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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-FOURTH SESSION

(Geneva, 29 April-7 June and 22 July-16 August 2002)

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The Work of the International Law Commission at Its Fifty-Fourth Session (2002)

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I. Introduction

The International Law Commission held its fifty-fourth session in two parts: from 29 April to 7 June and from 22 July to 16 August 2002, in Geneva. In November 2001, the UN General Assembly had elected twelve new and re-elected twenty-two members. [1] For the first time in its history the Commission includes two women among its members.[2] Under the chairmanship of Mr. Robert Rosenstock (U.S.A.), the Commission addressed four topics "inherited" from the last quinquennium: reservations to treaties, diplomatic protection, unilateral acts of States, and international liability for injurious consequences arising out of acts not prohibited by international law. In addition, the Commission started its consideration of three new topics: responsibility of international organizations, shared natural resources, and fragmentation of international law.[3]

With regard to the topic of "Reservations to treaties", the Commission adopted eleven draft guidelines dealing with formulation and communication of reservations and interpretative declarations.[4] The Commission also considered the Special Rapporteur's seventh report and referred fifteen draft guidelines dealing with withdrawal and modification of reservations to the Drafting Committee.

As regards the topic "Diplomatic protection", the Commission considered the remaining portions of the Special Rapporteur's second report relating to the exhaustion of local remedies rule, (articles 12 and 13), as well as the third report (draft articles 14 to 16), dealing with the exceptions to that rule, the question of the burden of proof and the Calvo clause, respectively. The Commission also undertook a general discussion, *inter alia*, on the scope of the study and held several open-ended Informal Consultations on the issue of the diplomatic protection of crews and that of corporations and shareholders. The Commission

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[1] The newly-elected members are: Mr. Ali Mohsen Fetais Al-Marri (Qatar), Mr. Choung Il Chee (Republic of Korea), Mr. Pedro Comissario Afonso (Mozambique), Mr. Riad Daoudi (Syrian Arab Republic), Ms. Paula Escarameia (Portugal), Mr. Salifou Fomba (Mali), Mr. Fathi Kemicha (Tunisia), Mr. Martti Koskenniemi (Finland), Mr. Valery Kuznetsov (Russian Federation), Mr. William Mansfield (New Zealand), Mr. Bernd H. Niehaus (Costa Rica), Ms. Hanqin Xue (China). The following members were re-elected: Mr. Emmanuel Akwei Addo (Ghana), Mr. Husain Al-Baharna (Bahrain), Mr. Joao Clemente Baena Soares (Brazil), Mr. Ian Brownlie (United Kingdom), Mr. Enrique J.A. Candioti (Argentina), Mr. Christopher John Robert Dugard (South Africa), Mr. Giorgio Gaja (Italy), Mr. Zdzislaw Galicki (Poland), Mr. Peter C.R. Kabatsi (Uganda), Mr. Maurice Kamto (Cameroon), Mr. James Lutabanzibwa Kateka (United Republic of Tanzania), Mr. Djamchid Momtaz (Islamic Republic of Iran), Mr. Didier Opertti Badan (Uruguay), Mr. Guillaume Pambou-Tchivounda (Gabon), Mr. Alain Pellet (France), Mr. Pemmaraju Sreenivasa Rao (India), Mr. Victor Rodríguez Cedeño (Venezuela), Mr. Robert Rosenstock (United States), Mr. Bernardo Sepúlveda (Mexico), Mr. Bruno Simma (Germany), Mr. Peter Tomka (Slovakia), Mr. Chusei Yamada (Japan).

[2] In its report (footnote 3), para.4, the Commission expressed satisfaction about this long-overdue development and, noting the number of women of recognized competence in international law, anticipated that this fact was likely to be reflected in the nomination and election process for the next and subsequent quinquennia.

[3] For the official report of the Commission to the General Assembly see *International Law Commission, Report on the Work of its Fifty-Fourth session, Official Records of the General Assembly,* Fifty-Seventh Session, Supplement No. 10 (A/57/10); in the following 'Report'.

[4] See *infra* Annex II.

further adopted articles 1 to 7 on the recommendation of the Drafting Committee.[5] It also referred to the Drafting Committee draft articles 14 (a), (b), (c) and (d) (both to be considered in connection with paragraph (a)), and (e), concerning futility, waiver and estoppel, voluntary link, territorial connection and undue delay, respectively.

As regards the topic "Unilateral acts of States", the Commission considered part of the fifth report of the Special Rapporteur. In his report, the Special Rapporteur reviewed the progress made thus far on the topic and presented revised draft article 5 (a) to (h) on the invalidity of a unilateral act, as well as articles (a) and (b) on interpretation. In Addendum 2 of his report, which the Commission did not consider, he proposed draft article 7 on *acta sunt servanda*, draft article 8 on non-retroactivity, draft article 9 on territorial application, as well as a structure for the draft articles.

With regard to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", the Commission decided to resume the study of the second part of the topic and to establish a working group to consider the conceptual outline of the topic. The report of the Working Group, which was considered by the Commission, set out some initial understandings and presented views on the scope of the endeavour, as well as on the approaches which could be pursued. Mr P.S. Rao was (re-) appointed as Special Rapporteur.

Concerning the topic "Responsibility of international organizations", the Commission decided to include the topic in its programme of work and established a working group to consider, *inter alia,* the scope of the topic. It further appointed Mr. Giorgio Gaja as Special Rapporteur. The Commission subsequently adopted the report of the Working Group, and approved its recommendation that the Secretariat approach international organizations with a view to collecting relevant materials on the topic.

With regard to the topic "Fragmentation of international law: difficulties arising from the diversification of international law", the Commission decided to include the topic in its programme of work and established a study group, chaired by the author of the present report. It subsequently adopted the report of the study group thus, *inter alia,* approving the proposed change of the title of the topic from "The risks ensuing from the fragmentation of international law" to the current title, as well as the recommendation that the first study to be undertaken will be on the issue entitled "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

Finally, the Commission decided to include in its programme of work the topic of "Shared natural resources" and appointed Mr. Chusei Yamada as Special Rapporteur. The Commission further recommended the establishment of a working group.

In response to paragraph 13 of General Assembly Resolution 56/82, the Commission indicated specific issues relating to the first five of the just-described topics, on which expressions of views by Governments either in the Sixth Committee or in written form would be of particular interest in providing effective guidance for the Commission on its further work.[6]

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[5] See *infra* Annex I.

[6] See *infra* Annex III.

II. Diplomatic Protection[7]

A. Introductory Remarks

Under the leadership of the Special Rapporteur, Mr. John Dugard, the Commission took several strides forward in its work on diplomatic protection: discussion was completed of the Special Rapporteur's second report[8] and also of his third report.[9] During the session, notable discussion topics included the local remedies rule, exhaustion of local remedies as a procedural precondition, denial of justice, voluntary link, exceptions to the local remedies rule, and the Calvo doctrine.

The Drafting Committee, on its part, presented seven draft articles, adapted from the proposals presented by the Special Rapporteur, which in turn had been sent to the Drafting Committee during the fifty-third session.[10] With a few minor changes, these draft articles (1-7) were provisionally adopted by the plenary.[11]

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[7] At its forty-eighth session (1996), the ILC proposed the topic of diplomatic protection for codification and progressive development *(Official Records of the General Assembly, Fifty-first Session*, Supplement No. 10 (A/51/10), para. 249). That same year, the UN General Assembly invited the Commission to discuss the topic and to indicate its future direction (Resolution 51/160 of December 16, 1996).

In 1997, the Commission appointed Mr. Mohamed Bennouna as Special Rapporteur. In Resolution 52/156 of December 15, 1997, the General Assembly endorsed the Commission's decision to include the topic on its agenda.

In 1998, the Commission considered Special Rapporteur Bennouna's preliminary report (A/CN.4/484). It then established a Working Group to consider approaches to the topic. The Commission approved the recommendations of the Working Group.

After Mr. Bennouna had resigned from the Commission in 1999, the Commission appointed Mr. Christopher J. R. Dugard as Special Rapporteur and considered the topic in an informal working group.

At its fifty-second session, in 2000, the Commission considered Mr. Dugard's first report (A/CN.4/506). The report proposed eight draft articles, six of which were submitted to the Drafting Committee, namely draft article 1 (describing the scope of the topic), 3 (respecting the discretionary nature of the State's right to exercise protection), 5 (regarding the meaning of "national" and the ways of acquisition of nationality), 6 (regarding the principle of "effective" nationality), 7 (addressing dual nationality), and 8 (on the protection of stateless and refugee residents). No action was taken on draft articles 2 (dealing with cases of the threat or use of force in the protection of nationals) or 4 (formulating a legal duty to exercise diplomatic protection in case of grave breaches of *ius cogens* norms).

In 2001, the Commission continued the discussion of the first report and began discussion of the Special Rapporteur's second report (A/CN.4/514), which proposed a set of four draft articles (articles 10-13). Discussion of the rule of continuous nationality was based on draft article 9 proposed in addendum 1 to the first report ((A/CN.4/514/Add.1). The Commission came to the conclusion that draft article 9 ought to be entirely reformulated to maintain the traditional rule of continuous nationality while providing for certain exceptions. Draft articles 10 and 11, regarding the exhaustion of local remedies, were relatively less controversial, although some changes were suggested. All three articles were referred to the Drafting Committee.

The Commission deferred consideration of draft articles 12 and 13, also contained in the second report, to the 2002 session.

[8] A/CN.4/514.

[9] A/CN.4/523.

[10] The draft articles adopted by the Drafting Committee appear in document A/CN.4/L.613.

[11] For these articles, see *infra* Annex I.

B. Discussion of the Second and Third Reports

1. Draft articles 12 and 13: Exhaustion of local remedies as a procedural precondition[12] *and denial of justice*[13]

Draft articles 12 and 13 address the question of when an internationally wrongful act is complete, in order to enable the home State to engage in diplomatic protection. Traditionally, three different views have been expressed as to when the wrong is complete: (1) only after a national has exhausted local remedies (with the local remedies rule thus being a substantive precondition to diplomatic protection), (2) at the time of the injury (with the local remedies rule being merely a procedural precondition to diplomatic protection), or (3) the timing depending on whether the injury is a violation of international or domestic law.[14] Draft articles 12 and 13, proposed by the Special Rapporteur, take the third view: where a State incurs international responsibility at the time of the injury, the exhaustion of local remedies does not stand as a substantive precondition to recovery, and where a foreign national brings a claim for a harm not amounting to an internationally wrongful act, the foreign State may incur international responsibility if the foreign national suffers a denial of justice in pursuing the claim. These articles move away from the view of diplomatic protection as expressed by the Commission twenty-five years ago, in article 22 of the draft articles on State responsibility adopted at first reading in 1996.[15] In the Commission, there was little support to send either draft article 12 or 13 to the Drafting Committee. Some members thought that too much had been premised on an unworkable dualist position (the substantive versus procedural debate). Others thought that it was improper to include article 13, because it dealt with a situation where no international wrong had necessarily occurred. This situation more appropriately fell within the work already accomplished by the Commission on the topic of State responsibility.

The Commission finally decided to exclude draft articles 12 and 13 from its further work on diplomatic protection. However, given its special relevance as a rationale for draft article 10, it was agreed that the substance of draft article 12 would be borne in mind in the commentary to draft article 10.

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[12] The Special Rapporteur proposed the following text:

Draft article 12

The requirement that local remedies must be exhausted is a procedural precondition that must be complied with before a State may bring an international claim based on an injury to a national arising out of an internationally wrongful act committed against the national where the act complained of is a breach of both local law and international law (A/CN.4/514, p. 15, para. 31).

[13] The Special Rapporteur proposed the following text:

Draft article 13

Where a foreign national brings legal proceedings before the domestic courts of a State in order to obtain redress for a violation of the domestic law of that State not amounting to an international wrong, the State in which such proceedings are brought may incur international responsibility if there is a denial of justice to the foreign national. Subject to article 14, the injured foreign national must exhaust any further local remedies that may be available before an international claim is brought on his behalf (A/CN.4/514, p. 15, para. 31).

[14] A/CN.4/514, p. 15, para. 32.

[15] Ibid. at p. 20, para. 41 (quoting *Yearbook of the International Law Commission* 1977, vol. II (Part Two), p. 30). Article 22 of the draft articles on State responsibility, as adopted on first reading, stated:

When the conduct of a State has created a situation not in conformity with the result required by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of an international obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligations or, where that is not possible, an equivalent treatment (A/CN.4/514 at p. 20, para. 41).

2. Draft article 14: Exceptions to the local remedies rule

a. Draft article 14(a): Futility[16]

Draft article 14(a) presents three different formulations of the futility exception to the local remedies rule, all of them having been used in judicial decisions, in State practice, and in codification efforts.[17] The Commission was nearly unanimous in its support of the third formulation, according to which "[l]ocal remedies need not be exhausted where ... the local remedies provide no reasonable possibility of an effective remedy". This formulation, taken from the opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* Case[18] was seen as a middle ground between the too strict test of "obvious futility" and the too generous criterion of "no reasonable prospect of success" also proposed in draft article 14.

