that, to interpret the constituent instrument.”

17. That provision, which systematized a rare practice, was of course far from resolving all the problems that might arise in that regard. A reservation to a constituent instrument was usually formulated at the time of the instrument’s ratification, which very often was before the instrument came into force and thus before an organ competent to assess the admissibility of the reservation existed. As could be seen in the examples given in paragraph 81 [261] of the report, that was not a textbook case: the question had in fact arisen, in cases of reservations formulated prior to the entry into force of the constituent instrument, as to who could accept those reservations. As indicated in paragraphs 82 [262] and 83 [263], two solutions were contemplated to respond to that situation. The first was unanimous acceptance by all States that had already expressed their consent to be bound. The second was to do nothing and consider that the reservation would not be established until, the constituent instrument having entered into force, the competent organ as defined in draft guideline 2.8.9 had accepted the reservation. The disadvantage of the second solution was that it allowed a nagging uncertainty to persist as to the status of the reserving State or international organization, the very situation which article 20, paragraph 5, of the 1969 Vienna Convention sought to avoid. Accordingly, he suggested retaining the first solution in draft guideline 2.8.10 (Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established), which provided that if it was formulated

before the entry into force of the constituent instrument, “a reservation requires the acceptance of all the States and international organizations concerned”. In that connection, he did not think that the draft guideline should speak of “all the States” or of the States and international organizations “concerned”; there was no reason why it should not read “all the contracting States or international organizations”. He left that question for the Drafting Committee to consider.

18. Paragraphs 86 [266] to 90 [270] of the report addressed a final problem that had not been settled by the 1969 and 1986 Vienna Conventions: whether the requirement of an express acceptance of reservations to the constituent instrument of an international organization excluded the possibility of States taking an individual position on the reservation. Arguments to the contrary could be cited: one might ask what purpose such a possibility served, since the States in question would probably be called upon to give their view within the competent organ of the organization, which was usually a plenary body, and since, regardless of whether they objected or accepted individually, their position would not have any real immediate effect for those States that reacted to a reservation in any case. Indeed, either they would be bound by the reservation because the competent organ had accepted it, or the reservation would not produce effects, because the competent organ had rejected it. It might be asked whether the States could still take a formal position *vis-à-vis* the reservation. Even if it might seem odd to encourage them to do something which served no legal purpose, he was in favour of allowing for such a possibility, because it was always useful to know the views of contracting States and international organizations. Such knowledge could help the competent organ to arrive at its own position and above all could offer an opportunity for a fruitful reservations dialogue. He therefore proposed that the Guide to Practice should include draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), which read: “Guideline 2.8.7 does not preclude the right of States or international organizations that are members of an international organization to take a position on the validity or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.”

19. That concluded his introduction of draft guidelines 2.8 to 2.8.12, which he hoped the Commission would refer to the Drafting Committee. Recalling that document A/CN.4/584, artificially referred to as his twelfth report, was actually the continuation of the eleventh, he said that it was not the end. He had just completed a section on the procedure relating to interpretative declarations, thereby concluding his work on the procedure for the formulation of reservations and interpretative declarations, which constituted the second part of the draft Guide to Practice. In 2008, the Commission would thus be able to continue with and, it was to be hoped, conclude the third part of the Guide, on the validity of reservations, and then begin the adoption of the fourth part, on the effect of reservations.

The meeting rose at 11.10 a.m.

2937th MEETING

Tuesday, 17 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the twelfth report of the Special Rapporteur on the topic of reservations to treaties (A/CN.4/584).

2. Ms. ESCARAMEIA, after commending the Special Rapporteur, whose powers of analysis and capacity to scrutinize all possible situations and problems never failed to amaze her, for his twelfth report on reservations to treaties, noted that paragraph 2 [182] of the report stated that acceptances of reservations were irreversible, the reasoning being that article 22 of the 1969 Vienna Convention referred only to the withdrawal of reservations and objections to reservations and not to acceptances. In her view, the absence of a reference to acceptances did not necessarily indicate that they were final. Rather, it seemed logical to apply the same regime to acceptances as to withdrawal of reservations or of objections to reservations. She would, however, return to the issue in connection with draft guideline 2.8.12. On the other hand, she agreed with the Special Rapporteur's view that there was no need to make a distinction, for the purposes of the draft guidelines, between tacit and implicit acceptances or to refer to so-called "early acceptances" in cases where reservations were expressly referred to in a treaty.

3. With regard to draft guideline 2.8 (Formulation of acceptances of reservations), she endorsed its content but drew attention to the need to bring the English text into line with the original French. In the phrase "the contracting State", the word "the" should thus be replaced by the word "a" or, for even greater clarity, the word "another". As for the words in square brackets in the second paragraph of the draft guideline, they should, in her view, be retained because, even if they were not strictly necessary, their inclusion would make for greater clarity both in the draft guideline and in the commentary.

4. With regard to draft guideline 2.8.1 (Tacit acceptance of reservations), she preferred, in principle, its simpler wording to that of draft guideline 2.8.1 *bis*, since, as the Special Rapporteur had pointed out, draft guideline 2.6.13 had already been referred to the Drafting Committee and there was no point in simply repeating it almost word for word. As for the phrase currently in square brackets ("Unless the treaty otherwise provides,"), she would favour its inclusion, since it also appeared in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions. Its inclusion would cause no harm and it would serve the useful purpose of emphasizing the subsidiary nature of the provision.

5. Turning to treaties with limited participation, and to draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations), she endorsed the position adopted by the Special Rapporteur, namely that newcomers to a treaty should not be permitted to object to reservations that had been unanimously accepted. She was, however, concerned that, as drafted, the phrase "all the States or international organizations that are entitled to become parties to the treaty" implied that such States or organizations could accept a reservation before becoming parties, which was surely not what was intended. Acceptance was limited to contracting parties and not open to potential parties, as could be inferred from article 20, paragraphs 2 and 5, of the Vienna Conventions and, indeed, as was stated in paragraph 59 [239] of the report. She was not sure how the existing draft should be amended in order to clarify the situation. Perhaps the best solution would be to draft a guideline 2.8.2 *bis*.

6. She endorsed the content of draft guideline 2.8.3 (Express acceptance of a reservation). However, she had serious doubts about the example, given in paragraph 49 [229], of a so-called "reservation" by France to the Convention providing a Uniform Law for Cheques, made 40 years after France's accession to that Convention. According to the definition contained in article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions, the French action was not a reservation, because one of the constituent elements of a reservation was the time at which it was made. She did not know how the depositary had reacted, but the German response to the "reservation" seemed to be more in the nature of a political understanding or a courtesy than an acceptance in the legal sense. She endorsed draft guidelines 2.8.4 (Written form of express acceptances), 2.8.5 (Procedure for formulating express acceptances) and 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation).

7. Turning to section 3, relating to treaties establishing international organizations, she endorsed draft guidelines 2.8.7 (Acceptance of reservations to the constituent instrument of an international organization), 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument) and 2.8.9 (Organ competent to accept a reservation to a constituent instrument). Draft guideline 2.8.10 (Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established), however, should be amended along the lines already suggested

by the Special Rapporteur during his presentation; the word “concerned”, the meaning of which was potentially very broad, should be replaced by a phrase along the lines of “that have expressed their consent to be bound by the treaty”.

8. Draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument) was a useful provision, but she was uneasy about some of the terms used. First, the word “right”, which appeared both in the title and in the text, was too strong as a translation of the French word “*faculté*”, particularly as the position taken was one devoid of legal effects. She would prefer a word such as “possibility”, “faculty” or “capacity”. Secondly, the word “accept” in the title of the draft article was misleading, since members could also object to a reservation, as was made clear in the text of the draft guideline by the words “take a position on”. In the title, the word “accept” should therefore be replaced by the words “respond to” or “react to”.

9. With regard to the provision relating to the irreversibility of acceptances of reservations, she said it was her belief that, in draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations), the same regime should apply both to tacit acceptances (which were the most common) and to express acceptances (which were very rare); in other words, they should become final only once 12 months had passed. The 1969 and 1986 Vienna Conventions were silent on the issue, but the Special Rapporteur had argued that article 20, paragraph 5, pointed in the direction of the final and irreversible nature of acceptances, which would be operative after 12 months in the case of tacit acceptances but immediately in that of express acceptances. According to the Special Rapporteur, any other approach would undermine the principle of good faith and militate against the stability of treaty relations. That might be true if an acceptance came after several years had elapsed, but not if it came within a certain period. During the discussion on draft guideline 2.7.9 (Prohibition against the widening of the scope of an objection to a reservation), there had been a measure of consensus that the scope could be widened within a 12-month period; and that was borne out by the statement in paragraph 92 [272] of the report, discussing the acceptance of reservations, that “[a] comparable conclusion must be drawn with regard to the question of widening the scope of an objection to a reservation”. It stood to reason that, if an objection was not final until a 12-month period had elapsed, a State should also be able to change its mind over the same period about the acceptance of a reservation. She therefore proposed that draft guideline 2.8.12 should be amended to state that an acceptance was final and irreversible after a 12-month period had elapsed after notification of the reservation. Subject to that amendment, she was in favour of referring all the draft guidelines to the Drafting Committee.

10. Mr. McRAE said that he, too, was impressed by the content, detail and depth of the discussion in the twelfth report. He had no major objections to any of the draft guidelines, all of which should be referred to the Drafting Committee. He agreed, however, with most of the points raised by Ms. Escarameia. As she had indicated, for example, draft guideline 2.8.2 (Tacit acceptance of a

reservation requiring unanimous acceptance by the other States and international organizations) referred to the possibility of objections by States or international organizations that were entitled to become parties to the treaty. Such States or organizations were, however, irrelevant for purposes of determining whether acceptance had or had not been unanimous; if they were not yet parties to a treaty, they could not be considered as such.

11. With regard to draft guideline 2.8.12, his concern differed slightly from that of Ms. Escarameia and would not be met simply by the addition of a reference to a 12-month period. In his view, there could be circumstances in which a State might wish to revisit its acceptance of a reservation, either because it found that the reservation had far wider application than anticipated, as a result of a statement by the reserving State or, perhaps, owing to a judicial interpretation. If the content of the reservation turned out to be significantly different from what had been supposed, there was surely a case for entitling the accepting State to reconsider its position. He acknowledged that an amendment to that effect would have an impact on security in treaty relations, but it could be argued that the original acceptance really related to what was effectively a different reservation.

12. With regard to draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument), he wondered whether the issue had any place in the draft guidelines. The question of the organ competent to accept a reservation to a constituent instrument was a matter for the members of the organization concerned, or at least for the organization itself. At best, the draft guideline would serve as a fallback position, when the organization was unable to provide an answer.

13. With regard to draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), he agreed with Ms. Escarameia that both the title and the text would benefit from further work. First, the title referred to the right to “accept” a reservation, whereas the text referred to the right to “take a position” on the validity or appropriateness of a reservation. Moreover, the second sentence of the text used the word “opinion” to denote what in the first sentence was described as a “position”. The Drafting Committee should review the text carefully. Lastly, he wondered whether there was any need to specify that in such cases the State’s opinion was devoid of legal effects. Given that knowledge of a State’s position might well encourage the reservations dialogue favoured by the Special Rapporteur, he wondered whether at least some of those positions were not more akin to interpretative declarations, and could usefully be characterized as such.

14. Mr. NOLTE said that the twelfth report on reservations to treaties was thorough, systematic and pragmatic. Nevertheless, he wished to make two points regarding the acceptance of reservations to the constituent instrument of an international organization.

15. His first point concerned draft guideline 2.8.7. Paragraph 77 [257] of the report suggested that it was debatable whether a distinction should be made between the strictly constitutional provisions of constituent instruments and

their material or substantive provisions. In the Special Rapporteur's view, there was no value in introducing a guideline that attempted to define the concept of "constituent instrument" and it would make more sense to set out the difficulties of defining the concept in the commentary. While he agreed with the Special Rapporteur that it would be difficult to provide an exact definition of the concept of a "constituent treaty" or to delimit "strictly constitutional" and "substantive" provisions, he thought it would be possible and advisable to address the problem in draft guideline 2.8.7, rather than in the commentary, by simply replacing the first word "when" with the phrase "as far as". The draft guideline would then read: "As far as a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization." That formulation would alert the reader to the existence of an important distinction without attempting to delineate the boundary between strictly constitutional and substantive provisions, whereas a reference to that distinction in the commentary could easily be overlooked.

16. His second point concerned draft guideline 2.8.10. He was somewhat uncomfortable with the Special Rapporteur's suggestion that a reservation formulated before the entry into force of a constituent instrument of an international organization "requires the acceptance of all the States and international organizations concerned" only, and not that of the organs of the international organization concerned. As he understood it, that provision would mean that a State which acceded to a treaty at a very early stage might have its reservation accepted much more easily than if it were to accede later. In that case, States that acceded at a later stage and the organs of the international organization might be faced with a precedent which they would not have accepted if the reserving State had formulated its reservation at a later date. He wondered whether the interests of early legal security should really prevail in such circumstances. After all, the treaty had not yet entered into force and, once it had done so, the organs of the newly established international organization might immediately take a decision on whether to accept reservations. If the Commission were to take the view that the interests of early legal security should indeed prevail, consideration could perhaps be given to requiring all signatories to the treaty to accept the reservation concerned.

17. Having listened to the points made by Ms. Escarameia and Mr. McRae regarding the final and irreversible nature of acceptances of reservations, he tended to concur with the Special Rapporteur. He could imagine circumstances in which the full implications of a reservation might become clear only some time after it had been accepted; however, if such a case were to arise, it would be more appropriate for the accepting State to react by explaining and interpreting its acceptance.

18. In conclusion, he was in favour of referring all the draft guidelines contained in the twelfth report to the Drafting Committee.

19. Mr. MELESCANU said he had initially supposed that the subject of reservations to treaties was a straightforward topic which the Commission could quickly

dispatch. Over the years, however, he had come to realize that it was in fact extremely complex. The Special Rapporteur's very thorough Guide to Practice would therefore be of great practical value to all those who, in their professional capacity, were concerned with such matters.

20. He, too, was in favour of referring the draft guidelines contained in the twelfth report to the Drafting Committee.

21. Draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations) was absolutely necessary in order to secure the stability of a treaty establishing an international organization. Furthermore, the provision was also needed to make it clear that only contracting parties and those States or international organizations entitled to become parties to the treaty were required to accept such reservations.

22. Notwithstanding the excellent arguments put forward by Ms. Escarameia and Mr. McRae regarding draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations), he agreed with Mr. Nolte that it was difficult to contend that the draft guideline should be redrafted in order to cover the eventuality that the full extent of the effects of a reservation might not have been realized when it was accepted, or that it might subsequently be interpreted in a broader sense by the courts.

23. On the other hand, the language of draft guideline 2.8.12 needed to be less categorical, in order to cover situations in which a State which was a member of an international organization ceased to exist and its successor State or States became members of that organization. In such circumstances, the successor State might have a position on a reservation very different from that held by its predecessor. Given that State practice allowed successor States some latitude during the process of assuming the obligations of the predecessor State, it would be wise to find more flexible wording for the draft guideline in question.

24. Mr. PELLET (Special Rapporteur), replying to the comments of Ms. Escarameia, Mr. McRae and Mr. Melescanu on draft guideline 2.8.12, reminded Mr. Melescanu that the effects of the succession of States on reservations to treaties would be covered by a set of draft guidelines in the fifth part of the Guide to Practice. The Secretariat had already provided him with a very full study on the matter, to which he wished to give further thought before making it public.

25. While he was prepared to accept some of the suggestions made by Ms. Escarameia and Mr. McRae, that was not true of their observations in connection with draft guideline 2.8.12, since it was necessary to bear in mind the differing effects of objections, and reservations and of acceptances. An acceptance had far-reaching effects in that it resulted in the treaty entering into force for the State making the reservation. To withdraw an acceptance once the treaty had entered into force would be contrary to the principle of good faith, and would also have very serious effects. That was why it was impossible to align the wording of the draft guidelines on acceptances with those on objections.

26. Mr. Nolte had been right to counter Mr. McRae's argument that, many years after a reservation had been made, it might be interpreted in an unforeseen manner, by pointing out that, in that case, the accepting State would not be bound by that interpretation, in accordance with the principle of relative *res judicata*. Mr. McRae had given the impression that a decision of an international court was of universal application, whereas in fact it was binding only on the parties to the dispute and in respect of that particular case. He was therefore most uncomfortable with the idea that acceptance might be revoked on the strength of a court's interpretation of a reservation. It would be more logical for the State in question to formally declare that it had accepted a reservation on the understanding that it was to be interpreted in a particular manner.

27. In other respects he was inclined to agree with the criticisms of his wording of the draft guidelines in his twelfth report.

28. Ms. ESCARAMEIA, responding to Mr. Pellet's comment concerning draft guideline 2.8.12, that the result of the suggestion she and Mr. McRae had made would be that a treaty which had already entered into force would cease to operate between the two States in question, said that almost no instances of that happening had ever been recorded. In 99.9 per cent of cases, the treaty would remain in force if an acceptance was withdrawn, because even in the event of an objection being made to a reservation, the treaty normally entered into force as between the reserving and the objecting State.

29. Mr. PELLET (Special Rapporteur) said that if his answer was a poor argument, so was the "quantitative" objection to it.

The meeting rose at 10.55 a.m.

2938th MEETING

Wednesday, 18 July 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (continued) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the twelfth report of the Special Rapporteur (A/CN.4/584), which contained draft guidelines 2.8 to 2.8.12.

2. Ms. XUE, said that the wording of draft guideline 2.8 (Formulation of acceptances of reservations) was precise and logical, but was perhaps somewhat too abstract for the practitioner and ought to be simplified.

3. Noting that in paragraph 17 [197] of the report the Special Rapporteur stated that "[i]t arises from both the text of the 1969 and 1986 Vienna Conventions and their *travaux préparatoires* and the practice that tacit acceptance is the rule and express acceptance the exception", she pointed out that tacit acceptance was more a common practice than a rule, not so much because it was the *opinio juris* of States, but for reasons of procedural convenience.

4. With regard to draft guidelines 2.8.1 and 2.8.1 *bis* (Tacit acceptance of reservations), she said that she much preferred the latter because although the content of the two was identical, the wording of draft guideline 2.8.1 *bis* was clearer than that of 2.8.1, which contained an impractical cross-reference.

5. She endorsed the content of draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations), but upon reflection it seemed to her that it might pose a number of practical problems. For example, when a treaty establishing an international organization was concluded, it was possible that all the contracting States might sign the final act, but that some might not ratify it in due time. Under the terms of the 1969 and 1986 Vienna Conventions, however, the latter States were also entitled to be notified of all legal acts on the part of the other contracting States. If they formulated an objection to a reservation made by a signatory State, the reserving State might contest their status.

6. Draft guideline 2.8.4 (Written form of express acceptances) was well founded from a theoretical point of view but might pose practical problems, which she would discuss when she addressed draft guideline 2.8.8.

7. As to draft guideline 2.8.7 (Acceptance of reservations to the constituent instrument of an international organization), the Special Rapporteur had raised very pertinent questions in paragraph 69 [249] and had dealt with them in a sensible manner.

8. With regard to draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument), she said that at first sight it had seemed very clear, but after having listened to the questions raised by a number of members she had had second thoughts. She now wondered how the draft guideline could be applied in practice and what was meant by the phrase "shall not be presumed". If it meant that acceptance should be express, and express only, it would be preferable to say so. Or, bearing in mind draft guideline 2.8.4, did it mean that the international organization must always express its acceptance in writing? It was common knowledge that organizations did not always do so in practice. The words "shall not be presumed" might

be taken to mean that acceptance should be expressed in conformity with the rules of the international organization concerned, in other words that the organization should take a decision or a position *vis-à-vis* such a reservation. There again, she wondered whether that corresponded to practice. She would return to that point when she addressed draft guideline 2.8.9.

9. Noting that draft guideline 2.8.8 also provided that “[g]uideline 2.8.1 is not applicable”, meaning that the time period of 12 months was not applicable to the reservations in question, she enquired whether that meant that the time period should be longer or shorter, or that acceptance should only be express.

10. In respect of draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument), she said she agreed with those members who had argued that it should be up to the member States to decide, but she would not object if it was the competent organ that took that decision.

11. With regard to draft guideline 2.8.10 (Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established), she recalled that the type of instrument in question often stipulated that the instrument would enter into force when a certain number of States had ratified it. However, she wondered what would happen if all States which ratified the instrument formulated a reservation at the same time—what rule should be applied? Since it was sometimes desirable for political reasons for the instrument to enter into force as soon as possible, it was probable that ratification would be accepted and that the instrument would enter into force before the end of the 12-month time period.

12. She was sceptical about draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument). States could always make a political declaration, and she did not see any point in mentioning that in a guideline.

13. She had no difficulty with draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations) and was in favour of referring draft guidelines 2.8 to 2.8.12 to the Drafting Committee.

14. Mr. FOMBA noted that the Special Rapporteur proposed to focus on the question of how and under what procedural conditions a State or international organization could expressly accept a reservation while leaving open the question of whether and in what circumstances an express acceptance was necessary in order to “establish the reservation”. Thus he differentiated between two types of things: on the one hand, between the possibility of the express acceptance and the need for—and hence justification of—such acceptance, and, on the other hand, between cases in which the aim was to “establish the reservation” and cases in which the objective was to “make the reservation”. That raised the two questions. The first was whether the matter of justification was unimportant, or whether it would be taken up later. The second concerned the underlying reason for the second distinction: was it linked to the question of legal effects?

15. With regard to the issue of the express or tacit acceptance of reservations, the Special Rapporteur’s interpretation of “silence”—more specifically, of the consequences that should be drawn from it—was logical, consistent and persuasive. As to the proposals to distinguish between tacit and implied acceptances or to introduce the notion of early acceptance when the reservation was permitted by the treaty, he agreed with the Special Rapporteur that such proposals should not appear in the Guide to Practice, because they would complicate matters for its users. The Special Rapporteur did, however, seem to have a preference for the term “tacit”, although he sometimes used both words indiscriminately. Regarding the question as to whether in some cases an objection to a reservation was not tantamount to tacit acceptance, a question that the Special Rapporteur had deemed “paradoxical”, asserting that it was not a simple hypothesis but above all a problem of the effects of acceptances of objections on reservations, he agreed with the Special Rapporteur that at the current stage, it was sufficient to refer to the matter in the commentary to draft guideline 2.8.1; he would nevertheless reserve his reply for the part of the Guide to Practice that would deal with effects.

16. Draft guideline 2.8 (Formulation of acceptances of reservations) did not pose any particular problem of substance. As to what ought to be done with the words in square brackets, the argument based on the “definitional role” of the guideline was relevant and decisive. He therefore proposed that paragraph 2 should be redrafted to read: “The absence of objections to the reservation may arise from an express acceptance stemming from a unilateral statement in this respect or from a tacit acceptance arising from silence kept by a contracting State or contracting international organization within the time periods specified in guideline 2.6.13.” That wording was terminologically repetitive, but could be improved, the main point being to reflect the idea of express acceptance and tacit acceptance in the actual body of the guideline. As to the scope *ratione personae* of draft guideline 2.8, he strongly endorsed the line of reasoning set out by the Special Rapporteur in paragraph 16 [196]. The Special Rapporteur’s assertion that draft guideline 2.8 was not intended to establish cases in which it was possible or necessary to resort to either of the two possible forms of acceptances was understandable; nevertheless, he would have to deal with it, at least theoretically, and, most importantly, he would have to consider whether in some cases it would not be preferable to reverse the order of things and make express acceptance the rule rather than the exception.

17. The justification given for draft guideline 2.8.1 *bis* (Tacit acceptance of reservations) in paragraph 24 [204] seemed to him valid. He asked the Special Rapporteur whether he could provide an example that illustrated the situation described in the phrase in square brackets. As to the possible options, given that the wording of draft guideline 2.8.1 *bis* repeated part of the text of draft guideline 2.6.13, on the time period for formulating an objection to a reservation, it would be wiser and more sensible simply to refer to draft guideline 2.6.13. In any case, the justification which the Special Rapporteur gave in paragraph 27 [207] was acceptable. He also wondered whether, by evoking the dialectic between acceptance and objection (and by stating that objection excluded acceptance

and vice versa), the Special Rapporteur was not already providing a negative answer to the paradoxical question raised in paragraph 12 [192].

18. In the light of the reference to draft guideline 2.6.13, it was not absolutely necessary to retain the phrase “unless the treaty otherwise provides”. As to the time period, he wondered whether there was not a contradiction in the ideas which the Special Rapporteur set out in paragraph 40 [220], namely that, first, States and international organizations that were not already parties to the treaty apparently did not enjoy a period of reflection; secondly, they usually had more than 12 months to consider the reservation that had been formulated; and, thirdly, in any case they had at least one year to consider reservations. He endorsed the Special Rapporteur’s interpretation, in paragraph 43 [223], of cases in which unanimity remained the rule.

19. Neither the objective nor the wording of draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations) posed any particular problem. As to the question of the link between the validity of a reservation and the simple possibility of expressing consent—tacitly or openly—to a reservation, he agreed with the Special Rapporteur that this aspect of the topic should not be elucidated in the section of the Guide dealing with procedure, but in the one that dealt with effects, which would be the subject of a future report.

20. With regard to draft guideline 2.8.3 (Express acceptance of a reservation), he said that allowing for such a possibility did not seem at all problematic; on the contrary, it constituted an important argument from a teleological point of view. Moreover, he agreed with the Special Rapporteur’s interpretation in paragraph 47 [227].

21. He wished to draw attention to a mistake in the French version: in paragraph 52 [232], the text of article 23, paragraph 1, of the 1986 Vienna Convention as quoted contained an erroneous repetition of the phrase “aux États contractants et autres organisations contractantes”.

22. Draft guideline 2.8.4 (Written form of express acceptances) did not call for any particular comment, and the Special Rapporteur’s explanation of it was very clear. However, it seemed that the text constituted something of a contradiction in terms, since the Special Rapporteur said, first, that by very definition, an express acceptance must be formulated in writing; secondly, that the simple fact that an acceptance was express did not necessarily mean that it was in writing; and, thirdly, that insofar as Sir Humphrey Waldock’s various proposals and drafts were concerned, a written version was required in every case.

23. With regard to draft guideline 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation), he said that there was some confusion in the questions addressed. In paragraph 57 [237], the Special Rapporteur spoke of the confirmation of express acceptances; in the title, however, he referred to the confirmation of an objection. Even better, or worse, the title did not correspond to the content, which did in fact deal with express acceptance. The title should

therefore be corrected by replacing the word “objection” with the term “express acceptance” (assuming that this was actually the subject of the draft guideline). As to the formulation of an acceptance prior to the expression of consent to be bound by a treaty, he could agree for the time being with the Special Rapporteur that there was no reason to establish a parallel with “preventive objections”, for the reasons set out in paragraph 59 [239]. Nevertheless, he wondered whether the question of the concrete responsibility of such acceptance had been exhaustively considered. With regard to the acceptance of reservations to the constituent instrument of an international organization, the Special Rapporteur stated in paragraph 65 [245] that “the diversity of bilateral relations between States or member organizations is largely inconceivable”. He wondered whether “largely” meant that it was conceivable elsewhere or that it was, *a contrario*, conceivable.

24. Turning to draft guideline 2.8.7 (Acceptance of reservations to the constituent instrument of an international organization), he said that although it was legitimate and useful to stress at that point the special nature of the rules applicable to the constituent instruments of international organizations with regard to the acceptance of reservations, a number of questions which the positive law of Vienna did not regulate—rightly or wrongly—did in fact arise: the definition of a constituent instrument, the definition of the organ competent to decide on acceptance of a reservation and the determination of the consequence of the acceptance formulated by the competent organ on the power or right of member States of the international organization to react individually.

25. With regard to draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument), he said that there he subscribed to the Special Rapporteur’s view that it was useful to reiterate the idea that the presumption of acceptance by the competent organ of the organization did not apply in that context. The actual wording of the draft guideline did not call for any particular comment. Interesting ideas had been put forward concerning the definition of the words “constituent instrument of an international organization”, such as making a distinction between constituent instruments *stricto sensu* and hybrid constituent instruments, or between “organizational” and “substantive” provisions, by establishing a differentiated legal regime. That was all intellectually stimulating, but it might prove very complicated for the practitioner, namely the user of the Guide to Practice. He therefore agreed with the Special Rapporteur that there was no value in defining the concept of “constituent instrument” of an international organization in a draft guideline. It would be wiser to discuss the difficulties associated with that concept in the commentary to draft guideline 2.8.7, which introduced it, or, if absolutely necessary, in the commentary to draft guideline 2.8.8.

26. Taking up draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument), he said that the wording of the guidelines should be harmonized by saying, wherever necessary, “constituent instrument of an international organization” (2.8.7, 2.8.8, 2.8.9, etc.). On the whole, he agreed with the line of reasoning followed by the Special Rapporteur, particularly in

paragraph 78 [258] of the report. Like the Special Rapporteur, he thought that it would be helpful to indicate in the Guide to Practice how the term “competent organ” was to be understood. However, he wondered whether the residuary criterion of competence to interpret the constituent instrument applied regardless of the political, quasi-judicial or jurisdictional nature of the organ in question. With regard to the specific case in which the competent organ did not yet exist, the proposal to find a *modus vivendi* for the period of uncertainty between the time of signature and the entry into force of the constituent instrument was interesting, but the example of an “interim committee responsible for setting up the new international organization” did not seem to be based on common practice, as it mainly concerned treaties concluded under the auspices of the United Nations.

27. Draft guideline 2.8.10 (Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established) was clearly useful, but its wording should be reviewed; in particular, the phrase “all the States and international organizations concerned” might give rise to questions. Did it include States and international organizations which intended to become parties? As to the question of whether the competence of the organ of the organization precluded individual reactions by other members of the organization, he strongly endorsed the view expressed by the Special Rapporteur in paragraphs 86 [266] and 88 [268].

28. In the case of draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), he said he thought that it was indeed useful to specify that the right of members of an international organization to take a position individually was not altered by the competence of the organ of the international organization, since the positive law of the Vienna regime did not address the question and, even more importantly, in view of the fact that “the organization’s consent is nothing more than the sum total of acceptances of the States members of the organization” (para. 83 [263]). With regard to the second sentence of the draft guideline, on the other hand, he wondered what point there was in taking a position if it was devoid of any effect.

29. Noting the Special Rapporteur’s observation with regard to draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations) that the effects produced by an express acceptance were no different from those produced by a tacit acceptance, he asked whether the Special Rapporteur was already anticipating the conclusion of the forthcoming report on that question. In order to justify the idea that acceptance—whether express or tacit—should be final, the Special Rapporteur had put forward two main arguments, namely the dialectical relationship between the objection and the acceptance (objection excluded acceptance and *vice versa*) and the need to stabilize treaty relations through the framework for the objections mechanism. At first glance, that line of reasoning was logical and valid, and thus acceptable. In fact, however, everything depended on how the dialectical relationship between the objection and the acceptance was perceived. A strict and uncompromising position

would lead one to endorse the Special Rapporteur’s proposal, whereas a relativistic view would ultimately allow for the possibility of reversible acceptance, the point being to be able to assess its actual impact on the certainty of treaty relations, but also, and most importantly, to identify any relevant case or cases in which the exception might or ought to come into play. In that regard, some of the ideas that had been expressed should perhaps be closely examined. Ultimately, the question was whether the Commission was prepared to send the message that the will of the State should be given free rein, at the risk of undermining—unduly and without any restriction—the fundamental principles of the integrity of treaties, legal certainty and good faith.

30. He was in agreement with referring draft guidelines 2.8 to 2.8.12 to the Drafting Committee.

31. Mr. PELLET (Special Rapporteur) thanked Mr. Fomba for his close reading of the twelfth report on reservations to treaties and confirmed that there was an error in paragraph 52 [232] of the French version, which appeared in the quotation of article 23, paragraph 1, of the 1986 Vienna Convention. In addition, draft guideline 2.8.6 should read “*Inutilité de la confirmation d’une acceptation faite avant la confirmation formelle de la réserve*” (“Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation”). The mistake had apparently been reproduced in all language versions of the report, and a corrigendum should therefore be issued.

32. Mr. WISNUMURTI said that the twelfth report on reservations to treaties reflected an in-depth analysis of the various legal aspects relating to the procedure for acceptances of reservations, which formed the basis of the Special Rapporteur’s proposed draft guidelines. On the whole, he had no difficulties with the draft guidelines, but he nevertheless wished to make a few comments. In paragraph 8 [188] of the report the Special Rapporteur analysed the concept of express and tacit acceptance of reservations and referred to the distinction made by some authors between “tacit” and “implicit” acceptances on the basis of the two cases covered by article 20, paragraph 5, of the 1969 Vienna Convention. An acceptance was tacit if a State or international organization raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation. It was implicit if a State or international organization made no objection to the reservation when it expressed its consent to be bound by the treaty. In paragraph 10 [190], the Special Rapporteur provided a logical explanation of the different grounds of the two concepts stemming from article 20, paragraph 5, of the Convention. In his own view, that doctrinal distinction had the value of providing a better understanding of the subsequent draft guidelines.

33. He noted that the Special Rapporteur proposed two alternative provisions relating to tacit acceptance of reservations, namely draft guideline 2.8.1 *bis* (para. 25 [205]) and draft guideline 2.8.1 (para. 26 [206]), each of which had advantages and disadvantages. He thought that draft guideline 2.8.1 should be retained because it made a specific cross-reference to draft guidelines 2.6.1 to 2.6.14.

That approach not only avoided repetition but also clearly showed the necessary link between draft guideline 2.8.1, draft guideline 2.6.13 and article 20, paragraph 5, of the 1969 Vienna Convention. In other words, draft guideline 2.8.1, on tacit acceptance of reservations, was not a stand-alone provision but a further elaboration of the provision dealing with the time period for formulating an objection (draft guideline 2.6.13). As draft guideline 2.8.1 made a cross-reference to previous draft guidelines, and in particular to draft guideline 2.6.13, which contained the phrase “unless the treaty otherwise provides”, the phrase should not be repeated in draft guideline 2.8.1. He noted that in paragraph 32 [212], the Special Rapporteur explained that the phrase meant that the presumption of tacit acceptance in the absence of an objection was not absolute, in the sense that the 12-month period could be altered if the States or international organizations parties to the treaty so wished.

34. He did not see why the Special Rapporteur thought that the notion of implicit acceptance of reservations should not be reflected in the Guide to Practice. In the report, the Special Rapporteur had discussed at length the two cases contemplated in article 20, paragraph 5, of the 1969 Vienna Convention, i.e. tacit acceptance and implicit acceptance, as well as the doctrinal distinctions underlying the different rationale for each, and he was not convinced that it would be wise to exclude either. Would it not be logical to have a draft guideline on implicit acceptance, given that, as in the case of tacit acceptance, it was contemplated in article 20, paragraph 5, of the Convention and in draft guideline 2.6.13? It would be useful for legal advisers of foreign ministries and practitioners if the Guide to Practice contained a draft guideline indicating that a State or international organization was considered to have accepted a reservation if it had formulated no objection thereto when it had expressed its consent to be bound by the treaty. That would certainly be a factor which States and international organizations would have to take into account before they decided to express their consent to be bound by the treaty.

35. As to draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), he agreed with the Special Rapporteur that member States and international organizations should be able to take individual positions on a reservation, irrespective of draft guideline 2.8.7, which provided that a reservation required the acceptance of the competent organ of the organization concerned. However, like Ms. Escarameia and Mr. McRae, he had difficulty with the wording of the draft guideline and thought that it should be reformulated so as to avoid giving the impression that a member State or organization of an international organization had the right to challenge a decision of the competent organ of that international organization outside the framework of the latter if that decision differed from its own position, especially if the State or international organization was permitted to take a different position on the validity or appropriateness of a reservation already accepted by the competent organ. That might undermine the integrity of the constituent instrument and the international organization concerned. For those reasons, draft guideline 2.8.11 should simply

indicate that, notwithstanding draft guideline 2.8.7, States or international organizations could express their own opinion on a reservation to a constituent instrument of the organization. If that watered-down formulation was retained, it no longer seemed necessary to include the safeguard clause in the last sentence of draft guideline 2.8.11, the title of which should then be adjusted accordingly.

36. He agreed with Ms. Escarameia and Mr. McRae that the wording of draft guideline 2.8.12 was too categorical. The Special Rapporteur had proposed the draft guideline in absolute terms to protect the integrity of the constituent instrument, but States and international organizations should have the possibility of withdrawing their acceptance if a fundamental change of circumstances required them to do so on the basis of their higher interests. On the other hand, he did not share the view that in such cases the State or international organization concerned should only be required to make a statement or interpretative declaration concerning the reservation to accommodate the new circumstances instead of withdrawing or amending the acceptance.

37. Mr. HMOUD thanked the Special Rapporteur for his twelfth report on reservations to treaties, which dealt with the procedure for acceptances of reservations. The report contained a thorough analysis of the *travaux préparatoires* of the 1969 and 1986 Vienna Conventions and the practice of States and international organizations on the question and was thus instrumental to a better understanding of the reasoning behind the draft guidelines in the report. The draft guidelines were very useful for the application of the legal regime of reservations to treaties, as they reflected the content of the Conventions and covered areas on which the Conventions were silent.

38. He did not see any need to make a distinction between implicit acceptance and tacit acceptance. Instead, a single term should be used to signify the lack of express objection. Accordingly, acceptance should be regarded as tacit in both situations contemplated in article 20, paragraph 5, of the 1969 Vienna Convention. He preferred draft guideline 2.8.1 *bis* to draft guideline 2.8.1, but agreed with Mr. Fomba that the phrase “in accordance with guidelines 2.6.1 to 2.6.14” should be replaced by “in accordance with guideline 2.6.13”, the only draft guideline on objections that was related to tacit acceptance. That said, it was not very clear what was meant by the “presumption” of tacit acceptance. It would seem, based on a reading of paragraph 32 [212], that the term “presumption” indicated that the treaty could provide for a time frame that was different from the 12-month period. Then, in paragraph 36 [216], it was stated that the 12-month time period “provides a time frame for the presumption of tacit acceptance. If a State does not object within a period of 12 months, it is presumed to have accepted the reservation”. Further on, in paragraph 38 [218], the Special Rapporteur wrote that “the objection constitutes the act that reverses the presumption of tacit consent”. The question therefore arose as to whether a different time frame in the treaty reversed the presumption or whether the presumption continued after the 12-month period, in keeping with State practice regarding late reservations. Did the

presumption take effect from the moment the reservation was notified, and would it only be reversed by the formulation of an objection by a State or international organization? Tacit acceptance, and acceptance in general, was not presumed: article 20, paragraph 5, of the 1969 Vienna Convention stipulated that a reservation was “considered” to have been accepted; however, the word “considered” signified a determination, and not a presumption. The Special Rapporteur also argued that, once the time period had elapsed, the State or international organization was considered to have accepted the reservation and could no longer validly object to it. In that connection, draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument) should not refer to the presumption of acceptance either, but should be worded to indicate that acceptance must be express or must arise from an act of the organ competent to formulate it, for example the absence of objection to the admission of a reserving member. Draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations) was acceptable, because it addressed considerations of legal certainty. However, as a number of Commission members had pointed out, it ought to be reworded to remove the unintended implication that States and organizations which were not yet parties were included in the “unanimous acceptance of the parties”.

39. The distinction drawn in draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument) between two categories of competent organs, i.e. the one that was competent to decide whether the author of the reservation should be admitted to the organization, or failing that, the one that was competent to interpret the constituent instrument, was in keeping with the practice of international organizations in that area. As Mr. McRae had pointed out, it should be left to the rules of the organization to decide on the matter and to designate another organ or reverse the hierarchy of the two organs referred to in the draft guideline.

40. The general rule set out in draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations) was warranted for reasons of legal certainty; the question was whether it should be formulated in such absolute terms. If a State which had accepted a reservation came to the conclusion that in certain circumstances the reservation was no longer compatible with the object and purpose of the treaty, should it not have the exceptional right to revoke its acceptance and even to preclude the entry into force of the treaty between it and the reserving State? That possibility of derogation from the general rule should be looked into more closely. He was in favour of referring draft guidelines 2.8 to 2.8.12 to the Drafting Committee.

41. Mr. PETRIČ said that he had no particular objection to the draft guidelines proposed by the Special Rapporteur in his twelfth report on reservations to treaties. Most of the issues raised by Commission members could be settled in the Drafting Committee, including the question of the phrase in square brackets in draft guideline 2.8 (Formulation of acceptances of reservations), which did not pose any problems of substance.

Personally, he preferred draft guideline 2.8.1 *bis*, which was more explicit and more effective. On the other hand, there were a number of problems with draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations). Although the emphasis on “unanimous acceptance” and the time period of 12 months was justified, it was difficult to place States and international organizations which had already signed or ratified a treaty on an equal footing with States and international organizations that were entitled to become parties to the treaty or had signed but not yet ratified it. He agreed with Ms. Xue that the Special Rapporteur might have gone too far in referring to States and international organizations “entitled to become parties”. Draft guideline 2.8.4 (Written form of express acceptances) also posed a problem: it was not certain that it had to be so categorical and restrictive. Express acceptance of a reservation could certainly be formulated very clearly, but in another way—for example, in a statement by a Head of State or Minister for Foreign Affairs. However, he would not object if the majority of Commission members thought that the draft guideline should be retained as it stood.

42. He had no difficulty with draft guideline 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation) or draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument). With regard to draft guideline 2.8.7 (Acceptance of reservations to the constituent instrument of an international organization), he agreed with the comment made by Mr. Nolte at the previous meeting that the Commission should perhaps distinguish between the various provisions of the constituent instrument. As to draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument), he shared Mr. McRae’s view that it would be preferable to explain what the competent organ was and to establish a closer link between the international organization and its constituent instrument, without being specific or restrictive. Draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument) was also problematic, and, like Ms. Xue, he had doubts about its usefulness. States and international organizations always had the right to make statements, to comment and to express their views, but he wondered whether the draft guideline did not give those statements a little too much importance. At the least, the draft guideline could be reformulated, as proposed by Mr. Wisnumurti, because the use of the word “right” in the English text seemed to be excessive. Draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations) reflected the sole approach possible in the interest of legal certainty; there was no place for the concept of fundamental change of circumstance. He was in favour of referring the draft guidelines to the Drafting Committee.

43. Mr. PELLET (Special Rapporteur) said that the word “right” in the English version of draft article 2.8.11 was not a good translation for “*faculté*”. The Drafting Committee should return to that question and use a word that was not as strong as “right”, such as “faculty” or “possibility”.

Responsibility of international organizations (continued)* (A/CN.4/577 and Add.1–2, sect. B, A/CN.4/582, A/CN.4/583, A/CN.4/L.720)

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)*

44. The CHAIRPERSON said that as the Commission had not had sufficient time to complete its consideration of the additional draft article proposed by Mr. Pellet, it would hear the comments of members of the Commission on the proposed text rather than continue the general debate on the topic.

45. Speaking in his capacity as a member of the Commission, he said that the introduction of the proposed draft article had been better than the draft article itself. The reasons given in support of the additional draft article had been clearly explained, and he endorsed them, but he thought that the draft article itself was too vague compared to those reasons and that the problem it addressed ought to have been fully explored at the fifty-eighth session, when the Commission had considered and adopted draft article 29 on first reading.²⁷³ The basic assumption behind draft article 29 was that the members of an international organization were not responsible as such for the organization's acts. Yet, Mr. Pellet's proposal was in effect telling member States *ex post facto* that they should create a claims account or insurance fund to help the organization pay reparations to the victims of its wrongful acts. While he would like to see the draft article referred to the Drafting Committee, he nevertheless thought that more work on its substance was still needed.

46. Mr. SINGH said that he fully endorsed the aim of Mr. Pellet's proposal, which was to ensure that an international organization that had incurred responsibility under the draft articles under consideration discharged its responsibility and to guarantee that international organizations settled liabilities arising out of that responsibility. However, the proposal did not take account of the principle that an international organization had an identity which was distinct from that of its member States. Since an international organization was funded by contributions from its member States, it was clear that when the organization was not in a position to meet its liabilities, it would turn to its member States. However, that was a matter which concerned relations between the organization and its member States and had no place in the draft articles.

47. In practice, States took questions concerning the liabilities of international organizations of which they were members very seriously. One good example was that of the International Tin Council, which by the time it had ceased its operations had accumulated some £512 million in debts, debts that its creditors had attempted in vain to recover in the British courts; only after negotiations had the creditors agreed to accept £182.5 million as a final settlement of their claims against the Council, and it was

the member States that had provided the funds that had allowed the Council to pay its debts.²⁷⁴

48. Mr. NOLTE said that in his first statement on the Special Rapporteur's fifth report he had already explained briefly why he had not been persuaded by Mr. Pellet's criticism that the Special Rapporteur should have included a duty on the part of the States members of an international organization to provide it with the means to honour its obligations arising out of its internationally wrongful acts. Mr. Pellet, having introduced a proposal on the subject, felt compelled to give his reasons more fully.

49. To start with, he was not convinced by the reasons given by Mr. Pellet in support of his proposal. Mr. Pellet's first point consisted in an analogy with national constitutional law. It was not true, however, that national parliaments were required under constitutional law to vote the funds which States needed to meet their international obligations. The State as such had that duty under international law, and under its constitutional law it might also even be bound to fulfil its international obligations. He was not aware that the constitutional law of Germany, the United Kingdom or the United States required the parliaments of those countries to provide funds to honour the State's international obligations. The absence of such an obligation stemmed from the basic freedom of parliamentarians to vote in accordance with their own conscience. That freedom was the reason that conclusions applicable to the problem at hand could not be drawn from national constitutional law. The only question that could arise was whether the opposite, *a contrario* conclusion should not be drawn: if the absence of an obligation on the part of national parliaments to provide funds was based on the freedom of parliamentarians, it might be otherwise in cases such as the one before the Commission, in which that freedom was not involved.

50. Secondly, in his argument Mr. Pellet had cited the 1954 advisory opinion rendered by the ICJ (*Effect of awards of compensation made by the United Nations Administrative Tribunal*) on the obligation of the General Assembly to approve the necessary funds to honour a judgement of the United Nations Administrative Tribunal. However, that precedent was much more limited than Mr. Pellet suggested. It did not concern general international law, but only the treaty constituting the Charter of the United Nations. Moreover, the judgment did not postulate an obligation on the part of the Member States of the United Nations, but only on the part of the General Assembly. Lastly, it had to do with the special case of the effects of a final judgment within a constitutional system. It might sometimes be possible in national constitutional law for courts to require parliaments to provide or set aside funds in order to implement final judgments, but that possibility was much narrower than Mr. Pellet's interpretation of it. It did not include a general requirement to provide the necessary funds to meet such obligations.

51. Thirdly, in his most general point, Mr. Pellet argued that it would be absurd and pointless to enunciate rules on the responsibility of international organizations if member States were not under an obligation to provide such

* Resumed from the 2935th meeting.

²⁷³ *Yearbook ... 2006*, vol. II (Part Two), p. 121, para. 91.

²⁷⁴ See the International Tin Council cases.

organizations with the funds needed to answer for their internationally wrongful acts. Personally, he did not think that the absence of such an obligation would be absurd. It made perfect sense to leave it to the international organization and to its internal or external political process to find the necessary funds. In that respect, international organizations were in the same position as States. Often, the political pressure to honour their commitments was such that member States felt compelled to make the necessary funds available.

52. In other cases, such as the agreement to which Mr. Singh had referred concerning the International Tin Council, the international organization might be conceived in a way that suggested that the liability of member States was limited to their contributions as determined by the constituent instrument. In yet other cases, the international credibility of the organization and its member States would suffer, just as would that of a State that did not honour its commitments. That political effect was the consequence of the separate legal personality of the international organization, the very feature which Mr. Pellet had so emphasized. It would be unbalanced if the international organization had only the advantages of a legal personality but not its potential disadvantages.

53. He did not mean to say that it was not desirable for States to provide the funds needed for an international organization to fulfil its obligations. However, once it was accepted that an international organization had a separate legal personality with respect to some of its activities, the issue could not be addressed under general international law, but only on the basis of the treaty law in question. The ICJ had taken that approach in its advisory opinion on *Certain Expenses of the United Nations*. It might be possible in some cases to interpret the constituent instrument of an international organization as enunciating a duty on the part of its member States to pay their contributions in accordance with the needs and international obligations of the organization, but it went too far, and would unnecessarily limit the options States had when creating an international organization, to postulate that such a duty existed under general international law for all organizations.

54. Mr. VÁZQUEZ-BERMÚDEZ said that international law placed obligations on international organizations that were responsible for an internationally wrongful act, in particular the obligation to provide reparation for the damage incurred by the act. Thus, as the Special Rapporteur had pointed out in his fifth report, it would be illogical for the responsibility of international organizations not to be incurred. Moreover, although the member States could not themselves be held responsible for the organization's wrongful act, they must provide it with the means of making reparation for the damage. States which had replied to the question which the Commission had asked them on that matter in Chapter III of its most recent report²⁷⁵ had taken the position that there was no direct obligation on the part of States to compensate for the damage. The interest of Mr. Pellet's proposed draft article, which concerned the progressive development of law, was that it made it possible to actually implement the responsibility of international organizations; otherwise,

the notion of such responsibility would simply remain wishful thinking. With such an article, the States members of international organizations would also be more careful to prevent international organizations or their agents from committing wrongful acts.

55. Mr. YAMADA said that he agreed with the substance of the draft article proposed by Mr. Pellet. Member States should not be able to hide behind the legal personality of the international organization. They must do their utmost, in good faith, to ensure that the international organization fulfilled its obligations resulting from its internationally wrongful act. He therefore had no difficulty in endorsing Mr. Pellet's proposal as a political declaration or recommendation of the Commission. However, he wondered whether the proposal could be acceptable as a legally binding provision. If he understood correctly, Mr. Pellet wanted to have the proposal included in Part Two, and not in chapter (x), on the responsibility of a State in connection with the act of an international organization, which had been adopted in 2006. In other words, member States were not responsible for the organization's internationally wrongful act. The proposal was clearly formulated. The obligation of the member States was not to compensate the victim on the part of the international organization but to provide the organization with the means to compensate the victim. However, in the real world, such an obligation often created financial obligations for the member States.

56. The question therefore arose as to the legal justification for linking the two elements under consideration. The first element was the fact that the member States were not responsible for the wrongful act of the international organization. The second element was the fact that the member States were obliged to bear financial obligations. Two approaches were possible. The first would be to recognize the responsibility of member States and to try to deal with it in article 29 in chapter (x). That approach might not be viable, as it had already been vigorously rejected by many States during the debate on it in 2006 in the Sixth Committee of the General Assembly.²⁷⁶ A second approach would be to retain the proposal in Part Two, as Mr. Pellet wished, but to make it abundantly clear that the obligation of member States was one of conduct and not of results. For example, the beginning of the draft article might read: "The member States shall take all appropriate measures to provide the organization with the means ...".

57. It should also be made clear that the member States did not bear any financial obligations, whether severally or jointly. Otherwise, it would lead to unacceptable situations. For example, several member States might attempt in good faith to provide the organization with the means for compensating the victim, without being able to secure the approval of the majority of member States. The victim might then claim the total amount of compensation from the sympathetic member States, and it would be up to those States to recover the moneys from the other member States. Clearly, that would be unacceptable. In supporting Mr. Pellet's proposal, Mr. Galicki had argued that a precedent to the proposed provision existed in the

²⁷⁶ See *Official Records of the General Assembly, Sixth Committee, Sixty-first session*, summary records of the 13th to 16th meetings (A/C.6/61/SR.13-16) and of the 18th to 19th meetings (A/C.6/61/SR.18-19), *passim*.

²⁷⁵ *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 28 (a).

area of outer space. However, that situation related not to a responsibility regime but to provisions governing the obligation to compensate in the event of an accident and constituted a *lex specialis*, not general international law.

58. Mr. Pellet's proposal should be carefully examined; for Mr. Yamada's part, he remained open to any other suggestions.

59. Mr. WISNUMURTI said that as he had not taken part in the debates in plenary on the topic, he wished to express his appreciation to the Special Rapporteur for his clear and succinct fifth report. The draft articles proposed therein were straightforward and reflected the general pattern of the relevant articles on responsibility of States for internationally wrongful acts.²⁷⁷ He shared many of the Special Rapporteur's views, including on the diversity of international organizations and the consequent need to maintain a level of generality in elaborating the draft articles. Likewise, he agreed with the Special Rapporteur that the international legal personality of organizations did not depend on recognition of the injured party.

60. With regard to Mr. Pellet's proposal, he said that the obligation of the responsible international organization, regardless of its size, to pay reparations to the injured party should not be compromised by an obligation of the organization's member States to provide financial support for the organization to enable it to do so, unless the rules of the organization provided for such an obligation. Thus Mr. Pellet's proposed draft article might not solve the problem. Although it was formulated in general terms that did not directly relate to the financial problem faced by the international organization, it still had the effect of interfering in the internal affairs of the organization. It was incumbent upon the international organization and its members to take the necessary measures to enable the organization to pay reparation for its internationally wrongful act up front, either when States created the organization or when the organization had to deal with a financial problem.

61. Mr. AL-MARRI said that he endorsed the additional draft article proposed by Mr. Pellet. The States members of an international organization, when the latter committed an internationally wrongful act, could distance themselves from it, for example through a statement, but they could not, as member States, avoid their legal obligations. The member States were the source of the organization's financing, and they could not be exonerated from all responsibility when the organization to which they belonged committed an internationally wrongful act and lacked the means to pay reparations.

62. Mr. VALENCIA-OSPINA said that the additional draft article proposed by Mr. Pellet was an attempt to address the legitimate concern expressed by the Commission in the question posed in that connection to States in chapter III of its 2006 report.²⁷⁸ As formulated, the question implied recognition of an additional direct obligation on the part of members towards the party injured by the internationally wrongful act of an insolvent international

organization. That proposition had been rejected by the majority of States which had expressed their views in writing or in the Sixth Committee.²⁷⁹ Interpreting that widely shared sentiment, Mr. Pellet had transformed the direct obligation of members to pay compensation to the injured party into an obligation of members to provide the organization with the means to honour its own obligation to pay reparation. When he had introduced his draft article, Mr. Pellet had defined the proposal's parameters. However, despite the shift of emphasis, the obligation was still additional, to be borne by the members of the organization. Yet even with that change, there was no need for any such obligation.

63. The obligation to help bear the "expenses of the organization", a phrase that had not really been heard during the debate, was in fact inherent in the position of States as members of an international organization. It concerned all expenses, both those under the regular budget and any unforeseen or extraordinary expenses, regardless of the duration of the budget cycle. The fact that an obligation incurring an expense for the organization arose after the annual, biennial or any other regular budget was approved on no account implied that the obligation of the members to help meet that expense was an additional obligation that must be expressly provided for in the draft articles on responsibility of international organizations. In joining an international organization, a State or other international organization undertook to contribute to the expenses of the organization in a proportion determined by the competent organ, in which all the members were usually represented. For the United Nations, that was set out succinctly in Article 17, paragraph 2, of the Charter of the United Nations, a provision also found in the constituent instruments of other international organizations, regardless of their objectives or size. Each member's share was normally calculated as a percentage. An increase in the individual contribution of each member State did not require the imposition of an additional obligation but resulted naturally from the application of the scale of assessments to a total volume of expenses in excess of the amount initially approved in the regular budget.

64. That applied regardless of the origin of the organization's obligation to compensate the injured party and whether or not an internationally wrongful act was involved. Various examples had been cited during the debate, and Mr. Pellet had drawn attention to the jurisprudence of the ICJ, as attested to in its advisory opinion on the *Effects of awards of compensation made by the United Nations Administrative Tribunal*, a decision whose limitations Mr. Nolte had referred to. In another advisory opinion, on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* [para. 66], the Court had pointed out that "the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts". Reference could also be made in that connection to the mechanism for compensation for death, injury or illness of United Nations staff or

²⁷⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

²⁷⁸ *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 28(a).

²⁷⁹ See footnote 276 above.

experts attributable to the performance of official duties on behalf of the Organization.

65. Interpreting Article 17, paragraph 2, of the Charter of the United Nations in its advisory opinion on *Certain Expenses of the United Nations*, the Court had noted that:

The obligation is one thing; the way in which the obligation is met—that is from what source the funds are secured—is another. The General Assembly may follow any one of several alternatives: it may apportion the cost of the item according to the ordinary scale of assessment; it may apportion the cost according to some special scale of assessment; it may utilize funds which are voluntarily contributed to the Organization; or it may find some other method or combination of methods for providing the necessary funds. In this context, it is of no legal significance whether, as a matter of book-keeping or accounting, the General Assembly chooses to have the item in question included under one of the standard established sections of the “regular” budget or whether it is separately listed in some special account or fund. The significant fact is that the item is an expense of the Organization and under Article 17, paragraph 2, the General Assembly therefore has authority to apportion it. [pp. 169–170]

66. The final form the draft articles on responsibility of international organizations would take was still uncertain. The inclusion of a text like the one proposed by Mr. Pellet could give rise to misinterpretations in that, in the absence of such a text, the Member States of the United Nations would not be bound, under Article 17, paragraph 2, of the Charter of the United Nations, to bear the expenses incumbent on the Organization in the form of compensation for an internationally wrongful act by the Organization.

67. The obligation to pay compensation to the party injured by the internationally wrongful act of an organization was incumbent solely upon the latter, even in the case of insolvency, and not upon its members. The payment of such compensation was an expense of the organization which its members had committed themselves to financing *ab initio*. Thus, to ensure that the injured party received compensation, it would probably be more useful from a legal standpoint to elaborate a draft article expressly imposing on the international organization the obligation to adopt, in its rules, the mechanisms needed to ensure effective compliance by its members with their obligation to bear all the organization’s expenses.

68. Mr. McRAE said that the idea put forward by Mr. Pellet in his proposed additional draft article did not pose any problem for him, and he accepted the logic behind it. On the other hand, to enunciate such a legal obligation in a draft article was more problematic: its existence in general international law had yet to be demonstrated. In that connection, he agreed with the view expressed by Mr. Nolte and suggested replacing the words “shall provide the organization” with the phrase “should provide the organization”, although personally he would prefer to see the question addressed in the commentary, as the Special Rapporteur himself had suggested.

69. Mr. DUGARD said that Mr. Pellet’s proposal raised a question of policy in respect of responsibility of international organizations. A cautious approach would be to refuse to expand the responsibility of international organizations by expanding the responsibility of the organization’s member States. That approach had been reflected in draft article 29, which had already been adopted on first reading. Another approach, the one followed by Mr. Pellet, would be to make

international organizations more responsible by clearly specifying that their member States were under an obligation to provide the organization with the means to fulfil its obligations. It must be recognized that if no such obligation were imposed upon member States, it would be impossible for the responsibility of an international organization to be effectively carried out. In a word, the question was whether the Commission ought to approach the matter from the broader perspective of the interests of the international community or from the narrower viewpoint of sovereign States. The Commission must also decide whether it should confine itself to a strict codification of international law or whether it should also engage in its progressive development. In the case at hand, he thought that the Commission should give preference to progressive development. He therefore supported Mr. Pellet’s proposal, while endorsing the drafting change suggested by Mr. McRae.

70. Mr. PELLET said that the debate showed just how divided the Commission was. All the members agreed that his proposed draft article reflected a real problem, but the solution he suggested remained highly controversial.

71. Mr. GAJA (Special Rapporteur) apologized for the delay with which the debate had taken place, which had been due to his absence from Geneva.

72. The draft articles on responsibility of member States for the internationally wrongful acts of international organizations had already been provisionally adopted in 2006, and it would be inappropriate to revise them. The outcome had been a middle course, and the responsibility of member States had been admitted in three types of circumstances. Draft article 29 covered the case in which a State member of an international organization was responsible for an internationally wrongful act of the organization when the member State had accepted that it could be held responsible for that act or had led the injured party to rely on its responsibility. Draft article 28 contemplated a situation in which member States attempted to circumvent one of their obligations by transferring certain functions to an international organization which had no such obligation.

73. The issue which the Commission was currently discussing arose when member States were not held responsible for an internationally wrongful act and the international organization which was responsible for it did not have the means to provide compensation. That was not, then, a subsidiary responsibility of member States. In practice, however, the difference for the member States concerned between a subsidiary responsibility and an obligation to compensate or to provide the organization with the means to compensate was somewhat questionable. In other words, was there a difference for the member States between their money going to the organization, and thus indirectly to the victims, or to its going directly to the victims? Mr. Pellet was certain that there was. In Mr. Pellet’s view, the many States which had spoken against establishing an obligation had done so because the question posed by the Commission had not specified that the money would be paid to the organization for the purpose of compensating the victims.

74. Having looked again at the comments made by States in the Sixth Committee which were mentioned

in the fifth report (para. 29), he had been able to detect only one which had argued the existence of an obligation for member States that was not based on the rules of the organization. It was a comment by the Russian Federation, which had contended that States establishing an international organization were required to “give it the means to fulfil its functions, including those which had led it to incur responsibility towards a third party”.²⁸⁰ In the view of several other States, an obligation existed for the member States only if provided for in the constituent instrument or the rules of the organization. In practice, when member States did in fact provide an organization with the necessary means to make compensation, they did so expressly on the basis of the rules of the organization or else *ex gratia*, through voluntary contributions. That practice certainly did not confirm the existence of an obligation in general international law for member States to provide an organization with the means to compensate.

75. Mr. Pellet’s proposal was ambiguous because it did not make it clear that the basis of the obligation was a rule of general international law, which was necessarily implicit if the proposed draft article was added. If an additional draft article on the subject was necessary, as several members of the Commission had suggested, reference would have to be made to the rules of the organization, rules which would enunciate, either expressly or implicitly, the existence of an obligation for member States to cooperate with the organization. He therefore proposed the following draft article: “In accordance with the rules of the responsible international organization, its members are required to take all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under the present chapter.” He also suggested that the members of the Commission should hold consultations to see whether they could agree on a compromise solution. If that was not possible, perhaps the Commission could either take a vote or establish a working group.

76. The CHAIRPERSON endorsed the idea that the members of the Commission should hold consultations. If the consultations were not successful, Mr. Pellet’s proposal would be put to a vote.

77. Mr. PELLET said that he withdrew his proposal, since Mr. Gaja’s was perfectly acceptable. He suggested that, if there was no objection, Mr. Gaja’s proposal might be referred to the Drafting Committee; there was no need for consultations.

78. After an exchange of views on the question in which Mr. BROWNLIE, Mr. CANDIOTI, Mr. GAJA, Mr. NOLTE and Mr. PELLET took part, the CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to refer the additional draft article proposed by the Special Rapporteur to the Drafting Committee.

It was so decided.

The meeting rose at 1.05 p.m.

2939th MEETING

Thursday, 19 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vas-ciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GAJA said that the work of the Special Rapporteur on reservations to treaties was always remarkable, even when he became mired in matters of detail, or when the multiplicity of cross-references to other parts of the Guide to Practice made for difficult reading, the depth of his research and ability to organize material had to be acknowledged. He regretted having been unable to attend all the meetings on the agenda item, especially the one at which the Special Rapporteur had made his presentation.

2. In his view, the question of the formulation of acceptances of reservations was best approached by considering first the admittedly rare case in which acceptance was not simply an absence of objections to the reservation in question, as indicated in draft guideline 2.8, but instead an act through which a State or organization expressed its consent to the formulation of a reservation.

3. He was not of the opinion that the 1969 Vienna Convention allowed for such express acceptance only when the State or organization expressed its consent to be bound by the treaty. As with a reservation or objection, article 23 of the Convention did not seem to exclude the possibility of formulating an acceptance prior to the expression of consent to be bound by the treaty. Nor did article 20, paragraph 5 exclude that possibility, contrary to the assertion in paragraph 59 [239] of the report. It was clear, however, that where acceptance preceded the expression of consent, it would produce effects only when bilateral relations as between the reserving State and the accepting State were established on the basis of the treaty.

4. The Commission should place next to express acceptance, not tacit acceptance, but presumption of acceptance. Although the report used the two terms interchangeably, as in paragraph 36 [216], it was important to distinguish between them. If a State publicly criticized a reservation but omitted to formulate an objection in accordance with the procedure laid down in the 1969 Vienna Convention,

²⁸⁰ *Official Records of the General Assembly, Sixth Committee, Sixty-first session, summary record of the 18th meeting (A/C.6/61/SR.18), para. 68.*

it would hardly be appropriate to refer thereafter to its tacit acceptance. However, the absence of objection would allow for the application of a presumption of acceptance. Accordingly, the term “tacit acceptance” should be replaced by “presumption of acceptance” in draft guidelines 2.8, 2.8.1 or 2.8.1 *bis*, and 2.8.2.

5. With regard to the choice between draft guidelines 2.8.1 and 2.8.1 *bis*, his preference was for the latter, which seemed more “user-friendly”: in a guide to practice, it was important to give the reader all the information required in as clear a fashion as possible and to avoid elaborate cross-references.

6. He had some doubts as to whether draft guideline 2.8.2 was in conformity with the 1969 Vienna Convention. It covered the case in which a reservation had to be accepted by all the parties on account of the limited number of the negotiating States and the object and purpose of the treaty, as indicated in article 20, paragraph 2 of the Convention. According to paragraph 5 of the same article, the general rule relating to the presumption of acceptance was applicable even in the case referred to in paragraph 2. A State was thus free to raise an objection until the time of its expression of consent to be bound by the treaty, provided that a period of 12 months had elapsed since notification of the reservation. While he did not agree that such a rule “would have extremely damaging consequences for the reserving State, and, more generally, for the stability of treaty relations”, as asserted in paragraph 41 [221] of the report, he understood the reasons given for the solution proposed, namely to limit the scope of the presumption by stating that only the 12-month period should apply. However, in the case in question it was unlikely that the treaty could enter into force unless all the States that had participated in negotiations became parties to it.

7. He shared the doubts raised with regard to draft guideline 2.8.9, concerning which organ within an international organization was competent to accept a reservation to a constituent instrument; a simple reference to the relevant rules of the organization concerned would be preferable.

8. He also endorsed the concerns expressed about the usefulness of draft guideline 2.8.11 as currently worded. It related to the constituent instrument of an international organization or an act modifying it, which would have to be ratified by all member States or by a certain number of them. The fact that the acceptance of the competent organ within the organization was required did not necessarily imply that member States had no right to formulate objections to reservations or to accept them. If such a right existed, as the report seemed to suggest, it could not be stated in general terms that those objections or acceptances had no legal effects.

9. On the other hand, in the interest of legal security, it was necessary to state clearly, as in draft guideline 2.8.12, that once a reservation had been accepted, it could not be withdrawn.

10. In conclusion, he reiterated his view that the rule relating to the presumption of acceptance laid down in the 1969 Vienna Convention was applicable only when the reservation was deemed valid within the meaning

of article 19 of the Convention. If the reservation was not valid, there could be no acceptance or presumption of acceptance merely on the ground that the 12-month period since notification of the reservation had elapsed.

11. Mr. VÁZQUEZ-BERMÚDEZ commended the Special Rapporteur’s twelfth report, and in particular the quality of the legal analysis of the issues. States would undoubtedly find the draft guidelines useful for resolving problems that arose in practice.

12. He disagreed with the argument put forward in paragraph 11 [191], and subsequently developed in paragraphs 39 [219] and 40 [220], that it was sufficient for practical purposes to distinguish the States and international organizations which had a period of 12 months to raise an objection from those which, not yet being parties to the treaty at the time of the formulation of the reservation, had time for consideration until the date of expression of their consent to be bound by the treaty. In his view that was not always the case. Article 20, paragraph 5, of the 1969 Vienna Convention provided that

[f]or the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

He drew particular attention to the phrase “whichever is later”.

13. It was clear that only States and international organizations which were contracting parties could accept reservations. However, pursuant to article 23, paragraph 1, of the 1986 Vienna Convention, a reservation must be communicated not only to the contracting States and organizations but also to other States and international organizations entitled to become parties to the treaty. He had no problem with the argument that if a contracting State or organization received notification of a reservation and raised no objection within a 12-month period, it should be presumed to have tacitly accepted the reservation. Nor did he have any problem with the idea that if a State or organization which received notification of the reservation was not yet a contracting party and the date on which it consented to be bound by the treaty fell after the expiry of the 12-month period, the period for consideration of the reservation lapsed on the date of its expression of consent, and that if no objection had been raised, the State or organization was presumed to have tacitly accepted the reservation.

14. However, article 20, paragraph 5, of the 1969 Vienna Convention provided for a third case: a State or organization entitled to become party to a treaty might receive notification of a reservation and within the 12-month period express its consent to be bound without raising any objection to the reservation. In that case, if the expression “whichever date is later” was applied *stricto sensu*, the State or organization in question still had the remainder of the 12-month period from the date of notification of the reservation in which to raise an objection. Consequently, the fact that it had not raised an objection to the reservation at the time of expression of consent to be bound by

the treaty should not be considered as an acceptance of the reservation. The State or organization concerned might well raise an objection to the reservation after its expression of consent, but prior to the expiry of the 12-month period; that would be logical where a State or organization that had already decided to consent to be bound by the treaty did not wish to delay depositing its instrument of ratification or accession in order to analyse a reservation of which it had received notification only the day before, secure in the knowledge that it still had the remainder of the 12 months in which to raise an objection. That was a completely different scenario from the one in which the date of expression of consent came after the expiry of the 12-month period, as should be clearly explained in the draft guidelines or in the commentary thereto, preferably in connection with draft guideline 2.8.1 *bis*.

15. He was in favour of retaining the bracketed references to express and tacit acceptance in the text of draft guideline 2.8 so that the subject matter of the draft guideline would immediately be clear to the reader. His preference would be for draft guideline 2.8.1 *bis*, which duly reflected the text of article 20, paragraph 5, of the 1969 Vienna Convention and was easier to understand at a glance than draft guideline 2.8.1.

16. As for draft guideline 2.8.2, he agreed that it was necessary in order to ensure stability in treaty relations. He endorsed the Special Rapporteur's view that the existence of the presumption relating to the tacit acceptance of a reservation in article 20, paragraph 5, of the 1969 Vienna Convention did not preclude States or organizations from expressly accepting a reservation. He also agreed that there was nothing to prevent States and organizations that had raised an objection to a reservation from expressly accepting it at a later date.

17. Given that article 23, paragraphs 1 and 3, of the 1969 and 1986 Vienna Conventions explicitly provided for express acceptance of reservations, draft guideline 2.8.3 was useful. However, the word "contracting" should be inserted before "State or international organization" for the sake of consistency with article 20 of the Conventions. Draft guideline 2.8.4 was a useful reminder of a requirement of article 23, paragraph 1, of the Conventions.

18. He drew attention to an apparent contradiction between draft guideline 2.8.8, according to which acceptance by the competent organ of the organization should not be presumed, and the last sentence of paragraph 71 [251], which referred to cases in which the organ implicitly accepted the reservation. With regard to draft guideline 2.8.10, he concurred with other members that the phrase "all the States and international organizations concerned", in paragraph 85 [265] of the report, required clarification.

19. As for draft guideline 2.8.12, while he understood the Special Rapporteur's concern to promote legal certainty in treaty relations, it was necessary to provide for the possibility that a State or international organization might wish to change its mind; following its acceptance of a reservation, it might subsequently decide to enter an objection, even one which might prevent the entry into force of the treaty as between the reserving party and itself.

20. Mr. PELLET (Special Rapporteur) said he had some sympathy with Mr. Gaja's argument that it would be more appropriate to refer to "presumption of acceptance" rather than "tacit acceptance". He wondered whether, if draft guidelines 2.8, 2.8.1 and 2.8.2 were amended along the lines suggested by Mr. Gaja, that might meet the concerns of Mr. Vázquez-Bermúdez regarding the third possibility provided for under article 20, paragraph 5, of the 1986 Vienna Convention, namely, that the State or organization could still raise an objection during the remainder of the 12-month period. That might obviate the need for an explicit reference in the draft guidelines; some mention in the commentary should suffice.

21. He also wondered whether the insertion of the word "contracting" before "State or international organization" in draft guideline 2.8.3 would meet some of the other concerns raised by Mr. Gaja.

22. Mr. VÁZQUEZ-BERMÚDEZ reiterated that the presumption in question arose only upon the expiry of the 12-month period or at the time of expression of consent to be bound by the treaty, provided that it came after the 12 months had elapsed: article 20, paragraph 5, of the 1969 Vienna Convention provided that the later date was the one applicable. Furthermore, the Special Rapporteur seemed to have been thinking along the same lines, as was borne out by his statement in the last sentence of paragraph 40 [220]: "In any case, the phrase 'whichever is later [the end of the period of 12 months or the date on which it expressed its consent to be bound by the treaty]' ensures that States and international organizations have at least one year to consider reservations."

23. Mr. GAJA said that he had no objection to draft guideline 2.8.3 as currently worded. Contrary to what was stated in the report, neither article 20, paragraph 5, nor article 23 of the 1969 Vienna Convention laid down the condition that only contracting States and contracting organizations could formulate acceptances of reservations.

24. Ms. JACOBSSON thanked the Special Rapporteur for an enlightening presentation. Few members could have foreseen that so many booby traps surrounded the form and procedure for the formulation of acceptances and reservations. On the whole, she was in favour of the draft guidelines and of their referral to the Drafting Committee. She nonetheless wished to make a few comments.