Despite the consensus to send the described version of draft article 14(a) to the Drafting Committee, some members did urge the Drafting Committee to scrutinize the current phrasing and to make the content more precise. At least one member was concerned that "reasonableness" was too subjective a standard.

b. Draft article 14(b): Waiver[19]

At times, States have been ready to dispense with the requirement that foreign nationals exhaust local remedies before diplomatic protection sets in. While State practice and academic sources almost unanimously endorse express waiver as valid, there is some doubt that a State may tacitly waive the local remedies requirement, and we must certainly maintain a presumption against the existence of such an implied waiver. In addition, some regional courts have recognized that States may be estopped from raising the objection of non-exhaustion of local remedies. Draft article 14 recognizes the importance of the doctrines of waiver and estoppel and takes a step forward in codifying their features.

In the Commission, reception of this article was mixed. Most members were in favor of recognizing the doctrine of express waiver, while many voiced concern over implied waiver. Others doubted that there was any basis for recognizing a doctrine of "estoppel" with regard to diplomatic protection and thought that it fit better in the context of draft article 14(f) (see *infra*). In the end, draft article 14(b) was sent to the Drafting Committee with a recommendation that it should consider strengthening the presumption against implied waiver.

c. Draft articles 14(c) and (d): Voluntary link and territorial connection[20]

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[16] The Special Rapporteur proposed the following text:

Draft article 14

Local remedies do not need to be exhausted where:

(a) the local remedies:

-are obviously futile (option 1)

-offer no reasonable prospect of success (option 2)

-provide no reasonable possibility of an effective remedy (option 3)… . See third report on diplomatic protection (A/CN.4/523), p. 5, para. 17.

[17] A/CN.4/523 at p. 7, para. 23.

[18] Cf. ibid. at p. 12, para. 35 (quoting *1957 I.C.J. Reports,* p. 9 at p. 39).

[19] The Special Rapporteur proposed the following text:

Draft article 14

Local remedies do not need to be exhausted where:

…

(b) the respondent State has expressly or impliedly waived the requirement that local remedies be exhausted or is estopped from raising this requirement … . (A/CN.4/523 at 5, para. 17).

[20] The Special Rapporteur proposed the following text:

Draft article 14

These draft articles attempt to codify the jurisprudential and doctrinal view that the exhaustion of local remedies rule does not apply where there is no "link" between an injured national and a respondent State. This view is neither confirmed nor denied – at least not clearly so – by State practice, judicial opinions, or by doctrine. The issue was raised by Israel in the *Aerial Incident* Case[21], in which Bulgaria had mistakenly shot down an Israeli plane[22]; however, the International Court of Justice did not address voluntary link in its decision denying jurisdiction.[23]

There was a marked divergence of opinion within the Commission as to how the issue of voluntary link should best be dealt with. A majority of Commission members saw it as problematic to consider voluntary link as a precondition to the requirement of exhaustion of local remedies and urged the Special Rapporteur to deal with the issue in article 14(a) or in the commentary to articles 10, 11 and 14. Some members opposed sending article 14(c) to the Drafting Committee because they were not persuaded that there was sufficient State practice to support the principle. Other members thought that the Drafting Committee should discuss the principle of voluntary link in the commentary to article 14, but should not maintain articles 14(c) and (d). At least one member thought that a separate report was needed on the subject before proceeding. One member thought that article 14(d) was incompatible with article 14(c) and that there was little authority to support it. On the other hand, another member believed that the preponderance of authority supported the requirement of voluntary link, while yet another member went so far as to describe voluntary link as "very useful".

In the end, Commission members deferred to the Special Rapporteur, and it was agreed that articles 14(c) and (d) would be sent to the Drafting Committee, to be considered, however, in the context of articles 10, 11 and 14(a).

d. Draft article 14(e): Undue delay[24]

In codifications, judicial opinions, and among academics, there is wide support for the view that local remedies need not be exhausted when a respondent State is responsible for unreasonable delays in providing remedies.[25] While the Special Rapporteur recognized that article 14(a) was broad enough to cover a respective exception, he believed that a separate provision was justified as a means of drawing courts' and States' attention to the importance of the exception. He did, however, agree that the formulation "respondent State" should be avoided.

Most members were in favor of keeping this article, but thought that its function was

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Local remedies do not need to be exhausted where:

…

(c) there is no voluntary link between the injured individual and the respondent State;

(d) the internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State … . (A/CN.4/523 at 26, para. 64).

[21] Oral Pleadings of Israel in the *Aerial Incident* Case (Israel v. Bulgaria), *1959 I.C.J. Pleading*s, pp. 531-532. Israel argued that "a link should exist [before the local remedies rule could be applied] between the injured individual and the State whose actions are impugned". (A/CN.4/523 at 26, para. 64)

[22] See A/CN.4/523, p. 28, para. 74.

[23] *1959 I.C.J. Reports,* p. 127.

[24] The Special Rapporteur proposed the following text:

Draft article 14

Local remedies do not need to be exhausted where:

…

(a) the respondent State is responsible for undue delay in providing a local remedy… . (A/CN.4/523, p. 35, para. 89)

[25] A/CN.4/523 at p. 35, para. 90.

inherent in article 14(a). At least one member favored making a more precise formulation of the parameters of the delay. Ultimately, draft article 14(e) was referred to the Drafting Committee.

e. Draft article 14(f): Denial of access[26]

This article owes its inspiration to human rights jurisprudence,[27] but concerning "classic" diplomatic protection, it has no basis in practice, jurisprudence, or doctrine. The Special Rapporteur suggested that a draft article recognizing denial of access could be an important step forward in the progressive development of diplomatic protection, but the majority of members believed that the same result could be achieved by article 14(a). Hence, draft article 14(f) was not referred to the Drafting Committee.

3. Draft article 15: Burden of proof [28]

The Special Rapporteur attempted to remedy a perceived gap in diplomatic protection doctrine by proposing an article that allocates the burden of proof in disputes concerning the exhaustion of local remedies. Nonetheless, there was little support for the article among members. One member thought that it drifted too far into the realm of procedure, and even the Special Rapporteur eventually described the article as innocuous and complex. The proposal was, therefore, not referred to the Drafting Committee.

4. Draft article 16: Calvo clause[29]

In introducing draft article 16, the Special Rapporteur described the Calvo clause as an integral part of the local remedies rule. In his third report on diplomatic protection, he defines

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[26] The Special Rapporteur proposed the following text:

Draft article 14

Local remedies do not need to be exhausted where:

…

(b) the respondent State prevents the injured individual from gaining access to its institutions which provide local remedies. (A/CN.4/523 at p. 38, para. 99)

[27] See A/CN.4/523 at p. 38, para. 100.

[28] The Special Rapporteur proposed the following text:

Draft article 15

1. The claimant and respondent States share the burden of proof in matters relating to the exhaustion of local remedies in accordance with the principle that the party that makes an assertion must prove it.

2. In the absence of special circumstances, and without prejudice to the sequence in which a claim is to be proved:

the burden of proof is on the respondent State to prove that the international claim is one to which the

exhaustion of local remedies rule applies and that the available local remedies have not bee exhausted;

(c) the burden of proof is on the claimant State to prove any of the exceptions referred to in article 14 or to prove that the claim concerns direct injury to the State itself. (A/CN.4/523 at pp. 38-39, para. 101)

[29] The Special Rapporteur proposed the following text:

Draft article 16

1. A contractual stipulation between an alien and the State in which he carries on business to the effect that:

(a) the alien will be satisfied with local remedies; or

(b) no dispute arising out of the contract will be settled by means of an international claim; or

(c) the alien will be treated as a national of the contracting State for the purposes of the contract, shall be construed under international law as a valid waiver of the right of the alien to request diplomatic protection in respect of matters pertaining to the contract. Such a contractual stipulation shall not, however, affect the right of the State of nationality of the alien to exercise diplomatic protection on behalf of such a person when he or she is injured by an internationally wrongful act attributable to the contracting State or when the injury to the alien is of direct concern to the State of nationality of the alien.

2. A contractual stipulation referred to in paragraph 1 shall be construed as a presumption in favor of the need to exhaust local remedies before recourse to international judicial settlement. (A/CN.4/523/Add.1, p. 2)

the clause as "a contractual undertaking by an alien in which he agrees to waive any right which he may have to diplomatic protection by his State of nationality in matters arising out of the contract and to confine himself exclusively to local judicial remedies for any grievances he may have relating to the contract".[30] The clause was utilized most frequently in Latin America as a means of combating what Latin American countries perceived as foreign intervention in their domestic affairs.[31]

Outside of Latin America, the Calvo doctrine has not been widely accepted.[32] Many countries, including the United States, have viewed the use of Calvo clauses as inconsistent with international law, because the right to invoke diplomatic protection belongs to the State and not to the injured alien. Therefore, the alien cannot waive a right that properly rests with the State. The United States-Mexican Claims Commission in the *North American Dredging Company* Case[33] case took the view that the clause was valid as to contractual disputes between an alien and a foreign State, but that a State could still exercise diplomatic protection following a denial of justice to one of its nationals, even if that national had signed an agreement containing a Calvo clause.

Reception in the Commission of the Special Rapporteur's proposal was deeply divided. On one side were members who valued the Calvo clause as a way of buttressing the sovereign equality of States; on the other side were members who saw individual choice as irrelevant to the codification of the Calvo clause, as the right to engage in diplomatic protection belongs to the State.

Many Commission members lauded draft article 16 for its recognition of the continuing importance of sovereign equality, the importance of letting local legal systems deal with these issues, and the equal treatment of nationals and aliens. They suggested that one could no longer argue that the Calvo doctrine is contrary to international law on the basis of these principles. They also appreciated the way in which draft article 16 clarified the limits of States' power and clarified the role of the exhaustion of local remedies. For example, the Calvo doctrine clearly gave way in cases where there was a denial of justice. However, even the members in favor of the Calvo doctrine were generally not in favor of the second paragraph of article 16, which they saw as adding little substance.

Reflecting the traditional understanding of diplomatic protection, the reaction against the draft article was equally strong, and many members opposed sending article 16 to the Drafting Committee. They saw the Calvo doctrine as a subject that was quickly losing its relevance with the advent of international human rights and international minimum standards. One member noted that a national could not guarantee that his or her State would not intervene, because the right to intervene belongs solely to the State. The same member thought that the phrase, "valid waiver of the right of the alien to request diplomatic protection", was dangerous and misleading, because there is no right to diplomatic protection.

Several members thought that the Calvo clause was a regional practice at best. One member noted that a request for intervention from an injured national was not a precondition for diplomatic protection, and that anyone could make the request on behalf of the injured alien without violating a Calvo clause. Therefore, this member saw the effects of a Calvo clause as being extremely limited. He thought that the tradition of the clause would be better served by a commentary, rather than a draft article. Another member, expressing the same reservations, noted that the second sentence of draft article 16, paragraph one,[34] opened the door for State intervention, because it would allow States to intervene even when there had not been an

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[30] A/CN.4/523/Add.1, p. 2.

[31] Ibid. at p. 3, para. 3.

[32] Ibid. at p. 5, 8, paras. 11, 18.

[33] Ibid. at p. 9, para. 20.

[34] See fn. 23, supra. This sentence begins, "Such a contractual stipulation … ".

internationally wrongful act.

In the same vein, a few members doubted that the Commission had a mandate under its Statute to codify a mere "device" like the Calvo clause. These members saw the Calvo clause as an application of law and not as a custom. One member urged the Commission not to confuse a contractual clause with an international legal rule. Another pointed out that the "Calvo clause is one of a vast array of [contractual] devices", which should not be examined piecemeal.

In response, one member in favor of draft article 16 reminded the Commission that there was nothing stopping the Commission from having a provision on rules of domestic law and pointed to article 3 of the articles on State responsibility.

Following lengthy debate, it was agreed that draft article 16 would not be sent to the Drafting Committee, but the importance and history of the Calvo clause would be adequately reflected in the commentary to the draft articles.

C. Discussion of the Drafting Committee's Report[35]

The Drafting Committee presented its work on proposals on the Special Rapporteur's first report discussed in last years session, in the form of seven draft articles, including Part One, General Provisions, and Part Two, Natural Persons**.** All seven articles were provisionally adopted by the plenary, with minor changes.[36]

The Drafting Committee also noted that it envisaged an additional Part Three, entitled Legal Persons, which it would consider at future sessions, after the Special Rapporteur completed his work on the diplomatic protection of natural persons.

1. Part One: General Provisions

a. Article 1: Definition and scope [37]

Article 1(1) defines diplomatic protection as the procedure by which a State takes up the claim of a national, injured by an internationally wrongful act, not carrying out official business of the State. A "national" could be either a natural or a legal person, but the national must have some link with the State of nationality. This article makes it clear that the right of diplomatic protection belongs to the State and not to the injured national.

Diplomatic protection includes traditional diplomatic action, as well as other means of peaceful settlement, which would include, but not be limited to, mediation and arbitration. The use of force would never be permitted.

Article 1(2) leaves open the possibility of an exception to the general rule, allowing States to exercise diplomatic protection in respect of non-nationals, subject to the requirements of article 7.

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[35] For titles and text of the Drafting Committee report, see A/CN.4/L.613. The titles and text, as adopted by the plenary, appear as Annex I to the present article. The text of the original draft articles, as proposed by the Special Rapporteur, appears as footnotes to the following text. For a full commentary to the Special Rapporteur's draft articles, see A/CN.4/L.506 and A/CN.4/L.506/Add.1.

[36] The Drafting Committee later adopted the changes proposed by the plenary. See A/CN.4/L.613/Rev.1.

[37] The Special Rapporteur proposed the following text:

Article 1: Scope

1. In the present articles diplomatic protection means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.

2. In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national. (A/CN.4/506, p. 11. para. 32)

Members of the Commission generally embraced article 1, although there was some concern that the scope of protection afforded by the article was too narrow. Some members suggested that the article list the forms of diplomatic protection available to a State. In response, the Chairman of the Drafting Committee explained that the phrase, "or other means of peaceful settlement" was sufficiently broad to cover all forms of such dispute resolution. Echoing this, another member noted that a list could give the impression of being exhaustive and that the article would be more useful if its scope were left broad.

It was also suggested that the title of the article be changed from "Scope" to "Definition and Scope" or "Nature and Scope" to indicate the article's definitional elements. Following discussion in the plenary, the Drafting Committee proposed a new title to article 1: "Definition and Scope".

Article 1 was provisionally adopted by the plenary with its new title.

b. Article 2[3][38]: Right to exercise diplomatic protection[39]

Article 2 stresses that the right to diplomatic protection belongs to the State and not to the national. Thus, a national enjoys no right to diplomatic protection under international law, and a State has no international legal obligation to exercise diplomatic protection on behalf of a national. The view that the right vests in the State stems from the *Mavrommatis Palestine Concession* Case,[40] while the principle that a State has no duty to exercise diplomatic protection was more recently confirmed in the *Barcelona Traction* Case[41].

The Commission provisionally adopted this article without discussion.

2. Part Two: Natural Persons

a. Article 3[5]: State of nationality[42]

Article 3(1) explains that it is the bond of nationality that gives a State the right to exercise diplomatic protection on behalf of its nationals.

Article 3(2) is premised on the idea that international law leaves States free to define the requirements of nationality, subject to certain limits imposed by international law. Together with a definition of "State of nationality", article 3(2) lists the most common factors linking an individual and a State. Significantly, article 3(2) does not require a State to prove an effective or genuine link, as foreseen in the *Nottebohm* Case.[43] Rather, the article reflects the view that the International Court of Justice in *Nottebohm* did not intend to express a general rule and that such a rule would deprive millions of persons of the possibility of diplomatic protection.

Finally, article 3(2) imposes certain limits on States in their regulation of nationality. The acquisition of nationality must "not [be] inconsistent with international law". This phrase is

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[38] The bracketed numbers refer to the numeration of articles originally used by the Special Rapporteur.

[39] The Special Rapporteur proposed the following text:

Draft Article 3

The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to article 4, the State of nationality has a discretion in the exercise of this right.

(A/CN.4/L.506, p. 22, para. 60)

[40] *1924 P.C.I.J. Series A, No. 2*, p. 12.

[41] *1970 I.C.J. Reports*, p. 44.

[42] The Special Rapporteur had proposed the following text:

Draft Article 5

For the purposes of diplomatic protection of natural persons, the "State of nationality" means the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization.

(A/CN.4/L.506, p. 22, para. 93)

[43] *1955 I.C.J. Reports*, p. 23.

meant to remind States that certain international conventions, international customary law and general principles of law impose international standards on the right of States to determine who qualifies for nationality. This last phrase in article 3(2) is also meant to stress that the burden of proving that nationality was acquired in violation of international law falls on the State challenging the acquisition of nationality.

Discussion in the plenary over this article focused on the list of common linking factors. One member recommended that marriage and adoption be added to the list of factors linking an individual and a State. However, other members cautioned that domestic laws were too varied in their treatment of marriage and adoption for these to be added to that list. Ultimately, the Commission decided to leave article 3 unchanged and provisionally adopted it.

b. Article 4[9]: Continuous nationality[44]

Article 4 requires a person to have been a national of a State exercising diplomatic protection both at the time of the injury to that person and at the time of the official presentation of the claim ("continuous nationality"). The Commission had previously been divided over the requirement of continuous nationality, but decided to retain the requirement, with certain exceptions.

Article 4(1) lays out the basic requirements of continuous nationality. The article indicates a policy preference for the time of injury rather than for the time the internationally wrongful act was committed, because the former is more easily ascertainable. As used in the article, the term "date of the official presentation of the claim" refers to the time when official contact is made by the State exercising diplomatic protection, but not to informal diplomatic contacts. The use of the term "claim" is meant to refer to both a claim submitted to a judicial body and other official notice.

Article 4(2) provides an exception to the rule set down in paragraph one: a State may exercise diplomatic protection on behalf of a person seeking it where that person lost his or her former nationality for a reason unrelated to the claim and where that person's acquisition of the new nationality is not inconsistent with international law. As to the first condition, the loss of nationality may be voluntary or involuntary. As to the second condition, the requirement that the loss of nationality be unrelated to the claim is meant to deter forum shopping, but leaves room for hardship cases, for example, where a person has lost his or her nationality through marriage or adoption. As to the third condition, the requirement that acquisition of nationality not be inconsistent with international law is meant to reflect the obligations that international law imposes on States in their regulation of nationality.

Article 4(3) limits the exception in paragraph two to situations where the present State of nationality is not bringing a claim against the former State of nationality. This is meant to safeguard against potential abuse.

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[44] The Special Rapporteur proposed the following text:

Draft Article 9

1. Where an injured person has undergone a *bona fide* change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury,

provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs.

2. This rule applies where the claim has been transferred *bona fide* to a person or persons possessing the nationality of another State.

3. The change of nationality of an injured person or the transfer of the claim to a national of another State does not affect the right of the State of original nationality to bring a claim on its own behalf for injury to its general interests suffered through harm done to the injured person while he or she was still a national of that State.

4. Diplomatic protection may not be exercised by a new State of nationality against any previous State of nationality in respect of an injury suffered by a person when he or she was a national of the previous State of nationality. (A/CN.4/506/Add.1, p. 2)

Article 4 was provisionally adopted by the plenary without discussion.

c. Article 5[7]: Multiple nationality and claim against a third State[45]

Article 5 addresses the case of dual or multiple nationality. Although some domestic legal systems contain prohibitions in this regard, the practice of allowing multiple nationalities has become sufficiently widespread to justify the present article.

Article 5(1) lays out the principle that any State may exercise diplomatic protection in respect of its national, even if that person has two or more nationalities. This paragraph, like article 3, imposes no burden of establishing a genuine or effective link.

Article 5(2) endorses the joint exercise of diplomatic protection by two or more States. A respondent State may, nonetheless, raise an objection where States exercising diplomatic protection jointly bring separate claims before the same or different fora, or where one State of nationality brings a claim after the claim has already been satisfied as to another State of nationality.

Article 5 was provisionally adopted by the plenary without discussion.

d. Article 6: Multiple nationality and claim against a State of nationality[46]

This article reflects the well-established principle that one State of nationality may bring a claim against another State of nationality, so long as the nationality of the State bringing the claim is predominant.[47] The term "predominant" is meant to convey an element of relativity and indicate that the person has stronger ties to one State. The negative phrasing of the article is meant to emphasize the fact that the article envisages an exceptional situation and that the burden of proof is on the State aiming to show that its nationality is predominant.

The Commission debated this article extensively, after it had been noted that one possible reading of article 6(2) created an overlap with article 4(3). While some members doubted that there was any conflict, a majority of the members were concerned about this ambiguity. To resolve this potential conflict, the Commission decided to revise paragraph (1) and omit paragraph (2).[48]

Following this revision, the Commission provisionally adopted article 6.

e. Article 7[8]: Stateless persons and refugees[49]

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[45] The Special Rapporteur proposed the following text:

Draft Article 7

1. Any State of which a dual or multiple national is a national, in accordance with the criteria listed in article 5, may exercise diplomatic protection on behalf of that national against a State of which he or she is not also a national.

2. Two or more States of nationality, within the meaning of article 5, may jointly exercise diplomatic protection on behalf of a dual or multiple national. (A/CN.4/L.506, p. 54, para. 160)

[46] The Special Rapporteur proposed the following text:

Draft Article 6

Subject to article 9, paragraph 4, the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual's [dominant] [effective] nationality is that of the former State. (A/CN.4/L.506, p. 42, para. 120)

[47] See *Nottebohm*, *1955 I.C.J. Reports*, pp. 22-23, *Mergé*; (1955) 22 *I.L.R.* p. 455 (para. V. 5).

[48] See Annex I for the text of the former para. 2 and fn. 107 thereto.

[49] *Draft Article 8*

A State may exercise diplomatic protection in respect of an injured person who is stateless and/or a refugee when that person is ordinarily a legal resident of the claimant State [and has an effective link with that State?]; provided the injury occurred after that person became a legal resident of the claimant State.

(A/CN.4/L.506 at p. 57, para. 174)

This article departs from the traditionally accepted view that a State may undertake diplomatic protection on behalf of its own nationals only.[50] Bearing this in mind, both paragraphs of article 7 set a high threshold of residency for persons who wish to benefit from this exception, and both paragraphs use the word, "may", in order to stress the discretionary nature of this exception.

Article 7(1) provides an exception for stateless persons. Although no definition appears in the article, the Commission had in mind the Convention Relating to Stateless Persons of 1954[51] when it formulated this exception. Under the article, the stateless person who wishes to benefit from protection must have been a lawful and habitual resident at the time of the injury and at the time of the official presentation of a claim. This high standard is meant to recall the traditional principle that diplomatic protection requires some link between the injured person and the protecting State.

Article 7(2) uses the same language and follows the same logic as to refugees. It sets a higher bar than that established in article 28 of the Convention Relating to the Status of Refugees [52] ("lawfully staying"), but this difference was seen as justified because the Refugee Convention does not deal with diplomatic protection. As used in the article, the term, "refugees", is meant to cover a wide range of persons and situations such that a State could exercise diplomatic protection on behalf of any person that State considered a refugee. As in article 7(1), the person seeking diplomatic protection must have been resident in the State exercising diplomatic protection both at the time of the injury and at the time of the official presentation of the claim.

Article 7(3) limits the scope of article 7(2). Under article 7(3), no State may exercise diplomatic protection against a State of nationality of an injured refugee. This is meant to emphasize the traditional rule of diplomatic protection and to avoid a situation where States might be discouraged from accepting refugees because of increased demands for diplomatic protection.

Article 7 was provisionally adopted by the Commission following debate.

D. Future Work

In the second half of the Commission's session, work on diplomatic protection continued in the form of informal consultations. In next year's session, the Special Rapporteur is expected to present draft articles on diplomatic protection of legal persons and on diplomatic protection of crews.

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[50] For an expression of the traditional view, see *Dickson Car Wheel Company v. United Mexican States*, 4 *R.I.A.A.*, p. 678 (1931).

[51] 360 *U.N.T.S.*, p. 117. The Convention defines a stateless person "as a person who is not considered as a national by any State under the operation of its law". Ibid.

[52] 189 *U.N.T.S.*, p. 150.

III. Reservations to Treaties[53]

A. Introductory Remarks

In 2002, the Commission continued consideration of the topic "Reservations to Treaties". It had decided in 1995 that time that the end product should be a Guide to Practice in the form of draft articles and commentaries, accompanied where appropriate by model clauses. This Guide to Practice is intended to supplement the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions on the Law of Treaties (in the following: VCLT).

At its fifty-fourth session the Commission continued its consideration of Special Rapporteur Alain Pellet's sixth report[54] and then dealt with his seventh report.[55]

The Commission considered the draft guidelines proposed in the sixth report that had not been discussed in 2001 due to a lack of time. It ultimately adopted these draft guidelines with commentaries at first reading, with some minor amendments that were made in the plenary.[56]

The Special Rapporteur's seventh report summarized the history of the topic for the benefit of the new members, from his first report to recent developments in the area. Eleven of the draft guidelines contained in the seventh report were referred to the Drafting Committee for consideration at next year's session.[57] Three draft guidelines proposed in the

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[53] In 1993, the General Assembly approved the ILC's decision to include the topic of "the law and practice relating to reservations to treaties" on its agenda (General Assembly resolution 48/31 of 9 December 1993). The ILC appointed Alain Pellet as Special Rapporteur the following year.

In 1995, in response to the Special Rapporteur's first report (A/CN.4/470 and Corr. 1), the ILC decided to produce a Guide to Practice in respect of reservations.

In 1997, following debate on the Special Rapporteur's second report (A/CN.4/477 and Add. 1), the ILC adopted Preliminary Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties. See *Report of the International Law Commission on the work of its Forty-Ninth Session, General Assembly Official Records,* Fifty-Second Session*,* Supplement No. 10 (A/52/10), para. 157.