25. First, her preference was for draft guideline 2.8.1 *bis*, despite the fact that to some extent it duplicated draft guideline 2.6.13. Repetition could sometimes be useful. Draft guideline 2.8.1 *bis* spelled out clearly the conditions for the procedure of tacit acceptance, and, as Mr. Gaja had said, was more "user-friendly".

26. Secondly, she agreed with several other members that the text of draft guideline 2.8.2 needed to be clarified with respect to States and organizations which were not yet parties to the treaty.

27. Thirdly, she was inclined to agree with Ms. Xue that application of the very strict rule contained in draft guideline 2.8.4 might pose problems in practice. However, given the requirements of article 23, paragraph 1,

of the 1969 Vienna Convention, she doubted whether the problems could be resolved in the Drafting Committee, although she was willing to engage in a discussion on the matter.

28. Several members had suggested that draft guideline 2.8.12 should be reformulated. She too could foresee situations in which the irreversible nature of acceptances of reservations could do more harm than good where preserving the integrity of treaty relations was concerned. Moreover, there was a slight imbalance in that the reserving State could withdraw its reservation but the accepting State could never withdraw its acceptance. However, in the light of the arguments of the Special Rapporteur and other members, she was in favour of retaining the current wording of the draft guideline for the time being, but suggested that the text should be the subject of further discussion in the Drafting Committee.

The meeting rose at 10.40 a.m.

2940th MEETING

Friday, 20 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Reservations to treaties (concluded) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the Special Rapporteur on reservations to treaties to sum up the debate on his twelfth report (A/CN.4/584). He informed the members of the Commission that the Enlarged Bureau had recommended the appointment of Mr. Kolodkin as Special Rapporteur on the topic entitled “Immunity of State officials from foreign criminal jurisdiction”. He took it that the Commission agreed to that recommendation.

It was so decided.

2. Mr. PELLET (Special Rapporteur) said that, as he had feared, only a few members of the Commission had expressed their views on the first part of his twelfth report, which dealt with a very technical and dry subject. He was thus all the more grateful to those who had

taken the trouble to read the report carefully and comment on it. A number of other members had let him know informally that they had not taken the floor because the proposed draft guidelines had not posed any particular problems for them, apart from possible drafting questions. Although doubts had been expressed as to the utility of draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), all speakers had been in favour of referring draft articles 2.8 to 2.8.12 to the Drafting Committee. Two points, however, had given rise to criticism or suggestions that went beyond simple drafting problems. He wished to stress that, notwithstanding the recent misguided practice of the Commission, which, when unable to take a decision, had often left it to the Drafting Committee to do so, the Drafting Committee’s role was to draft and not to decide questions of principle. The Commission should therefore put an end to that regrettable practice. If any members were opposed to drawing conclusions from the debate, which they had every right to do, then he would ask the Chairperson to take a vote—at least an indicative one—to ensure that the Drafting Committee did not yet again replace the plenary in deciding questions of principle.

3. He would first address the suggestions of Commission members which he felt were primarily of a drafting nature and on which the Drafting Committee was competent to decide. The clumsy wording of the draft articles concerned might have suggested that there had been disagreement, although no principle had been at issue and it should be possible to find a solution that satisfied all members. For example, it had been noted that the English translation of draft guideline 2.8 (Formulation of acceptances of reservations) posed problems. That was certainly true for the translation of the French word “*objection*”, which appeared in the plural in the English text although it should be in the singular, since it was in the singular in the sole authentic, authoritative version of the draft guideline, namely the French. If there were other problems, whether in the English or in the other language versions, the Drafting Committee could easily deal with them, too.

4. Another question raised did not concern the draft guideline itself but the explanation of it given in paragraph 17 [197] of the report, where he had written that “tacit acceptance [was] the rule and express acceptance the exception”. He had had a purely quantitative statement in mind and did not think that, legally speaking, express acceptance was an exception to a principle of tacit acceptance that was obligatory for States. He thus believed that he could fully reassure those who had expressed concern in that regard; once again, the problem seemed to be one of translation.

5. With one exception, all speakers had been in favour of including the phrase that had been left in square brackets in the text of draft guideline 2.8. One member of the Commission had made a useful proposal for new wording which would surely make it possible to incorporate the words “tacit acceptance” and “express acceptance” more harmoniously in the second paragraph of draft guideline 2.8, which would then read: “Express acceptance arises from a unilateral statement in this respect and tacit acceptance from silence kept ...”. Yet again, the problem was mainly one of drafting.

6. The same could be said of the problem posed by draft guideline 2.8.1 (Tacit acceptance of reservations), and in that connection he noted that, despite the divergent positions expressed by speakers, it would appear that the variant proposed in draft guideline 2.8.1 *bis* was preferred. In any event, the two draft guidelines were intended to mean the same thing, and the Drafting Committee might decide the question, which did not raise any issue of principle. If it adopted draft guideline 2.8.1 *bis*, the question of whether all the draft guidelines from 2.6.1 to 2.6.14 or only draft guideline 2.6.13 should be referred to the Drafting Committee would no longer arise, which was an additional reason to retain that variant.

7. A number of members had pointed out that after explaining the doctrinal difference between “implicit acceptance” and “tacit acceptance” in paragraphs 9 [189] to 11 [191], he had used the two terms indiscriminately in the rest of the report and had at times confused the two. It was unfortunate that those speakers had not cited the paragraphs concerned; those passages would have to be carefully identified when the new version of the commentary to the future guidelines was drafted, although the problem related only to paragraphs of the report and not to the draft guidelines themselves.

8. A more important substantive question had been vigorously argued by another speaker, who had contended that the words “whichever is later” in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions necessarily implied that the contracting States and international organizations had at least one year to react. He fully agreed with that assertion, but just as he considered that it would certainly be useful to place greater emphasis on the scenario in which the contracting State or international organization became a party by the end of the 12-month period following notification, he also wondered whether such a scenario must or even could have an impact on the wording of the draft guideline. In any event, the Drafting Committee might give the question some thought.

9. The comment made with a certain insistence by several speakers on draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations), which, they had argued, posed problems as currently worded, was an entirely different matter. He could endorse that view, even though on reflection he thought that the criticism was sometimes rather muddled. Having reread the draft guideline, he admitted that it posed a real problem which the Commission should try to address. In that connection, he was not at all certain that he had really succeeded in categorizing the problems raised. However, he had eventually concluded that it was necessary to differentiate between a number of scenarios, which would probably lead to different solutions, yet those solutions were none other than the ones contained in draft guidelines 2.8.1 and 2.8.2. Thus, the problem was not one of principle, and it was for the Drafting Committee to settle it.

10. All told, there were four scenarios. In the first, if a treaty made its own entry into force subject to unanimous ratification by the signatories, or even to ratification by a specific number of signatories, the principle set out in article 20, paragraph 5, of the 1969 and 1986 Vienna

Conventions clearly applied, because the treaty could not enter into force until all the signatories had ratified it without objecting to the reservation, which could occur at any time until ratification. That should probably be expressly stated so as not to continue giving the impression that the Guide to Practice was incompatible with the text of the Vienna Conventions on that point, as some members seemed to think. It would perhaps be enough to spell that out in the commentary to draft guideline 2.8.1.

11. The other scenarios were more difficult. What happened if for some other reason the reservation had to be accepted by all the parties? If the treaty was in force, there was no problem, because it was a simple matter to identify the parties: those that had expressed their consent to be bound and that had 12 months in which to raise an objection after they had been notified, as stipulated in draft guideline 2.8.2. What happened, however, with States or international organizations that intended to become parties? To remain faithful to the spirit of article 20, one would have to conclude that they had 12 months to ratify, starting from notification, and that upon notification or during the 12-month period they might decide not to accept—and that was the principle set out in draft guideline 2.8.1.

12. In the last scenario, the treaty was not in force and the parties could react to the reservation at any time between notification and the end of the subsequent 12-month period or until entry into force, whichever came later. Thus, a number of scenarios existed for which either draft guideline 2.8.1 or draft guideline 2.8.2 was always applicable, and he could not imagine that an additional draft guideline was necessary. On the other hand, those scenarios needed to be formulated in a way that made it clear when draft guideline 2.8.2 had to be applied. That might seem rather convoluted, but on reflection he had concluded that he had no real difference of opinion with the members of the Commission. Accordingly, it would be up to the Drafting Committee to verify which of the possibilities, i.e. draft guideline 2.8.1 or 2.8.2, should be applied to each scenario, on the understanding that there was probably no reason to retain the reference to States or international organizations that “are entitled to become parties to the treaty”, and it would also be necessary to decide whether to speak of “parties”, as was the case in article 20, paragraph 2, of the 1969 Vienna Convention, or of “contracting parties”, as was done later on in article 20. When giving its opinion on that rather technical question, the Drafting Committee should probably review the wording of draft guideline 2.8.2, bearing in mind the need to safeguard treaty relations.

13. The problems posed by draft guidelines 2.8.3 to 2.8.10 were much less complicated. Agreement seemed to be unanimous on draft guideline 2.8.3 (Express acceptance of a reservation), including on its wording, although one Commission member continued to contend that the illustration given in paragraph 49 [229] was not a good example, since a late reservation, in that member’s view, was not a reservation. Such a position undermined the Commission’s carefully considered decision, adopted by a formal vote, that late reservations must be treated as reservations, although they could be objected to later and should be discouraged. As Special Rapporteur, it was

his job firmly to oppose such undertakings, which would only destabilize the draft guidelines and make them less coherent. On the other hand, the Drafting Committee would probably want to take account of the suggestion to insert the word “contracting” before the phrase “State or an international organization” (and to delete the word “an”) in draft guideline 2.8.3 in order to avoid any inconsistency with article 20 of the 1969 Vienna Convention.

14. Some members thought that the wording of draft guideline 2.8.4 (Written form of express acceptances) might pose practical problems. He did not really understand why that was—on the contrary, he would have thought that the requirement of an acceptance in writing would avoid practical problems—and he did not see how the Commission could reconsider the point without calling into question one of the fundamental postulates upon which the draft guidelines were based, namely compliance with the Vienna text, unless there was a very important reason, which was not the case.

15. There had been no criticism, not even as to form, of draft guideline 2.8.5 (Procedure for formulating express acceptances) or draft guideline 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation), except in connection with a purely technical mistake in the title of 2.8.6. On the other hand, a proposal had been made by one member and supported by another which, if adopted, would have a considerable impact: to distinguish between the institutional provisions and the substantive provisions of the constituent instrument. He was not at all in favour of that idea, for both the theoretical and practical reasons set out at length in paragraphs 73 [253] to 78 [258]. Could one really apply to reservations to Articles 1 and 2 of the Charter of the United Nations the ordinary rules applicable to the acceptance of reservations without the General Assembly or the Security Council having something to say about it? He did not think so, because to do so would not be in keeping with practice: regardless of their object, reservations to constituent instruments were always submitted to an organ of the organization.

16. Draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument) had not given rise to much discussion either, apart from the comment that reference should be made to the rules of the organization. Although that suggestion was valid for draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument), he did not think that it should be followed for 2.8.8, where it was not the rules of the organization that were important but the transparency of the process and the certainty that should result from it. The problem was one of certainty and not of the pre-eminence or constitutionality of the rules of the organization. One Commission member had contended that there was a contradiction between draft guideline 2.8.8 and the end of paragraph 71 [251] of the report. He disagreed: that was a drafting problem, because the purpose of draft guideline 2.8.8 was precisely to avoid the situation described in the last sentence of paragraph 71 [251].

17. The more numerous criticisms of draft guideline 2.8.9 had partly convinced him, in that the organ competent to accept a reservation to a constituent instrument

was first and foremost the organ so designated, expressly or implicitly, in the constituent instrument of the international organization. That principle should be embodied in the draft guideline from the outset, as several members of the Commission had suggested. However, he did not think that this was sufficient. The current wording retained its eminently practical interest as a “safety net” for cases in which the constituent instrument said nothing or nothing clear could be deduced from it. It might in fact be useful to specify what the practice was if the constituent instrument was silent.

18. With regard to draft guideline 2.8.10 (Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established), he recalled that he had been the first to express confusion at his own drafting. The phrase “the acceptance of all the States and international organizations concerned” was in fact odd; to resolve the problem, it would probably suffice to replace it with the more appropriate phrase “the acceptance of all the contracting States and international organizations”.

19. In that connection, one Commission member had raised an interesting legal question: what happened in the case of reservations formulated by the last State that ratified? The problem did in fact arise, but it was more closely linked to the question of the effect of reservations and acceptances than that of their formulation. However, if the words “contracting States and international organizations” were replaced with “States and international organizations concerned”, that might pose procedural problems not for the last State to ratify, but for the first. What would happen if the first State to ratify, wanted to formulate a reservation to the constituent instrument and there was no one to react? Would it simply be necessary to wait for the second ratification, or did something more complicated have to be found? If there was any need for a discussion of what was after all a rather academic problem, it should take place only in the commentary. In any event, it might be preferable to refer to the “signatory” States and international organizations in order, as had been pointed out, to prevent conditions from becoming increasingly stringent as the number of contracting parties rose.

20. Turning to draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), he pointed out that the French word “*faculté*” had been incorrectly translated—and that was a recurring problem—into English as “right”; that should be corrected. The draft guideline had given rise to two other criticisms which must be taken seriously. The less serious was the fact that its title was inconsistent with its content: the draft guideline concerned not only acceptance, but also the reaction to the reservation in the broad sense, whether it was an acceptance or an objection. That criticism was absolutely right, and some thought needed to be given to the wording on that basis.

21. On a more fundamental matter, the question had been raised whether any purpose was served by having a guideline that confined itself to stating that the conduct to which it referred had no legal effect. He conceded that such wording was somewhat unusual for a positivist jurist, and it ought to be reconsidered, as had been suggested, to

avoid giving the impression that the members of the international organization could reconsider the position taken by the competent organ, which was binding on all, and to abandon the current wording in favour of an approach that was not so heavily negative. It might be possible to say, as had been proposed, that the right was “without prejudice to the effects that might be produced by its exercise”.

22. Draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations) was surely the most controversial. Some members had asserted that it was too categorical and that it should stipulate that within the 12-month time period a State or international organization which had given its acceptance was always free to change its position, and that once it had expressly formulated its acceptance it could still withdraw and make a reservation.

23. Other members, meanwhile, had vigorously defended the draft guideline, and he thanked them, for it was very important that the draft guideline should stress the categorical nature of the rule. First, he saw no reason that the legal regime for express acceptances should be brought into line with the regime for tacit acceptances, as had been recommended as a justification for altering the draft guideline. He did not see why, if a State took the initiative—which nothing compelled it to do—of formally declaring before the end of the 12-month period that it accepted the reservation, that this should be the same as if the State had done nothing and had simply let the time period elapse. That was not supported by the text of the 1969 Vienna Convention and was quite simply at variance with the principle of good faith, which was essential in relations between States. Secondly, the proposal was particularly troublesome in that while the Commission had not yet taken up the question of the effects of reservations and acceptances, it was aware that, under articles 20 and 21 of the 1969 and 1986 Vienna Conventions, acceptance was necessary for a treaty to enter into force in respect of the reserving State, and that if the first express acceptance was formulated before the end of the 12-month period, it produced fundamental effects for the respective situation of the States concerned. The possibility of withdrawing the acceptance would thus be highly destabilizing from the standpoint of the security of legal relations.

24. Thirdly, to affirm, as had been done during the debate, that such withdrawals of acceptance were quite rare was not convincing. The question was what to do if they did occur. The reply must be very clear, and a State that had taken the initiative of committing itself unilaterally should not be able to go back on an acceptance which produced legal effects. Nor was he any more convinced by another suggestion, supported by several members, to make it possible to withdraw an express acceptance if it had been made on the basis of a particular treaty interpretation which was contradicted, perhaps much later, by a judicial interpretation. Quite apart from the fact that, legally speaking, the interpretation concerned had only the relative authority of *res judicata*, the correct response to such a situation, as one member had put it so well, was certainly not withdrawal of the acceptance but rather the formulation of an interpretative declaration, which, unlike an acceptance and in conformity with draft guideline 2.4.3, could be

formulated at any time. That should be specified in the commentary or else in the draft guideline itself. To go back on the principle reflected in draft guideline 2.8.12 would constitute a grave danger for the security of legal relations and would lead to a result that was contrary to the fundamental principle of good faith. That was not a drafting problem, and the Commission should not rely on the Drafting Committee, as it had done too often in the recent past, because the question was one of principle that must be decided in plenary meeting.

25. Noting that a narrow majority of Commission members had supported draft guideline 2.8.12, he asked the Chairperson to hold an indicative vote on the question so as to avoid having the Drafting Committee decide on a question of principle that was not within its competence.

26. The CHAIRPERSON suggested that the Commission should indicate by show of hands whether it agreed with the principle expressed in draft guideline 2.8.12 that when express acceptance was given, such acceptance bound the State or international organization that gave it without any possibility of reversing the acceptance, even during the 12-month period that might follow it.

27. By means of a vote by show of hands, the Commission expressed its approval of draft guideline 2.8.12 in principle.

28. Mr. PELLET (Special Rapporteur) said that a second problem of principle also arose. In his statement at the previous meeting, Mr. Gaja, commenting on draft guidelines 2.8, 2.8.1 and 2.8.2, had said that it would be preferable to speak of “presumption of acceptance” rather than “tacit acceptance”. Personally, he was firmly convinced that this distinction, although hardly reflected in the report, was very important and that the point was not simply one of drafting. In defence of his proposition that silence maintained for 12 months or until ratification created a simple presumption of acceptance, Mr. Gaja had argued that the reservation could prove impermissible for several reasons, above all on account of its incompatibility with the object and purpose of the treaty. One might object that this had nothing to do with the question of the formal validity of the reservation, which was dealt with in the second part of the Guide to Practice, but rather concerned the issue of substantive validity, which was addressed in the third part. However, the point of that observation was sufficiently important for the attention of States to have been drawn to it already in the second part. Moreover, it might also help dispel the fears of those members of the Commission for whom draft guideline 2.8.12 was too inflexible. Not only was Mr. Gaja’s position of principle compatible with article 20, paragraph 5, of the 1969 Vienna Convention, which indicated that the consequence of the silence of the State or international organization was not that the reservation was accepted but that it was “considered to have been accepted”: it was its inescapable consequence.

29. It was for the Drafting Committee to propose wording to render the idea that silence was tantamount to presumption of acceptance rather than to tacit acceptance, but the subtle distinction was important enough that the matter should be decided in plenary meeting.

30. In concluding his remarks, he requested the Commission to refer the draft guidelines contained in his twelfth report to the Drafting Committee.

31. The CHAIRPERSON said he took it that the Commission considered, with Mr. Gaja and the Special Rapporteur, that the words “presumption of acceptance” should be used rather than “tacit acceptance” in draft guidelines 2.8, 2.8.1 and 2.8.2 and that it decided to refer the draft guidelines proposed by the Special Rapporteur in his twelfth report to the Drafting Committee.

It was so decided.

32. The CHAIRPERSON said that the Commission had thus concluded its consideration at the current session of the topic of reservations to treaties and that he would adjourn the meeting to enable the Drafting Committee on responsibility of international organizations to meet.

The meeting rose at 11.05 a.m.

2941st MEETING

Tuesday, 24 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens (*continued*)* (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. KAMTO (Special Rapporteur), introducing his third report on expulsion of aliens (A/CN.4/581), said that, having defined the scope of the topic and the key terms in his second report,²⁸¹ he was now embarking on a consideration of the general principles of the law governing expulsion of aliens and proposing five new draft articles. Upon close examination, the expulsion of aliens was seen to involve, on the one hand, the fundamental principle of State sovereignty in the international order and the territorial jurisdiction that flowed from that principle, and, on the other hand, the fundamental principles underpinning

* Resumed from the 2926th meeting.

²⁸¹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573. For the discussion of this report by the Commission, see the 2923rd to 2926th meetings above.

the international legal order and basic human rights which all States must respect.

2. The right to expel could thus be seen to be a right inherent in the sovereignty of the State, not one granted by an external rule of customary law. It was, so to speak, a natural right of the State emanating from its full authority over its territory. That had never raised serious doubts in the literature and was confirmed by State practice and ample international case law. That right, which existed irrespective of any special provision in internal law, was nevertheless not absolute: it must be exercised within the limits of international law—first, limits inherent in the international legal order that formed the basis of the international legal system and existed independently of other constraints relating to special areas of international law; and second, those derived from international human rights law, since expulsion affected human beings who enjoyed certain non-derogable rights under contemporary international law.

3. Draft article 3, entitled “Right of expulsion”, proposed a rule on the right of the State to expel an alien and stated that this right was restricted by the fundamental principles of international law, thereby dissociating the requirement of respect for those principles from the requirement of respect for fundamental human rights, something that would be addressed in other provisions. It was to be found in paragraph 23 of the third report and read:

“1. A State has the right to expel an alien from its territory.

“2. However, expulsion must be carried out in compliance with the fundamental principles of international law. In particular, the State must act in good faith and in compliance with its international obligations.”

4. Independently of the general rules of international law, the exercise of the right to expel foreigners was limited by a number of principles specifically governing that right. Some of those limits related to the person to be expelled. Even though the topic did not at first sight appear to cover nationals of an expelling State, since they could not be aliens in their own country, it had seemed important to begin by recalling the principle of non-expulsion by a State of its own nationals, especially as historically there had been some—albeit not many—exceptions to that principle, a few of which still persisted. Those exceptions justified addressing the expulsion of nationals under the topic.

5. It would be recalled that, following its consideration of his second report, the Commission had decided to use the terms “*ressortissant*” and “national” as synonyms; anything in the third report that might seem to indicate the contrary should be disregarded. The distinction crept in at certain points and was to some degree pertinent in the context of expulsion of nationals, but he had endeavoured to respect the general trend in the Commission away from making such a distinction.

6. The principle of non-expulsion of nationals was far from absolute. Certain individuals or categories of

individuals, particularly deposed Heads of State and the members of their families, had, in the past and even quite recently, been expelled from their own countries and gone into exile. Such had been the fate during the twentieth century of members of certain royal families who had been dethroned, and of the former Head of State of Liberia, Charles Taylor, who had been expelled from his country to Nigeria and subsequently brought before an international tribunal.²⁸² The only basic requirements were that there should be a State willing to receive the persons expelled in such special cases and that they had the right to return to their own country if the receiving State no longer wished them to be in its territory; in the absence of that right, they would be placed in the same situation as that of a stateless person.

7. Draft article 4 (Non-expulsion by a State of its nationals) was to be found in paragraph 57 of the report, and read:

“1. A State may not expel its own nationals.

“2. However, if, for exceptional reasons it must take such action, it may do so only with the consent of a receiving State.

“3. A national expelled from his or her own country shall have the right to return to it at any time at the request of the receiving State.”

8. The second principle relating to expulsion of individuals was that of non-expulsion of refugees. It might be asked whether there was any need to consider that issue and to devote a draft article to it, given the existence of the 1951 Convention relating to the Status of Refugees and a number of regional instruments that contained provisions on their expulsion. Examination of those provisions led one to answer in the affirmative, for the reasons set out in paragraphs 62 to 73 of the report. Recent developments in international law in connection with the fight against international terrorism suggested that there was arguably a case for including terrorism among the grounds for expulsion of a refugee, in addition to the grounds cited in articles 32 and 33 of the 1951 Convention. As was indicated in paragraphs 76 and 77 of the third report, Security Council resolution 1373 (2001) of 28 September 2001 could be taken to imply that a refugee might be expelled for committing or facilitating terrorist acts.

9. Draft article 5 (Non-expulsion of refugees) was to be found in paragraph 81 of the report, and read:

“1. A State may not expel a refugee lawfully in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a final judgement of a particularly serious crime or offence, constitutes a danger to the community of that State.

“2. The provisions of paragraph 1 of this article shall also apply to any person who, being in an unlawful situation in the territory of the receiving State, has

applied for refugee status, unless the sole manifest purpose of such application is to thwart an expulsion order likely to be handed down against him or her [against such person].”

10. The square brackets had been placed around the phrase “or terrorism” for reasons explained in the report. Of course, terrorism could be addressed in the context of State security, but since it had been identified as a discrete phenomenon and specific international legal instruments had been elaborated on the question, including a Security Council resolution, which had quasi-legislative authority at the international level, a specific reference thereto might usefully be included in the draft articles by way of progressive development of international law.

11. There was ample justification for proposing draft article 5. It filled a gap in existing legal instruments on refugees. Articles 32 and 33 of the 1951 Convention were worded in the negative, and thus did not establish a rule on expulsion of refugees. The proposed draft article supplemented those provisions without straying too far from existing positive law.

12. The principle of non-expulsion of stateless persons flowed from the same logic, *mutatis mutandis*, as the principle regarding refugees, as paragraphs 82 to 94 of the report showed. Draft article 6 (Non-expulsion of stateless persons) was contained in paragraph 96 of the report, and read:

“1. A State may not expel a stateless person [lawfully] in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a final judgement of a particularly serious crime or offence, constitutes a danger to the community of that State.

“2. A State which expels a stateless person under the conditions set forth in these draft articles shall allow such person a reasonable period within which to seek legal admission into another country. [However, if after this period it appears that the stateless person has not been able to obtain admission into a host country, the State may [, in agreement with the person,] expel the person to any State which agrees to host him or her].”

13. The term “lawfully” in the first paragraph was in square brackets. While it was used in article 31 of the 1954 Convention relating to the Status of Stateless Persons, the question was whether the draft article should cover only stateless persons in a lawful situation, a concept whose meaning was far from clear. A person was stateless because no national legislation existed that made it possible to confer nationality on him or her. It was a *de facto* situation. Could one then speak of “lawful” presence? How was one to determine whether a person with no nationality had entered a country lawfully? The Commission should discuss the issue further.

14. A study of case law showed that if the task of finding a receiving State was left solely to the stateless person who was about to be expelled, the expulsion might never occur, even if there were real grounds for

²⁸² See Security Council resolution 1688 (2006) of 16 June 2006.

carrying it out, hence the idea that the expelling State could become involved in the search for a receiving State. The principle was that a stateless person must not be expelled when no State of destination had been established, that such a person should only be expelled to a State that agreed to accept him or her, and that the task of finding such a State must not fall solely to the stateless person. The proposed wording to that effect was in square brackets.

15. The principle of prohibition of collective expulsion operated differently depending on whether it occurred in peacetime or in time of war. In the former, collective expulsion was absolutely prohibited. The mass expulsions once so common in Europe, particularly from the seventeenth to the mid-twentieth century, were a thing of the past. The collective expulsion of aliens was now prohibited, and absolutely no derogations were permitted, under a number of international legal instruments and the case law of regional human rights courts. For example, in the *Čonka v. Belgium* case, the European Court of Human Rights had found that the applicants' expulsion might have been collective. However, the mass expulsion of individuals whose individual cases had been examined could not be regarded as constituting collective expulsion.

16. In time of war, collective expulsion was a different matter. Practice varied from the eighteenth century to the present. While fairly common in the eighteenth century, the practice of collective expulsion of nationals of enemy States had diminished in the nineteenth and much of the twentieth centuries. However, instances had been recorded recently, for example in the 1998 war between Eritrea and Ethiopia. Neither the law of armed conflict nor international humanitarian law resolved the matter. On the contrary, the monumental research work on customary international humanitarian law carried out under the auspices of the ICRC did not contain a single rule, among the 161 rules identified, on the collective expulsion of foreign nationals of an enemy State in time of war.²⁸³ It appeared, from an analysis of practice, doctrine and case law, that there was no rule of international law that required a belligerent State to allow nationals of an enemy State to remain in its territory; that there was also no rule that required such State to expel them; that the collective expulsion of that category of aliens was practised by some States, to varying degrees; and that the practice was sometimes particularly entrenched in that the literature seemed to consider that such expulsion must be permitted only in the case of aliens who were hostile to a receiving State at war with their country. It followed, *a contrario*, that foreign nationals of an enemy State who were living peaceably in the host State and causing no trouble could not be collectively expelled; their expulsion must obey the ordinary law governing expulsion in time of peace.

17. On that basis, there was reason to propose draft article 7 (Prohibition of collective expulsion), which was contained in paragraph 135 of the report, and read:

“1. The collective expulsion of aliens, including migrant workers and members of their family, is prohibited. However, a State may expel concomitantly the members of a group of aliens, provided that the expulsion measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.

“2. Collective expulsion means an act or behaviour by which a State compels a group of aliens to leave its territory.

“3. Foreign nationals of a State engaged in armed conflict shall not be subject to measures of collective expulsion unless, taken together as a group, they have demonstrated hostility towards the receiving State.”

Paragraph 1 of draft article 7 was based on the case law of the European Court of Human Rights.

18. Having succinctly outlined the content of his third report, he was prepared to hear any criticisms and comments that members of the Commission might wish to offer.

19. Ms. ESCARAMEIA thanked the Special Rapporteur for a comprehensive and well-researched report containing an abundance of historical references. She agreed with a great many of the points made in the report, but wished to comment on a few small matters with which she did not agree. Her remarks should not, therefore, be construed as indicating disapproval of the report as a whole.

20. Her first point, on draft article 3, related to the theoretical distinction—a central issue in the report—between the right of expulsion and the exercise of that right. In paragraph 5, the Special Rapporteur referred to the need to strike a balance between the State's sovereign right and the right of the individual to human dignity. In other words, the right to expel related to sovereignty and the conditions in which it was exercised related to human dignity. The right to expel was therefore considered as an inherent right in the traditional world order, which was divided into States with their respective territories, frontiers and population. However, she wished to challenge that traditional view.

21. In paragraphs 19 to 23 the Special Rapporteur put forward the theory that the limits to the *right* of expulsion derived only from the existence of other States, and were thus “inherent in the international legal order”. Such limits were to be distinguished from limits to the *exercise* of the right of expulsion, where human rights considerations were taken into account, referred to in paragraph 24 as “external to the international legal order”. She disagreed: the protection of human dignity must be considered to be one of the main pillars of the present international legal order, as integral to it as sovereignty, particularly since some of the norms in question were norms of *jus cogens*. She could therefore not accept the Special Rapporteur's distinction between internal rights, based on sovereignty, and external rights, relating to human rights. In her view, human rights relating to expulsion affected not only the procedure for expulsion, but also the very existence of that right; in certain cases, they might even prevent expulsion from taking place.

²⁸³ See J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I: *Rules*, ICRC and Cambridge University Press, 2005.

22. As an example of State practice, in the last footnote in paragraph 8 of the report, the Special Rapporteur cited the United States Assistant Secretary of State Dutton's letter to a member of Congress in 1961: "it may be pointed out that under generally accepted principles of international law a State may expel an alien whenever it wishes, provided it does not carry out the expulsion in an arbitrary manner". There again, the Special Rapporteur's theory was based on a distinction between substance and procedure, yet that theory had been challenged many years previously. In paragraph 8 of the report, reference was made to a statement by the umpire in the *Boffolo* case of 1903 to show that the right of expulsion was an inherent right of States. However, another statement by the umpire in the same case showed that the possibility of expulsion was itself limited by the considerations of the dignity of the individual; it read: "A State possesses the general right of expulsion; but—[e]xpulsion should only be resorted to in extreme circumstances and must be accomplished in the manner least injurious to the person affected" [p. 528]. Given that human rights were now far more developed than had been the case at the time that statement was made, the Special Rapporteur's theory warranted further reflection, especially since it had so many practical implications.

23. For example, in paragraph 7 of the report, the Special Rapporteur argued that the right to expel could be restricted "only by the State's voluntary commitments or specific *erga omnes* norms". That seemed to exclude customary law as a source of restrictions on the right to expel, which was particularly puzzling in the light of the Special Rapporteur's remark in his oral presentation to the effect that because the right to expel was an inherent right, customary law should not be taken into account. The wealth of State practice and case law available on the subject indicated the contrary—that customary law did indeed exist in that area. She sought clarification in that regard.

24. The meaning of the phrase "specific *erga omnes* norms" was obscure. They could encompass several human rights norms, even some norms of *jus cogens*, which would seem to suggest that the right itself had a dimension that did not derive only from the existence of other sovereign States, but also from the existence of individuals whose rights must be respected in the international legal order.

25. The Special Rapporteur's theoretical construct was clearly reflected in draft article 3: paragraph 1 related to the right; paragraph 2 to the procedure. According to the former, the right was absolute and restrictions were placed only on its exercise. Nevertheless, the considerations in the latter paragraph, namely good faith and compliance with international obligations (presumably, the principle *pacta sunt servanda*), also related to the existence of other States. She wondered why no direct reference was made to the rights of the person or to rules of *jus cogens*, some of which would embody such rights.

26. On the actual exercise of the right of expulsion, she endorsed the categorical nature of draft article 4, paragraph 1, but found the expression "for exceptional reasons" used in paragraph 2 unjustifiable. It was not clear what exceptional reasons could justify a State's decision

to expel its own nationals. Her understanding of the present state of international law was that the prohibition on the expulsion of nationals was absolute. The Special Rapporteur cited many international instruments to provide examples of exceptions. Of the more recent examples the most interesting one concerned the debate during the drafting of article 3 of Protocol No. 4 to the European Convention on Human Rights, mentioned in paragraphs 50 and 51, but it involved a case of extradition, not of expulsion. Likewise, the case of what was described in paragraph 55 as the "negotiated expulsion" of Charles Taylor in fact concerned his surrender to a special international court.

27. The only instrument that might provide an exception was the African Charter on Human and Peoples' Rights. However, it was a regional instrument, and might be contradicted by the provisions of other regional instruments. Furthermore, some of the situations it covered involved criminal proceedings and were thus more likely to fall into the category of extradition cases. She would welcome some clarification from the Special Rapporteur on those points. Of all the draft articles in the report, draft article 4 was the one that posed the most serious problem of substance. Moreover, it made no reference to due process of law in respect of the expulsion decision, nor did it specify whether the "exceptional reasons" must be based on existing law. Consequently, it provided fewer guarantees for the individual than did the African Charter on Human and Peoples' Rights. Her preference would be to delete paragraph 2; if it was retained, its provisions would need to be made more restrictive.

28. Draft article 5 dealt with the non-expulsion of refugees who were lawfully in the territory of a State, but it would be useful to mention, at least in the commentary, persons waiting to be granted refugee status, since they were afforded protection under article 31 of the 1951 Convention relating to the Status of Refugees. As worded, the grounds on which expulsion of refugees was permitted were too broad, and implied, *a contrario*, that offences against national security or public order and, perhaps, acts of terrorism would not result in a judgement. A reference to the principle of *non-refoulement*, which was guaranteed under article 33 of the 1951 Convention and widely regarded as constituting customary law, might also be appropriate. It should be noted that the Convention listed only two exceptions to the principle of *non-refoulement*: when the refugee was regarded as a danger to the security of the country in question, or, by virtue of having been convicted by a final judgement of a particularly serious crime, constituted a danger to the community of that country. More restrictions were required in order to safeguard the refugee against the risk of persecution in the country of return.

29. As for the bracketed reference to terrorism, Security Council resolution 1373 (2001) of 28 September 2001, which, incidentally, applied to nationals as well as refugees, referred to asylum seekers and persons who abused refugee status and not to refugees in general. Moreover, the resolution was silent on the matter of whether a judgement was required in respect of the terrorist acts in question. In the event of a judgement and conviction, it would be a matter of extradition and not of expulsion.

30. With regard to draft article 6 on the non-expulsion of stateless persons, it was not clear what would happen if no country was willing to host the person in question. Such a situation warranted further reflection.

31. The situation of migrant workers and members of their families, including the possibility of their collective expulsion, should be the subject of a separate article based on article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, rather than being dealt with under draft article 7. Situations involving the expulsion of migrant workers arose much more frequently than those relating to stateless persons, and such individuals required a higher level of protection than did, for instance, nationals of an enemy State.

32. It seemed from the report that the Special Rapporteur had some doubts as to whether the prohibition on collective expulsion was a prohibition under international law, although the wealth and comprehensive nature of the examples of regional practice he had proffered, drawn from every continent but one, should leave no room for doubt. The text of draft article 7 required some refinement. In paragraph 1, the word “reasonable” should be replaced by a stronger word such as “fair”. Moreover, in paragraph 3, it was not sufficiently clear that the phrase “[f]oreign nationals of a State engaged in armed conflict” referred to nationals of a State directly engaged in armed conflict with the host State. The phrase “taken together as a group” was dangerously ambiguous. The words “demonstrate hostility”, too, were vague, and some qualifier such as the adjective “grave” or “serious” should be inserted. The need for a threshold for such hostility should also be made clear in the commentary.

33. In conclusion, she said that, broadly speaking, she endorsed the basic principles outlined by the Special Rapporteur in his third report. She was in favour of the draft articles being referred to the Drafting Committee, with the possible exception of draft article 4, given her conviction that the prohibition on the expulsion of nationals should be absolute.

34. Mr. PELLET said he had found the third report interesting and on the whole convincing, although he had some sympathy with the criticisms voiced by Ms. Escarameia. The Special Rapporteur was less persuasive concerning the draft articles themselves, on which he would focus his comments. However, he wished at the outset to make two points on the report.

35. First, he quite failed to see the relevance to the topic of the distinction drawn by Herbert Hart between “primary rules” and “secondary rules”²⁸⁴ referred to in paragraph 24 of the report. Secondly, there seemed to be several instances in the report—for instance, in paragraphs 51 and 55—of confusion between the concepts of expulsion and extradition, a number of examples of which had been given by Ms. Escarameia. Although the distinction between expulsion and extradition had been discussed in connection with the second report, it would

appear that it needed to be reviewed and applied more rigorously.

36. With regard to draft article 3, paragraph 2 seemed to state the obvious, and was surely true, *mutatis mutandis*, of any right exercised by a State. It invited the absurd inference that, *a contrario*, there were some rights of States that could be exercised in bad faith and in disregard of the fundamental principles of international law and of those States’ international obligations. Rather than knocking on open doors, it would be preferable to state explicitly at the outset that the right of expulsion could be exercised only in accordance with the provisions of the draft articles, and also, but perhaps elsewhere in the text, that the State must of course comply with its specific obligations under the relevant treaties. However, he agreed with the Special Rapporteur’s view that the question of compliance with procedural rules could be dealt with at a subsequent stage.

37. The text of draft article 4 was unobjectionable as it stood, but its scope should be extended. In the paragraphs introducing the draft article, the report discussed in some detail the question of the acquisition of nationality, with particular reference to specific cases of dual or multiple nationality, the aim apparently being to highlight the fact that the problem of expulsion was particularly acute, both in theory and in practice, in cases of dual or multiple nationality (two distressing cases in point being the expulsion of Franco-Algerians by France and of Anglo-Pakistanis by the United Kingdom). Having built up a formidable body of evidence, however, the Special Rapporteur had not developed the theme further and the draft articles themselves, curiously, did not broach the question of dual or multiple nationality at all. He wondered, therefore, given the substantial practice described in the report—including a number of recent cases, some of which might, however, relate to extradition rather than to expulsion—whether it might not be worthwhile to draft an article specifically dealing with the question of what might more appropriately be called “banishment”, or at least to mention it in draft article 4. Such a course of action would also make it possible to clarify the phrase “for exceptional reasons”, which Ms. Escarameia had, rightly, in his view, criticized for its vagueness.

38. With regard to draft articles 5 and 6, he was, as he had said before, doubtful whether it was right to concentrate on the specific cases of refugees and stateless persons. He had not been persuaded either by the draft articles themselves or by the Special Rapporteur’s assertion in his introduction to the report that there were serious omissions from the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. Articles 32 and 33 of the former and article 31 of the latter were well-established provisions and, by attempting to rewrite them, the draft articles risked creating conflicts of rules that might be difficult to settle. The two Conventions worked reasonably well, but, if they had shortcomings, it would be more sensible to amend the Conventions themselves than to produce alternative rules.

39. With specific regard to draft article 5, he was strongly against the inclusion of the words “or terrorism”

²⁸⁴ H. L. A. Hart, *The Concept of Law*, 2nd ed., Oxford University Press, 1994, chap. V, pp. 79 *et seq.*

in paragraph 1. Not only was the expulsion of terrorists sufficiently covered by the phrase “on grounds of national security or public order”, but the specific inclusion of a reference to the fashionable concept of terrorism might give the false impression that, by contrast, article 32 of the 1951 Convention would not permit the expulsion of foreign nationals in case of a terrorist threat. Moreover, as Ms. Escameia had noted, the problem of terrorism was not exclusively confined to situations involving refugees and stateless persons. He was also opposed to the inclusion in paragraph 1 of only part of the wording of article 33 of the 1951 Convention, reproduced in paragraph 66 of the report. Such a cherry-picking approach in the draft article risked upsetting the careful balance of the original provision.

40. As for draft article 6, he saw no need to delete the word “lawfully”, which appeared in square brackets; to do so would, again, be to rewrite the well-established provision contained in article 31, paragraph 1, of the 1954 Convention relating to the Status of Stateless Persons, thereby fragmenting the law of statelessness. Despite the arguments put forward by the Special Rapporteur, he could not see that, in the special circumstances of expulsion, it made much difference whether the stateless person’s presence in the country was lawful or unlawful. He was therefore opposed to the inclusion of draft articles 5 and 6, whose provisions might conflict with those of the very widely ratified 1951 and 1954 Conventions, which, in his view, reflected general international law and should remain untouched. However, should the Commission nonetheless decide to refer those two draft articles to the Drafting Committee, he commended draft article 5, paragraph 2, which introduced a valuable new element in the context of the progressive development of international law, though not of its codification *stricto sensu*. Whatever course the Commission decided to adopt, it should take care not to change the general sense of the provisions of the 1951 and 1954 Conventions.

41. With regard to draft article 7, like Ms. Escameia he had some concerns about the wording, although they differed from hers. In his view, the phrase “reasonable and objective examination” was perfectly appropriate in the circumstances. The more detailed the requirements, the more ways States would find of bypassing the intended effect; conversely, by couching the requirement in general terms, the draft articles might well provide more effective protection for the aliens concerned. The same went for the word “group”: the more flexible the language of the draft article, the more effective the prohibition of collective expulsion would be.

42. There might also be a case for reversing the order of paragraphs 1 and 2. Paragraph 3, meanwhile, was excessively high-minded. Realistically, provision should be made for situations in which nationals of States engaged in armed conflict with the host State might be expelled, if that was the only, or the most effective, way of ensuring their protection from popular vengeance. After all, it was better to be expelled than exterminated.

43. He therefore recommended that, while draft articles 3, 4 and 7 should be referred to the Drafting Committee, it would be premature to refer draft articles 5

and 6 to that subsidiary body, for a reason of principle, namely that the whole issue of the expulsion of refugees and stateless persons should be considered in depth by the Commission in plenary session, perhaps following the establishment of a working group that could briefly consider the main issues. The need to protect refugees and stateless persons must be balanced against the need to protect the integrity of the relevant provisions of the 1951 and 1954 Conventions. He intended no criticism of the report; he merely felt that the full Commission should give more thought to the principles involved before the text of draft articles 5 and 6 was referred to the Drafting Committee.

44. Mr. AL-MARRI, after thanking the Special Rapporteur for his excellent report, said that, although the right of expulsion was a sovereign right of the State, it was not absolute, since States were obliged to act within the limits prescribed by international law, as stated in draft article 3, paragraph 2. The report mentioned a number of general principles, particularly in relation to regional human rights case law, under which States were prohibited from the collective or arbitrary expulsion of refugees or stateless persons and were obliged to observe the principles of non-discrimination and respect for the basic rights of the person expelled. Moreover, in expelling an alien, a State was required to respect its own laws and applicable international rules. In that connection, the phrase “for exceptional reasons” in draft article 4 required further clarification.

45. The report rightly distinguished between refugees and asylum seekers: whereas the status of the former was determined by international law, regional asylum seeking was governed by internal law. The Commission should undertake a careful study of the rules governing the expulsion of persons in both categories. As for the exceptions to the principle prohibiting the expulsion of a refugee, although national security and public order constituted possible exceptions to the rule, other categories might be added, including combating terrorism. That was reflected in draft article 5.

46. Draft article 6 rightly set out the principle that the expulsion of stateless persons should be prohibited. Since the expulsion of a stateless person was different from that of an alien, however, in that it would not be easy to find a country willing to accept a stateless person, the proposed wording of paragraph 2 was not satisfactory, and amounted to progressive development of international law. In that connection, he wondered what the position would be if a person deported to his country of origin was exposed to harassment owing to his or her ethnic origin, religion or political opinions. The Commission should seek an alternative solution.

47. As for draft article 7, he commended the discussion in the report of State practice and jurisprudence governing the prohibition of collective expulsion in both peacetime and time of war. On that basis, he found the text of the draft article generally acceptable. Collective expulsions should be prohibited; instead, each case should be considered on its merits and individuals should be expelled only if they constituted a threat to the State.

48. Mr. DUGARD, after congratulating the Special Rapporteur on an informative, thorough and thoughtful report, said that he wished, nonetheless, to draw attention to a number of issues, some of which had already been raised by Ms. Escameia and Mr. Pellet. First, he noted that paragraphs 7 and 22 of the report referred to restrictions on the right to expel aliens imposed by *erga omnes* and *jus cogens* rules and by peremptory norms. Consideration should, however, be given to the fact that such restrictions were most frequently imposed by customary norms of international law, which did not necessarily constitute peremptory norms.

49. With regard to draft article 5, he fully endorsed the views expressed by Mr. Pellet and Ms. Escameia: it would be very unfortunate to include a reference to terrorism in the draft article. The principal difficulty lay in the inability of the international community to agree on a definition of the term “terrorism”, and, in that connection, he looked forward to hearing from Mr. Perera, who was deeply involved in the efforts by the Sixth Committee to come up with a comprehensive definition. States abused the term for political purposes and even the Security Council, in its wisdom, was prepared to use the term in the absence of an agreed definition. The report mentioned Security Council resolution 1373 (2001) of 28 September 2001 in that connection, but others, such as Security Council resolution 1465 (2003) of 13 February 2003, were of equal importance. If the Special Rapporteur felt it necessary to cite examples of exceptional cases constituting a threat to national security, he need look no further than the core crimes listed in the Rome Statute of the International Criminal Court.

50. The report should also, in his view, have paid much more attention to the question of whether a State had the right to deport a holder of dual or multiple nationality. Dual nationality was a fact of international life, and was not contrary to international law, yet the practice persisted of deporting political dissidents or other groups considered undesirable. Political dissidents had been expelled from South Africa under the apartheid regime. In that connection, the Commission should consider whether it should support the inclusion in the draft articles of the “genuine link” principle of the *Nottebohm* case.

51. Similarly, even though the United States Supreme Court had ruled the practice unconstitutional as long ago as the nineteenth century, some countries used denationalization as a punishment and as a prelude to expulsion. Although it was frequently the case that no other State was prepared to accept such a person, denationalization was seen by some States as providing a licence for expulsion. Political dissidents had been stripped of their nationality in the Soviet Union in the 1930s, as had the German Jews in 1941; some 8 million black South Africans had suffered that fate in the 1970s and 1980s. That phenomenon, too, was not dealt with adequately in the present draft articles.

52. He would be happy for the draft articles to be referred to the Drafting Committee, subject to further consideration of his suggestion concerning the problems

of dual or multiple nationality and deprivation of nationality in connection with the expulsion of aliens.

The meeting rose at 11.35 a.m.

2942nd MEETING

Wednesday, 25 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens (*continued*) (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the Special Rapporteur’s third report on the expulsion of aliens (A/CN.4/581).

2. Mr. SABOIA said that he agreed with the approach adopted in the report, namely, that the right of expulsion should be defined as a right of the State, but not as an absolute right, since it must be exercised within the limits set by international law. The Special Rapporteur distinguished between the limits deriving from the international legal order, as referred to in draft article 3, paragraph 2, and the limits or obligations specific to particular areas of international law forming part of the conditions for the exercise of the right of expulsion. In the light of the discussion at the preceding meeting, account must be taken of the comment by Ms. Escameia, who had stressed that human rights rules must not be regarded as external to the international legal system and that they must therefore be seen not only as determining the exercise by the State of its right to expel aliens, but also as affecting the content of that right. In his own view, consideration should also be given to the possibility of including a reference in paragraph 2 to the peremptory norms of international law, mentioned by the Special Rapporteur in paragraph 22 of his report.

3. Draft article 3, paragraph 2, would be more explicit, and more normative, if, as Mr. Pellet had proposed, it contained the words “in accordance with the draft articles” and a reference to the applicable treaty rules and rules of general international law.

4. Draft article 4, paragraph 2, should be stricter in stating exceptions to the general rule prohibiting the expulsion of nationals. In that connection, the Commission might use the wording of human rights instruments such as the African Charter on Human and Peoples' Rights, as referred to in paragraph 54 of the report. Mr. Pellet had rightly pointed out with regard to paragraph 2 that more attention should be paid to dual nationals. Mr. Dugard had also made an important comment on denationalization and the tragic consequences it might have, since, in Hannah Arendt's words, it deprived the persons concerned "of the right to have rights".²⁸⁵

5. With regard to refugees and the general principle of the prohibition of their expulsion, draft article 5 was generally acceptable. As to the explanations given in the report, a distinction could, of course, be made between the institution of asylum, which had an individual connotation, and the concept of refugee, which had taken on a more collective connotation, but, for practical reasons, the term "asylum seekers" had come to mean persons, often in large numbers, who were fleeing situations of conflict, disaster or civil strife and who were in need of immediate protection. They had to be able to have their claim to refugee status given fair consideration and that could take some time. Perhaps paragraph 2 should expressly mention the principle of *non-refoulement*. In that connection, it would be useful for the Commission to have the advice of or a briefing by an international protection officer from the Office of the United Nations High Commissioner for Refugees, who might provide more detailed information, at the next session, on the relevant standards applicable to refugees and asylum seekers.

6. Referring to draft article 6 on the non-expulsion of stateless persons, the word "lawfully" should be retained because there was nothing to prevent a stateless person from having his presence in the host State recognized by that State. Both draft article 5 and draft article 6 were useful, but Mr. Pellet had been right to say that, if those articles were retained, the terminology of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons should be used. He personally was also not in favour of the inclusion of the word "terrorism" in those two articles, since terrorist acts or activities were covered by the words "threat to national security".

7. In draft article 7 on the prohibition of collective expulsion, the words "demonstrated hostility towards the receiving State" in paragraph 3 were too subjective and it would be better to use wording along the following lines: "engaged in hostile activities or behaviour towards the receiving State".

8. Still referring to collective expulsions, he had been surprised to read the last footnote in paragraph 113 of the report, relating to the reply by Brazil to a questionnaire from the Rapporteur of the Organization of American States on migrant workers and their families, which stated that "Brazil gave a rather lengthy reply in order to obscure the fact that, under its legislation, it is possible to practise

collective expulsion". Although he acknowledged that the Brazilian reply was not straightforward, he saw no basis for the Special Rapporteur's assumption with regard to the intention of that reply and considered that it might be helpful to clear up some of the points that might have given rise to that misunderstanding. First of all, what was known in Brazil as an "expulsion" was a specific measure taken against an individual who had committed an offence or who was regarded as a threat to national security or public order; it was thus a penalty involving a prohibition on entering the national territory. That was more clearly indicated in the rest of the reply, which could be found on the Internet, since expulsion procedures were individually considered by a competent judge. Account must also be taken of the provisions of the Brazilian Constitution and the fact that the American Convention on Human Rights: "Pact of San José, Costa Rica" expressly prohibited collective expulsions. Brazil was a party to that Convention and had recognized the competence of the Inter-American Court on Human Rights to consider individual cases.

9. In conclusion, he congratulated the Special Rapporteur on his work and said that he was in favour of referring the draft articles to the Drafting Committee.

10. Mr. VARGAS CARREÑO said that he fully agreed with the rules the Special Rapporteur had proposed by way of an introduction in Part One of his report on general principles. Like the Special Rapporteur, he thus considered that the right of the State to expel aliens from its territory was confirmed in positive international law, but must be exercised in conformity with other basic rules of international law or, in other words, as the Special Rapporteur stated, that the right to expel was a right inherent in State sovereignty, even if it was not an absolute right, since it must be exercised within the limits set by international law. Such limits derived from general international law, as embodied in treaties, international custom and the general legal principles that required a State not to act arbitrarily, but in good faith and rationally. Such limits were, however, also defined in specific instruments, especially in the areas of international human rights law, international humanitarian law and international refugee and migrant worker law.

11. He therefore endorsed draft article 3 as proposed by the Special Rapporteur on the right of expulsion, even if its paragraph 2 could be improved. The Commission might adopt Mr. Pellet's suggestion of indicating that expulsion must be carried out in accordance with the rules stated in the draft articles. It would also be advisable to maintain the principle that expulsion must be in conformity with the basic principles of international law. In any event, those principles had their source in international human rights law, based on the relationship of the State with persons in its territory rather than with other States, and the element of good faith was therefore not unnecessary and must be retained as one of the rules on which the expulsion of an alien had to be based.

12. It was very important that the draft articles should contain a provision relating to the prohibition of the expulsion of nationals, which was, unfortunately not a thing of the past: in Chile, for example, during the military regime in place under General Pinochet until the 1990s, hundreds of Chileans had been administratively expelled from their country simply for having been political dissidents. That

²⁸⁵ H. Arendt, *The Origins of Totalitarianism*, London, George Allen & Unwin, 1962, p. 296.

must not happen again, in any part of the world. The prohibition of the expulsion of nationals was the corollary, or other side of the coin, of the right of all persons to live in their country, an absolute and unconditional right recognized in international instruments, such as article 22, paragraph 5, of the American Convention on Human Rights: "Pact of San José, Costa Rica", article 3, paragraph 1, of Protocol No. 4 to the European Convention on Human Rights and other texts, such as article 12, paragraph 4, of the International Covenant on Civil and Political Rights and article 12, paragraph 2, of the African Charter on Human and People's Rights.

13. A person's right not to be expelled from his country undoubtedly involved a link of nationality with the State in question. Even though international law recognized dual nationality, the draft articles did not have to contain a provision on the situation of dual nationals, especially if what was to be protected was the right of every person not to be expelled from the territory of the State whose nationality he held, whatever the origin of that nationality. As Mr. Pellet had recalled at the preceding meeting, many such expulsions that had taken place in the past had concerned persons with dual nationality. The only exceptions to that right related to extraditions in the case of countries that allowed the extradition of nationals or in the case of the execution of a sentence such as banning, which might be provided for instead of a custodial sentence. None of those situations must, however, be regarded as an expulsion and, in order to make that right absolute, no exceptions should be allowed, and paragraph 2 of article 4 should therefore be deleted and paragraph 3 redrafted in order to guarantee persons who did not reside in the territory of the State of which they were nationals the right to return to that State, either on their own initiative or at the request of the receiving State.

14. Draft articles 5 and 6 on non-expulsion of refugees and stateless persons were generally satisfactory. Particularly as far as refugees were concerned, they reflected the principle of *non-refoulement* provided for in the 1951 Convention, as supplemented by later instruments such as the 1984 Cartagena Declaration,²⁸⁶ which even allowed the principle of *non-refoulement* to be regarded as a rule of *jus cogens*.

15. Like other members of the Commission, he considered that the provision must not refer expressly to terrorism, a problem that had not yet been conventionally defined. The grounds of national security or public order referred to in paragraph 1 of draft articles 5 and 6 should suffice to meet any concern that might arise in that regard.

16. Draft article 6, paragraph 2, was a truly important provision that formed part of the progressive development of the law and filled a legal vacuum.

17. The prohibition of collective expulsions, as dealt with in draft article 7, must apply both in time of peace and in periods of armed conflict. Collective expulsions had been

supported by doctrine in the nineteenth and early twentieth centuries, but, at present, the main regional instruments, such as article 22, paragraph 9, of the American Convention on Human Rights: "Pact of San José, Costa Rica", article 4 of Protocol No. 4 to the European Convention on Human Rights and article 12, paragraph 5, of the African Charter on Human and People's Rights, categorically prohibited collective expulsions of aliens, without making any distinction between time of peace and time of war. That was provided for in article 22, paragraph 1, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which also contained an interesting provision stating that: "Each case of expulsion shall be examined and decided individually." For those reasons, draft article 7, paragraph 1, must be retained, even if the situation of migrant workers and members of their families could, in view of its particular importance, be the subject of a separate paragraph of draft article 7.

18. The definition of collective expulsion contained in draft article 7, paragraph 2, was satisfactory, but paragraph 3 should be deleted. It was not easy to determine that a group as such had demonstrated hostility to the receiving State and that provision could give rise to subjective interpretations. In any event, a reasonable and objective examination of the particular situation of each of the aliens forming the group provided for in paragraph 1 might be enough to protect the legitimate rights and meet the concerns of the receiving State while protecting the rights of the aliens concerned.

19. He was in favour of referring the proposed draft articles to the Drafting Committee.

20. Mr. PERERA said that, in his third report, the Special Rapporteur discussed the basic principles of international law relating to the expulsion of aliens and described the approach he had adopted in preparing the draft articles as the building of a structure that struck a balance between the right of expulsion as an attribute of State sovereignty and the exercise of that right on the basis of respect for human rights and human dignity. Draft article 3 reflected that attempt to strike a balance between the right of expulsion and the ways it was exercised. In general, he endorsed that draft article.

21. With regard to draft article 4, he agreed with the opinion of some members that the principle of the non-expulsion of nationals must be stated categorically and absolutely as allowing for no derogation. The cases of the extradition or handing over of nationals must be distinguished from the exercise of the right of expulsion. In that connection, as had been suggested, the question of dual nationality might be worth studying. It was a growing problem that gave rise to rather complex questions. It might be discussed in the framework of draft article 4 or, as Mr. Pellet had proposed, dealt with in a separate article.

22. Draft articles 5 and 6 stated the rule that, in general, refugees and stateless persons could not be expelled. Those provisions were in keeping with the general protection granted to those categories of persons in the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons and they belonged in the draft articles. In the case

²⁸⁶ Adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, 19–22 November 1984; the text of the conclusions of the declaration appears in OEA/Ser.L/V/II.66 doc. 10, rev.1. OAS General Assembly, fifteenth regular session (1985), resolution approved by the General Commission held at its fifth session on 7 December 1985.

of exceptions to the rule, the draft articles reflected the two criteria provided for in the above-mentioned Conventions, namely, national security and public order, which had long been recognized. The key question raised by the report under consideration related to the possibility of making terrorism a third criterion in view of the grave danger which it constituted for the international community and which had not existed in all its present forms and manifestations in the 1950s when the two Conventions had been drafted. While conceding that terrorism could be considered as a danger to national security and public order, the Special Rapporteur made convincing arguments in favour of separate treatment of that problem. He referred to Security Council resolution 1373 (2001) of 28 September 2001, which had been adopted under Chapter VII of the Charter of the United Nations and imposed obligations that bound States both before and after the granting of refugee status in order to guarantee that asylum seekers were not involved in terrorist activities. The obligation to prevent the improper use of refugee status for terrorist purposes had originated in the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism,²⁸⁷ adopted by the General Assembly in its resolution 51/210 of 17 December 1996, which, for the first time, made it an obligation for States to ensure, before granting refugee status, that the asylum seeker had not participated in terrorist acts, and, after granting refugee status, to ensure that this status was not used to commit terrorist acts against other States or their citizens. Those obligations must, of course, be implemented on the basis of respect for international human rights standards. A practically identical provision was to be found in article 7 of the draft comprehensive convention on international terrorism now being negotiated. From the point of view of progressive development, a definite trend was thus taking shape in the practice of States as reflected in General Assembly declarations, Security Council resolutions and the draft conventions being negotiated on the use of refugee status for terrorist purposes. In the context of the draft articles under consideration, however, the use of the generic term “terrorism” as a ground for derogating from the principle, without reference to specific serious offences, might create more problems than it would solve.

23. There were two options the Commission could consider in that regard. It could either use the term “terrorism” in relation to certain offences as defined in generally accepted multilateral conventions on the suppression of terrorism, or it could adopt the less ambitious and direct approach of incorporating the concept of terrorism in “national security” and “public order”, with a detailed commentary on trends in the use of refugee status for terrorist purposes. That would facilitate interpretation and application in the context of changes in the way the terms “national security” and “public order” were being used as derogations from the principle of the non-expulsion of refugees.

24. As to draft article 7, the Special Rapporteur provided a great deal of useful documentation in his report on the implementation of the principle of the prohibition of collective expulsions in time of peace and in time of war. He was to be commended on the explicit reference to

“migrant workers and members of their families”, since protection was granted to that category of persons by article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Because of the vulnerability of those categories of persons, who must be better protected, he agreed with Ms. Escameia’s proposal that there should be a separate provision on the question.

25. Mr. Petrić thanked the Special Rapporteur for his report, whose basic premise he endorsed. A close study of relatively recent cases of expulsions that had taken place since the Second World War in Europe might help shed some light on the topic. He was thinking, for example, of the collective expulsions authorized by the Potsdam Agreement of 2 August 1945,²⁸⁸ and those to which Mr. Dugard had referred at the preceding meeting and which South Africa had carried out during the apartheid period after stripping the persons concerned of their nationality.

26. The Special Rapporteur indicated that the right to expel aliens was a sovereign right of the State, but that the State was not authorized to expel its own nationals (draft article 4). Could it be considered that the collective expulsion of nationals was implicitly covered by draft article 4? He also referred to so-called “population transfers”, which were in fact collective expulsions.

27. With regard to draft article 3, he did not share Ms. Escameia’s opinion concerning the distinction the Special Rapporteur had drawn between primary and secondary rules. The victims of expulsion enjoyed their fundamental rights, which were of the same nature as the rights of the State to expel aliens, but, in specific cases of expulsion, the fundamental rights of the individual placed procedural limits on the fundamental right of the State to expel. The Special Rapporteur had not tried to establish a hierarchy between the right of the State to expel and the fundamental rights of the individuals expelled. He also agreed with Mr. Pellet’s comments on draft article 3: mere “respect for the basic principles of international law” was not enough and might, to some extent, cause confusion. It would therefore be better to adopt the wording proposed by Mr. Pellet and endorsed by Mr. Vargas Carreño and Mr. Saboia, namely, “in accordance with the rules stated in the present draft articles”.

28. He agreed with the principles embodied in draft article 4, paragraphs 1 and 2, but considered that the procedural guarantees applicable to the expulsion of an alien should also be applicable to the consent of the receiving State as a condition for the lawfulness of the expulsion. He was nevertheless in favour of referring draft articles 3 and 4 to the Drafting Committee.

29. Like other members of the Commission, he was of the opinion that draft articles 5 and 6 were not really necessary, since the specific problems of refugees and stateless persons were well covered in the 1951 and 1954 Conventions. In fact, the Commission must take a decision of principle: if it wanted to adopt a position *de lege lata*, those two draft articles were unnecessary,

²⁸⁷ General Assembly resolution 49/60 of 9 December 1994.

²⁸⁸ *British and Foreign State Papers*, vol. 145, p. 852.

but, if it wanted an approach *de lege ferenda*, a new text was necessary and the reference to terrorism should be retained because it was a fact of life in the modern-day world, despite the lack of a legal definition. Its absence from the draft articles might be interpreted *a contrario* as meaning that expulsion did not apply to terrorists. He was nevertheless in favour of the deletion of those two draft articles.

30. As to draft article 7, he supported Ms. Escarameia's proposal for a separate provision on migrant workers. Referring to paragraph 114 of the report and the footnotes thereto, the Special Rapporteur attached too much importance to the number of persons expelled in determining whether a collective or an individual expulsion was involved. In his own view, it was not so much the number of persons concerned as the lawfulness of the procedure that must be taken into account in distinguishing between the two.

31. At the end of draft article 7, paragraph 3, the words "taken together as a group, they have demonstrated hostility towards the receiving State" should be deleted or redrafted because they had a connotation of collective guilt or collective punishment. It would be better to stress the idea that, even in the event of armed conflict, the collective expulsion of aliens was unacceptable. He nevertheless agreed that draft article 7 should be referred to the Drafting Committee.

32. Mr. McRAE thanked the Special Rapporteur for his report, which shed good light on the practice of States in respect of expulsion. Although he agreed with the basic principle stated in draft article 3, paragraph 1, he thought that the words "fundamental principles of international law" introduced unnecessary complexity. Like Mr. Pellet, moreover, he considered that the distinction between primary and secondary rules was not really necessary because it gave the impression that customary international law in general was not taken into account. In his view, reference should be made simply to international law, and not only to the draft articles, since this emphasized that the right of expulsion was not unlimited.

33. Draft article 4 related to the expulsion of nationals and he wondered why that question was dealt with in draft articles on the expulsion of aliens. In that connection, he agreed with Mr. Dugard, who was of the opinion that, if the Commission wanted to include nationals in the draft articles, it should discuss the question of denationalization prior to expulsion and then deal specifically with the situation of persons with dual nationality or multiple nationalities.

34. Like Mr. Pellet and Mr. Petrić, he thought that the inclusion of some provisions of the 1951 and 1954 Conventions in draft articles 5 and 6 might create some confusion; it would suffice to say that the expulsion of refugees was governed by the 1951 Convention and the expulsion of stateless persons, by the 1954 Convention. Draft article 4, paragraph 2, was also somewhat problematic because, if reference was to be made to "exceptional reasons", it must at least be explained what those exceptional reasons were.

35. In draft article 5, the Special Rapporteur proposed that reference should be made to terrorism. In his own view, "grounds of national security or public order" included "grounds of terrorism", but the real question was whether the Commission wanted to include a reference to terrorism in the draft articles or whether it preferred that States should do so. If it did not do so, States would. It was therefore better for the Commission to do so because it could thus circumscribe the issue, as Mr. Perera had indicated.

36. The fact of applying draft article 6 only to stateless persons "lawfully" in the territory of a State gave rise to a problem because stateless persons "unlawfully" in the territory of a State should also benefit from protection. The question was whether the same type of protection should be provided. A distinction should be drawn between those two types of stateless persons, but without excluding those in an unlawful situation from the draft articles.

37. He agreed with the reservations expressed with regard to draft article 7, paragraph 3, on measures of collective expulsion in the event of armed conflict. The Commission must not depart from the fundamental principle that expulsion had to be applied on an individual basis. A general provision thus worded would make it possible to target groups in which some members might have engaged in hostile activities. If the Commission followed Mr. Pellet's reasoning that collective expulsion might be in the interest of the group, it would have to be clearly stated that it was justified in order to protect the group.

38. In conclusion, he agreed that draft articles 3 and 7, and draft article 4, could be referred to the Drafting Committee if the Commission was of the opinion that the case of nationals should be included. Draft articles 5 and 6 could be referred to the Drafting Committee as well, subject to the reservation he had mentioned concerning the conventions on refugees and stateless persons.

39. Mr. CAFLISCH thanked the Special Rapporteur for his report, whose rigour and attention to practice he greatly appreciated. With regard to terminology, he wondered whether the word "non-expulsion" might not be replaced by the words "prohibition of expulsion" or "prohibition on expelling".

40. Draft article 4, which related to the prohibition of expulsion by a State of its own nationals, raised the question of dual nationals, as well as that of denationalization prior to expulsion. Those two questions would have to be settled either in draft article 4 or in one or two separate provisions. Basically, he could not yet see how the problem of dual nationality was to be solved. Denationalization prior to expulsion must quite simply be prohibited. Exceptions to the prohibition of the expulsion of nationals should, moreover, be defined as precisely as possible. The words "for exceptional reasons" did not fully meet that requirement. He nevertheless agreed on the need, as provided for in draft article 4, paragraph 2, not to expel nationals, even "for exceptional reasons", unless the receiving State so consented.

41. He appreciated the explanations that preceded draft article 5 on the expulsion of refugees, as well as the relative precision of the wording describing the reasons allowing a State to derogate from the prohibition on expelling a refugee, but he had not yet decided whether terrorism should be mentioned, although Mr. Pellet's arguments in that regard were quite interesting.

42. Referring to draft article 7 on collective expulsions, he welcomed the way in which the Special Rapporteur dealt with the question of the expulsion of enemy nationals in time of conflict, i.e. "prudently". Despite wording that was somewhat inexact, such as "they have demonstrated hostility" and "taken together as a group", draft article 7, paragraph 3, was generally acceptable.

43. Subject to his comments on draft article 4, he agreed that draft articles 3 to 7 could be referred to the Drafting Committee.

44. Mr. PELLET, referring to the condition relating to the consent of the receiving State laid down in draft article 4, paragraph 2, said that, when an alien was expelled, he was either sent home or the approval of the receiving State was required. In any event, that alternative should be referred to somewhere; hence, as far as aliens were concerned, paragraph 2 did not belong in draft article 4.

45. Mr. KAMTO (Special Rapporteur) said that the destination of the person expelled would be dealt with later. With regard to the expulsion of nationals by a State, precision was necessary and a provision to that effect must be included in the draft articles.

46. Mr. GAJA said that the Special Rapporteur's third report contained a number of useful proposals which did not contest the principle that a State was authorized to expel aliens, but tended to impose some restrictions designed to provide greater protection for the individuals concerned. Restrictions applicable to expulsion should be affirmed in the same paragraph as the right of the State. The Commission did not have to look for the basis for those restrictions in general international law or the general principles of law. It could simply identify a general trend in favour of such restrictions in human rights instruments and the practice of the relevant treaty bodies.

47. Although he agreed with the tenor of draft article 4, paragraph 1, he had some reservations about the exception provided for in paragraph 2. He could understand that, in some cases, the presence in the territory of a State of a former emperor or dictator might be a security risk, but such exceptional situations were not important enough to be mentioned. Moreover, since most human rights instruments prohibited the expulsion of nationals, none of them clearly provided for exceptions, and practice in relation to exceptions was limited, if not nonexistent, he would prefer draft article 4, paragraph 2, to be deleted, thereby supporting the position of some of the speakers who had preceded him, but perhaps not for the same reasons. As Mr. Caflisch had suggested, one should consider whether the prohibition of expulsion should not be extended to persons who were not nationals, but who were closely linked to the State concerned. Draft article 6 on non-expulsion of stateless

persons was designed to protect stateless persons, but only to a certain extent. However, a specific provision prohibiting expulsion in certain cases ought to go farther than the 1954 Convention. In the views it had adopted in 1996 in *Stewart v. Canada*, the Human Rights Committee had cited a number of cases in referring to article 12, paragraph 4, of the International Covenant on Civil and Political Rights, which provided that "[n]o one shall be arbitrarily deprived of the right to enter his own country", without expressly mentioning nationality. The Human Rights Committee referred to "nationals", but also to persons having "special ties to or claims in relation to a given country". The Human Rights Committee also included "long-term residents", "nationals of a country who have there been stripped of their nationality in violation of international law and ... individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them" and finally referred to long-term immigrants [paras. 12.1 to 12.8 of the decision]. That list of special cases was in no way exhaustive and should be completed.

48. In paragraphs 41 and 42 of his report, the Special Rapporteur referred in the context of nationality to the existence of family ties as grounds for the prohibition of expulsion. That question should be considered separately because it also related to immigrants who had been residing in the country for a relatively short time. He did not understand why reference was made in paragraph 46 to the practice of certain countries that did not expel the persons in question, on ethnic and other grounds, as being closely linked to the majority of nationals. That restriction was based only on the internal law of certain States, so that no general conclusion could be drawn. It also reflected a nationalistic approach that was not unlawful, but should not be encouraged.

49. He supported the principle of the prohibition of collective expulsion in time of peace and the way it was set out in draft article 7. He nevertheless considered that the risks frequently run by persons, particularly large numbers of persons, who were subjected to collective expulsion should be emphasized more than had been done in the commentary. The tragic cases that had occurred over the years showed that such persons were often treated inhumanely and even lost their lives.

50. Mr. HASSOUNA said that he agreed with the structure of draft article 3, which struck a balance between the right of the expelling State and the rights of the expelled person. Thus, paragraph 1 recognized the right to expel an alien as an established principle of international law, while paragraph 2 restricted the exercise of that right under the principles of international law. In that context, it was indicated that the State must act in good faith and on the basis of respect for its international obligations. In his view, a general reference to international law might be enough, but, if more precision was required, a reference to the fundamental rights of the expelled persons might be added.

51. With regard to draft article 4 on non-expulsion by a State of its nationals, he was grateful to the Special Rapporteur for having used the terms "*ressortissant*" and

“national” of a State as synonyms, thus taking account of the comments made by various members of the Commission during the consideration of the second report.²⁸⁹ Noting that draft article 4, paragraph 2, referred to the possibility for a State to expel its own national “for exceptional reasons”, he said that this rather vague term should be clarified and explained in order to prevent any kind of abuse. According to draft article 4, paragraph 3, a person expelled from his own country had the right to return to it at any time at the request of the receiving State, but he thought that the right of return should also be granted in the case where the ground for the expulsion had ceased to exist, for example, if there was no longer any reason for the expulsion because new evidence had been uncovered in the context of legal proceedings.

52. He welcomed the fact that the two categories of persons dealt with in draft article 5 (Non-expulsion of refugees) and draft article 6 (Non-expulsion of stateless persons) had been included in the draft articles despite the existence of a statute or legal regime applicable to them in treaty law and customary international law. The draft articles on the expulsion of aliens could supplement those specific legal regimes without contradicting them.

53. Draft article 5, paragraph 1, included reasons of “national security” and “public order” as grounds for the expulsion of a refugee, but the meaning of those terms was broad enough to cover any act of terrorism of which a refugee might be suspected or guilty. It was therefore not necessary to refer specifically to terrorism, particularly as international efforts to agree on a definition of terrorism had still not been successful. If, however, some members considered that the Commission should refer to terrorism in its draft articles in order to emphasize the importance of that problem at the present time, the term “national security” might be explained in the commentary.