At its fiftieth session (1998), the Commission had before it the Special Rapporteur's third report, which dealt with the definition of reservations and interpretative declarations (A/CN.4/491 and Add. 1, Add. 2 (and Corr. 1), Add. 3, Add. 4 (and Corr. 1), Add. 5 and Add. 6 (and Corr. 1)). The Commission considered part of the report and referred 11 draft guidelines to the Drafting Committee. On the recommendation of the Drafting Committee the Commission provisionally adopted six draft guidelines, along with commentaries.

At its fifty-first session (1999), the Commission again had before it that part of the Special Rapporteur's third report that it had been unable to consider at the fiftieth session, as well as the Special Rapporteur's fourth report, which continued the discussion of the definition of reservations and interpretative declarations (A/CN.4/478). The Commission referred 11 draft guidelines to the Drafting Committee. On the recommendation of the Drafting Committee the Commission adopted 17 of the proposed draft guidelines and a new version of two previously adopted draft guidelines on first reading.

At its fifty-second session (2000), the Commission considered the Special Rapporteur's fifth report and addenda (A/CN.4/508 and Add. 1-4). Several draft guidelines were revised and adopted by the Drafting Committee. However, debate in plenary was deferred until 2001.

At its fifty-third session (2001), the Commission adopted 12 draft guidelines proposed in the Special Rapporteur's fifth report. The Commission began consideration of Prof. Pellet's sixth report (A/CN.4/518 and Add. 1-3). The draft guidelines contained in this report were discussed by the Commission and referred to the Drafting Committee. The Commission adopted 12 draft guidelines on the formulation of reservations and interpretative declarations.

The remaining draft guidelines proposed in the sixth report were referred to the Drafting Committee for consideration at the fifty-fourth session in 2002.

[54] A/CN.4/518 and Add. 1-3.

[55] A/CN.4/526 and Add. 1-3.

[56] The text of the draft guidelines as adopted can be found in the attached Annex II.

[57] The draft guidelines referred to the Drafting Committee from the seventh report were draft guidelines 2.5.1-2.5.3 and 2.5.5-2.5.12 contained in Add. 2 and 3.

seventh report were withdrawn by the Special Rapporteur due to lack of support.[58] The Special Rapporteur stated that he would do further work on these proposals and would resubmit them.

B. Consideration of the Draft Guidelines Proposed in the Sixth Report

In 2001, the Commission had considered the draft guidelines proposed in the sixth report and referred them to the Drafting Committee.[59] At that session, the Drafting Committee reported back on some of these draft guidelines, which were then adopted by the Commission. However, there was no time in 2001 to consider and adopt all of the draft guidelines from the sixth report.[60]

In 2002, the Commission considered these remaining draft guidelines after they were reported back by the Drafting Committee. The Commission adopted these draft guidelines with some small amendments.

1. Guideline 2.1.4: Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations

Draft guideline 2.1.3 *bis* states that the procedure for formulating a reservation at the internal level is a matter for internal law. Draft guideline 2.1.4 makes it clear that a State or international organization cannot rely on the failure to follow internal procedures to invalidate a reservation.

There was hesitation about accepting these two draft guidelines as they were seen to be unnecessary, and the idea contained in them is not expressed in the VCLT. Under this view, if a reservation had been formulated in a manner inconsistent with the internal laws of the State concerned, the State could simply withdraw the reservation at any moment, and a specific draft guideline was not necessary. The opposing view in the Drafting Committee was that the two draft guidelines clarified an important point, especially with regard to international organizations. This view prevailed and the two draft guidelines were kept, although the Drafting Committee altered the wording slightly, and also merged the two proposed draft guidelines into one draft guideline (now 2.1.4). This was accepted by the Commission, which adopted the draft guideline as proposed by the Drafting Committee.

2. Guideline 2.4.1: Formulation of interpretative declarations

Draft guideline 2.4.1 is the equivalent of draft guideline 2.1.3, dealing with competence to formulate a reservation, but in relation to competence to formulate an interpretative declaration. However, some differences in procedure. In the case of interpretative declarations, the procedure is more flexible and less formal. Therefore, the Drafting Committee changed the Special Rapporteur's proposed wording "An interpretative declaration must be formulated *by a person competent to represent a State. . .*" to "An interpretative declaration must be formulated *by a person who is considered as representing a State*…" [emphasis

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[58] The draft guidelines *not* referred to the Drafting Committee from the seventh report were draft guidelines 2.5.4, 2.5.11 *bis* and 2.5.X contained in Add. 2 and 3.

[59] See Add. 1 to the seventh report (A/CN.4/526/Add.1), which sets out a consolidated list of all the draft guidelines adopted by the ILC or proposed by the Special Rapporteur but not yet adopted. The draft guidelines in Add. 1 that are in italics were meant to represent those guidelines that were considered by the Drafting Committee, the draft guidelines not in italics being those already adopted by the ILC. However, a mistake was made in the English translation and some draft guidelines that had already been adopted by the ILC were put in italics. For ease of reference all of 1.1-1.7.2 has been adopted by the ILC. In addition, among the italicized articles, 2.2.1 – 2.3.4 and 2.4.3 – 2.4.7 were adopted by the ILC at the 2001 session.

[60] The draft guidelines that were adopted in 2001 are reproduced in B. Simma, "The Work of the International Law Commission at its Fifty-Third Session (2001)" *Nordic Journal of International Law* 71 (2002), pp. 123 ff; Annex III (pp. 185 ff.).

added]. This draft guideline was adopted by the Commission, as recommended by the Drafting Committee, without further amendment.

3. Guidelines 2.4.2 and 2.4.3: Formulation of interpretative declarations at the internal level, and formulation of conditional interpretative declarations

Draft guidelines 2.4.2 and 2.4.3 also deal with interpretative declarations. Draft guideline 2.4.2 relates to internal procedures for the formulation of such declarations, while draft guideline 2.4.3 covers the formulation of conditional interpretative declarations. The Drafting Committee put these two draft guidelines in square brackets until further work on interpretative declarations was undertaken. It was thought that if the nature of interpretative declarations were found to be exactly like that of reservations, draft guidelines 2.4.2 and 2.4.3 would lose their *raison d'être*. Thus, their future will depend on the future decision of the Commission on the place, if any, of conditional interpretative declarations in the Guide to Practice. Several members of the Commission emphasized that they felt very wary of conditional interpretative declarations because of their potential to create reservations by the 'back door', which was seen to be inappropriate.

4. Guideline 2.1.7: Functions of depositaries

During the discussion of the Drafting Committee's report, the Special Rapporteur proposed a small change to draft guideline 2.1.7. He had modeled the wording on VCLT articles 77(1) and 78(1). However, he had inadvertently left off several words that appear in the VCLT. Thus, he asked permission to add the phrase "and, where appropriate, bring the matter to the attention of the State or international organization concerned" to the end of the first sentence of draft guideline 2.1.7. There was no objection to this and the Commission adopted the draft guideline as amended.

5. Guideline 2.1.6: Procedure for communication of reservations

The only other amendments to the draft guidelines as reported back by the Drafting Committee were made to draft guideline 2.1.6. It was pointed out that draft guideline 2.1.6 left ambiguous whether a communication relating to a reservation took effect from the date of receipt of the email or facsimile, or from the date of its confirmation. This was important, as it was the date that triggered the beginning of the 12-month period within which an objection to a reservation may be made.[61] It was thought that it did not matter which date was chosen, but that it was important to state which one would apply for the sake of certainty. Thus, a sentence was added, making it clear that the relevant date was the receipt of the email or facsimile.

Further, the question arose as to whether the 12-month period under the VCLT, during which time an objection could be made, started to run from the date on which the reservation was received by the depositary, or from the date on which it was received by the State, as the depositary may take some days to circulate the reservation to contracting States. A new third paragraph was added to clarify this point[62] and draft guideline 2.1.6 was then adopted by the Commission with those two amendments.

The Commission finally adopted all the remaining draft guidelines from the sixth report, with the above changes to draft guidelines 2.1.6 and 2.1.7.

The Drafting Committee also considered and reported back on new draft guideline 2.1.7 *bis*, added this year to the Drafting Committee's consideration of the set of draft guidelines from the sixth report. Draft guideline 2.1.7 *bis* was introduced in the seventh report, but the Special Rapporteur asked that it be referred to the Drafting Committee for consideration along with the draft guidelines from the sixth report, as it fell within their scope.

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[61] VCLT article 20(5).

[62] The new third paragraph reads "The 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".

Draft guideline 2.1.7 *bis* is discussed below.

C. Consideration of the Draft Guidelines Proposed in the Seventh Report

1. Guideline 2.1.7 bis: The case of manifestly impermissible reservations

As just mentioned, the seventh report proposed a new draft guideline 2.1.7 *bis*, to be considered with draft guidelines 2.1.6 and 2.1.7, which had already been referred to the Drafting Committee in 2001. The proposed draft guideline 2.1.7 *bis* reads as follows:[63]

2.1.7 bis Case of manifestly impermissible reservations

Where, in the opinion of the depositary, a reservation is manifestly impermissible, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such impermissibility.

> If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations, attaching the text of the exchange of views which he has had with the author of the reservation.

There was a lengthy discussion of this draft guideline. It raised two main issues: the appropriate role of the depositary, and the use of the phrase "manifestly impermissible".

a. Role of the depositary

The issue of an expanded role for the depositary was discussed in the Sixth Committee in 2001 in response to questions posed by the Commission. States expressed differing views, ranging from the traditional role as an administrator and communicator of reservations, to a more active role of safeguarding the integrity and purpose of a treaty.[64] The Special Rapporteur thought that the Commission could take a middle way: The Special Rapporteur's proposed draft guideline 2.1.7 *bis* gives the depositary the power to draw the attention of the author State to aspects of the reservation that appear manifestly impermissible. If the State would not withdraw the reservation, the depositary would accept the reservation and transmit it to all signatory States, attaching a record of the communication with the author State. This draft guideline was particularly directed at reservations that are potentially incompatible with the object and purpose of the treaty (VCLT article 19(c)).

Members were divided in their responses to draft guideline 2.1.7 *bis*. Those who opposed the draft guideline believed that the depositary's appropriate role was one of a "mailbox", that is, a conduit for reservations and related communications, ensuring that these were distributed to all the relevant parties. However, their function did not, and should not extend past this.[65] In particular, there was strong resistance from some members to giving the depositary powers to assess reservations for "manifest impermissibility". This was seen

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[63] A/CN.4/526.

[64] Generally, States spoke out against an enlarged role for the depositary, preferring that the draft guidelines remain close to the impartiality model embodied in VCLT article 76. However, a small number of States supported a larger role for the depositary where a reservation was manifestly impermissible, supporting the ability of the depositary to inform the author of the reservation of the problem, and if the reservation is maintained by the author, drawing the attention of the other parties to the treaty to the alleged impermissibility. See the seventh report (A/CN.4/526), paras. 44-47.

[65] Several members cited VCLT article 77 as supporting this view. On the other hand, it was also noted that the functions of the depositary listed in VCLT article 77 are not exclusive, the list of functions being prefaced with the words "in particular". Therefore, enlarging the functions of the depositary would not be incompatible with the VCLT, and would be consistent with human rights treaty practice.

to be an inherently subjective judgment, and unless the relevant treaty expressly conferred such a role, there was no basis for it in international law.[66] It was for States, and not the depositary, to assess and respond to reservations.

On the other hand, some members of the Commission supported an expanded role for the depositary, as envisaged by draft guideline 2.1.7 *bis*. Several members stated that depositaries already have an unavoidable field of discretion or judgment in their current practice, and that, therefore, it would be spurious to say that the depositary should not undertake subjective assessments of reservations. Currently, depositaries assess reservations and communicate with States informally where a reservation appears manifestly impermissible. It is also up to depositaries to assess which declarations constitute reservations in the first place. Further, it was highlighted that the procedure foreseen in draft guideline 2.1.7 *bis* would only be used where the impermissibility is so obvious that it is undisputed; in other words, that the phrase "manifest impermissibility" sets a sufficiently high threshold. A depositary would not lightly come to the view that a reservation was impermissible.

There was a discussion in the Commission about the effect of circulating the communications between the depositary and the author State of a reservation. Communication of this exchange would draw the attention of the contracting parties to the doubtful nature of the reservation, allowing them to reach a view on it. As a consequence, an author State may reconsider or modify its reservation. In addition, this may also cause other ratifying States who wish to submit an identical reservation to reconsider. It was thought that this could only serve to strengthen the treaty regime. On the other hand, one member thought that States might not be ready for such discipline, and that it might therefore force States to abstain rather than ratify a treaty, thus undermining universality. It was suggested that discretion on the part of the depositary and a lack of publicity might be more constructive, as publicity could, on occasion, lead States to harden their position. In response, one member stated that the depositary could still prefer informal discussions, even if such a draft guideline was included.