54. In draft article 6, paragraph 1, it would be better to delete the word “[lawfully]” and distinguish in the commentary between lawful and unlawful residents. He also thought that the words “[or terrorism]” should be deleted for the reasons he had just explained. In paragraph 2, he agreed with the Special Rapporteur’s suggestion that reference should be made to the intervention of the expelling State to find a host State for the expelled stateless person, since that was a matter of the progressive development of international law.

55. The prohibition of collective expulsions, as dealt with in draft article 7 on prohibition of collective expulsion, was based on rejection of the concept of collective guilt that was widely present in international human rights law and international humanitarian law. Collective expulsions were contrary to the provisions of most regional human rights conventions, such as the Arab Charter on Human Rights, article 26, paragraph 2 of which provided that the collective expulsion of aliens was prohibited “under all circumstances”. The order of the paragraphs of draft article 7 should be inverted so that the definition of collective expulsion came before its prohibition; the word “reasonable” in paragraph 1

should be replaced or even deleted because of its ambiguous connotation; and the reference in paragraph 3 to “[f]oreign nationals of a State... taken together as a group, [demonstrating] hostility towards the receiving State” should be replaced or amended. Lastly, he agreed with the suggestions that particular attention should be paid in some draft articles to a number of important and topical questions as the expulsion of migrant workers, dual nationality and denationalization. In conclusion, he supported the referral of draft articles 3 to 7 to the Drafting Committee.

56. Mr. WISNUMURTHI said that the research the Special Rapporteur had conducted and his clearly-worded analysis of State practice, judicial decisions, arbitral awards and *opinio juris* had enabled him to understand the bases on which the five draft articles had been prepared. In that regard, however, he considered that draft article 3, paragraph 2, on the right of expulsion did not sufficiently reflect the different limitations mentioned by the Special Rapporteur. Of course, mentioning all of them would overload the paragraph. In order to solve that problem, there were three possibilities: first, delete the second sentence of paragraph 2 and keep only the first; secondly, delete the second sentence, keep the first and add a provision, perhaps a new paragraph 3, referring to *pacta sunt servanda*, good faith and the requirement of respect for *jus cogens*; and, thirdly, on the basis of what Mr. Pellet had proposed, amend paragraph 2 by stating simply that expulsion must be carried out in accordance with the provisions of the treaty or convention in question.

57. In draft article 4 on non-expulsion by a State of its nationals, the words “for exceptional reasons” in paragraph 2 were too general and might give rise to multiple interpretations. Perhaps the Special Rapporteur could explain why he had not used the same terms as in draft article 5, paragraph 1, i.e. “on grounds of national security or public order”, while, in paragraph 55 of his report, he used the words “national security”. He therefore proposed that the words “for exceptional reasons” should be replaced by the words “for reasons of national security”.

58. Draft article 4, paragraph 3, confirmed the right of a person expelled from his own country to return to his country of nationality, only at the request of the receiving State. Did that mean that, if the receiving State did not make such a request, a national could not exercise his right to return to his country of nationality? Perhaps the Special Rapporteur could clarify that point. Still with regard to draft article 4, he agreed with Mr. Pellet and Mr. Dugard that the Special Rapporteur should broaden the scope of the provisions on non-expulsion of nationals to include persons with dual or multiple nationality.

59. Referring to draft article 5 on non-expulsion of refugees, he agreed with the Special Rapporteur’s arguments in paragraph 76 of his report that terrorism justified special treatment and that this was the approach taken by the international community in dealing with acts of terrorism, which were not considered ordinary crimes. That was reflected not only in a number of Security Council resolutions, but also in the final document of the 1995 World

²⁸⁹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573. See also the 2923rd to 2926th meetings above.

Summit for Social Development.²⁹⁰ For those reasons, he was of the opinion that the words “or terrorism” in draft article 5, paragraph 1, should be retained. He nevertheless shared the concern of some members that the use of the word “terrorism” separately from the words “national security” might imply that terrorism was not covered by the words “national security”. In order to solve that problem, he proposed that the words “including terrorism” should be added after the words “national security”.

60. His opinion concerning the need to include the word “terrorism” in draft article 5 also applied to draft article 6 on non-expulsion of stateless persons and, in particular, its paragraph 1. He proposed that the square brackets around the word “lawfully” should be removed, in conformity with the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. Paragraph 2 of draft article 6 did not give rise to any problems, but he did wonder about the words “in agreement with the person” in square brackets. In the situation referred to in the second sentence of paragraph 2, was it really necessary for a State to ask for the stateless person’s agreement before it could expel him?

61. Draft article 7 on the prohibition of collective expulsion did not give rise to any difficulty. He supported Ms. Escarameia’s proposal that, in paragraph 1, the word “reasonable” should be replaced by the word “fair”.

62. In conclusion, he agreed that draft articles 3 to 7 should be referred to the Drafting Committee.

63. Mr. VASCIANNIE said that, according to the Special Rapporteur, the right of expulsion was an inherent right. States had that right because they were States. They could expel persons because they had the “natural” right to do so, and it emanated from their sovereignty. He was not enthusiastic about that approach, which was based on writings and arbitral decisions relating to expulsion. He would prefer the right of expulsion to be grounded in customary law so that it would then have no “inherent” status and would be subjected to the same processes of change and development as other customary rules. When reference was made to an “inherent” right, it was not known exactly whether it had a special status in relation to other rules of law which might in fact restrict the right of expulsion. Of course, that was purely a matter of policy preference and, if the facts led the Special Rapporteur to the conclusion that the right of expulsion had traditionally been and continued to be regarded as an inherent right, the facts must then be respected. In that connection, he nevertheless noted that one of the authorities in that field, Mr. Goodwin-Gill, tended to regard the right of expulsion as a positive right that had developed from the practice of States and *opinio juris*, and not necessarily as an inherent right.²⁹¹

64. His second general comment related to the question of human rights. Noting that, in several parts of his

report, the Special Rapporteur carefully evaluated the role of human rights in relation to the right of expulsion, he wondered, also from a policy perspective, whether more emphasis might not be placed in certain places on the impact of human rights developments that had taken place since widespread acceptance of the International Covenant on Civil and Political Rights. The point was not that the Special Rapporteur relied unduly on end-of-century State practice, for such practice still had evidential weight. He was simply suggesting that the Special Rapporteur might place greater emphasis on certain human rights, as Ms. Escarameia had pointed out, with more details and greater clarity.

65. As to the content of the draft articles, he agreed with the wording of draft article 3, paragraph 1, but he had some reservations about paragraph 2 because it could be considered, as Mr. Pellet had said, that it merely stated the uncontroversial point that expulsion must be carried out in compliance with the basic principles of international law. He personally thought that, quite apart from that statement of the obvious, the main problem to which that article gave rise was that it was limited to saying that a State must act in good faith and in compliance with its international obligations. Perhaps the Special Rapporteur should incorporate in the text of that draft article some of the specific rules of international law that actually limited the right of the expelling State. For example, article 13 of the International Covenant on Civil and Political Rights provided that an alien lawfully in the territory of a State party could be expelled “only in pursuance of a decision reached in accordance with law” and it embodied safeguards that the expulsion decision would be reviewed. Similar wording could be included in draft article 3, paragraph 2, to reflect those procedural rules, which were important because they were also substantive rules. The Special Rapporteur might also question whether the exercise of the right of expulsion provided for in draft article 3, paragraph 1, should not be limited when it was nearly certain that the person being expelled would be subjected to torture and other forms of inhuman treatment in breach of the Covenant. It might be mentioned in the body of draft article 3, paragraph 2, or in the related commentary that the State must take account of a number of elements before carrying out the expulsion of an alien. In some countries, the length of residence, conduct and family or community ties were examined, as part of the expulsion process, if such elements had not risen to the level of customary law. Those were humanitarian considerations that States should be encouraged to bear in mind when they were about to hand down an expulsion order.

66. He could support draft article 4 as proposed by the Special Rapporteur, but, as part of the codification and progressive development of international law, he could also support a provision simply stating that a State could not expel its nationals. The exception to that rule now set out in paragraph 2 was not easy to justify and it was, in addition, sharply limited by paragraph 3; those two paragraphs should therefore be deleted.

67. In draft article 5, the inclusion of a provision relating to refugees might help strengthen the notion that the principle of *non-refoulement* was part of customary law

²⁹⁰ Report of the World Summit for Social Development (Copenhagen, 6–12 March 1995), A/CONF.166/9, Resolution I, Annex I (Copenhagen Declaration on Social Development) and Annex II (Programme of Action of the World Summit for Social Development).

²⁹¹ G. S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 21–22.

and, consequently, dissuade States from thinking about denouncing the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. However, Mr. Pellet had made the point that deviating from the approach adopted in the 1951 Convention might weaken the system of protection established by that instrument. The Commission therefore had to be cautious in wording draft article 5 in order to prevent it from appearing to derogate from the regime established by the 1951 Convention and the 1967 Protocol. It was also not necessary to keep the words in square brackets in draft article 5, paragraph 1; however terrorism was defined, it constituted a danger to national security and public order and was thus already covered.

68. Draft article 6 was acceptable, provided that the terms “lawfully” and “terrorism” were not retained and it was specified that, if a stateless person could not find anywhere to go or the State expelling him could not find a State willing to receive him, he should be authorized to remain in the country wishing to expel him. The approach taken in draft article 7 was appropriate, but paragraph 3 could be amended in order better to protect individuals and avoid any possibility of collective guilt. In conclusion, he said that he was in favour of referring the draft articles to the Drafting Committee, even though he had reservations about draft article 3.

69. Mr. NOLTE said that he agreed with most of the Special Rapporteur’s views and suggestions and would therefore speak only on the points on which his own views differed. Like several other members of the Commission, he had some reservations about the methodological approach adopted by the Special Rapporteur and, while he fully endorsed the basic premise stated in draft article 3 that the right of a State to expel aliens was not absolute, he would explain the limitations applicable to the exercise of that right in a slightly different way. The main limitations were human rights as derived from treaties and customary international law, including rules of *jus cogens*. He would thus not emphasize, as the Special Rapporteur did, the “limits inherent in the international legal order” because they basically involved inter-State relations, not international law relations between a State and an individual. In his opinion, the second sentence of draft article 3, paragraph 2, should be amended to read: “In particular, the State must respect its obligations arising from human rights.” As Mr. Gaja had suggested, moreover, paragraphs 1 and 2 should be combined in order to make the principle a more unitary one. Apart from the question of the basis and limits of the right of expulsion, he agreed with Ms. Escameia that the distinction between the internal and external limits of the right of expulsion did not serve much purpose, and with Mr. Pellet and Mr. McRae that the distinction Herbert Hart had drawn between “primary rules” and “secondary rules”²⁹² did not really fit in the present study.

70. With regard to draft article 4, he agreed with the principle stated in paragraph 1 that a State could not expel its own national, but, like several other members of the Commission, he was not sure whether the exception stated in such vague terms in paragraph 2 (“for

exceptional reasons”) was well founded. After all, the cases cited by the Special Rapporteur to justify it related mainly to extradition, not to expulsion. He was also not sure whether the Special Rapporteur was reintroducing his initial interpretation of the concept of “*ressortissant*” in paragraph 43 of his report in order to extend the concept of “national”, which had apparently been agreed on as being the opposite of that of “alien”. The Special Rapporteur used that usual interpretation of the concept in paragraph 28 of his report, but the reference to the decision of the Human Rights Committee in the *Stewart v. Canada* case (para. 43 of the report) was not sufficient. While agreeing that the questions raised by Mr. Gaja about the term “national” were worth asking, he did not think that they belonged in a draft article relating to “*ressortissants*”.

71. Referring to draft articles 5 and 6 relating to refugees and stateless persons, respectively, he supported the view expressed by Mr. Pellet and other members such as Mr. McRae and Mr. Petrić that the Commission should not use language different from that of the 1951 and 1954 Conventions. He did, however, fully agree with the principle stated in draft article 7 and wished to refer in that regard to certain experiences that had not been mentioned in the report. Under the Nazi regime, Germany had carried out terrible, inexplicable mass expulsions as a prelude to the Holocaust and as part of the aggressions it had perpetrated during the Second World War. It must also not be forgotten that, after the war and as a reaction to the German aggression, over 10 million Germans had been expelled from their homeland. It was of course not a matter of relativizing German guilt, but it was conceivable that the collective expulsions of Germans after 1945 would not be justified today. As to the text of the draft article, he agreed with the Special Rapporteur’s view, as further explained by Mr. Pellet, that the words “reasonable and objective examination” in paragraph 1 were better than the word “fair”, as suggested by Ms. Escameia. The word “reasonable” was probably more helpful for the victims of collective expulsions than the word “fair” because it left more room for considerations other than legal process. Referring to draft article 7, paragraph 3, he shared Ms. Escameia’s doubts about the words “taken together as a group, they have demonstrated hostility towards the receiving State”, which were too vague and general and thus gave a State engaged in armed conflict too easy an excuse for carrying out an unjustified collective expulsion. It would be better to apply the principle of the distinction drawn in international humanitarian law between civilians and combatants, with the result that only the members of the group who had actually behaved in a clearly hostile manner would be liable to expulsion in time of war.

72. On the basis of those comments, he agreed that draft articles 3, 4 and 7 should be referred to the Drafting Committee. He nevertheless shared Mr. Pellet’s view that the Commission as a whole should decide whether the draft articles should contain rules relating to refugees and stateless persons and, if so, whether such rules should deviate from the relevant conventions. He personally did not endorse either of those two options.

²⁹² Hart, *op. cit.* (see footnote 284 above).

73. Mr. HMOUD commended the Special Rapporteur on his third report on the expulsion of aliens, which gave a good overview of theory and practice in that regard. The Special Rapporteur had adopted the approach of reconciling different political and legal considerations and giving an overview of the formulation of the rules of international law relating to the expulsion of aliens. The fact was that the State had a set of powers enabling it, for example, to control its territory and conduct its internal affairs for the purpose of safeguarding its interests and its security. However, the rights deriving from those powers, particularly the right to expel aliens, were not of an absolute nature in international law. The right of the expelling State was thus limited by other considerations linked primarily to human rights such as the right to lawful and non-arbitrary proceedings. The State had discretionary power by which it could decide whether aliens could be present in its territory in return for respect for its internal procedures, but it had to fulfil its obligations under international law and, in particular, act in good faith and respect its human rights obligations. In that context, draft article 3 struck a suitable balance between the rights of the State and its obligations under international law.

74. There was at first glance no reason to consider the question of the expulsion by a State of its own nationals in draft articles relating to the expulsion of aliens. Although those two questions received different legal treatment, they shared a number of principles which served as the basis of human rights in international law. In addition, practical problems arose in the case of dual nationality or the effective nationality of the person in question, and that justified the inclusion in the draft articles of certain principles relating to the expulsion of nationals. International law offered maximum protection to nationals against expulsion from their State of nationality and the source of the obligation of the State not to expel its nationals was to be found in international law, as the practice of States, some human rights instruments, jurisprudence and doctrine showed. It could, however, be asked whether there were any exceptions to the rule. Draft article 4, which authorized a State to expel its nationals “for exceptional reasons”, allowed a State the possibility of abuse and such “exceptional reasons” would have to be defined so that the expulsion of a national would appear to be an extreme measure of last resort. The extradition of nationals was not prohibited in international law, however, and the wording of the relevant draft articles should reflect the fact that the extradition of nationals was not subject to the rules prohibiting their expulsion.

75. He stressed once again that draft articles 5 and 6 dealt with questions relating to the international law applicable to refugees and stateless persons, and establishing hybrid principles in the present draft articles in order to protect that category of persons from expulsion amounted to the rewriting of the international law on those two issues. The 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons had codified the protection of refugees and stateless persons, including the protection of such persons from forced return and expulsion. State practice was abundant, and those

Conventions could be amended only in accordance with certain procedures. In his report, the Special Rapporteur drew attention to the “gaps” in the 1951 Convention with regard to the protection of refugees in time of war. It was not, however, the Commission’s task to redefine the concept of “refugee” and to include a principle of the prohibition of such persons in its draft articles, for that would not strengthen the protection of refugees fleeing an armed conflict. Even if draft article 5 was adopted as it stood, a State bound only by the definition of “refugees” contained in the 1951 Convention would be bound only to protect against the expulsion of refugees covered by that definition and persons who had become refugees as a result of war would be excluded from the scope of that protection.

76. The temporary protection of refugees in time of war outside the framework of the 1951 Convention ended when the conflict ended. The refugees must then return to their country, even *en masse*, and that was, on the face of it, contrary to draft article 7 on the prohibition of collective expulsion. That example showed the type of problems to which the draft articles could give rise if they applied to the expulsion of refugees or overlapped with the law relating thereto. Draft article 5 reproduced the wording of articles 32 and 33 of the 1951 Convention in such a way that it had the effect of altering the scope of article 33, which applied to any refugee, whether “lawfully” or “unlawfully” in the territory of the receiving State, and prohibited expelling or returning a refugee to a country where “his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. Under that article, moreover, the refugee could be returned only if there were serious reasons for regarding him as a danger to national security or if he had been convicted as a result of a final judgement, but draft article 5 applied only to refugees “lawfully” present in the territory of the receiving State, and that was contrary to article 33 of the 1951 Convention. Consequently, draft articles 5 and 6 should be replaced by articles providing that the expulsion of refugees or stateless persons was subject to the rules of international law and the legal obligations of the receiving State.

77. International practice showed that States had different opinions on the question of collective expulsion and that no universal rule prohibiting that practice seemed to exist. A principle of that kind, together with exceptions, nevertheless seemed to be emerging from regional practice. A State that enforced its own laws in a “non-arbitrary” manner should be in a position to expel a group of individuals in strict conditions, provided that it respected the right to due process of each individual making up the group. The adoption of an absolute prohibition of collective expulsion was therefore contrary to the power of the State with regard to the conduct of its internal affairs. Although the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families prohibited collective expulsion, there was no reason for a specific provision of the draft articles to be devoted to migrant workers. That Convention had been in force only since 2003 and the prohibition of expulsion for which it provided was more a treaty obligation than an obligation of customary

international law. As such, that obligation must remain in the Convention as an obligation on its own merits and not be stated in the draft articles in favour of migrant workers. Consideration should also be given to the question whether the definition of collective expulsion as the expulsion of a “group of aliens”, as taken from the work of the European Commission on Human Rights, should or should not be further refined. What did the term “group of aliens” mean? Did it reflect a specific number or must it be considered that a group of aliens was one regarded or treated as such by the expelling State? Must it be considered that a State which expelled a large number of persons whose residence permits had expired was carrying out a collective expulsion (even though it applied due process of law and did not contravene the principle of non-discrimination)? The answer to those questions would determine whether the act in question came within the definition of collective expulsion or was an exception to the principle of the prohibition of collective expulsion.

78. The practice of States with regard to expulsion in time of war was mixed. The law of armed conflict did not prohibit the expulsion of aliens from the territory of a belligerent State and he was not in a position to support the Special Rapporteur’s view that the 1949 Geneva Convention relative to the protection of civilian persons in time of war (Convention IV) implicitly prohibited such a practice. If it did, a provision to that effect would have been included in that text, as in the case of an occupying Power which proceeded to transfer its own civilian population to the territory it occupied. Nonetheless, such considerations should not prevent the Commission from deciding to prohibit collective expulsion, provided that the rule was accompanied by broader exceptions than those provided for in time of peace. Such exceptions should be applied only in the light of considerations of high national security and after all the other possible options had been exhausted. In conclusion, he was in favour of referring draft articles 3, 4 and 7 to the Drafting Committee. He would like draft articles 5 and 6 to be amended in accordance with the suggestions just made.

The meeting rose at 12.55 p.m.

2943rd MEETING

Thursday, 26 July 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Candiotti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens (*continued*) (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. FOMBA congratulated the Special Rapporteur on his highly erudite and instructive third report on the expulsion of aliens (A/CN.4/581), with its emphasis on thorough research and rigorous analysis. The general aim was twofold: first, to strike a balance between the interests of the expelling State and those of the expellees; and secondly, to identify balanced general principles resting on *lex lata*, or *lex ferenda* if necessary—a difficult and sensitive exercise in which the Special Rapporteur had succeeded brilliantly. He broadly endorsed the Special Rapporteur’s views concerning the method of work and the conceptual basis of the draft articles.

2. Draft article 3, paragraph 1, was well founded in international law and practice regarding the right of expulsion, and the content of paragraph 2 was convincingly explained in paragraph 22 of the report. While the wording of that draft article should certainly underscore the need to respect the fundamental principles of international law, the formulation “in accordance with international law” might be sufficient. There was no need to go any further and place particular emphasis on such axiomatic legal principles as good faith and compliance with international obligations.

3. *Prima facie* there was reason to doubt the wisdom of referring to the non-expulsion by a State of its own nationals in the context of the expulsion of aliens, since the terminology could seem vague and contradictory, as was illustrated by the fact that in draft article 4, paragraph 1, the Special Rapporteur had decided to use the terms “*ressortissants*” and “nationals” as synonyms, yet in paragraph 43 of the report he stated that the principle of non-expulsion of nationals should be understood in the broad sense, as applying to “*ressortissants*” of a State. Hence, it would seem that the notion of “*ressortissant*” was wider in scope than that of “national”, which made it all the more vital to determine which categories of persons were covered. The clear and logical explanation set out in paragraph 43 should, however, remove any doubts as to the pertinence of the draft article. In any event, the fact remained that the notion of “alien” could be understood only by reference and in opposition to that of “national”, and that the question of the equal or unequal treatment of aliens as compared with nationals and its implications for expulsion were an underlying element of the Special Rapporteur’s conceptual approach.

4. The uncertainty therefore related to whether draft article 4, paragraph 1, should refer to “its own nationals” or “its own *ressortissants*”. If the term “national” in the strict sense were to be retained, that would leave unresolved the question of the status of a person who had been stripped of his or her nationality but who had not acquired another nationality and who was being expelled from the territory of his or her former national State. On the other hand, if the term “*ressortissant*” were to be retained, that would make it possible to cast a wider net

and to take account not only of nationals *stricto sensu*, but also of persons who had been stripped of their nationality and those with a status similar to that of nationals either under the law of the host State, or by virtue of the ties they had with the latter, a point discussed in paragraph 43 of the report.

5. In draft article 4, paragraph 2, while he could understand and accept the expression “exceptional reasons”, it might give rise to doubts as to the precise nature of the much-cited concepts of national security and public order, whether there might be any other grounds, and how to avoid or reduce the risk of abuses. It would be useful to provide some clarification of those questions in the commentary. Another important practical point was what would happen if the national State were, without due cause, to refuse the right of return.

6. Turning to draft article 5 (Non-expulsion of refugees), he noted that, in paragraph 59 of the report, the Special Rapporteur had drawn a distinction between “refugees” and “territorial asylees” and concluded that the rules applicable to the expulsion of the two categories of persons should be analysed separately. He asked when that would be done. In paragraph 65, a distinction was made between “expulsion” and “repatriation”, but when there was constraint and repatriation was no longer voluntary but forced, the dividing line between the two notions surely became blurred. On the other hand, the differentiation between “temporary protection” and “subsidiary protection” in paragraph 72 was interesting and useful.

7. With reference to draft article 5, paragraph 1, he agreed with the Special Rapporteur that it was not easy to define the exact content and meaning of the notions “endangerment of security” and “threat to or endangerment of public order”. Although the Special Rapporteur had put forward some good reasons why terrorism could possibly be included by way of progressive development, in order to lessen the difficulties that its inclusion would entail, it might be advisable to say no more than “for reasons of national security and/or public order, including terrorism”. The phrase “against him or her” in paragraph 2 of the same article might be sufficient, but if more explicit wording were desired, at the risk of being repetitious, the expression “against such person” could be used.

8. As for draft article 6, in paragraph 86 of the report the Special Rapporteur raised some legitimate points regarding undocumented stateless persons. If, in draft article 6, paragraph 1, the term “lawfully” were retained, that would mean that the Commission was abiding by the letter and spirit of article 31 of the 1954 Convention relating to the Status of Stateless Persons, but that did nothing to address the position of the undocumented stateless person, or answer the question of what legal regime was applicable in that case. An answer would nevertheless have to be found. The crux of the matter was whether it would be advisable to treat undocumented stateless persons differently from refugees. *Prima facie* he would be inclined to delete the word “lawfully” and to leave the possibility open, even though that did not by any means solve all the problems. His comments with respect to the reference to terrorism in draft article 5 also applied to draft article 6.

9. The attempt in paragraph 2 of the same article to engage in progressive development by giving the expelling State a new role seemed to meet a logical and practical need springing from a concern for efficiency, and his initial feeling was that it should be accepted. The moot point concerning the stateless person’s consent was whether or to what extent a host State chosen without the agreement of that person would offer sufficient guarantees of his or her security and peace of mind. For that reason, he would be in favour of retaining the phrase “in agreement with the person” and deleting the square brackets so as to retain the full text.

10. A question of principle had been raised, namely whether draft articles 5 and 6 should be retained, and the view had been expressed that it would be unwise to tamper with the relevant provisions of the 1951 Convention relating to the Status of Refugees or of the 1954 Convention relating to the Status of Stateless Persons, but that, if that had to be done, their integrity should be preserved at all costs. Personally, he did not consider that the contents of the two paragraphs of article 6 as they stood greatly disturbed that integrity, inasmuch as the few changes proposed seemed, on the contrary, to supplement those Conventions in a useful manner. It was hard to see how a general convention on the expulsion of aliens could ignore refugees and stateless persons. All things considered, he would prefer to maintain the current versions of draft articles 5 and 6, subject to a few drafting improvements, but if that could not be done, his preference would be to replicate the content of the relevant provisions of the above-mentioned conventions. Failing that, it would be better to simply refer to the relevant articles of those Conventions. He would, however, support any compromise solution reached by the Commission.

11. The substance of draft article 7 on the prohibition of collective expulsion did not raise any particular difficulties as far as the scope *ratione personae* was concerned. Moreover, it was unnecessary to devote a separate article to migrant workers because the constituent elements of the regime laid out in article 22, paragraph 1, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families were to be found in draft article 7, paragraph 1. The expression “reasonable and objective examination” was acceptable, but could possibly be replaced by the words “thorough and objective examination”. As for paragraph 3 of that draft article, the rationale set out in paragraph 134 of the report appeared to be sound, especially as international humanitarian law was silent on the subject. The sticking point in that context was not the legitimacy of the exception to which reference was made, but the way it was worded, especially in respect of the reason for expulsion. That part of paragraph 3 should therefore be reviewed.

12. In concluding, he supported the referral of draft articles 3 to 7 to the Drafting Committee.

13. Mr. NIEHAUS congratulated the Special Rapporteur on his third report on the expulsion of aliens. It would make a very valuable contribution to the Commission’s work on a most important subject which would help to bolster human rights and international humanitarian law in a field where serious violations of human dignity were not a thing of the past, but were still occurring.

14. While the sovereign right of a State to expel an alien from its territory constituted an unquestionable principle of contemporary international law, it had to be exercised in compliance with the general principles of international law, treaty obligations and customary law, and the State must act reasonably and in good faith. Specifically, expulsion must respect the relevant legal instruments, especially in the fields of human rights, humanitarian law, international refugee law and migration law.

15. Article 3, paragraph 1, was perfectly clear in that respect. Paragraph 2 also performed its function, although its wording could be improved and expanded to make it more emphatic. The provision that he found most problematic, however, was draft article 4, although, unlike some members, he considered that the draft articles should deal with the expulsion by a State of its own nationals, a fundamental, absolute and unconditional principle that needed to be highlighted. That principle was set forth in the first paragraph of the article, the force of which was, however, weakened by the contents of the second paragraph, which allowed for exceptions, and by the provisions of the third paragraph. The fact that so many international instruments recognized the right of every person not to be expelled from the State of which he or she was a national confirmed that it was firmly enshrined in contemporary international law.

16. The sole possible exceptions, which had to be based on court decisions, were extradition, accepted by certain countries and, rarer still, the penalty of exile, when freely chosen by the person concerned as an alternative to deprivation of liberty. While such exceptions were disagreeable in that they implied a certain disregard for the fundamental rights of the individual, nonetheless their recognition in the internal law of some States made it necessary to acknowledge their existence, but to consider them as the only admissible exceptions. To that end, he suggested that the second and third paragraphs of draft article 4 should be amended to simply mention those exceptions and to include the vital stipulation that all such cases must be subject to the appropriate judicial procedure.

17. In view of the difficulty of expelling nationals, some States stripped citizens of their nationality in order to rid themselves of persons whose presence was inconvenient or undesirable for political or economic reasons. It was a relatively little known fact that in Latin America during the Second World War, not only had resident German civilians been conscripted or expelled, but in some Central American countries second-generation nationals of German origin had been detained or expelled for the sole purpose of divesting them of their assets. Those persons had been sent to concentration camps in the United States and their assets expropriated or confiscated. They had been stripped of their nationality not by the courts, but by mere executive decree, and German nationality imposed on them in order to declare them enemy belligerents and thereby provide a pretext for robbing them of their property. The lawsuits to settle their claims had dragged on for decades and the amounts of compensation—when any was awarded—had been ridiculously small in proportion to the enormous economic and moral damage inflicted. Yet such blatant human rights violations on the other side of the Atlantic had gone unnoticed. Accordingly, he

supported Mr. Dugard's suggestion to include denationalization in peacetime and time of war in the scope of the topic, since such flagrant violations of human rights and the international legal order could easily take place again.

18. The question of dual nationality and the problems it could cause should also be studied and dealt with in a separate draft article.

19. Draft articles 5 and 6 were similar and, as Mr. Pellet had pointed out, raised the same substantive issues. While he had no objection to them, he was concerned by the fact that they repeated the provisions of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. That being so, he wondered what was the purpose of those two articles and whether it would not be better simply to refer to the relevant articles of the two Conventions.

20. He concurred with the views of several other members with regard to the incorporation of an express mention of terrorism; there was not yet any clear, internationally accepted definition of the term, which had a number of—sometimes contradictory—meanings. Like Mr. Vargas Carreño, he was of the opinion that the terms “national security” and “public order” covered that pernicious problem quite adequately.

21. Draft article 7 on the prohibition of collective expulsion was logical and coherent. The second sentence of paragraph 1 was particularly apt and necessary.

22. Lastly, having regard to the comments made, he was in favour of the draft articles being referred to the Drafting Committee.

23. Ms. XUE said that the third report on the expulsion of aliens rested on well-documented research and provided a historical review of the development of the law together with a conspectus of current international practice and contemporary international law. The Special Rapporteur's balanced, prudent, thought-provoking and far-sighted approach constituted an excellent contribution to the Commission's work. She endorsed the general thrust of the report and agreed that in principle draft articles 3 to 7 could be referred to the Drafting Committee.

24. The Special Rapporteur offered a convincing analysis of States' right of expulsion in paragraphs 15 to 22 of the report, clearly highlighting the two aspects of the principle of sovereignty in relation to the expulsion of aliens. The arguments concerning the inherent nature of the principle were strong and convincing, but those in favour of the progressive development and codification of international law in that field would have been far more cogent if contemporary developments in the international legal order—particularly in regard to human rights protection, development, and traditional and non-traditional threats to peace and security—had been emphasized in the section on the factual background. In other words, it was not only the legal principle of sovereignty as such that intrinsically determined that the right of expulsion was not an absolute right; the current legal order, which had evolved greatly since the end of the Second World War, also imposed certain limits on that right. For that reason, many

of the cases cited in the report were no longer relevant, or no longer regarded as acceptable or applicable in contemporary international law. Draft article 3 would reflect those changes more accurately if the two paragraphs were merged, so that it became clear that the contents of paragraph 2 set out the conditions for the exercise of the right of expulsion proclaimed in paragraph 1.

25. As for draft article 4, she agreed in principle that a State should not expel its nationals. The inclusion of such a principle in the draft articles might, however, open up a whole range of complicated issues relating to nationality. The examples given in the report showed that the Special Rapporteur's conception of expulsion was rather broad. If the involuntary removal of nationals from a State's territory, by means of measures such as surrender, extradition or special political arrangement, was deemed to be an exception to the principle, the consent of the receiving State might not be the only condition that had to be met. Moreover, the right of the nationals expelled in such cases to return to their home country did not necessarily depend on the request of the receiving State, as provided in draft article 4, paragraph 3.

26. As Mr. Gaja had said, expulsion was a harsh measure for a State to impose on an individual. A State should not and, in fact, could not, expel a person unless another State was willing to accept him or her. During and even after the Cold War, the removal of nationals in extraordinary circumstances had often complicated relations between States and had had a significant political impact on the security and public order of the States concerned. In many cases, however, the person concerned might choose to leave his or her home country, as former Liberian President Charles Taylor had done. She therefore welcomed the Special Rapporteur's acknowledgement of political reality and the fact that he had not made the non-expulsion by a State of its nationals a rigid rule. Nevertheless, the draft article, as it stood, required closer examination.

27. Turning to draft articles 5 and 6, she said that, given that draft article 1 explicitly stated that refugees and stateless persons fell within the definition of "aliens" and were thus included within the scope of the draft articles, it would be desirable to incorporate in them draft articles specifically dealing with the non-expulsion of refugees and stateless persons. As the draft articles were meant to be an overarching legal document encompassing various types of acts of expulsion of aliens, choosing to omit refugees and stateless persons would not further the protection of those people. A general reference to existing legal regimes on refugees and stateless persons under the 1951 and 1954 Conventions would address the concerns raised in that respect during the Commission's deliberations.

28. In her view, it was unnecessary to include a reference in the draft articles to terrorism as a separate ground for expelling refugees or stateless persons, as the subject was sufficiently covered by the reference to national security or public order provisions. Current developments in international law as well as international action to combat terrorism had enhanced international cooperation between States in many fields, particularly that of judicial

assistance, but had not led to terrorism being placed in a separate category from threats to national security among the conditions for expelling aliens, particularly refugees and stateless persons.

29. On draft article 6, she supported the proposal to delete the word "lawfully" from paragraph 1, because the main focus of the draft articles was on expulsion, and the Special Rapporteur's argument in favour of its deletion was quite convincing. Article 31 of the 1954 Convention relating to the Status of Stateless Persons should apply to such people even if they were illegally present in the receiving State.

30. Lastly, on draft article 7, she supported the Special Rapporteur's position that collective expulsion should be prohibited under international law. In his report, he had listed a series of historical instances of collective expulsion but, as a result of more recent developments, it could certainly be held that any collective expulsion of aliens on grounds of race, religion, nationality or political opinion was prohibited under international law. Indeed, the criterion should relate to qualitative rather than quantitative considerations. One exception, however, concerned cases where the national State might request the receiving State to return a group of its nationals who had illegally entered the country, with a view to preventing any recurrence of such illegal action. Expulsions in such circumstances, even if regarded as collective, should not be characterized as such within the meaning of the draft articles.

31. She concurred with those members who believed that migrant workers were a separate issue deserving special treatment in the draft articles in the light of recent developments with regard to their protection.

32. Whether, in times of armed conflict, aliens should be subject to collective expulsion very much depended on the extent of the threat they posed to the security of the State of residence. A hostile attitude, or even hostile activity, might not in itself constitute sufficient grounds for their expulsion. Given the changes in the law on the use of force and the application of humanitarian law in time of armed conflict, the conditions for such expulsions should be spelled out if a provision on that subject were to be retained in draft article 7. Action to protect aliens from a hostile social environment in their country of residence in time of armed conflict should perhaps not be regarded as collective expulsion, but instead termed "temporary removal", a term which carried a positive rather than a negative connotation. Paragraph 3 should in principle be deleted, but if most members preferred to retain it, its subject matter merited separate treatment.

33. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for his rigorous legal analysis of the topic and thorough research work. In paragraph 7 of the report, the Special Rapporteur affirmed that the right to expel was a natural right of the State emanating from its own status as a sovereign legal entity with full authority over its territory, that it was a right inherent in the sovereignty of the State, and that it was not an absolute right, as it had to be exercised within the limits established by international law. Instead of speaking of a "right" to expel, however, he himself would prefer to refer to the "competence" of a State to expel an alien from its territory.

34. State sovereignty was the foundation for a whole set of competences that were intrinsic to the exercise of its functions. Such competences were chiefly territorial, relating to activities carried out within its boundaries, and personal, relating to persons residing or staying in its territory and to its nationals, even when they were outside its territory. The State's competences were exercised fully, exclusively and independently but were limited or conditioned by international law. Obviously, the State had competences with respect to the entry into and residence of aliens in its territory, including the competence to expel an alien from its territory, one which was discretionary but not unlimited. The limits derived from the obligations imposed on the State by international law, especially international human rights law, international humanitarian law, and international law regulating refugees and migration.

35. In the context of inter-State relations, it was perhaps appropriate to speak of a right of a State *vis-à-vis* another State, but in the context of the topic of expulsion of aliens, the antithesis was that between the State and aliens as individuals enjoying the rights accorded them under international law. Consequently, it was perhaps inappropriate to speak of the *right* of a State to expel *vis-à-vis* the rights of such individuals; instead, one should speak of the *competence* of a State to expel, a competence which was nevertheless limited by international law. Accordingly, he suggested that the title of draft article 3 should be "Competence to expel" and that paragraphs 2 and 3 should be reworded in order to express more clearly the general principle that a State had the competence to expel an alien from its territory subject to the obligations imposed by international law, particularly international human rights law.

36. The article should retain the references to the obligation to act in good faith and in compliance with international obligations, in addition to incorporating a direct reference to human rights. The latter was important, since human rights pertained to persons as human beings, irrespective of their status as nationals or aliens *vis-à-vis* a given State, and some human rights were relevant for purposes of assessing the lawfulness and limits of an expulsion. Examples were the likelihood that a person would be tortured or subjected to other violations of human rights in the country to which he or she was being expelled; where the expulsion violated the principle of non-discrimination on grounds of colour, race, sex or religion; or where it violated the principle of legality in respect of the substantive and procedural requirements for lawful expulsion, as set forth, *inter alia*, in article 13 of the International Covenant on Civil and Political Rights. Other relevant rights were family rights, the right of family reunification and the property rights of aliens.

37. Although the Special Rapporteur rightly affirmed that the State's competence to expel was restricted by international law, he himself agreed with other members that it was not useful to apply the distinction between primary and secondary rules. However, the approach of listing the principles relevant for purposes of determining the limits regarding the categories of persons to be expelled, starting with the principle of non-expulsion of nationals, was, in his view, a useful one. In view of

the explicit prohibition on expulsion of nationals in the American Convention on Human Rights: "Pact of San José, Costa Rica", Protocol No. 4 to the European Convention on Human Rights, the Arab Charter on Human Rights and the implicit prohibition in the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, he fully endorsed draft article 4, paragraph 1. As Mr. Caffisch had suggested, however, its title could be improved through the replacement of the expression "non-expulsion" by "prohibition of expulsion".

38. The recent example given in the report of an exception to the principle whereby a State was prohibited from expelling a national was actually an instance of surrender of a person to a court. The distinction between extradition, surrender of a person to a court (both of which could include nationals), and expulsion must be kept in mind.

39. Draft article 4, paragraph 2, should be deleted, since expelling nationals was categorically prohibited. Paragraph 3 should be relocated to the commentary in order to make it clear that while expulsion of nationals was prohibited, if it occurred the State had the obligation to allow the national to return at any time at the request of the receiving State. He supported the suggestion that the Commission should deal with dual and multiple nationality, in the context of expulsion, even though it would seem at first sight that the prohibition of expulsion also applied to such cases. It would also be useful to look at the phenomenon of deprivation of nationality and subsequent expulsion in order to prevent abuses such as those that had occurred in the past, as Mr. Dugard and Mr. Niehaus had urged. It should be kept in mind, however, that the legislation of many countries permitted the cancellation or revocation of naturalization papers granted to an alien, *inter alia*, if he or she obtained them fraudulently, also providing for his or her expulsion.

40. He supported the Special Rapporteur's proposal to include draft article 5 on non-expulsion of refugees, which was consistent with the principle of *non-refoulement*. However, account must of course be taken of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. He also agreed on the need to include a specific article on non-expulsion of stateless persons. The wording of draft articles 5 and 6 could be improved, however.

41. On the Special Rapporteur's idea of including a reference to terrorism in paragraph 1 of those two provisions, it should be noted that the paragraph stated the grounds for lawful or non-arbitrary expulsion, namely national security or public order. The idea was to avoid listing all the grave offences justifying expulsion that a refugee or stateless person might be alleged to have committed. Were terrorism to be included, it should not be linked to the concepts of national security and public order, and it would also be necessary to include the list of the most serious crimes of concern to the international community as a whole under the Rome Statute of the International Criminal Court, namely genocide, crimes against humanity and war crimes. That, of course, was not what was intended.

42. Another even better reason for not including terrorism in the draft articles was that if an alien present in the territory of a State, irrespective of whether he or she was a refugee or stateless person, was suspected of having committed an act of terrorism or genocide, the State in question must not use those allegations as grounds for expelling the person, but must instead bring the person before a court or extradite him or her. Expulsion in such cases would reduce the likelihood of the person concerned being brought to justice and would simply pass the problem on to the receiving State. The obligation set out in the Declaration on Measures to Eliminate International Terrorism adopted by the General Assembly in its resolution 51/210 of 17 December 1996 should be understood to mean that States must ensure that applicants for asylum had neither committed nor been accomplices to acts of terrorism and that they must not mistakenly or inadvertently grant refugee status to persons who were not in fact refugees but simply criminals who sought to take advantage of such status. States must obviously also ensure that persons who had already been granted refugee status were brought to justice if they committed or assisted in terrorist acts or other grave offences such as those he had mentioned.

43. It was for those reasons that no reference to terrorism should be included in the draft articles, rather than because negotiations regarding a general convention against terrorism incorporating the definition of terrorism to be found in the 1999 International Convention for the Suppression of the Financing of Terrorism had not yet been concluded.

44. On draft article 7, he endorsed the categorical formulation prohibiting the collective expulsion of aliens both in peacetime and in time of war and emphasizing the need for examination of the particular case of the individual alien. Paragraph 3 should be deleted, however, as it could give rise to abuse. He also favoured the inclusion of an article specifically prohibiting the expulsion of migrant workers and their families, as suggested by Ms. Escarameia.

45. Lastly, he was in favour of the referral of the draft articles to the Drafting Committee.

46. Ms. JACOBSSON said she wished to add her voice to those of members who had praised the Special Rapporteur's well-researched and balanced report, which offered the Commission a range of possible choices both on matters of principle and on more detailed substantive matters.

47. In paragraph 4 of the report, the Special Rapporteur contrasted the principle of sovereignty and the fundamental principles underpinning the legal order and basic human rights. The implication appeared to be that there was a dichotomy between sovereignty and human rights, a view she did not share. Others had expressed similar concerns. It was true that the implementation of human rights had formerly been seen as primarily an internal affair, but that view no longer prevailed—and rightly so.

48. Mr. Vasciannie had questioned the underlying assumption in the report that the right of expulsion flowed from the concept of sovereignty, instead citing the

suggestion by Guy Goodwin-Gill that the right of expulsion stemmed from customary law and that accordingly it was subject to modification, development and restraints in the same manner as any other part of customary law.²⁹³ Sovereignty and the duty of States to protect human rights were now seen as two sides of the same coin. Embodied in the privilege of being a sovereign State was the duty of that State to respect human rights and protect its people. Hence, the obligation of States to respect and ensure respect for human rights could be seen as an intrinsic element of the privilege of sovereignty. Irrespective of whether one shared Mr. Vasciannie's point of view or that of the Special Rapporteur, the assumption that sovereignty implied a duty of the State to respect and protect human rights should be made unambiguously clear in the wording of the draft articles.

49. Turning to draft article 3 on the right of expulsion, she endorsed its basic underlying assumption that a State had the right to expel an alien and that this right was not unlimited. Like others, however, she felt that the wording did not properly reflect that postulation. The Special Rapporteur stated in his report that the traditional view that the right of expulsion was an absolute right had been completely abandoned and that for almost two centuries that freedom had been subject to limits. He demonstrated his point through evidence of extensive State practice and treaty law, and other members of the Commission had given more modern examples. While she welcomed that clear position, it was for that very reason that she thought draft article 3 should be reworded and that paragraph 1 should not stand alone but be combined with a clear stipulation that the right of expulsion was indeed subject to limitations. It was not enough to refer to "fundamental principles of international law" in a separate paragraph. The word "however" should be deleted and the limitations should be seen as part of the concept of the right to expel aliens, not separate from it. Perhaps that was what Mr. Vasciannie had meant when he had said that the right of expulsion was a part of customary law, rather than an outflow of the principle of sovereignty.

50. Did article 3, paragraph 2, state the obvious, as Mr. Pellet claimed? The answer was certainly in the affirmative. One could not foresee any situation in which a State had the right to act contrary to the principles of international law, good faith or its international obligations. However, that must not lead to the conclusion that there was no need for a reference to the parameters of international law. The problem was that the draft article did not go far enough in stating the obvious, since it entailed the slight risk that an *a contrario* conclusion would be drawn. She therefore supported Mr. McRae's suggestion that a reference to international law should be included in order to show that the right of expulsion was not absolute—although that would still not make it entirely clear that what was meant was restrictions in the context of human rights, as Mr. Nolte had pointed out. The two paragraphs of draft article 3 should be merged into one, to read: "A State has the right to expel an alien from its territory. Such a right of expulsion is not unlimited. It must be carried out in compliance with international law, in particular, human rights obligations." As procedures

²⁹³ Goodwin-Gill, *op. cit.* (see footnote 291 above).

and procedural guarantees were to be discussed in future reports, she would simply note that those in the International Covenant on Civil and Political Rights were of particular interest, as Mr. Vasciannie had mentioned.

51. On draft article 4 on non-expulsion by a State of its nationals, she did not think the reference in paragraph 24 of the report to Hart's distinction between primary and secondary rules²⁹⁴ made the text confusing. She saw it rather as a tool to help members of the Commission understand the thinking behind the Special Rapporteur's desire to make a distinction between substantive and procedural rules, and as a way of justifying addressing both those facets in the report. The Commission did not have to subscribe to Hart's thinking: the ideas expressed in the report neither commenced nor ended with his structural analysis.

52. Draft article 4 was a major source of concern to her, as it was to many other members. The prohibition against a State's expelling its own nationals was, and should be, absolute. State practice was in fact more reliable than the report tended to indicate. Paragraph 2 of the draft article was too imprecise. Not only did it indicate that there were exceptions to the rule, but it also attempted to cover cases of extradition, rather than expulsion. She was in favour of either improving the drafting or else deleting the article altogether.

53. On draft articles 5 and 6, while she was not opposed to their inclusion, she agreed with many other members that they needed to be more carefully worded. If they were retained, special attention should be given to dual nationality, migrant workers and denationalization. Terrorism, on the other hand, should not be included, not because of the lack of a definition of terrorism, but because of the great risk that States might bypass other legal requirements, particularly those connected with the obligation to legislate and institute juridical procedures relating to suspected, tried or convicted terrorists. The real test of whether a State was governed by the rule of law was that it treated its criminals, including terrorists and war criminals, in accordance with accepted legal standards.

54. Although terrorism could rightly be seen as being covered by grounds of national security or public order, some members had called for it to be listed and treated separately. She failed to see what would be gained thereby. It was indeed a heinous crime, as had been recognized by the international community. However, States had adopted a number of conventions on terrorism, most of which imposed clear obligations on States to legislate and either prosecute or extradite individuals who had committed such crimes. That body of law should be strengthened, not undermined.

55. In grey areas, for example, where there was not enough evidence to convict a suspected terrorist for planning a crime of terrorism, the State could expel an alien by reference to national security or public order, but the starting point was the legal procedure applied in the individual case. Including terrorism might, as Mr. Perera had said, create more problems than it solved. Like Mr. Saboia, she would like to see a clear reference to the principle of *non-refoulement*.

²⁹⁴ Hart, *op. cit.* (see footnote 284 above).

56. She would defer commenting on draft article 6 for the present. In discussing draft article 7, the Special Rapporteur made a distinction between situations of armed conflict and other situations. While she agreed with others that collective expulsion was prohibited in peacetime, the situation in time of armed conflict was less clear. The Special Rapporteur was right to claim that despite the lack of clear guidance in international humanitarian law, which had not developed in accordance with modern standards, citizens of an enemy State enjoyed basic human rights protection in times of armed conflict. If international humanitarian law was silent on the matter, there was room for provisions aimed at preventing the abuse of any right there might be of collective expulsion. In an attempt to broaden the protection under international humanitarian law, the Special Rapporteur had placed conditions on the right of expulsion in armed conflict, which some members of the Commission had claimed did not go far enough. The situation in armed conflict needed more thorough discussion if an acceptable and enduring end product was to be achieved: the problem was mentioned nowhere in the study of customary law by the ICRC.²⁹⁵

57. In conclusion, she said that draft articles 3, 4 and 7 could be referred to the Drafting Committee, whereas draft articles 5 and 6 needed more attention.

58. Mr. PELLET said that Mr. Vasciannie's position was not necessarily incompatible with an attempt to identify the basis for the competence to expel. It was certainly rooted in customary rules, but that did not preclude analysing why a State had the right to expel, and within what limits. That said, after listening to Ms. Jacobsson and others, he remained of the view that the Special Rapporteur's attempt to draw a distinction between a right of expulsion that was based on sovereignty and the limits on that right, anchored in the ideology of human rights, was not only wrong but even dangerous. The PCIJ, in the *SS "Wimbledon"* case, had said in essence that in protecting human rights, States were not limiting their sovereignty but fulfilling obligations inherent in that sovereignty. The idea that its sovereignty put a State above the law was indefensible. Consequently, he was surprised that some members of the Commission attached so much importance to including a reference to international law in draft article 3, since it was impossible to envisage a State being permitted to exercise a right without taking into account international law. All that was necessary—indeed, indispensable—was to make it clear that the limits to the right of expulsion were clearly indicated in subsequent articles of the draft.

59. Mr. DUGARD reminded members that the distinction between primary and secondary rules traditionally observed by the Commission had been developed by Mr. Roberto Ago, its second Special Rapporteur on the topic of State responsibility.²⁹⁶ The issue had also come up in the context of the topic of diplomatic protection. Interestingly enough, Mr. Ago had devised his scheme without any reference to Herbert Hart's writings, yet some

²⁹⁵ Henckaerts and Doswald-Beck, *op. cit.* (see footnote 283 above).

²⁹⁶ See *Yearbook ... 1970*, vol. II, document A/CN.4/233, p. 179, para. 11, for the proposal of Special Rapporteur Ago, revisited by the Commission in *Yearbook ... 1973*, vol. II, document A/9010/Rev.1, chap. II, pp. 169–170, para. 40.

members were now attributing the distinction solely to Mr. Hart. That was incorrect from a historical standpoint.

60. The CHAIRPERSON, speaking as a member of the Commission, said he could confirm those remarks, having long ago attended the first lecture given by Herbert Hart upon his assumption of the chair of jurisprudence at Oxford University, in the course of which he had expounded his theory of primary and secondary rules by drawing an analogy with a cricket match.

61. In the report before the Commission, the Special Rapporteur did a good job of providing the necessary background material, but while the foundations were good, there were problems with the superstructure—the draft articles themselves. The first was the major inconsistency between draft article 3 and draft article 7, the latter being much more liberal, although both articles actually dealt with the same subject matter, as collective expulsion was nevertheless expulsion. However, the proviso in draft article 7, paragraph 1, that collective expulsion could be carried out only “on the basis of a reasonable and objective examination of the particular case of each individual alien of the group” posed a problem: one could imagine people forming clubs in order to enjoy the benefits of collective expulsion, because a higher level of legal protection was afforded under draft article 7 than under draft article 3.

62. He very much agreed with Mr. Pellet that the historical background to the subject did not square with the fashionable perspectives now being advanced. In the nineteenth century, the question of expulsion of aliens had been part of the larger problem of the presence of aliens and the incorporation of their interests and economic activities into the life of sovereign States. The human rights aspect of expulsion was important, but there were two other important aspects: the economic control exercised by a State within its territory, and the question of security, obviously including the problem of terrorism. The category of expulsion of aliens was part and parcel of the old problem of the international minimum standard for the treatment of aliens, including conditions for the presence of aliens in State territory, their subjection to taxation regimes and the like, a part of the law that ran in parallel to norms relating to human rights.

63. The essence of the subject, however, was the control that a State had over its territory. Broadly speaking, it was a question of public order, and the wording of draft articles 5 and 6 acknowledged as much. The question of sovereignty and control had several facets. It connoted not only a power to control but various duties to control. There was no polarity between human rights concerns and the question of control. The report seemed to miss the point that control often involved positive elements, even from a human rights perspective. Article 1 of the European Convention on Human Rights read: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Many other similarly important duties under customary law could be listed, such as the duty to control the activities of armed bands, which had been a major issue in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*

case. The topic involved the protection of human rights in general and the security of foreign nationals and their property on the territory of a State, but it was the individual’s nationality and presence in the territory that were the dominant issues.

64. The question of expulsion could be approached in two ways: under draft article 3 through the formulation of a right to expel and a reference to the legal standards governing that right; and under draft article 7 subject to the requirements of a monitoring procedure for each individual concerned. Those two approaches were obviously inconsistent, and it was to be hoped that in the Drafting Committee the Special Rapporteur could make the choice between them clearer. He agreed with Mr. Vasciannie that customary law should provide the basis for determining which was the appropriate standard. The basis of the legal standards was the control of State territory and the power and the duty to maintain public order and protect national security. Incidentally, national security was as much a matter of human rights as of any other domain: there was no polarity between human rights and other legal values. Those premises were not inimical to the rights of individuals or groups, and provided the most appropriate basis for approaching some of the problems raised by the topic.

65. Draft article 4 was being characterized as posing a problem of scope, but he viewed things slightly differently. In the first place, the Special Rapporteur’s assertion in paragraph 33 of the report that nationality was a matter that fell within the competence of the State was incorrect. The confusion arose because individual States had the power to remove and confer nationality, but their decision to do so came within the framework of public international law. A useful analogy had been drawn in the *Nottebohm* case: only a State could create its own territorial sea, but it could not do so except within the framework of public international law. The same applied to the baselines of the territorial sea created by Norway in the *Fisheries* case. The problem of dual and multiple nationalities would also have to be dealt with somehow, possibly in the commentary.

66. Second, the non-expulsion of nationals was not so much an independent rule as a lack of competence of the State. Third, cases of negotiated transfers, such as that of Charles Taylor, were not really relevant. As the Special Rapporteur recognized in paragraph 55 of the report, a State could not expel its nationals without the express consent of a receiving State.

67. He was not sure what should be done with draft article 4. It could perhaps be deleted and the issues it raised mentioned in the commentary to draft article 3. The problem with draft article 4 was that a provision couched in the form of a negative exhortation often created a normative possibility even when that was not the intention. Persons faced with the exhortation “do not dump rubbish here” could be relied upon to dump rubbish somewhere else.

68. With regard to draft article 5, he endorsed Mr. Pellet’s comment concerning the risks of incorporating the language of existing multilateral standard-setting treaties. Some members were in favour of deleting the draft article. However, his own preference would be to include a

“without prejudice” clause along the lines of draft article 5, together with an explicit indication that a person who failed to obtain refugee status retained a residual status as a person present within the territory of a State who was thus subject to expulsion in accordance with the normal principles of international law.

69. Turning to draft article 6, to which Mr. Pellet’s comment also applied, he said that the non-expulsion of stateless persons was analogous to that of nationals and consequently came under the competence of the State concerned. The status of stateless persons arose from their presence, lawful or otherwise, on the territory of the State; their presence afforded them some level of legal protection.

70. He was deeply sceptical about the concept of collective expulsion, taken up in draft article 7, except as a useful political shorthand to describe certain situations. The concept lacked precision, and the need for a special provision was not self-evident. It would be more logical to have a provision on discriminatory expulsion, but in principle that was covered by draft article 3.

71. He agreed with Mr. Gaja and other members that the proviso in draft article 3, paragraph 2, should form part of paragraph 1. He also agreed that the reference to “the fundamental principles of international law” was inappropriate. He suggested it should be replaced by a proviso to the effect that the exercise of the right must be compatible with the principles of general international law. It might perhaps still be useful to refer draft article 3 to the Drafting Committee so that the problems it posed could be thrashed out there. He had some doubts, however, concerning draft articles 5 and 6, which seemed to be shared by other members of the Commission.

72. On the whole, he was reluctant to refer the draft articles to the Drafting Committee for a number of reasons. First, there were too few provisions dealing directly with the expulsion of aliens: draft articles 4, 5 and 6 dealt with issues on the boundaries of the topic. Secondly, draft article 3 needed some refinement: not enough emphasis had been laid on the question of nationality. Thirdly, the relationship between draft articles 3 and 7 required clarification. It might also be appropriate to have an additional draft article on migrant workers; it seemed odd to deal with the matter under draft article 7. Lastly, it was important to include a provision along the lines of draft article 5 on the beneficiaries of treaties of friendship, commerce and navigation, which also covered the status and conditions of aliens.

73. Ms. JACOBSSON said that the Chairperson had been rather unjust in saying that members failed to see the topic in its historical perspective, namely as an offshoot of the question of the international minimum standard for the treatment of aliens. Most members saw that very clearly; however, given the fact that the historical background had been very thoroughly examined by the Special Rapporteur, they had preferred to focus on new developments.

74. As for Mr. Pellet’s comments, she had carefully avoided suggesting that the different approaches followed by the Special Rapporteur and Mr. Vasciannie were

contradictory. Instead, she had said that they approached the situation from different angles. Different approaches could lead to the same result, and were not necessarily incompatible.

Cooperation with other bodies (*continued*)*

[Agenda item 10]

STATEMENT BY THE REPRESENTATIVE OF THE INTER-AMERICAN JURIDICAL COMMITTEE

75. The CHAIRPERSON welcomed Mr. Herdocia Sacasa, Chairperson of the Inter-American Juridical Committee and a former member of the Commission, and invited him to address the Commission.

76. Mr. HERDOCIA SACASA (Chairperson of the Inter-American Juridical Committee) said that in 2006, the Inter-American Juridical Committee had held its centenary celebrations in Rio de Janeiro, Brazil, where its predecessor, the Permanent Commission of Jurisconsults of Rio de Janeiro, had first met in 1906. The centenary had provided an opportunity to assess the invaluable contribution of the Latin American and Caribbean region and the inter-American system to many aspects of international law, including the very concept of its codification. It had also provided the opportunity to highlight the role played by the Committee in the development of the Inter-American Peace System, and notably the American Treaty on Pacific Settlement (“Pact of Bogotá”), which ensured that conflicts were resolved promptly. The importance of that Treaty in dealing with and preventing conflicts among States in the Americas was not always sufficiently emphasized. When conflicts did break out, however, they were usually of an internal nature and served as a warning of need to strengthen democracy and the rule of law and as a reminder of the relevance of the Inter-American Democratic Charter.

77. Other achievements recalled during the centenary celebrations had included the Inter-American Juridical Committee’s contribution to the development of the principle of non-intervention under the 1933 Montevideo Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States, originally promoted by José Gustavo Guerrero, a Central American citizen of world renown who had enjoyed the distinction of presiding over both the PCIJ and the ICJ. Also worthy of note had been the Committee’s role in establishing legal equality among States and the exclusion of the power of veto from all procedures in the inter-American system.

78. In 1947, the Inter-American Juridical Committee had drafted a declaration on the international rights and duties of man, which had later become the American Declaration on the Rights and Duties of Man, adopted at the Ninth International Conference of American States, held in Bogota in 1948,²⁹⁷ preceding by a few months the

* Resumed from the 2933rd meeting.

²⁹⁷ *International Conferences of American States, Second Supplement, 1942–1954*, Washington, D.C., Pan American Union, 1958, p. 262.

adoption of the Universal Declaration of Human Rights.²⁹⁸ From the outset, the Committee had been committed to promoting social rights, as was borne out by its drafting of the 1948 Inter-American Charter of Social Guarantees.²⁹⁹ That year, the Ninth International Conference of American States had requested the Committee to prepare a draft statute for an inter-American court in order to protect human rights. It was to become the cornerstone of human rights in the Americas, in the form of the American Convention on Human Rights: “Pact of San José, Costa Rica”.

79. The Inter-American Juridical Committee had made useful contributions on other important legal issues such as the right of asylum, diplomatic protection, the continental shelf, economic integration and exclusive economic zones. In March 1971, its Rapporteur on the law of the sea, Mr. Vargas Carreño, had proposed the idea of the patrimonial sea. That idea had influenced national legislation and the discussions that had taken place in the United Nations on the exclusive economic zone during the Third United Nations Conference on the Law of the Sea.

80. Equally laudable had been the Inter-American Juridical Committee’s contribution to representative democracy. It had declared that all States in the inter-American system were obliged to exercise effectively representative democracy in their systems and political organizations; further, it had declared the principle of non-intervention and the right of each State of the system to choose its political, economic and social system without any outside interference and to organize itself in the most appropriate manner, subject to the obligation to exercise effectively representative democracy.

81. The Inter-American Juridical Committee had also delivered a number of courageous opinions on various sensitive issues, such as the extraterritoriality of laws and limits to the exercise of jurisdiction, for instance with respect to the Helms-Burton Act,³⁰⁰ which might well be of relevance to the Commission’s new topic of extraterritorial jurisdiction. Its opinion in the case of Carlos Tünnermann Bernheim, Nicaragua’s Ambassador to the United States who had also been Permanent Representative to the OAS—had had implications regarding the headquarters agreements of international organizations and their regulations governing the dismissal of representatives. With regard to the *United States v. Alvarez-Machain* case, the Inter-American Juridical Committee had affirmed the violation of sovereignty and territorial integrity of one State and the duty of another to repatriate the person who had been abducted.

82. In its efforts to combat corruption, the Inter-American Juridical Committee had drawn extensively on the Commission’s work in the area of diplomatic protection, and in particular the basic principle that nationality must be acquired in a manner that did not contradict international law. At its sixty-sixth Regular Session in 2005, the Committee had issued an opinion proposing, by way of

progressive development, the need for a regulation to combat corruption. Pursuant to that opinion, in the event of a conflict of nationality, if the nationality of the requesting State was the dominant or predominant nationality, or the genuine and effective link, extradition should not be refused on the sole basis of nationality; when nationality was acquired or invoked fraudulently or unlawfully, extradition should not be refused solely on the basis of nationality. That clearly tied in with the topic of the obligation to extradite or prosecute, currently being considered by the Commission, and was reflected in many inter-American instruments, including the Inter-American Convention against Corruption.

83. Turning to the future work of the Inter-American Juridical Committee and the challenges that lay ahead, he stressed the importance of forging international law in a spirit of cooperation and responsibility and with a sense of humanity. Like the Commission, the Inter-American Juridical Committee considered that it need not confine itself to traditional topics, but could also deal with new issues arising under international law and the urgent concerns of the international community.

84. On the occasion of its centenary, the Inter-American Juridical Committee had reflected on the most significant developments in contemporary society. The first was the increasingly broader scope of international law, which now covered areas that had formerly fallen exclusively within the jurisdiction of States. As the Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law could attest,³⁰¹ in the last 50 years the scope of international law had broadened to such an extent as to encompass virtually all areas of international affairs, ranging from trade to protection of the environment.

85. The second development was the demise of State monopolies, which opened the way for new subjects of international law and other emerging partners to take their place alongside the once-powerful State leviathan. The concept of security had also changed radically: the new threats posed were complex and transnational, calling for greater collective efforts and a legal framework of regional scope. That change was accompanied by an increasing interdependence of national legal systems and international law, which made it easier for subjects of international law to move from one system to another, and for individuals to come under the jurisdiction of international law, especially in the areas of human rights and community law.

86. The last development was the rise of a new body of law of universal application reflected in norms of *jus cogens* or *erga omnes* obligations and, above all, in regional and subregional regulations established to protect collective interests essential to the group of States concerned. A case in point was the inter-American regulations governing representative democracy and human rights that constituted a system of inter-American public order norms that the Commission would refer to as *erga omnes partes*.

²⁹⁸ General Assembly resolution 217 (III) of 10 December 1948.

²⁹⁹ *International Conferences of American States, Second Supplement, 1942–1954*, Washington D.C., Pan American Union, 1958, Ninth International Conference of American States, Final Act, p. 254.

³⁰⁰ Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act), Pub. L. No. 104-114 (1996).

³⁰¹ See the conclusions of the work of the Study Group on this topic in *Yearbook ... 2006*, vol. II (Part Two), para. 251. The full report of the Study Group (A/CN.4/L.682 [and Corr. 1] and Add. 1) is available on the Commission’s website (see footnote 28 above).

87. Such norms did not only give rise to collective obligations, but also entailed a joint and several responsibility to respond to grave violations of those obligations. Legal solidarity was an inter-American principle that went beyond mere cooperation between States and signified the capacity of States that were not directly affected by violations to defend the very values, principles and regulations that had led to the establishment of the OAS. Such solidarity was in keeping with the spirit of the Commission's own draft articles on responsibility of States for internationally wrongful acts.³⁰²

88. All those developments were taking place in a world undergoing a transition which ushered in a new era. Hence the Inter-American Juridical Committee's insistence on the need to secure those vital human values that would avert the risk of the world being dragged into a century of dehumanization. International law was at the heart of efforts towards the consolidation of a *jus gentium* with new social dimensions. In a recent study addressing the legal aspects of the interdependence of democracy, comprehensive development and the fight against poverty, the Committee had noted the importance of upholding the human rights underpinning democracy and development, implementation of which, despite their being enshrined in relevant international and inter-American instruments, was weak.

89. The purpose of the Inter-American Juridical Committee's reflection on those significant developments was to draw up an agenda for the future consisting of topics of direct relevance to the public. They included the consumer protection, access to public information, the right to an identity, the protection of migrant workers and their families and combating all contemporary forms of discrimination. The Committee also intended to enhance its role as an independent consultative body and to make greater use of its specialist skills in selecting more far-reaching and challenging issues for inclusion on its agenda. In that regard, he paid tribute to the valuable role played by the Commission's own Planning Group in providing guidance to organizations such as his own in identifying areas ripe for codification or progressive development. The Inter-American Juridical Committee could break new ground by responding boldly and imaginatively to the challenges facing it. Among the new topical issues on its agenda were legal cooperation with Haiti and strengthening of jurisdictional mechanisms available in the OAS. The inclusion of the latter was perhaps prompted by the need to consider the reasons for the low rate of ratification of treaties such as the American Treaty on Pacific Settlement ("Pact of Bogotá") and the large number of reservations regarding the compulsory jurisdiction of the ICJ, as well as to ensure that the powers conferred by the Inter-American Democratic Charter relating to constitutional remedies could be exercised by all State bodies and not only by the executive.

90. As for measures to combat all forms of discrimination and intolerance, the central question was whether an additional, regional instrument was needed to complement the International Convention on the Elimination of

All Forms of Racial Discrimination. The Inter-American Juridical Committee had delivered an opinion in which it had found that the relevant regional instruments such as the Charter of the Organization of American States and the American Declaration on the Rights and Duties of Man explicitly or implicitly covered all forms of existing and potential discrimination. It had concluded that the value of a new instrument would reside in its coverage of new and contemporary forms of discrimination not contemplated in earlier instruments.

91. The Inter-American Juridical Committee had discussed the possibility of drafting a new inter-American instrument on the right to information. In that connection, Mr. Herdocia Sacasa drew attention to the judgement of the Inter-American Court of Human Rights in the *Claude Reyes et al. v. Chile* case concerning Chile's alleged violation of article 13 of the American Convention on Human Rights ("Pact of San José, Costa Rica") by refusing access to public information in connection with the environmental impact of a foreign investment contract. The Court had found that, by expressly stipulating the right to "seek" and "receive" "information", article 13 of the Convention protected the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Furthermore, such restrictions must have been established by law, be enacted for reasons of general interest, respond to a purpose allowed by the Convention, and be necessary in a democratic society and proportionate to the interest justifying them. The Court's contribution to the presumption that all public information should in principle be accessible to individuals must be recognized. The Commission's draft articles on prevention of transboundary harm from hazardous activities were also relevant to the issue of access to public information. Also important was the existence of effective legal remedies to guarantee the right of access to public information. A related aspect of the question currently being considered by the Committee was the need to separate the issue of access to public information from that of the protection of information and personal data, including transboundary transfers of data.

92. Another important issue under consideration by the Inter-American Juridical Committee was the legal situation of migrant workers and their families under international law. The legal aspects of human mobility, especially with regard to human rights, should be properly reflected in legislation on migrant workers. Some progress had already been made with the entry into force of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the advisory opinions of the Inter-American Court of Human Rights, the judgments of the ICJ, especially in the *Avena* case, the mandates stemming from the Summit of the Americas and the adoption of the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and their Families.

93. With regard to the International Criminal Court, the OAS sought to encourage ratification of the Rome Statute of the International Criminal Court and had mandated the Inter-American Juridical Committee to promote cooperation with the Court. On the basis of an exchange of

³⁰² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

information with 17 States, it had provided States not parties to the Statute with information on the mechanisms available to overcome constitutional and legal obstacles to ratification. The Committee had used questionnaires as a very useful source of information on best practices regarding the incorporation of crimes under the Statute into national legislation, and on ways of amending that legislation so as to promote cooperation with the Court.

94. The Inter-American Juridical Committee had also been considering the issue of the right to identity. In response to a request for its opinion on the scope of that right, the Committee had, in March 2007, held an extraordinary session on children, the right to identity and citizenship. Its deliberations were continuing, but it had found that there was no consistent position on the question. Although in some cases and under some constitutions it was seen as an autonomous right, it was generally seen as interrelated with or stemming from other rights, such as the right to be registered, the right to a name, the right to nationality or the right to legal personality. Accordingly, the Inter-American Court of Human Rights had found that, in accordance with doctrine and jurisprudence, the right to identity was both autonomous and an expression of other rights, providing the means to their enjoyment. In order to secure universal realization of the right to civil identity in the Americas, it was, in the Committee's view, vital that all persons should carry an identification document officially confirming that identity.

95. The Inter-American Juridical Committee was engaged in the planning of the seventh Inter-American Specialized Conference on Private International Law. The theme of the Conference, on which two special rapporteurs specializing in the topic were working, was to be consumer protection.

96. Closer cooperation and dialogue between the Inter-American Juridical Committee and the Commission would be of great benefit to both parties. The Commission should consider sending a representative to the Committee's next regular session in Rio de Janeiro. At a time when international law was in a transitional stage between two epochs, an exchange of information between the two bodies was crucial. Mr. Herdocia Sacasa also suggested that the Commission's forthcoming sixtieth anniversary could be marked by a campaign, using the framework of the Committee's structures and, in particular, its annual courses on international law, to raise regional awareness of the immense volume of work done by the Commission on providing a structure for a new vision of international law on the part of the international community.

97. Mr. VARGAS CARREÑO, after thanking Mr. Herdocia Sacasa for his exhaustive presentation of the Inter-American Juridical Committee's work, said that among the many conclusions that might be drawn from his statement was the urgent need for continual dialogue between the Commission and the Committee, which would enrich the work of both. The two bodies had similar functions, despite their differences. The Commission's primary mandate was the codification and progressive development of international law, whereas the Committee, which had also had such a function in the past, had narrowed its range. Globalization had resulted in a new universality

in international law, so a regional body had to be cautious in its codification work and should focus rather on specific problems relating to its region. In the framework of its Specialized Conferences on Private International Law, the Inter-American Juridical Committee had been instrumental in the adoption of a number of fundamental instruments in that area, including the Inter-American Convention against Corruption, which had been the first such convention in the world. It had also made significant contributions, at an international level, for example on the law of the sea, through its important work on exclusive economic zones and the continental shelf. The Committee also played a vital role as a dispute settlement body. He recalled the case concerning Carlos Tünnermann Bernheim, who, as Ambassador of Nicaragua to the United States of America, had been declared *persona non grata* by the latter country, but who was also Ambassador to OAS. The resulting dispute had been settled within the inter-American system. The Inter-American Juridical Committee had also been involved in dealing with the extraterritorial repercussions of legislation such as the Helms-Burton Act. The Committee should not duplicate efforts at international level, but should make specific regional contributions, as it was doing in areas such as the promotion of democracy, and the new draft social charter of the Americas, which deserved the Commission's support. He therefore endorsed Mr. Herdocia Sacasa's suggestion that the Committee should take advantage of the Commission's forthcoming sixtieth anniversary to promote awareness of its work.

98. Mr. PELLET said that, although links existed between the Commission and regional bodies such as the Inter-American Juridical Committee, they were, by and large, extraordinarily formal and had no real practical consequences. He therefore wondered whether Mr. Herdocia Sacasa had any practical suggestions for improving the situation, particularly in the context of the Commission's forthcoming sixtieth anniversary celebrations. The Commission would also welcome suggestions on how to improve the process for selection of topics, given most States' extreme reluctance to offer any guidance in that regard. The Commission would welcome suggestions on topics from regional bodies, *inter alia* from an American perspective.

99. Mr. NIEHAUS said that the parallel nature of the work undertaken by the Commission and the Inter-American Juridical Committee underlined the crucial need for closer cooperation between the two. The Committee focused on areas such as the legal issues relating to the integration of the developing countries of the continent and the scope for harmonizing their legislation. It was thus clear that the Committee played a vital role in defending democracy in the continent. In that connection, he asked whether, in the context of the realization of the right to information, the Committee had encountered any instances of legislation incompatible with that right, and, if so, what steps it could take to rectify the situation.