Finally, in support of the draft guideline, one member pointed out that neutrality seldom means passivity. If the depositary remains just a letterbox for reservations, this plays into the hands of reservations that would be disruptive to the treaty as a whole. The depositary must be active in certain situations *because* of the depositary's neutrality, not in contradistinction to it. If the depositary signals to an author State that there is a problem with a reservation he in reality renders a service to the author State.

b. Meaning of "manifestly impermissible"

Several members questioned the use of the term "impermissible", objecting on the grounds that its meaning was not clear. There was also concern that the term implicated State responsibility and gave the depositary too much power to examine the substance of a reservation, rather than being confined to procedural aspects of the reservation. Alternatives suggested included "inadmissible" and "invalid". On the other hand, it was pointed out that the word "manifest" is already used in the VCLT, in relation to manifest violations of treaties in article 46, and therefore its meaning cannot be entirely ambiguous.

After substantial discussion of draft guideline 2.1.7 *bis*, summarized above, the draft guideline was referred to the Drafting Committee.

When the Drafting Committee reported back on the draft guideline, now renumbered

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[66] Both the 1982 Convention on the Law of the Sea (article 309) and the Rome Statute of the International Criminal Court (A/CONF.183/9) (article 120) were mentioned in the Commission's discussion as examples of treaties that expressly state that reservations are not acceptable. In this case, it was agreed that the depositary was able to say that a reservation was impermissible.

2.1.8, it proposed solutions to both issues. In relation to the use of the phrase "manifestly impermissible", the Drafting Committee proposed retaining the word "impermissible"[67] but putting it in square brackets, thereby signalling that it was subject to further reflection.

In relation to the role of the depositary, the Drafting Committee proposed a compromise position, which was more cautious than the original draft guideline. The new text allows the depositary to draw any legal problems raised by the reservation to the attention of the contracting States, after having had a dialogue with the author State about the reservation, but does not allow him to circulate the communications with the author State. The new drafting strikes a balance between the traditional role of the depositary and the depositary taking a role in safeguarding the purpose of the treaty.

While draft guideline 2.1.8 appears to be more cautious, it is arguable whether it serves the interests of those who objected to draft guideline 2.1.7 *bis*. Under draft guideline 2.1.8, all States will be notified by the depositary that a reservation appears to be manifestly impermissible. Thus, those members of the Commission who wished to limit the depositary's role to communicating reservations and objections have, in this draft guideline, yielded to the depositary having some role in assessing reservations for manifest impermissibility. However, the communication that States receive is one-sided, only containing the depositary's view. If the depositary is to have this function, ideally, the author State would also have the concomitant opportunity to respond to the depositary's concerns and outline the internal situation that justifies the reservation, or specify why, in the author State's view, the reservation is not manifestly impermissible. This would leave contracting States well placed to assess the reservation themselves, having been provided with arguments on both sides of the issue. This could only facilitate appropriate State practice in the area of reservations. As it currently stands, States have their attention drawn to the reservation but must assess the legality of the reservation in the abstract, without the benefit of background information or arguments from the author State and without detailed arguments from the depositary.

2. Introduction of new draft guidelines proposed in the seventh report

In his seventh report, the Special Rapporteur also introduced a new set of draft guidelines (draft guidelines 2.5.1 – 2.5.12). These were discussed and almost all were referred to the Drafting Committee. They will be considered for adoption at the next session. However, the Special Rapporteur withdrew the most controversial among these draft guidelines, namely draft guidelines 2.5.4, 2.5.11 *bis* and 2.5.X, and these will be submitted in a revised form at a later stage.

a. Guidelines 2.5.1 and 2.5.2: Withdrawal of reservations

Draft guidelines 2.5.1[68] and 2.5.2[69] deal with the withdrawal of a reservation, requiring that such withdrawal be in writing and noting that a reservation may be withdrawn at any time without the consent of the other contracting States. The question of implicit withdrawal was discussed,[70] but there was broad agreement that no such thing existed, as a reservation was not withdrawn until the withdrawal had been formulated in writing.

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[67] The equivalent phrase in the French translation is "*illicite*".

[68] Draft guideline 2.5.1 is based on VCLT article 22. Reproduction of parts of the VCLT was thought to be helpful in order to make the Guide to Practice complete in and of itself, not requiring reference to other sources. In support of this, the Special Rapporteur stated that the Guide to Practice is addressed to all States while the VCLT only binds signatories. It was also thought that this would be the best approach for the ease of the user of the Guide, although not all members supported this approach.

[69] Draft guideline 2.5.2 is based on VCLT article 23(1).

[70] See the seventh report (A/CN.4/526/Add.2), paras. 91-96.

b. Guideline 2.5.3: Periodic review of the usefulness of reservations

Draft guideline 2.5.3 encourages States to periodically review, with a view to withdrawal, the reservations made by them. Members thought that this was a useful draft guideline. It was noted that the Guide to Practice has no binding legal force; therefore, it was possible to include such a recommendatory guideline.

c. Guideline 2.5.4: Withdrawal of reservations held to be impermissible by a monitoring body

There was substantial discussion of draft guideline 2.5.4.[71] Some members were extremely wary of the use of the word "must" as they thought it implied some kind of obligation for States, whereas it was noted that States can also choose to do nothing, even if a reservation is found to be impermissible. One suggestion was to replace "must" with "should". The Special Rapporteur tried to reassure members that, in his opinion, the draft guideline did not impose an obligation to withdraw a reservation following a finding of impermissibility. However, he did believe there was an obligation on the State to do something where a reservation was impermissible, although the nature of that response would be up to the State to decide. The first paragraph of draft guideline 2.5.4 was also criticized as being too obvious, or even nonsensical, as such a finding could never constitute withdrawal.

There was also concern over the bodies meant by the phrase "body monitoring the implementation of the treaty". It was thought that this could include judicial bodies such as the International Court of Justice, whose judgments are mandatory. Members were of the view that the draft guideline should be clarified to indicate exactly which bodies were covered by the guideline. Some members also thought that the language of the guideline was misleading, and that this should be addressed.

Given the reluctance to send draft guideline 2.5.4, as it currently stood, to the Drafting Committee the Special Rapporteur decided to withdraw it. He stated that he would revise it in light of the plenary discussion and resubmit it at a later stage.

d. Guidelines 2.5.5, 2.5.5 bis*, 2.5.5* ter*, 2.5.6, 2.5.6* bis*, and 2.5.6* ter: *Competence to withdraw a reservation and communication of withdrawals*

Draft guideline 2.5.5 sets out who is competent to withdraw a reservation on behalf of a State, and is closely modelled on draft guideline 2.1.3 and VCLT article 7. Draft guideline 2.5.5 *bis* states that the internal procedure for formulating a withdrawal is a matter of the internal law of the author State.[72] Draft guideline 2.5.5 *ter* makes it clear that a State may not invoke failure to follow the internal procedure to invalidate a withdrawal.[73]

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[71] *Draft guideline 2.5.4 states:*

2.5.4 Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty

The fact that a reservation is found impermissible by a body monitoring the implementation of a treaty to which the reservation relates does not constitute the withdrawal of that reservation.

Following such a finding, the reserving State or international organization must act accordingly. It may fulfil its obligations in that respect by withdrawing the reservation. (A/CN.4/526.Add.2)

[72] Draft guideline 2.5.5 *bis* is the equivalent of draft guideline 2.1.3 *bis* (which became the first paragraph of draft guideline 2.1.4 as adopted by the Commission) but in relation to the formulation of withdrawals rather than formulating reservations.

[73] Draft guideline 2.5.5 *ter* is the equivalent of draft guideline 2.1.4 (which became the second paragraph of draft guideline 2.1.4 as adopted by the Commission) but in relation to the consequences of not following the internal procedure as to withdrawals rather than reservations. In line with the draft guidelines adopted at this session, the Special Rapporteur suggested merging draft guidelines 2.5.5 *bis* and 2.5.5 *ter* into one draft guideline, just as draft guidelines 2.1.3 *bis* and 2.1.4 were merged, and that this would retain consistency of form throughout the guidelines.

In relation to the communication of withdrawals, the Special Rapporteur wished to transpose the rules outlined in draft guidelines 2.1.5, 2.1.6 and 2.1.7 relating to the communication of reservations. He proposed two different solutions. The first proposal, draft guideline 2.5.6, expressly referred to the rules contained in draft guidelines 2.1.5, 2.1.6 and 2.1.7 and made those rules applicable to the communication of withdrawals. The second proposed solution repeated in full the rules contained in draft guidelines 2.1.5, 2.1.6 and 2.1.7 but altered the wording so as to apply to withdrawals. This is set out in a second and longer version of draft guideline 2.5.6 and draft guidelines 2.5.6 *bis* and 2.5.6 *ter*. In the Commission, some members, including the Special Rapporteur, expressed a preference for setting out the applicable rules, i.e. repeating material rather than referring to other draft guidelines, as it was thought that this made the Guide to Practice easier to use. The Special Rapporteur also included three model clauses for States to use in future treaties, which deal with the effective date of withdrawal.

3. Guidelines 2.5.7 and 2.5.8: Effect of withdrawal

Draft guidelines 2.5.7 and 2.5.8 make it clear that the effect of the withdrawal of a reservation is the application of the treaty as a whole between the withdrawing State and all other treaty parties. As the Special Rapporteur later pointed out, this is inaccurate where a State has made multiple reservations and it only withdraws some of them. In this case the treaty as a whole may still not be in effect. Thus, the draft guideline was amended to read: "The withdrawal of a reservation entails the application in its entirety of the treaty provision to which the reservation related…".

4. Guidelines 2.5.9 and 2.5.10: Effective date of withdrawal

Draft guideline 2.5.9 states that a withdrawal does not take effect *vis-à-vis* a State or international organization until notice of withdrawal has been received by that State or organization. Draft guideline 2.5.10 allows a State to set the date at which the withdrawal takes effect, where the date is later than the date of notification and withdrawal does not alter the situation in relation to other contracting States or organizations. These two guidelines were accepted as helpful by the Commission.

5. Guidelines 2.5.11, 2.5.11 bis, 2.5.X, and 2.5.12: Partial withdrawal

Partial withdrawal is defined in draft guideline 2.5.11 to include only those modifications of a reservation that limit the effect of a reservation, thereby enlarging the application of the relevant treaty. The Special Rapporteur proposed switching the order of the two paragraphs of draft guideline 2.5.11 so that the definition is contained in the first paragraph, as everything else was dependent on this definition. Draft guideline 2.5.11 makes partial withdrawals subject to the same rules as total withdrawals.

Draft guideline 2.5.12 states that a partial withdrawal modifies the legal effect of a reservation. It further states that objections to a reservation continue to have effect as long as their authors do not withdraw them. There was discussion about whether objections would remain in effect if the reservation to which they related had been modified in such a way as to make the objection redundant. An additional phrase was suggested by a member, and accepted by the Special Rapporteur, and it was agreed that the Drafting Committee would take up consideration of the necessary amendments.[74]

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[74] The additional phrase appears in bold:

2.5.12 Effect of a partial withdrawal of a reservation

The partial withdrawal of a reservation modifies the legal effects of the reservation to the extent of the new formulation of the reservation. Any objections made to the reservation continue to have effect as long as their authors do not withdraw them **insofar as the objections do not deal with the part of the reservation that is withdrawn.** (A/CN.4/526.Add.3)

Draft guidelines 2.5.11 *bis*[75] and 2.5.X[76] state the equivalent to draft guideline 2.5.4[77] but in relation to partial withdrawal. They were subject to the same critical comments in the Commission as draft guideline 2.5.4 (see above main text following footnote 71). Consequently they were also withdrawn by the Special Rapporteur and were not submitted to the Drafting Committee.

D. Future Work

Next year, the Drafting Committee will consider the above draft guidelines proposed in the seventh report. The Special Rapporteur also indicated that he would next treat modifications of reservations that reduce the application of a treaty, rather than enlarging it ("aggravating" reservations). Next year, there would also be a discussion of the term "impermissibility", and the consequences of a finding of impermissibility by a monitoring body. Further, the Special Rapporteur indicated his intention to conduct, in the future, an in-depth analysis of article 19 of the VCLT. He also stated that the Preliminary Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, adopted in 1997, would be taken up again in two years' time with a view to finalizing them.

There was discussion on interaction with the Subcommission on the Promotion and Protection of Human Rights of the Human Rights Commission, which has entrusted to Ms. Françoise Hampson the development of a Working Paper on reservations to human rights treaties. There was concern about that work duplicating unnecessarily the work of the Commission, and there was agreement that greater cooperation between the Commission and other international organizations and human rights bodies was desirable. It was decided that the Chair of the Commission and the Special Rapporteur would write to the Chair of the Subcommission and Ms. Hampson with the aim of organizing a meeting during next year's session.

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[75] Draft guideline 2.5.11 *bis* states:

2.5.11 bis *Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*

Where a body monitoring the implementation of the treaty to which the reservation relates finds the reservation to be impermissible, the reserving State or international organization may fulfil its obligations in that respect by partially withdrawing that reservation in accordance with the finding. (A/CN.4/526.Add.3)

[76] Draft guideline 2.5.X states:

2.5.X Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty

The fact that a reservation is found impermissible by a body monitoring the implementation of a treaty to which the reservation relates does not constitute the withdrawal of that reservation. (A/CN.4/526.Add.3)

[77] For the text of draft guideline 2.5.4, see fn. 65 above.

IV. Unilateral Acts of States[78]

A. Introductory Remarks

The Special Rapporteur, Mr. Victor Rodriguez-Cedeño, introduced his fifth report on Unilateral Acts of States[79] and the text of replies received from States[80] to the questionnaire on the topic circulated on 31 August 2001. The report, while largely recapitulative in nature, contained a new version of article 5 on validity/invalidity of unilateral acts, which replaces the former single draft article on causes of invalidity with separate provisions.[81] Furthermore, it

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[78] In 1996, the General Assembly, in Resolution 51/60, para. 13, invited the Commission to examine the topic "Unilateral Acts of States" and to indicate its scope and content. At its forty-ninth session, in 1997, the Commission appointed Mr. Victor Rodríguez Cedeño as Special Rapporteur.

At its fiftieth session, in 1998, the Commission considered the Special Rapporteur's first report and decided to convene a Working Group on the topic. The Commission considered and endorsed the report of the Working Group, addressing issues related to the scope of the topic, its approach, the definition of unilateral acts and the future work of the Special Rapporteur. At its fifty-first session, in 1999, the Commission considered the Special Rapporteur's second report on the topic.

The Special Rapporteur's third report, presented at the Commission's fifty-second session, in 2000, made several revisions to the report of the previous year. Specifically, it revised the definition of unilateral acts in article 1 (replacing previous draft article 2). It also revised the draft articles dealing with the capacity of States to formulate unilateral acts (article 2), persons authorized to formulate unilateral acts on behalf of the State (article 3), and the subsequent confirmation of an act formulated by a person not authorized for that purpose (article 4). In addition, the Special Rapporteur proposed a new version of a draft article on the invalidity of unilateral acts (article 5). At the conclusion of its debate in the fifty-second session, the Commission decided to reconvene the Working Group on unilateral acts to continue consideration and study of draft article 5, while draft articles 1 to 4 were referred to the Drafting Committee.

At its fifty-third session, in 2001, the Commission considered the Special Rapporteur's fourth report, which addressed the classification of such acts and presented draft articles (a) and (b) on general rules of interpretation. No further action was taken with regard to the draft articles submitted in the Special Rapporteur's third report of 2000. However, a Working Group on unilateral acts was convened to consider future work on the topic. The Working Group formulated a questionnaire regarding State practice, which was subsequently circulated to Governments.

[79] A/CN.4/525 and Add.1 and 2.

[80] A/CN.4/524.

[81] The proposed text reads as follows:

Article 5 (a) Error

A State [or States] that formulate[s] a unilateral act may invoke error as a defect in the expression of will if [said] act was formulated on the basis of an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its [expression of will] [consent] to be bound by the act. The foregoing shall not apply if the author State [or States] contributed by its [their] own conduct to the error or if the circumstances were such as to put that State [or those States] on notice of a possible error.

Article 5 (b) Fraud

A State [or States] that formulate[s] a unilateral act may invoke fraud as a defect in the expression of will if it has/they have been induced to formulate an act by the fraudulent conduct of another State.

Article 5 (c) Corruption of the representative of the State

A State [or States] that formulate[s] a unilateral act may invoke a defect in the expression of will if the act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State.

Article 5 (d) Coercion of the person formulating the act

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him.

Article 5 (e) Coercion by threat or use of force

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if the formulation of the act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 5 (f) Unilateral act contrary to a peremptory norm of international law (jus cogens)

included revised versions of articles (a) and (b) regarding interpretation of unilateral acts which had first been introduced in the Special Rapporteur's fourth report during the Commission's fifty-third session in 2001.[82] These proposals were debated during the first part of the session. No further action was taken with regard to the draft articles submitted by the Special Rapporteur.

B. Consideration of the Draft Articles and Responses to the Questionnaire

The questionnaire circulated to Governments in 2001 proved to be of limited use to the development of the topic as merely three Governments had provided answers, one of which strongly opposed the Special Rapporteur's approach of seeking to codify general rules applicable to all unilateral acts.[83]

With respect to article 5, members held conflicting viewpoints as to whether analogies to the 1969 Vienna Convention on the Law of Treaties would be desirable in the formulation of the draft articles. While some members found that the proposed draft articles did not follow the language of the VCLT closely enough, others warned that the Convention itself could be weakened by such analogies. With respect to article 5 (f) entitled "Unilateral act contrary to a peremptory norm of international law (*jus cogens*)", several members questioned whether a unilateral act of this nature would not be void *ab initio*, so that there would be no need to invoke its invalidity. Regarding article 5 (g) entitled "Unilateral act contrary to a decision of the Security Council", a member stressed that this provision would clash with article 103 of the Charter of the United Nations, which only mentions obligations of members under international agreements, and could therefore not be extended to unilateral acts. More importantly, article 103 does not render the respective provision invalid, but

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A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law.

Article 5 (g) Unilateral act contrary to a decision of the Security Council

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council.

Article 5 (h) Unilateral act contrary to a norm of fundamental importance to the domestic law of the State formulating it

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if it conflicts with a norm of fundamental importance to the domestic law of the State formulating it.

[82] The proposed text reads as follows:

Interpretation

Article (a) General rule of interpretation

1. A unilateral act shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the declaration in their context and in the light of the intention of the author State.

2. The context for the purpose of the interpretation of a unilateral act shall comprise, in addition to the text, its preamble and annexes.

3. There shall be taken into account, together with the context, any subsequent practice followed in the application of the act and any relevant rules of international law applicable in the relations between the author State or States and the addressee State or States.

Article (b) Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including [the preparatory work and] the circumstances of the formulation of the act, in order to confirm the meaning resulting from the application of article (a), or to determine the meaning when the interpretation according to article (a):

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result that is manifestly absurd or unreasonable.

[83] Replies were received from the Governments of Portugal, Estonia, and the United Kingdom. The latter expressed the view that "any approach which seeks to subject the very wide range of unilateral acts to a single set of general rules is not well-founded". A/CN.4/524, p. 2.

merely states that in such cases the Charter obligations shall prevail, i.e. apply. In the view of the Commission the problems with article 5 were of too fundamental a nature to send it to the Drafting Committee.

Discussion of articles (a) and (b), regarding interpretation of unilateral acts, focussed on the role of the preparatory work in the interpretation of a unilateral act. Article (b) lists preparatory work as supplementary means of interpretation. While some members welcomed the inclusion of that provision and suggested that even a stronger role of the preparatory work in the interpretation of a unilateral act would be desirable, others questioned the existence or accessibility of these materials in practice.

Furthermore, some members expressed more profound doubts as to the direction of the Commission's work on the topic of Unilateral Acts of States in general. Some newly elected members called into question the viability of the codification effort as a whole due to, on the one hand, lack of insight into State practice - as exemplified by the very limited responses received from Governments to the respective questionnaire - and on the other hand, the absence of a firm theoretical grounding of the topic. In discussing these views, members of the Commission expressed diverging views on how consideration of the topic should proceed. While a few members encouraged the Special Rapporteur to continue his effort at codifying general rules applying to all unilateral acts, others suggested that he focus on specific forms of unilateral acts such as promise, waiver, recognition and protest, and study these subjects separately. Another member voiced concern about analogizing unilateral acts to treaties and elevating them to the same level, i.e. to treat unilateral acts as a source of law, an exercise that in the view of the member was neither useful nor theoretically justifiable.

Members welcomed the suggestion to have the Special Rapporteur, with the help of other members of the Commission, supervise a comprehensive study of State practice in the area.

C. Future Work

It was agreed that the Special Rapporteur, with the support of other members of the Commission, should seek to obtain outside funding for a research project that would compile a comprehensive overview of State practice.

V. International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (International Liability in the Case of Loss from Transboundary Harm Arising Out of Hazardous Activities)[84]

A. Introductory Remarks

In 2002, the International Law Commission established a Working Group on international liability, chaired by Mr. Pemmaraju Sreenivasa Rao. The Commission adopted the report of the Working Group[85] on "International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (International Liability in the Case of Loss from Transboundary Harm Arising out of Hazardous Activities)".[86] The report establishes a framework for the study now to be undertaken on liability, as a continuance of the subject of "International Liability for Injurious Consequences Arising out of Acts Not Prohibited by

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[84] The "liability" topic originated from the Commission's discussions on State responsibility, particularly on draft Article 35 (now 27) of Part One. It was placed on the ILC's Programme of Work in 1978, at which time Mr. Quentin-Baxter was appointed Special Rapporteur. Between 1980 and 1984, Mr. Quentin-Baxter submitted five reports. After his death, he was succeeded as Special Rapporteur by Mr. Julio Barboza, who provided the Commission with 12 reports between 1985 and 1996. From 1988 onwards these reports contained draft articles on various aspects of the topic.

In 1992, the Commission established a Working Group to consider the scope of the topic, and, on the basis of its recommendations, decided in the same year to complete work on prevention of transboundary harm first and then to proceed with remedial measures.

In 1994-5, the Commission at first reading provisionally adopted several draft articles. In 1996, a new Working Group was established, which, at the same session, submitted a report containing a complete picture of the topic, relating not only to the issue of prevention but also including liability for compensation or other relief, in the form of draft articles with commentaries (for the text see *International Law Commission, Report on the Work of its Forty-Eighth Session, Official Records of the General Assembly,* Fifty-First Session, Supplement No.10 (A/51/10), pp.235ff.).

In 1997, at its forty-ninth session, the Commission decided to divide the "liability" topic. Since the Commission thought that there was a need for substantial comments from Governments on the issue of liability, it decided to postpone consideration of that issue and meanwhile to concentrate on prevention, which was less contentious and which had already received considerable attention in the ILC. The General Assembly took note of this in para.7 of resolution 52/156. At the same session, Mr. Pemmaraju Sreenivasa Rao was appointed as Special Rapporteur.

Mr. Rao's first report (A/CN.4/487 and Add.1), presented to the Commission in 1998, reviewed the work done by the ILC on the topic since 1978, focusing on the scope of the draft articles to be elaborated and on the analysis of a number of substantive and procedural obligations. Since the Commission already had before it the complete set of draft articles with commentaries on prevention provisionally adopted in 1996, Mr. Rao recommended that the Commission review these articles as a starting point for its future work on the topic. Therefore, the Commission adopted at first reading a set of 17 draft articles on Prevention of Transboundary Damage from Hazardous Activities (see *International Law Commission, Report on the Work of Its Fiftieth Session, Official Records of the General Assembly,* Fifty-Third Session, Supplement No. 10 (A/53/10), pp.18ff.), and at the same time invited comments and observations by Governments. The articles were drawn from the text of the 1996 articles; however, the text was subjected to careful scrutiny resulting in a number of changes.

Mr. Rao's second report, presented at the fifty-first session in 1999 (A/CN.4/501), discussed the questions submitted to Governments and their reactions. The report also addressed the obligation of due diligence and reviewed the treatment of the topic of liability in the work of the Commission. In 1999, the Commission itself reviewed three options for its future work and chose to finish prevention instead of terminating the work altogether or proceeding with work on liability.

At its fifty-second session in 2000, the Commission established a Working Group to discuss comments from Governments. One the basis of these discussions, the Special Rapporteur presented his third report (A/CN.4/516) containing a revised set of draft articles. The ILC recommended to the General Assembly the elaboration of a convention on the basis of the draft articles.

In 2001, the Commission adopted nineteen draft articles with commentaries (see Simma, fn. 60, pp. 179 ff.; *International Law Commission, Report on the Work of Its Fifty-Third Session, Official Records of the General Assembly,* Fifty-Sixth Session, Supplement No. 10 (A/55/10), para 97.).

[85] A/CN.4/L.627.

[86] Hereinafter "Liability".

International Law". This work, thus, follows the articles on "Prevention of Transboundary Harm from Hazardous Activities".[87] The report of the Working Group discusses the scope of the topic as well as the roles of the States concerned and the operator with regard to liability. The report also identifies possible future directions for study of the topic.

B. Work of the Commission

1. Appropriateness of the topic

An extensive debate took place in the plenary over whether the topic of liability was an appropriate subject for the Commission to consider. Some members felt that the Commission lacked the necessary know-how to consider some of the topics inherent in the study of liability. For example, topics such as insurance would require a financial knowledge not possessed by most outside of that field. In addition, some members felt that the topic of liability involved negotiations between States and therefore would not be appropriate for codification by the Commission. However, the prevailing view was that the Commission could make a valuable contribution in the area of loss allocation, and that in light of the fact that the topic was recommended for study by the General Assembly and the Sixth Commission[88], liability should be considered. At a minimum, the Commission's work on the topic could serve as a preparatory effort for guidelines for State negotiation and a basis for further discussion in the Sixth Committee. It was agreed that, if necessary, expertise from other fields could be sought and consultation with States could be held.