100. Mr. SABOIA welcomed Mr. Herdocia Sacasa's suggestion that cooperation between the Commission and the Inter-American Juridical Committee should be strengthened. Against the background of the Committee's recent centenary, it should be borne in mind that the two

themes of legal equality and the principle of non-intervention had been discussed as long ago as 1906 and at the Second International Peace Conference at The Hague in 1907 but still had resonance for the Americas and the world. Curiously, the American continent, though not a model of democracy, had remained faithful to international law and its principles. In that connection, he asked how the Committee viewed the new threats to security, including terrorism, and their impact on human rights and democracy. It was a topic that deserved special consideration, given the difficulty that many international organizations, including the United Nations, had in striking a balance between measures to combat terrorism and respect for human rights.

101. Ms. ESCARAMEIA, referring to Mr. Herdocia Sacasa's suggestion that dialogue between the two bodies should be enhanced, said it would be a good idea for a representative of the Commission to participate actively in the Inter-American Juridical Committee's sessions and report on the Commission's work. As for the idea of involving the Commission in the Committee's annual courses on international law, she wholeheartedly endorsed that suggestion. It would be most helpful if the Committee could occasionally devote a meeting to discussing topics on the Commission's agenda. She also wished to echo Mr. Pellet's request that the Committee suggest topics for consideration by the Commission. Such suggestions would be particularly valuable in view of the Committee's tendency to regard the law as a tool for social change in areas such as democracy and development, an approach that differed from that of the Commission. With regard to efforts to promote wider acceptance of the compulsory jurisdiction of the ICJ, she wondered whether the Inter-American Juridical Committee was examining specific declarations or reservations on the matter, or whether it was simply engaging in political lobbying to urge more countries to accept the Court's jurisdiction.

102. Mr. VASCIANNIE concurred with the view that the Commission and the Inter-American Juridical Committee should work towards greater collaboration. He also supported the suggestion that representatives of the Commission should give lectures during the Committee's annual courses on international law, which were respected throughout Latin America and the Caribbean for their outstanding quality. He asked how the Committee chose topics for its agenda and whether there was any tension between questions that were seen as largely political and those that were perceived as largely legal. He wondered how the Committee reconciled the two conflicting demands in deciding what should go on its agenda.

103. Mr. HERDOCIA SACASA (Chairperson of the Inter-American Juridical Committee) said he welcomed the evident support within the Commission for a strengthening of ties with the Committee. Specific steps that could be taken included the presence of a representative of the Commission at the Committee's sessions and those of its bureau, which would lead to a mutually beneficial exchange of information and a greater understanding of how the topics under consideration by the two bodies interrelated. Another useful step would be to forge closer links between the rapporteurs of the two bodies:

much expertise could be shared and time saved, with benefit to both rapporteurs and to both bodies. Thirdly, as he had suggested, a representative of the Commission could take part in the international law courses organized by the Committee, and could explain the Commission's work and show how it overlapped with that of the Committee. A further possibility would be to establish a forum that would provide a focus for the discussion of the new challenges generated by the modern world. Such a forum could, perhaps, be held during the international law courses.

104. The Inter-American Juridical Committee's topics were chosen for a variety of reasons. For example, a member of the Inter-American Court of Human Rights attending the Committee's meetings as an observer might request the Committee to take up the question of non-compliance with the Court's judgments in a given area. Officials of the Court or of international organizations might ask the Committee to include specific items on its agenda, either because legislation had shortcomings to be addressed or simply because greater knowledge needed to be built up on a specific topic.

105. With regard to Mr. Niehaus's question concerning the right to information, he said that there were undoubtedly glaring deficiencies. The *Claude Reyes et al. v. Chile* case had drawn attention to a problem that was not confined to Chile. Judicial mechanisms were not flexible enough to accommodate requests relating to violations of the right to information. Some States restricted the procedure to information on the administrative sector, despite the fact that the American Convention on Human Rights: "Pact of San José, Costa Rica" contained provisions guaranteeing access to information. Much remained to be done to bring national legislation into line with the Convention.

106. On the question regarding security, he said that the Inter-American Juridical Committee conducted its work in the context of the Bridgetown Declaration of Principles of 10 May 1997 and the Declaration on Security in the Americas, adopted by the OAS Special Conference on Security held in Mexico City in October 2003.³⁰³ Those Declarations were not, however, reflected in national legislation, which continued to ignore the social, cultural, human and democratic dimensions of security. As for the question regarding acceptance of the compulsory jurisdiction of the ICJ, he confirmed that the Committee had for some time been seeking how to promote wider acceptance of the Court's jurisdiction by virtue of accession to instruments such as the American Treaty on Pacific Settlement ("Pact of Bogota"). As for Mr. Vasciannie's question, some items were placed on the Committee's agenda because they raised important topical legal issues. Others emanated from the OAS General Assembly, and might be of a more political nature, but the Committee restricted itself to the legal aspects of a given topic. Often, however, the legal and the political overlapped.

107. The CHAIRPERSON thanked the Chairperson of the Inter-American Juridical Committee for his statement.

³⁰³ OEA/Ser.K/XXXVIII-CES/DEC. 1/03 rev.1 (available at www.oas.org).

Organization of the work of the session (concluded)*

[Agenda item 1]

108. Mr. YAMADA (Chairperson of the Drafting Committee) announced that the Drafting Committee for the topic of expulsion of aliens would be composed of the following members: Mr. Kamto (Special Rapporteur), Mr. Candioti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue and Mr. Petrič (*ex officio*).

The meeting rose at 1.10 p.m.

2944th MEETING

Friday, 27 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens (continued) (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the members of the Commission to continue and complete their consideration of the third report of the Special Rapporteur on the expulsion of aliens (A/CN.4/581).

2. Mr. KOLODKIN commended the Special Rapporteur on the quality of his report, which had given rise to an in-depth debate in the Commission. He endorsed unreservedly the right of expulsion provided for in draft article 3, paragraph 1, which stemmed directly from State sovereignty and reflected an objective reality, with the limitations imposed on its exercise by international law. The wording of paragraph 2, however, was not entirely felicitous. It probably depended on the definition of the scope of the draft articles and, in particular, the question whether the scope should cover all categories of aliens. If that was the case, it should be made clear that the right to expel aliens must be exercised in conformity with the provisions of the current draft articles. If not, the reference

to the draft articles was insufficient. The words “fundamental rules of international law” should be deleted and he supported the idea of merging the two paragraphs of draft article 3.

3. He had no objection if the draft articles strengthened the rules prohibiting the State from expelling its nationals, although, strictly speaking, the draft articles related only to the expulsion of aliens. He noted that the Constitution of the Russian Federation prohibited the expulsion of nationals. The reference in draft article 4, paragraph 2, to exceptions to that principle could be retained.

4. He did, however, have serious reservations about the inclusion of refugees and stateless persons in the draft articles because the regime applicable to those categories of persons was defined in the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. By adopting provisions on refugees and stateless persons which differed from those set out in the two Conventions, the Commission might cause a fragmentation of the legal regime. Moreover, the draft articles introduced by the Special Rapporteur were different from the corresponding provisions of those two instruments, and not only in form.

5. For example, draft article 5 linked articles 32 and 33 of the 1951 Convention relating to the Status of Refugees, although they dealt with different points. Article 32 covered the expulsion of refugees who were lawfully in the territory of a State, whereas article 33 prohibited the expulsion or *refoulement* of all refugees, regardless of whether they were in a lawful or unlawful situation. Article 32, paragraphs 2 and 3, provided substantial guarantees with regard to the rights of refugees, whereas article 33 did not. He thus did not see how the two articles could be linked, as the Special Rapporteur had proposed.

6. The Commission must come to an agreement on the principles. It must decide whether refugees and stateless persons should be included in the scope of the draft articles and, if so, whether the relevant provisions of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons should be reviewed. He was opposed to such a decision in both cases, but the adoption of a “without prejudice” clause should not be ruled out.

7. He agreed with the idea in draft article 7 of prohibiting the collective expulsion of aliens, although more details and substantive changes were needed, but the question should not be considered in the draft articles because it was a matter of humanitarian law. If the Commission decided to include it, however, it should be made clear that the draft article should apply only in the context of an international armed conflict and that the question of the expulsion of hostile or enemy aliens must be the subject of separate provisions in the draft articles. Otherwise it might be thought that the Commission was applying the general regime applicable to aliens to such persons and the impression would be given that the tendency was to apply the basic provisions of the regime applicable in time of peace to the expulsion of aliens in time of armed conflict. He was not convinced that this was justified. The prevailing opinion in the doctrine was that States had

* Resumed from the 2933rd meeting.

the right to expel enemy aliens collectively. That opinion was confirmed in paragraph 1020 of the study by the Secretariat,³⁰⁴ which specified that this right was an exception to the prohibition of mass expulsion. Consequently, the difference between the regime applicable in time of peace and in time of armed conflict must be retained. Furthermore, the collective expulsion of enemy aliens could not be regarded as collective punishment; rather, it was a control measure applied by a State party to an armed conflict and it was in conformity with the Geneva Convention relative to the protection of civilian persons in time of war (Convention IV). It went without saying that the guarantees and rights applicable to the expulsion of enemy aliens must be respected, especially articles 35 and 36 of that Convention. He reiterated that, in his opinion, the question of the expulsion of enemy aliens in time of armed conflict must not be included in the scope of the draft articles, but, if it was, it should be considered independently of the question of the expulsion of aliens in time of peace. On another matter, he said that the definition of collective expulsion in draft article 7, paragraph 2, was unsatisfactory and the Commission should consider it again once it had decided how to define “expulsion”.

8. He proposed that draft articles 3, 4 and 7 should be referred to the Drafting Committee, which should decide, however, whether draft article 4, paragraph 1, should be retained as it stood. With regard to draft article 7, the Drafting Committee should confine itself to formulating a prohibition of collective expulsion, without including the case of enemy aliens, and should also specify what it meant by “collective expulsion”.

9. Mr. KAMTO (Special Rapporteur) thanked the members of the Commission for their contributions to the debate. Their positions on the five draft articles were sometimes at variance with each other and doctrinal or ideological preferences occasionally did not reflect current international practice and even current positive law in some cases.

10. The members of the Commission who had taken part in the debate were unanimously in favour of referring draft articles 3 and 7 to the Drafting Committee. As to draft article 4, only Ms. Escarameia and Mr. Niehaus had clearly called for its deletion. Mr. McRae wondered whether its inclusion was warranted, Mr. Brownlie thought that it was on the boundaries of the topic, and Mr. Vasciannie and Ms. Xue endorsed it. The other members of the Commission had taken a number of different positions. Thus, with the exception of three participants in the debate, all the others were in favour of referring draft articles 3, 4 and 7 to the Drafting Committee.

11. Opinions on draft articles 5 and 6 were even more varied. Mr. Brownlie, Mr. Hmoud, Mr. Kolodkin, Mr. Nolte, Mr. Pellet and Mr. Petrič, were clearly opposed to their retention, while Mr. Fomba, Mr. Vázquez-Bermúdez and Ms. Xue supported them. On the whole, the other members of the Commission were of the view that the two draft articles should be worded to ensure that the relevant provisions of the 1951 and 1954 Conventions were

not altered in any way. Those who were opposed to the retention of the provisions did not say that no reference should be made to refugees or stateless persons, but that their case could be dealt with either by a “without prejudice” clause or by a footnote. All things considered, it was clear from the debates that the five draft articles could be referred to the Drafting Committee.

12. A number of points raised during the consideration of the draft articles called for explanations. On draft article 3, two major questions had arisen. First, there was the distinction which he had drawn between the fundamental principles of the international legal system as an inter-State legal order and the principles or rules deriving from specific areas of international law, such as international human rights law, humanitarian law and refugee law. In his opinion, such a distinction existed and it was defensible from the standpoint of the theory of international law. Secondly, the question of the merger of draft article 3, paragraphs 1 and 2, of which several members of the Commission were in favour, could be considered by the Drafting Committee. Having listened to the arguments on paragraph 2 put forward by Ms. Jacobsson, Mr. McRae and Mr. Pellet, he suggested the following new wording, which would take account of the points they had made: “However, expulsion must be carried out in compliance with the relevant rules of international law, in particular fundamental human rights, and the present draft articles.”

13. The debates on draft article 4 (Non-expulsion by a State of its nationals) had focused on whether it belonged in a study on the expulsion of aliens and on the content of paragraph 2. On the first point, he did not think that the category of nationals should be left out. It was common practice for an international convention to refer to a concept which, although not its main subject, was nonetheless related to it. Thus, the provision should be retained in the draft articles. As to paragraph 2, it was astonishing that some members, demonstrating a somewhat unusual approach to human rights, had refused to learn the lessons of history and had fiercely contested the relevance of the examples cited. It was incorrect to say that the Charles Taylor case was one of extradition or of judicial transfer. In actual fact, it had had to do with Charles Taylor’s negotiated expulsion by the rebel authorities towards a receiving State, namely, Nigeria.

14. He acknowledged that the words “exceptional reasons” in paragraph 2 were imprecise and could give rise to abuse; the Drafting Committee should attempt to clarify their meaning.

15. He did not intend to consider the questions raised by dual nationality, multiple nationality and deprivation of nationality—the latter term being broader than “denaturalization”, the word used by Mr. Caffisch, and more appropriate than “denationalization”, employed by other members—and even less to propose draft articles at the current stage. Contrary to what Mr. Brownlie had said, he had not asserted that the question of nationality did not fall within the competence of international law, but that the conditions for access to the nationality of a State depended on the latter: the assessment of the link of nationality was a matter of international law, but

³⁰⁴ A/CN.4/565 and Corr.1, mimeographed, available on the Commission’s website.

the criteria for the granting of nationality were defined by domestic law. In his own opinion, the prohibition of expulsion was required of any State of which a person was a national. It seemed to him that his viewpoint was more protective of the rights of the persons concerned than one which, in the case of dual nationality, was tantamount to granting the right to expel to the State which could invoke a less effective link of nationality with the person concerned. In Part Three on the legal consequences of expulsion, he would draw a distinction and conclude that the State which could claim the most effective link—what was called “active” nationality—could invoke that argument to exercise diplomatic protection. Given the very large majority in favour of considering the issue, he undertook to conduct, with the Secretariat’s assistance, a study on the questions of dual nationality, multiple nationality and deprivation of nationality, to be contained in an addendum to the third report, which the Commission should be able to consider at its sixtieth session.

16. The major problem raised by draft article 5 (Non-expulsion of refugees) appeared to be the merger of articles 32 and 33 of the 1951 Convention relating to the Status of Refugees. He had the impression that the provisions of that Convention were so sacrosanct that there was simply no question of touching them, even to improve them. He understood the argument put forward by Mr. Pellet and several other members, including Mr. Kolodkin, when they said that the coexistence of two conventions with non-identical provisions on the same subject might cause difficulties, but thought that international law would be able to resolve such a problem, as had been seen in the context of the Commission’s work on fragmentation of international law.

17. The above comments were also valid for draft article 6. He recalled that the 1951 Convention had already been amended, in a sense, by regional legal instruments, including in respect of the definition of “refugee”, as he had indicated in his second report.³⁰⁵ He strongly disagreed with Mr. Kolodkin’s analysis of the distinction which the authors of the Convention had supposedly tried to make between articles 32 and 33. In actual fact, article 33 merely repeated part of article 32, adding an additional criterion to justify expulsion. What distinguished the two articles was the principle of *non-refoulement* and the fact that the provision set out in article 33 could not be claimed “by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is”.

18. As he had indicated in his report, the principle of non-expulsion in article 32 of the 1951 Convention was worded in a negative way: it did not state that a refugee could not be expelled, but that he could be expelled only in certain circumstances. Thus, the first element of his proposal was the idea that the principle was expulsion, not non-expulsion, but that it could be derogated from in certain circumstances. The second element was based on an attempt at a clarification with regard to articles 32 and 33: the idea was that the former could serve to regulate the question of refugees in a lawful situation and

the latter that of refugees in an unlawful situation, in the context of draft article 5, paragraph 2, and that conclusions could be drawn later, when the procedure for expulsion and the limits *ratione materiae* of those rules were discussed. Responding to the concerns expressed by Ms. Escameia and Ms. Jacobsson, he said that he would consider the question of *non-refoulement* at that time, by focusing on refugees in an unlawful situation; the others could not be *refoulés*, since their status protected them.

19. Noting that views were divided in the Commission on a number of questions, such as the reference to terrorism, he asked the plenary for clearer instructions. He would not make draft articles 4 and 5 a question of principle. He had merely wanted to improve on the provisions of the 1951 Convention, primarily by guaranteeing greater protection for the rights of refugees, but, if the Commission wished to preserve this Convention’s “monument”, he could agree to the proposal for a “without prejudice” clause. In his fourth report, he would nevertheless attempt to explain what he had intended to do, in particular by addressing the questions of the temporary protection of persons who had requested the status of refugees and the residual rights of persons whose request had been denied.

20. There had been virtual unanimity among the members of the Commission that the reference to terrorism was inappropriate. Several members had proposed that the words “including terrorism” should be added after “national security”, but it would be better to place any such clarification in the commentary.

21. With regard to draft article 7 (Prohibition of collective expulsion), he did not see why there should be a separate provision for migrant workers. Moreover, the argument put forward seemed insufficient because the principle of the collective expulsion of migrant workers was stated in a treaty provision and was thus not a matter of customary law. He was unhappy with the definition of collective expulsion in paragraph 2, no doubt because he was unhappy with the definition of expulsion itself.

22. Paragraph 3 was the paragraph of draft article 7 that gave rise to the most problems, a number of members having called for its deletion because it was a question of international humanitarian law. He did not understand that argument, especially since, in the context of the expulsion of aliens, the Commission had, for example, considered questions relating to human rights: should it leave everything that had to do with human rights in the field of human rights? Why was international humanitarian law so special that it could not be referred to anywhere other than in the 1949 Geneva Conventions for the protection of war victims? He could agree with the idea that a separate provision was needed because the proposal was purely formal, but no one had put forward a convincing argument for not addressing the question. Moreover, as confirmed in his discussions with ICRC officials, international humanitarian law did not settle the matter at all. What he had wanted to show with the provision was that the individual expulsion of a national of an enemy State was governed by the ordinary law on the expulsion of aliens and that there was no reason to

³⁰⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

set up a special regime. On the other hand, the collective expulsion—or “mass expulsion”, which amounted to the same thing, notwithstanding the point Mr. Kolodkin had tried to make—was prohibited in time of peace by all the international instruments which he had examined, hence his recapitulation of the principle. However, he had also studied the doctrine, case law since the eighteenth century and State practice, and he had found that practice had fluctuated: it was not that States considered that the collective expulsion of nationals of an enemy State was prohibited, but that they sometimes tolerated their presence, provided that such nationals did not have a hostile attitude towards the receiving State. The doctrine, and British doctrine in particular, which was reflected in *Oppenheim's International Law*³⁰⁶ and which had been cited by the Eritrea–Ethiopia Claims Commission, had tended to support the collective expulsion of alien nationals in time of war [see paragraph 81 of the decision of 17 December 2004]. He was thus departing somewhat from what might appear to be jurisprudence and doctrine when he proposed that the expulsion of the nationals of an alien State should be prohibited, provided that those aliens, collectively, as a group—and the concept of group was unrelated in the current context to nationality, enemy or ethnic criteria—had not engaged in activities hostile to the receiving State.

23. As a result of the debates, Mr. Pellet had proposed specifying instead that such aliens could be expelled if their security was in danger, i.e. in their own interest. He had no objection to that, but the opposite could be retained because there was a balance to be struck between the protection of alien nationals of an enemy State and the interests of the expelling State in cases in which those nationals constituted a threat to the expelling State's peace and security. In order to take account of Mr. Pellet's proposal, he suggested that the end of draft article 7, paragraph 3, should be amended to read: “unless, taken together or collectively, they have been the victims of hostile acts or have engaged in hostile activities against the receiving State”.

24. Turning to more “peripheral” considerations, he noted that Mr. Pellet had called for a provision or a draft article on the concept of banishment, but he did not really see the need for it, since banishment was part of his proposed definition. Ms. Escameia, Ms. Jacobsson and Mr. Saboia had asked for a provision on *non-refoulement*, but he had already indicated that he wanted to deal with that question not at the current stage, when he was addressing the categories of persons whom it was prohibited to expel, but, rather, in the context of the substantive normative limitations on the principle of the non-expulsion of refugees, in particular those who had not yet obtained official refugee status. Mr. Al-Marri's concern about the expulsion of an alien to a country in which he or she was in danger of torture or ill-treatment and Mr. Brownlie's concern about the risk of discrimination would be considered in his fourth report because those questions were also related to substantive limitations on the right to expel.

25. Mr. Fomba and Mr. Nolte had asked why the distinction between “national” and “ressortissant” had been

used in paragraph 43. The reason was very simple: when the Commission had decided to use the two terms as synonyms, the third report had already been completed and he had just had time to insert a sentence in the introduction referring to the Commission's decision.

26. Mr. Niehaus had suggested introducing the requirement of a judicial decision for the expulsion of a national. Although such an expulsion was possible, the requirement did not seem necessary, since the reasons for such an expulsion usually did not leave open the possibility of a trial.

27. He hoped that he had answered most of the members' questions and he proposed that the Commission should refer draft articles 3 to 7 to the Drafting Committee.

28. After a procedural discussion in which the Chairperson, Ms. Escameia and Mr. Pellet took part, the CHAIRPERSON noted that a majority of the members were in favour of referring draft articles 3 to 7 to the Drafting Committee.

It was so decided.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/577 and Add.1–2, sect. G, A/CN.4/L.716,³⁰⁷ A/CN.4/L.719³⁰⁸)

[Agenda item 8]

LONG-TERM PROGRAMME OF WORK OF THE COMMISSION:
REPORT OF THE WORKING GROUP ON THE MOST-FAVOURED-NATION CLAUSE

29. The CHAIRPERSON invited the Chairperson of the Working Group on the most-favoured-nation clause to introduce the report of the Working Group (A/CN.4/L.719).

30. Mr. McRAE (Chairperson of the Working Group on the most-favoured-nation clause), introducing the report of the Working Group, said that the Working Group had been established by the plenary to examine the possibility of the inclusion of the topic of the most-favoured-nation clause in the long-term programme of work of the Commission.³⁰⁹ In 2006, at the fifty-eighth session, the Working Group on the long-term programme of work had considered the topic, but the Commission had not taken any decision on it. The Commission had then asked Governments for their views and the Sixth Committee of the General Assembly had subsequently received three comments.³¹⁰

31. The Working Group had had before it a discussion paper prepared by Mr. Perera and himself which set out the past work of the Commission on the topic, new issues that had arisen as a result of the application

³⁰⁷ Mimeographed, available on the Commission's website.

³⁰⁸ *Idem.*

³⁰⁹ See the 2929th meeting above, para. 2.

³¹⁰ *Yearbook ... 2006*, vol. II (Part Two), p. 186, para. 259.

³⁰⁶ R. Y. Jennings and A. D. Watts (eds.), *Oppenheim's International Law*, 9th edition, vol. I, *Peace*, Harlow, Longman, 1992.

of the most-favoured-nation clause, the work which the Commission might undertake and the arguments for and against making a contribution in that area (A/CN.4/L.719, Annex). The Working Group had concluded that the Commission could play a useful role in providing clarification of the meaning and effect of the most-favoured-nation clause in the field of investment agreements. Such work could be useful to Governments which were negotiating investment agreements, including regional free-trade agreements and economic integration agreements, as well as to courts in interpreting the clause. Consequently, the Working Group had recommended that the topic of the most-favoured-nation clause should be included in the Commission's long-term programme of work. In reaching its conclusion, the Working Group had borne several considerations in mind. First, although circumstances had changed perceptibly since it had examined the clause in the final draft articles of 1978,³¹¹ the Commission must ensure that it did not give the impression that doubts were being cast on its past work on the topic and it should take that work into account. Secondly, the Commission should proceed cautiously through a step-by-step approach to the topic and establish a working group to prepare for the consideration of the topic by undertaking a comprehensive review of State practice and jurisprudence since the conclusion of the Commission's work on the topic in 1978, articulating all the issues arising out of the inclusion of a most-favoured-nation clause in investment agreements, establishing a dialogue with other bodies concerned with the issue, including the Organisation for Economic Cooperation and Development, UNCTAD and WTO, and preparing commentaries—rather than draft articles—on model most-favoured-nation clauses, including those developed from State practice and jurisprudence in the area. Lastly, the Working Group had suggested that the Commission should annex the discussion paper contained in document A/CN.4/L.719 to its annual report to the General Assembly to give Governments the opportunity to comment on the topic.

32. The CHAIRPERSON thanked Mr. McRae for his introduction and asked the members of the Commission for their comments.

33. Mr. CANDIOTI said that the useful report prepared by the open-ended Working Group established to examine the possibility of including the topic of the most-favoured-nation clause in the Commission's long-term programme of work should not have been introduced in plenary because that was contrary to the usual procedure. The document (A/CN.4/L.719) should be submitted to the Working Group on the long-term programme of work so that it could examine it and report to the Planning Group, which was responsible for drafting a final recommendation on the question and referring it to the plenary. The failure to abide by that procedure might create an unfortunate precedent and leave the door open to new topics being included "out of the blue" in the long-term programme of work of the Commission.

34. Mr. SABOIA said that he agreed with Mr. Candiotti; the Commission should follow its usual procedure.

35. Mr. PELLET recalled that, at the preceding session, the Working Group on the long-term programme of work, which he had chaired, had not succeeded in taking a position on the question of a study on the topic of the most-favoured-nation clause and, already departing from the usual procedure, had decided that Governments should be asked for their views. Although he had been shocked that a task which was incumbent upon the Planning Group should be entrusted to a working group, he had not objected to that decision because an equivalent procedure had been chosen and because that was not the most important point. As a comparable result had been achieved, Mr. Candiotti's call for procedural orthodoxy was surprising and seemed to be based on the pure pleasure of involving a large number of bodies, something that would result in a pointless detour as far as practice was concerned.

36. Mr. McRAE said that the Working Group which he had chaired had discussed the question and had concluded that, as it had received its mandate from the plenary, it should report back to it.

37. Mr. YAMADA said that he agreed with Mr. Candiotti's proposal that the Commission's usual procedure should be followed.

38. Following an indicative vote requested by the CHAIRPERSON, it was decided, by 16 votes in favour and 9 abstentions, that the report prepared by the Working Group established to examine the possibility of the inclusion of the topic of the most-favoured-nation clause in the long-term programme of work of the Commission should be submitted to the Planning Group.

Cooperation with other bodies (*continued*)

[Agenda item 10]

STATEMENT BY THE REPRESENTATIVE OF THE ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

39. Mr. KAMIL (Secretary-General of the Asian–African Legal Consultative Organization (AALCO)) said that he would briefly describe some interesting observations on questions of international law made by representatives to the forty-sixth annual session of the member States of AALCO. Most of them had stressed that they generally appreciated the work of the Commission on the topic of diplomatic protection, as well as the adoption on second reading of the relevant draft articles.³¹² One representative had noted that the draft articles dealt only with the rules governing the circumstances in which diplomatic protection could be exercised and the conditions which must be met for it to be exercised, and not with ways of acquiring nationality. He had also stressed that, in draft article 4 (State of nationality of a natural person), the Commission had rightly specified that States had the right to determine who their nationals were and had pointed out that States should avoid adopting laws that increased the risk of dual nationality, multiple nationality or statelessness.

³¹¹ *Yearbook ... 1978*, vol. II (Part Two), pp. 16–73, para. 74.

³¹² *Yearbook ... 2006*, vol. II (Part Two), paras. 49–50, pp. 24 *et seq.*

40. The same representative had also noted that, in the context of draft article 7 (Multiple nationality and claim against a State of nationality), the nationality of a person was determined as a function of his “predominant” nationality and that the criterion of preponderant nationality was somewhat subjective, as confirmed in paragraph (5) of the commentary to draft article 7, which stressed that none of the factors to be taken into account in deciding which nationality was predominant was decisive. The representative had pointed out that draft article 7 was not based on customary international law and that it was premature in the context of an exercise of progressive development of international law, since customary international law recognized the rule of the non-opposability of diplomatic protection against a State in respect of its own nationals. In paragraph (3) of its commentary to draft article 7, the Commission could thus not reasonably consider that the awards of the Iran–United States Claims Tribunal reflected the development of the international law of diplomatic protection. Moreover, most disputes before that Tribunal, including all those brought by claimants having dual nationality, had involved a private party on one side and a Government or Government-controlled entity on the other, and many of those disputes came under the rules of domestic law and general principles of law. The inclusion of such a controversial article in the final text might deter States from adopting the final instrument.

41. It had also been stressed that extending diplomatic protection to corporations (chapter III of the draft articles) was in most cases not necessary because the circumstances in which corporations performed their activities and the procedures for the settlement of disputes were largely regulated by the bilateral and multilateral treaties which had been signed between and among States and which were binding on them. With regard to undue delay in the remedial process, as referred to in draft article 15 (b), the representative had considered that sluggish judicial proceedings could not be considered *ipso facto* to justify an exception to the rule of the exhaustion of local remedies. Judicial proceedings in some countries were more time-consuming, for unavoidable reasons. Equality before the law and non-discrimination being generally accepted principles, the judicial authorities of a State could not and should not treat their own citizens and foreign nationals differently.

42. Another representative had welcomed the adoption of the 19 draft articles on diplomatic protection and stressed that they summarized and further developed the rules of international law applicable to diplomatic protection. For other representatives, certain elements of the draft articles had not been corroborated by State practice and the time was thus not ripe to adopt a legally binding instrument based on the draft articles. One representative had welcomed the Special Rapporteur’s decision not to include the “clean hands” doctrine in the draft articles and another had said that the scope of draft article 19 (Recommended practice) gave rise to great difficulties. While noting that the draft article corresponded to his country’s practice of responding to legitimate requests for diplomatic protection from its nationals abroad, he had nevertheless expressed the hope that it would be withdrawn from the set of articles adopted.

43. On the topic of reservations to treaties, one representative had noted that the draft guidelines adopted so far by the Commission were a significant contribution to the codification and progressive development of international law. His delegation had held the view that sovereign States had the right to make reservations, as provided in the 1969 Vienna Convention. The prohibition of reservations was only an exception to the general rule. The practice in certain regions of restricting reservations could not be universally applied. There should be a balance between the legal security of treaty relations and the freedom to conclude treaties. For another representative, who had also supported the work of the Commission, it was preferable to maintain the position taken in the 1969 Vienna Convention, namely, that it was the prerogative of the signatory States to accept or reject a reservation and that, if they had doubts about the validity of a reservation, they could raise them through diplomatic channels.

44. One representative had supported the codification of the topic of unilateral acts of States, which would provide the international community with guidelines concerning the extent to which States could be considered to be bound by their voluntary commitments. For efficiency’s sake, the Commission might have to consider limiting the scope of the study to certain categories of acts rather than proceeding with the codification of unilateral acts of States in general.

45. With regard to responsibility of international organizations, one representative had commented on the draft articles in Chapter V (arts. 17–24) on circumstances precluding wrongfulness, adopted by the Commission at its fifty-eighth session.³¹³ The representative noted that, although the Special Rapporteur had pointed out in paragraph 5 of his fourth report that the analysis had followed the general pattern adopted in the draft articles on responsibility of States for internationally wrongful acts under the heading “Circumstances precluding wrongfulness”,³¹⁴ in general, the position and functions of international organizations should be differentiated from those of States. Circumstances precluding wrongfulness were thus different in the two cases.

46. On draft article 17, the same representative had raised a question on the elements constituting “valid consent”. The validity of the consent of a State or international organization should be based on their will, without any pressure or violation of their sovereignty or independence. Every instance of consent should in principle be taken as valid and it was also important to determine the limits of consent in an objective manner. The same representative had referred to considerable inconsistencies in the section on self-defence, which should be corrected. For example, draft article 18 did not completely reflect the content of paragraphs 15 to 17 of the report. For that representative, a clear distinction must be made between “self-defence” and “lawful use of force” in the framework of the reasonable implementation of the objectives of a given mission. Moreover, draft article 18 appeared to be limited to self-defence as used in Article 51 of the Charter

³¹³ *Ibid.*, pp. 121 *et seq.*, para. 91.

³¹⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 27–28 and pp. 71–86.

of the United Nations. Yet that provision related exclusively to States and did not concern international organizations. In other words, the draft article on self-defence seemed to contain elements of progressive development, since no one had ever suggested that customary law took account of the activities of international organizations. It was therefore unnecessary to refer, even indirectly, to Article 51. As to state of necessity, draft article 22 provided that necessity could not be invoked by international organizations as a ground for precluding wrongfulness. The representative had argued that the words “essential interest” and “international community” were ambiguous and the Special Rapporteur’s arguments in paragraphs 35 to 42 had not provided any objective definition of or decisive factors for a determination of those concepts. The same representative had agreed with draft article 23 on compliance with peremptory norms of international law.

47. With regard to the question posed in paragraph 28 (a) of the report of the Commission on the work of its fifty-eighth session,³¹⁵ the representative had said that, when an international organization was not in a position to provide compensation to the injured party for its internationally wrongful act, its States parties, to the extent that they had participated in the decision resulting in the wrongful act, should try to offer compensation, taking due account of the rules of the organization.

48. Another representative had expressed strong support for the work of the Commission on the responsibility of international organizations and had noted that this responsibility and responsibility of States were the two pillars of international responsibility for internationally wrongful acts. Both should be included in a basically uniform system analogous to the relationship between inter-State treaties and treaties between States and international organizations or between international organizations. Hence, it was necessary to adhere to the same structure of common headings and provisions, paralleled by revisions and additions reflecting the distinctive qualities of each international organization. The Commission must ensure that there was no departure from that structure. Another representative had welcomed the draft articles on circumstances precluding wrongfulness adopted by the Commission at the fifty-eighth session and had observed that member States which had exercised a key influence on the international organization in its commission of a wrongful act should be held accountable; member States should not be able to shift their responsibility to the international organization and necessity was not a circumstance precluding wrongfulness for international organizations.

49. In respect of shared natural resources, one representative had stated that his Government had welcomed the timely completion on first reading of the set of 19 draft articles on the law of transboundary aquifers³¹⁶ and that it generally supported the principles embodied therein. Another representative had stressed that it would be preferable not to prejudge the final form that the work would take and that the Commission should be cautious with regard to the study of oil and natural gas.

50. One delegation had commented on the second report³¹⁷ and the seven draft articles introduced by the Special Rapporteur on the topic of the effects of armed conflicts on treaties, noting that there were several conventions and legal instruments which were related to the topic and that the Commission’s mandate was to supplement the existing international instruments. It had also agreed with the view expressed by the Special Rapporteur in paragraph 4 of his second report, for which general support was expressed by States, that the topic was not part of the law relating to the use of force, but was closely related to other areas of international law, such as the law of treaties, international humanitarian law, State responsibility and self-defence. The delegation had also argued that non-international armed conflicts might adversely affect the ability of the States concerned to fulfil their treaty obligations, but the inclusion of such conflicts in draft article 2 (b) would broaden the scope of the term “armed conflict”. The intention of the parties at the time the treaty was concluded was a fundamentally important factor in determining the validity of a treaty in the event of armed conflict. The intention of the parties at the time of the treaty’s conclusion might be deduced from the text of the treaty, including its preamble and annexes, as well as the *travaux préparatoires* and the circumstances of the treaty’s conclusion. The indicia of susceptibility to termination or suspension of treaties in the event of an armed conflict did not make any distinction between the State resorting to the unlawful use of force in violation of the Charter of the United Nations and the State which exercised its inherent right of self-defence; the two could not be placed on an equal footing. As the Institute of International Law had rightly put it in article 7 of its resolution adopted on 28 August 1985 on the effects of armed conflicts on treaties,³¹⁸ States should be entitled to suspend in whole or in part the operation of a treaty which was incompatible with their inherent right of self-defence. Such a distinction should be reflected throughout the draft articles. For the same delegation, the integrity and continuity of international treaties were two basic principles of the law of treaties and they should be taken into account. Thus, draft article 6 should be retained, either as such, or as part of draft article 4.

51. The categories of treaties referred to in draft article 7 might be re-examined to identify criteria for determining which treaties should remain in force during an armed conflict. *Erga omnes* obligations constituted one such criterion, and treaties which encompassed such obligations could not be suspended or terminated in such a case. That should be made clear in draft article 7.

52. For another delegation, the question of the effects of armed conflicts on treaties was a grey zone of international law. Article 73 of the 1969 Vienna Convention made it clear that the question should not be prejudged. The issue was extremely complex and the doctrines and practices of States before the Second World War were no longer very relevant. Today, armed conflicts took the form of police actions, self-defence or humanitarian

³¹⁵ *Yearbook ... 2006*, vol. II (Part Two), p. 21.

³¹⁶ *Ibid.*, pp. 94 *et seq.*, para. 76.

³¹⁷ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570.

³¹⁸ Institute of International Law, *Yearbook*, vol. 61, Part II, session of Helsinki (1985), p. 278.

intervention. New legal regimes, such as in the areas of human rights and the environment, must also be operative during armed conflicts. Another delegation had expressed opposition to the Special Rapporteur's proposal that "*ipso facto*" should be replaced by "necessarily", which was less incisive, and had also argued that the draft articles should not rule out the possibility of automatic suspension or termination. With regard to the relation of the topic to other areas of international law, that delegation's position was in conformity with the principles stated by the ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, namely, that although certain human rights and environmental principles did not cease to be applicable in time of armed conflict, their application was determined by *lex specialis*, i.e. the law applicable to armed conflicts which was deemed to govern the conduct of hostilities [see paragraph 25 of the advisory opinion]. *Lex specialis* should also be applicable during situations of armed conflict as long as it included not only treaties of international humanitarian law, but also bilateral treaties concluded between the parties to the conflict.

53. For another delegation, armed conflicts should be limited to international armed conflicts. Treaties should include those concluded between States and international organizations. When judging whether a treaty had been suspended or terminated because of an armed conflict, it was important to take into consideration the intention of the signatory States at the time of conclusion of the treaty, the implementation of the treaty, the situation that prevailed upon the outbreak of the conflict and the nature, objective and purpose of the treaty. In the view of that delegation, the legitimacy of the use of force affected treaty relations and the issue should be given further study.

54. Another delegation had commented on three provisions of the draft articles introduced by the Special Rapporteur, namely, draft article 2 (b), draft article 3 and draft article 4. With regard to draft article 2 (b), the delegation had thought that it might be preferable to have a broader provision and to leave to whoever was applying the draft article the task of deciding case by case. One solution might be to adopt a simpler formulation, indicating that the articles were applicable to armed conflicts, with or without a declaration of war. As to draft article 3, a conflict usually resulted in a suspension of treaties between the States concerned, which clearly were unable to apply the provisions of a treaty concluded with what had become an enemy State. It seemed unrealistic to postulate a general principle of continuity in such cases. In draft article 4, the Special Rapporteur had made the intention of the parties the main criterion for deciding on the suspension or termination of treaties. That question must be considered in greater depth, at the same time as other possible criteria, which might stem, for example, from articles 31 and 32 of the 1969 Vienna Convention, as well as from the nature of the armed conflict.

55. On the question of the obligation to extradite or prosecute (*aut dedere aut judicare*), one representative had referred to the need to be cautious and to recognize the treaty basis of the obligation. It was important to establish an international network to ensure that perpetrators of serious international crimes did not find a safe haven, but the cardinal principles of criminal justice must also be borne

in mind. Those principles were relevant, for instance, to constraints on extradition based on the sovereign criminal jurisdiction of the requested State, the human rights of the accused and the need to ensure due process and the independence of prosecution; a more guarded formulation was required, which could read, "to submit the case to the competent authorities for the purpose of prosecution", as opposed to an outright "obligation to prosecute".

56. For another delegation, a major obstacle to the implementation of the obligation in question was the protracted nature of extradition procedures in some countries. That might lead to prescription of the prosecution of the suspect, which would subsequently prevent the requesting State from instituting its own criminal proceedings or referring the case to the requested State for prosecution. The international community should therefore attempt to establish rules governing extradition procedures in order to speed them up. The human rights of persons subject to extradition must also be protected.

57. On the topic of the expulsion of aliens, one delegation had stressed the need for a balance to be maintained between the right of the State to expel and the protection of the rights of aliens. The draft articles should also cover illegal immigrants. Another representative had noted that the topic was particularly relevant at a time in which globalization had led to an enormous increase in migrations. The right of the State to expel aliens was inherent in the State's sovereignty, but it was not absolute. The Commission should be encouraged to undertake a detailed study of customary international law, treaty law and jurisprudence at the global, regional and national levels.

58. At its forty-sixth session, AALCO had adopted a resolution in which it had expressed its appreciation for the fruitful exchange of views on the items discussed during the joint AALCO-International Law Commission meeting held in New York in 2006 in conjunction with the meeting of legal advisers of the United Nations. He looked forward with interest to the views and suggestions of the members of the Commission on topics that might be taken up at the next joint meeting. The AALCO Secretariat would continue to prepare notes and comments on the items considered by the Commission so as to assist representatives of AALCO member States to the Sixth Committee during the consideration of the report on the work of the Commission at its fifty-ninth session. An item entitled "Report on matters relating to the work of the International Law Commission at its fifty-ninth session" would be considered by AALCO at its forty-seventh session.

59. Mr. HASSOUNA asked how cooperation between AALCO and the Commission could be further developed. It would also be useful if the Commission could have information on the activities of the five regional centres for arbitration set up by AALCO.

60. Mr. DUGARD noted that few States in Africa or Asia made comments on the Commission's draft articles and that international law thus inevitably tended to be developed in a Eurocentric manner. He asked whether AALCO could encourage its members to comment on the draft texts prepared by the Commission.

61. Mr. KAMIL (Secretary-General of the Asian-African Legal Consultative Organization) said that seminars and study days, as well as the annual joint meeting in New York, were useful tools for improving cooperation between AALCO and the Commission. In reply to a comment by Mr. Hassouna, he said that detailed information on the AALCO centres for arbitration could be found at its website, www.aalco.int. The sixth such centre had been established in Nairobi following a decision taken at the organization's session held in Cape Town. As to the comment by Mr. Dugard, he said that the records of AALCO sessions contained all the comments of member States on the work of the Commission; he promised to send a copy of those records to every member of the Commission.

62. Mr. SINGH, joined by Mr. CANDIOTI, Mr. PERERA and Mr. WISNUMURTI, described the genesis of AALCO and drew attention to the importance and usefulness of its activities for the International Law Commission.

The meeting rose at 1.10 p.m.

2945th MEETING

Tuesday, 31 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

The obligation to extradite or prosecute (*aut dedere aut judicare*)³¹⁹ (A/CN.4/577 and Add.1–2, sect. F, A/CN.4/579 and Add.1–4,³²⁰ A/CN.4/585³²¹)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPporteur

1. Mr. GALICKI (Special Rapporteur), introducing his second report on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/585), said that the report drew heavily on his preliminary report;³²² in places, the two were almost identical. There were three main reasons for such an approach. The first was that around half the members of the Commission had been replaced as a result of the election at the end of 2006. It

³¹⁹ For the history of the Commission's work on the topic, see *Yearbook ... 2006*, vol. II (Part Two), chapter XI.

³²⁰ Reproduced in *Yearbook ... 2007*, vol. II (Part One).

³²¹ *Idem*.

³²² *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

therefore seemed worth recapitulating, for the benefit of new members, the main ideas set out in the preliminary report, together with a summary of the discussion in the Commission and later in the Sixth Committee. Secondly, it would be necessary to ascertain the views of the new members on the most controversial issues covered in the preliminary report before the Commission could proceed to a substantive elaboration of draft rules or articles. Lastly, there was undoubtedly a need for a wider response from States to the questions posed in paragraph 30 of the Commission's report to the General Assembly on the work of its fifty-eighth session.³²³ At the time when the report had been finalized, only seven States had responded. That number had since risen to 21, but it still seemed necessary to repeat the request to States in order to obtain the fullest possible picture of States' internal regulations and international commitments concerning the obligation to extradite or prosecute.

2. The second report began with a preface and an introduction which briefly outlined the history of the Commission's work on the topic. Chapter I (paras. 9–72) dealt with a number of old and new aspects of the topic for the benefit of new members. Paragraphs 9 to 19 addressed some of the principal questions discussed during the fifty-eighth session. The first had been whether the obligation *aut dedere aut judicare* derived exclusively from international treaties specifically relating to it or whether it could be considered to be based also on existing, or emerging, principles of customary international law. The preliminary report had posed much the same question.

3. The second question had been whether there existed a sufficient customary basis for applying the obligation to extradite or prosecute to at least some categories of crime, for instance to the most serious crimes recognized under customary international law, such as war crimes, piracy, genocide and crimes against humanity. Thirdly, it had been asked whether it was generally acceptable to draw a distinction between the concept of the obligation to extradite or prosecute and the concept of universal criminal jurisdiction, and whether the Commission should embark on a consideration of the latter concept, and, if so, to what extent. The fourth question had been whether one of the alternative obligations—to extradite or to prosecute—should be given priority over the other, or whether both carried equal weight, and also to what extent the fulfilment of the one obligation released States from the other.

4. Another question had been whether there should be a third possibility, or “triple alternative”, involving the jurisdiction of international tribunals, since State practice was increasingly evolving in that direction. In Argentina, for example, Law 26.200 implementing the Rome Statute of the International Criminal Court included a provision under which Argentina was obliged to extradite or surrender persons suspected of crimes falling within the jurisdiction of the International Criminal Court or, failing that, to take all such measures as might be necessary to exercise its jurisdiction over that offence. Legislation recently enacted in Panama, Peru and Uruguay to implement the Rome Statute of the International Criminal Court also provided for the *aut dedere aut judicare* obligation.

³²³ *Yearbook ... 2006*, vol. II (Part Two), p. 21.

5. The last question had been whether the final product should take the form of draft articles, rules, principles, guidelines or recommendations, or whether it was too soon to reach a decision on the matter. Divergent views had been expressed on that and the other questions raised and he would therefore welcome a conclusive response from the newly elected Commission, which could also draw on the views expressed in the Sixth Committee. Thanks to the kind assistance of the Secretariat, those views were set out in paragraphs 21 to 39 of the report.

6. Paragraphs 40 to 60 contained the Special Rapporteur's concluding remarks concerning the debate in the Commission and the Sixth Committee on the preliminary report. Given the specific nature of that report, comments had largely focused on the main issues to be considered by the Commission and the Special Rapporteur in future work on the topic. Within those parameters, however, a great variety of opinions had been expressed with regard to both the substance and the presentation of the text, starting with its title and including the final form it should take.

7. The comments and information received from Governments in response to the Commission's request were summarized in paragraphs 61 to 72. The full replies appeared in document A/CN.4/579 and Add.1-4. The information received from States was set out in four clusters: (a) international treaties containing the obligation *aut dedere aut judicare*; (b) domestic legal regulations; (c) judicial practice; and (d) crimes or offences to which the principle was applied. Such an arrangement would make it easier to conduct any future comparative exercise. He wished once again to express his gratitude to the Secretariat for its assistance and cooperation in that regard. The four addenda to the document contained information which, owing to its late submission, would be considered in the third report.

8. Chapter II (paras. 73-116) contained the core of the work. It consisted, as was the Commission's tradition when it engaged in the process of codification and progressive development of a topic of international law, of a draft text—the final form of which was to be decided later—aimed at reflecting current international law and State practice in that field. Although the comments and information provided by States were still far from complete and did not yet constitute a solid basis for constructive conclusions, it already seemed quite feasible to formulate a provisional draft article on the scope of application of any future draft articles on the topic, the text of which would be the following:

“Article 1. Scope of application

“The present draft articles shall apply to the establishment, content, operation and effects of the alternative obligation of States to extradite or prosecute persons under their jurisdiction.”

9. Paragraphs 79 to 104 contained a short survey of the three main elements of the draft article and the problems that, in his view, might give rise to discussion in the Commission. Those elements were (a) the time element, namely the extent to which any draft articles should

concern themselves with the periods of establishment, operation and effects of the obligation *aut dedere aut judicare*; (b) the substantive element, namely the alternatives of extradition or prosecution; and (c) the personal element, namely what persons might be the subject of the obligation *aut dedere aut judicare*.

10. At least three separate periods of time, each possessing its own specific characteristics, relating respectively to the establishment, operation and effects of the obligation *aut dedere aut judicare*, needed to be reflected in the draft articles. With regard to the question of sources, the first of those periods was of paramount importance. For the Commission to conclude that the obligation was customary in nature, it needed to refer to State practice during the period at which the obligation was established.

11. With regard to the substantive element, the Commission would need to decide whether an obligation to extradite or prosecute existed; if so, to what extent; and whether it was absolute or relative (para. 89). Numerous questions might arise in that connection, three of which were discussed in paragraphs 90 to 92 of the report. The first was which of the alternative courses of action should have priority and whether States had the freedom to choose between extradition and prosecution. The second was whether a custodial State was entitled to refuse an extradition request if it was prepared to undertake a prosecution itself or if the arguments used in the extradition request were shown to be flawed or incompatible with the custodial State's legal system. The third question was whether the obligation *aut dedere aut judicare* included or excluded the possibility of any third choice. That question had particular importance in the light of the possibility of the parallel jurisdiction of the International Criminal Court on the basis of accession to the Rome Statute of the International Criminal Court.

12. Lastly, it should be remembered that the obligation to extradite or prosecute was not an abstract one but one which existed *vis-à-vis* specific natural persons. A further condition for natural persons to be covered by the obligation was that they should be under the jurisdiction of the States bound by the obligation. The term “under their jurisdiction” in draft article 1 meant both actual jurisdiction, which was effectively exercised, and potential jurisdiction that a State was entitled to establish over persons committing specific offences. Ultimately, the Commission would need to decide how far the concept of universal jurisdiction should play a role in the scope of the obligation *aut dedere aut judicare*. It would also, at a later stage, have to consider the question of the crimes and offences that would be covered by the obligation. For the time being, as indicated in paragraph 100 of the report, there seemed to be no need to include a direct reference to such crimes and offences in the text of draft article 1.

13. Paragraphs 105 to 116 contained specific suggestions and ideas for the subsequent draft articles. Thus draft article 2, which could be entitled “Use of terms”, should include a definition or description of the terms used for the purposes of the draft articles. The list of such terms remained open and its content would depend on needs perceived during the elaboration of other draft articles. It would probably include such terms as “jurisdiction”,

“prosecution”, “extradition” and “persons under jurisdiction”. Another draft article or articles might contain a more detailed description of the obligation *aut dedere aut judicare* and its constituent alternative elements.

14. Given the fairly wide consensus that international treaties were a generally recognized source of the obligation to extradite or prosecute, a draft article—referred to as draft article X in paragraph 108—might be formulated along the following lines: “Each State is obliged to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.” Such an article would, of course, be without prejudice to the recognition of international customary norms as a possible source of the criminalization of certain acts and of the obligation to extradite or prosecute.

15. Another source of interesting suggestions for possible subsequent draft articles was the draft code of crimes against the peace and security of mankind, adopted by the Commission in 1996.³²⁴ The draft code incorporated the *aut dedere aut judicare* rule and, in the commentary, prepared the ground for possible further draft articles on the topic.³²⁵ Paragraph 114 of the report contained four possible provisions, which, he stressed, were not formal proposals for draft articles. However, since they expressed views of the Commission, albeit in a different context, it seemed appropriate to bring them to the Commission’s attention for possible further consideration.

16. He wished to confirm that the preliminary plan of action set out in paragraph 61 of the preliminary report,³²⁶ including the gathering and analysis of information concerning legislation, both international and national, judicial decisions and State practice and doctrine, remained the main road map for his further work. He was confident that, once further views and comments had been received from Governments, there should be a sufficient basis for the effective elaboration of draft articles.

17. Mr. DUGARD, after wishing the Special Rapporteur well with his difficult task, said that it had been wise to reproduce in the second report the ideas and concepts contained in the preliminary report. He feared, however, that the second report was weaker than its predecessor, since it tried to take into account the many doubts expressed in the Sixth Committee, which confused rather than clarified the discussion of the topic.

18. The Commission would need to decide how the topic should be approached. The report recognized that it involved a comparative study of legislation, judicial decisions, treaties and customary rules. The question was how the necessary information was to be obtained. The debate in the Sixth Committee had proved unhelpful in that regard, since it failed to address the questions raised by the Commission. Such a failure to provide information was, however, not surprising, since most delegates to the Sixth Committee if indeed they were lawyers at all, were international lawyers, and were not versed in the niceties of criminal law, criminal procedure or extradition law.

19. As for comments provided by Governments, he noted that of the 20 replies he had seen, six had come from Asia, 10 from Europe, two from Latin America, one from North America and only one from Africa. Such a sample was hardly representative and, in any case, the responses were not particularly helpful, since they consisted simply of an account of those States’ legislation and the treaties to which they were parties. What was needed from States was input from their criminal and extradition lawyers, rather than a mere list of treaties to which States were parties or details of legislative enactments and cases. The United Kingdom’s reply, for example, had provided a very inadequate account of British law, and most of the other States’ information had probably been equally incomplete. The general comments by the United States on the draft had, however, been particularly useful. While he disagreed with the cautious approach adopted by the Government of the United States, which argued that there was no customary rule and that a treaty must be in force before the obligation came into effect, at least its reply was a clear statement of principle and position and expressed some helpful ideas on the subject. It was important to pay heed to those comments.

20. Although the topic was not particularly difficult in itself, it was hard to decide how to approach it and determine its scope. For example, it was crucial to ascertain whether a customary rule or general principle existed and whether the obligation arose only in the event of a treaty, the view taken by the United States. Secondly, it was necessary to consider whether the rule applied only to international crimes or also to other crimes such as murder; and, if it applied only to international crimes—which was his own view—whether it applied to customary law crimes, such as genocide, war crimes and crimes against humanity, in other words the core crimes of the Rome Statute of the International Criminal Court, or whether it applied to treaty crimes, such as those characterized in the anti-terrorism conventions. Did it also apply to narcotic drugs and anti-counterfeiting conventions? Did it apply to both multilateral and bilateral treaties? In that connection, once again the United States had offered some helpful comments to the effect that it was opposed to finding that such an obligation existed in bilateral treaties.

21. Another important matter, which raised the whole issue of universal jurisdiction, was whether the obligation would come into play only if jurisdiction had first been established. The Commission could not ignore the subject of universal jurisdiction, any more than it could ignore other forms of extraterritorial jurisdiction, such as active or passive personality jurisdiction or protective jurisdiction. Naturally, it would be necessary to have regard to the fact that treaties differed in their jurisdictional rules; the Convention for the suppression of unlawful seizure of aircraft laid down limited jurisdictional rules, whereas the International Convention for the Suppression of Terrorist Bombings established much wider jurisdictional rules. It was, however, important to stress that the obligation *aut dedere aut judicare* arose only after jurisdiction had been established. In other words, it would be necessary to establish whether the custodial State had jurisdiction to prosecute and whether, if it decided not to do so, it had the competence to extradite.

³²⁴ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

³²⁵ *Ibid.*, pp. 27–33 (draft articles 8–10 and the commentaries thereto).

³²⁶ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

22. Of course, there was no problem with territoriality, but all the other forms of extraterritorial jurisdiction would require some examination, as the United States had pointed out. One particular problem which the Commission would have to address if it looked at universal jurisdiction in isolation was the question that had arisen in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, namely, whether such jurisdiction came into play only when the person concerned was present in the territory of the State, or whether it also applied in cases in which the person was absent. The Commission did not really need to concern itself with that issue because, in the context of the obligation *aut dedere aut judicare*, it arose only when the person was present in the territory. It was important to stress that all anti-terrorism conventions gave jurisdiction where the person was present in the territory of the State, which meant that, in effect, the obligation *aut dedere aut judicare* came into operation only when the person was present in the territory.

23. It would then be necessary to study limitations on extradition. While most States refused to extradite in particular circumstances, for instance if the person was a political offender, the anti-terrorism conventions adopted a different approach. The Convention for the suppression of unlawful seizure of aircraft was silent on the subject, whereas the International Convention for the Suppression of Terrorist Bombings excluded exceptions for political offences. The Commission would also have to examine the question of whether a State was under an obligation to extradite a person to a State which had a judicial system falling short of the required standards, in other words where extradition would deny that person due process of law or protection of their human rights.

24. Nationality was another vexed question, as was shown by the current confrontation between the United Kingdom and the Russian Federation. He was personally of the opinion that the United Kingdom position took inadequate account of the fact that many States were constitutionally bound not to extradite their own nationals. Thus, although the European arrest warrant excluded nationality as a possible ground for refusing extradition, constitutional courts in countries such as the Czech Republic and Poland had declined to comply with the European arrest warrant when it affected one of their nationals.

25. Paragraph 14 of the second report referred to some of the practical difficulties encountered in the process of extradition which the Commission might have to scrutinize. In his view, it would be necessary to draw a line between the broad principles of extradition law and some of the more technical approaches. He therefore suggested that the Commission should return to the preliminary plan of action set out in paragraph 61 of the preliminary report, which provided a valuable basis for its work.

26. In his view, it would be advisable for the final product to take the form of draft articles. Although he basically agreed with the proposed draft article 1, the formulation, which referred to the establishment, content, operation and effects of the obligation, was inelegant, and unnecessarily cumbersome. He would prefer to say, quite

simply: "The present draft articles shall apply to the obligation of States to extradite or prosecute." He concurred with the Special Rapporteur that *aut dedere aut judicare* was an obligation, not a principle. Noting the reference to primary and secondary rules in paragraphs 59 and 85 of the second report, he again urged the Commission not to become too involved in distinctions between primary and secondary rules, given that it was uncertain whether reference was being made to the formulation of Roberto Ago³²⁷ or that of H. L. A. Hart.³²⁸ In addition, in draft article 1 he would favour omitting the word "alternative": as the Special Rapporteur conceded that there was uncertainty as to whether the obligation was conditional or alternative, it was probably unnecessary to engage in such a jurisprudential debate at the current stage. If the "triple alternative" were to be included, it should be dealt with in a separate codicil to the draft articles, but it should not be considered at the outset.

27. Lastly, the Special Rapporteur included the phrase "under their jurisdiction", but in paragraphs 96 to 97 of his second report, he suggested that the obligation *aut dedere aut judicare* came into being when a person was only potentially under the jurisdiction of the State. He personally disagreed, since his own position was that the person must be present and in the custody of the State. A State might exercise jurisdiction on grounds of territoriality, active or passive personality, the protective principle or universal jurisdiction, but only if the person was actually in its custody. It was hard to see how a State could be expected to extradite a person who was only potentially within its jurisdiction.

28. In conclusion, although *aut dedere aut judicare* was likely to be a difficult topic to deal with, because its scope was uncertain, he agreed with the Special Rapporteur's decision to prepare a set of draft articles on the subject. Given that it constituted a useful starting point, it would be more helpful to refer draft article 1 to the Drafting Committee than to a working group.

29. Ms. ESCARAMEIA commended the Special Rapporteur's second report, with its useful recapitulation of the previous year's debate on the topic in the Commission and in the Sixth Committee and analysis of Governments' comments. The comparatively large number of comments received since the finalization of the second report showed that States were interested in the subject.

30. Paragraph 77 of the report contained an interesting analysis of the three elements proposed in draft article 1 (the temporal, substantive and personal elements), which had been further clarified by the Special Rapporteur's presentation of his report. It would be better to entitle the draft article "scope of the draft articles", or simply "scope", rather than "scope of application", a title which might give the mistaken impression that the draft articles were restricted to the application of the *aut dedere aut judicare* obligation and did not deal with the question of sources or with other vital questions such as universal jurisdiction and the surrender of suspects to international criminal tribunals.

³²⁷ See footnote 296 above.

³²⁸ Hart, *op. cit.* (see footnote 284 above).

31. The time element related to the establishment, operation and production of effects of the obligation in question. While she endorsed the explanatory approach of the draft article, which offered a dynamic view of the whole procedure and showed that it was a process evolving over time, the use of the words “establishment” and “operation” was perplexing. “Establishment” was not a term commonly used in the context of an obligation; it seemed to relate more to a treaty obligation and would thus pre-judge the issue of whether the obligation was sometimes of a customary nature.

32. In that connection, she concurred with the Special Rapporteur’s conclusion in paragraph 112 that the existence of generally binding rules of a customary nature could be inferred from the large number of treaties incorporating such an obligation. Her own view, stated at the previous session, that for certain types of crimes *aut dedere aut judicare* was a norm of customary law, had been confirmed by a number of studies, including one carried out by Amnesty International in 2001, which had examined the practice of 125 States with regard to universal jurisdiction,³²⁹ and another conducted in the field of international humanitarian law by the ICRC in 2005.³³⁰ Most of the legal literature considered that *opinio juris*, supported by intensive State practice, made it possible to establish that the obligation to extradite or prosecute was already an obligation of a customary nature with respect to certain crimes. Furthermore, the idea that it was not just a State’s right, but also its duty, to extradite or prosecute the perpetrators of crimes under international law was also gaining ground. For all those reasons she would prefer a reference to the “existence”, rather than the “establishment”, of the obligation.

33. In using the term “operation”, rather than, for instance, “exercise”, the Special Rapporteur was probably seeking to convey the idea of a process, rather than a one-off obligation, but “operation” was more appropriate to the context of a principle, whereas the term “exercise” would be more apt when referring to an obligation.

34. She wished to make five points in connection with the substantive question of the content of the obligation. First, the adjective “alternative” should be deleted, since it was unclear whether both parts of the obligation always carried equal weight, a question which that adjective prejudged. She believed that both parts carried equal force. Furthermore, the word “alternative” was redundant, the antithesis already being conveyed by the conjunction “or”.

35. Secondly, on the question whether *aut dedere aut judicare* was an obligation or a principle, the Special Rapporteur affirmed that the term “obligation” had greater force than “principle” and was more appropriate to the nature of a secondary rule. The notion of “principle” would, however, place the precept on a higher plane than a mere treaty obligation. It could also be argued that the “obligation” would constitute the operative aspect of the principle from which it arose.

36. Thirdly, she did not agree with the statement in paragraph 87 of the report that the obligation as a whole was conditional; in her view it took the form of a choice between prosecution or extradition. It was therefore unclear why so much stress was placed on the conditional nature of the obligation, although it might become important for the further development of the topic. Except when a specific treaty prescribed otherwise, the choice of whether to prosecute or extradite seemed to lie with the custodial State, bearing in mind that this State’s constitution might prohibit extradition on grounds of nationality or because of the likelihood of the extradited person being subjected to persecution for political or other reasons, the death sentence or life imprisonment. If the custodial State could not extradite, it was then under an obligation to prosecute; extradition was, however, not necessarily always the option that took precedence.

37. Fourthly, the obligation should exclude the obligation to surrender a suspect to an international criminal court or tribunal, because the considerations involved with respect to extradition and to surrender differed in nature. The relationship between requests for extradition and for surrender was regulated by the constituent instruments of the tribunals or courts in question. Accordingly, the Commission should not embark on a consideration of the “triple alternative”. If it did so, however, it should examine the question as a separate issue.

38. Lastly, with regard to the types of crimes to be covered by the draft articles, it would be useful to distinguish, as proposed in the preliminary report, between three categories of crimes: crimes under international law, crimes of international relevance, and ordinary crimes under national law. Different rules should apply to each category. When the crime fell into the first category, the grounds for refusing extradition must be subject to stricter limitations. Crimes under international law and crimes of international relevance should certainly be covered by the obligation to extradite or prosecute, and some ordinary crimes under national law should perhaps also be included.

39. She agreed with the Special Rapporteur that the personal element should be restricted to natural persons and that the concept of jurisdiction should be applied in its widest form. For that reason, the Commission’s consideration should encompass extraterritorial jurisdiction, active and passive personality, reasons of security and universal jurisdiction. While the concept of universal jurisdiction was distinct from that of *aut dedere aut judicare*, the two concepts appeared together in some instruments, for example in articles 8 and 9 of the draft code of crimes against the peace and security of mankind³³¹ and in the draft convention on jurisdiction with respect to crime prepared in 1935 by the Harvard Research in International Law.³³² The topic of universal jurisdiction was relevant only as a means for asserting national jurisdiction over a crime or determining which crimes should be subject to the obligation *aut dedere aut judicare* as serious

³³¹ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50. (See footnote 324 above.)

³³² *Supplement to the A.J.I.L.*, vol. 29 (1935), Codification of International Law, Part II, “Draft convention on jurisdiction with respect to crime”, p. 435.

³²⁹ *Universal Jurisdiction: The duty of States to enact and implement legislation* (IOR 53/003/2001–IOR 55/018/2001), September 2001.

³³⁰ Henckaerts and Doswald-Beck, *op. cit.* (see footnote 283 above).

crimes under international law, a notion referred to in the 2001 Princeton Principles on Universal Jurisdiction.³³³ As universal jurisdiction and the obligation *aut dedere aut judicare* were related but conceptually quite different, it would be wise to have a draft article spelling out the relationship and the distinction between them.

40. In chapter II, section B (Plan for further development), the Special Rapporteur proposed a draft article 2 on definitions, of which she was in favour, provided that the final decision concerning its content was left open until the end of the exercise. He had also suggested a draft article X on sources. Such a provision would be useful mainly in order to obviate the need for an additional requirement of executory measures, or even bilateral treaties, before a treaty obligation became effective. If a State was a party to a multilateral treaty, that in itself should be sufficient. Nevertheless, the language proposed could be read as excluding customary law as a source and asserting no more than the principle *pacta sunt servanda*, as if any doubts existed on that score. While an article on that subject would offer a means of countering objections such as those voiced in the comments of the United States, it should be redrafted in order to dispel the impression that it merely repeated article 26 of the 1969 Vienna Convention.

41. She endorsed the pertinence of the Special Rapporteur's preliminary plan of action as set out in the preliminary report,³³⁴ but believed that it would require redrafting in the light of the debates at the current session in order to propose a structured approach to the topic, rather than merely providing a list of issues for consideration.

42. She was in favour of referring draft article 1 to the Drafting Committee.

43. Mr. PELLET endorsed Mr. Dugard's remarks concerning Governments' reactions in the Sixth Committee and in their written replies. He was troubled by the growing tendency of several special rapporteurs to allow themselves to be guided by States' positions. That approach would be understandable if any clear guidance could be deduced therefrom, but that was not generally the case. Determining the overall stance of Governments was more like divining the meaning of the Sibylline Oracle. Although the Commission should listen to the views of individual Governments when they had something to say, it should be able to forge ahead under its own steam and should not attempt to plot its course by reference to currents of thought that were all but unfathomable.

44. Although he should by rights have little to say concerning the first three parts of the second report, because in the main it recapitulated earlier instalments, the Special Rapporteur had given him a good excuse, by citing the maxim *repetitio est mater studiorum*, to summarize the reactions he had already expressed to the preliminary report at the Commission's meeting on 27 July 2006.³³⁵

45. He had principally wished to caution the Special Rapporteur against what he and Mr. Candioti had termed the "García Amador syndrome", in other words the temptation to encompass the whole range of international criminal law on the pretext that the subject under consideration touched on numerous other questions. It was very important to remain focused on what was a rather technical subject, whose scope should not be exaggerated.

46. In particular, the topic should not be seen as an opportunity to attempt to redefine or list for the umpteenth time crimes which might be covered by the obligation to extradite or punish. The Commission should confine itself to determining the categories which might *ipso jure* entail the application of the principle, even in the absence of treaties. He was somewhat reassured by the fact that in paragraph 55 of the second report the Special Rapporteur endorsed "proposals that such categories of specific crimes be identified", the emphasis being on categories, not crimes. It was important to identify criteria without attempting to set in stone a rapidly evolving area of law, bearing in mind that conservatism was a danger inherent in the codification and even the progressive development of international law. Once a standard had been embodied in an instrument, especially if the latter took the form of a convention, it became much more difficult for that standard to develop. By seeking to define a category or categories, a criterion or criteria, that danger was not completely banished, because the law would then become more rigid, but there was less likelihood of the frame being frozen: the film must run on and practice must be allowed to evolve. Although practice was moving in the right direction, there was still a considerable danger that necessary developments in practice might be halted by the codification exercise.

47. Another reason for not drawing up an unduly detailed list of offences that triggered the obligation to extradite or punish was that it was simply impossible. In addition to the categories of offences just mentioned, States could undertake to extradite or prosecute the alleged perpetrators of any other offence covered in a bilateral or multilateral treaty. One might object that this was a case of *leges speciales* and thus outside the scope of the topic, which concerned only cases in which there was no obligation to extradite or prosecute under any existing treaty. That, however, was not a sound objection, for the future draft must, first, aim to catalogue the categories in which the obligation to extradite or punish was incumbent *ipso jure* upon States, irrespective of whether a treaty on the matter existed—and such cases did exist, a point on which he vehemently disagreed with the United States. Secondly, it must also take account of the fact that while States could undertake by treaty to extradite or punish, that was not necessarily the end of the story. In fact, the draft could render great service, since many treaties enshrined only a commitment to extradite or prosecute without going into the modalities for fulfilling that commitment. It could thus establish rules applicable in situations that the parties had not foreseen when signing the treaty. It might also help in establishing priorities where States had potentially incompatible obligations by virtue of customary law or of their various treaty commitments to extradite or punish.

³³³ S. Macedo (ed.), *The Princeton Principles on Universal Jurisdiction*, Princeton University, 2001.

³³⁴ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

³³⁵ *Yearbook ... 2006*, vol. I, 2901st meeting, pp. 234–236, paras. 58–70.

48. It was in respect of the hierarchy of priorities that the problem mentioned in paragraph 35 of the report arose most pointedly: the surrender of suspects to an international criminal tribunal. As some delegations in the Sixth Committee had remarked, and as indicated in paragraph 35 and by Ms. Escarameia, the question was governed by distinct legal rules. Nevertheless, the implementation of the obligation to extradite or prosecute could be blocked if surrender to an international criminal court took priority over *aut dedere aut judicare*. The problem was complicated still further by the fact that for States for whom the obligation arose by virtue of bilateral relations, the statute of the international criminal court concerned could be *res inter alios acta*. All such hypotheses must be envisaged in the future draft.

49. Still on the categories of offences that entailed *ipso jure*, and without specific provision therefore in a treaty, the application of the obligation to extradite or prosecute, he noted that in the report the Special Rapporteur envisaged all possible categories except the one that he himself regarded as the most obvious, namely, crimes against the peace and security of mankind. That omission was all the more surprising and unfortunate in that, first of all, it concerned one of the Commission's real achievements, namely the adoption in 1996 of the draft code of crimes against the peace and security of mankind,³³⁶ and that, secondly, those crimes were perhaps the sole crimes, but certainly the hard core of crimes, to which the principle *aut dedere aut judicare* applied *ipso jure*. Lastly, the draft code clearly established the obligation to extradite or punish. Admittedly, the Special Rapporteur devoted two paragraphs of his report to the draft code but, in drawing a distinction between crimes which entailed *ipso jure* the obligation to extradite or prosecute and other crimes, he never once entertained the possibility that the first category might simply consist of crimes against the peace and security of mankind.

50. His second general remark was that paragraph 26 of the report cited the view "that the principle *aut dedere aut judicare* was not part of customary international law and ... certainly did not belong to *jus cogens*". While the first assertion was totally wrong, at least regarding certain categories of crimes, the second merited further consideration. It certainly showed that some States were not well disposed towards extending the obligation to extradite or prosecute to any crimes other than those against the peace and security of mankind. His initial, perhaps erroneous, impression was that the prohibition on perpetrating a crime against the peace and security of mankind was part of *jus cogens*. If that was so, then it was by no means evident that the obligation either to punish or to extradite was not also a peremptory norm. That question needed to be resolved, and fairly quickly, for if *aut dedere aut judicare* could in some cases be considered a peremptory norm, the Commission must ask whether there were also cases in which the norm applied but was not peremptory.

51. His last general point concerned the relationship of the topic with that of universal jurisdiction, a point which seemed to cause the Special Rapporteur understandable unease. He himself would have preferred the topic of universal jurisdiction to be placed on the Commission's agenda, but since the Commission had chosen otherwise, it was necessary to abide by that decision and not to confuse the two. In paragraph 103, the Special Rapporteur was extremely cautious in his statement that "to some extent" the crimes or offences that "could, or should", be covered by the obligation to extradite or punish "would fall" among the crimes subject to universal jurisdiction. To what extent? What were the links between the two questions? The Commission would have to provide an answer sooner rather than later.

52. In principle he found nothing to criticize in draft article 1, other than the infelicitous use of the word "*fonctionnement*" in French, although the word "operation" in English did seem much better. He entirely agreed with the Special Rapporteur and Mr. Dugard that one should speak of a "principle" rather than an obligation.

53. On the explanations given for draft article 1, whose referral to the Drafting Committee he supported, one could hardly quarrel with the comment in paragraph 95 to the effect that the extradition of legal persons would be, to say the least, a difficult proposition. However, it might be useful to say so explicitly in draft article 1. For example, the text might state that if a legal person committed or was complicit in a crime that fell into one or more of the categories that brought the principle *aut dedere aut judicare* into play, consequences would ensue. If the crime was a breach of *jus cogens* or a crime against the peace and security of mankind, a substitute principle for *aut dedere aut judicare* should be found.