2. Title

When the Working Group report was brought for consideration in the plenary, the sub-title of the topic read: International Liability for Failure to Prevent Loss from Transboundary Harm Arising out of Hazardous Activities. During the plenary discussion, it was recognized that "failure to prevent loss" connoted non-compliance by States and that the title should make clear that there would be compensation for innocent victims even if States were in full compliance. Furthermore, emphasis was placed on the clear differentiation between the topics of State responsibility and liability with regard to risks. Therefore, the phrase "for failure to prevent loss" was replaced in the title with the phrase "in the case of" to clarify the intent of the Commission.

In addition, concern was expressed over the use of the term "liability". In both Spanish and French, there is only one word that denotes both liability and responsibility, and it was felt that, while "liability" was an appropriate term, "responsibility" was not. Therefore, there was a potential problem with the translations of the report into French and Spanish. Replacement of the word "liability" with a term such as "consequences" was one suggestion made. Another member noted that it might be clearer to use the term "loss allocation" in the title. This issue remains unresolved.

3. Discussion of Precaution

Paragraph five of the report of the Working Group deals with the freedom that States should have to allow potentially hazardous activities within their borders, while accepting responsibility if an accident occurs despite the precautions taken by the State. If this were not the case, the international community might insist on a complete ban on the hazardous activity.

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[87] In accordance with operative para. 3 of General Assembly Resolution 56/82.

[88] See General Assembly resolution 3071 (XXVIII) of 30 November 1973, requesting addition of the topic to the Commission's Working Programme; resolution 3315 (XXIX) of 14 December 1974, sect. I, para. 4 (a); resolution 3495 (XXX) of 15 December 1975, para. 4 (b); resolution 31/97 of 15 December 1976; operative paragraph 3 of General Assembly resolution 56/82.

Some members objected to the inclusion of this paragraph in the report. This objection was based on the argument that this paragraph deals with prevention and therefore should have been included in the earlier work of the Commission. However, other members pointed out that it was not dealt with there, so it would be important that it would be established here as a context for the study of liability. Ultimately, the latter view prevailed.

4. Scope

The scope of the subject matter was identified as "loss to (a) persons (b) property, including the elements of State patrimony and national heritage, and (c) environment within the national territory".[89] The Chairman of the Working Group explained that the scope was already accepted for the draft articles on prevention. However, some concerns remained regarding the scope. One view was that the scope was limited and tied the hands of the Commission from dealing with damage occurring to global commons. Another concern involved the appropriateness of a reference to the environment as an innocent victim. In general, a need for refinement of the term "environment" was perceived.

The report of the Working Group also mentioned the need to establish a threshold to trigger the application of the regime. Although the specific threshold was not included in the report, many members agreed that "significant harm" would be the appropriate threshold, in order to maintain consistency with the previous report. However, the dissenting view was that the threshold of the prevention regime was inappropriate and therefore a higher threshold was necessary.

5. Relief

There was common agreement that the relief provided in cases of remedying environmental harm should, as far as possible, be restoration as *restitutio naturalis,* which represents the best solution.

6. Role of the State and the operator

Three main actors were identified in the problem of liability: the State, the operator, and the innocent victim. The responsibility of these three actors would be addressed, as would the role of private entities, such as insurance companies, as well as pools of industry funds. It was pointed out that in case of residual State liability, the determination of the State obliged to participate in loss-sharing could be difficult, since any of the following could be held liable: the State of origin, the State authorizing and monitoring the operation, the State benefiting from the operation, or the State of nationality of the relevant operator. There was consensus that the innocent victim should not bear the loss, although one member expressed the view that the victim could share in the loss. There also seemed to be a consensus that the system should encourage all involved in hazardous activities to exercise caution and preventive measures.

Most members felt that the operator should bear the primary responsibility. One member questioned this approach, imagining that it may be easier for the foreign victims to get compensation from the State than from the operators. Another member explained that the cost of liability was frequently included in operators' expectations if they are involved in hazardous activities, and that operators' insurance companies would provide much of the compensation. In addition, if the State has primary responsibility, the incentive for caution would be lower for the operators.

However, it was felt that the potential damage from hazardous activities often exceeds the combination of insurance of the operator and the operator's own resources. In general, the operator's share would be limited in cases where his liability is either strict or absolute. Therefore, the rest of the loss must be allocated. It was felt that if the State has

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[89] See the report of the Working Group, para. 7 (iii).

agreed on preventive measures and if damage occurs despite this, the State could be liable. This gives the State an incentive to regulate operators and minimize the risk of damage, as well as to compensate the victim. The principle that the victim of transboundary harm should not be left to bear the entire loss was commonly agreed to be particularly significant. In other words, State liability should serve as a last resort, but not be limited to exceptional cases only. When determining the State's role in loss allocation, factors to be considered include the degree of State control as well as the role of the State as beneficiary. There were some potential problems noted with placing liability on the State. For example, States might be reluctant to agree to accept this responsibility. In addition, some developing nations might not be able to absorb the cost of liability.

C. Future Work

The Commission appointed Mr. Rao as Special Rapporteur for the topic. Future topics noted in the Working Group report include: inter-State or intra-State mechanisms for consolidation of claims, issues arising out of the international representation of the operator, the process of assessment, qualification and settlement of claims, access to the relevant fora, and the nature of available remedies. No definite final product or a timeframe to achieve it were indicated, and it was noted by the Commission that outside help may be solicited for advice on some of the technical aspects of the topic of liability.

At the fifty-fifth session of the Commission (2003), the conceptual outline of the topic will be further developed.[90]

VI. Responsibility of International Organizations

A. Introductory Remarks

In the last quinquennium, the Commission decided to include the topic of "Responsibility of international organizations" in its long-term programme of work.[91] The General Assembly took note of this decision[92] and requested the Commission to begin its work on the topic.[93] During its fifty-fourth session, the Commission established a Working Group and appointed Mr. Giorgio Gaja as Special Rapporteur. The Commission adopted the report of the Working Group. Items considered included the scope of the topic; relations between the topic of responsibility of international organizations and the Commission's work on State responsibility; questions of attribution; questions of responsibility of member States for conduct attributed to an international organization; other questions concerning the arising of responsibility for an international organization; questions of content and implementation of international responsibility; settlement of disputes; practice to be taken into consideration; and a recommendation of the Working Group that the Secretariat request relevant materials from international organizations.

B. Work of the Commission

1. Scope of the topic

The Working Group considered the concept of "responsibility" as well as the concept of "international organizations". With regard to "responsibility", the Group agreed to adopt

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[90] See Work Programme (2003-2006), p. 6.

[91] See *International Law Commission, Report on the Work of Its Fifty-Third Session, Official Records of the General Assembly,* Fifty-Sixth Session, Supplement No. 10 (A/56/10), Chapter IX, A.1, para. 729.

[92] General Assembly Resolution 55/152, 12 December 2000, para. 8.

[93] General Assembly Resolution 56/82, 12 December 2001, para. 8.

the same use of that term as put forth in its recently adopted articles on State responsibility.[94] According to this system, responsibility would arise when an international organization commits an act that is wrongful under international law, that can be attributed to the organization, and that constitutes a breach of an international obligation of the organization. Therefore, a study of the responsibility of international organizations would involve examining their responsibility for internationally wrongful acts, as well as matters left aside in the articles on State responsibility. In plenary discussion, members of the Commission expressed support for this approach.

Similar to the Commission's approach to State responsibility, it was agreed in the plenary that the Commission could only attempt to establish rules of general international law and should leave aside conditions for the existence of an internationally wrongful act as well as questions involving content or implementation that are governed by special rules of international law. This choice was not viewed as excluding the possibility that special rules could help to indicate general rules or respective implementing practice.

The Commission also agreed that while special rules may exist governing the relations between international organizations and their member States, responsibility of an international organization *vis-à-vis* its member States should not be excluded from future study for this reason. Study of the topic would, thus, include responsibility of international organizations *vis-à-vis* member and non-member States.

The concept of "international organizations" provoked energetic in plenary discussion. In its report, the Working Group referred to the limited definition of intergovernmental organizations, such as that of article 2(1)(i) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The Working Group noted that a wide spectrum of organizations fit this definition. In plenary discussion, members debated the extent to which it would be possible to establish general rules for very different organizations. Members also debated the usefulness of including "hybrid" organizations, which have as members both State and non-State actors. On one hand, it was observed that some organizations were adopting a more inclusive approach to participation and membership. With the view that this trend would continue, it was suggested the Commission test tentative conclusions against some of these hybrid organizations. On the other hand, it was also observed that the statutes for State and non-State members usually differed in such hybrid organizations. Other members felt it would be best to limit the study to intergovernmental organizations only. The Commission left aside, for the time being, the question of whether future study should include either organizations that States establish under municipal law or non-governmental organizations.

2. Relationship between the topic of responsibility of international organizations and the articles on State responsibility

The manner in which the Commission should refer to its work on State responsibility was also the subject of lively debate in plenary discussion. The Commission agreed with the Working Group's suggestion that the product of the topic of "Responsibility of international organizations" should be a text independent from the Commission's work on State responsibility. Yet several references would seem to be required to the latter work; therefore, the question was how best to refer to previous work without duplicating it. After discussing this question, the Commission agreed to identify the gaps left by the previous work as well as areas that were left unprejudiced. Once those areas had been identified, it would be easier to determine the best means of referring to the work on State responsibility. The Commission could then regard the articles on State responsibility as a source of

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[94] See *International Law Commission, Report on the Work of Its Fifty-Third Session, Official Records of the General Assembly,* Fifty-Sixth Session, Supplement No. 10 (A/56/10), Chapter IV, E.1, para. 76, articles 1-3.

inspiration, whether or not those articles would always present analogous solutions to the problems posed by the responsibility of international organizations. It was noted that it would be better to avoid linkage to the work on State responsibility until the General Assembly had made its final decision as to the legal format of the articles on State responsibility.

3. Questions of attribution

The Commission agreed with the Working Group's view, as noted in the latter's report, that additional questions of attribution could also fall within this topic. The Working Group's report first points to situations where the question of attribution arises for both an international organization and its member States, either where the conduct in question was performed only by the member State, or, where the member State had seconded one of its officials to an international organization. Another relevant situation would be one in which the conduct of a State organ was mandated by an international organization or took place in an area that fell within an organization's exclusive competence. A further related question would concern member States that make declarations transferring competence to an international organization. In plenary discussion, there was additional emphasis on the area of States' delegation of powers to international organizations or to regional groups.

4. Questions of responsibility of member States for conduct attributed to an international organization

The Commission recognized as contentious the question of whether a State could be responsible for conduct of an international organization of which the State was a member. Members agreed that the different structure and functions of international organizations make analogies to State responsibility (*vis-à-vis* other States) only partly applicable. It was agreed that the Commission should examine which kinds of responsibility would apply, such as joint, joint and several, or merely subsidiary responsibility. Limited existing practice was viewed as potentially helpful in situations where member States' responsibility would arise in the case of non-compliance with obligations that were undertaken by a subsequently dissolved international organization. However, this practice covers only a very narrow area of member States' additional responsibility.

5. Other questions concerning the arising of responsibility of an international organization

The Commission agreed that the articles on State responsibility could provide a model for considering the responsibility of international organizations, and in particular: (1) questions relating to the breach of international law by international organizations, (2) the responsibility of an organization in connection with the acts of another organization or a State, and (3) circumstances precluding wrongfulness, including waivers as a form of consent.

In the view of the Working Group, if one considers that the conduct of a State organ is attributed to that State, even when the conduct was mandated by an international organization, then one would have to consider whether the organization is responsible in this case together with the instances of the organization's aid or assistance, direction and control, or coercion of a State resulting in the commission of an internationally wrongful act. However, it could be the case that a State's membership in an international organization precludes analogies to varying levels of State control over other States. The question of whether membership could act as a form of waiver, therefore, would seem to merit close attention. A related question would be whether States and international organizations are able to exert the same varying levels of control over each other. In other words, the concepts of aid or assistance, direction and control, or coercion may not transfer well to an international organization's control over its member State.

6. Questions of content and implementation of international responsibility

In regard to content and implementation, the Working Group suggested that the Commission adopt an approach similar to that of its work on State responsibility. That work only dealt with the content of a State's responsibility toward another State and the implementation of responsibility in the relations between States, and was without prejudice to any right arising from State responsibility that could accrue to a person or entity other than a State. It was suggested that it would not be necessary to specify whether the rights corresponding to the responsible organization's obligations pertain to a State, another organization, or a person or entity other than a State or organization.

After some debate in the plenary discussion, it was agreed that the Commission should leave open, at this stage, the question whether the study should include matters relating to implementation of responsibility of international organizations and, in the affirmative, whether it should consider only claims by States or also claims by international organizations, owing to the complex nature of some of these issues.

7. Settlement of disputes

The Commission also agreed to leave in abeyance, for the time being, the question of whether provisions on the settlement of disputes should be drafted, without prejudice to their inclusion.