54. In paragraph 96, the Special Rapporteur said that the phrase "under their jurisdiction" did not mean that a natural person must be physically present in the territory of a given State or "in the hands" of that State. What, then, did it mean? Paragraph 97 seemed to imply that States must prosecute such persons *in absentia*. He personally was not in principle opposed to trial *in absentia*, but agreed with the comments by Mr. Dugard and Ms. Escarameia on the subject. One could not *dedere* (give) what one did not *habere* (have). "Under the jurisdiction of" thus had to mean "in the territory or under the control of".

55. Lastly, he did not understand what use the Special Rapporteur was intending to make of the distinction between three types of jurisdiction described as "extraterritorial" in paragraph 98.

56. In conclusion, he admitted to being a surgeon rather than an anaesthetist, having the tiresome habit of not lulling Special Rapporteurs into a false sense of security by lavishing praise on them. As a special rapporteur himself, he was only too well aware of what a thankless task it was. Anyone who accepted the job of special rapporteur and acquitted himself or herself of the task conscientiously deserved the Commission's gratitude. That was certainly true of Mr. Galicki.

³³⁶ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

Responsibility of international organizations (*concluded*)* (A/CN.4/577 and Add.1–2, sect. B, A/CN.4/582, A/CN.4/583, A/CN.4/720)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

57. Mr. YAMADA (Chairperson of the Drafting Committee) introduced the titles and texts of draft articles 31 to 45 [44]** adopted by the Drafting Committee, as contained in document A/CN.4/L.720, which read:

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

GENERAL PRINCIPLES

Draft article 31. Legal consequences of an internationally wrongful act

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Draft article 32. Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

Draft article 33. Cessation and non-repetition

The international organization responsible for the internationally wrongful act is under an obligation:

- (a) to cease that act, if it is continuing;
- (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Draft article 34. Reparation

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

Draft article 35. Irrelevance of the rules of the organization

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.
2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations.

Draft article 36. Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more other organizations, to one or more States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

* Resumed from the 2938th meeting.

** The draft article numbers between square brackets correspond to the draft article numbers as proposed by the Special Rapporteur.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

CHAPTER II

REPARATION FOR INJURY

Draft article 37. Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Draft article 38. Restitution

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;
- (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Draft article 39. Compensation

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Draft article 40. Satisfaction

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

Draft article 41. Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Draft article 42. Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

Draft article 43.³³⁷ Ensuring the effective performance of the obligation of reparation

The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under the present chapter.

³³⁷ The following text was proposed, discussed and supported by some members: "The responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under the present chapter."

CHAPTER III

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW*Draft article 44 [43]. Application of this chapter*

1. This chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

Draft article 45 [44]. Particular consequences of a serious breach of an obligation under this chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 44 [43].

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 44 [43], nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

58. At its 2935th meeting, on 12 July 2007, the Commission had referred 14 draft articles proposed by the Special Rapporteur in his fifth report, namely draft articles 31 to 44, to the Drafting Committee. At its 2938th meeting, on 18 July 2007, the Commission had also referred to the Drafting Committee a supplementary draft article proposed by the Special Rapporteur, taking into account a written proposal by a member of the Commission and the debate in plenary. In five meetings, held on 18, 19, 20 and 25 July 2007, the Drafting Committee had successfully completed its consideration of all the draft articles referred to it. He wished to pay tribute to the Special Rapporteur, Mr. Giorgio Gaja, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee. He also thanked the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome.

59. The 15 draft articles before the Commission, draft articles 31 to 45 [44], formed Part Two of the draft, concerning the content of the international responsibility of an international organization, in other words the legal consequences for a responsible international organization arising from the new legal relationship that ensued from the commission of an internationally wrongful act.

60. Part Two comprised three chapters. Chapter I, consisting of draft articles 31 to 36, set forth a series of general principles. Chapter II, entitled “Reparation for injury” and comprising draft articles 37 to 43, addressed the various forms of reparation and their interrelationship, including the implications of the contribution of the victim to the injury. Chapter III, comprising draft articles 44 [43] and 45 [44], focused on a particular category of legal consequences: those arising from serious breaches of obligations under peremptory norms of general international law. The draft articles corresponded to draft articles 28 to 41 on responsibility of States for internationally wrongful

acts.³³⁸ However, draft article 43 was new and had no corresponding provision in the draft articles on responsibility of States.

61. The Drafting Committee had made no changes to the text proposed by the Special Rapporteur for draft articles 31 to 34, which corresponded to draft articles 28 to 31 of the draft on responsibility of States.

62. Draft article 31 set out the general parameters for the operation of Part Two, linking it to Part One, which had already been provisionally adopted. Draft article 32 addressed the continued duty of performance. While a breach of an obligation under general international law would not as such affect the underlying obligation, the commentary would indicate that there were situations in which the duty of continuing performance could cease. That could be the case in treaty relations, when a material breach of a bilateral treaty might cause the injured international organization to terminate the treaty. It had been suggested in plenary that an explicit proviso to that effect should be incorporated in draft article 32, but the Drafting Committee had deemed it sufficient to explain the matter in the commentary.

63. Draft article 33, on cessation and non-repetition, addressed two separate but interrelated matters arising from the breach of an international obligation, which, however, were not *per se* legal consequences of such a breach, namely cessation of the wrongful act and assurances and guarantees of non-repetition. Those matters were addressed in subparagraphs (a) and (b), respectively. It had been pointed out in plenary, and acknowledged in the Drafting Committee, that the specificities of the decision-making processes of the responsible international organizations might make it difficult to envisage a situation in which an offer of assurances and guarantees of non-repetition by an international organization might be applicable. The commentary would draw attention to that question. While practice in the area concerned mostly States, the Drafting Committee had not seen any merit in providing for a different rule in respect of international organizations.

64. Draft article 34 laid down the legal principle stated in the *Chorzów Factory* case that “any breach of an engagement involves an obligation to make reparation” [p. 29], and that in that respect the responsible organization must endeavour to “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” [p. 47]. The Drafting Committee had acknowledged the paucity of relevant practice, most of it being related to settlement of disputes concerning employment and contractual relationships. That, however, had not been considered to be a sufficient reason to depart from the well-established principle. The Drafting Committee had also acknowledged that it might be worthwhile to highlight in the commentary the peculiarity that might arise in respect of international organizations where full reparation might be contingent upon the extent of involvement of the international organization and its members.

³³⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 28–29 and pp. 87–116.

65. Draft article 35, which largely corresponded to draft article 32 of the draft on responsibility of States,³³⁹ had been a source of detailed discussion in the Drafting Committee. It dealt with the irrelevance of the rules of the organization. In particular, the discussion had focused on the proviso proposed by the Special Rapporteur that was intended to cover the special situation of international organizations where their rules could themselves be the basis of a breach of an international obligation. It would be recalled that draft article 4 defined rules of the organization as including, in particular: the constituent instruments; decisions, resolutions and other acts of the organization taken in accordance with those instruments; and established practice of the organization. Moreover, under draft article 8, a breach of an international obligation was contemplated where there had been a breach of an obligation established by a rule of the organization. It had therefore been necessary to address the situation where the rules of the organization might have a bearing on responsibility as it related especially to members of the organization.

66. A number of issues had been raised by the proviso, in particular, whether the proviso was itself necessary, whether it was sufficiently clear, and whether it would apply to situations contemplated in draft articles 44 [43] and 45 [44]. The concern of those who had had doubts about the proviso had centred mainly on its seemingly broad scope. It had been feared that it would be used by the responsible organization to obviate the consequences that could arise as a result of a breach of an international obligation, in particular in respect of serious breaches of obligations under peremptory norms of general international law. However, it had been clearly understood in the Drafting Committee that the proviso had a more limited scope: it applied in relation to members of the organization and did not apply to obligations towards the international community as a whole.

67. As to whether the proviso was sufficiently clear, there had been some concern that it seemed to prevail over the main rule. It had been suggested that it should be uncoupled from the main rule and that the main rule, namely non-reliance on rules of the organization as justification, should be given greater prominence. Accordingly, it had been agreed that the main rule should be reflected separately, as paragraph 1 of draft article 35. In other words, the responsible organization could not rely on its rules as justification for failure to comply with its obligations under Part Two of the draft. The reference to “pertinent” rules had been deleted, as it was unnecessary. The present formulation followed more closely the language of the corresponding article in the draft on responsibility of States.

68. As to the proviso itself, it had been suggested that, if captured in a separate paragraph, it should take the form of a “notwithstanding” clause, so as to state that, notwithstanding the main rule contained in paragraph 1 of draft article 35, the rules could provide otherwise in respect of the responsibility of the organization towards one or more of its members. Its formulation as a “notwithstanding” clause had, however, posed a number of difficulties. It

remained unclear, particularly as a result of the combination of “notwithstanding” and “may provide otherwise”, and it seemed to affect the basic rule. Ultimately, it had been considered appropriate to formulate the proviso as a “without prejudice” clause. Paragraph 2 of draft article 35 thus provided that: “Paragraph 1 is without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations.” The commentary would have more to say regarding the consequences of a breach of an international obligation arising from a breach of a rule of the international organization *vis-à-vis* non-members. In addition, draft article 35 had a bearing on any provision that might be formulated in future on *lex specialis*.

69. The final draft article in the chapter, concerning the scope of the international obligations set out in that Part, had also been a source of considerable debate. Draft article 36 corresponded to draft article 33 of the draft articles on responsibility of States.³⁴⁰

70. The initial problem had been whether there was any justification for specifying that the obligations set out in Part Two were owed only to other organizations, States or the international community as a whole, and not to any other person or entity. It had been argued that the likelihood of obligations of a responsible organization affecting other persons or entities was greater than in the case of a responsible State, with which the draft articles on responsibility of States had been concerned.

71. However, it had been recalled that the scheme under Part Two did not exclude the possible situation in which an internationally wrongful act might involve legal consequences with regard to relations between an international organization responsible for that act and persons or entities other than a State or an international organization. After all, article 1 of the draft articles provided that the draft articles applied to the international responsibility of an international organization for an act that was wrongful under international law. The only limitation consisted in the fact that Part Two did not apply to obligations concerning reparation to the extent that such obligations might arise towards or be invoked by a person or entity other than a State or an international organization. The right of such person or entity other than a State or international organization, as pointed out in paragraph 2 of draft article 36 proposed by the Special Rapporteur, was not thereby prejudiced. That understanding had contributed to an agreement that there was no need to change paragraph 1.

72. That, however, had resulted in the transfer of some concerns to paragraph 2. In particular, it had been suggested that paragraph 2, which had a corresponding provision in article 33 of the draft articles on responsibility of States, was unclear and might occasion misinterpretation by judicial bodies to the effect that the articles had nothing to do with the rights of persons or entities other than States or international organizations. At any rate, the phrase “which may accrue” seemed to cast doubt as to the existence of the right of the person or entity other than a State or international organization.

³³⁹ *Ibid.*, pp. 28 and 94.

³⁴⁰ *Ibid.*

73. It had also been pointed out that there was an asymmetry between paragraphs 1 and 2. Whereas paragraph 1 addressed “obligations”, paragraph 2 referred to “rights”: paragraph 2 ought therefore to be recast to conform with the language of paragraph 1.

74. It had been confirmed that “may accrue” was a reference to the contingency of a direct claim arising, rather than an expression of doubt regarding the existence of such a right.

75. After extensive discussion, it had been suggested that paragraph 2 of draft article 36 should be reformulated to read: “This Part is without prejudice to any right of a person or entity other than a State or an international organization, arising from the international responsibility of an international organization.”

76. While initially there had been differing views as to whether that language broadened or narrowed the scope of the original formulation, ultimately there had seemed to be some general understanding that, in substance, the two options were the same.

77. However, different conclusions had been drawn from such an understanding. One group had felt that it was necessary to maintain the integrity and consistency between the texts on responsibility of States and on international responsibility of international organizations. In the interests of ensuring certainty and predictability in legal interpretation, the Commission would be hard pressed to find a justification for any departure from the language used in the draft articles on responsibility of States, even if such a change was only of a drafting nature. In other words, it would be difficult to explain the more direct language, when in fact the draft articles on responsibility of States did not seek to downplay the rights of persons and entities other than States and when no evolution had taken place. That group had considered it important to retain the text provided by the Special Rapporteur. It had been clearly understood that the commentary would reflect the nuanced differences between the role of persons and entities in respect of responsibility of States and of responsibility of international organizations.

78. The other group had been of the view that the more direct language of the alternative text had been clearer and conveyed the import of the paragraph in better terms. The situation regarding responsibility of States was not entirely similar to that regarding responsibility of international organizations. The fact that “rules of the organization” were part of international law created a different situation justifying the use of more direct language. That situation presented broader prospects for the assertion of rights relating to persons or entities other than States or international organizations in the realm of international responsibility of international organizations. That group had been in favour of changing the text, on the understanding that the commentary would indicate that the use of different language was not intended to change the substance of the text from the corresponding paragraph in the draft articles on responsibility of States.

79. In the final analysis, a straw vote had been cast, the results of which indicated a preference for the retention of the language proposed by the Special Rapporteur.

80. Turning to the draft articles comprising Chapter II of Part Two, he said that the chapter, which dealt with reparation for injury, contained seven draft articles, namely draft articles 37 to 43. Draft articles 37 to 42 corresponded to draft articles 34 to 40 on responsibility of States for internationally wrongful acts. The Drafting Committee had not made any changes to those draft articles as proposed by the Special Rapporteur, other than a minor correction in draft article 41. As to draft article 43, it was an amended version of the supplementary draft article referred to the Drafting Committee on 18 July 2007.

81. Draft article 37 introduced the various forms of reparation for injury caused by an internationally wrongful act. Since there was no reason to consider that the obligation to provide reparation should apply differently to States and to international organizations, nothing seemed to justify a departure in the current draft from the generic language used in draft article 34 on responsibility of States. Draft article 37 thus described restitution, compensation and satisfaction, either singly or in combination, as the various forms of reparation for an injury caused by the wrongful act of a responsible international organization.

82. Draft article 38 set out restitution as the first form of reparation owed by a responsible international organization. As with the other forms of reparation, the practice concerning international organizations in that regard was limited. However, instances that could be found in practice confirmed the applicability to international organizations of the obligation to make restitution. Comments made in plenary as to the drafting of the provision had not been prompted by any specificity that the situation of international organizations would present in that respect. Accordingly, the Drafting Committee had retained for draft article 38 the wording of draft article 35 on responsibility of States,³⁴¹ with the usual replacement of “State” by “international organization”.

83. The Drafting Committee had come to the same conclusion in respect of draft article 39, dealing with compensation. The Special Rapporteur had pointed out that the suggestion made in plenary that a choice between restitution and compensation should be offered to the injured party would be more properly addressed in Part Three of the draft, on the implementation of responsibility. There was actually a provision to that effect in draft article 43, paragraph 2 (b), on responsibility of States.³⁴²

84. Draft article 40 laid down the obligation to give satisfaction and detailed its various possible forms and conditions for its exercise. Unlike draft articles 37 to 39, it had given rise to an extensive debate in the Drafting Committee. As had been pointed out in plenary, satisfaction might well appear as a form of reparation more frequently resorted to by international organizations than restitution or compensation; at the same time, it raised some specific issues which the Drafting Committee had carefully considered.

85. It would be recalled that some members of the Commission had expressed doubts as to the need to

³⁴¹ *Ibid.*, pp. 28 and 96.

³⁴² *Ibid.*, pp. 29 and 119.

maintain the reference to a “formal apology” in draft article 40, paragraph 2, as well as to the mention of satisfaction in a humiliating form in paragraph 3. They had argued, especially in respect of the latter point, that considerations which applied to States in that regard were of doubtful relevance as far as international organizations were concerned. In any event, for an injured party to make a claim in respect of a humiliating form of satisfaction would be, according to one view, an abuse of rights, making it unnecessary to retain an express reference in the draft article. Arguably, a situation where a responsible international organization would be humiliated in giving satisfaction was not likely to occur often in practice. However, the Drafting Committee had felt that the possibility of such a humiliation could not be excluded. It had also considered that the deletion of the relevant language in paragraph 3 could have the undesirable effect of implying that even a humiliating form of satisfaction could be required from the responsible organization.

86. In the course of the discussion on draft article 40, paragraph 3, it had also been suggested that the words “or its organs” should be added after “responsible international organization”, so as to take account of the limited composition and specific powers of some organs which would be particularly targeted by a request for a humiliating form of satisfaction. Such a situation would, however, necessarily affect the responsible organization through its organs, and thus did not require a specific addition to the provision.

87. The possibility of adding the words “or its members” at the end of draft article 40, paragraph 3, had attracted more support within the Drafting Committee, as it had appeared to make the prospect of a humiliating form of satisfaction a more realistic one. One could for instance think of a peacekeeping force whose acts would be attributed to the United Nations and, if wrongful, entail its international responsibility. The injured party might request that the organization should give some form of satisfaction humiliating to the State providing the force. In such a case, the legal personality of the organization would not be affected, as the obligation to give satisfaction would still rest with it, and not with the State. The State, however, could be indirectly humiliated in being specifically targeted by the injured party.

88. While they had agreed that such a case might well occur in practice, several members of the Drafting Committee had considered that the suggested addition to draft article 40, paragraph 3, would put too much emphasis on member States in a situation where the international organization was responsible and obliged to give satisfaction. In practical terms, the organization would be expected to consult with its member States and opt for a form of satisfaction that would be humiliating neither for it nor for them.

89. Following a straw vote, it had been decided to retain draft article 40 in the formulation initially proposed by the Special Rapporteur, on the understanding that the commentary would address the issue of member States being humiliated by a specific form of satisfaction requested from the organization.

90. Draft article 41 dealt with the interest on any principal sum, due in order to ensure full reparation. It had been suggested in plenary that a proviso should be added to paragraph 2, stating that the injured party might waive the interest or stop it from running at any time before the obligation to pay was fulfilled. The possibility of a waiver was not confined to the payment of interest, as it was indeed not infrequent in practice that an injured party did not require full reparation. Moreover, it should be noted that the issue of waiver of a claim was addressed in Part Three of the draft articles on responsibility of States. The Drafting Committee had adopted draft article 41 unmodified, except for the replacement of “payable” by “due” in the first sentence, in order to align the text with that of draft article 38 on responsibility of States.³⁴³

91. Draft article 42 related to the contribution to the injury. It would be recalled that some comments had been made in plenary to the effect that some general guidance should be given regarding the distribution of responsibility according to certain categorical distinctions. Arguably, the responsibility of an international organization for a recommendation should be limited, compared to that of a State acting on the basis of that recommendation. However, that was not an issue dealt with in draft article 42, which was concerned with the contribution of the victim to the injury caused by the internationally wrongful act.

92. Two other issues raised in plenary had also been addressed during the discussion on draft article 42 in the Drafting Committee. First, it had been confirmed that the phrase “wilful or negligent” applied to the omission as well as to the action of the injured party. Secondly, the Special Rapporteur had indicated his willingness to specify in the commentary that draft article 42 was without prejudice to the duty of the victim of the internationally wrongful act to mitigate damage.

93. Comments similar to those previously made in relation to draft article 36 had been voiced during the discussion on draft article 42 in the Drafting Committee. It had been recalled, for instance, that draft article 1 of the draft on diplomatic protection³⁴⁴ considered the natural or legal person as directly injured by the internationally wrongful act, whereas draft article 42 referred only to any person or entity “in relation to whom reparation is sought”. That limitation had seemed to some members all the more difficult to accept given that some of the most frequent issues arising in practice concerned breaches of labour contracts within international organizations. In such cases, the contribution of the victim to the injury could play a predominant role.

94. The Drafting Committee had felt nonetheless that any modification to draft article 42 in that respect would not be consistent with decisions previously made regarding the scope of the draft articles. The commentary to the draft article would make an explanatory reference to the draft articles on diplomatic protection, in order to clarify the different conceptual approaches adopted in that text and in the current draft respectively. It had already been acknowledged that the draft should cover only the

³⁴³ *Ibid.*, pp. 29 and 107.

³⁴⁴ *Yearbook ... 2006*, vol. II (Part Two), pp. 26 *et seq.*, para. 50.

responsibility of an international organization towards a State or another international organization, and the obligations stemming therefrom. That did not mean that persons or entities other than States and international organizations could not be considered as injured under other rules of international law.

95. Draft article 43 was an amended version of the supplementary draft article referred to the Drafting Committee on 18 July 2007. It would be recalled that the initial proposal made in plenary had been modified before it was sent to the Drafting Committee, with the inclusion of a reference to the rules of the organization. In plenary, while some members of the Commission had considered that member States of an international organization were obliged under general international law to provide the organization with the means to effectively provide reparation, others had been of the view that no such obligation existed outside the rules of the responsible organization. For that reason, they had considered that there was no need to add to the draft articles a provision imposing on States the obligation embodied in the supplementary draft article.

96. The Drafting Committee had held an extensive discussion on the supplementary draft article. According to one view, the text proposed by the Special Rapporteur could be read as affirming that member States were bound by the obligation contemplated by the provision unless the rules of the organization provided otherwise. In order to clarify the relationship between the organization and its members in that regard, it had been suggested that the phrase “in accordance with” should be replaced by “according to”, “under” or “following the rules of the organization”. Notwithstanding potential problems of translation, it had been considered that “in accordance with” was a standard phrase, making it sufficiently clear that member States must abide by the rules of the organization.

97. It had been agreed that the phrase “in accordance with the rules of the organization” should be placed between the words “take” and “all appropriate measures”. That shift would go along with the broadly shared view that the obligation contemplated by draft article 43 originated in the rules of the organization. The commentary would also make it clear that, even if the rules of the organization did not contain any express provision to that effect, they encapsulated a general obligation of cooperation. In compliance with that obligation of cooperation, member States would have to consider giving the organization the means for fulfilling its obligation of reparation.

98. Several members of the Drafting Committee had expressed concern that the supplementary draft article placed the onus on member States. According to that view, the obligation contemplated in draft article 43 should be worded in a way that would bind the international organization rather than its members. The following text had been proposed: “The responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under the present chapter.”

99. For its proponents, that was a more appropriate text for a set of draft articles devoted to the responsibility of international organizations; it could also prompt international organizations to adapt their internal rules in order to meet their obligations under Part Two.

100. Whereas the view had been expressed that the two provisions were complementary and could actually be combined in a single draft article, several members of the Drafting Committee had considered that the provision stressing the obligation of the international organization differed in subject matter from that embodied in the proposed supplementary draft article. The view had also been expressed that the proposal made in the Drafting Committee would state an obligation without specifying how it was to be fulfilled. The commentary could make it clear that the responsible international organization should strive to develop rules in order to meet its obligations towards injured parties.

101. Given the variety of views expressed on that issue, the Drafting Committee had resolved to adopt the text of the supplementary draft article as amended in the course of its debate, accompanied by a footnote to the draft article which would reproduce the alternative proposal as one supported by some of its members. The differences of views would also be reflected in the commentary to the draft article.

102. He also wished to draw attention to a minor editing amendment to draft article 43: the words “the present chapter” should be replaced by “this chapter”, for the sake of consistency with the other draft articles.

103. With regard to the placement of the draft article, it had been agreed that it should be located at the end of Chapter II as it related to all the obligations of reparation, and that it should be entitled “Ensuring the effective performance of the obligation of reparation”.

104. The last chapter in Part Two, namely Chapter III, consisted of two draft articles dealing with serious breaches of obligations under peremptory norms of general international law. Those draft articles, which corresponded to draft articles 43 and 44 as originally proposed by the Special Rapporteur, had been renumbered after the inclusion of a new draft article 43 at the end of Chapter II.

105. Draft article 44 [43] defined the parameters of application of Chapter III. In plenary, doubts had been expressed regarding the necessity of distinguishing a specific category of breaches of obligations of *jus cogens* by international organizations. There was, however, broad agreement within the Commission as well as in the replies by States to the question raised in Chapter III of the Commission’s 2006 report on the work of its fifty-eighth session.³⁴⁵ As there appeared to be no reason to differentiate in that respect between the situation of a State and that of an international organization, draft article 44 [43] provided for the applicability of Chapter III of Part Two to breaches by international organizations of obligations under peremptory norms of general international law.

³⁴⁵ *Ibid.*, para. 28.

106. Draft article 45 [44] set out particular consequences of a serious breach within the meaning of draft article 44 [43]. As could be clearly inferred from its paragraph 3, it was not the purpose of draft article 45 [44] to provide an exhaustive description of all the particular consequences entailed by a serious breach by an international organization of an obligation under *jus cogens*. Some specific rules might indeed entail resort by States and international organizations to further consequences other than those stated in draft article 45, paragraphs 1 and 2. Those provisions should be interpreted as laying down general consequences applying as a minimum in case of serious breach by an international organization of an obligation of *jus cogens*.

107. The level of generality of the draft article, combined with the “without prejudice” clause embodied in paragraph 3, made it unnecessary to include in the provision the additions suggested in plenary. It would also be odd to extend to international organizations obligations that had not been contemplated in the corresponding article on responsibility of States, namely draft article 41.³⁴⁶

108. The suggestion had been made in plenary to extend to subjects other than States and international organizations the obligations set out in paragraphs 1 and 2 of draft article 45 [44], namely the obligation to cooperate to bring the breach to an end as well as the duty not to recognize the situation as lawful and not to render aid or assistance in maintaining it. That suggestion, which raised issues similar to those addressed in relation to draft articles 36 and 42, had also been considered by the Drafting Committee. Again, it had appeared that an express reference in the draft article to other subjects would substantially affect the scope of the text, which dealt with obligations of international organizations towards States and other international organizations. Nevertheless, the commentary to draft article 45 [44] would make it clear that the particular consequences contemplated in paragraphs 1 and 2 were without prejudice to the obligations that other entities might have in the event of a serious breach by an international organization of an obligation under a peremptory norm of general international law.

109. The commentary to draft article 45 [44] would also state in clear terms that the obligation to cooperate to bring such a breach to an end should not be understood as requiring from international organizations any action outside their competences and functions, as defined by their constituent instruments or other pertinent rules.

110. In concluding his introduction of the second report of the Drafting Committee, he commended draft articles 31 to 45 [44] contained in the report for adoption by the Commission on first reading.

111. The CHAIRPERSON invited the Commission to adopt the titles and texts of draft articles 31 to 45 [44].

Draft articles 31 to 42

Draft articles 31 to 42 were adopted.

³⁴⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 29 and 113–114.

Draft article 43

112. Mr. GALICKI asked whether draft article 43 was to be adopted with or without the accompanying footnote.

113. The CHAIRPERSON confirmed that the footnote was an integral part of the text to be adopted.

Draft article 43, as orally amended by the Chairperson of the Drafting Committee, was adopted.

Draft articles 44 [43] and 45 [44]

Draft articles 44 [43] and 45 [44] were adopted.

The titles and texts of draft articles 31 to 45 [44] on responsibility of international organizations, as a whole, as orally amended, were adopted on first reading.

The meeting rose at 12.55 p.m.

2946th MEETING

Thursday, 2 August 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Later: Mr. Edmundo VARGAS CARREÑO
(*Vice-Chairperson*)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (continued) (A/CN.4/577 and Add.1–2, sect. F, A/CN.4/579 and Add.1–4, A/CN.4/585)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the second report of the Special Rapporteur on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/585).

2. Mr. McRAE thanked the Special Rapporteur for providing the new members with an opportunity to comment on his preliminary views and for reviewing in his second report the substance of the debate in the Commission and the comments made by Governments.

3. One might have thought that the topic was self-contained, and yet, as the Special Rapporteur had shown, it raised broader questions, such as its link with universal

jurisdiction and with the jurisdiction of international criminal tribunals. There was thus a risk that the scope of the topic would expand out of control; that was probably what Mr. Dugard had had in mind at the previous meeting, when he had suggested that the Commission should return to the plan of action contained at the end of the preliminary report. In his own view, the success of the work on the topic would depend on the way in which the Special Rapporteur was able to confine it and ensure that it dealt with related areas only to the extent necessary. For example, as some members of the Commission and delegations to the Sixth Committee had commented, there was no need to provide a full treatment of the principle of universal jurisdiction, although some degree of overlap was inevitable. The same applied for the question raised by the Special Rapporteur on the “triple alternative”: in principle, he should focus on the obligation to extradite or prosecute and should leave aside the possibility of surrendering the alleged offender to the International Criminal Court or another international criminal tribunal, but it was not so easy to compartmentalize the issue. Was an obligation to extradite fulfilled if the person concerned had been surrendered to an international tribunal? The Special Rapporteur had to address that question, but, once again, care must be taken not to enlarge the scope of the topic too much, because, as Mr. Pellet had pointed out at the previous meeting, the issue involved the relationship between treaties and, if a customary obligation was being considered, the issue was that of the relationship between treaties and customary international law.

4. The main question raised by the consideration of the topic, in any case as a starting point for any treatment of the issue, was whether the obligation to extradite or prosecute was found only in treaties or whether it also existed in customary international law. If it did, its scope would have to be determined. The Special Rapporteur recognized in paragraph 40 of his preliminary report³⁴⁷ that this was one of the crucial problems which the Commission must resolve. In fact, its resolution would affect the Commission’s approach to the treatment of the topic and the content of the draft articles.

5. The three members of the Commission who had spoken after the Special Rapporteur at the previous meeting had taken the view that, at least to some extent, the obligation to extradite or prosecute existed in customary international law and they seemed to think that work on the topic should proceed on that basis. However, the Commission should be more explicit and open on that point. For those members, although the Special Rapporteur made frequent reference to customary international law in his reports, it was unclear where he stood. In paragraph 40 of the preliminary report, the Special Rapporteur noted that a growing number of scholars supported the view that the obligation to extradite or prosecute was based on a customary international obligation and, in paragraph 109 of his second report, he cautiously stated that the development of international practice based on the growing number of treaties establishing and confirming such an obligation might lead at least to the beginning of the formulation of an appropriate customary rule. As he

saw it, the Special Rapporteur was justified in his caution. However, the proposition in the footnote to paragraph 109 of his second report, according to which the fact alone that a State entered into treaties containing obligations to extradite or prosecute was strong evidence that it intended to be bound by that principle of customary international law, went too far. The Special Rapporteur seemed to be leaning towards that view when he said, in paragraph 112 of his second report, that the growing quantity of such obligations accepted by States under treaties could be considered justification for the change of quality of those obligations—from purely treaty obligations to customary rules. However, the Commission’s work could not rest on that analysis: quantity was important, but showed only a frequent practice and did not necessarily of itself constitute an *opinio juris*. The Commission should not base itself solely on the content of treaties, but also on national legislation and evidence of actual compliance. If the Commission was to be credible, the identification of an obligation in customary international law to extradite or prosecute had to be built on rigorous analysis. One State at least, setting out a carefully considered argument, had taken the view that such an obligation had no source in customary law; regardless of whether there was agreement on that assertion, it had to be taken into account.

6. The growing number of treaties containing the obligation to extradite or prosecute was an important starting point, as the Special Rapporteur had said, but it was only a starting point. The Commission must also consider domestic law: for example, how many States had included in their legislation the obligation to extradite or prosecute independently of corresponding treaty obligations? How was the obligation, whatever its source, actually fulfilled? The Special Rapporteur was right in indicating that, to continue its work, the Commission needed more responses from Governments. As had been suggested in the Commission and in the Sixth Committee, the most appropriate place to begin looking for a customary law obligation was in the area of serious international crimes. Consequently, the Special Rapporteur should consider whether States’ obligations with respect to such crimes required action to ensure prosecution, either through direct prosecution of the alleged offender or through extradition to another State.

7. Clarification of whether there was an obligation to extradite or prosecute in customary international law would help settle a number of other issues raised by the Special Rapporteur. On the question of rights, to which reference was made in paragraph 88 of the second report, if the obligation was based only on treaty law, then the other States parties might also have the correlative right to demand the fulfilment of treaty obligations. On the other hand, if it was an obligation under customary law, the existence of correlative rights was a much more complicated question and answers were far less obvious.

8. The same applied to the questions raised by the Special Rapporteur in paragraphs 91 and 92 on priority between the obligation to extradite and the obligation to prosecute and on whether States had discretion to choose between the two, as well as on whether the obligation was conditional or alternative, the reply to which was in large part contingent on whether the obligation was deemed to

³⁴⁷ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

be based primarily on a treaty or on customary law. The scope of draft article 1 likewise depended on clarification of that question. In paragraph 81, the Special Rapporteur recognized that the sources of the obligation to extradite or prosecute were paramount with respect to the establishment of the obligation. He agreed, but that was also true for the content, operation and effects of the obligation. Hence the need to know whether draft article 1 applied to both a treaty-based regime and a regime based on customary law or only to a treaty-based regime. Before referring draft article 1 to the Drafting Committee, the Commission should wait until the Special Rapporteur had submitted other draft articles that would help provide clarification on that point.

9. The CHAIRPERSON, speaking as a member of the Commission, said that he fully agreed that there was a need to distinguish clearly between what was presented as being a matter of customary law and what was enunciated simply as practice, but was not necessarily representative of *opinio juris*. The whole area of criminal jurisdiction and extradition was particularly complex, precisely in the context of the sources of the law and the extent to which a principle of customary law could be said to have emerged.

10. It would also be difficult to avoid the question of progressive development. If the Commission deemed it necessary to formulate proposals *de lege ferenda*, it should do so because that was not beyond its mandate.

11. It seemed very difficult to decide whether the obligation to extradite or prosecute was an obligation or several obligations under international law without dealing with certain corollaries, in particular the question whether universal jurisdiction constituted a lawful basis for prosecution. Universal jurisdiction should be exercised only if guarantees of due process, including the presence of witnesses and the existence of evidence, were observed; that was not always the case.

12. Mr. DUGARD said that he agreed entirely with Mr. McRae that it was very difficult to be certain whether the obligation to extradite or prosecute was based on customary law or not. Even Bassiouni and Wise,³⁴⁸ the authors of the leading work on the subject, disagreed on the subject. However, as the Chairperson had just pointed out, the Commission had the opportunity to engage in progressive development. Thus, priority should not be given to verifying the existence of a customary obligation to prosecute or extradite before embarking on codification; instead, the Commission should choose between progressive development and an approach which would blur the line between progressive development and codification.

13. Mr. GAJA said that he appreciated the care with which the Special Rapporteur had laid the basis for his work, although it might delay his analysis of the subject. The study contained in the second report was clearly valuable and showed the great attention which the Special Rapporteur had given to the variety of comments made in both the Commission and the Sixth Committee. It was

perhaps understandable, however, that he should be somewhat impatient to see how the Special Rapporteur would reply to some of those comments.

14. Having had the opportunity to speak on the topic at the previous session, he would confine himself to recalling the general thrust of the comments he had made. At the outset of a discussion on *aut dedere aut judicare*, it made sense to refer to various issues which might be connected to the topic, such as the scope of universal jurisdiction or the limits to extradition. However, it should be clear that those issues would have to be addressed only insofar as they were directly relevant. To contribute to defining what was relevant, it might be useful to describe the system underlying *aut dedere aut judicare*: according to a treaty or perhaps a rule of general international law, one or more States enjoyed priority jurisdiction with regard to a certain crime. They would also be under an obligation to prosecute the alleged offender, but only if the offender was present in their territory, since trial in the absence of the offender would be of little use and would also raise the question of how the rights of the accused would be respected. Hence, if the alleged offender was in the territory of another State, in order to exercise its priority jurisdiction, a State would have to request extradition from the State in whose territory the offender was present. That State would probably not be one of those that had priority jurisdiction; otherwise, it would have exercised it. The requested State might be under an obligation to extradite the alleged offender, but, even when there was a treaty or a rule of general international law prescribing extradition for the crime, there might be provision for exceptions. Thus, the rules on extradition and the related exceptions were important, but only indirectly relevant to the obligation for the requested State to prosecute, and they should not be included in the Commission's study.

15. The obligation to prosecute arose only if the requested State did not extradite. In that case, the rule giving priority to the requesting State in the exercise of jurisdiction no longer applied. The requested State might have jurisdiction for the crime irrespective of *aut dedere aut judicare*. However, when that obligation applied, the requested State necessarily had jurisdiction, at least under a treaty providing for *aut dedere aut judicare*, and it even had the obligation to exercise that jurisdiction.

16. The existence of the universal jurisdiction of the requested State was not a precondition. Even if the requested State did not have jurisdiction for the crime, it acquired it on the basis of *aut dedere aut judicare* and it would have an obligation to exercise it.

17. Another scenario was possible: State A, in whose territory the alleged offender was present, was under an obligation to prosecute, but State B requested extradition. If State A acceded to that request, it could be deemed to have fulfilled its obligation to prosecute because it had made it possible for a willing State to do so. That scenario could be described as *aut judicare aut dedere*, since extradition was merely a modality for complying with the obligation to prosecute.

18. Several conclusions could be drawn from his brief description of the legal institution of *aut dedere aut*

³⁴⁸ M. C. Bassiouni and E. M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Dordrecht, Martinus Nijhoff, 1995.

judicare. First, the road map outlined in paragraph 61 of the preliminary report³⁴⁹ should be made more precise to enable the Commission to focus on issues that were directly relevant. Secondly, with regard to draft article 1, the word “alternative” should be deleted because, although the formulation of the obligation suggested that there was an alternative, it would be misleading to say that the requested State always had a choice. In many cases under international law, the requested State was under an obligation to extradite and only in the second scenario which he had just described—*aut judicare aut dedere*—did the requested State have an actual alternative because it could use extradition as a way of complying with its obligation.

19. Thirdly, it was pointless to ask whether the requested State would have jurisdiction irrespective of *aut dedere aut judicare*. As noted by other members of the Commission, the obligation to prosecute, whether under a treaty or under international law, was triggered by the presence of the alleged offender in the territory of the requested State and the latter’s refusal to extradite to a State that had priority jurisdiction.

20. Mr. FOMBA, referring to the question of the link between the principle of universal jurisdiction and the obligation to extradite or prosecute, said that, in order to know whether the two should be dealt with together or separately, it was important to identify what, *de jure* or *de facto*, linked or distinguished them from the point of view of substance. In any case, the Commission had before it a two-sided obligation that was formulated not in a cumulative, but in an alternative manner. The second aspect of the obligation—the obligation to prosecute—raised the question of jurisdiction for prosecution, hence the need to compare the two institutions and to determine their objective, their content, their legal foundation and the way in which they actually operated or should operate.

21. The principle of universal jurisdiction was designed to ensure that punishment for certain particularly serious crimes was inescapable. It recognized that the courts of all States were entitled to try acts committed abroad, regardless of where they had been committed or the nationality of the offender or the victim, and it was based on both customary law and treaty law. It could reasonably be asserted that, in accordance with general international law, States could invoke universal jurisdiction for certain particularly serious crimes. It was also the case that, in accordance with international treaty law, several instruments defining international offences provided for a system of universal jurisdiction.

22. The obligation *aut dedere aut judicare*, which was meant to prevent impunity, was an essential element of the system of State jurisdiction and cooperation in criminal matters. That alternative obligation, which could also be called a conditional obligation in the sense that the implementation of one of the terms was subordinate to the non-implementation of the other, was usually treaty-based. However, it could reasonably be argued that crimes against the peace and security of mankind came under customary law.

23. To conclude on that point, it could be asserted, first, that the two elements—universal jurisdiction and *aut dedere aut judicare*—had the same objective; secondly, that the objective was of particular importance and of an absolute nature for the category of crimes against the peace and security of mankind; thirdly, that it was only logical that the exercise of universal jurisdiction should have priority; and, fourthly, that, otherwise, and solely residually, the obligation to extradite should be established as a rule. In that connection, he did not clearly understand what the Special Rapporteur meant by the word “simultaneous”, which he used in paragraph 104 of his second report in connection with the Princeton Principles on Universal Jurisdiction:³⁵⁰ did he mean that the obligation to extradite or prosecute was applicable to both “serious crimes” and “other crimes” or that it was applicable at the same time as universal jurisdiction? In the latter case, it would be an odd assertion, given that a person could not be tried and extradited at the same time.

24. He had no objection to the preliminary formulation of a draft article on scope, since the text proposed by the Special Rapporteur seemed at first glance to move in the right direction by indicating the essential aspects to be covered. The terminology employed was perhaps not perfect because the use of terms such as “establishment” or “operation” could create difficulties. The words “alternative obligation” might prejudice the reply to the question whether there was a cumulative obligation (para. 90 of the report) and he therefore proposed the following wording: “The present draft articles shall apply to the definition, scope and implementation of the obligation to extradite or prosecute.”

25. The Special Rapporteur was right to give detailed consideration to the question of the reciprocal effects of the two terms of the obligation from the dual point of view of form and content and to speak of “obligation” rather than “principle”. On the question whether a State could refuse extradition when it “is ready to enforce its own means of prosecution” (para. 91), the answer would appear to be that it could, subject to questions of priority between the requesting State and the requested State, because that was part of the logic according to which a State which did not extradite was under an obligation to try. That logic also meant that a State could refuse to extradite if it considered that the request for extradition was unjustified or incompatible with its domestic law, subject to that presumption being well founded and to guarantees of protection and effectiveness.

26. With regard to the existence of a “triple alternative”, he said that it was of little importance whether it was the State that tried, provided that there was no parody of justice, or the International Criminal Court. The important thing was to prevent impunity. Accordingly, the principle of complementarity, which raised the question of competition between national courts and the International Criminal Court, was applicable and the problem thus arose in different terms depending on whether surrender to the International Criminal Court had priority. If it did, the obligation *aut dedere aut judicare* should not come into play.

³⁴⁹ Yearbook ... 2006, vol. II (Part One), document A/CN.4/571.

³⁵⁰ Macedo, *op. cit.* (see footnote 333 above).

27. As to the scope *ratione personae* of the obligation, although it was clear that it concerned natural persons, further consideration should be given to whether it also applied to legal persons. He agreed with the Special Rapporteur on the meaning of the words “under their jurisdiction” in paragraph 96 of the report. As to the scope *ratione materiae* of the obligation, the Commission should not redefine the crimes, but should focus instead on the relevant categories of crimes on the basis of an irrefutable criterion, such as the particular seriousness of a crime, or crimes against the peace and security of mankind.

28. On the approach to be followed, a draft article 2 on use of terms was in fact necessary and even indispensable, although it was difficult at the current stage of work to provide a comprehensive list of terms for definition. However, it was clear that, despite their possible ramifications, three key concepts, namely, “obligation”, “extradite” and “prosecute”, were included in the current wording of draft article 1. With regard to the main obligation, several articles would in fact be necessary before it could be defined in detail.

29. Draft article X (para. 108) was useful, although it merely stated an obvious fact of international law. In addition, its scope was limited, since it did not answer the important question of the customary nature or basis of the obligation. He also endorsed the idea of systematically studying all international treaties in order to have a sounder foundation. The instructions provided by the Commission in the 1996 draft code of crimes against the peace and security of mankind³⁵¹ were of some use, but the Commission should consider whether and to what extent they should be further clarified or supplemented. The preliminary plan of action should remain the road map because a consideration of the essential aspects it contained would certainly help the work advance. He was in favour of referring draft article 1 to the Drafting Committee.

30. The CHAIRPERSON, speaking as a member of the Commission, said that it seemed unhelpful to refer to treaty law in the context of the topic under consideration. What would be the point of recommendations concerning the obligation *aut dedere aut judicare* that were based on treaty law? They would simply be tautological and serve no purpose. Instead, the Commission should either produce recommendations based on the principles of general international law or customary international law or it should make proposals with a view to the progressive development of law. It had never occurred to him that the “obligation” of a State to extradite or prosecute could be exercised, so to speak, on its own, independently of the application of other rules of international law, especially rules governing the existence of a legitimate basis for the exercise of that jurisdiction.

31. Mr. KAMTO, referring to the scope of the topic, said that it might have been wiser to take a closer look at the meaning of the part of the title that was in Latin. Other Latin expressions were used to describe the obligation to extradite or prosecute, such as *aut dedere aut punire* or *aut dedere aut prosequi*, the latter being preferred by

many authors because it reflected the obligation to prosecute and not necessarily the obligation to punish. In any case, the current title could be retained because the word *judicare* automatically implied *prosequi* and might lead to *punire*. He did not think that there were any good reasons not to include the obligation to surrender or transfer to an international court, at least at the current stage of work, bearing in mind in particular that the jurisdiction of the International Criminal Court was in principle subsidiary, or complementary, to that of national courts. As the State had initial jurisdiction, as a matter of principle, for trying crimes under article 5 of the Rome Statute of the International Criminal Court, it could be seen that the obligation *aut dedere aut judicare* was also applicable in such a case. In any event, the topic could not be defined well unless an effort was made to set it apart from related concepts, such as transfer or universal jurisdiction.

32. With regard to the origin—or source—of the obligation *aut dedere aut judicare*, he broadly agreed with the views expressed by Mr. McRae and Mr. Gaja. The Special Rapporteur had rightly stressed in paragraph 81 of his second report that it was a matter of paramount importance to decide whether the obligation was only treaty-based or whether it was also based on customary law. The treaty origin of the obligation was clear, whereas the question of its foundation in customary law was still the subject of heated discussions in international criminal law, as Mr. Dugard had recalled. Assuming that such an obligation existed in customary law, it still had to be ascertained whether the obligation existed prior to the emergence, in international law, of certain categories of offences whose commission was either a violation of a peremptory norm of international law or one of the most serious crimes covered by the Rome Statute of the International Criminal Court. If the emergence of *aut dedere aut judicare* as a principle or, more exactly, as an obligation in customary law was concomitant with or subsequent to the appearance of that category of offences, was it in that case an obligation in customary law or a principle which derived logically from the peremptory nature of those norms? Even if it was teleological, since the final objective was to combat impunity, as Mr. Fomba had rightly recalled, was it not precisely because those were *jus cogens* obligations and were thus particularly serious crimes for the international law that the State was under an obligation to try or prosecute? In that case, would the obligation still be a norm of customary origin or would it be a peremptory norm, as viewed from its other side?

33. Assuming that the obligation *aut dedere aut judicare* was linked to that category of offences, it would be a derived norm rather than a customary norm. Accordingly, the obligation *aut dedere aut judicare* would then clearly be tied in with the question of universal jurisdiction, which the Special Rapporteur might consider in greater depth in his future reports, and would thus be limited in its scope—apart from cases in which it was treaty-based—to that type of offence, which would need to be examined. If it was assumed that the obligation *aut dedere aut judicare* was a norm which did not originate in a treaty and that it was linked to that category of *jus cogens* obligations, i.e. offences resulting from the violation of norms of *jus cogens*, it would then have the character of a peremptory

³⁵¹ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

norm. In other words, the obligation *aut dedere aut judicare* might have a variable legal status in international law depending on the nature of the offence in question.

34. The implementation of the obligation raised the question of jurisdiction. As noted by Mr. Dugard, that obligation applied only when the jurisdiction of the custodial State was established. In that sense, *aut dedere aut judicare* was an obligation derived from a peremptory norm or a customary norm, or even a treaty norm, and was exercised on the basis of territorial jurisdiction. Conversely, it could be asked whether a State could be bound by such an obligation when the alleged offender was not in its territory. In actual fact, the implementation of the obligation presupposed, at least in principle, a dual jurisdiction: that of the custodial State, but also that of the State to which the alleged offender might be extradited when the custodial State did not want to exercise the *judicare* or when the State to which the person must be extradited had priority. The question then arose whether the *dedere* could apply in the absence of an express request by the State to which the custodial State could extradite. Must extradition be automatic when it was based on customary law, provided that the custodial State considered that it did not have jurisdiction to try, as had been suggested in the context of the *Hissène Habré* case, for example?

35. The whole point of those questions became clear in paragraphs 89 to 92 of the report. To consider that the obligation was alternative, i.e. that the custodial State had the choice between extraditing or trying, was tantamount to acknowledging that it could extradite, including to a State which had not made an express request. Otherwise, could the custodial State have an obligation to give priority to extradition? Could it choose to give preference or priority to its willingness to try rather than extradite? And what happened if it did not want to try the person and the other State did not want to either? What would the custodial State be required to do? He hoped that on the basis of his observations, the Special Rapporteur would consider the topic in greater depth and move ahead in the direction mapped out in his preliminary report.

36. With regard to draft article 1, it did not seem very wise to explain in detail the content of the obligation. It would be enough to delete the words “the establishment, content, operation and effects” because that was what the Special Rapporteur must clarify as he proceeded with his work on the topic. To say that the present articles applied to the obligation of States to extradite or prosecute persons under their jurisdiction would also avoid taking the risk of leaving out some aspects of the obligation under consideration. Notwithstanding those comments, he was not opposed to referring the draft article to the Drafting Committee.

37. Mr. CAFLISCH said that the second report on the obligation to extradite or prosecute contained a useful clarification of questions linked to the definition of the topic and stressed the need to avoid delving into related areas of international law or insisting on limitations so strict that there would be nothing much left to say. If the topic was confined to the treaty-based origins of the precept of *aut dedere aut judicare*, its sole interest would be to describe the operation of that obligation when it was

expressly provided for, whereas there was every reason to consider that the precept was one of the rules of general international law, provided, of course, that the Commission drew the necessary conclusions and undertook to define it and delimit its scope. If the precept was regarded as a rule of general international law, clearly, it was necessary to speak of “obligation” and not “principle”.

38. One boundary which must be drawn to narrow down the topic was to distinguish it from the surrender of suspects to international criminal tribunals, which was another matter entirely. What was involved was not extradition, since the criminal jurisdiction of one State was not substituted for that of another, but the involvement of an international body established by the community of States. Moreover, conditions of surrender varied from one international criminal tribunal to another. Sometimes, surrender must take place as soon as the suspect was apprehended, although the international tribunal could return the suspect to the custodial State if it deemed that the case was not sufficiently important (the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda) and, sometimes, the obligation to surrender did not apply unless the custodial State or the State to which the suspect had been extradited did not or could not prosecute and try (the International Criminal Court). Hence, the question of surrender to international criminal tribunals could hardly be included in the obligation to try or extradite.

39. The topic before the Commission was closely linked to the question of universal jurisdiction, as shown by the resolution on universal jurisdiction in criminal matters adopted by the Institute of International Law in 2005.³⁵² Paragraph 2 of that text established a link between universal jurisdiction and the obligation to try or extradite, stating that, although universal jurisdiction was primarily based on customary international law, “[i]t can also be established under a multilateral treaty in the relations between the contracting parties, in particular by virtue of clauses which provide that a State party in the territory of which an alleged offender is found shall either extradite or try that person”. The topic under consideration was thus closely related to the issue of universal jurisdiction and, consequently, to reply to the question asked by the Special Rapporteur in paragraph 74 of his second report, special attention did in fact have to be paid to that link. The issue of universal jurisdiction was similar to the obligation to extradite or prosecute in its objective, which was to prevent persons suspected of having committed serious offences of concern to the international community as a whole from evading punishment. Hence, the Commission should define those categories of serious offences with all necessary caution and retain those which it had become customary to refer to as “international crimes”, namely, war crimes and crimes against humanity and genocide, as well as serious human rights violations which did not come under that first category and, perhaps also in that case, other acts covered by conventions which provided for the obligation to try or surrender the suspect. It could thus be seen that customary law did play a certain role in the topic after all.

³⁵² Institute of International Law, *Yearbook*, vol. 71, Part II, Session of Krakow (2005), Resolution III, Paris, Pedone, 2006, p. 297.

40. Once the consideration of questions related to the definition of the obligation *aut dedere aut judicare* was completed, it would be necessary to identify the cases in which the rule could not be applied. The first such case involved a national of the custodial State. Contrary to the view of the Monegasque authorities (para. 67 of the second report), the alternative obligation was not really applicable in that case because the custodial State did not have a choice: it must prosecute and try, and could not extradite unless domestic law so allowed. The rule *aut dedere aut judicare* was also not applicable if the extradition of the suspect might have serious consequences for that person's human rights, in particular with regard to the right to life and the prohibition of torture. Nor was the rule applicable if the custodial State itself did not have criminal jurisdiction in the matter. In that case, there was no alternative obligation and only the obligation to extradite remained, where applicable. That situation should remain the exception because, to the extent that the Commission confined itself to essential categories of crimes, the rule of universal jurisdiction (and hence the jurisdiction of the custodial State) would be applicable. Lastly, the obligation *aut dedere aut judicare* would not be applicable if the State requesting extradition did not have jurisdiction because, in such a case, the suspect might slip through the net. The custodial State could no longer try the suspect because it had extradited him, and the State which had obtained his extradition could not try him either because its courts did not have jurisdiction. The jurisdiction of the requesting State could stem from the place of the offence, active or passive personality, the principle of protection or the principle of universal jurisdiction, in the case of an offence under the categories referred to earlier—additional proof of the links between the precept under consideration and the concept of universal jurisdiction.

41. As to the questions in abeyance referred to in paragraphs 77 to 116 of the second report, he had no objection in principle to the Special Rapporteur's proposals, although the wording of paragraph 115 needed to be qualified. It was not enough for another State, when requesting extradition, to declare itself ready to prosecute and try a suspect; that State must also be seen to have jurisdiction. He was nevertheless in favour of referring the draft article to the Drafting Committee.

42. Mr. PERERA said that two aspects of the report called for particular attention, namely, the source of the obligation to extradite or prosecute and the scope of the topic, especially the relationship between that obligation and the principle of universal jurisdiction.

43. With regard to the source of the obligation, the second report reflected the cautious approach adopted both by the Commission and by the Sixth Committee in concluding that, at least at present, there was no obligation under customary law to extradite or prosecute that was applicable in general to all criminal offences. At the same time, there appeared to be a broad consensus that international treaties increasingly embodied such an obligation in respect of offences falling within their scope. The Commission must give closer attention to the question whether the obligation was gradually acquiring a customary-law character, at least for certain categories of crimes, and must take into account current developments in State practice and jurisprudence.

44. The factors which needed to be taken into account included the acceptance of the obligation to extradite or prosecute by a growing number of States as State parties to treaties dealing with the suppression of serious international crimes, and thus an increase in State practice leading to a broad network of international legal obligations to extradite or prosecute; the adoption by those States of domestic legislation to give effect to the obligation to extradite or prosecute; judicial decisions, of which the *Lockerbie* case was a good example, referring to the existence of a principle of customary international law, *aut dedere aut judicare*; and doctrinal support, as referred to in the second report (para. 109), for the idea that growing acceptance of the obligation and State practice in respect of a wide range of international treaties embodying it should lead to the entrenchment of the principle in customary international law. In his view, there was a sufficient customary basis for the limited category of "grave international crimes" with broad recognition in international law. That category also included crimes defined in a number of international conventions whose purpose was the suppression of terrorism and drug trafficking and which were widely accepted by the international community. That was a crucial issue and he looked forward to the next report, in which the Special Rapporteur had undertaken to present a systematic survey of the relevant international treaties, classified according to the extent of the obligation they defined. That would certainly simplify the Commission's task.

45. With regard to the scope of the topic, the second report raised the important issue of the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction. Work should focus primarily on the issues arising out of the obligation to extradite or prosecute and a boundary line must be drawn between the obligation and the principle of universal jurisdiction, but that should not necessarily result in the watertight compartmentalization of the two related principles. Although not automatically entailing a general study of the principle of universal jurisdiction, the study of the obligation to extradite or prosecute must of necessity recognize the obvious linkages between the two and take account of the fact that the principle of universal jurisdiction was a key component of the full implementation of the obligation to extradite or prosecute. In practice, the State in whose territory the suspect was present must ensure that its courts were vested with the jurisdiction to prosecute that person, regardless of where the offence had been committed, when it was not in a position to extradite the suspect to a requesting State with the necessary jurisdiction. International treaties containing the obligation to extradite or prosecute, particularly sectoral conventions dealing with the suppression of certain terrorist crimes, provided for different types of jurisdiction. The farthest-reaching provision was the requirement that a contracting State should establish its jurisdiction for the offences specified in the convention when the alleged offender was present in its territory and the State did not extradite. In such a case, the State was under an obligation to assume jurisdiction. The only link between the crime and the State which exercised jurisdiction in such instances was the presence of the alleged offender in its territory and the control which the custodial State had over that person. That

requirement was nearly the same as the principle of universal jurisdiction. As noted by Mr. Dugard at the previous meeting, some conventions, such as the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism, had a broader jurisdictional basis. On the question of surrender to international tribunals, he agreed with the previous speakers that there was a need to be cautious and that distinct rules might be applicable.

46. The Special Rapporteur was proposing draft article 1 on the basis of the material contained in the preliminary³⁵³ and second reports. It recognized the alternative nature of the obligation, deriving directly from the traditional expression of *aut dedere aut judicare*, which was premised on the choice between extradition and prosecution; and it was broadly acceptable. However, the Special Rapporteur raised several questions on the substance of the provision, namely: which alternative should have priority in the practice of States which implemented the obligation; whether States were free to choose between extradition and prosecution; and whether the custodial State had the discretion to refuse a request for extradition when it was prepared to prosecute or when the request was manifestly wrongful. Those issues must be approached in the light of the historical evolution of the legal concept of extradition as an attribute of sovereignty and a prerogative of the State. A requested State would thus be free to refuse a request for extradition on the basis of legal or other impediments, such as the constitutional prohibition of the extradition of a national. In such instances, however, refusal would immediately give rise to the obligation to prosecute so that the alleged offender did not evade justice. Thus, it was not a question of priority, and the two sides of the alternative obligation must be placed on an equal footing.

47. Another issue was that of the application of traditional restrictions on extradition. Current developments with regard to the non-applicability of the political-offences exception in the case of serious international crimes, in view of their predominantly criminal and indiscriminate nature, must be duly taken into consideration. The International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism and the draft comprehensive convention on terrorism currently being elaborated contained an identical provision excluding the applicability of exceptions in respect of crimes under those instruments.

48. The States parties to those conventions had adopted legislation which amended their extradition laws by removing the application of the political-offences exception in respect of the category of crimes covered by those instruments. However, another traditional limitation, namely, the right to refuse extradition when the request itself was made in bad faith, was not in the interest of criminal law or was for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or opinion, was expressly retained and remained applicable. Those developments were directly relevant to

the practical application of the obligation and deserved careful consideration for the preparation of future draft articles.

49. As to further work on the topic, he agreed that the formulations referred to in paragraphs 113 and 114 of the second report, on the important work accomplished by the Commission on the 1996 draft code of crimes against the peace and security of mankind, would provide invaluable material and serve as useful guidelines for further work on the draft articles. Like Mr. McRae, he thought that the Commission should wait to have more draft articles before referring them to the Drafting Committee.

Effects of armed conflicts on treaties (concluded)* (A/CN.4/577 and Add.1–2, sect. D, A/CN.4/578, A/CN.4/L.718)

[Agenda item 5]

REPORT OF THE WORKING GROUP

Mr. Vargas Carreño (Vice-Chairperson) took the Chair.

50. The CHAIRPERSON invited the Chairperson of the Working Group on the effects of armed conflicts on treaties to introduce the report of the Working Group (A/CN.4/L.718).

51. Mr. CAFLISCH (Chairperson of the Working Group on the effects of armed conflicts on treaties), referring to the approach taken by the Working Group, said that its mandate was very broad, namely, to seek a common position on several key matters raised during the plenary debate on the Special Rapporteur's third report. The Working Group had understood that the purpose of the exercise was to facilitate the transmission of the draft articles to the Drafting Committee by developing specific guidance on those key matters and, where possible, even to suggest drafting. At the same time, the Working Group had appreciated that matters of drafting were primarily the province of the Drafting Committee, with one exception (relating to draft article 4), and that had been the approach which it had taken.

52. The work programme of the Working Group had been organized into three clusters of issues: the scope of the draft articles; draft articles 3, 4 and 7, as proposed by the Special Rapporteur; and other matters raised during the debate in plenary, including the question of the legality of the use of force. The Working Group had completed consideration of the first two clusters, as well as of some matters in the third. However, several issues required more time for reflection and, accordingly, it was recommended in the last paragraph of the report that the Working Group should be re-established the following year to complete its work.

53. In paragraph 4 of its report, four main recommendations were formulated. First, the Working Group recommended that draft articles 1 to 3, 5, 5 bis, 7, 10 and 11, as proposed by the Special Rapporteur in his third report, should be referred to the Drafting Committee together

³⁵³ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

* Resumed from the 2929th meeting.

with the recommendations contained in paragraph 4 (1) (a) to (d) of its report. With regard to draft article 1, the Working Group had been of the view that the draft articles should apply to all treaties between States where at least one was a party to an armed conflict. In addition, there had been agreement that it was premature to take a definitive decision on whether treaties involving international organizations should be included within the scope of the draft articles. It had been decided to leave the matter in abeyance until a later stage in the development of the draft articles. In the meantime, the Working Group recommended that the Secretariat be requested to circulate a note to international organizations asking for information about their practice with regard to the effect of armed conflict on treaties involving them.

54. Turning to draft article 2, he said that the definition proposed by the Special Rapporteur did not exclude internal armed conflicts *per se*. Although there had been differences of opinion on the inclusion of that type of conflict, the Working Group had ultimately decided that, in principle, the definition should cover internal armed conflicts, but that States should be able to invoke the existence of an internal armed conflict in order to suspend or terminate a treaty only when the conflict had reached a certain intensity. The intensity threshold had been introduced so as to favour the continuity principle contained in draft article 3 by limiting the kinds of internal conflicts which could be invoked to suspend or terminate the application of a treaty. It had also been agreed that occupation in the course of an armed conflict should likewise not be excluded from the definition.

55. The Working Group had also considered draft article 7 and the question of the inclusion of a list of categories of treaties in the draft articles. It had thought that the essence of paragraph 1 should be retained, with a caveat that its formulation should be aligned with that proposed for draft article 4. In addition, the provision should be placed closer to draft article 4. It was proposed that the list of categories in paragraph 2 should be placed in an appendix to the set of draft articles with an indication that the list was non-exhaustive, that the various types of treaties on the list might be subject to termination or suspension either in whole or in part and that the list was based on practice and, accordingly, its contents might change over time. He also drew the Commission's attention to footnote 3 in the report of the Working Group, where it was suggested that the Drafting Committee should review the list taking into account the views expressed in the plenary debate. The Working Group had agreed that the Drafting Committee, when considering draft articles 10 and 11, should proceed along the lines of articles 7, 8 and 9 of the resolution adopted by the Institute of International Law³⁵⁴ on the same topic.

56. As to the Working Group's second recommendation, relating to draft article 4, he recalled that this provision had given rise to difficulties in plenary. The Working Group had decided to reformulate the draft article by suggesting that resort should be had both to the rules on the interpretation of treaties contained in the 1969 Vienna

Convention, i.e. articles 31 and 32, and to the nature and extent of the armed conflict, its effect on the treaty, the subject matter of the treaty and the number of parties to it. The Working Group recommended that the Commission refer that formulation of draft article 4 to the Drafting Committee.

57. The third recommendation of the Working Group was that draft article 6 *bis* be deleted. The provision would raise more questions than initially apparent and its subject matter would be better dealt with in the commentary, possibly to draft article 7.

58. The fourth and final recommendation was that the Working Group be re-established in the following year to complete its work, particularly on issues relating to draft articles 8, 9 and 12 to 14. He hoped that the Working Group would be able to meet early at the next session of the Commission in order to finalize its recommendations on the other draft articles, so that the Drafting Committee could work on a complete set of proposals.

59. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Working Group and the recommendations contained in paragraph 4 thereof.

It was so decided.

60. The CHAIRPERSON said that, in keeping with the decision that had just been taken, draft articles 1 to 3, 5, 5 *bis*, 7, 10 and 11, as proposed by the Special Rapporteur in his third report, together with the guidance contained in paragraph 4 (1) (a) to (d) of the report of the Working Group, as well as the revised draft article 4 contained in paragraph 4 (2) of the report, would be referred to the Drafting Committee. In addition, as also recommended by the Drafting Committee, draft article 6 *bis* would be deleted and its content would be reflected in a commentary, perhaps to draft article 7.

Mr. Brownlie (Chairperson) resumed the Chair.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (continued) (A/CN.4/577 and Add.1-2, sect. F, A/CN.4/579 and Add.1-4, A/CN.4/585)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

61. THE CHAIRPERSON said that, as time still remained, he invited the Commission to resume its consideration of the second report of the Special Rapporteur on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/585).

62. Mr. SABOIA commended the Special Rapporteur on his second report, which defined the extent and content of the obligation to extradite or prosecute in a balanced manner. The obligation was part of the issue of criminal jurisdiction and its international dimension and its application had evolved over time. Extradition, which usually had a basis in treaties but could also be carried out by States on the basis of reciprocity, corresponded to

³⁵⁴ Institute of International Law, *Yearbook*, vol. 61, Part II, Session of Helsinki (1985), p. 278.

the shared interest of States, namely, ensuring that serious offences committed in the territory of another State did not go unpunished. Many treaties provided that, when the requested State refused extradition, it must institute criminal proceedings against the alleged offender. In that respect, bilateral and, in certain cases, multilateral treaties concerning extradition and reciprocal judicial assistance established the conditions under which that alternative obligation was exercised. He agreed with the view expressed by the Special Rapporteur in paragraph 47 of his report that, rather than considering the technical or procedural aspects of extradition, the Commission should concentrate on the conditions for the triggering of the obligation to extradite.

63. The interest of the international community in the repression of certain grave offences had contributed to the progressive development of rules of international law imposing on States the obligation to exercise jurisdiction in that regard, no matter where or by whom the offences were alleged to have been committed. The number of international legal instruments establishing that kind of jurisdiction attested to an emerging customary rule that might be applicable to all States, at least in respect of *jus cogens*.

64. In his opinion, the Commission was in fact in the presence of an obligation and not a mere principle, although its extent and implications were more limited in the case of treaties on cooperation in the area of extradition, which covered most crimes punishable by the criminal legislation of the contracting States, whereas international crimes were defined in the relevant constituent instruments. As indicated in paragraph 54, for that category of crimes, there was general recognition by States of the emergence of a customary or generally binding obligation to extradite or prosecute. Another argument in favour of that position could be drawn from the Rome Statute of the International Criminal Court, according to which a State party had an obligation to exercise its jurisdiction over the crimes defined in the Statute when the conditions for the establishment of that jurisdiction were fulfilled.

65. With regard to extradition, article 90 of the Rome Statute of the International Criminal Court, on competing requests, might be of relevance for the topic under consideration. He was not calling for extensive treatment of the concept of surrender, but the distinction between it and extradition should be taken into account.

66. As to the starting point for the draft articles, and specifically paragraph 74 on the link between universal jurisdiction and the obligation to extradite or prosecute, he believed that it would be necessary to establish a distinction between the two concepts, since they both referred to the broader subject of jurisdiction, but not go any further than that in the treatment of universal jurisdiction. The proposed text of draft article 1 seemed to be a good starting point for the definition of the scope of the draft articles and he was in favour of referring it to the Drafting Committee.

67. The answer to the question whether the obligation to extradite or prosecute was absolute or relative depended

on whether the Commission was dealing with obligations arising out of an extradition treaty—in which conditions did in fact exist regarding the exercise of jurisdiction by the requested or requesting State and in which the role of national legislation and courts was greater—or with situations in which the obligation to extradite or prosecute derived from provisions of a multilateral treaty defining categories of international crimes, for which the obligation was more comprehensive or even absolute. That obligation, at least in some cases, should be seen as an obligation of behaviour rather than one of result.

68. With regard to paragraph 99, in which the Special Rapporteur advocated a wide concept of jurisdiction, “including all possible types of jurisdiction—both territorial and extraterritorial”, he said that caution should be exercised not to legitimize the abuse of extraterritorial jurisdiction, through which some States or judicial systems tried to extend their national legislation beyond the limits of legitimate jurisdiction, in violation of international law. He agreed with the reasoning in paragraph 102 on the need to consider international customary rules as a possible source of criminalization of certain acts, but thought that strict criteria should be used to determine the types of offences that belonged in that category. The provisional formulation of a draft article X proposed in paragraph 108 would not be sufficient in respect of obligations arising out of customary norms or multilateral treaties which established obligations with regard to international crimes. On the other hand, the same provision might be seen as excessive in the case of the implementation of the obligation under extradition treaties, when a requested State, having refused extradition, found itself unable to establish grounds for prosecution.

69. Replying to the question asked by the Special Rapporteur in paragraph 116 of the report, he said that the “preliminary plan of action” remained a good road map for future work, on the understanding that it should reflect the ongoing debate in the Commission and the Sixth Committee. At least provisionally, the outcome of the work should take the form of draft articles.

70. Mr. VARGAS CARREÑO said he was pleased that the Commission had included the obligation to extradite or prosecute (*aut dedere aut judicare*) in its long-term programme of work and he paid tribute to the Special Rapporteur for his preliminary³⁵⁵ and second reports.

71. He agreed with Mr. Dugard that responsibility for the codification and progressive development of the topic was incumbent above all on the Special Rapporteur and the Commission, although the opinions of the Sixth Committee and Governments must be taken into consideration.

72. The obligation to extradite or prosecute was applicable only if a State had jurisdiction to accuse a person of an offence and if that person was physically present in its territory. As to the question of which part of the alternative obligation should take precedence, it was important to bear in mind the territory in which the offence had been committed. In the course of its work, the Commission

³⁵⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

should also clarify whether the rule *aut dedere aut judicare*, which was generally accepted in international law, was absolute or relative. In any event, given current practice, the main limitation on the obligation to extradite appeared to be the nationality rule. In such cases, a State could not extradite its national and was under an obligation to try him. One such recent treaty which established the obligation to try a national who could not be extradited was the 2003 United Nations Convention against Corruption (Merida Convention).

73. One of the most difficult and controversial aspects of the topic was that of sources. At the previous meeting, Mr. Dugard had drawn the Commission's attention to the comments by the United States that, since, in international law, the obligation to extradite or prosecute was limited to what the relevant international legal instruments provided, only binding instruments could make provision for the obligation *aut dedere aut judicare* (A/CN.4/579 and Add.1-4). That was an interesting viewpoint, particularly since international law was composed primarily of international conventions and the international community was increasingly trying, with the help of conventions, to punish illegal acts or crimes against humanity. The International Convention for the Protection of All Persons from Enforced Disappearance, adopted at the end of 2006, was a recent example. However, that did not suggest that customary international law should be left out. It could be applicable, in particular in the absence of a binding treaty between two States, but a treaty which defined a particular behaviour as an international crime could be considered, in view of the large number of States parties to it, to have established a customary norm which was also applicable to non-States parties. However, the imprecise application of a so-called "customary law" had more drawbacks than advantages and he referred in that context to the *Pinochet* case. Pinochet had been present in London when a Spanish judge, citing two offences duly defined in Spanish law, namely, genocide and terrorism, had requested his extradition to Spain. The Court of Appeal of the House of Lords had not accepted the offences cited by the Spanish judge to justify the extradition. However, it had recognized that the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Chile, Spain and the United Kingdom were parties, was the legal instrument applicable in that situation. He believed that in practice, there was always a treaty that might be invoked without it being necessary to resort to a vague customary law.

74. The Commission should also consider two important questions relating to universal jurisdiction and referral to an international jurisdiction, the International Criminal Court in particular. Before referring to universal jurisdiction, it was first necessary to define a number of elements which the Commission had not yet discussed. As to the possibility of referral to the International Criminal Court, that did not necessarily stem from the obligation *aut dedere aut judicare*, but from the provisions of the Rome Statute of the International Criminal Court itself, which stated that its jurisdiction was complementary to national jurisdictions and was exercised as an alternative. If the Commission decided to address that point, it should do so in a separate provision.

75. He endorsed draft article 1 on the scope of application, but thought that the word "alternative" should be deleted. He also agreed with the three elements proposed by the Special Rapporteur in paragraph 77 of the report for determining the scope of the draft articles, namely, the time element, the substantive element and the personal element. The Special Rapporteur should develop those three elements further when he introduced his third report to the Commission. He was in favour of referring draft article 1 to the Drafting Committee.

76. Mr. NIEHAUS congratulated the Special Rapporteur on the quality of his second report on the obligation to extradite or prosecute. The importance of the topic could be seen in the fact that it had been one of the projects considered as early as 1949, at the first session of the International Law Commission.³⁵⁶

77. He recalled that, in paragraph 61 of his preliminary report, the Special Rapporteur had introduced a very clear preliminary plan of action for a study of the topic. In his view, the suggestions made therein must be followed up because they would greatly facilitate the Commission's work. The Commission should not wait for comments or information from the Sixth Committee or Governments with some exceptions.

78. The Special Rapporteur had allowed himself to be too influenced by the views expressed in the Sixth Committee, the effect of which had been to undermine his second report. Like Mr. Pellet, he personally considered that the growing tendency to follow the positions of States was a negative development. He also agreed with those members of the Commission who had argued that the best contribution to the consideration of the topic could be made by specialized criminal experts, because that would make it possible to have an in-depth comparative study and would provide a clear idea on how to treat the subject matter.

79. The Commission must decide whether the obligation to extradite or prosecute was based on a customary norm or general principle or originated in a treaty and also whether it was applicable solely to international crimes, regardless of the basis of such crimes in customary law or treaty law, or also to offences which were not deemed international or ordinary. It should also examine the implementation of universal jurisdiction, the need for an extra-territorial jurisdiction to be able to try or extradite, the question of limitations on extradition (political offences and guarantees of due process, as well as the problem of the existence of constitutional provisions which prohibited the extradition of nationals) and the problems to which insufficient evidence gave rise.

80. He endorsed draft article 1, as contained in paragraph 76 of the second report, which augured well for future draft articles. The three elements proposed in draft article 1 were important and should be clearly formulated; that was a matter for the Drafting Committee. He also agreed with the Special Rapporteur and other members of the Commission that an obligation, and not a principle, was at issue. On the other hand, he disagreed with the idea

³⁵⁶ *Yearbook ... 1949*, p. 280.

of making distinctions between primary and secondary rules because that might cause the Commission to make serious mistakes.

81. It emerged from paragraphs 106 to 108 of the second report that the Special Rapporteur had a rather clear idea of the probable content of the future draft articles. It would have been preferable for the other draft articles to have been submitted at the same time as draft article 1 because that would have facilitated the Commission's work. In other words, if the Commission had been able to consider the scope of the draft articles at the same time as such concepts as "extradition", "prosecution" and "jurisdiction", or if it had been able to undertake a clear and detailed analysis of the main obligation of *aut dedere aut judicare*, it would have been able to go to the very heart of the matter in a more comprehensive way. In that connection, he was not convinced by the arguments in favour of draft article 2 contained in paragraph 106. He was in favour of referring draft article 1 to the Drafting Committee.

The meeting rose at 1 p.m.

2947th MEETING

Friday, 3 August 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (concluded) (A/CN.4/577 and Add.1–2, sect. F, A/CN.4/579 and Add.1–4, A/CN.4/585)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. WISNUMURTI thanked the Special Rapporteur for his enlightening second report, contained in document A/CN.4/585, and for having summarized the main ideas contained in the preliminary report³⁵⁷ and the discussions held thereon in the Commission and Sixth Committee for the benefit of new members.

2. The second report raised a number of pertinent and difficult questions, the first of which was whether the obligation to extradite or prosecute had become part of

customary international law, or whether the legal source of the obligation included customary international law or general principles of law aside from treaties. He shared the Special Rapporteur's view that aside from international treaties, customary international law was also a legal source of the obligation insofar as it related to certain categories of crimes generally recognized as being subject to universal jurisdiction, such as genocide, crimes against humanity, war crimes and terrorism. He nevertheless felt that there was a need for further study of the question.

3. With regard to draft article 1, while he had no serious difficulty with the title, his preference would be for the title to read "Scope of the present articles". As for the text of the draft article, he concurred with the view that it would be better to delete the words "the establishment, content, operation and effects of". Those clusters constituted important aspects of the obligation to extradite or prosecute which would facilitate the Commission's future work on the draft articles and should therefore be taken up in the third report, rather than in the context of draft article 1. The word "alternative", in the phrase "alternative obligation of States to extradite or prosecute", was also redundant and could be deleted.

4. Like the Special Rapporteur, he favoured the use of the term "obligation" rather than "principle" in the draft articles, in line with the Commission's normal practice. He endorsed the view that draft articles on the obligation to extradite or prosecute should be limited to rules of a secondary character rather than principles of a primary nature. He also endorsed the statement in paragraph 85 of the report to the effect that the term "obligation" reflected the generally recognized character of *aut dedere aut judicare* as a secondary rule.

5. There was no straightforward answer to the question whether, in implementing the obligation, priority should be given by States to extradition or to prosecution. Various factors had to be taken into account by the custodial State before it took any decision to implement the obligation, such as the terms of an extradition treaty with the State requesting extradition, where such a treaty existed; the availability of sufficient *prima facie* evidence; the national interest of the custodial State and that of the requesting State; and the nature of the bilateral relations between the two States. For those reasons, there was strong justification for the view that States had freedom of choice between extradition and prosecution of the person concerned. In that connection, he was of the opinion that the custodial State had sufficient margin to refuse extradition if, in the context of the implementation of its obligation, it decided to prosecute the person, or when there was insufficient evidence on the basis of which the custodial State could implement its obligation to extradite or prosecute.

6. On the question of the "triple alternative", he agreed that there might be a possibility of parallel jurisdictional competences, not only on the part of the States concerned, but also of international criminal courts, as established in the Rome Statute of the International Criminal Court and supported by judicial practice. However, he stressed the need for caution: the Commission must look closely at the obligation to surrender persons to international criminal

³⁵⁷ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

courts and decide whether it should be included in the draft articles as part of the concept of the obligation to extradite or prosecute, given that surrender to international criminal courts was an instance of *lex specialis*.

7. While he agreed that a clear distinction should be made between the concept of the obligation to extradite or prosecute and that of universal jurisdiction, and that the Commission should focus on the former, as also recommended by the Sixth Committee, he believed that universal jurisdiction should at some stage be included in the study. The Commission would have to consider it when addressing the different categories of crimes to be covered by the obligation to extradite or prosecute, which in his view primarily comprised international crimes subject to universal jurisdiction.

8. He supported the general thrust of the Special Rapporteur's plan for further development set out in paragraphs 105 to 116 of the second report. He agreed that the formulation of a future draft article 2 on the use of terms should remain open until the Commission had a comprehensive view of the draft articles. There seemed to be a general consensus that international treaties were a more generally recognized source of the obligation to extradite or prosecute. However, he would have to reserve his position on how that legal source was to be reflected in the formulation of a draft article along the lines of draft article X, as set out in paragraph 108 of the report, until the Commission had addressed another legal source, namely customary international law, at least with respect to certain international crimes which were subject to universal jurisdiction.

9. In conclusion, he endorsed the proposal to refer draft article 1 to the Drafting Committee.

10. Mr. KOLODKIN thanked the Special Rapporteur for his second report, which responded to some comments and summarized the key issues, taking into account the discussions held during the fifty-eighth session, and the views of States and the Sixth Committee as well as written submissions. The Special Rapporteur's efforts to take account as far as possible of the views of member States, however diverse they might sometimes be, were also praiseworthy. He endorsed the Special Rapporteur's proposal to recirculate the request for information addressed to States at the fifty-eighth session;³⁵⁸ perhaps more questions could be added in order to elicit more detailed comments along the lines of those submitted by the United States.

11. Additional information was required from States, not only relating to their practice, legislation and jurisprudence, but also regarding their views on the source of the obligation to extradite or prosecute. Otherwise it would be difficult to determine whether or to what extent the obligation to extradite or prosecute existed in customary international law. His initial reply to the question would be in the negative. Nonetheless, an academic answer would be inappropriate: information on the practice and *opinio juris* of a large number of States was necessary; the opinion of just one State, however eminent, would not suffice.

12. As had been observed, there were not enough international treaties containing such an obligation to demonstrate that it was a customary norm. On the contrary, it could be argued that States concluded a multitude of treaties in different areas precisely because there was no customary norm under international law and because the obligation to extradite or prosecute was a complex issue. States were willing to assume such an obligation only if it was enshrined in a treaty. That was why many States made extradition conditional upon the existence of a treaty. Moreover, for some States, such as the United States, a multilateral treaty on the prevention of a specific offence which contained a provision on extradition might not suffice—a special extradition treaty was required. Such practice was fairly widespread. In any case, the obligations of States under customary international law could not be admitted lightly; strong evidence in their favour was required.

13. Even stronger evidence was required to advance the theory of the peremptory nature of the obligation to extradite or prosecute. He would not dismiss that theory outright: by all means the Commission and the Special Rapporteur could analyse it. However, it would be wrong to infer the peremptory nature of the obligation on the basis of the peremptory nature of norms prohibiting, for example, crimes against the peace and security of mankind or crimes subject to universal jurisdiction. The nature of a secondary rule—and the obligation under consideration was a secondary rule—could not be deduced from the nature of a primary rule to which the secondary rule related; other criteria must be taken into consideration. In order to qualify as a peremptory norm, the obligation *aut dedere aut judicare* must comply with the criteria laid down in article 53 of the 1969 Vienna Convention.

14. While he agreed with the Special Rapporteur on the need to draw a clear distinction between universal jurisdiction and the obligation *aut dedere aut judicare*, he considered that the intellectual distinction or relationship between the two concepts should be dealt with in the reports, or in the commentaries to the draft articles, but not in the draft articles proper—leaving aside the question of the form that the final product should take. In his view, the presumption should be that when a State decided to extradite or prosecute, it already had the jurisdiction to do so. It was therefore not important whether such jurisdiction was universal or not. The draft articles must be based on the presumption of the existence in the State concerned of the jurisdiction necessary to extradite or prosecute a person, but there was no need to draft provisions on jurisdiction as such.

15. He also agreed with the Special Rapporteur on the need to draw a clear distinction between extradition and surrender to the International Criminal Court. However, the “triple alternative” should not be included in the draft articles. He did not believe that such an alternative was sufficiently widespread to warrant consideration by the Commission.

16. Due attention should be paid to the link between extradition and the principle of reciprocity, which the Special Rapporteur had not touched upon. Some States,

³⁵⁸ *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 30.

including the Russian Federation, could extradite on the basis of reciprocity as well as by virtue of treaties, without thereby considering themselves bound to extradite under customary international law. It could be that extradition and the obligation to extradite or prosecute were two different matters. The principle of reciprocity might be the basis for extradition, but not for the obligation to extradite or prosecute. Some further study of the question might therefore be necessary.

17. He supported much of what had been said regarding draft article 1. The reference to the obligation to extradite or prosecute as alternative in nature should be deleted; it would be more appropriate in the commentary. Likewise the reference to “the establishment, content, operation and effects of” the obligation should be deleted. Perhaps he had not sufficiently comprehended the Special Rapporteur’s comments on the time element, in paragraphs 79 to 81 of the report, to be able to understand the need for its inclusion in the draft article.

18. He was not convinced that the obligation applied simply to persons under the jurisdiction of a State. He did not see how it was possible to extradite a person who was under a State’s jurisdiction but not in its territory. He had mentioned earlier the presumption of the existence of jurisdiction; it might be more accurate to say that the existence of jurisdiction was a necessary precondition for a State’s decision to extradite or prosecute. However, it was a necessary, but not a sufficient condition: another necessary condition was the person’s presence in the territory of the State to which the request for extradition was addressed. That aspect of the matter also required further study.

19. He agreed that the obligation applied to natural persons only, although it had been suggested that some reference should be made to situations involving the criminal prosecution of legal persons. The concept of criminal responsibility and the criminal prosecution of legal persons was not found in all legal systems, and the inclusion of legal persons in the scope of the draft articles could lead to substantive problems.

20. Given that draft article 1 dealt with the scope of application, he suggested that some reference should be made in that draft article to the category or categories of crimes to which the draft articles applied, for instance crimes under international law or crimes against the peace and security of mankind. Perhaps that should be the subject of a separate paragraph in the draft article.

21. He shared the views of those who did not see that anything would be gained by the inclusion of the draft article X proposed in paragraph 108. Perhaps the Special Rapporteur had some further arguments to deploy in its favour.

22. In conclusion, he said he would be ready to continue work on draft article 1 in the Drafting Committee at the next session, on the basis of the discussions held during the current session and in the Sixth Committee, and in the light of the new draft articles to be proposed by the Special Rapporteur in his third report.

23. Mr. VALENCIA-OSPINA said he welcomed the opportunity to address the Commission for the first time on the topic of the obligation to extradite or prosecute. The second report provided an update on the discussions held during the fifty-eighth session and on the comments submitted in writing by Governments and made orally in the Sixth Committee. Both the reports drafted on the topic thus far were preliminary in nature—much of the second report was repetition—and invited the Commission to undertake a systematic study of the topic, which had been on the long-term agenda of the Commission since its first session, in 1949. He wished the Special Rapporteur every success in a task which was fraught with difficulties.

24. In view of the preliminary nature of the two reports, he would begin with a brief preliminary overview of how he perceived the origin, purpose and nature of the obligation *aut dedere aut judicare* and then make some general comments and suggestions on draft article 1.

25. The Latin maxim *aut dedere aut judicare* reflected a general principle of *jus gentium* and was a development of the term *aut dedere aut punire* (to extradite or to punish) originally formulated by Grotius.³⁵⁹ In the debate thus far, some members of the Commission had rendered “*judicare*” indiscriminately as “punish” (*punire*) and “prosecute” (*judicare*). For the purposes of the codification and progressive development of the topic, the maxim, as enshrined in modern positive law, recognized the existence not only of a principle but also, implicitly, of an international obligation. The old formulation *aut dedere aut punire* presumed the guilt of the alleged perpetrator of the offence, whereas *aut dedere aut judicare* rightly presumed the innocence of the person tried for the commission of an offence. That was the only way in which an obligation of that nature could be viewed in the modern world, in the light of the basic principles of criminal law and respect for due process.

26. The maxim had been incorporated in a large number of bilateral and multilateral treaties, many of which the Special Rapporteur had referred to in his reports. Its importance had also been recognized by the United Nations General Assembly, which had adopted many resolutions on the matter: since 1946 a number of General Assembly resolutions relating to war crimes and crimes against humanity had included a statement to the effect that the refusal of States to cooperate in the arrest, extradition, prosecution and punishment of persons guilty of war crimes and crimes against humanity was contrary to the purposes and principles of the Charter of the United Nations and the generally recognized norms of international law.

27. It was therefore only logical that the Commission must determine whether the obligation *aut dedere aut judicare* derived exclusively from the relevant international instruments and, in particular, treaties, or whether it was also a general obligation under customary international law. In that regard, the comments submitted by the United States, to which the Special Rapporteur intended

³⁵⁹ H. Grotius, *De Jure Belli Ac Pacis*, book II, chap. XXI, paras. III and IV (English translation by F. W. Kelsey), *The Law of War and Peace*, in J. B. Scott (ed.), *Classics of International Law*, Oxford, Clarendon, 1925, pp. 526–529.

to refer in his next report, were worthy of note. It should be recalled that the matter had been referred to the ICJ in the *Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* and *(Libyan Arab Jamahiriya v. United States of America)* cases. In its orders of 14 April 1992, the Court had decided not to exercise its power to indicate provisional measures as requested by the Libyan Arab Jamahiriya. Although the Court itself had been silent concerning the obligation in question, two judges had confirmed in their dissenting opinions the existence of “the principle of customary international law *aut dedere aut judicare*” (dissenting opinion of Judge Weeramantry, p. 69), and of “a right recognized in international law and even considered by some jurists as *jus cogens*” (dissenting opinion of Judge Ajibola, p. 82). Naturally, those dissenting opinions were not a sufficient basis for accepting that to extradite or prosecute was a rule under customary international law; however, it was worth looking into the limits of those opinions in the light of State practice.

28. It seemed from the reports that, under the relevant provisions of most international instruments, States viewed extradition or prosecution as a right rather than an obligation. However, in order to establish the existence of such an obligation under customary international law, it must also be established that, in international efforts to combat crime, States considered the maxim not only as enshrining a right or power, but above all as a limitation, in accordance with the law, on the exercise of their sovereignty that could be inferred from their practice.

29. Aside from the foregoing, the importance of such an obligation was clear. On the one hand, the international community had a genuine interest in ensuring that under no circumstances should the perpetrator of an offence be exempt from criminal responsibility and find a safe haven where his crime would go unpunished. On the other hand, the maxim *aut dedere aut judicare*, insofar as it was binding, guaranteed greater legality, transparency and certainty in the exercise of international criminal justice.

30. In that connection, repeated practice, the consistency of its implementation, States’ discernible perception of the practice as a legal obligation, and the opinions of some judges and framers of treaties suggested that, at least for certain categories of crimes—those which on account of their gravity could be considered as subject to international law—the obligation in question was customary in nature. The position the Commission finally took on the question, which might possibly be the result of progressive development, would first warrant careful reflection.

31. The Special Rapporteur had described the obligation arising from *aut dedere aut judicare* as “alternative”. In other words, when seeking international cooperation in criminal matters, States had two options—to extradite or to prosecute—and possibly also the option to surrender the accused to an international criminal court (the “triple alternative”). Without entering into a debate as to whether the obligation related to conduct or result—a distinction not drawn by the Commission in article 12 of its draft articles on responsibility of States for internationally

wrongful acts³⁶⁰—it could be said that what was alternative was not the obligation *per se*, but rather its performance, the term used by the ICJ in its judgment in the *Gabčíkovo–Nagymaros Project* case. The performance of the obligation could be secured through one option or the other, and decided by the State on a case-by-case basis.

32. That did not mean that the State was required to choose one of the options. A State might be empowered to extradite a person but not have the jurisdiction to prosecute him or her. In that event, it would fulfil its obligation through extradition to another State. Irrespective of whether the maxim envisaged the “triple alternative”, for practical purposes there was also the option that the alleged culprit could be surrendered to an international court. The case might also arise where there was no basis for extradition under international law, and in such cases the obligation could be met only through prosecution, provided that the State had jurisdiction.

33. The obligation *aut dedere aut judicare* could thus be described in minimalist terms as a basic obligation under which, in the event of grave breaches of international law, States had limited options. First, they could extradite the alleged culprit or perhaps surrender him or her to an international court, on the basis of a treaty, reciprocity or another source. Secondly, they could prosecute the person in question where they had the necessary jurisdiction and decided in accordance with domestic legislation, not to extradite, or in the absence of any treaty establishing the particular conditions for extradition. If any of those methods was followed, the obligation was understood as having been fulfilled.

34. That might give rise to at least two problems. The first, as mentioned in the report, related to the nature of the offences to which such an obligation applied. If, as appeared to be the case, it applied only to categories of offences which, owing to their gravity, were considered to come under international law or be of international concern, the obligation *aut dedere aut judicare* would become a mere subcategory of universal jurisdiction. The second problem was to determine when and under what qualitative conditions it might be considered that the obligation had been fulfilled with respect to its second component, *judicare*. Faced with such complex questions as those, it would seem advisable that, in elaborating the draft articles, the Special Rapporteur should concentrate on identifying the category or categories of offence to which the obligation *aut dedere aut judicare* applied and determining how close was the connection between that obligation and universal jurisdiction, a connection which had already been recognized by the Institute of International Law.³⁶¹ He should also establish the criteria for determining the circumstances under which it could be claimed that the obligation had been met when the component chosen was *judicare*, and identify the situations in which the obligation could not be met through the application of the *judicare* component alone.

³⁶⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 27 and 54–57; see, in particular, page 55, paragraph (4) of the commentary.

³⁶¹ Institute of International Law, *Yearbook*, vol. 71, Part II, Session of Krakow (2005), Resolution III, “Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes”, Paris, Pedone, 2006, p. 297. See also *ibid.*, vol. 60, Part II, Session of Cambridge (1983), Resolution III, “New Problems of Extradition”, p. 305.

35. With regard to draft article 1, he endorsed the Spanish title “*Ámbito de aplicación*”, which was the form of words traditionally used in the Commission’s texts. The corresponding term in English, however, was simply “Scope”, not “Scope of application”. The words “of application” should, therefore, as pointed out by Ms. Escarameia, be deleted. The text of the draft article could also be simplified. The words “establishment, content, operation and effect” could be deleted, since they introduced a number of highly ambiguous elements that were not sufficiently specific to enable the scope of the draft articles to be determined in each concrete case. The choice of four different words suggested that the degree of obligation applicable to each under the draft articles would differ, depending on the time element. The time of operation and effects, however, was of little significance; what was important was the moment at which the obligation was established. In that connection, he drew attention to paragraph 1 of draft article 14 of the draft articles on responsibility of States for internationally wrongful acts entitled “Extension in time of the breach of an international obligation”, which read: “The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.”³⁶² Moreover, it was incongruous to bracket three concepts that referred to the temporal nature of the obligation—“establishment”, “operation” and “effect”—with the word “content”, which had nothing to do with the time factor. In any case, to use the word “content” was tautological, since the aim of the draft articles as a whole was to establish the content of the obligation *aut dedere aut judicare*. To say that draft article 1 applied to its own content was circular and added nothing to the reader’s understanding.

36. Lastly, the word “alternative” could also be deleted. The obligation *aut dedere aut judicare* was “alternative” only in the manner in which it might be fulfilled. To retain the word “alternative” in the text of the article as a description of the obligation could, therefore, give rise to the mistaken impression that the obligation itself, rather than compliance with it, was of an alternative nature. He hoped that a clearer form of words might be found, which would also incorporate the phrase “*aut dedere aut judicare*” in the wording of the draft article.

37. For the reasons given above, he was in favour of a simplified text along the lines suggested by Mr. Dugard early on in the debate and subsequently supported by Mr. Kamto and Mr. Wisnumurti. He suggested the following:

“Scope

“The present draft articles shall apply to the obligation of States to extradite or prosecute (*aut dedere aut judicare*) persons under their jurisdiction.”

He would support the proposal that the draft article should be referred to the Drafting Committee at the current session, on the understanding that it would be amended in the light of the points already made in the Commission’s discussion. If the elements more appropriately dealt with

in subsequent draft articles were removed, the simplified text would not be materially affected by later developments. The Drafting Committee should also ensure that the terminology used to translate the Latin maxim *aut dedere aut judicare* was harmonized in all the Commission’s official languages.

38. Mr. HASSOUNA said that the topic was both legally complex and of growing importance to the international community, since it reflected recent developments in international criminal law, the purpose of which was to deny impunity to persons suspected of having committed international crimes, by depriving them of safe havens.

39. As a new member, he was grateful to the Special Rapporteur for summarizing, in his second report, the content of the preliminary report and the discussion in the Commission and the Sixth Committee in 2006. Such a summary would greatly assist new members in formulating their views on the main issues, as would the compilation of comments and information received from Governments (A/CN.4/579 and Add.1–4) and the topical summary of the discussion held in the Sixth Committee (A/CN.4/577 and Add.1–2) helpfully prepared by the Secretariat. In his view, the Commission should not disregard the opinions of delegations to the Sixth Committee, as had been suggested by some members of the Commission. Such opinions reflected the official position of the very Member States of the United Nations that would eventually adopt or reject the product of the Commission’s work. While, as an independent body, the Commission was not bound by States’ opinions, it should take them into consideration as far as possible. In that connection, he was pleased to learn that the number of replies to the question posed in paragraph 30 of the Commission’s report on the work of its fifty-eighth session had grown over the past few months. The invitation to States to submit information should, however, be repeated in chapter III of the Commission’s report on its fifty-ninth session. Among the States that had replied, African and, to a lesser degree, Asian States were conspicuous by their absence. Given that they represented an important segment of the international community, it was regrettable to have been deprived of their views; he therefore hoped that more African and Asian States would respond shortly, particularly in view of the interest shown in the topic at the most recent meeting of AALCO, held in Cape Town in July 2007.

40. Turning to specific issues raised during the debate, he said that, with regard to the scope of the topic, he shared the views of those who believed that the Commission should focus on the issues directly relating to the obligation to extradite or prosecute and avoid related issues such as the technical aspects of extradition law or deportation procedures. While it should recognize the link between universal jurisdiction and the obligation to extradite or prosecute, the Commission should restrict itself to referring to their interrelationship and drawing a distinction between the two concepts. A further distinction should be drawn between extradition and surrender to an international criminal tribunal, which was a process governed by distinct legal rules. He would support the inclusion in the Commission’s work on the topic of an analysis of the relationship between the obligation to extradite or prosecute and other principles of international law, particularly

³⁶² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 27.

State sovereignty—and the limitations on it—and human rights protection.

41. The fundamental question of the nature of the obligation to extradite or prosecute, and whether it had become a part of customary international law, required close scrutiny, in view of the divergent opinions that were apparent among States and legal scholars alike. In his view, the answer to the question whether there was an emerging customary source of that obligation, side by side with the accepted treaty-based source, could be ascertained mainly through existing State practice, particularly in relation to the most serious international crimes such as genocide, war crimes, crimes against humanity, torture and terrorist acts. As for the final form the Commission's work should take, he would favour a set of draft articles.

42. He wished to suggest a number of amendments to draft article 1. The word "establishment" should be replaced by a word such as "existence", and the term "operation" by the word "application". He would also favour the deletion of the word "alternative" in referring to the obligation to extradite or prosecute. Better still would be to redraft the article in more general terms so as to include all its existing elements without excluding other relevant ones.

43. There was a case for referring the draft article to the Drafting Committee. However, such a referral should, in his view, be deferred, for two reasons: first, on the practical grounds that the Drafting Committee would not be able to take up the matter until the next session; and, secondly, because draft article 1 needed to be considered in conjunction with future draft articles substantively connected with it, which the Special Rapporteur had promised to submit in the context of his third report.

44. Ms. JACOBSSON said that the Special Rapporteur's "road map" was well designed and carefully thought through. She welcomed his confirmation that the preliminary plan of action set out in the preliminary report would be retained for further work. She also appreciated his willingness to listen to the views of new members of the Commission.

45. The title of the topic clearly indicated that it was primarily the procedural aspects of the obligation to extradite or prosecute that would be addressed. However, as many other members had stressed, it was impossible to avoid also addressing the jurisdictional grounds for the obligation, and the way to identify those grounds was to consider the categories of crimes involved in order to establish whether procedural consequences flowed from given treaty obligations.

46. Both the title of the topic and draft article 1 referred to an obligation of States to prosecute or extradite, but, in her view, it could sometimes be a principle as well. Some treaties contained a limited and clearly defined obligation on States to prosecute or extradite, whereas others, such as the 1949 Geneva Conventions for the protection of war victims, also embodied the principle of universal jurisdiction. She accepted, however, the argument that the title should be retained for the time being: partly because the parallel question of a State's right, rather than obligation,

to prosecute and extradite needed to be discussed, and also because the current title did not exclude the existence of a principle. Moreover, the word "obligation" seemed more appropriate from a legal point of view for the purpose of the exercise.

47. The Special Rapporteur's premise was that universal jurisdiction and the obligation *aut dedere aut judicare* were separate bases for jurisdiction, even though there existed a relationship between them. She agreed with that assumption as a working hypothesis, but she was not yet convinced that it would always be possible to separate the two, particularly in the grey areas of serious breaches of international humanitarian law, torture and genocide. The principle of universal jurisdiction should therefore be analysed in order to establish whether it might correspond with the obligation *aut dedere aut judicare* and, if so, in what circumstances.

48. As for the question whether the so-called "triple alternative" should be considered by the Commission, she believed that it could not be totally disregarded. At the least, there needed to be an analysis and an explanation—on a juridical basis and also from a theoretical perspective—of whether surrender to international tribunals was legally different from the obligation *aut dedere aut judicare*—not least since the obligation to do so was most often treaty-based—and, if so, why and how. The situation was complicated by the different ways in which the word "surrender" was used. By contrast with its use in the Rome Statute of the International Criminal Court, the term as used in the European Arrest Warrant, introduced in 2002,³⁶³ really amounted to extradition. At one stage, some European courts had refused to "surrender"—or extradite—persons under the Warrant, but it seemed that this was no longer the case and, according to the European Commission, the European Arrest Warrant was now "a success": in 2006, nearly 6,900 arrest warrants had been issued, and in 1,200 cases the wanted person had been traced and arrested. The Warrant was not an *aut dedere aut judicare* procedure, properly speaking, since it focused on serious national crimes rather than international crime, but it had elements that were closely related to *aut dedere aut judicare*. It was no coincidence that it used the same term—"surrender"—as the Rome Statute of the International Criminal Court. It would be helpful if the Special Rapporteur could examine the differences and similarities between surrender and extradition, both because of its legal and political dimension and also in the light of extensive regional State practice. Her purpose in suggesting that course of action was to help narrow down the topic so as to focus on the nature of the core obligation.

49. She wholeheartedly agreed with the Special Rapporteur's contention that both the obligation to prosecute and the obligation to extradite should be subject to more detailed analysis, since their scope and the interpretation of the two concepts were not always clear, even under existing treaties. She therefore welcomed his intention to formulate draft rules on the concept, structure and

³⁶³ *Official Journal of the European Communities*, No. L 190, 18 July 2002, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), pp. 1–18.

operation of the obligation. The division of the scope of application into three main elements—the time element, the substantive element and the personal element—was a good starting point. The time element—the “periods of establishment, operation and production of effects”—was important, particularly in situations where dual criminality was involved and States had different statutory limitations. As for the substantive element, the obligation either to prosecute or to extradite was, generally speaking, an obligation and not primarily a right, particularly if the obligation was applied in the context of universal jurisdiction. In that connection, she noted, in relation to the question whether the obligation to extradite was absolute or relative, that the conditional element—in the sense that the will of another sovereign State was involved and human rights obligations might intervene—did not diminish the force of the obligation.

50. Any legal procedure was subject to restraints. In the case of the obligation to extradite or prosecute, the primary restraint was the requirement of due process, which extended to the requirement that the extradition request should be based on juridical grounds. There were, however, other restraints, such as the risk that the person subject to the extradition request might suffer torture or the death penalty. The crucial issue was not so much the restraints that a State imposed on itself in setting up the conditions for extradition, as what happened if a State did not want to prosecute and was prevented from extraditing. In that connection, she noted that the report contained no reference to two elements of particular interest: diplomatic guarantees, and the political element, namely that a State might want to extradite for political reasons.

51. She concurred with the Special Rapporteur’s conclusion that the concept of jurisdiction should be understood in its broadest sense. There were close and multifaceted links between the establishment of jurisdiction and the possibility of extradition. The more restrictive a State’s basis for jurisdiction under domestic law—if, for example, the State based its jurisdiction solely on the principle of territoriality—the more likely it seemed to accept extradition in order to prevent impunity.

52. As for the legal source of the obligation, she noted that members of the Commission and delegates to the Sixth Committee had been cautious in their responses, with the exception of the United States, which had taken a firm position on the matter. She wondered whether an obligation to prosecute or to extradite could exist without any basis in a treaty, in other words, whether it could be based in customary law. She was inclined to think it could. True, extensive State practice developed under treaty commitments did not necessarily mean that such practice could be considered customary law, but it might, as Mr. Vargas Carreño had pointed out, be an indication of the existence or emergence of customary law. The question should be further analysed.

53. Draft article 1 should be simplified. In that connection, the wording suggested the day before by Mr. Kamto could be helpful. The Commission should await the next set of draft articles before referring draft article 1 to the Drafting Committee, thereby gaining a clearer picture of the situation as a whole.

54. Mr. HMOUD, after congratulating the Special Rapporteur on a thorough and balanced report, said that, over the years, bilateral and multilateral treaties relating to criminal law had laid down the principle or obligation to extradite or prosecute, the purpose of which was to deny the perpetrators of certain crimes a safe haven. The principle had become a standard legal tool to combat impunity with regard both to ordinary crimes under national law and to crimes affecting the international community as a whole, but it did not exist in a legal vacuum: it had to operate within the context of both national and international law. A State in whose territory the perpetrator of a crime was present could extradite such a perpetrator only if its national law did not criminalize the act committed, or it would prosecute the perpetrator only if it was under no international legal obligation to extradite. National and international law were thus both relevant.

55. That was why multilateral law-enforcement instruments had several integral obligations, including the obligation to extradite or prosecute. Such instruments usually defined the crime concerned and imposed on States parties the obligation to enact legislation to give effect to such a definition, among other obligations. They also, however, provided for jurisdiction, which could be mandatory in some cases and optional in others. That was crucial in terms of the obligation to extradite or prosecute, because, under such treaties, a State might choose not to exercise its option of jurisdiction over the crime, although, in that case, it had to extradite the accused to a requesting State that wished to exercise jurisdiction, as it was commonly entitled to do in treaties relating to organized crime, terrorism or attacks against United Nations personnel. It was the presence of the individual in that State or his or her being under its control that triggered the obligation, not the fact that he or she was under its jurisdiction. For that reason, the phrase “under their jurisdiction”, in draft article 1, should be amended, so that a State could prosecute the person concerned if it exercised jurisdiction over the offence or extradite him or her if it lacked such jurisdiction or did not exercise it.

56. The source of the obligation to extradite or prosecute was relevant in that connection. If there was no treaty providing for such an obligation, the requested State would need a legal basis to meet the extradition request. If its national law provided for jurisdiction over the crime, it might opt to prosecute, or to extradite if its internal law so permitted: several States had laws that authorized extradition in cases of dual criminality without benefit of a treaty. In such cases, however, prosecution or extradition became a right for the requested State, to be exercised under its national law, and not an obligation.

57. As for the question whether the principle of extradition or prosecution had a basis in customary international law, the principle was, as already stated, a tool with which to combat impunity. Yet in order to combat impunity, the international community must agree on the categories or types of crimes to which such a goal undeniably applied. The most serious crimes of concern to the international community as a whole were more limited in range than those covered by the bilateral and multilateral treaties which applied the principle *aut dedere aut judicare*; they included genocide, war crimes, crimes against humanity

and aggression, as was evident from the criminalization of such acts under the Rome Statute of the International Criminal Court, whose object and purpose was to put an end to impunity for the perpetrators. No State ever declared that it supported such crimes, or that it was willing to provide a safe haven for those who had committed them. Accordingly, combating those crimes was an obligation under customary international law.

58. But did the “prosecute or extradite” tool have the status of an obligation under customary law in the battle against such crimes? In recent years, as a reaction to the grave crimes committed by some individuals in various parts of the world, several offenders had been brought to justice in one way or another, or else States had been eager to extradite them in order to rid themselves of the political and moral burden of their presence. Some had been sent for trial before international tribunals, others had been returned to their home country for prosecution and some had been tried in national courts on the basis of universal jurisdiction. Yet there seemed to be no instance of their ever facing justice on the basis of a customary legal obligation to extradite or prosecute. Nevertheless, that should not deter the Commission from including in the scope of the articles the obligation to extradite or prosecute the perpetrators of the most serious crimes of international concern on a basis other than treaty law.

59. One argument advanced in favour of such an approach was that a State which was a party to a significant number of law-enforcement instruments embodying the obligation to extradite or prosecute became bound by such principle under customary international law and that the *opinio juris* condition had been met for that State. But that was a false argument which confused treaty obligations with customary law requirements. In fact, a State was bound by that principle under every treaty, subject to those treaties’ distinct conditions and in relation to different crimes. The “extradite or prosecute” tool did not exist in the abstract for that State and was not transformed into a customary obligation for it. For example, although the dozen or so sectoral conventions against terrorism contained an obligation to extradite or prosecute, each convention had its own provisions governing the bringing of charges, jurisdiction, definition of crimes, scope and judicial cooperation. Yet it could not be claimed that a State which was a party to all those conventions was under an abstract customary law obligation to prosecute or extradite terrorists, since for that State the principle *aut dedere aut judicare* was defined in each case by the specific treaty, which determined the content of the principle. However, under customary law the principle would be devoid of content.

60. In short, *aut dedere aut judicare* was an obligation incumbent on a State under its treaty law. It should also be an obligation under the draft articles in relation to the most serious crimes of international concern, such as genocide, war crimes, crimes against humanity and aggression, even if the obligation was not part of that State’s treaty obligations. It was also a right for the State in accordance with its national laws.

61. As an obligation, it had two components: prosecution and extradition. To describe it as an alternative obligation

was misleading and unnecessary. The word “alternative” should therefore be deleted from draft article 1.

62. As for the hierarchy within the obligation as between extradition or prosecution, there should be no doubt in the light of international practice and the normal interpretation of the legal texts that the obligation provided the requested State with a choice between exercising criminal jurisdiction under certain conditions or extraditing under other conditions. That was not, however, an absolute rule, since it was possible to find treaties providing for priority of jurisdiction between the States parties. For that reason, a State on whose territory a crime had been committed might have priority of jurisdiction under a certain treaty and could therefore demand that the requested State extradite the accused even though the latter State might also have criminal jurisdiction. While, as a general rule, the State on whose territory the accused was present had a choice, the relevant treaty should decide the priority or hierarchy.

63. Turning to the question of the relationship between universal jurisdiction and the principle *aut dedere aut judicare*, Mr. Hmoud gave it as his opinion that they were two entirely different things: the first was a matter of jurisdiction, the second was a legal process. In recent years, however, the measures taken to deny a safe haven to the perpetrators of the most serious crimes of concern to the international community had included resort to the universal jurisdiction of States. That trend had given rise to requests for the extradition of suspects, but on the basis of the concept of bringing the perpetrators to justice in the State exercising universal jurisdiction, rather than in implementation of an *aut dedere aut judicare* obligation *stricto sensu*. Nevertheless, the fact that the goal of denying impunity to perpetrators of crimes was common to both universal jurisdiction and the principle *aut dedere aut judicare* enabled the two issues to be linked. However, the link should be confined to the most serious crimes of concern to the international community. In other cases, a State could exercise universal jurisdiction only within the context of treaty provisions authorizing such jurisdiction, thereby applying the *aut dedere aut judicare* obligation.

64. It was hard to see how the Commission could fail to deal with the issue of the “triple alternative”, namely to extradite, prosecute or surrender the suspect to an international criminal tribunal. The creation of the international criminal court with its complementarity and extradition procedures, together with the operation of several international criminal tribunals, warranted consideration of that issue in the draft articles. Although several of those tribunals’ constituent instruments regulated the relationship between surrender to the tribunal and the obligation of a State party to extradite or prosecute, it was necessary to look into the legal situation that arose when such a relationship was not regulated by a treaty, or when there was a conflict between the State’s various international obligations.

65. In conclusion, he recommended that draft article 1 should be eventually referred to the Drafting Committee.

66. Mr. KAMTO said that Mr. Hmoud’s statement had shown that the question of the source of the obligation *aut*

dedere aut judicare still required clarification. Although he had no doubt that the Special Rapporteur would conduct extremely rigorous investigations to determine whether that obligation existed under customary international law outside the framework of treaty law, it seemed to him that if the Commission were to consider *aut dedere aut judicare* in the light of breaches of obligations owed to the international community as a whole or in relation to crimes against the peace and security of mankind, the source of the obligation could not be the same as for simple obligations under treaties that included an *aut dedere aut judicare* clause.

67. In that context, the Commission could either try to confirm the existence of such an obligation under customary international law—though he feared that such an investigation would produce a fairly meagre result, or, as suggested by Mr. Caflich, it could look for the source among the principles of international law, along with principles such as that of sovereignty, or else it could view it as an obligation closely linked to rules whose violation would constitute a breach of *jus cogens* or of a duty owed to the international community as a whole. The reason why he took that view was quite simply that it would be extremely difficult to demonstrate that States had applied the principle *aut dedere aut judicare* under customary law to past instances of genocide.

68. He also wished to point out, with respect to the linkage between *aut dedere aut judicare* and universal jurisdiction, that in the case of Hissène Habré, Senegal—the State on whose territory Habré was present—had claimed that it could not prosecute him because Senegalese law did not permit it and that the Constitution would have to be amended in order to make his prosecution possible. Belgium had requested Habré's extradition on the basis of universal jurisdiction, not on that of a bilateral extradition treaty between Belgium and Senegal.³⁶⁴ Universal jurisdiction and the obligation *aut dedere aut judicare* should not be confused; instead, the scope of each notion should be carefully delimited and any points of intersection identified.

69. Mr. COMISSÁRIO AFONSO congratulated the Special Rapporteur on an excellent second report on the obligation to extradite or prosecute which, together with the preliminary report, constituted a solid basis for tackling the substantive issues raised by the topic.

70. He agreed that the topic's aim should be to curtail the impunity of persons suspected of having committed serious crimes. In an era of globalization, the law was becoming increasingly internationalized, as was crime. At the same time, the moral values of humankind were increasingly shared by people all round the world and sovereign entities were cooperating, rather than competing, in the combating and punishment of heinous crimes. Thus the obligation *aut dedere aut judicare* translated the duty of States to act and cooperate in the defence of their common and universal interests. That partly explained the expansion of universality of suppression and jurisdiction, and also justified a pragmatic approach

to the issue under consideration. The Commission should therefore base its work on a very clear road map along the lines of that outlined by the Special Rapporteur in his preliminary report.

71. In that context, a discussion of the source of the obligation *aut dedere aut judicare* was important in order to provide the necessary legal foundations for its wider and, if possible, universal acceptance. Such acceptance could be achieved by affirming the dual nature of the obligation as a customary rule of international law, on the one hand, and as a treaty-based obligation, on the other. As Mr. Kamto had so eloquently argued at the previous meeting, the Commission must remember that *aut dedere aut judicare* had a variable legal status. He endorsed that position, which had been echoed by many other members, and also strongly supported the idea of determining categories of crimes as proposed in paragraph 20 of the preliminary report,³⁶⁵ although, of course, the Commission could change or adapt that categorization to fit its own purposes. Accordingly, the exercise should involve both the codification and the progressive development of international law, and should keep in mind the Commission's own draft code of crimes against the peace and security of mankind.

72. On draft article 1, he said that while he accepted its main thrust, greater economy with words would be advisable. It did not appear to be necessary to mention the defining elements of the concept *aut dedere aut judicare* under the heading of "scope"; a general and simple statement would suffice. No doubt the Drafting Committee could deal with that matter appropriately. In his view, paragraph 114 (d) of the second report provided a basis for the separate draft article, different from that on the use of terms, which would probably be required in order to define, clarify and pinpoint the concept of the obligation itself. In the past, defining the scope of a concept had sometimes proved a painful but nevertheless ultimately successful exercise, the topic of diplomatic protection being a case in point.

73. As to the substantive element discussed in paragraphs 82 to 93 of the report, he agreed that the term "obligation" was more appropriate than "principle" for codification purposes, but he saw no necessary incompatibility between the two terms.

74. The Commission should take the position that the obligation to extradite or prosecute most emphatically existed, even if there was disagreement as to the sources of that obligation. It should also affirm that the essence of the obligation resided in its alternative nature. The absence of that condition, or the introduction of an order of priority or other elements, would undermine the integrity and balance of the obligation. Similarly, it was necessary to exclude, or distinguish between, other concepts which were similar but different such as *primo judicare et deinde dedere* (prosecute first and extradite later) or the "triple alternative". Although the principle of complementarity as set out in the Rome Statute of the International Criminal Court served the important purpose of combating impunity, it should not be confused with *aut dedere*

³⁶⁴ See the opinion of the Dakar Court of Appeals of 25 November 2005.

³⁶⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

aut judicare. It could, however, be argued that the root cause might be the same. If a State was unwilling or unable to prosecute, it should surrender the alleged offender.

75. As to the personal element, the term “persons” would require definition in the draft article on the use of terms. In paragraph 108 the Special Rapporteur presented a provisional draft article X which was presumably a reminder of the principle *pacta sunt servanda*. In addition to that provision, the Commission should also contemplate situations beyond treaty obligations, in which, even in the absence of treaty law, States were duty bound to extradite or prosecute. The categorization of crimes might possibly take care of that concern.

76. He supported the referral of draft article 1 to the Drafting Committee.

77. Mr. VÁZQUEZ-BERMÚDEZ said that the obligation upon custodial States to extradite or prosecute alleged offenders who were in their territory constituted a formidable legal tool for securing justice, because it ensured that alleged offenders who were neither in the State where the crime had been committed, nor in a State that had a legal base for exercising criminal jurisdiction over the conduct or the offender, could be brought before a competent criminal court.

78. Although the legal theory regarding *aut dedere aut judicare* derived from Grotius³⁶⁶ and Vattel,³⁶⁷ more modern proponents, such as Gilbert Guillaume,³⁶⁸ claimed that the related precept of *aut dedere aut punire* could be traced further back to the Spanish legal writer Diego de Covarrubias y Leyva. The first international convention to include a provision on the obligation *aut dedere aut judicare* had been the International Convention for the Suppression of Counterfeiting Currency, adopted in Geneva in 1929. Following its inclusion in some subsequent international instruments, recognition of the obligation had become generalized with the entry into force of the 1970 Convention for the suppression of unlawful seizure of aircraft and a number of other conventions on cooperation in criminal matters. Since then, the international community had tended to include the obligation to extradite or to prosecute in practically all multilateral treaties concerning the suppression of certain crimes. Thus, the obligation *aut dedere aut judicare* was included as a necessary mechanism in all treaties on criminal matters.

79. The Special Rapporteur’s study of numerous multilateral and bilateral treaties containing that obligation would be a useful means of revealing evidence of *opinio juris* on the subject. Of course, in order for the Commission to decide whether *aut dedere aut judicare* was an obligation under customary law, that study would have to be rigorous and complemented by an analysis of national laws, State practice and existing case law.

³⁶⁶ See footnote 359 above.

³⁶⁷ E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1758), English translation by C. G. Fenwick, Washington D.C., Carnegie Institution, 1916.

³⁶⁸ G. Guillaume, “Terrorisme et droit international”, *Collected Courses of the Hague Academy of International Law, 1989*, vol. 215 (1990), pp. 287–416.

80. Obviously, the Commission’s work consisted not only in codifying international law, but also in putting forward proposals *de lege ferenda* for the progressive development of international law. In addition, the Commission must base its deliberations on its own substantial achievements, such as the 1996 draft code of crimes against the peace and security of mankind,³⁶⁹ which elaborated on that obligation. In determining and defining the scope of *aut dedere aut judicare*, the Commission should clarify the links which might exist with the principle of universal jurisdiction and distinguish between the two concepts. The obligation should not cover ordinary crimes but only limited categories of offences, such as crimes against the peace and security of mankind, crimes under international law, and the most serious crimes of concern to the international community.

81. As for the content of the obligation, it seemed inappropriate to describe the obligation as an alternative between extradition and prosecution, because a State’s obligation to prosecute an alleged offender present in its territory arose only when it did not grant extradition. In other words, the custodial State’s refusal to allow extradition generated the obligation to prosecute the suspect present in its territory and to exercise its criminal jurisdiction. If, on the other hand, it complied with a request for extradition, it would have fulfilled its obligation *aut dedere aut judicare*.

82. On the other hand, he agreed with Mr. Gaja that if the custodial State possessed the basis for exercising jurisdiction and received a request for extradition, the obligation was instead an obligation *aut judicare aut dedere* and the obligation to prosecute would not then flow from a refusal to allow extradition. If the custodial State prosecuted the alleged offender, it would have honoured its obligation but if, for any reason, it decided not to prosecute, it must allow the suspect’s extradition.

83. If no request for extradition was submitted, the custodial State would meet the obligation *aut dedere aut judicare* if it prosecuted the alleged offender. The Commission itself had provided guidance in that respect in paragraph (7) of the commentary to article 9 of the draft code of crimes against the peace and security of mankind, where it stated:

In the absence of a request for extradition, the custodial State would have no choice but to submit the case to its national authorities for prosecution. This residual obligation is intended to ensure that alleged offenders will be prosecuted by a competent jurisdiction, *that is to say*, the custodial State, in the absence of an alternative national or international jurisdiction.³⁷⁰

Further, paragraph (2) of the commentary to article 9 stated that:

[t]he fundamental purpose of this principle is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction.³⁷¹

84. As some members had indicated, there were some factors which could influence compliance with the

³⁶⁹ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

³⁷⁰ *Ibid.*, p. 32.

³⁷¹ *Ibid.*, p. 31.

obligation, for example when the basic laws of the custodial State prohibited the extradition of its nationals, which would mean that it could not allow extradition, in which case it would have to fulfil the obligation by prosecuting the suspect. Basic human rights standards were also important. The laws of many States and international conventions on extradition provided, for example, that extradition was not obligatory if the statutory penalties in the requesting State included degrading treatment or the death sentence, but that if it was certain that no such penalties would apply, extradition could be granted. It was also important to take account of guarantees of due process. In addition, it might be necessary to set priorities in the event that there were two or more competing requests for extradition of the same alleged offender by two or more States.

85. Lastly, surrender to the International Criminal Court or other international criminal tribunals was something entirely distinct from the obligation to extradite or prosecute. Nevertheless, any interconnections that might arise when the two processes were being carried out should be addressed, even though article 90 of the Rome Statute of the International Criminal Court governed such situations.

86. Turning to the text of draft article 1, he agreed that it should be worded in a simpler and more direct fashion. The reference to the “establishment, content, operation and effects” of the obligation could be deleted, as those subjects would be developed in later articles. On the other hand, draft article 1 should make it clear at the outset that the State on which the obligation was incumbent was the custodial State, not simply all States in general, and that it applied not to persons under its jurisdiction but to alleged offenders. That would avert the problem of determining whether the person was under the jurisdiction of the State or in its territory. In the definition of the custodial State, it might be made clear whether the obligation applied only when the alleged offender was in the territory of the State or also when he or she was under the jurisdiction of the State, for example, in a ship flying the flag of that State or in similar situations.

87. In conclusion, he thanked the Special Rapporteur for his excellent work and encouraged him to continue in the same vein.

88. Mr. GALICKI (Special Rapporteur), summing up the debate on his second report on the obligation to extradite or prosecute (*aut dedere aut judicare*), expressed his sincere gratitude to all members of the Commission for their constructive and friendly criticism. His special thanks went to the newly elected members who had responded to his request for comments, not only on the second report, but also on the preliminary report.

89. He had included in the second report many difficult problems and questions that had arisen, for the purpose of obtaining answers and suggestions, both from the members of the Commission and, later, from the delegates to the Sixth Committee. Members of the Commission had offered a wide variety of views, remarks and suggestions during the debate both on the substance and on the formal aspects of the exercise, starting with the title and ending

with the choice of the final form to be given to the Commission’s work.

90. As to the title, the notion of an “obligation” seemed to prevail over that of a “principle”. Accordingly, he agreed that, at least for the present, the title should be retained as currently formulated. Indeed, an “obligation” *aut dedere aut judicare* seemed to provide safer ground for continuing further constructive analysis than did a “principle”. It did not, of course, exclude the possibility, and even the necessity, of considering the parallel question of the right of States to extradite or prosecute as a kind of a *sui generis* counterbalance to that obligation.

91. Some doubts had been expressed as to the use of the Latin formula “*aut dedere aut judicare*”, and particularly with regard to the “*judicare*” element, which did not precisely reflect the scope of the term “prosecute”. While he agreed with those remarks, he thought it premature at that stage to concentrate on the precise formulation of the terms. In the preliminary report, he had reviewed the various terms used at different periods of the development of the obligation, starting with Grotius’s famous phrase “*punire*”. The precise meaning and exact scope of the term “*judicare*”, which was the one now generally used, should be defined in the future draft article 2, “Use of terms”, as should the other terms as used for the purposes of the draft articles. The total elimination of the Latin origin of the obligation in question would not be appropriate, since it persisted both in legislative practice and in the doctrine.

92. The debate in the Commission had generally focused on three main problems: first, how to approach the topic from the standpoint of the sources of the obligation; second, what kind of interrelationship, if any, between the obligation *aut dedere aut judicare* and the concept of universal jurisdiction should be accepted for the purposes of the draft; and, third, how the limits of the obligation’s scope and of the application of the future draft should be established. Although those questions had already been posed at the previous session, members’ views had been significantly clarified during the debate at the current session.

93. As to the first question, although there was a general consensus that treaty provisions existed which could be considered an incontrovertible source of the obligation *aut dedere aut judicare*, there seemed to be a growing interest among members in the possibility of also recognizing a customary basis for the obligation, at least with regard to some categories of crimes such as the most serious crimes recognized under customary international law. He conceded that, in giving examples of such crimes, he had omitted crimes against the peace and security of mankind. But he was pleased to note that one member of the Commission had added that category to those which could be considered as a possible background for the application of the obligation.

94. At the previous session, members of the Commission had been much more cautious with regard to the question whether the obligation had a customary basis. Now, their attitude seemed generally more permissive, although he acknowledged the warnings from many

members that such a conclusion should be based only on a very solid analysis of the international, legislative and judicial practice of States. As one member had correctly stressed, for that purpose it was necessary to ascertain both the practice and *opinio juris* of a large number of States. Therefore, it seemed worthwhile to continue requesting States to provide information, either directly from Governments or through their delegates to the Sixth Committee, although the latter's contribution had been criticized by some members.

95. The growing number of responses to the request contained in Chapter III of the Commission's report on the work of its fifty-eighth session in 2006 justified a certain optimism as to the likelihood of sufficient representative information being received from States in time for inclusion in the third report, to be submitted in 2008.

96. As to the second question, concerning universal jurisdiction, an evolution could also be seen as compared to the position taken by members the previous year. Then, the prevailing opinion had been that the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction should be given very careful treatment, and that the distinction between universal jurisdiction and the obligation *aut dedere aut judicare* should be clearly drawn. During the current session, however, a more permissive approach had been taken by a large number of members. It had been suggested that the two institutions should be studied in parallel, and that universal jurisdiction needed to be analysed in order to determine whether and, if so, where, that basis for jurisdiction might overlap with the obligation *aut dedere aut judicare*. He agreed with those suggestions, especially in the light of the interesting conclusions referred to by one member and contained in the resolution adopted by the Institute of International Law in 2005 in Krakow, entitled "Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes".³⁷² A mutual relationship, and to some extent an interdependence, between universal jurisdiction and the obligation *aut dedere aut judicare* had been clearly revealed in that resolution. However, he was convinced that the main focus of the Commission's consideration should remain the obligation to extradite or prosecute and that it should not be dominated by the question of universal jurisdiction.

97. Coming to the third question, concerning the scope of application of the draft articles and, as some members had suggested, the scope of the obligation *aut dedere aut judicare*, he agreed with the view that the two components of the obligation should not be treated as alternatives, but that the interrelationship and interdependence of the two elements—*dedere* and *judicare*—should be carefully and thoroughly analysed, preferably in the third report, which would also consider the specific characteristics of both elements and the conditions necessary for their application. Taking into account the opinions expressed by most members of the Commission, he would consider withdrawing his initial proposal for a possible "triple alternative" and would instead try

to present and analyse possible specific situations relating to the surrender of persons to the International Criminal Court which might have an impact on the obligation *aut dedere aut judicare*. However, he was not fully convinced that the time element in the proposed draft article 1 dealing with the scope of application should be treated in a unified way, without any differentiation between the periods relating to the establishment, operation and effects of the obligation in question.

98. Many members had suggested referring draft article 1 to the Drafting Committee for further elaboration. In principle, he was not opposed to that suggestion, but for practical reasons he would suggest instead that it should be referred to the Drafting Committee along with some other draft articles which he was planning to present at the next session. A small group of draft articles could more easily be considered by the Drafting Committee, taking into account possible interdependences between them. He had made a number of substantive suggestions concerning such future articles in the final part of his second report, and they seemed to have been fairly favourably received by the members of the Commission.

99. In view of the very full participation in the debate and owing to time constraints, he had been able to touch only on the most important general problems and questions raised. He could assure members that all remarks, views and comments, positive as well as critical, had been carefully noted and would be taken into account in the next report. He wished to express once more his deep gratitude to all members of the Commission for their valuable assistance and friendly help in his work on the obligation *aut dedere aut judicare*, which, thanks to them, would be of a better standard and much more effective. He was equally grateful to the Secretariat for assisting him in gathering appropriate materials and in preparing his two reports.

100. The CHAIRPERSON said that if he heard no objection, he would take it that, as recommended by the Special Rapporteur, the Commission wished to leave draft article 1 in abeyance pending the submission of further draft articles at the next session.

It was so decided.

Expulsion of aliens (concluded)* (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581)

[Agenda item 7]

PROGRESS REPORT BY THE CHAIRPERSON
OF THE DRAFTING COMMITTEE

101. Mr. YAMADA (Chairperson of the Drafting Committee), introducing the third report of the Drafting Committee to the current session of the Commission, said that unlike the two previous reports, it was simply an oral progress report, and was devoted to the topic "Expulsion of aliens".

³⁷² Institute of International Law, *Yearbook*, vol. 71, Part II, Session of Krakow (2005), Resolution III, Paris, Pedone, 2006, p. 297.

* Resumed from the 2944th meeting.

102. At its 2926th meeting, the Commission had referred draft articles 1 and 2 proposed by the Special Rapporteur in his second report,³⁷³ as later revised, to the Drafting Committee. At its 2944th meeting, the Commission had also referred to the Drafting Committee draft articles 3 to 7, contained in the Special Rapporteur's third report (A/CN.4/581).

103. The Drafting Committee had held three meetings, on 26, 30 and 31 July 2007. While it had made good progress in its consideration of the draft articles, it had been unable to complete its work. Some of the articles that it had adopted had a bearing on the draft articles still to be considered. It had therefore been decided that the draft articles provisionally adopted thus far should remain in the Drafting Committee until it completed its work. That would afford it the flexibility to revisit all those draft articles once it had a full picture of the content of all the draft articles referred to it at the present session.

104. He wished to pay tribute to the Special Rapporteur, whose mastery of the subject, guidance and cooperation had greatly facilitated the Drafting Committee's work. He also thanked the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome.

105. The Drafting Committee had been able to make progress at three levels of generality. First, it had been able to reach agreement on several texts of parts of draft articles, including on the deletion of certain proposed texts. Secondly, it had decided to retain certain provisions in square brackets, on the understanding that it would examine them at a later stage in light of the treatment to be given to certain articles that had already been proposed or of whether the terms in question would be used in the draft articles at all. Thirdly, it had begun but been unable to complete discussion on some draft articles, although several alternative texts had been proposed.

106. Regarding the agreement reached on several texts of draft articles, including on the deletion of certain texts, the Drafting Committee had provisionally adopted texts of parts of draft articles 1 and 2, relating to scope and use of terms respectively. It would, however, revisit draft article 1, on scope, once it became clear how questions relating to expulsion of nationals, including questions of dual and multiple nationality, would be dealt with. With regard to draft article 2, the Drafting Committee had been able to reach agreement on the use of the terms "expulsion" and "alien" for the purposes of the draft articles. The definition of "expulsion" comprised a formal act (*acte juridique*) and conduct attributable to a State by which an alien was compelled to leave the territory of that State. The various elements would be further developed in the commentary, including the question of intention in the case of conduct consisting of an omission.

107. In view of the inclusion of conduct in the definition of expulsion, the Drafting Committee had not seen any reason for retaining the definition of "conduct" proposed by the Special Rapporteur in the light of the debate in plenary. The definition of "expulsion" did not include extradition

to another State or surrender to an international criminal court. The definition of "alien" omitted the phrase "except where the legislation of that State provides otherwise", which had been intended to safeguard the interests of those aliens who had acquired certain protected rights. That matter would be dealt with in the commentary. As the definition was linked with paragraph 2 of draft article 1, which was pending, the Drafting Committee might have to return to it later. In addition to deleting the definition of "conduct", the Drafting Committee had deleted the definition of "territory". It had been felt generally that the proposed definition might give rise to more problems than it solved. A more detailed description of the discussion on these issues would be given at the appropriate time.

108. The Drafting Committee had decided to place square brackets around draft article 1, paragraph 2. That provision, regarding aliens of particular relevance for the purposes of the draft articles, had a bearing on the definition of "alien" in draft article 2 and needed to be addressed at a later stage, once the Drafting Committee had decided further to clarify the scope of the draft articles through an inclusionary or exclusionary provision or a combination thereof. A new draft article addressing the exclusionary aspects of the matter had been proposed by the Special Rapporteur, but no definitive conclusions had been reached on it.

109. The Drafting Committee had also decided to examine the definition of "frontier" at a later stage when it would become clearer from the other draft articles whether such a definition was required. The understandings reached on texts or their deletion and on putting square brackets around certain provisions had been reflected in a conference room paper.³⁷⁴

110. Turning to provisions on which the Drafting Committee had been able to have some preliminary discussion without reaching a conclusive decision, he said, first, that in the light of the discussion on draft article 1, paragraph 2, the Special Rapporteur had proposed a new draft article which sought to exclude from the application of the draft those aliens whose departure from the territory of a State might be governed by special rules of international law. That provision was intended to cover aliens with special privileges and immunities and members of armed forces. The discussions in the Drafting Committee had resulted in alternative texts.

111. Secondly, the Drafting Committee had begun discussions on draft article 3, but had been unable to complete them owing to lack of time. The Special Rapporteur had proposed a text that sought, in part, to combine the original paragraphs 1 and 2. The texts proposed in relation to those draft articles on which discussions had been incomplete had been reflected in a conference room document, together with draft articles 4 to 7, which the Drafting Committee had not had an opportunity to discuss.

112. He hoped that the Commission would wish to take note of the progress made so far, which should assist the Drafting Committee in continuing its work on the topic at the following session.

³⁷³ Yearbook ... 2006, vol. II (Part One), document A/CN.4/573.

³⁷⁴ Unpublished.

113. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to take note of the progress report by the Chairperson of the Drafting Committee.

It was so decided.

Shared natural resources (concluded)* (A/CN.4/577 and Add.1–2, sect. A, A/CN.4/580, A/CN.4/L.717)

[Agenda item 2]

REPORT OF THE WORKING GROUP

114. Mr. CANDIOTI (Chairperson of the Working Group), introducing the report of the Working Group (A/CN.4/L.717), said that at its 2920th meeting, on 16 May 2007, the Commission had decided to establish a Working Group on shared natural resources to assist the Special Rapporteur in formulating a future work programme, taking into account the views expressed in the Commission on the Special Rapporteur's fourth report. The Working Group had held four meetings and had dealt with three issues, namely, the substance of the draft articles on the law of transboundary aquifers adopted on first reading;³⁷⁵ the final form that the draft articles should take; and issues involved in the consideration of oil and gas. Paragraphs 4 to 7 of the report of the Working Group reflected its deliberation on those matters.

115. It had been recognized that the draft articles adopted on first reading had already been submitted to States for comments. The comments made in the Working Group on the substance and form of the draft articles had been understood to be of an informal character, intended to assist the Special Rapporteur in considering future work on the topic. The Working Group had also exchanged views regarding the future consideration of shared oil and gas resources. It had been agreed, as a first step, that a questionnaire on State practice would be prepared for circulation to Governments. That measure would be accompanied by an effort by the Secretariat to identify expertise within the United Nations system to provide the necessary scientific and technical background information for further consideration of the subject. So far, preliminary contacts had been established with the United Nations Environment Programme (UNEP), whose Division of Technology, Industry and Economics was based in Paris, and with the United Nations Economic Commission for Europe.

116. It was his hope that the Commission would wish to take note of the report of the Working Group. He expressed appreciation to all the members of the Working Group for their useful contributions, to the Special Rapporteur for his diligence and helpful guidance, and to the Secretariat for its very efficient assistance to the Working Group.

* Resumed from the 2931st meeting.

³⁷⁵ For the text of the draft articles on the law of transboundary aquifers adopted on first reading by the Commission and the commentaries thereto, see *Yearbook ... 2006*, vol. II (Part Two), Chap. VI, sect. C, pp. 91 *et seq.*, paras. 75–76.

117. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to take note of the report of the Working Group on shared natural resources.

It was so decided.

The meeting rose at 12.50 p.m.

2948th MEETING

Monday, 6 August 2007, at 10.10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO
(Vice-Chairperson)

Present: Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its fifty-ninth session

CHAPTER V. Shared natural resources (A/CN.4/L.709 and Add.1)

1. The CHAIRPERSON invited the members of the Commission to consider chapter V of the draft report on shared natural resources.

A. Introduction (A/CN.4/L.709)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 11

Paragraphs 4 to 11 were adopted.

Paragraph 12

2. Ms. ESCARAMEIA proposed that the wording of the first sentence should be amended to read: "Pollution in relation to oil and natural gas stored in reservoir rock itself seemed to be minimal."

Paragraph 12, as amended, was adopted.

Paragraphs 13 and 14

Paragraphs 13 and 14 were adopted.

Paragraph 15

Paragraph 15 was adopted, subject to a minor drafting change.

Paragraph 16

3. Following a discussion in which Mr. McRAE, Mr. SABOIA and Mr. VASCIANNIE took part, it was proposed that, in the second sentence, the words “prevaricate on” should be replaced by the word “ask”.

It was so decided.

4. Following a discussion in which Ms. ESCARAMEIA, Mr. NOLTE, Mr. YAMADA and the CHAIRPERSON took part, it was decided that the Secretariat would amend the wording of paragraph 16 to reflect the fact that, during the debate in plenary, some members of the Commission had also stated that, in accordance with the relevant General Assembly resolutions, the Commission had been entrusted with the task of discussing the question of oil and natural gas, which was part of the topic.

Paragraph 16, as amended, was adopted.

Paragraphs 17 to 19

Paragraphs 17 to 19 were adopted.

Paragraph 20

5. Mr. PERERA proposed that, in the first sentence, the words “Some members” should be replaced by the words “The members”.

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 23

Paragraphs 21 to 23 were adopted.

Section B, as amended, was adopted.

Document A/CN.4/L.709, as amended, was adopted, subject to the insertion of section C, entitled “Shared natural resources: report of the Working Group”(A/CN.4/L.709/Add.1).

CHAPTER VIII. Responsibility of international organizations (A/CN.4/L.713 and Add.1–3)

6. The CHAIRPERSON invited the Commission to begin its consideration of chapter VIII of the draft report on responsibility of international organizations.

A. Introduction (A/CN.4/L.713)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 15

Paragraphs 4 to 15 were adopted.

Paragraph 16

7. Mr. HMOUD recalled that it was the Special Rapporteur who had prepared the supplementary draft article submitted to the Drafting Committee and paragraph 16 should therefore be amended by adding the following sentence before the last sentence: “The Special Rapporteur then submitted a different supplementary draft article on the same question.” The last sentence of paragraph 16 should therefore be amended to read: “... the Commission referred the supplementary draft article submitted by the Special Rapporteur to the Drafting Committee.”

Paragraph 16, as amended, was adopted.

Paragraphs 17 and 18

Paragraphs 17 and 18 were adopted, on the understanding that the numbers would be filled in by the Secretariat.

Section B, as amended, was adopted.

8. The CHAIRPERSON said that the Commission would continue its consideration of chapter VIII when documents A/CN.4/L.713/Add.2–3 had become available.

CHAPTER I. Organization of the session (A/CN.4/L.710)

9. The CHAIRPERSON invited the members of the Commission to consider chapter I of the draft report.

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

10. Ms. ESCARAMEIA said that the names of Mr. Candioti and Mr. Gaja should be added to the list of members of the Planning Group.

Paragraph 5, as amended, was adopted.

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

Paragraph 8

11. Mr. NOLTE said that the names of the members of the Working Group on the most-favoured-nation clause should be indicated. He therefore proposed that they should be added.

Paragraph 8, as amended, was adopted.

Paragraphs 9 to 12

Paragraphs 9 to 12 were adopted.

Chapter I of the draft report, as amended, was adopted.

The meeting rose at 11.10 a.m.

2949th MEETING

Monday, 6 August 2007, at 3 p.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO
(*Vice-Chairperson*)

Later: Mr. Ian BROWNLIE

Present: Mr. Brownlie, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Mr. Vargas Carreño (Vice-Chairperson) took the Chair.

Draft report of the Commission on the work of its fifty-ninth session (*continued*)

CHAPTER VII. *Effects of armed conflicts on treaties* (A/CN.4/L.708 and Corr.1 and Add.1)

A. Introduction (A/CN.4/L.708)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.708 and Corr.1)

Paragraph 4

Paragraph 4 was adopted.

Paragraph 5

Paragraph 5, as corrected in document A/CN.4/L.708/Corr.1, was adopted.

Paragraphs 5 bis and 5 ter

Paragraphs 5 bis and 5 ter, contained in document A/CN.4/L.708/Corr.1, were adopted, with an editorial correction to paragraph 5 bis proposed by Mr. McRae.

1. GENERAL REMARKS ON THE TOPIC

(a) Introduction by the Special Rapporteur

Paragraphs 6 to 9

1. Mr. GAJA said he wished to make a general remark on the manner in which the discussion on the topic had been presented in the draft report. A similar remark that he had made in the past had gone unheeded. Chapter VII, on the effects of armed conflicts on treaties, was very readable but represented what might be called creative

reporting. Chronological accuracy was obviously not sought in the interests of giving a clearer idea of the issues. However, that approach created certain distortions. Since the discussion was presented according to subtopics, the absence of comments on some subtopics might be taken as signifying that everyone agreed on those points. Moreover, the Special Rapporteur's responses were not always reflected, perhaps suggesting that he had had nothing to say on certain points, which was not necessarily true.

2. He suggested that at the Commission's sixtieth session the preparation of the draft report should be a bit less creative; above all, consistency amongst the various chapters should be pursued. The topic of armed conflict had been treated in a manner entirely different from the way in which other topics had been dealt with. The Secretariat should assist the Rapporteur in adopting a reasonably uniform approach.

3. In response to a question from the CHAIRPERSON, he said that he was not pressing for a revision of that chapter of the report, but simply urging the Secretariat to see that it was drafted differently in 2008.

Paragraphs 6 to 9 were adopted.

(b) Summary of the debate

Paragraph 10

4. Mr. PELLET said that the phrase "continued conception" in the second sentence seemed strange. He proposed that the word "continued" should be deleted.

Paragraph 10, as amended, was adopted.

Paragraph 11

Paragraph 11 was adopted.

(c) Special Rapporteur's concluding remarks

Paragraph 12

Paragraph 12 was adopted.

2. ARTICLE 1. SCOPE

(a) Introduction by the Special Rapporteur

Paragraph 13

Paragraph 13 was adopted.

(b) Summary of the debate

Paragraph 14

5. Mr. PELLET, supported by Mr. CANDIOTI, said that the second sentence was inaccurate: the word "conflicts" should be replaced by "treaties".

6. Mr. BROWNLIE (Special Rapporteur) said he did not think the sense was altered but had no objection to that proposal.

Paragraph 14, as amended, was adopted.

Paragraph 15

7. Mr. PELLET drew attention to the third sentence, which read: “It was also recalled that the Charter of the United Nations made reference to ‘regional arrangements’ ... as opposed to ‘international organizations’.” While that was certainly true from a legal standpoint, the reasoning seemed incomplete. Something should be added to clarify the point, or else the sentence should be deleted.

8. Mr. HASSOUNA said that he himself had made the point that the regional arrangements covered by Chapter VIII of the Charter were different from other organizations. He would prefer not to delete the phrase.

9. Ms. ESCARAMEIA said that she, like Mr. Pellet, had had difficulty understanding the sentence. It seemed strange to compare regional arrangements with international organizations. Moreover, she failed to see how the sentence fit in with the summary of the debate, and she agreed that something seemed to be missing in the logic. She supported the proposal to delete the sentence.

The third sentence of paragraph 15 was deleted.

Paragraph 15, as amended, was adopted.

Paragraph 16

Paragraph 16 was adopted, with an editorial correction proposed by Mr. Gaja.

Paragraph 17

Paragraph 17 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 18

Paragraph 18 was adopted.

3. ARTICLE 2. USE OF TERMS

(a) Introduction by the Special Rapporteur

Paragraph 19

Paragraph 19 was adopted.

(b) Summary of the debate

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

10. Mr. CAFLISCH said that in the footnote regarding the *Tadić* case, it was cited as having been decided by an “Appeals Chamber”, but the reference should also specify the court of which that Chamber was part. The case was extremely well known and the decision had been widely disseminated.

With that editorial correction, paragraph 21 was adopted.

Paragraph 22

11. Mr. GAJA said that as the final sentence reflected comments he had made, he wished to propose that the first part of that sentence should be amended to read: “One should also consider the relationship between obligations under a treaty and other obligations ...” The remainder of the sentence, “that States ... in conflicts.”, would remain unchanged. The footnote at the end of the paragraph wrongly cited the *Kiel Canal Collision* case: he had actually referred to the *S.S. “Wimbledon”* case.

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 24

Paragraph 24 was adopted.

4. ARTICLE 3. NON-AUTOMATIC TERMINATION OR SUSPENSION

(a) Introduction by the Special Rapporteur

Paragraph 25

Paragraph 25 was adopted.

(b) Summary of the debate

Paragraph 26

12. Mr. PELLET drew attention to the final sentence of the paragraph and proposed the addition of the word “solely” before the phrase “on the outbreak of armed conflict” and the word “also” before the phrase “on the likelihood of”.

Paragraph 26, as amended, was adopted.

Paragraph 27

Paragraph 27 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 28

13. Mr. PELLET said that in the final sentence, the French phrase “*en matière d’avis d’experts*” was a poor way of translating “in expert opinion”. He proposed that it should be replaced by “*sur le plan doctrinal*”.

14. Mr. BROWNLIE (Special Rapporteur) endorsed that proposal and said that in English as well, “in expert opinion” was not the “*mot juste*”. The use of the phrase “at the doctrinal level” would be a definite improvement.

Paragraph 28, as amended, was adopted.

5. ARTICLE 4. THE INDICIA OF SUSCEPTIBILITY TO TERMINATION OR SUSPENSION OF TREATIES IN CASE OF ARMED CONFLICT

(a) Introduction by the Special Rapporteur

Paragraph 29

Paragraph 29 was adopted.

(b) Summary of the debate

Paragraph 30

15. Mr. GAJA asked what was meant by the phrase “the interpretation of express provisions in a treaty” in the final sentence.

16. Mr. McRAE said that it was he who had made that point during the debate. What he had meant was that if a treaty contained no provisions on the consequences of armed conflict, there was nothing to interpret. A better way of conveying that point might be to replace the phrase “the interpretation of express provisions in a treaty” with the words “the interpretation of the provisions of a treaty”.

17. Mr. PELLET said that he had had the same problem as Mr. Gaja. One did not necessarily interpret only provisions in the light of articles 31 and 32 of the 1969 Vienna Convention: silence could also be interpreted. In the penultimate sentence, the words “*ou trop incertain*” (“or too uncertain”) should be inserted after the words “*trop compliqué*” (“too complicated”).

Paragraph 30, as amended by Mr. McRae and Mr. Pellet, was adopted.

Paragraphs 31 and 32

18. Mr. VÁZQUEZ-BERMÚDEZ proposed that a new paragraph should be inserted after paragraph 32 to reflect a view that had been expressed during the debate in plenary but was not covered in the draft report. The new paragraph would read: “It was also suggested that in addition to the intention of the parties another criterion should be included, namely the nature of the treaty, which depends on its subject matter.”

19. Mr. HMOUD recalled that there had also been a suggestion to cite the nature of armed conflict as an additional criterion. He proposed that an appropriate reference to the nature of armed conflict should be included in the new paragraph proposed by Mr. Vázquez-Bermúdez.

20. Mr. BROWNLIE (Special Rapporteur) said that the point made by Mr. Vázquez-Bermúdez was already covered in paragraph 31.

21. Mr. PELLET endorsed Mr. Brownlie’s comments. It would make more sense to make an addition to the second sentence of paragraph 31 following the colon, than to add a new paragraph, which in any case should logically follow paragraph 31 and not paragraph 32.

22. Mr. BROWNLIE (Special Rapporteur) said that paragraph 31 contained a long list of factors, including “the extent of the conflict”, which was more inclusive than the proposed new paragraph.

23. Mr. VÁZQUEZ-BERMÚDEZ said that there was no reference in paragraph 31 to the nature of the treaty, which was quite different from the object of the treaty. He would not insist on his proposal for a new paragraph; however, the point that had been made in plenary must be reflected somewhere. If the Commission decided that it should be reflected in paragraph 31, he would suggest

that the part of the second sentence which read “including: the object of the treaty” should be reformulated to read “including: the nature of the treaty, which depends on its subject matter”.

24. Mr. SABOIA endorsed the basic thrust of the proposal by Mr. Vázquez-Bermúdez and said that he would be in favour of an amendment to paragraph 31, if the Commission deemed it appropriate.

25. Ms. ESCARAMEIA said that the points made by Mr. Hmoud and Mr. Vázquez-Bermúdez could be reflected through two simple amendments to the second sentence of paragraph 31. First, the phrase “the extent of the conflict” should be expanded to read: “the nature and extent of the conflict”. Secondly, the phrase “including: the object of the treaty” should be reformulated to read: “including: the nature of the treaty, i.e. its subject matter; the object of the treaty ...”, with the remainder of the sentence unchanged.

26. Mr. VÁZQUEZ-BERMÚDEZ endorsed that proposal.

Paragraph 31, as amended by Ms. Escarameia, was adopted.

Paragraph 32 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 33

Paragraph 33 was adopted.

6. ARTICLE 5. EXPRESS PROVISIONS ON THE OPERATION OF TREATIES

ARTICLE 5 BIS. THE CONCLUSION OF TREATIES DURING ARMED CONFLICT

(a) Introduction by the Special Rapporteur

Paragraphs 34 and 35

Paragraphs 34 and 35 were adopted.

(b) Summary of the debate

Paragraph 36

Paragraph 36 was adopted.

7. ARTICLE 6 BIS. THE LAW APPLICABLE IN ARMED CONFLICT

(a) Introduction by the Special Rapporteur

Paragraph 37

Paragraph 37 was adopted.

(b) Summary of the debate

Paragraph 38

27. Ms. ESCARAMEIA expressed concern about the final clause in the first sentence, which read: “so as to clarify that human rights treaties were not to be excluded as a result of the operation of *lex specialis*”. Since it was a point that she had raised during the debate, she would prefer it to be reflected more accurately. She therefore proposed that it should be reformulate to read: “so as to

clarify that human rights treaties were not to be excluded as a result of the operation of international humanitarian law and that the categorization as *lex specialis* depended on the specific situation at issue”.

28. Mr. PELLET said that the reference to international humanitarian law would suffice, particularly since the question of *lex specialis* was already dealt with in the second sentence. It did not seem necessary to have two rather lengthy explanations of *lex specialis* in the same paragraph.

29. Mr. McRAE said that the reference to international humanitarian law was understandable, but that the second part of Ms. Escameia’s proposed text might give rise to confusion.

30. Mr. BROWNLIE (Special Rapporteur) said that the reference to *lex specialis* should be retained, since it related to the advisory opinion issued by the ICJ in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case.

31. Ms. ESCARAMEIA said that, in her view, the reference to *lex specialis* in the first sentence was too broad: the Court had been referring to a specific situation. Her intent, however, was merely that her view, right or wrong, should be accurately reflected in the report.

32. Mr. KOLODKIN pointed out that several members had referred to the Court’s advisory opinions in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case and in the *Legality of the Threat or Use of Nuclear Weapons* case and how they ought to be covered in draft article 6 *bis*. During the debate, he had recalled that in both advisory opinions the Court had used the term *lex specialis* with reference to humanitarian law. However, he felt that the second sentence of the paragraph reflected Ms. Escameia’s views.

33. Mr. SABOIA said that there was no clear link between the first and second sentences. The former referred to one of the advisory opinions in question, while the latter did not. In any event, he requested that the second sentence should be retained as currently worded because it reflected his own view. Perhaps another sentence could be added at the end of the paragraph to reflect Ms. Escameia’s differing view.

34. Ms. ESCARAMEIA said that she, too, had referred to the Court’s advisory opinions and might well have interpreted them differently from other members. Perhaps, as Mr. Saboia had suggested, it would be a good idea to draft another sentence indicating that some members considered that the advisory opinions in question did not necessarily lead to the conclusion that the law of armed conflict always constituted *lex specialis*.

35. The CHAIRPERSON suggested that, in order to expedite the proceedings, Ms. Escameia, Mr. Saboia, Mr. Pellet and any other members who so wished should briefly consult with a view to reaching agreement on a suitable text for paragraph 38.

It was so decided.

36. Ms. ESCARAMEIA proposed that, on the basis of informal consultations she had just held with Mr. Hmoud and Mr. Saboia, the following sentence should be added at the end of the paragraph: “Some other members were of the view that the article should be deleted because the applicability of human rights law, environmental law or international humanitarian law depended on specific circumstances, which could not be subsumed under a general article.”

37. Mr. GAJA said that he would have difficulty accepting the additional sentence proposed by Ms. Escameia. The phrase “depended on specific circumstances” suggested, doubtless unintentionally, that human rights law, environmental law and international humanitarian law generally did not apply.

38. Ms. ESCARAMEIA suggested that the word “choice” could be inserted, so that the relevant phrase would read “the choice of applicability of human rights law, environmental law or international humanitarian law ...”. That would avoid the implication that none of the bodies of law in question would apply.

39. Ms. JACOBSSON said that the word “choice” should be avoided. On the contrary, the paragraph dealt with one of the few situations in international law where States had no choice. She agreed with Mr. Gaja, however, that the wording of the proposed additional sentence should be amended.

40. Mr. HMOUD said that the intention behind the proposed additional sentence was to make it clear that there was no contradiction between the two bodies of law applicable in armed conflict.

41. Mr. PELLET said that the reference to *lex specialis* at the end of the first sentence needed some explanation; as it stood, it was ambiguous. He therefore suggested that the phrase “constituted by humanitarian law” should be inserted after the words “*lex specialis*”, in keeping with the wording of paragraph 106 of the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. By the same token, the word “humanitarian” should be inserted before the phrase “law of armed conflict” in the last sentence.

42. The CHAIRPERSON suggested that the Commission should accept the amendment proposed by Mr. Pellet and the addition of a new sentence worded as additionally proposed by Ms. Escameia.

It was so decided.

Paragraph 38, as amended, was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 39

43. Mr. GAJA said that he had some misgivings about the tone of the paragraph and in particular the second sentence, which read: “His instructions had been to take into account what the International Court of Justice had said in its advisory opinion in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, yet he

now conceded that the text should also refer to the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.” Perhaps the sentence should be redrafted.

44. Mr. BROWNLIE (Special Rapporteur) said that, in his view, the paragraph satisfactorily reflected the sequence of events relating to the preparation of draft article 6. It might now seem redundant, since the Working Group had subsequently decided to delete the draft article. However, he saw no need for any redrafting.

45. Mr. GAJA said that, in the light of those comments, he would not insist on any redrafting.

Paragraph 39 was adopted.

8. ARTICLE 7. THE OPERATION OF TREATIES ON THE BASIS OF THE NECESSARY IMPLICATION FROM THEIR OBJECT AND PURPOSE

(a) Introduction by the Special Rapporteur

Paragraph 40

Paragraph 40 was adopted.

(b) Summary of the debate

Paragraph 41

46. Mr. PELLET said that the words in brackets at the end of the penultimate sentence should be converted into a footnote.

Paragraph 41, as amended, was adopted.

Paragraph 42

Paragraph 42 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 43

Paragraph 43 was adopted.

9. ARTICLE 8. MODE OF SUSPENSION OR TERMINATION

(a) Introduction by the Special Rapporteur

Paragraph 44

Paragraph 44 was adopted.

(b) Summary of the debate

Paragraph 45

47. Mr. GAJA noted that there were no concluding remarks by the Special Rapporteur on draft articles 8 or 9. The Commission’s “creative reporting” approach would seem to demand some response to the debate from the Special Rapporteur, unless the intention was for the reader to interpret what lay behind the Special Rapporteur’s silence.

48. Ms. ESCARAMEIA said that the paragraph failed to reflect one aspect of the topic that had been discussed at length in the Commission. She therefore proposed that a sentence should be added at the end of the paragraph,

to read: “Some members also stated that the procedure foreseen in article 65 *et seq.* of the Vienna Convention on the Law of Treaties could not be applicable to situations of armed conflict, in which the procedure should be simpler.”

49. Mr. BROWNLIE (Special Rapporteur) said that he had no objection to the proposed amendment. That point of view had been expressed and should be reflected in the report.

50. Mr. CAFLISCH said that the discussion had dealt with a point that had yet to be resolved and should indeed be reflected in the report. He suggested, however, that the words “would not ... be applicable” should be amended to read “might not ... be applicable”.

51. Mr. McRAE suggested that the words “in which” should be replaced by the words “for which”.

Paragraph 45, as amended, was adopted.

10. ARTICLE 9. THE RESUMPTION OF SUSPENDED TREATIES

(a) Introduction by the Special Rapporteur

Paragraph 46

Paragraph 46 was adopted.

(b) Summary of the debate

Paragraph 47

Paragraph 47 was adopted.

11. ARTICLE 10. EFFECT OF THE EXERCISE OF THE RIGHT TO INDIVIDUAL OR COLLECTIVE SELF-DEFENCE ON A TREATY

(a) Introduction by the Special Rapporteur

Paragraph 48

Paragraph 48 was adopted.

(b) Summary of the debate

Paragraph 49

Paragraph 49 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 50

52. Mr. BROWNLIE (Special Rapporteur) said that he wished to recast the final phrase, “uncharted juridical territory”, which was a mixed metaphor: territory was “mapped” rather than “charted”. In response to a suggestion by Mr. McRae, he said that the phrase should read “uncharted juridical seas” rather than “uncharted juridical waters”.

53. Mr. PELLET said that the Special Rapporteur had not, as stated in the first sentence of the paragraph, “recalled” the general view but had “noted” it.

Paragraph 50, as amended by Mr. Brownlie (Special Rapporteur) and Mr. Pellet, was adopted.

12. ARTICLE 11. DECISIONS OF THE SECURITY COUNCIL

ARTICLE 12. STATUS OF THIRD STATES AS NEUTRALS

ARTICLE 13. CASES OF TERMINATION OR SUSPENSION

ARTICLE 14. THE REVIVAL OF TERMINATED OR SUSPENDED TREATIES

(a) Introduction by the Special Rapporteur

Paragraph 51

54. Mr. McRAE said that the third sentence lacked a main verb. He suggested that it should be reworded to read: “The point was that the issue of neutrality had not been ignored; it was just that the draft articles were to be without prejudice.”

Paragraph 51, as amended, was adopted.

(b) Summary of the debate

Paragraph 52

55. Mr. PELLET said that two aspects of the paragraph gave rise to concern. First, he could see no reason why Chapter VII of the Charter of the United Nations should not be given its proper title, which was “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”. The Commission should not tinker with the original wording. Secondly, the meaning of the penultimate sentence as currently worded was obscure. He therefore suggested that the phrase “in the case of a topic specifically concerned with the effect of armed conflicts on treaties” should be inserted after the word “insufficient”.

Paragraph 52, as amended, was adopted.

Paragraph 53

Paragraph 53 was adopted.

Paragraph 54

56. Mr. BROWNLIE (Special Rapporteur) said that his view was that a fundamental change of circumstances following the outbreak of armed conflict between States parties to a treaty belonged to a different area of law; he had never said that the outbreak of armed conflict could not constitute a fundamental change of circumstances or a supervening impossibility of performance. He resented being misrepresented on such a basic question of law.

Paragraph 54 was deleted.

Paragraph 55

Paragraph 55 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 56

Paragraph 56 was adopted.

Section B, as amended, was adopted.

Mr. Brownlie took the Chair.

CHAPTER VIII. *Responsibility of international organizations (continued)* (A/CN.4/L.713 and Add.1–3)C. **Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (A/CN.4/L.713/Add.1–3)**

1. TEXT OF THE DRAFT ARTICLES

Paragraph 1

Paragraph 1 was adopted.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-NINTH SESSION

Paragraph 2

Paragraph 2 was adopted.

Commentary to the chapeau of Part Two (Content of the international responsibility of an international organization)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to the chapeau of Part Two (Content of the international responsibility of an international organization) was adopted.

CHAPTER I. *General principles*

Commentary to draft article 31 (Legal consequences of an internationally wrongful act)

Paragraph (1)

57. Mr. VALENCIA-OSPINA asked whether it was necessary to number the paragraph, as there was only one.

58. The CHAIRPERSON replied that it was unnecessary.

The commentary to draft article 31, as amended, was adopted.

Commentary to draft article 32 (Continued duty of performance)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

59. Mr. PELLET said that paragraph (2) was too succinct, since the last sentence merely stated “This will depend on the character of the obligation concerned.” For its meaning to be clear to the reader, the sentence should at the very least indicate which obligations could still be performed after a breach and which could not. An example of relevance to the article should be provided, as had been done in paragraph (4) of the commentary to article 33, but given the paucity of practice, a theoretical example would suffice. It was awkward to have such insubstantial commentaries, and he therefore asked the Special Rapporteur to find some examples.

60. Mr. GAJA (Special Rapporteur) said that the commentaries could be lengthened if the Commission so wished. He would look at the commentaries to the corresponding draft articles on the responsibility of States

for internationally wrongful acts³⁷⁶ in order to see if they offered any examples and, if they did, he would adapt them. If they did not provide any examples, he would submit that Mr. Pellet's remark had been made five years too late. Personally, he would prefer to retain the commentary as it stood rather than possibly stating the obvious.

61. The CHAIRPERSON suggested that after the Special Rapporteur had consulted the commentaries to the draft articles on the responsibility of States for internationally wrongful acts, he should report back briefly to the Commission at the following meeting.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Commentary to draft article 33 (Cessation and non-repetition)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to draft article 33 was adopted.

Commentary to draft article 34 (Reparation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraphs (3) and (4)

62. Mr. PELLET took issue with the phrase "*Ce fait révèle l'insuffisance ...*" in the French version of paragraph (3). The corresponding phrase "This fact points to ..." in the English was somewhat better. In his opinion, it would be more apt in the French version to use the expression "*Ce fait résulte de l'insuffisance ...*" ("This fact results from the inadequacy ..."). In addition, the French version of the last sentence in that paragraph was incomprehensible. In his view, the legal consequences to which it referred were those deriving from the organization's responsibility. Even if repetition was normally shunned in French, it would be clearer if the sentence spoke of the "*conséquences juridiques de sa responsabilité*" ("legal consequences of its responsibility"). Furthermore, paragraphs (3) and (4) should be inverted, because paragraph (4) concerned the actual principle of reparation and should therefore precede paragraph (3), whereas paragraph (3) concerned the implementation of the principle and ought to follow paragraph (4).

63. Mr. GAJA (Special Rapporteur) said that in English the words "results from" would be too strong; he therefore suggested the phrase "This fact is linked to the inadequacy ...". He agreed that it would be judicious to amend the last part of the last sentence of paragraph (3) so that it referred to the "legal consequences of the responsibility that it incurs under international law". On the other hand, he considered it inadvisable to invert paragraphs (3) and (4), as the argument regarding *ex gratia* compensation in paragraph (4) stood in opposition to what had been said in paragraph (3). Of course, it would be possible to ignore *ex gratia* compensation entirely, but none of the Commission members had deemed such action wise because the draft articles under consideration had to take into account

the fact that some international organizations had inadequate funds while others were very generous. He therefore considered that the order of the paragraphs in the commentary should be left unchanged, but would bow to the Commission's decision on the matter.

64. Mr. PELLET requested clarification of the meaning of "*indique le contraire*" and "point in a different direction", because he did not see why the fact that international organizations sometimes granted *ex gratia* compensation would exempt them from the legal consequences of their responsibility; that was a *non sequitur*. The opposite would be that they were bound to provide compensation. Since full reparation was the subject of paragraph (2), paragraph (4) would make sense if it followed paragraph (2), but as it stood paragraph (4) was ambiguous.

65. The CHAIRPERSON agreed that Mr. Pellet had some justification for stating that paragraph (4) was unclear.

66. Mr. McRAE said that part of the difficulty lay in the fact that the "different direction" related to the first and, possibly, second sentence of paragraph (3) rather than to the third sentence of that paragraph. He therefore suggested that recasting the last sentence of paragraph (3) to read "However, that inadequacy cannot exempt an organization from the legal consequences that result from its responsibility under international law" would avoid the problematical phrase "legal consequences that it incurs" while conveying the desired meaning. He further suggested that the difficulty posed by paragraph (4) could be surmounted by running its two sentences together so that they read: "The fact that international organizations sometimes grant compensation *ex gratia* is not due to an abundance of resources ...".

67. Mr. GAJA (Special Rapporteur) said that he could accept Mr. McRae's suggestions but would still prefer, in the second sentence in paragraph (3), the expression "linked to" rather than "results from".

Paragraphs (3) and (4), as amended, were adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

The commentary to draft article 34, as amended, was adopted.

Commentary to draft article 35 (Irrelevance of the rules of the organization)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

68. Mr. McRAE said that "suffer exceptions" should be replaced by "admit of exceptions".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to draft article 35, as amended, was adopted.

³⁷⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, commentary to draft article 29, p. 88.

Commentary to draft article 36 (Scope of international obligations set out in this Part)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

69. Mr. PELLET said that the inclusion of the word “likely” in the last sentence of the paragraph was indicative of an excessively cautious approach: the issues of international responsibility arising in the context of employment were certainly similar to those examined in the draft. He asked if any of the draft articles actually stipulated that an international organization was exempt from responsibility *vis-à-vis* its staff. The radical statement contained in paragraph (5) had been a shattering revelation, especially as in some of his reports the Special Rapporteur had rightly quoted examples of the abundant case law of international administrative tribunals.

70. Mr. GAJA (Special Rapporteur) expressed surprise at Mr. Pellet’s comment because, as paragraph (4) made clear, article 36, paragraph 2, was calqued on article 33, paragraph 2, of the draft articles on responsibility of States for internationally wrongful acts.³⁷⁷ That point had been discussed both in plenary and in the Drafting Committee. Part One of the draft articles dealt with the responsibility of international organizations in general, while Part Two and Part Three would cover only such obligations of international organizations as arose from internationally wrongful acts towards States, other international organizations or the international community as a whole. The limitation had been established for reasons which had been fully explained. That was why it was probably more accurate not to make any reference to an international organization’s responsibility towards its staff. The words “likely to be” had been included because the Commission had not analysed that matter and the draft articles and commentaries thereto did not deal with questions of employment. Assertions must not be made unless they were supported by proof, and that was the reason for the cautious tone of the sentence. Nevertheless, as it would not be too bold to say “are similar to”, he could accept the deletion of “are likely to be”. He was not, however, prepared to reopen the question of whether the Commission should include employment issues in the draft articles.

71. Mr. PELLET said that, although he had been convinced by most of the Special Rapporteur’s reply, the paragraph should nevertheless be amended because it was too late to make such a bald statement. He suggested that the sentence should read: “It emerges from article 36, paragraph 2, that the consequences of these breaches are not covered by the draft; certain issues of international responsibility arising in the context of the international civil service are very similar to those examined in the draft.” That wording would make sense and would be consistent with the idea that the draft articles on responsibility of States for internationally wrongful acts were not being called into question. While he had been persuaded by the Special Rapporteur’s argument, he would prefer not to beg the question by omitting an express reference to the relevant article.

Lastly, he once again urged the deletion of the phrase “likely to be”, since he was familiar with the branch of law in question and he saw no reason for such a defensive attitude.

72. Mr. GAJA (Special Rapporteur) repeated that he was prepared to delete “likely to be” but said that he had not quite grasped Mr. Pellet’s first proposal. The purpose of the paragraph in question was to explain the text of the article. It should not imply that what was said in Part Two with regard to States or other organizations would necessarily apply to natural persons.

73. Mr. PELLET drew attention to the fact that article 1, on the scope of the draft articles, stated that the draft articles applied to the international responsibility of an international organization for an act that was wrongful under international law. It excluded responsibility *vis-à-vis* officials or staff only in article 36, paragraph 2. While he agreed with the explanation of that exclusion provided by the Special Rapporteur, namely that the draft articles on the responsibility of international organizations should not diverge from those on State responsibility, he still did not concur with the wording of the last sentence of paragraph (5) and thought that it should be amended in the manner he had proposed.

74. The CHAIRPERSON suggested that the Special Rapporteur should prepare a proposal which would satisfy Mr. Pellet and submit it to the Commission at the next meeting.

The meeting rose at 5.55 p.m.

2950th MEETING

Tuesday, 7 August 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caffisch, Mr. Candioti, Mr. Comisário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its fifty-ninth session (*continued*)

CHAPTER VIII. *Responsibility of international organizations (continued)* (A/CN.4/L.713 and Add.1-3)

C. *Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (continued)* (A/CN.4/L.713/Add.1-3)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-NINTH SESSION (*continued*)

1. The CHAIRPERSON recalled that two questions had been left in abeyance during the adoption of the

³⁷⁷ *Ibid.*, pp. 28 and 94.

commentaries contained in the addendum to the chapter on responsibility of international organizations (A/CN.4/L.713/Add.1): paragraph (2) of the commentary to draft article 32 and paragraph (5) of the commentary to draft article 36. The Special Rapporteur had indicated that he would check the corresponding article of the draft articles on responsibility of States for internationally wrongful acts and that he would meet with Mr. Pellet to finalize new wording for the last sentence of paragraph (5) of the commentary to draft article 36.

Commentary to draft article 32 (Continued duty of performance) (concluded)

Paragraph (2) (concluded)

2. Mr. GAJA (Special Rapporteur), referring to paragraph (2) of the commentary to draft article 32, proposed that the words “and of the breach” should be inserted at the end of the second sentence and that a third sentence should be added, to read: “Should, for instance, an international organization be under the obligation to transfer some persons or property to a certain State, that obligation could no longer be performed once those persons or that property have been transferred to another State in breach of the obligation.”

Paragraph (2) of the commentary to draft article 32, as amended, was adopted.

The commentary to draft article 32, as amended, was adopted.

Commentary to draft article 36 (Scope of international obligations set out in this Part) (continued)

Paragraph (5) (continued)

3. Mr. GAJA (Special Rapporteur) said that the last sentence of paragraph (5) of the commentary to draft article 36 should be amended to read: “While the consequences of these breaches, as stated in paragraph (1), are not covered by the draft, certain issues of international responsibility arising in the context of employment are arguably similar to those that are examined in the draft.”

CHAPTER IV. *Reservations to treaties* (A/CN.4/L.706 and Add.1–3)

4. The CHAIRPERSON invited the members of the Commission to begin the adoption of chapter IV, on reservations to treaties, of the draft report of the Commission.

A. **Introduction** (A/CN.4/L.706)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

5. Ms. ESCARAMEIA asked whether the information in the footnote at the end of the paragraph was up to date.

6. Mr. PELLET (Special Rapporteur) said that he would check on that point and forward the relevant information to the Secretariat.

Paragraph 5 was adopted, subject to that amendment.

Paragraphs 6 to 9

Paragraphs 6 to 9 were adopted.

Section A was adopted, subject to the amendment of paragraph 5.

B. **Consideration of the topic at the present session** (A/CN.4/L.706/Add.1–2)

Paragraph 1

7. Mr. PELLET (Special Rapporteur) said that, since the topic was his, he had drafted the commentary and he had noticed that a number of mistakes had slipped through. He would therefore give the corrections directly to the Secretariat, unless the English version was also affected. He also asked what was meant by the asterisk which appeared in parentheses in paragraph 1 of the French text.

8. The CHAIRPERSON said that the Secretariat would check whether the asterisk could be deleted.

Paragraph 1 was adopted.

Paragraphs 2 and 3

9. The CHAIRPERSON said that paragraphs 2 and 3 should be replaced by the following:

“2. The Commission considered the eleventh report of the Special Rapporteur at its 2914th to 2920th meetings, held on 7 to 11 and on 15 and 16 May 2007, and the twelfth report at its 2936th to 2940th meetings, held on 13 and on 17 to 20 July 2007.

“3. At its 2917th, 2919th and 2920th meetings, held on 10, 15 and 16 May 2007, the Commission decided to refer draft guidelines 2.6.3 to 2.6.6, 2.6.7 to 2.6.15 and 2.7.1 to 2.7.9 to the Drafting Committee and to review the wording of draft guideline 2.1.6 in the light of the discussion. At its 2940th meeting, held on 20 July, the Commission decided to refer draft guidelines 2.8 and 2.8.1 to 2.8.12 to the Drafting Committee.”

Paragraphs 2 and 3, as amended, were adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS ELEVENTH REPORT

Paragraph 4

10. Mr. VASCIANNIE proposed that the words “to Practice” should be inserted after “Guide” in the fourth line.

Paragraph 4, as amended, was adopted.

Paragraph 5

11. The CHAIRPERSON, speaking as a member of the Commission, proposed that the end of the last sentence should be modified to read: “... the object and purpose of the treaty would render ineffective the procedure for acceptance of and objections to reservations under article 20”.

Paragraph 5, as amended, was adopted.

Paragraph 6

12. Mr. CAFLISCH, referring to the last sentence, said that it was not “surprising” that States invoked incompatibility with the object and purpose of the treaty as a ground when formulating an objection.

13. Mr. PELLET (Special Rapporteur) said that he had in fact intended to propose that the end of the sentence should be amended to read: “States did, surprisingly enough, quite frequently invoke that very ground.”

14. Mr. CAFLISCH said that it was the word “surprisingly” which posed a problem for him, but he would not insist.

Paragraph 6, as amended by the Special Rapporteur, was adopted.

Paragraph 7

15. Mr. PELLET (Special Rapporteur) said that the paragraph should read: “Draft guideline 6.1.3 conveyed the idea that any State or international organization had the freedom to make objections.”

Paragraph 7, as amended, was adopted.

Paragraph 8

16. Mr. PERERA said that, in the sixth line, the words “the reservation” should be replaced by “the objection”.

17. Mr. VASCIANNIE said that the title of the advisory opinion referred to in the paragraph should be cited [*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*].

18. Mr. PELLET (Special Rapporteur) said that the sentence related to the position of Sir Humphrey Waldock and that reference should thus be made to his report.³⁷⁸

19. The CHAIRPERSON said that the Secretariat would take care of the matter.

Paragraph 8, as amended, was adopted.

Paragraphs 9 to 11

Paragraphs 9 to 11 were adopted.

Paragraph 12

20. Mr. GAJA proposed that the third sentence should be amended to read: “The intention should be expressed at the latest when the objection would produce its full effects.”

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 18

Paragraphs 13 to 18 were adopted.

Paragraph 19

21. Mr. PELLET (Special Rapporteur) said that the word “Thus” at the beginning of the third sentence should be deleted because the third sentence was not an illustration of the preceding one, but introduced a different idea.

Paragraph 19, as amended, was adopted.

Paragraphs 20 and 21

Paragraphs 20 and 21 were adopted.

2. SUMMARY OF THE DEBATE

Paragraph 22

22. Mr. GAJA, noting that it was his opinion that was reflected in paragraph 22, said that two amendments should be made. In the second sentence, the words “did not draw any distinction” should be replaced by “did not expressly make any distinction” and the beginning of the third sentence should be deleted so that the sentence would start with the words “One might well ask”.

Paragraph 22, as amended, was adopted.

Paragraphs 23 to 26

Paragraphs 23 to 26 were adopted.

Paragraph 27

23. Mr. McRAE, recognizing the comment he had made on NAFTA, proposed that the words “certain ‘reservations’ or derogations” should be replaced by “certain derogations, but called them reservations”.

Paragraph 27, as amended, was adopted.

Paragraph 28

24. Mr. NOLTE said that, in the third line, the word “clarified” should be replaced by “qualified”.

Paragraph 28, as amended, was adopted.

Paragraphs 29 to 37

Paragraphs 29 to 37 were adopted.

Paragraph 38

25. Mr. GAJA said that, in the second sentence, the words “should also be drawn” should be replaced by “was drawn”.

Paragraph 38, as amended, was adopted.

Paragraphs 39 and 40

Paragraphs 39 and 40 were adopted.

Paragraph 41

26. Mr. PELLET (Special Rapporteur) said that the words “did not produce legal effects” at the end of the first sentence should be replaced by “did not produce any legal effect”.

Paragraph 41, as amended, was adopted.

³⁷⁸ Yearbook ... 1962, vol. II, document A/CN.4/144 and Add.1.

Paragraphs 42 and 43

Paragraphs 42 and 43 were adopted.

Paragraph 44

27. Mr. PELLET (Special Rapporteur) said that the last part of paragraph 44, starting with the third sentence, should be made into a separate paragraph 44 *bis*.

Paragraph 44, as amended, was adopted.

Paragraph 45

28. After a debate in which Mr. PELLET (Special Rapporteur), Ms. ESCARAMEIA and Mr. GAJA took part, Mr. PELLET proposed that the penultimate sentence should be amended to read: "An absolute prohibition seemed far too categorical to be justified. For other speakers, it was not possible to draw an exact parallel between widening of the scope of a reservation and widening of the scope of an objection." He also suggested that in the last line, the words "an additional" should be replaced by "a widened".

It was so decided.

Paragraph 45, as amended, was adopted.

Paragraph 46

29. Mr. PELLET (Special Rapporteur) said that the last sentence should be made into a separate paragraph 46 *bis*.

30. Mr. GAJA said that the words "every reservation" in the second sentence should be replaced by "different reservations".

Paragraph 46, as amended, was adopted.

3. SPECIAL RAPPORTEUR'S CONCLUDING REMARKS

Paragraph 47

Paragraph 47 was adopted.

Paragraph 48

31. Mr. PELLET (Special Rapporteur) said that the end of the last sentence should be amended to read: "given that the Guide to Practice contained only residual rules, which States were free to follow or not, by rendering them inapplicable through treaty provisions which provided otherwise". It was not true that the Guide to Practice contained only "recommendations": it aimed to reflect legal rules, even if they were not binding.

The adoption of paragraph 48 was postponed pending the English translation of the amendment to the last sentence.

Paragraph 49

32. Mr. NOLTE, noting that there was an inconsistency in the English text between the first and the last sentences, suggested that the words "should be included in the context of" in the first sentence should be replaced by "should be put in the context of".

33. Mr. CAFLISCH proposed that, in the English version, in the first sentence, the words "somewhat convinced by the argument" should be replaced by "receptive to the argument".

Paragraph 49, as amended in the English version, was adopted.

Paragraphs 50 to 52

Paragraphs 50 to 52 were adopted.

Paragraph 53

34. Mr. FOMBA said that, in the French version, the words "*plutôt qu'au caractère*" should be replaced by "*plutôt que sur le caractère*".

Paragraph 53, as amended in the French version, was adopted.

Paragraphs 54 and 55

Paragraphs 54 and 55 were adopted.

Paragraph 56

35. Mr. PELLET (Special Rapporteur) said that the part of the paragraph that began with the second sentence should become a separate paragraph 56 *bis*.

Paragraph 56, as amended, was adopted.

Paragraph 57

Paragraph 57 was adopted.

Paragraph 58

36. Mr. NOLTE said that, for the sake of consistency with paragraph 41, the words "objecting declarations" should be replaced by "objecting communications" in the last sentence.

Paragraph 58, as amended, was adopted.

Paragraph 59

37. Mr. PELLET (Special Rapporteur), following up on a suggestion by Mr. Fomba, proposed that, in the last sentence, the words "a late objection did not produce the same legal effects as those produced by an objection formulated on time" should be amended to read: "a late objection did not produce legal effects".

Paragraph 59, as amended, was adopted.

Paragraphs 60 to 63

Paragraphs 60 to 63 were adopted.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (A/CN.4/L.706/Add.3)

1. TEXT OF THE DRAFT GUIDELINES

38. The CHAIRPERSON, recalling that subsection C.1 (*Text of the draft guidelines*) had already been adopted, invited the members of the Commission to consider subsection C.2.

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-NINTH SESSION

Paragraph 1

Paragraph 1 was adopted.

Commentary to draft guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

39. Mr. PELLET (Special Rapporteur) said that the bibliographical references in the first footnote to the paragraph should be amended to read: “(P. Reuter, “*Solidarité et divisibilité des engagements conventionnels*”, in Y. Dinstein, *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Dordrecht, Martinus Nijhoff, 1989, p. 627; also reproduced in P. Reuter, *Le développement de l’ordre juridique international—Écrits de droit international*, Paris, Economica, 1995, p. 366)”.

40. Mr. GAJA said that, in the first sentence, the word “reservations” should be replaced by “article 19” because that fit with “seven other provisions of the Vienna Convention, including one—article 20, paragraph 2—which concerns reservations”.

41. Mr. PELLET (Special Rapporteur) said that the French version did not need to be corrected because it said, much more cautiously, that the concept of the object and purpose of the treaty was far from being confined “to the field of reservations” (“*au domaine des réserves*”), and not “to reservations”. The problem was thus one of translation.

42. Mr. GAJA said that, even with that correction, the French text gave rise to a problem because “the field of reservations” and “seven other provisions” could not be placed on the same plane. One way or another, article 19 had to be introduced.

43. Mr. PELLET (Special Rapporteur) said that, in that case, it would be preferable to say “... to article 19 ..., including outside the field of reservations”.

44. Mr. GAJA proposed that the first sentence should be replaced by two sentences which would read: “In fact, the concept of the object and purpose of the treaty is far from being confined to reservations. In the Vienna Convention, it occurs in eight provisions, only two of which—article 19 (c) and article 20, paragraph 2—concern reservations.”

Paragraph (2) was adopted with the amendment proposed by Mr. Gaja.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

45. Mr. GAJA said that, in the last footnote to the paragraph, the words “the Japanese member of the

Commission” after “Tsuruoka” should be deleted: there was no need to mention nationality, especially since that had not been done for the other members cited.

46. Mr. PELLET (Special Rapporteur) said that he had thought it useful to specify that, until the end, Japan had taken very inflexible positions on draft article 18, although he admitted that this detail was more appropriate in a report of the Special Rapporteur than in a report of the Commission.

Paragraph (4) was adopted with the amendment proposed by Mr. Gaja.

Paragraph (5)

47. Mr. GAJA said that, in the English version, the words “in a reasonable manner” should be added after “resolving”.

Paragraph (5), as amended in the English version, was adopted.

Paragraph (6)

48. Mr. PELLET (Special Rapporteur) said that, at the end of the English version of the paragraph, the word “*sic*” in square brackets should be deleted because, as he understood it, “paragraph” was the English translation of both “*paragraphe*” and “*alinéa*”. It should, however, be retained in the French version.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (11)

Paragraphs (7) to (11) were adopted.

Paragraph (12)

49. Mr. NOLTE said that he had doubts about whether the word “effectiveness”, which had been taken from the judgment of the European Court of Human Rights cited in the first footnote to the paragraph, was appropriate. The word played a much greater role in the European context than in public international law in general, and what was considered the core of the treaty was thereby enlarged. Thus, in a sense, any reservation impaired the effectiveness of the treaty. That was probably not what the Commission meant and he therefore suggested that the reference to “effectiveness” should be deleted or at least qualified.

50. The CHAIRPERSON, speaking as a member of the Commission, said that he was opposed to the deletion of a term which a particular court had used. It would be better to comment on it.

51. Mr. PELLET (Special Rapporteur), acknowledging that it was debatable whether the effectiveness of a treaty could be placed on an equal footing with its “*raison d’être*” or its “fundamental core”, proposed that the sentence should be amended to read: “In other words, it is the *raison d’être* of the treaty, its ‘fundamental core’, that is to be preserved in order to avoid endangering the ‘effectiveness’ of the treaty as a whole.” The reference to the footnote in question would then be placed at the end of the sentence.

Paragraph (12), as amended, was adopted.

Paragraph (13)

52. Mr. PELLET (Special Rapporteur) said that, at the beginning of the second sentence, the words “Most members of the Commission” should be replaced by “Some members of the Commission”.

Paragraph (13), as amended, was adopted.

Paragraph (14)

53. Mr. PELLET (Special Rapporteur) said that the last footnote to the paragraph should read: “See paragraph (10) above” (and not “See paragraph (12) above”).

Paragraph (14), as amended, was adopted.

Paragraph (15)

54. Mr. NOLTE proposed that the end of the first sentence should be amended to read: “rather than establishing a clear criterion that can be directly applied in all cases” so as not to give the impression that the criterion established by draft guideline 3.1.5 was never directly applicable.

Paragraph (15), as amended, was adopted.

The commentary to draft guideline 3.1.5, as amended, was adopted.

Commentary to draft guideline 3.1.6 (Determination of the object and purpose of the treaty)

Paragraph (1)

55. Mr. PELLET (Special Rapporteur) said that, for the sake of clarity, the words “in which category the process falls” should be replaced by “and it is in fact a question of interpretation”.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

56. Mr. NOLTE, pointing out that it was difficult to refer to the concept of “intuition” in such a context, proposed that the end of the first sentence should simply read: “in which subjectivity inevitably plays a considerable part.”

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph (8)

57. After a discussion in which Mr. GAJA, Mr. PELLET (Special Rapporteur), Mr. NOLTE, Mr. SABOIA and the CHAIRPERSON took part, it was decided that the words “Thus, for example” at the beginning of the second sentence should be deleted and that the last phrase in the first footnote to the paragraph should end with the following words: “here, however, the focus is on the validity of that quasi-reservation clause.”

Paragraph (8), as amended, was adopted.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

Commentary to draft guideline 3.1.7 (Vague or general reservations)

Paragraph (1)

58. Mr. McRAE, referring to the last sentence, said he did not think that there was a great difference between “worded” and “formulated” and therefore suggested that the words “rather than ‘formulated’” should be deleted.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (7)

Paragraphs (2) to (7) were adopted.

Paragraph (8)

59. Mr. PELLET (Special Rapporteur) said that, in the first sentence of the French version, the word “*que*”, which was a mistake, should be replaced by “*et non*”.

Paragraph (8), as amended in the French version, was adopted.

Paragraph (9)

60. The CHAIRPERSON suggested that, in the first sentence, the words “as well”, which were not needed, be deleted.

61. Mr. GAJA proposed that, in the second sentence, the following phrase should be inserted after the word “judged”: “according to article 57 of the European Convention on Human Rights”.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

Paragraph (11)

Paragraph (11) was adopted, subject to minor drafting changes.

The commentary to draft guideline 3.1.7, as amended, was adopted.

Commentary to draft guideline 3.1.8 (Reservations to a provision reflecting a customary norm)

Paragraph (1)

62. Mr. PELLET (Special Rapporteur) said that, at the end of the first sentence of the French version, the word “*conventionnelle*” should be replaced by “*coutumière*”.

Paragraph (1), as amended in the French version, was adopted.

Paragraphs (2) to (15)

Paragraphs (2) to (15) were adopted.

Paragraph (16)

63. Mr. PELLET (Special Rapporteur) said that, for the sake of consistency, the words “set forth” in the first line should be replaced by “reflected”.

Paragraph (16), as amended, was adopted.

Paragraphs (17) and (18)

Paragraphs (17) and (18) were adopted.

The commentary to draft guideline 3.1.8, as amended, was adopted.

Commentary to draft guideline 3.1.9 (Reservations contrary to a rule of jus cogens)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

64. Mr. PELLET (Special Rapporteur) said that, in the last footnote to the paragraph, the reference to “paragraph (7)” should be changed to “paragraph (2)” and the words “see paragraph (3) above” should be inserted at the end.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (9)

Paragraphs (6) to (9) were adopted.

Paragraph (10)

The adoption of paragraph (10) was postponed until a later meeting.

The meeting rose at 1 p.m.

2951st MEETING

Tuesday, 7 August 2007, at 3.05 p.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its fifty-ninth session (continued)

CHAPTER IV. Reservations to treaties (continued) (A/CN.4/L.706 and Add.1-3)

B. Consideration of the topic at the present session (continued) (A/CN.4/L.706/Add.1-2)

1. The CHAIRPERSON invited the Commission to resume its consideration of document A/CN.4/L.706/Add.1.

3. SPECIAL RAPporteur’S CONCLUDING REMARKS

Paragraph 48 (concluded)

2. The CHAIRPERSON recalled that the adoption of paragraph 48 had been deferred, pending the English translation of an amendment to the last sentence. He read out the following proposed text and invited members to comment on the alternatives placed between square brackets: “He wondered, however, whether that last point ought to be mentioned in the text, given that the Guide to Practice only contained [auxiliary] [residuary] [default] rules, which States were free to follow or set aside by contrary treaty provisions.”

3. Mr. PELLET (Special Rapporteur) expressed support for the proposed text and said that the adjective “auxiliary” seemed to be the best translation for the French “*supplétive de volonté*”.

Paragraph 48, as amended, was adopted.

Section B, as amended, was adopted.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (concluded) (A/CN.4/L.706/Add.3)

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-NINTH SESSION (concluded)

4. The CHAIRPERSON then invited the Commission to resume its consideration of document A/CN.4/L.706/Add.3.

Commentary to draft guideline 3.1.6 (Determination of the object and purpose of the treaty) (concluded)

Paragraph (5) (concluded)

5. The CHAIRPERSON said that the word “Committee” should be replaced by “Commission”, thereby aligning the English text with the French original. He also drew attention to an error in the footnote related to paragraph (5), where the date “1955” should read “1994”. The same correction should be made to all other references to the same work by W. A. Schabas³⁷⁹ wherever they appeared in the draft report.

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 3.1.6, as amended, was adopted.

Commentary to draft guideline 3.1.7 (Vague or general reservations) (concluded)

Paragraph (7)

6. The CHAIRPERSON said that Mr. Hmoud wished to propose an amendment to paragraph (7) of the commentary to draft guideline 3.1.7, which the Commission had dealt with at the previous meeting. If he heard no objection, he would take it that the procedure was acceptable to the Commission.

It was so decided.

³⁷⁹ W. A. Schabas, “Reservations to human rights treaties: time for innovation and reform”, *Canadian Yearbook of International Law* 1994.

7. Mr. HMOUD queried the appropriateness of the phrase “the so-called ‘Sharia reservation’” in paragraph (7), which implied that all reservations to treaties based on Sharia law were general and vague, whereas some were specific. A case in point was the reservations entered by some States to the Convention on the rights of the child, mention of which was made in the report. He suggested that a phrase along the lines of “some Sharia reservations” would be more appropriate.

8. Mr. PELLET (Special Rapporteur) endorsed the general thrust of Mr. Hmoud’s suggestion; however, basing himself on the French text, he would prefer it to be rendered as: “That same objection arises in connection with some reservations falling under the heading of what is sometimes called the ‘Sharia reservation’”.

Paragraph (7), as amended, was adopted.

The commentary to draft guideline 3.1.7, as amended, was adopted.

Commentary to draft guideline 3.1.9 (Reservations contrary to a rule of jus cogens) (concluded)

9. The CHAIRPERSON said that in the light of consultations between Mr. Pellet and Mr. Gaja, it was proposed that a new paragraph should be added to the commentary to draft guideline 3.1.9.

10. Mr. GAJA proposed that the following text should be added to the commentary to draft guideline 3.1.9 as paragraph (10 bis):

“The draft guideline also covers the case in which, although no rule of *ius cogens* was reflected in the treaty, a reservation would require that the treaty be applied in a manner conflicting with *ius cogens*. For instance, a reservation could be intended to exclude a category of persons from benefiting from certain rights granted under a treaty, on the basis of a form of discrimination that would be contrary to *ius cogens*.”

11. Mr. PELLET (Special Rapporteur) questioned the need for the word “also” and suggested its deletion.

Paragraph (10 bis), as amended, was adopted.

The commentary to draft guideline 3.1.9, as amended, was adopted.

Commentary to draft guideline 3.1.10 (Reservations to provisions relating to non-derogable rights)

Paragraph (1)

12. Mr. GAJA proposed that the phrase “as yet unresolved” in the first sentence should be deleted.

13. Mr. PELLET (Special Rapporteur) said that he objected to that proposal because the word “unresolved” was very important. Draft guideline 3.1.9 did not resolve the dilemma of ascertaining the validity of a reservation to a provision reflecting a norm of *ius cogens*. The Commission had not achieved any agreement on that point, the Drafting Committee had turned the problem on its head

and the result had been a compromise provision which sidestepped the issue. Hence it was quite legitimate to reflect that situation somewhere in the commentaries. He had done that as diplomatically as possible in the commentary to draft guideline 3.1.9, but he had been more explicit in the commentary to draft guideline 3.1.10 because, although the Commission had not been able to settle the matter of reservations to peremptory norms of general international law, the question of reservations to non-derogable obligations could be solved without adopting a stance on *ius cogens*. Thus, the little phrase was meaningful, and he was opposed to its disappearance.

14. Ms. ESCARAMEIA agreed with the Special Rapporteur but said that, as paragraph (1) stood, it seemed to imply that the Commission was on the point of resolving the question, which was untrue. Instead of calling attention to the significance of reservations to *ius cogens* norms, the phrase at issue diminished it, because it implied that draft guideline 3.1.9 was of little or no importance. She would therefore prefer the deletion of the phrase “as yet unresolved” in the first sentence.

15. Mr. NOLTE proposed that the Commission should use compromise wording based on his formal point of departure that no specific assertion should be made in a commentary which was extraneous to an issue. The subject in question had been covered in draft guideline 3.1.9, and if some aspects remained unresolved, that should be stated in the commentary to that draft guideline. Since the Commission purported to have addressed some aspects of the matter in draft guideline 3.1.9, it could not simultaneously claim in the commentary to the next draft guideline that the question was as yet unresolved. Nevertheless, he understood why the Special Rapporteur wished to direct the reader’s attention to the fact that not much had been resolved. Accordingly, it might be possible to say that the question of reservations to non-derogable obligations was very similar to the difficult question of reservations to treaty provisions reflecting peremptory norms of general international law. That would draw attention to the difficulty referred to in the commentary to draft guideline 3.1.9 without adding anything untoward in paragraph (1).

16. The CHAIRPERSON said that two problems arose in connection with paragraph (1): one of substance and the other of opacity, in that the reader would be perplexed about what was meant in that commentary if reference was made to an issue which had not yet been resolved. Further ambiguity stemmed from the fact that if the commentary to draft guideline 3.1.9 reflected a compromise, some people would contend that this was one way of resolving the issue. For that reason, while he would prefer the deletion of the phrase in question, he believed there was room for a thoughtful footnote by the Special Rapporteur, which would take the heat out of the issue but still make the point, albeit not in the text of the commentary.

17. Mr. PELLET (Special Rapporteur) said that he was deeply disappointed that draft guideline 3.1.9 did not answer an important question to which a response ought to have been found. Furthermore, the translation into English was inaccurate, as the words “as yet” did not appear in

the French. He was convinced that the Commission would not resolve the question, to which he would never return, and he therefore urged the retention of the phrase. Moreover, he could not entirely agree with the Chairperson's statement. Nevertheless, as the question of *jus cogens* had not been solved, it was necessary to specifically mention that fact. He therefore proposed the deletion of the phrase "as yet unresolved" and the addition at the end of the sentence, following the footnote reference, of the phrase "it may, however, be resolved separately". That was a meaningful statement which did not rub salt in the wound. All the same, he regretted the position taken by the Drafting Committee and the Commission.

18. Mr. KOLODKIN asked whether in the second sentence of the paragraph the word "objections" referred to the treaty provisions or to the reservations to such provisions.

19. The CHAIRPERSON explained that the word "objections" referred to the treaty provisions.

20. Mr. PELLET (Special Rapporteur) proposed that the sentence should be recast to read "States frequently justify their objections to reservations to such provisions ...".

Paragraph (1), as amended, was adopted.

Paragraph (2)

21. Mr. GAJA requested clarification regarding the term "*petitio principii*" and suggested that the first sentence in paragraph (3) should be moved to the end of paragraph (2).

22. Mr. PELLET (Special Rapporteur) said that while he agreed that the first sentence of paragraph (3) should be moved to the end of paragraph (2), he was puzzled as to why Mr. Gaja should be unhappy about the expression *petitio principii*. When the Human Rights Committee had said that "a State has a heavy onus to justify such a reservation" that was, in his eyes, a *petitio principii*: in its eagerness to defend human rights the Committee had said that the State must justify a reservation, but it had not given a single reason for that statement, which had no legal basis and simply mirrored the deeply held conviction of the members of the Human Rights Committee.

23. The CHAIRPERSON suggested that the phrase should read in English: "The last point is question-begging".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

24. Ms. ESCARAMEIA said that the first name in the first footnote to the paragraph should be corrected to Mr. António Cançado Trindade.

Paragraph (4) was adopted with that amendment to the footnote.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

25. Mr. NOLTE said that he had two problems with the sentence which began with the words "Denmark objected ...". According to his reading of Denmark's objection to the reservations of the United States to articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights, there had been two reasons for the objection: the first had been that the reservations of the United States related to non-derogable right; while the second had been that the reservations were incompatible with the object and purpose of the Covenant. He therefore disagreed with the Special Rapporteur's interpretation of Denmark's objection. Furthermore, he wondered what was meant by "essential provisions" in the same sentence: did it refer to articles 6 and 7 of the International Covenant on Civil and Political Rights? He suspected that the Special Rapporteur had wished to imply that the reservations left the essential provisions of the treaty empty of any substance, because the point was that a reservation to a non-derogable right was incompatible only when it conflicted with the object and purpose of a treaty as a whole. He therefore suggested either the deletion of the whole of paragraph (6) because it did not prove the point, or the reformulation of the last two sentences.

26. Mr. PELLET (Special Rapporteur) said that he partly agreed with Mr. Nolte. He was not in favour of deleting the entire paragraph, as it did partly illustrate the point he was trying to make. But he accepted that he had, perhaps, been stretching the meaning of Denmark's objection. He therefore proposed that the penultimate sentence should be amended to read: "Denmark objected not only because the United States reservations related to non-derogable rights, but also because their wording was such that they left essential provisions of the treaty empty of any substance."

27. Mr. NOLTE said that he could accept the proposed amendment.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

The commentary to draft guideline 3.1.10, as amended, was adopted.

Commentary to draft guideline 3.1.11 (Reservations relating to internal law)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

28. Mr. NOLTE said that the first sentence of paragraph (5) was too strongly worded. It was based on the concluding observations of the Human Rights Committee with regard to the United States reservations to the International

Covenant on Civil and Political Rights³⁸⁰. He did not think that these observations suggested that the mere fact that the United States had formulated reservations so that it would not have to change its legislation was incompatible with the object and purpose of the treaty; the Human Rights Committee had only expressed its regret that they had that effect. It was easy to imagine cases where a State might formulate a reservation or reservations so that it would not have to change its law immediately, but such reservations would be perfectly legitimate and would not necessarily violate the object and the purpose of the treaty. The aim of the International Covenant on Civil and Political Rights was not to make States change their practice but to secure compliance with its obligations. The object and the purpose of the treaty was the decisive factor, and he therefore suggested that the second part of the sentence should read “even though a treaty’s object and purpose would have it change its practice”.

29. Mr. PELLET (Special Rapporteur) said that although he understood Mr. Nolte’s concerns, he did not understand the solution he was recommending. The problem would not be solved by introducing the idea of the object and purpose of a treaty into the sentence. The difficulty lay in the fact that if a State’s practice was not consonant with a provision of the treaty, the State was expected to change its practice. He failed to see how the amendment proposed by Mr. Nolte would answer the concerns he had expressed, but would not oppose the sentence being worded “even though the correct application of the treaty should lead it to change its practice”.

30. Mr. GAJA drew attention to the reference to the rules of the organization in the first footnote to paragraph (5) and said that, in the light of the Commission’s debate on the rules of international organizations and also of the previous year’s discussion of disconnection clauses, it was necessary to make a proviso concerning the effects which reservations relating to the rules of organizations might have in relations between the organization and its members. Perhaps some wording on that subject could be added to the end of the footnote.

31. The CHAIRPERSON invited Mr. Gaja to produce a written text on that point for the Commission’s consideration.

32. Mr. NOLTE asked whether the Commission really wished to imply that the United States, by formulating its reservations and understandings, had violated the object and purpose of the International Covenant on Civil and Political Rights because it did not wish to change its own law. He fully agreed that certain of its reservations did violate the object and purpose of that instrument, but he did not believe that the Commission supported the principle that when a State ratified a treaty, it could not make reservations designed to ensure that it would not have to change its law forthwith. Of course, the State undertook not to change its law if it was compatible with the treaty, but what was important was that any reservations it made should not violate the object and purpose of the treaty, not the fact that it did not wish to change its law.

Moreover, that was a point which concerned not only the United States but potentially all other States as well. It was not a treaty in the abstract, but the object and purpose of the treaty, that sought to change State practice, which was why a reservation had to be prohibited if it conflicted with that object and purpose. He therefore maintained his proposed amendment.

33. The CHAIRPERSON said that the first sentence of paragraph (5) seemed acceptable as it stood, and it would be unfortunate if it was unnecessarily altered. In any event, the concluding observations of the Human Rights Committee concerning United States policy were reflected verbatim in the footnote whose reference was at the end of the first sentence.

34. Mr. SABOIA said the aim of draft guideline 3.1.11, on reservations relating to internal law, was to make it clear that a State or an international organization could not modify or exclude the legal effect of a treaty because of its internal law. The concluding observations of the Human Rights Committee indicated that the sheer quantity of the reservations made by the United States on grounds of its internal law essentially voided the provisions of the International Covenant on Civil and Political Rights and created an imbalance between the obligations accepted by members in general and by those that made such substantive reservations. He agreed with the change proposed by Mr. Pellet: it was important to preserve the object of draft guideline 3.1.11, which was to prevent internal law from being used as an excuse to block the application of an important provision of a treaty.

35. Mr. PELLET (Special Rapporteur) agreed with the Chairperson’s remark about the link between the footnote whose reference was at the end of the first sentence and the text of paragraph (5). The problem raised by Mr. Nolte might be attributable to a faulty translation from French to English: “would have it change its practice” was not the most accurate equivalent of the French “*vise à*”. The French text made it clear that the object of the treaty was a change in a State’s practice. Mr. Nolte’s proposal simply reflected circuitous reasoning: in attempting to define the phrase “only insofar as it is compatible with the object and purpose of the treaty” contained in draft guideline 3.1.11, the Commission would be saying that something was not compatible with the object and purpose of a treaty if it was not compatible with the object and purpose of the treaty. His own proposal would be to translate the French phrase by the words “aims at”, which would avoid that tautology.

36. Mr. NOLTE said that it was the actual wording of draft guideline 3.1.11 that constituted circular reasoning. He was willing to compromise, however, and suggested that the phrase “a treaty would have it change its practice” should be replaced by “the object of the treaty is to change its practice”. The point of substance was that it was not appropriate for the Commission to state that every time a State formulated reservations that had the effect of preventing it from having to change its law, that was incompatible with the object and purpose of the treaty. Such instances occurred more often than one might think, and not only in the field of human rights. A serious misunderstanding in respect of treaty practice might arise in the future if that point was not made clear.

³⁸⁰ *Official Records of the General Assembly, Fiftieth session, Supplement No. 40 (A/50/40)*, vol. I, chap. VI, para. 279.

37. Mr. KOLODKIN said that he agreed with Mr. Nolte. The explanation in the first sentence of paragraph (5) went further than the draft guideline itself. There did indeed seem to be a problem with the translation from French into English, but even the French text did not constitute an appropriate commentary on the draft guideline. In addition, the commentary seemed to focus exclusively on reservations to human rights treaties, even though the draft guideline applied to a much wider range of instruments. There were numerous examples of reservations aimed at preserving the integrity of internal law that had been made to treaties having nothing to do with human rights. He cited the example of a reservation to a railway transport treaty, which concerned a very specific provision of the treaty that did not fully correspond to the reserving State's internal law. The reservation was fully compatible with the object and purpose of the treaty; it had been made to a secondary provision of the treaty.

38. Mr. HMOUD said that he agreed with Mr. Nolte. It did not make sense to say that a State could not make a reservation on the basis of its domestic law in order to exclude a certain international obligation; of course it could: the important thing was simply that the reservation should not go against the object and purpose of the treaty. That was precisely why the Human Rights Committee had objected to the position of the United States. It had first made the point that the reservations were regrettable and had then added that reservations designed to preserve internal law were incompatible with the object and purpose of a treaty. Paragraph (5) seemed to prohibit the formulation of reservations that were incompatible with the international obligations set out in the treaty, and not specifically with the object and purpose of the treaty, which was what the text ought to say.

39. Mr. McRAE said that essential difference between the positions espoused by Mr. Nolte and Mr. Pellet was the difference between "object" and "aim". He could go along with either wording.

40. The CHAIRPERSON suggested that, on Mr. Gaja's proposal, the following text should be added to the footnote whose reference was placed after "domestic law" in the first sentence of paragraph (5): "However, the reference to the rules of the organization may not raise a similar problem if the reservation only applies to the relations between the organization and its members."

41. Mr. McRAE suggested that the opening phrase of the footnote, which currently read "Or international organizations their 'rules of the organization'", should be reworded to read: "Or in the case of international organizations, the 'rules of the organization'".

42. Mr. NOLTE proposed that the phrase "even though a treaty would have it change its practice" in the first sentence of paragraph (5) should be amended to read "even though the treaty's aim is to change its practice". He further proposed that the footnote reference at the end of that sentence should be inserted earlier in the sentence, after the words "any new obligation". That should make it clear that the example of the reservations entered by the United States given in that footnote related to a situation in which the State refused to accept any new obligation and not to the aim of the treaty to change its practice.

43. Mr. GAJA proposed that the phrase "to change its practice" should be replaced by "to change a practice of States parties to the treaty".

Paragraph (5), including the text of the footnote whose reference was placed after "domestic law" in the first sentence, as amended, was adopted.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were adopted.

The commentary to draft guideline 3.1.11, as amended, was adopted.

Commentary to draft guideline 3.1.12 (Reservations to general human rights treaties)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

44. Mr. PELLET (Special Rapporteur), replying to a question from Mr. NOLTE, said that the adjective "general" that qualified "reservation" in the final sentence needed to be retained because it was crucial to the meaning of the entire paragraph. General reservations could not be made in connection with certain rights, such as the right to life, for example, but they could be made with regard to some rights that were of lesser importance. The whole point was the general nature of the reservation, not simply the ability to make a reservation.

Paragraph (2) was adopted.

Paragraph (3)

45. The CHAIRPERSON, speaking as a member of the Commission, said that the second sentence singled out a particular author as "hardly to be suspected of 'anti-human-rightsism'". That seemed gratuitous and should be deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

46. Mr. NOLTE said that draft guideline 3.1.12 referred to the "indivisibility, interdependence and interrelatedness" of the rights set out in a human rights treaty. That wording was explained in paragraph (6) of the commentary, which seemed to suggest that all rights in human rights treaties were interrelated, interdependent and indivisible. That was not true: they were to some degree, but certain human rights could nevertheless be the subject of reservations. He suggested the addition of a new sentence at the end of the paragraph to explain that idea, which would read: "This element should not be understood, however, to mean that every single human right contained in a general human rights treaty is an essential element thereof".

47. Mr. PELLET (Special Rapporteur) pointed out that paragraph (7) conveyed that notion, and conveyed it more clearly. He saw no reason to include the sentence proposed by Mr. Nolte but would nevertheless not oppose it.

48. Mr. NOLTE said that paragraph (7) covered a different aspect of the draft guideline than the one addressed in his proposal. He would not, however, press for the adoption of his proposal.

Paragraph (6) was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Paragraph (8) was adopted, with an editorial correction proposed by Mr. Pellet to the French text.

The commentary to draft guideline 3.1.12, as amended, was adopted.

Commentary to draft guideline 3.1.13 (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraphs (5) and (6)

49. Mr. NOLTE said that the reference in paragraph (5) to the “extreme” position taken by the European Court of Human Rights in the *Loizidou* case seemed out of place and should be deleted. He proposed that the phrase “took a position that was just as extreme” in the first sentence of that paragraph should be deleted and that the remainder of that sentence should be merged with the second sentence.

50. Mr. PELLET (Special Rapporteur) endorsed that proposal and added that in paragraph (6) the phrase “with all its nuances” should be deleted.

51. The CHAIRPERSON, supported by Mr. PELLET (Special Rapporteur), pointed out that subparagraph 2 of paragraph (6) was not grammatically consistent with the other two subparagraphs and suggested that the inconsistency should be corrected.

Paragraphs (5) and (6), as amended, were adopted.

Paragraph (7)

52. Mr. NOLTE said that, for the sake of accuracy and clarity, the words “might” should be deleted and the words “the two types of provision” should be replaced by “treaty provisions concerning dispute settlement and those concerning the monitoring of the implementation of a treaty”, words similar to those used in the previous paragraph.

53. Mr. PELLET (Special Rapporteur) said that as long as the French text remained unchanged, he could go along with that proposal.

54. Mr. CAFLISCH said that the French text could not possibly remain unchanged, since the text proposed in English diverged widely from the original French.

55. Mr. SABOIA asked for clarification as to whether it was customary in the commentary to mention that some members had disagreed on certain points, as was done at the start of paragraph (7).

56. Mr. PELLET (Special Rapporteur) said that it was legitimate to mention that there might have been disagreement among Commission members, since the Commission had just undertaken the first reading of the text; moreover, such a statement reflected the real situation. The second amendment proposed by Mr. Nolte, however, would not improve the French phrase “*dissocier ces deux types de clauses*”, where the word “*ces*” made it clear that there were two different types of provisions involved. He proposed that the English version should be aligned with the French text to read: “a distinction between these two types of provisions”.

57. Mr. McRAE expressed support for Mr. Pellet’s proposal, which would make the paragraph read more clearly.

Paragraph (7), as amended, was adopted.

The commentary to draft guideline 3.1.13, as amended, was adopted.

Section C as a whole, as amended, was adopted.

CHAPTER V. *Shared natural resources (concluded)** (A/CN.4/L.709 and Add.1)

58. The CHAIRPERSON drew attention to section C of Chapter V of the draft report of the International Law Commission on the work of its fifty-ninth session, which appeared in document A/CN.4/L.709/Add.1, and contained the report of the Working Group on shared natural resources. The Commission had already considered and taken note of that report. He therefore took it that the Commission wished to include it as section C of Chapter V of the Commission’s report.

It was so decided.

Chapter V of the draft report of the Commission as a whole, as amended, was adopted.

CHAPTER VII. *Effects of armed conflicts on treaties (concluded)*** (A/CN.4/L.708 and Corr.1 and Add.1)

59. The CHAIRPERSON drew attention to section C of Chapter VII, which appeared in document A/CN.4/L.708/Add.1 and contained the report of the Working Group on the effects of armed conflicts on treaties. The Commission had already considered and adopted that report. He therefore took it that the Commission wished to include it as section C of Chapter VII of the Commission’s report.

It was so decided.

* Resumed from the 2948th meeting.

** Resumed from the 2949th meeting.

Chapter VII of the draft report of the Commission as a whole, as amended, was adopted.

CHAPTER VIII. Responsibility of international organizations (continued) (A/CN.4/L.713 and Add.1-3)

60. The CHAIRPERSON invited the Commission to consider section C of chapter VIII, which appeared in document A/CN.4/L.713/Add.2.

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (continued) (A/CN.4/L.713/Add.1-3)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-NINTH SESSION (continued)

Commentary to draft article 37 (Forms of reparation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to draft article 37 was adopted.

Commentary to draft article 38 (Restitution)

The commentary to draft article 38 was adopted.

Commentary to draft article 39 (Compensation)

Paragraph (1)

61. Mr. PELLET said that the quotation from the letter of the Secretary-General was not entirely appropriate, because it did not concern compensation as much as it did the principle of responsibility. He wondered whether the relevant correspondence might not contain a more apposite illustration of the practice of international organizations.

62. Mr. GAJA (Special Rapporteur) said that the quotation should be read in connection with the subject of the draft article and in the context of the letter from the Secretary-General to the Permanent Representative of the Soviet Union, quoted in paragraph (2), who had challenged the legality of the payment of compensation by the United Nations. He had quoted from that case because it was the best-known example of an international organization paying compensation to States for damages suffered by their nationals. He was, however, prepared to search for another illustration of the point to be conveyed.

Subject to possible improvements by the Special Rapporteur, paragraph (1) was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

63. Ms. ESCARAMEIA said that there had been considerable discussion within both the Commission and the Drafting Committee on compensation to individuals. She conceded that the issue was partly covered by draft articles 36 and 42, but draft article 39 dealt with compensation most directly, and for that reason she proposed an additional paragraph along the following lines:

“Since article 39 must be read in conjunction with paragraph 2 of article 36 on the scope of international obligations, the existence of rights that directly accrue to the individual is not prejudiced.”

A footnote should then refer the reader to General Assembly resolution 52/247 of 26 June 1998 on third-party liability: temporal and financial limitations.

64. The CHAIRPERSON said that the proposed amendment was substantive. He therefore requested Ms. Escarameia to circulate her proposal, which would be considered at the next meeting.

Programme, procedures and working methods of the Commission and its documentation (concluded) (A/CN.4/577 and Add.1-2, sect. G, A/CN.4/L.716, A/CN.4/L.719)**

[Agenda item 8]

REPORT OF THE PLANNING GROUP

65. Mr. VARGAS CARREÑO (Chairperson of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.716), said that the Planning Group had held six meetings. Its agenda had included relations between the Commission and the Sixth Committee; the establishment of and the work of the Working Group on the long-term programme of work; the work programme for the remainder of the quinquennium; the Commission's documentation and publications, including the publication of Commission documents by members of the Commission, the waiver of the 10-week advance submission requirement, the backlog of *Yearbooks* and the renewal of mandates of current publications; the date and place of the sixtieth session; and commemoration of the sixtieth anniversary of the Commission.

66. Two issues warranted particular attention: relations between the Commission and the Sixth Committee and the sixtieth anniversary of the Commission. The Planning Group was of the view that regular discussion on how to improve the dialogue between the Commission and the Sixth Committee would be useful. It had also considered ways of making Chapters II and III of the Commission's annual report more user-friendly. For example, suggestions had been made concerning the drafting of executive summaries in Chapter II and further improvement in the preparation of issues raised by the special rapporteurs in Chapter III. The Planning Group had been unable to complete its consideration of those matters.

67. A number of suggestions had been made concerning the commemoration of the Commission's sixtieth anniversary; they were listed in paragraph 24 of the report. In the light of consultations he had held, he wished to propose that a group be established to deal with organizational matters and to make specific suggestions for the holding of a solemn meeting with dignitaries and a meeting with legal advisers to discuss the work of the Commission. The group would be composed of Mr. Candioti, Mr. Comissário Afonso, Mr. Galicki, Mr. Pellet and Mr. Yamada,

*** Resumed from the 2944th meeting.

with the Chairperson of the Commission and the Chairperson of the Planning Group serving *ex officio*. He hoped that the group would be able to meet before the end of the current session to hold a preliminary exchange of views and to consider how to communicate after the closure of the session in order to make arrangements. Among the issues to be discussed were the dates of the commemoration, which depended on the schedule of the Secretary-General of the United Nations, and an appropriate agenda.

68. As indicated in paragraph 26 of the report, it was recommended that the sixtieth session be held in Geneva from 5 May to 6 June and from 7 July to 8 August 2008. Should the recommendations of the Planning Group be accepted by the Commission, they would be reproduced, with any necessary adjustments, as Chapter X of the Commission's report on the work of its fifty-ninth session.

69. The CHAIRPERSON invited the Commission to consider the report of the Planning Group (A/CN.4/L.716) with a view to its adoption.

A. Programme, procedures and working methods of the Commission and its documentation

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

1. RELATIONS BETWEEN THE COMMISSION AND THE SIXTH COMMITTEE

Paragraph 3

70. Mr. PELLET suggested the insertion of an electronic link to the Official Documents System of the United Nations (ODS) for ease of reference.

Paragraph 3, as amended, was adopted.

Paragraph 4

Paragraph 4 was adopted.

2. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

Paragraph 5

Paragraph 5 was adopted.

3. WORK PROGRAMME OF THE COMMISSION FOR THE REMAINDER OF THE QUINQUENNIAL

Paragraph 6

71. Mr. PELLET proposed the following amendments to subparagraph (a) (Reservations to treaties). For 2009, the existing paragraph should be replaced by the following: "The Special Rapporteur is expected to submit his fourteenth report on effects of reservations and objections to reservations and probably on succession of States and international organizations with regard to reservations, which would enable the Commission to complete the first reading of the draft Guide to Practice." The paragraph relating to 2010–2011 would then read: "The Special Rapporteur is expected to submit his fifteenth and sixteenth reports with a view to the completion of the second reading of the draft Guide to Practice."

72. Ms. ESCARAMEIA asked whether, in subparagraph (c) (Effects of armed conflicts on treaties), the paragraph relating to 2008 should contain a reference to the forthcoming addendum to the third report.

73. The CHAIRPERSON, speaking in his capacity as Special Rapporteur, said that he saw no need for such a reference. The addendum to his report would be only one of several studies, including that by the Working Group.

74. Mr. GALICKI noted, with regard to subparagraph (f) (The obligation to extradite or prosecute (*aut dedere aut judicare*)), that the paragraph relating to 2010–2011 should state that "the Commission will complete the first reading ...".

75. The CHAIRPERSON said that while each special rapporteur would doubtless look at the programme relating specifically to his work, there nevertheless remained a potential problem with divergences from uniformity of style. He took it that the Secretariat would attend to the matter.

Paragraph 6, as amended, was adopted.

4. HONORARIA

Paragraph 7

Paragraph 7 was adopted.

5. DOCUMENTATION AND PUBLICATIONS

(a) External publication of International Law Commission documents

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

(b) Processing and issuance of reports of Special Rapporteurs

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

76. Mr. PELLET asked why, in a paragraph relating to the Planning Group, a reference was suddenly made to the Commission itself. Secondly, the phrase in the French text "*a reconnu*" sounded awkward. The phrase "*était conscient de*" would be preferable. Lastly, he wished to know what the consequences of not adhering to the established word-limit would be.

77. The CHAIRPERSON said that the word "recognized" was perfectly acceptable in the English text. As for the reference to "the Commission" rather than "the Planning Group", all references to the Planning Group would automatically become references to the Commission in the final report. Any anomalies were therefore ephemeral.

78. Ms. ARSANJANI (Secretary to the Commission) said that, as noted in paragraph 12 of the report, the Commission believed that an *a priori* limitation could not be placed on the length of its documentation. Commission documents, including reports by special rapporteurs, commonly did not respect the word-limit; the reference to four weeks in paragraph 11 had been inserted in order to

protect the Department for General Assembly and Conference Management, which was not obliged to process documents exceeding the established word-limit within four weeks. The request for the exemption from the 10-week rule for submission of pre-session documents had been made in recognition of the fact that, without the exemption, all documents, including the Special Rapporteurs' reports, would have had to be submitted 10 weeks before the opening of the session.

Paragraph 12

Paragraph 12 was adopted.

(c) Backlog relating to the *Yearbook* of the International Law Commission

Paragraph 13

Paragraph 13 was adopted.

(d) Other publications and the assistance of the Codification Division

Paragraphs 14 and 15

Paragraphs 14 and 15 were adopted.

Paragraph 16

79. Mr. PELLET said that the words “in English” should be inserted after the phrase “the Codification Division issued this publication”. The publication had not appeared in any of the other official languages.

Paragraph 16, as amended, was adopted.

Paragraphs 17 to 23

Paragraphs 17 to 23 were adopted.

6. COMMEMORATION OF THE SIXTIETH ANNIVERSARY OF THE COMMISSION

Paragraph 24

80. Mr. NOLTE said that he had previously suggested that academic institutions should be encouraged to participate in the observance of the Commission's sixtieth anniversary. He therefore proposed that a comma and the words “academic institutions” should be inserted after the words “professional associations” in paragraph 24 (c).

81. Mr. VARGAS CARREÑO endorsed that proposal.

Paragraph 24, as amended, was adopted.

Paragraph 25

82. The CHAIRPERSON said that a footnote listing the members of the group would be added to the paragraph.

Paragraph 25, as amended, was adopted.

B. Date and place of the sixtieth session of the Commission

Paragraph 26

Paragraph 26 was adopted.

The report of the Planning Group as a whole, as amended, was adopted.

The meeting rose at 6 p.m.

2952nd MEETING

Wednesday, 8 August 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comisário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Cooperation with other bodies (concluded)*

[Agenda item 10]

STATEMENT BY THE REPRESENTATIVE
OF THE COUNCIL OF EUROPE

1. The CHAIRPERSON invited Mr. Lezertua, Director of Legal Advice and Public International Law of the Council of Europe, to take the floor.

2. Mr. LEZERTUA (Director, Legal Advice and Public International Law of the Council of Europe) said that the Warsaw Declaration and Action Plan, which had been adopted at the Council of Europe Summit held in 2005, attached great importance to legal activities. In the past year, the Council of Europe had focused much of its attention on action to combat terrorism. Since November 2001, it been endeavouring to make a practical contribution by offering the added value it had created to strengthen legal action and cooperation against terrorism and its sources of funding, and to safeguard fundamental values. It continued to carry out its work in that regard with a view to the full implementation of the standards adopted and the strengthening of the capacity of States to combat terrorism effectively while guaranteeing full respect for the human rights and fundamental freedoms without which Europe could not exist.

3. The new Council of Europe Convention on the Prevention of Terrorism, adopted in May 2005, had been followed by the adoption of Security Council resolution 1624 (2005) of 14 September 2005, which was based on the Convention. The Council of Europe Convention on the Prevention of Terrorism had entered into force on 1 June 2007 and had already been signed by 39 member States of the Council of Europe. It was the first of the three conventions adopted at the Warsaw Summit to enter into force. In addition, the new Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, which took account of recent trends in that regard, particularly the recommendations of the Financial Action Task Force, had been signed by 25 countries and ratified by two, and would enter into force when six States had ratified it. Those two conventions were open, under

* Resumed from the 2944th meeting.

certain conditions, to non-member States of the Council of Europe. The process of the signature and ratification of the other Council of Europe instruments relating to counter-terrorism was also underway. Six States thus intended to ratify the Protocol amending the European Convention on the suppression of terrorism, which, to date, had been signed by 44 States and ratified by 25 others.

4. The Council of Europe Committee of Experts on Terrorism (CODEXTER) continued to prepare country profiles on legislative and institutional counter-terrorism capacity. Twenty such profiles already existed and had been extremely successful, as they were widely used by States and academic institutions. The Security Council Counter-Terrorism Committee was also using them for its own needs in connection with the monitoring of the implementation of Security Council resolution 1373 (2001) of 28 September 2001. That cooperation between the Council of Europe and the United Nations in the implementation of Security Council resolutions 1373 (2001) and 1624 (2005) was taking place at the operational level as well, since Council of Europe experts were taking part in evaluation visits by the Security Council Counter-Terrorism Committee in United Nations Member States that were also members of the Council of Europe.

5. CODEXTER also continued to identify gaps in international law and action against terrorism. In that connection, it was paying particular attention to the question of the use of the Internet for terrorist purposes and cyberterrorism and to the challenge that forged identity documents represented for immigration authorities. A new recommendation by the Committee of Ministers to member States on cooperation between the Council of Europe and its member States and INTERPOL had been added to the Council of Europe's legal arsenal, together with the four recommendations on special investigation techniques, the protection of witnesses and collaborators of justice, identity and travel documents and assistance to crime victims that had been drafted in the last two years.

6. An international conference entitled "WHY TERRORISM? Addressing the Conditions Conducive to the Spread of Terrorism" had been held in 2007 for the purpose of making a contribution to the United Nations Global Counter-Terrorism Strategy³⁸¹ and, in particular, chapter I of the Plan of Action on "measures to address the conditions conducive to the spread of terrorism" and article 3 of the Council of Europe Convention on the Prevention of Terrorism. For that same purpose, the Secretary-General of the Council of Europe had convened an *ad hoc* meeting in April 2007 of the chairmen of the relevant Council of Europe committees on terrorism to discuss the Council of Europe's contribution in that regard. The meeting had adopted a road map for the Council of Europe's contribution to the implementation of the United Nations Global Counter-Terrorism Strategy. A third Council of Europe Convention on Action against Trafficking in Human Beings had been opened for signature at the Warsaw Summit. To date, it had been signed by 36 States and ratified by seven. Ten ratifications were necessary for its entry into force.

³⁸¹ General Assembly resolution 60/288 of 8 September 2006, Annex.

7. With regard to action to combat corruption, he recalled that, with the Group of States against Corruption (GRECO), the Council of Europe had an integrated monitoring and fully operational system that might serve as an example for action to be taken at the global level. GRECO had recently been joined by Italy and Monaco and now had 46 member States; it continued to evaluate its members, including the United States, using methods that had been tried and tested. The Third Evaluation Round, which had been inaugurated in early 2007, related to transparency in the financing of political parties and the incriminations provided for in the Council of Europe Criminal Law Convention on Corruption and the additional protocol thereto.

8. Nationality law was another important aspect of the Council of Europe's work that had traditionally been of interest to the International Law Commission. The Council of Europe Convention on the avoidance of statelessness in relation to State succession had been signed by four member States and ratified by one. To enter into force, it had to be ratified by three. It had been prepared in accordance with a 1999 recommendation by the Committee of Ministers to member States on the prevention and reduction of statelessness and was based on practical experience built up in recent years on succession of States and statelessness in a number of countries. It also took account of the Convention on the reduction of statelessness, the 1996 Venice Commission Declaration on the Consequences of State Succession for the Nationality of Natural Persons and the work of the International Law Commission, particularly the draft articles on nationality of natural persons in relation to the succession of States.³⁸²

9. The Council of Europe continued to coordinate and, where possible, develop synergies between the various bodies responsible for improving the functioning of justice. A good example was the work that would soon begin on the revision of recommendation No. R (94) 12 on the independence, efficiency and role of judges.

10. As far as family law was concerned, the revision of the European Convention on the adoption of children was a priority. A draft Council of Europe convention on the adoption of children (revised) and its explanatory report had been finalized and approved by the Committee of Ministers and transmitted to the Parliamentary Assembly for its opinion. The drafting of the convention was thus in the final phase and it should be adopted within the next few months.

11. Action to combat cybercrime was another key area of the Council of Europe's work, in which it had a definite advantage, namely, the Convention on cybercrime, which had entered into force in 2004 and was still the only international treaty on the subject. The Council of Europe recommended the widest possible ratification of that Convention and the Additional Protocol to the Convention concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, which had entered into force in 2006. The Committee set up under the Convention on cybercrime had met in June 2007 to consider some specific questions concerning provisions of the Convention, including those relating to

³⁸² *Yearbook ... 1999*, vol. II (Part Two), p. 20, para. 47.

liability of legal persons, spam, phishing, pharming, the expedited preservation of stored computer data, terrorist propaganda on the Internet, mutual assistance in cases of computer-related offences, site blocking and evidence in electronic form.

12. With regard to action to combat crime, particular attention was being given to counterfeit medicines and pharmaceutical crime with a view to the preparation of a binding legal instrument, to be based on the conclusions of the international conference on that topic held in Moscow in October 2006. The implementation of the Council of Europe conventions on cooperation in the criminal justice field was being given particular attention in order to provide specific solutions to the practical problems that arose in that regard, to speed up procedures and to prevent disputes between States. Consideration was also being given to updating some legal instruments on the transfer of convicted persons.

13. Referring to the activities being carried out by the Committee of Legal Advisers on Public International Law (CAHDI), he welcomed the excellent cooperation between that body and the International Law Commission. CAHDI had worked to improve the implementation of sanctions adopted by the United Nations, as well as respect for human rights. In that connection, a database on the situation in the member States of the Council of Europe had been set up in addition to those on the practice of States and the organization and functions of the Office of the Legal Adviser in Ministries for Foreign Affairs, which were public and provided updated information on those questions.

14. CAHDI also played an important role as European Observatory on Reservations to International Treaties, whose activities had increased when the scope of its work had been expanded to include reservations to international treaties against terrorism, whether or not objections could be made to them. CAHDI had therefore drawn up a list of “possibly problematic” reservations and, on its recommendation, the Secretary-General of the Council of Europe had taken measures with a view to the withdrawal of such reservations. A dialogue had thus been established between CAHDI and reserving States, whether or not they were members of the Council of Europe.

15. The next meeting of CAHDI would be held on 10 and 11 September 2007 in Strasbourg. It would be an opportunity for legal advisers to discuss the report on the fifty-ninth session of the International Law Commission. CAHDI would also focus on digests of State practice and the work of the ICJ. The adoption of a draft recommendation by the Committee of Ministers to member States on acceptance of the jurisdiction of the ICJ was on the agenda, as was another draft recommendation on the nomination of international arbitrators and conciliators. CAHDI would continue to support the International Criminal Court (ICC). On the initiative of CAHDI, the Council of Europe had organized the fourth consultation meeting in Athens in September 2006 with the participation of the President and the Chief Prosecutor of the ICC; the meeting had discussed the interaction between ICC and national courts, agreements on witnesses and the implementation of ICC decisions.

16. The Committee of Ministers of the Council of Europe had, moreover, recently invited CAHDI to look into the so-called “disconnection clause”, which had appeared in the last few years in several Council of Europe conventions, including the three conventions adopted at the Warsaw Summit and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, adopted in July 2007. CAHDI would be called upon specifically to examine the consequences of that clause in international law.

17. The Council of Europe’s constitutional law and electoral activities were carried out primarily by the European Commission for Democracy through Law, better known as the Venice Commission. At the request of the Committee of Ministers, the Venice Commission had submitted a report on democratic oversight of security services in the member States of the Council of Europe that had been prepared as a result of proposals by the Secretary-General following the investigation, under article 52 of the European Convention on Human Rights, of allegations of secret detentions and illegal inter-State transfers of detainees involving member States of the Council of Europe. The Venice Commission had adopted an important opinion on the very sensitive issue of video surveillance by private operators in public places and the private sphere and by public authorities in the private sphere. It had also handed down other opinions, for example, on the draft constitution of Montenegro, early elections in Ukraine, amendments to the election code of Armenia and the Kosovo ombudsman bill.

18. High-level conferences had been held in autumn 2006 and in 2007. For example, the twenty-seventh Conference of European Ministers of Justice had been held in Yerevan in October 2006 and the Ministers had adopted a resolution on the victims of crime. In that connection, he recalled that the Council of Europe Convention on the Prevention of Terrorism was the only treaty now in force in the world containing a provision on the protection and compensation of victims of terrorism. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, adopted in July 2007, would be open for signature at the Conference of European Ministers of Justice, to be held in Lanzarote, Spain, in October 2007.

19. A High-Level Conference of Ministers of Justice and the Interior had been held in Moscow in November 2006 to consider ways of improving European cooperation in the criminal justice field. That topic had also been on the agenda of the European Conference of Prosecutors held in Warsaw in June 2007.

20. In conclusion, he stressed that the Council of Europe’s aim was to build a Europe without dividing lines based on the common values embodied in the Statute of the Council of Europe, namely, democracy, human rights and the rule of law.

21. The CHAIRPERSON invited the members of the Commission to put questions to Mr. Lezertua.

22. Mr. PELLET said that relations between the Commission and CAHDI were very close, but, in his view,

extremely formal. He wondered whether other methods of operation might be possible. He also wished to know what proposals the Council of Europe intended to make concerning the nomination of international arbitrators and conciliators.

23. Ms. ESCARAMEIA, referring to Mr. Lezertua's comment on action to combat cybercrime, said that she wished to know whether he thought it might be of some interest for the Commission to carry out a possible study of cyberterrorism and cybercrime in general. She also wished to know whether CAHDI was planning to devote one of its sessions to the work of the Commission.

24. Mr. NOLTE asked Mr. Lezertua whether the Council of Europe was involved in any way in the United Nations General Assembly's work on the rule of law at the national and international levels. He also wished to know the Council of Europe's position on the protection of human rights in relation to the sanctions provided for by the Security Council as part of action to combat terrorism. Referring to the conclusion by the Venice Commission on CIA flights, namely, that a number of member States of the Council of Europe must improve their vigilance, he asked what role the Council of Europe might play in monitoring international standards in that regard.

25. Mr. LEZERTUA (Director, Legal Advice and Public International Law of the Council of Europe), replying to the questions by Mr. Pellet and Ms. Escarameia on the formality of relations between CAHDI and the Commission and the possible holding of a special session of CAHDI on the work of the Commission, said the fact that CAHDI met only twice a year for one week was an obstacle to the establishment of a more lively and fruitful debate. However, since he too was convinced of the need to introduce greater flexibility in exchanges between the two bodies, he would work with his colleagues to ensure more active cooperation.

26. The question of international arbitration was on the agenda of the next meeting of CAHDI, which would be held in September 2007. As part of the Third Evaluation Round, moreover, GRECO would be considering the implementation of the Additional Protocol to the Criminal Law Convention on Corruption relating specifically to corruption in connection with arbitration.

27. Considerable efforts had been made to prepare the Convention on cybercrime because it was very difficult to set standards in that regard. The Cybercrime Convention Committee had already met once and the Commission could probably provide it with valuable assistance, perhaps by convincing some non-European States of the need for that instrument; that might offer an opportunity for more dynamic exchanges between the Council of Europe and the Commission.

28. In reply to Mr. Nolte, he said that he was not aware of any particular reactions within the Council of Europe as a result of the adoption of United Nations General Assembly resolution 61/39 of 4 December 2006 on the rule of law at the national and international levels. However, the Council participated actively in the implementation of General Assembly and Security Council resolutions, in particular in the area of the fight against terrorism.

29. With regard to action on the case of the CIA flights, pressure on European Governments to consider the need to monitor the activities of foreign military intelligence services in their territory had increased since the publication of the second report by Mr. Marty, the Rapporteur of the Council of Europe Parliamentary Assembly on that question. The new recommendation the Parliamentary Assembly had just submitted to the Committee of Ministers might lead to the adoption of measures.

30. Mr. BENÍTEZ (Secretary of CAHDI and Chief, Public International Law and Anti-Terrorism Division of the Council of Europe) said that the question of the rule of law at the national and international levels had been on CAHDI's agenda since 2006 and that the proposals by Mexico and Switzerland on ways and means of implementing the General Assembly resolution were being considered. CAHDI would continue its consideration of that question at its September 2007 meeting and Mr. Pellet, who would be present, would be able to report on it to the members of the Commission.

31. The question of targeted sanctions provided interesting examples of "quiet diplomacy". From the very beginning, CAHDI had understood the dilemma faced by the member States of the Council of Europe, which must, on the one hand, comply with the provisions of the European Convention on Human Rights and, on the other, with the requirements of the Charter of the United Nations. It had not prepared any normative texts or recommendations because it had considered that it was not its place to focus on the United Nations system of sanctions, but it had concentrated on the national aspect of the question, namely, the attitude of domestic courts towards persons contesting decisions adopted by national authorities in accordance with Security Council resolutions, and on the establishment of a restricted database relating to such cases, which the President of the Security Council had asked to consult.

32. Replying to Ms. Escarameia, he said that, although the Convention on cybercrime was an instrument adopted by a regional organization, it was open to signature by non-member States of the Council of Europe, and that explained why the Council was not at present in favour of the negotiation of an instrument of universal scope and preferred to give priority to promoting the full implementation of that Convention. The Council had, however, held a debate on whether the Convention on cybercrime really made it possible to deal with the reality of cyberterrorist attacks, particularly those targeting critical infrastructures. The Council had requested a study which had concluded that it was not necessary to prepare a specific instrument against cyberterrorism and that it was enough to rely on the combination of the Convention on cybercrime and the Council of Europe Convention on the Prevention of Terrorism.

33. Mr. HASSOUNA asked whether CAHDI cooperated with regional organizations in Africa, Asia and Latin America which played a role similar to that of the Council of Europe.

34. Ms. JACOBSSON said that she would like further information on the intentions of the Council of Europe with regard to the consequences of the "disconnection

clause” contained in several recent instruments, a matter which the Commission had discussed in connection with its work on the fragmentation of international law.

35. Mr. GALICKI, referring to Ms. Jacobsson’s question, recalled that the problem had arisen in particularly acute form at the time of the adoption of the Council of Europe Convention on the Prevention of Terrorism.

36. Mr. LEZERTUA (Director, Legal Advice and Public International Law of the Council of Europe) said that relations between the Council of Europe and the African Union and the Organization of American States were sporadic. They were in no way comparable to the relations that had been established with universal organizations such as the United Nations. In the framework of intercultural dialogue, more regular exchanges had taken place with the Member States of the United Nations, but they were admittedly limited to that type of question.

37. “Disconnection clauses” were a complex matter that had given rise to major problems on two occasions. The first had been when the three “Warsaw Conventions”, namely, the Council of Europe Convention on the Prevention of Terrorism, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism and the Council of Europe Convention on Action against Trafficking in Human Beings, had been opened for signature by the member States of the Council of Europe. The European Commission had requested the inclusion of a disconnection clause in each of the treaties for the purpose of regulating the relations established by them among the member countries of the European Union; that had been accepted after the Council of Europe and the European Commission had agreed that those clauses would relate only to the possibility of implementing means other than those provided for in the texts in question and could not have the effect of exempting the States concerned from their treaty obligations.

38. The European Commission had also requested the inclusion of a disconnection clause at the time of the signature of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, and it had been accepted. However, since some member States had stressed that this was an *ad hoc* solution adopted as a matter of urgency and that it in no way prejudged the inclusion of such a clause in other conventions in future, it had been decided that CAHDI should be entrusted with the task of carrying out a study on the consequences of disconnection clauses for international law. The contours of that study would be defined in September 2007 by the Committee of Ministers of the Council of Europe and the first report by CAHDI on the question was scheduled for March 2008.

Draft report of the Commission on the Work of its fifty-ninth session (*continued*)

CHAPTER VIII. Responsibility of international organizations (*continued*) (A/CN.4/L.713 and Add.1–3)

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (*continued*) (A/CN.4/L.713/Add.1–3)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-NINTH SESSION (*continued*)

Commentary to draft article 39 (Compensation) (continued)

Paragraph (4) (*continued*)

39. The CHAIRPERSON, suggesting that the members of the Commission might take up an issue left pending at the preceding meeting, invited them to consider Ms. Escarameia’s proposal that the following new paragraph 4 *bis* should be added to the commentary to article 39: “Since article 39 must be read in conjunction with article 36, paragraph 2, on the scope of international obligations, the existence of rights that directly accrue to individuals is not prejudiced.” The footnote would read: “See, for example, General Assembly resolution 52/247, dated 26 June 1998, on compensation of individuals injured as a result of wrongful acts by United Nations peacekeeping forces.”

40. Mr. GAJA (Special Rapporteur) said he did not think that it was wise to add such a paragraph to the commentary to article 39, which related to compensation, because the same thing would then have to be done for the other forms of reparation for injury. If something was to be added, it should be done in paragraph (5) of the commentary to article 36 (Scope of international obligations set out in this Part).

41. Ms. ESCARAMEIA said that she did not object to the Special Rapporteur’s suggestion, but she would like the wording adopted to be as close as possible to the wording she had proposed.

42. The CHAIRPERSON proposed that the Special Rapporteur and Ms. Escarameia should agree on specific wording that the Commission might adopt at a later meeting.

It was so decided.

Paragraph (1) (*concluded*)

43. After an exchange of views in which Mr. PELLET and Mr. GAJA (Special Rapporteur) took part, it was decided that the third and fourth sentences should be combined and that the words “the respective States” should be followed by the following words: “in accordance with the statement by the United Nations in the letter that it would not evade responsibility...”

Paragraph (1), as amended, was adopted.

Commentary to draft article 40 (Satisfaction)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to draft article 40 was adopted.

Commentary to draft article 41 (Interest)

The commentary to draft article 41 was adopted.

Commentary to draft article 42 (Contribution to the injury)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 42 was adopted.

Commentary to draft article 43 (Ensuring the effective performance of the obligation of reparation)

Paragraph (2)

44. Mr. PELLET said that, in order to justify the very important fact that the purpose of draft article 43 was not to transfer the responsibility of an international organization to a State, the commentary was based on opinions expressed by States and on practice. However, an equally important theoretical consideration did not appear in the commentary: since international organizations were considered to have legal personality, they were responsible, and their responsibility could not be transferred to a State. In order to reflect that consideration in the commentary, the following sentence should be added at the end of paragraph (2): “Moreover, since it is recognized that international organizations have international legal personality of their own, it is [in theory] inconceivable that they should not be held solely responsible for their internationally wrongful acts.” A footnote referring to the advisory opinion of the ICJ in the case concerning *Certain Expenses of the United Nations* might also be added after the words “of their own”.

45. Mr. GAJA (Special Rapporteur) said that the footnote was inappropriate because it referred only to the United Nations. Moreover, the text proposed by Mr. Pellet was unnecessary and belonged more at the beginning of the commentary, in connection with paragraph (1).

46. The CHAIRPERSON proposed that the Special Rapporteur and Mr. Pellet should agree on wording and that the Special Rapporteur should report back to the Commission at the next meeting, until when the adoption of paragraphs (1) and (2) would be suspended.

It was so decided.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

47. Mr. GAJA (Special Rapporteur), supported by Mr. PELLET, proposed that the words “in the Drafting Committee” in the first line should be deleted and that the words “the Drafting Committee” in the last line should be replaced by the words “the Commission”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

48. Mr. PELLET said that the words “of the Drafting Committee” should also be deleted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

49. Mr. NOLTE said that the second sentence, which went too far, should be toned down somewhat because it implied that, for all organizations, the general duty to cooperate involved an obligation to finance the organization. That was open to question, however, as the example of the International Tin Council showed. He therefore proposed that the word “generally” should be added after the word “may” in the second sentence.

Paragraph (6), as amended, was adopted.

Paragraph (7)

50. Mr. PELLET said that the two opinions reflected in paragraph (7) should be shown separately in two sentences, the first ending with the words “general international law” and the second, which would follow on immediately, beginning with the words “Other members considered that that principle could be stated by the Commission...”.

51. After a discussion in which Ms. ESCARAMEIA, Mr. GAJA (Special Rapporteur), Mr. HMOUD, Mr. NOLTE and Mr. PELLET took part, Mr. Pellet’s proposal was adopted following an indicative vote.

Paragraph (7), as amended, was adopted.

The meeting rose at 12.55 p.m.

2953rd MEETING

Wednesday, 8 August 2007, at 3.05 p.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comisário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobson, Mr. Kolodkin, Mr. McRae, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its fifty-ninth session (*continued*)

CHAPTER VIII. *Responsibility of international organizations (continued)* (A/CN.4/L.713 and Add.1-3)

C. **Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (*continued*)** (A/CN.4/L.713/Add.1-3)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-NINTH SESSION (*continued*)

1. The CHAIRPERSON drew attention to the portion of chapter VIII contained in document A/CN.4/L.713/Add.1. One issue remained to be settled, namely a proposal by Ms. Escarameia for an additional sentence to be inserted in paragraph (5) of the commentary to draft article 36.

Commentary to draft article 36 (Scope of international obligations set out in this Part) (concluded)*

Paragraph 5 (concluded)*

2. Mr. GAJA (Special Rapporteur) said that the proposed new text, to be inserted after the first sentence, would read: “Another area is that of breaches committed by peacekeeping forces and affecting individuals.” The footnote would read: “See, for instance, General Assembly resolution 52/247 of 26 June 1998 on third-party liability: temporal and financial limitations.”

Paragraph (5) of the commentary to draft article 36, as amended, was adopted.

The commentary to draft article 36, as amended, was adopted.

3. The CHAIRPERSON invited the Commission to consider a number of issues that had been left pending in the portion of chapter VIII contained in document A/CN.4/L.713/Add.2.

Commentary to draft article 43 (Ensuring the effective performance of the obligation of reparation) (concluded)

Paragraph (1) (concluded)

4. Mr. GAJA (Special Rapporteur) said that Mr. Pellet had proposed that the following sentence should be added at the beginning of the paragraph: “International organizations that are considered to have a separate international legal personality are in principle the only subjects for which the legal consequences of their internationally wrongful acts are entailed.”

5. Mr. McRAE suggested that the second half of the sentence should be recast to read: “... the only subjects whose internationally wrongful acts entail legal consequences”.

6. The CHAIRPERSON said that it would be safer to retain the text proposed by the Special Rapporteur, which was the product of careful consultations.

Paragraph (1), as amended, was adopted.

Paragraph (7) (concluded)

7. Mr. GAJA (Special Rapporteur) said that in order to clarify any possible ambiguity, he had thought it worthwhile to expand the commentary, since some members of the Commission favoured the view that the obligation of reparation already existed under general international law, while others considered that it did not exist or that it could be stated only as a possible rule of progressive development. He therefore proposed the following text to replace the existing first sentence of the paragraph:

“The majority of the Commission maintained that no duty arose for members under general international law to take all appropriate measures in order to provide the responsible organization with the means for fulfilling its obligation to make reparation. However, some members were of the contrary opinion, while some other members expressed the view that such an obligation should be stated as a rule of progressive development.”

Paragraph (7), as amended, was adopted.

* Resumed from the 2950th meeting.

The commentary to draft article 43 as a whole, as amended, was adopted.

Commentary to draft article 44 [43] (Application of this chapter)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to draft article 44 [43] was adopted.

Commentary to draft article 45 [44] (Particular consequences of a serious breach of an obligation under this chapter)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

8. Mr. PELLET said that it was not clear from the statement by the Russian Federation quoted in the paragraph that the draft article concerned serious breaches of obligations under *jus cogens* rather than simply unlawful acts. He therefore proposed that the quotation should be deleted or else given a context in order to show the link with serious breaches.

9. Mr. GAJA (Special Rapporteur) said that, in the context, it was clear that the Russian Federation was addressing serious breaches of obligations under peremptory norms of general international law. He had included the quotation because it was a specific reply to the question that had been put to Governments. There was no need for clarification. He would, however, engage in further consultations if the Commission so wished.

10. Mr. KOLODKIN said that he saw no problem with the quotation. The first sentence of the paragraph set the scene, and the context of the quotation was clear.

11. Mr. CANDIOTI said that he understood Mr. Pellet's concern. The Commission was endorsing the Russian Federation's opinion, which seemed to be that States should cooperate in terminating any unlawful act by an international organization, whereas the draft article was concerned solely with serious breaches of general international law.

12. Mr. KOLODKIN proposed that the quotation should be deleted. Thus no one State would be singled out.

13. Mr. SABOIA, supported by Mr. PELLET, said that the solution proposed by Mr. Kolodkin was fair. The quotation should be deleted, but the reference to the statement by the Russian Federation should be retained for ease of consultation.

14. The CHAIRPERSON said that he took it that the Commission wished to delete the quotation from the Russian Federation.

It was so decided.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

15. Mr. PELLET said that his concern with regard to paragraph (6) was the same as that regarding paragraph (2): the quotation from the advisory opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* referred to an illegal situation but did not specify in what way the situation involved a serious breach of international law. He therefore suggested that the quotation should be replaced by one indicating the seriousness of the breach involved.

16. Mr. GAJA (Special Rapporteur) said that the quotation bore no relation to the one in paragraph (2), which he had chosen because it had neatly expressed a point of view. In the case of paragraph (6), the problem was that the ICJ had not said in so many words that there existed an obligation under a peremptory norm of general international law. Indeed, there was no reference to peremptory norms in the advisory opinion. The opinion was well known and, in his view, there was no need for the Commission to go into detail on the Court's conclusions.

17. Mr. HMOUD pointed out that the delegation of Jordan, the observer for Palestine and other interested delegations had considered the whole legal regime of the wall to be contrary to the right to self-determination, which was a peremptory norm of international law. ICJ had not spelled that out, but he hoped that the implication that a peremptory norm had been breached had been intentional.

18. Mr. PELLET proposed that the quotation should be replaced by the following sentence, which appeared in paragraph 159 of the advisory opinion: "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall", which, at the least, implied that serious breaches of international law were involved.

Paragraph (6) was provisionally adopted, subject to the outcome of further consultations between the Special Rapporteur and Mr. Pellet.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

1. TEXT OF THE DRAFT ARTICLES (concluded)**

19. The CHAIRPERSON drew attention to document A/CN.4/L.713/Add.3, which contained the text of the draft articles on responsibility of international organizations. Since the Commission had already provisionally adopted the draft articles, it did not need to consider them again. He therefore took it that the Commission agreed to include the text of the draft articles in Chapter VIII.

It was so decided.

Section C.1 of Chapter VIII of the report of the Commission was adopted.

CHAPTER IV. *Reservations to treaties (continued)**** (A/CN.4/L.706 and Add.1-3)

20. The CHAIRPERSON drew attention to the portion of Chapter IV contained in document A/CN.4/L.706/Add.2, which contained a summary of the debate on the twelfth report on reservations to treaties.

21. Ms. ESCARAMEIA suggested that the Commission should defer consideration of the document, which, although substantive, had been issued only that morning. Members would have had little time in which to absorb the information.

22. The CHAIRPERSON said that, regrettably, exigencies of time required the Commission to proceed with its consideration of the document immediately.

B. *Consideration of the topic at the present session (continued)****

Paragraph 1

23. The CHAIRPERSON said that paragraph 1 was redundant and should be deleted.

Paragraph 1 was deleted.

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

Paragraph 4

24. The CHAIRPERSON said that the blanks in the first phrase should be filled as follows: "At its 2950th and 2951st meetings, on 7 August 2007, ...".

Paragraph 4, as orally revised, was adopted.

Paragraph 5

Paragraph 5 was adopted.

4. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS TWELFTH REPORT

Paragraph 6

25. Mr. PELLET said that, as it stood, the penultimate sentence was meaningless. He therefore suggested the following amendment: "Moreover, there was no need to consider treaty provisions that expressly authorize a reservation to be anticipated acceptances."

Paragraph 6, as amended, was adopted.

Paragraph 7

Paragraph 7 was adopted.

Paragraph 8

26. Mr. PELLET (Special Rapporteur) proposed, first, that the words "which was also contained" in the second sentence should be amended to read "although it was contained". Secondly, the beginning of the third sentence, which read "Retaining it might serve to indicate ..."

** Resumed from the 2949th meeting.

*** Resumed from the 2951st meeting.

should be reworded to read “Retaining it had the advantage of indicating ...”.

Paragraph 8, as amended, was adopted.

Paragraphs 9 to 14

Paragraphs 9 to 14 were adopted.

Paragraph 15

27. Mr. PELLET (Special Rapporteur) said that the words “a question” in the first sentence should be amended to read “another question”.

Paragraph 15, as amended, was adopted.

Paragraphs 16 to 18

Paragraphs 16 to 18 were adopted.

5. SUMMARY OF THE DEBATE

28. The CHAIRPERSON announced that consideration of section B.5 would be postponed until the next day to allow members sufficient time to peruse the document.

CHAPTER II. Summary of the work of the Commission at its fifty-ninth session (A/CN.4/L.711)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

29. Mr. PELLET said that paragraph 3 should mention that the Drafting Committee had also considered draft articles 1 and 2. He therefore proposed that the end of the last sentence should read, “... to the Drafting Committee, which considered draft articles 1 and 2, although it was not possible for the Commission to discuss those draft articles in plenary meeting”, or words to that effect.

30. The CHAIRPERSON noted that a progress report had been presented but that the draft articles had not been adopted by the Commission.

31. Mr. PELLET asked why no reference was made to that fact.

32. The CHAIRPERSON said that he would consult the Secretary of the Commission regarding the amendment of paragraph 3.

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

Paragraph 7

33. Ms. ESCARAMEIA asked why the paragraph did not allude to the presentation of the Planning Group’s report to the plenary Commission and to the report’s inclusion in the final chapter of the Commission’s report. She therefore proposed that the first sentence should be supplemented to read: “The Commission set up a Planning Group to consider its programme, procedures and working methods, which presented its report, which is reflected in Chapter X of the Commission’s report.”

34. Ms. ARSANJANI (Secretary to the Commission) explained that the final chapter of the Commission’s report reflected only the fact that the Planning Group had been established. The entire report of the Planning Group was incorporated in the Commission’s report as a Commission decision. It did not therefore form a specific section of the last chapter of the report.

35. Ms. ESCARAMEIA said that, in that case, since the purpose of Chapter II was to guide readers of the report, it should indicate where the substance of the Planning Group’s discussions could be found in the report.

36. The CHAIRPERSON asked the Secretary to investigate ways of improving the narrative clarity of paragraph 7, provided that such action would not be contrary to any established convention.

Paragraph 7 was adopted on the understanding that editorial improvements would be made to the text.

Paragraph 8

37. Ms. ESCARAMEIA said that the Commission’s meetings with treaty-monitoring bodies during the past year had been much more formal than those held in previous years. That being the case, she wondered why there was no reference to the seminar that had been held with representatives of treaty-monitoring bodies and the representative from the Sub-Commission on the Promotion and Protection of Human Rights.

38. Mr. PELLET said that he did not understand what had determined the order in which the various entities were listed. It would be more logical to put them in the order in which their presentations had been heard. It might also be advisable to add a phrase reading “and organized a seminar with United Nations human rights experts” at the end of the paragraph.

39. Mr. SABOIA agreed with Mr. Pellet’s proposal and endorsed Ms. Escarameia’s comments. He also pointed out that it was inappropriate to refer to the persons who had participated in the meetings as “experts” because they had attended in their capacity as representatives of treaty-monitoring bodies.

40. Mr. CAFLISCH concurred with Mr. Saboia and emphasized that not all participants had been United Nations experts, for some had been representatives of the European Court of Human Rights. Moreover, not all of them had been experts on matters concerning reservations to treaties.

41. The CHAIRPERSON said that all the proposals were sound. Mr. Pellet’s suggestions regarding presentation should be adopted and Ms. Escarameia had also made a valid point concerning improvements to the reference to the meetings in question. However, given that it would be impossible to go into great detail in Chapter II, contacts with treaty-monitoring bodies would be chronicled elsewhere in the report. The points made by Mr. Cafflich and Mr. Saboia should be accepted and the paragraph should specify that the individuals in question were members of particular treaty-monitoring bodies. He invited Ms. Escarameia to supply the appropriate wording.

42. Mr. PELLET suggested that it would be wise to abide by the wording used in General Assembly resolution 61/34 of 4 December 2006, on the report of the International Law Commission on the work of its fifty-eighth session.

43. The CHAIRPERSON suggested that even though the Secretary had emphasized that Chapter II was a summary of the Commission's work and that Chapter X was the proper place for a more detailed account, the end of the paragraph should be modified to indicate that the persons in question were members of human rights monitoring bodies and that not all were from the United Nations.

44. Mr. VALENCIA-OSPINA agreed with Mr. Pellet's solution and proposed that the sentence should read: "The Commission convened a meeting with representatives of the United Nations human rights bodies set up under human rights instruments and with regional human rights bodies."

45. The CHAIRPERSON suggested that members should hold consultations with a view to finding more apposite wording.

Paragraph 9

46. Mr. PERERA said that the paragraph should also state that the seminar had been addressed by several members of the Commission. The details could appear in chapter X.

Paragraph 9, as amended, was adopted, subject to minor editorial corrections.

Paragraph 10

Paragraph 10 was adopted.

47. Mr. CANDIOTI, supported by Mr. SABOIA, said that although he had refrained from commenting on each point, he was unhappy with editorial policy. Chapter II always amounted to no more than a shorthand, not to say statistical, account of the Commission's work and left the reader unenlightened on a number of important matters. It was a lacklustre way of describing all the discussions that had taken place. Chapter II should be more user-friendly; it should awaken the reader's curiosity and generate a desire to know what happened next. He therefore suggested that, in future, chapter II should summarize the substantive content of reports and indicate in greater detail what questions had been most hotly debated. Meatier presentation and better "selling" of the Commission's work would influence discussions in the Sixth Committee.

48. Mr. PELLET said that Mr. Candioti had touched on a sore point. He personally disliked chapter II on principle. No attempt should be made to prepare a summary for the lazy—the more interesting chapter II was, the less some members of the Sixth Committee would read the remainder of the report. It would be wiser to highlight the main issues in the separate chapters of the report. If an overview was prepared, it was certain that 90 per cent of delegates to the Sixth Committee would read only that, and no serious discussion could be based on a digest. The better chapter II was, the more harm it would do.

49. The CHAIRPERSON said that while he did not wish to embark on a discussion of the content and structure of the report, he believed that some important issues had been broached. He found Mr. Candioti's proposals persuasive. Chapter II was rather dry, and as a wide public did consult the Commission's publications, editorial policy must be discussed by the Planning Group.

50. Ms. ESCARAMEIA pointed out that chapter II of the Commission's report was indeed on the Planning Group's agenda for the following year. Priority should therefore be given to that subject and a meeting should be held on it at the beginning of the session, since the Secretariat required guidance as early as possible on the drafting of the report. She supported the views of Mr. Candioti and did not feel that a digest would promote laziness. She was sure that Mr. Pellet did not read every article in every international law journal and that he often read abstracts in order to find out if the full article would be of interest to him. An expanded chapter II should summarize the most controversial issues; as it stood, the chapter said nothing of substance.

The meeting rose at 4.20 p.m.

2954th MEETING

Thursday, 9 August 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comisário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its fifty-ninth session (*continued*)

CHAPTER VIII. *Responsibility of international organizations (concluded)* (A/CN.4/L.713 and Add.1-3)

C. *Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (concluded)* (A/CN.4/L.713/Add.1-3)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-NINTH SESSION (*concluded*)

Commentary to draft article 45 [44] (Particular consequences of a serious breach of an obligation under this chapter) (*concluded*)

Paragraph (6) (*concluded*)

1. The CHAIRPERSON, recalling that paragraph (6) of document A/CN.4/L.713/Add.2 had been left pending, invited Mr. Gaja to read the proposal which he had prepared together with Mr. Pellet.

2. Mr. GAJA (Special Rapporteur) proposed that, to meet Mr. Pellet's request, an excerpt from the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* be included. The text in question should be inserted in quotation marks after the words "for all States" and the footnote should be amended so that it referred to paragraph 159 of the opinion.

Paragraph (6), as amended, was adopted.

The commentary to draft article 45 [44], as amended, was adopted.

Section C.2, of Chapter VIII of the draft report of the Commission as amended, was adopted.

Chapter VIII of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER IV. Reservations to treaties (concluded) (A/CN.4/L.706 and Add.1-3)

3. The CHAIRPERSON invited the members of the Commission to continue their consideration of chapter IV.B of the draft report on reservations to treaties (A/CN.4/L.706/Add.2).

B. Consideration of the topic at the present session (concluded)

5. SUMMARY OF THE DEBATE

Paragraph 19

Paragraph 19 was adopted.

Paragraph 20

4. Mr. GAJA proposed that the first sentence should be moved to paragraph 19. The rest of the paragraph should be divided into two parts, the first part ending with the words "and the State accepting the reservation"; the new paragraph would start with "It was further pointed out". The beginning of the penultimate sentence should be worded: "Another view was that, according to the Vienna Convention, the absence of an objection gave rise to a presumption". In the last sentence, the words "It was also understood that" should be replaced by "It was suggested that".

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 24

Paragraphs 21 to 24 were adopted.

Paragraph 25

5. Mr. PELLET (Special Rapporteur) said that the last sentence should be amended to read: "Moreover, the draft guideline did not make it clear which provisions of draft guideline 2.8.1 did not apply."

6. Mr. HMOUD suggested that the following sentence should be inserted after the first sentence: "According to one view, the notion of presumption should be replaced by the notion of tacit acceptance."

Paragraph 25, as amended by Mr. Pellet and Mr. Hmoud, was adopted.

Paragraphs 26 to 28

Paragraphs 26 to 28 were adopted.

Paragraph 29

7. Ms. ESCARAMEIA said that the following words should be inserted at the end of the first sentence: "and that the title of the guideline did not reflect its contents because the position taken on a reservation could be an objection."

Paragraph 29, as amended, was adopted.

Paragraph 30

8. Mr. PELLET (Special Rapporteur) said that the words "such a regime would conform" at the end of the paragraph should be amended to read: "such a regime should conform".

9. The CHAIRPERSON said that Ms. Escarameia had circulated a proposal in writing which read:

"With regard to draft guideline 2.8.12, some members considered that acceptances should not have in all circumstances a final and irreversible nature. It was pointed out that an express acceptance should be considered final and irreversible only 12 months after the reservation was made because that was the period that applied, by their nature, to tacit acceptances."

10. Mr. PELLET (Special Rapporteur) said that he was astonished by the word "because" in the second sentence of Ms. Escarameia's proposal. What followed that word was not an explanation but a comparison. He therefore suggested that the end of the sentence should be replaced by the words: "as is the case with tacit acceptances".

11. Mr. NOLTE asked why the two sentences had been separated. As to substance, he seemed to recall that the opinion expressed in the second sentence had also been expressed by the members who had formulated the opinion expressed in the first sentence. Thus, the second sentence should begin with the words: "They pointed out".

12. Ms. ESCARAMEIA said that Mr. Pellet was right and that she endorsed his proposed amendment. As to Mr. Nolte's proposal, the members in question were not exactly the same and it would thus be preferable to retain the words "It was also pointed out".

Paragraph 30, as amended, was adopted.

Paragraphs 31 to 32

Paragraphs 31 to 32 were adopted.

6. SPECIAL RAPPORTEUR'S CONCLUDING REMARKS

Paragraphs 33 to 42

Paragraphs 33 to 42 were adopted.

Paragraph 43

13. Mr. PELLET (Special Rapporteur) said that, at the beginning of the first sentence of the French version, the words “*il était d'accord que son titre*” should be replaced by “*il convenait que son titre*” and that, at the beginning of the second sentence of both versions, the words “the expression relating to legal effects” should be replaced by “what was said relating to legal effects”.

Paragraph 43, as amended, was adopted.

Paragraph 44

Paragraph 44 was adopted.

Section B, as reproduced in document A/CN.4/L.706/Add.2, as amended, was adopted.

Chapter IV of the draft report of the Commission, as a whole, as amended, was adopted.

REPORT ON THE MEETING WITH HUMAN RIGHTS TREATY BODIES PREPARED BY THE SPECIAL RAPPORTEUR (ILC(LIX)/RT/CRP.1³⁸³)

14. The CHAIRPERSON invited the Special Rapporteur to speak on his report on the meeting with human rights treaty bodies, which had taken place on 15 and 16 May at the United Nations Office at Geneva on the Commission's initiative.

15. Mr. PELLET (Special Rapporteur) said that the meeting with the human rights treaty bodies, which had focused primarily on the question of reservations to human rights instruments, had provided an opportunity for a fruitful exchange of views, of which it would be a shame not to have any record. Accordingly, he had prepared, under his own responsibility, a report (ILC(LIX)/RT/CRP.1), which he offered to place on the Commission's website; a reference to that effect could be included in chapter X of the Commission's report.

16. The CHAIRPERSON, speaking as a member of the Commission, pointed out that the Commission's website was an official context and that all members would have to be consulted in that regard.

17. Mr. PELLET (Special Rapporteur) read out the first footnote of his report:

“The present report—which is not a ‘statement of conclusions’—was prepared solely by the Special Rapporteur on reservations to treaties. It was submitted for opinion to outside participants and to those members of the Commission who had made introductory presentations, but in no way engages their responsibility.”

18. Mr. NOLTE said that, if the report was to be placed on the Commission's website, the footnote would have to be amended to indicate more clearly that the text did not engage the Commission's responsibility.

19. Mr. VALENCIA-OSPINA said that he wondered whether the document in question should not instead be annexed to the tenth report on reservations to treaties.³⁸⁴

³⁸³ Mimeographed, available on the Commission's website, in English and French only, documents of the fifty-ninth session.

³⁸⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2.

20. Mr. GAJA said that the report could be placed on the Commission's website and also be the subject of a document with restricted distribution, but still accessible to the public.

21. Mr. PELLET (Special Rapporteur) said that nothing prevented him from annexing the report to his tenth report on reservations to treaties, but it would be better to make it available on the Commission's website, with an amendment to the footnote along the lines suggested by Mr. Nolte.

22. The CHAIRPERSON said he took it that the members of the Commission wished to place document ILC(LIX)/RT/CRP.1 on the Commission's website.

It was so decided.

CHAPTER VI. *Expulsion of aliens* (A/CN.4/L.707/Rev.1)

23. The CHAIRPERSON invited the members of the Commission to consider chapter VI of the draft report on the expulsion of aliens, notwithstanding the absence of the Special Rapporteur on the topic.

A. **Introduction**

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. **Consideration of the topic at the present session**

Paragraphs 5 to 14

Paragraphs 5 to 14 were adopted.

Paragraph 15

24. Mr. PELLET, referring to the French version, said that the word “*énoncer*” in the third sentence should be replaced by “*mentionner*”.

Paragraph 15, as amended in the French version, was adopted.

Paragraphs 16 and 17

Paragraphs 16 and 17 were adopted.

Paragraph 18

25. Mr. PELLET said that the words “or an obligation to expel them” at the end of the second sentence should be deleted because it suggested that a State could be bound by an obligation to expel enemy aliens, and that seemed absurd.

26. The CHAIRPERSON said that it would be difficult to take a decision on Mr. Pellet's suggestion without checking with the Special Rapporteur, who was solely responsible for the content of the introductory part of the chapter.

Paragraph 18, as amended, was adopted, subject to the Special Rapporteur's approval.

Paragraphs 19 to 25

Paragraphs 19 to 25 were adopted.

Paragraph 26

27. Mr. GAJA suggested that the word “interests” in the first sentence should be replaced by “situation” and that the words “in international zones” at the end of the sentence should be deleted.

28. Mr. PERERA said that, in the penultimate sentence, the words “in the territory” should be replaced by “in the international zone” because that was more in keeping with the question addressed in the paragraph, namely, non-admission.

Paragraph 26, as amended, was adopted.

Paragraphs 27 to 32

Paragraphs 27 to 32 were adopted.

Paragraph 33

29. Mr. GAJA said that the paragraph was unnecessary and should be deleted, since the question of the non-expulsion by a State of its nationals was dealt with in paragraphs 44 to 50.

It was so decided.

Paragraphs 34 to 37

Paragraphs 34 to 37 were adopted.

Paragraph 38

30. Mr. VÁZQUEZ-BERMÚDEZ proposed that the last sentence should be deleted because the view that it referred to had not been explained, it was unnecessary in the light of the content of the first sentence and it had become irrelevant, the Drafting Committee having decided not to include a definition of the concept of “territory”.

31. Mr. WISNUMURTI proposed that the words “or archipelagic waters” should be inserted in the last part of the second sentence, which would then read: “in the territorial sea, internal waters or archipelagic waters of a State”.

Paragraph 38, as amended, was adopted.

Paragraph 39

Paragraph 39 was adopted.

Paragraph 40

32. Ms. ESCARAMEIA, noting that it was her opinion which had been reflected in the second sentence, said that the words “considered by the Special Rapporteur as” should be inserted after “whereby only the rules” and the words “, because they derived from sovereignty,” inserted after “in the international legal order”.

Paragraph 40, as amended, was adopted.

Paragraph 41 to 43

Paragraphs 41 to 43 were adopted.

Paragraph 44

33. Mr. VARGAS CARREÑO said that, in fact, a majority of members had approved the inclusion of a provision relating to expulsion of nationals; thus, the words “A number” should be replaced by “A majority”.

Paragraph 44, as amended, was adopted.

Paragraphs 45 and 46

Paragraphs 45 and 46 were adopted.

Paragraph 47

34. Mr. GAJA said that, in order better to reflect the debate, the fourth sentence should be amended to read: “Expulsion of nationals could at best be justified, in extreme cases, in terms of a state of necessity.”

Paragraph 47, as amended, was adopted.

Paragraphs 48 to 51

Paragraphs 48 to 51 were adopted.

Paragraph 52

35. Mr. VÁZQUEZ-BERMÚDEZ pointed out that the first sentence of paragraph 52 of the English version said exactly the opposite of what was stated in the first sentence of the original French version and in the Spanish version. The English translation of the sentence therefore needed to be corrected.

Paragraph 52 was adopted with the correction to the English text.

Paragraphs 53 to 60

Paragraphs 53 to 60 were adopted.

Paragraph 61

36. Mr. PERERA recalled that a number of members, including himself, had referred to the need for a separate article on migrant workers, given their vulnerability, and proposed that this could be stated, for example, by adding the following sentence: “Some members suggested adding a separate article on migrant workers, having regard to their particular vulnerability.”

Paragraph 61, as amended, was adopted.

Paragraphs 62 to 83

Paragraphs 62 to 83 were adopted.

Section B, of Chapter VI of the draft report of the Commission as amended, was adopted.

Chapter VI of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER X. Other decisions and conclusions of the Commission (A/CN.4/L.715 and Add.1)

37. The CHAIRPERSON proposed that the Commission should adopt the part of chapter X of the report contained in document A/CN.4/L.715, which had already

been adopted by the Planning Group (see the 2951st meeting, above, paragraphs 65–82).

The part of sections A and B of Chapter X contained in document A/CN.4/L.715 was adopted.

38. The CHAIRPERSON invited the members of the Commission to adopt the part of chapter X of the report contained in document A/CN.4/L.715/Add.1.

A. Programme, procedures and working methods of the Commission and its documentation (concluded)

2. COST-SAVING MEASURES

Paragraph 1

Paragraph 1 was adopted.

4. INCLUSION OF NEW TOPICS ON THE PROGRAMME OF WORK OF THE COMMISSION AND ESTABLISHMENT OF WORKING GROUPS TO CONSIDER FEASIBILITY OF CERTAIN TOPICS

Paragraph 2

39. Mr. VALENCIA-OSPINA thanked the Commission for appointing him Special Rapporteur on the topic “Protection of persons in the event of disasters”. He asked the Commission to approve his request for the Secretariat to prepare a background study on the topic, initially limited to natural disasters. If that request was granted, a paragraph 2 *bis* would need to be added to that effect.

40. The CHAIRPERSON said that the Secretariat would take care of that matter.

41. Ms. ESCARAMEIA asked whether it might not be possible to expand the topic to include other types of disasters.

42. Mr. VALENCIA-OSPINA said that it was up to the Commission to decide the exact scope of the work. In any event, his preliminary study would focus on that initial aspect of the topic.

Paragraph 2 was adopted.

Paragraph 3

43. Mr. KOLODKIN, speaking as Special Rapporteur on the topic “Immunity of State officials from foreign criminal jurisdiction”, asked the Commission to request the Secretariat to prepare a background study on the topic.

Paragraph 3 was adopted.

Paragraph 4

44. Mr. PELLET said it should be stated that the opened Working Group referred to in the first sentence had worked on the basis of a paper prepared by Mr. McRae and Mr. Perera.

Paragraph 4, as amended, was adopted.

9. MEETING WITH UNITED NATIONS HUMAN RIGHTS EXPERTS

45. After a discussion in which Mr. NOLTE, the CHAIRPERSON and Mr. PELLET took part, it was proposed that the title of subsection 9 should be amended to read: “Meeting with human rights experts”.

It was so decided.

Paragraph 5

46. Mr. CAFLISCH said that, for consistency’s sake, the footnote whose reference was placed after “human rights experts” in the second sentence should be amended to read: “The participants were”. He also pointed out that Mr. Vincent Berger, whose name appeared in the footnote, was Jurisconsult at the European Court of Human Rights.

47. Mr. PELLET said that the words “representatives from human rights treaty bodies” should be avoided and that it would be better to refer to “members” of those bodies. He also suggested that the full stop at the end of the first sentence should be replaced by a semi-colon and that the following phrase should be added: “experts from regional organizations were also invited”. With regard to the above-mentioned footnote, it seemed to him that it was incorrect to refer to the “former Sub-Commission on the Promotion and Protection of Human Rights”, since legally speaking, it had not yet been disbanded. If his impression was correct, then the prefix “ex-” should be deleted.

48. Ms. ARSANJANI (Secretary to the Commission) said that the Secretariat would check on that question.

Paragraph 5, as amended, was adopted.

C. Cooperation with other bodies

Paragraphs 6 to 11

Paragraphs 6 to 11 were adopted.

D. Representation at the sixty-second session of the General Assembly

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

49. The CHAIRPERSON said that paragraph 13 should read: “At its 2954th meeting, on 9 August 2007, the Commission requested Mr. Kamto, Special Rapporteur on the topic ‘Expulsion of aliens’, to attend the sixty-second session of the General Assembly, on 4 December 1989, under the terms of paragraph 5 of General Assembly resolution 44/35.”

Paragraph 13, as amended, was adopted.

E. International Law Seminar

Paragraphs 14 to 18

Paragraphs 14 to 18 were adopted.

Paragraph 19

50. Mr. VARGAS CARREÑO said that he was the former Executive Secretary of the Inter-American Commission of Human Rights, not the former Secretary-General of the Inter-American Commission of Human Rights, as indicated in paragraph 19.

Paragraph 19, as amended, was adopted.

Paragraph 20

51. Mr. McRAE said that the words “and they also attended” should be replaced by “where they attended” and that the words “Disputes Settlement System” in the English version should be corrected to read “Dispute Settlement System”.

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 27

Paragraphs 21 to 27 were adopted.

52. Mr. CANDIOTI said that, before chapter X was adopted, he would like to refer again to document A/CN.4/L.715. Following the amendment to paragraph 4 of document A/CN.4/L.715/Add.1, the words “on the basis of a paper prepared by Mr. Nolte” should be added at the end of paragraph 5 of A/CN.4/L.715.

It was so decided.

The part of section A and sections C, D and E contained in document A/CN.4/L.715/Add.1, as amended, were adopted.

Chapter X of the draft report of the Commission, as a whole, as amended, was adopted.

The meeting rose at 1.05 p.m.

2955th MEETING

Friday, 10 August 2007, at 10.10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Cafilisch, Mr. Candiotti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its fifty-ninth session (concluded)

CHAPTER II. Summary of the work of the Commission at its fifty-ninth session (concluded)* (A/CN.4/L.711)

Paragraphs 7 to 9 (concluded)*

1. The CHAIRPERSON invited the Commission to resume its consideration of chapter II of its draft report (A/CN.4/L.711) and drew attention to amendments that had been made to paragraphs 7, 8 and 9 as agreed at the 2953rd meeting. The new text read:

* Resumed from the 2953rd meeting.

“7. The Commission set up the Planning Group to consider its programme, procedures and working methods (chap. X, sec. A). A Working Group on the long-term programme of work was established, under the Chairpersonship of Mr. Enrique Candiotti, which will submit its final report to the Commission at the end of the current quinquennium topic (chap. X, sect. A.2). The Commission decided to include in its current programme of work two new topics, namely ‘Protection of persons in the event of disasters’ and ‘Immunity of State officials from foreign criminal jurisdiction’. In this regard, it decided to appoint Mr. Eduardo Valencia-Ospina as Special Rapporteur for the former topic and Mr. Roman A. Kolodkin as Special Rapporteur for the latter topic (chap. X, sect. A.4). The Commission also established a Working Group on the most-favoured-nation clause under the Chairpersonship of Mr. Donald McRae to examine the possibility of considering the topic ‘Most-favoured-nation clause’ (chap. X, sect. A.4).

“8. The Commission continued its traditional exchanges of information with the International Court of Justice, the Inter-American Juridical Committee, the Asian–African Legal Consultative Organization, the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law of the Council of Europe (chap. X, sect. D). The Commission also organized a meeting with United Nations and other experts in the field of human rights, which was devoted to discussions on reservations to human rights treaties (chap. X, sect. A.9). The Commission also held an informal meeting with the International Committee of the Red Cross on matters of mutual interest (chap. X, sect. D).

“9. An international law seminar was held with 25 participants of different nationalities. Members of the Commission gave lectures and were involved in other activities concerning the seminar (chap. X, sect. E).”

Chapter II of the draft report as a whole, as amended, was adopted.

CHAPTER IX. The obligation to extradite or prosecute (aut dedere aut judicare) (A/CN.4/L.714 and Add.1)

2. The CHAIRPERSON drew attention to the portion of the chapter contained in document A/CN.4/L.714.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

B. Consideration of the topic at the present session

Paragraph 3

Paragraph 3 was adopted.

1. INTRODUCTION BY THE SPECIAL RAPPOREUR

Paragraph 4

Paragraph 4 was adopted.

Paragraph 5

3. Mr. FOMBA drew attention to the phrase “consisting of the surrender of the individual to a competent international criminal tribunal” in the first sentence and suggested that the word “individual” should be replaced by “suspect” or “alleged perpetrator”.

4. Mr. GAJA suggested that the term “alleged offender” would be more appropriate.

5. Mr. GALICKI (Special Rapporteur) endorsed that suggestion.

Paragraph 5, as amended by Mr. Gaja, was adopted.

Paragraph 6

6. Mr. FOMBA said that the amendment made to paragraph 5 should also be made in the third sentence of the French version of paragraph 6. Referring to the last sentence, he questioned the accuracy of the phrase in French “*les crimes et les infractions*”, since the latter subsumed the former.

7. Mr. GALICKI (Special Rapporteur) said that all language versions should be based on his original wording “crimes and offences”.

Paragraph 6 was adopted.

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

Section A and B. 1 contained in document A/CN.4/L.714, as amended, was adopted.

8. The CHAIRPERSON drew attention to the portion of chapter IX contained in document A/CN.4/714/Add.1.

2. SUMMARY OF THE DEBATE

(a) General comments

Paragraph 1

9. Mr. PELLET said that the phrase “and the so-called ‘triple alternative’ suggested by the Special Rapporteur” was rather esoteric and required some explanation. He suggested that it should be expanded to read: “and the question of surrendering an individual to an international court, the so-called ‘triple alternative’ suggested by the Special Rapporteur”.

10. Mr. GALICKI (Special Rapporteur) endorsed Mr. Pellet’s comments but suggested that the addition of the word “question” after “so-called ‘triple alternative’” would suffice.

Paragraph 1, as amended, was adopted.

Paragraph 2

11. Mr. PELLET questioned the need for the adjective “rigorous” before the noun “analysis” in the first sentence and suggested its deletion. Moreover, he was not entirely

satisfied with the overall structure of the paragraph, and in particular the position of the second sentence which raised the issue of *jus cogens*. As the third sentence followed logically from the first sentence, he suggested that the second sentence should be moved to the end of the paragraph, or else be made the subject of a new paragraph.

12. Mr. GALICKI (Special Rapporteur) said that his preference was for the second sentence to be moved to the end of the paragraph.

13. Mr. McRAE said that he wished to retain the words “rigorous analysis”, since he had used those words himself during the debate. His point had been that before taking any position on such a difficult and controversial matter, the Commission must conduct a thorough analysis of the situation, and he had not been satisfied with the references provided in the second report (A/CN.4/585).

14. Mr. GALICKI (Special Rapporteur) said that he agreed with Mr. McRae on the need to retain the word “rigorous”; it was important to reflect as faithfully as possible the actual words used by speakers during the debate.

Paragraph 2, as amended, was adopted.

Paragraph 3

15. Mr. PERERA suggested that the phrase “in presence of one or more treaties” in the first sentence should be amended to read “in the context of one or more treaties”.

Paragraph 3, as amended, was adopted.

Paragraph 4

16. Mr. GAJA suggested that a new sentence should be added after the third sentence which would read: “Some other members pointed out that a custodian State often acquired jurisdiction only as a consequence of the fact of not extraditing the alleged offender.”

17. Mr. NOLTE suggested the insertion of the qualifier “only” in the second sentence before the word “insofar”.

18. Mr. GALICKI (Special Rapporteur) endorsed those suggestions.

Paragraph 4, as amended, was adopted.

Paragraph 5

19. Ms. ESCARAMEIA suggested that, in order to ensure that the penultimate sentence tied in with the last sentence, the latter should be reworded to read: “Some members thought that to present the obligation as an alternative would tend to obscure its nature.”

20. Mr. GALICKI (Special Rapporteur) said he was agreeable to that suggestion.

Paragraph 5, as amended, was adopted.

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

21. Ms. ESCARAMEIA suggested that the following sentence should be added in order to reflect a view expressed by several members during the debate: “Some members noted that the constituent instruments of some international criminal tribunals deal with the question of concurrent requests for extradition and for surrender to the international tribunal.”

Paragraph 7, as amended, was adopted.

(b) Comments on draft article 1 proposed by the Special Rapporteur

Paragraph 8

22. Mr. HMOUD said that several members had made a point relating to the term “jurisdiction” in draft article 1 that was not covered in the paragraph. He therefore proposed the addition of a new sentence along the lines of: “Several members had proposed that the word ‘jurisdiction’ at the end of draft article 1 should be replaced by ‘present in their territory or under their control’; that was to clarify that the custodian State may not have criminal jurisdiction over the individual concerned.”

23. The CHAIRPERSON said that the Secretariat would find a suitable formulation for the proposed amendment.

24. Ms. ESCARAMEIA said that the fourth sentence did not accurately reflect the point made in connection with the alternative obligation and suggested that it should be reformulated to read: “It was also considered that the adjective ‘alternative’ should be deleted, since the alternative character of the obligation was a matter which the Commission would examine at a later stage.”

Paragraph 8, as amended, was adopted.

(c) Comments on the future work of the Commission on the topic

Paragraphs 9 to 11

Paragraphs 9 to 11 were adopted.

3. SPECIAL RAPPORTEUR’S CONCLUDING REMARKS

Paragraphs 12 to 15

Paragraphs 12 to 15 were adopted.

Paragraph 16

25. Ms. ESCARAMEIA said that, to the best of her recollection, the Special Rapporteur had not expressed the view ascribed to him in the first sentence, although he had said that the word “alternative” should not appear in draft article 1.

26. Mr. GALICKI (Special Rapporteur) concurred: the sentence did not reflect his original idea. He therefore proposed that the word “treated” should be replaced by the more neutral word “described”.

Paragraph 16, as amended, was adopted.

Chapter IX of the report of the Commission as a whole, as amended, was adopted.

CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.712)

27. The CHAIRPERSON invited the Commission to consider chapter III of the draft report, which was contained in document A/CN.4/L.712.

A. Reservations to treaties

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

28. Ms. ESCARAMEIA said that she had never before seen the suggestion that States’ replies to the Commission’s questions should be addressed to the Special Rapporteur.

29. Mr. PELLET (Special Rapporteur) said that the procedure was helpful in identifying the general direction of State practice and also in rectifying mistakes before reports came out.

30. Ms. ESCARAMEIA said that it was a welcome innovation that should be extended to the work of all the special rapporteurs.

31. The CHAIRPERSON, replying to a question by Mr. CANDIOTI, said that replies from Governments would be published in the usual way.

Paragraph 2 was adopted.

Paragraph 3

Paragraph 3 was adopted.

B. Shared natural resources

Paragraph 4

32. Mr. NOLTE asked why there was no reference to the questionnaire that was to be sent to Governments.

33. Mr. YAMADA (Special Rapporteur) said that the questionnaire, which had been drawn up by the Working Group on shared natural resources, was currently being sent out. The questionnaire was, of course, dealt with in a substantive chapter of the report, but it might well be an improvement to include a reference to it in the paragraph under consideration as well.

34. The CHAIRPERSON suggested that a footnote would refer the reader to the substantial chapter.

35. Ms. ESCARAMEIA said that while a footnote was better than nothing, she would have preferred a fuller reference to the questionnaire.

Paragraph 4 was adopted with the editorial change suggested by the Chairperson.

C. Expulsion of aliens

Paragraph 5

36. Mr. NOLTE said that the questions posed in subparagraphs (a) to (h) were so broad that States might be

deterred from answering them in full. Moreover, he noted that in three cases—subparagraphs (a), (c) and (h)—the questions related both to national practice and to the legality of such practice. He was aware that, in the absence of the Special Rapporteur, the Commission should be wary of tampering with the original questions; nevertheless, he wished to propose an amendment that would, while fully respecting the Special Rapporteur's intentions, give greater emphasis to the questions by deleting the questions in subparagraphs (a) and (b) and adding a subparagraph (i) requesting States' opinion on the possible basis of or limit to the practice referred to in subparagraphs (a) to (h) under international law.

37. Mr. PELLET noted that the English text of subparagraph (a) did not correspond to that of the French and Spanish texts: the first sentence ought to read: "State practice with regard to the expulsion of nationals." In addition, some of the questions might have been better phrased—for example, the question "Is it permissible under international law?" would better read "Should it be permissible ...?" However, as a matter of principle, the Commission should not rewrite the questions in the absence of the Special Rapporteur.

38. Mr. FOMBA and Mr. VASCIANNIE concurred with that view.

39. Mr. SABOIA supported Mr. Nolte's proposal. Without changing the substance of the questions, it would make States' tasks easier by grouping all the requests for their opinion in one subparagraph.

40. Mr. VARGAS CARREÑO said that, whatever wording was chosen, the Commission should specify that the question did not refer to extradition. If no such clarification was made, States would provide irrelevant information.

41. The CHAIRPERSON invited members to take an indicative vote on whether it was desirable, in the absence of the Special Rapporteur on the expulsion of aliens, to modify the questions proposed by him.

There were 2 votes in favour and 14 against. Accordingly, the Commission decided not to modify the questions proposed by the Special Rapporteur on the expulsion of aliens.

Paragraph 5 (a) was adopted.

Paragraphs 5 (b) and 5 (c)

Paragraphs 5 (b) and 5 (c) were adopted.

Paragraph 5 (d)

42. Mr. NOLTE said that he wondered whether subparagraph (d) properly reflected draft article 7 as proposed by the Special Rapporteur, in which a reference was made to the collective expulsion of a group of foreign nationals of a State engaged in armed conflict, who had displayed a hostile attitude.

43. The CHAIRPERSON recalled that the Commission had just decided not to modify the questions suggested by the Special Rapporteur.

Paragraph 5 (d) was adopted.

Paragraph 5 as a whole was adopted with minor editorial amendments.

Paragraph 6

Paragraph 6 was adopted.

D. Responsibility of international organizations

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

E. The obligation to extradite or prosecute (*aut dedere aut judicare*)

Paragraph 9

Paragraph 9 was adopted.

Paragraph 10

44. Mr. PELLET, supported by Mr. CAFLISCH, said that the questions in paragraph 10 should be reworded in the third person, so that, for example, the phrase "Do you have authority under your domestic law ..." would read: "Is the State authorized under its domestic law ...".

45. Mr. GALICKI (Special Rapporteur) said that his aim had been to elicit frank responses from States; however, if it was not the Commission's tradition to put direct questions to States, he requested the Secretariat to reword the questions appropriately.

46. Mr. KOLODKIN said that States should be asked specifically whether they deemed the obligation *aut dedere aut judicare* to be an obligation under customary international law.

47. Mr. CAFLISCH supported Mr. Kolodkin's proposal and suggested that, in order to make the question more sharply focused, States should be asked to what extent they deemed the obligation *aut dedere aut judicare* to be an obligation under customary international law.

48. Mr. GAJA said that, if it was necessary to find out whether there was any State practice which pointed to the existence of a customary rule of *aut dedere aut judicare*, one could not rely on statistics based on the replies to that question.

49. Mr. KOLODKIN said that his question was not intended to produce a straw poll but to elicit information about practice and an *opinio juris*.

50. Ms. JACOBSSON said that she favoured Mr. Kolodkin's proposal without the additional wording suggested by Mr. Caflisch. She was afraid that the answer to the questions regarding the existence of State practice might be a laconic "no" and so, without the proposed new question, no *opinio juris* would be forthcoming, despite the fact that many States did have an *opinio juris* even when they had no State practice.

51. The CHAIRPERSON, speaking as a member of the Commission, said that while past experience had shown that obtaining even “yes” or “no” responses from States was often a matter of good fortune, such short replies were not necessarily a bad thing. If Governments were asked to supply too much detailed information about State practice, they might not bother to answer at all. For that reason, a simple question should be asked in order to elicit at least a brief opinion from States.

52. Mr. CAFLISCH, supported by Mr. GALICKI (Special Rapporteur) and Ms. ESCARAMEIA, said that his additional wording would make the question more pointed and was therefore more likely to produce answers that would show whether practice existed in certain areas and whether an *opinio juris* existed. He therefore insisted on its maintenance.

53. Mr. CANDIOTI said that he was also in favour of adding Mr. Caflich’s additional query, as it would be interesting to know if States considered that there was a customary obligation to extradite or prosecute in respect of certain crimes or categories of crimes.

Paragraph 10 (f), as amended, was adopted.

Paragraph 10 as a whole, as amended, was adopted.

Paragraph 11

54. Mr. CANDIOTI, supported by Mr. KOLODKIN and Mr. VARGAS-CARREÑO, asked if it would be possible to seek the Special Rapporteur’s agreement to include the words “and any other further views” after the word “information”, because the crucial question was whether Governments or States regarded the obligation as a customary obligation, as a principle of general international law, or only as a treaty-based obligation. To date, only one Government had expressed an opinion on that subject, and it would be helpful for the Commission’s future work on the topic to ascertain the views of other Governments.

Paragraph 11, as amended, was adopted.

Chapter III of the draft report of the Commission as a whole, as amended, was adopted.

55. Mr. WISNUMURTI, speaking on a point of clarification, said that at the 2954th meeting, when the Commission had discussed chapter VI on the expulsion of aliens (A/CN.4/L.707/Rev.1), he had proposed the insertion of the term “archipelagic waters” in paragraph 38 of that chapter. Another colleague had expressed the view that the report should reflect members’ statements in the plenary. He therefore wished to draw attention to his statement to the plenary at the 2925th meeting.

56. The CHAIRPERSON drew attention to chapter VII of the report, on the effects of armed conflicts on treaties, and suggested that, to ensure consistency with the reports of other bodies, the Secretariat should be requested, when editing the final version of the report, to move the Special Rapporteur’s concluding remarks, which currently appeared after each draft article, to the end of the chapter and to place them in a separate section entitled “Special Rapporteur’s concluding remarks”.

57. Mr. CANDIOTI supported the Chairperson’s suggestion, which would help the reader to gain a more focused view of a topic. In the future, that modification should be applied to each chapter.

58. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to adopt his suggestion.

It was so decided.

The draft report of the International Law Commission on the work of its fifty-ninth session as a whole, as amended, was adopted.

Closing remarks

59. The CHAIRPERSON said that the session had been a successful one. The level of participation had been impressive and thorough debates had been held. While half the members were new, they had obviously settled in well, as the old guard continued to keep the Commission’s institutional memory alive. He thanked all members for their spirit of cooperation and good temper and commended in particular the members of the Bureau and the Chairperson of the Drafting Committee, who had a demanding role to play.

60. As the session drew to a close, he wished to indulge in a bit of introspection. The Commission was a body for which there was no paradigm: it was somewhat similar to the treaty monitoring bodies, although they were not primarily deliberative, as it was; it was also similar in some respects to the Inter-American Juridical Committee, although that body was not, as the Commission was, subject to the discipline of the General Assembly and its Sixth Committee.

61. The first point he wished to make about the Commission was that its professional composition was significant: several vocations and forms of experience were represented. It currently counted among its members 14 ambassadors, 3 legal advisers to foreign ministries, 1 foreign minister and 10 professors. Two of the professors were also judges *ad hoc* at the International Court of Justice, and one had been both a legal adviser and a judge at the European Court of Human Rights.

62. A second distinguishing feature of the Commission was its overall structure and the role of regional and language groups. In anthropological terms, it might be characterized as an acephalous confederation of regional clans. That formation was conducive to transparency and guaranteed that the main forms of civilization and the principal legal systems of the world were represented, as stipulated in article 8 of the Commission’s Statute.

63. The third feature was the Commission’s political status, its deliberative and consultative function as a subsidiary organ of the General Assembly. Lastly, there was the Commission’s parliamentary aspect, by which he meant that its end product must be a collegiate, institutional effort that reflected the different regions and legal groups involved in its work.

64. The Commission's current programme of work included some of the most important topics in current international affairs. At the current session, the Commission's methods of work had not encountered any new problems. Still, when the object of a particular exercise was the progressive development of international law, he believed that the situation should be more openly acknowledged. It was not always easy or necessary to classify projects as belonging to either the progressive development or the codification of international law, but doing so would make it easier to determine, for example, the precise role of State practice.

65. The Commission should also give further thought to the procedure for referring draft articles to the Drafting Committee. That procedure sometimes involved the intermediate stage of consideration in a working group, and he had become convinced of the value of that step. It was often difficult, although not impossible, to arrive at a collegiate, considered view within the plenary, and in such cases consideration in a working group was justified and perhaps even unavoidable. In the case of expulsion of aliens, however, the draft text had had to be referred directly to the Drafting Committee, albeit with guidance from the plenary. Some members of the Commission were concerned that the debate on the formulation of guidance could reopen the entire subject. Accordingly, the use of the intermediate stage of the working group deserved further consideration.

66. There had been fewer "mini-debates" in the current session than in the past. Such debates were sometimes useful, since they seemed to result in shorter substantive statements. With regard to sources, he noted that Commission members seemed to like to refer to treaty law, yet in fact there was no such thing. One could say that a concordance of treaty obligations constituted evidence of the formation of customary international law, but to speak of treaty law was to ignore problems of *opinio juris* and a number of other issues. In addition, he had the impression that the Commission was not very interested in State practice. It was true that waiting for States to send evidence of their practice on certain subjects might prevent the Commission from moving forward on certain topics.

States were often busy or reluctant to commit themselves on certain questions in documents that were to be made available for general distribution.

67. Lastly, there was a tendency to allow fashionable elements in thinking about the law to stand in the way of effective analysis of problems. Expulsion of aliens, for example, was often treated as a question of human rights, which of course it was, but was it helpful to describe it exclusively as such? Article 1 of the European Convention on Human Rights said that the High Contracting Parties had the duty to secure within their jurisdiction the rights and freedoms defined in the Convention. Thus, there was no dichotomy between the maintenance of human rights and the control which a State had over its territory: the State had a duty, not just a prerogative, to control its territory. To speak about sovereignty was to miss that point completely. If one group threatened another group, such as foreign visitors or a minority, for example, within the territory of a State, that State had a duty to use its jurisdiction to prevent breaches of human rights standards. A State also had the duty to make sure its territory did not play host to the operations of armed bands—an issue central to the recent ICJ case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. There was thus a symbiosis, and not a polarity, between the control of territory and human rights.

68. In conclusion, he said that his long career in international law carried a number of drawbacks, among which were cynicism and pessimism. Yet even against that backdrop, he could say that the Commission was doing very well, and he wished to commend all its members.

Closure of the session

69. After the customary exchange of courtesies, the CHAIRPERSON declared the fifty-ninth session of the International Law Commission closed.

The meeting rose at 12.35 p.m.

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