8. Practice to be taken into consideration

The Working Group suggested that some well-known judicial or arbitral decisions on the subsidiary responsibility of member States for conduct of an international organization could offer some elements of interest for the study of responsibility under international law. Such decisions could be helpful, either for comments made on member States' responsibility, or for potentially useful analogies to municipal law. Decisions concerning commercial contracts would be considered under the latter perspective. Members generally assented to this suggestion in plenary discussion.

9. Recommendation of the Working Group

The Working Group, and subsequently the Commission as a whole, viewed as important the ability to have access to previously unpublished materials. The Commission adopted the Working Group's recommendation that the Secretariat approach international organizations with a view to collecting relevant materials, especially on questions of attribution and of responsibility of member States for conduct attributed to an international organization.

VII. Shared Natural Resources

As a sort of natural continuance of its work on the non-navigational use of international watercourses, the International Law Commission included the item "Shared natural resources" on its Programme of Work and appointed Mr. Chusei Yamada as Special Rapporteur.

The Planning Group recommended the establishment of a working group to assist the Special Rapporteur. In the Commission's Work Programme, a first report on the outline of the item is envisaged for 2003; a report on transboundary confined groundwater[95] and another one on oil and gas would then be presented in the following years. A fourth report will offer a

[95] Focusing on confined groundwaters, as one member suggested, would represent the logical continuance of the ILC's work on the non-navigational use of watercourses, which excluded *confined* groundwaters (General Assembly Resolution 51/229, p. 3, art. 2, subpara. (a)).

See in addition the ILC Resolution on Confined Transboundary Groundwaters, Yearbook of the International Law Commission 1994, Vol. II, Part Two, p. 135:"The International Law Commission, […] recognizing also the need for continuous efforts to elaborate rules pertaining to confined transboundary groundwater, […]".

comprehensive review in 2006.[96] During this year's session, preliminary ideas were exchanged in the form of informal consultations.

In the course of the future work on Shared Natural Resources, the Commission will have to consider the exact qualification of groundwater and its apportionment, because of its crucial importance for the survival of mankind, which may give rise to a differentiation from conventional natural resources.

State practice, existing legal norms and considerable work already done on the regional level will serve as a basis for the further work of the Commission. In particular, the provisions of the Convention on the Law of the Non-Navigational Uses of International Watercourses[97] as well as the draft articles on prevention adopted in 2001 will have to be examined with regard to their applicability to the current topic.[98]

Furthermore, cooperation with relevant United Nations bodies and private academic institutions will be indispensable for an efficient and comprehensive approach as well as coordination of work with that done at the regional level.[99] The shared natural resource of migrating animals might, because of its different characteristics, be considered at a later stage.

VIII. Fragmentation of International Law: Difficulties Arising from the Diversification of International Law

A. Introductory Remarks

At the outset of its fifty-fourth session, the Commission established a Study Group on the topic with the working title "Fragmentation of international law", chaired by the present author. The Study Group defined the scope of the topic and established its proper format and working methodology. In its report,[100] considered and adopted by the plenary, the Study Group summarized its discussions and made recommendations for future work.

The Study Group's preliminary discussion was based on a feasibility study by Mr. Gerhard Hafner, entitled "Risks Ensuing from Fragmentation of International Law",[101] which examined the suitability of the topic for future inclusion in the Commission's long-term programme of work. Mr. Hafner's paper focused on areas of conflicting rules and regimes of international law. In addition, it addressed the root causes and consequences of fragmentation. Finally, Mr. Hafner introduced a list of envisaged solutions, including a proposed role for the International Law Commission.

The Study Group considered the term "fragmentation" to designate effects of expansion and diversification of international law. Members of the Study Group agreed that the work of the Commission should be guided by the aim of countering the difficulties of fragmentation while avoiding an overly negative view of the phenomenon. In plenary, the Commission adopted a subtitle to the topic to express this approach. It also adopted a

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[96] See the Work Programme (2003-2006), *International Law Commission, Report on the Work of Its Fifty-Fourth Session, Official Records of the General Assembly,* Fifty-Seventh Session, Supplement No. 10 (A/57/10), Chapter X, A.2, para. 520.

[97] See General Assembly Resolution 51/299.

[98] See the Resolution on the Law of Confined Transboundary Groundwater, preamble, para. 5.

[99] See the Convention on the Law of the Non-Navigational Uses of International Watercourses, article 2(c) (A/Res/51/229).

[100] A/CN.4/L.628 and Corr.1.

[101] G. Hafner, "Risks Ensuing from Fragmentation of International Law", *International Law Commission, Report on the Work of its Fifty-Second Session, Official Records of the General Assembly,* Fifty-Fifth Session, Supplement No. 10 (A/55/10), annex.

working methodology according to which it would examine areas where problems could arise from fragmentation. Members agreed to adopt an exploratory approach to the topic, given its unique nature. The Commission decided to undertake a series of studies on specific areas of fragmentation, with the aim of eventually providing a "tool-kit" to aid in resolving problems arising from conflicting or incongruous international norms or regimes.

B. Work of the Commission

1. Support for the study of the topic

Members of the Study Group were strongly in favor of taking up the topic of fragmentation, despite the collective view that fragmentation differed greatly from other topics the Commission had covered. Most members felt the Commission could provide useful guidance to the international community on this topic. In expressing, members in the plenary felt this topic would be especially appropriate for the Commission in light of its past work on the law of treaties. In addition, it was noted that fragmentation had already spurred the creation of some mechanisms for coping with challenges arising from the phenomenon and that those mechanisms should be examined.

Some members of the Study Group felt that the positive aspects of fragmentation should be highlighted as well. For instance, the proliferation of international rules, regimes and institutions could indicate the increased vitality of international law. Upon considering this suggestion in the plenary, members debated the extent to which the scope of international law had expanded into areas previously only addressed by domestic law. In addition, members expressed a belief that there were advantages to the increased diversity of voices and a polycentric system in international law.

However, there also was consensus during plenary discussion that the positive aspects should not be the focus of the group's work and that the proper role of the Commission was to counter the negative aspects of fragmentation through a "tool-box" approach.

2. Procedural issues

Some members of the plenary questioned whether the topic fell within the Commission's mandate. Most members regarded this concern as unfounded. Additionally, some members raised the issue of whether the Commission would have to obtain further approval from the Sixth Committee before beginning work.[102] In such an event, most members felt the needed approval could be obtained.

3. Title of the topic

The Study Group arrived at a general consensus to attempt a more balanced approach to the study of fragmentation after considering Mr. Hafner's study. Some members viewed the title of Mr. Hafner's report as casting the phenomenon in too negative a light. Members observed that the expansion and diversification of international law and international judicial bodies increased the number of dispute resolution fora available to States. It was felt that such phenomena also allowed beneficial experimentation between international regimes and could positively affect the peaceful resolution of conflicts in many ways.

The Commission agreed to adopt this more moderate view of fragmentation. Many members expressed doubts regarding any title that would convey a negative view of the phenomenon offered suggestions for a revised title. Some members felt that the negative aspects in the former title, however, would help to explain the need for the Commission's

[102] For initial approval, see General Assembly Resolution 55/152.

work on the topic. In the end, members agreed that, for the sake of clarity, it would be best to include the term “Fragmentation” in the title.

4. Format of work and methodology

Members of the Commission vigorously debated the proper format of work and methodology for this topic. With regard to the format of the work, members agreed that codification in the form of draft articles was not suitable, opting instead to produce work in the form of a study or report.

The members of the Study Group came to a consensus on methodology after discussion of various proposed approaches, keeping in mind the desire to adopt a balanced approach. Many members in the Study Group and plenary expressed a preference for an exploratory methodology, according to which the Commission would focus on specific subject areas or themes of fragmentation and identify areas where conflicting rules, regimes, or norms existed. If such conflicts created the necessity for solutions, the Commission would develop these solutions, if possible. Human rights treaties and extradition agreements were suggested as an example of such an area of tension. In plenary discussion, the conflict between international criminal law and State immunity also arose as a possible area of study.

The rationale for identifying incongruities or conflicts among existing legal rules, norms, or regimes, was that doing so would be most useful for the international community. In plenary discussion, members observed that while it could be tempting to examine root causes of fragmentation, what would be most valuable would be to find practical solutions to problems arising from it. Further, the view was expressed that the Commission should examine “fracture zones” of international law doctrines and norms, but avoid wringing of hands over the increase in number of international fora.

The Study Group had identified areas of study that, in its view, did not fall within the expertise or mandate of the Commission. In plenary discussion, members agreed that the Commission should not address questions regarding the creation or relationship among international judicial institutions, except where problems arose from diverging interpretations of the same or similar treaties through such institutions. Members agreed that it would not be appropriate for the Commission to act as a referee between institutions or otherwise make value judgments between different institutions or conflicting rules. At the same time, it was agreed that the Commission should reserve for itself a potential role as a facilitator of communication between institutions.

The Study Group’s report expressed skepticism as to the usefulness of analogies to domestic law, since such analogies would indicate a hierarchy not present at the international level. Members of the Commission expressed support for this view in plenary discussion.

During the discussions of the Study Group, it had been suggested that the Commission seek to gain an overview of State practice and provide a forum for dialogue and potential harmonization. One suggestion made to enable such an exchange of views was for the Commission to organize a seminar. The idea of a seminar provoked much debate at meetings of the Study Group and the plenary. Members expressed various opinions on the form such a seminar could take, one of which being that the seminar would take place at the beginning of each annual session of the Commission, pursuant to Chapter Three of the Commission’s Statute. Another proposal envisaged more institutionalized and periodic meetings, similar to the meetings of the Chairpersons of Human Rights Treaty Bodies or the annual meeting of legal advisors of States at the United Nations during the sessions of the General Assembly. Members expressed concern over the funding for such seminars of meetings. It was also proposed that the Commission examine, by way of a questionnaire, existing coordination mechanisms.

5. Possible outcome of the Commission's work

The Commission agreed to prepare, as a final result, a study or research report, though its exact format and scope remain to be determined.

C. Future Work

The Study Group recommended that the Commission undertake a series of studies on specific aspects of fragmentation. Taking into account extensive suggestions and comments made in plenary discussion, the Study Group revised its list of initial areas to be included in the study, which now include: (a) the function and scope of the *lex specialis* rule and the question of "self-contained regimes"; (b) the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (VCLT article 31 (3)(c)) and in the context of general developments in international law and concerns of the international community; (c) the application of successive treaties relating to the same subject matter (VCLT article 30); (d) the modification of multilateral treaties between certain of the parties only (VCLT article 41); (e) hierarchy among some sources of international law: *jus cogens*, obligations *erga omnes*, article 103 of the Charter of the United Nations, as conflict rules.

These topics would build on earlier work of the Commission, just as its work on reservations to multilateral treaties built on the Commission's work on the law of treaties. The Commission agreed that its aim should be to provide what could be called a "tool-kit" designed to assist in solving practical problems arising from incongruities and conflicts between international legal norms and regimes.

The Chairman of the Study Group agreed to undertake the first in the series of studies, concerning the function and scope of the *lex specialis* rule and the question of "self-contained regimes".

IX. Other Matters

A. Programme, Procedures and Working Methods of the Commission and Its Documentation

1. Work programme 2003/2006

Following the course it had taken in the last quinquennium, the Commission again established a – tentative – work programme for the ensuing four years setting out in general terms the goals with respect to each topic to be achieved during this period.[103]

2. Long-term programme of work

The Commission reconstituted its respective Working Group and appointed Professor Alain Pellet as chairman. At this stage, its work has a preliminary character only.

3. Procedures and methods of work

The Commission discussed a proposal which had already been presented last year. It was composed of three aspects pertaining to a system of partial renewal of the Commission, to the observance of improved attendance at the ILC to measures for a more balanced gender representation among members. Another proposal related to the rotation of geographical distribution of seats in the Bureau. These proposals were discussed in depth but finally it was felt that they would be extremely difficult to implement in practical terms, in addition to various sensitive political issues that they might raise (on the Commission's action with

[103] See Report, Chapter X, A.2., para. 520.

regard to the gender issue see *supra* footnote 2).

4. Cost-saving measures

With regard to paragraph 10 of General Assembly resolution 56/82 encouraging the Commission, at its future sessions, to continue taking cost-saving measures in organizing its programme of work, the Commission wishes to note that it is making every effort aiming towards the most cost-effective and economical way to conduct its work. The Commission considers that the shortening of its current and next (fifty-fifth) sessions to 10 weeks represented a significant cost-saving measure. The Commission also intends, once it returns to its sessions of 12 weeks' duration, to consider organizing its work in a manner similar to that it applied at its fifty-third session.

5. Honoraria

The Commission notes that after the date on which members were appointed to their position the General Assembly adopted resolution A/56/272, which reduced the honoraria payable to them and to members of certain other bodies. The Commission draws attention to the point made in the Report of the Secretary-General (document A/53/643) that the level of the honoraria had not been reviewed since 1981 and that the decision of the General Assembly was taken in direct contradiction to the conclusions and recommendations in that report.

The Commission notes that the decision by the General Assembly was taken without consultation with the Commission and considers that the decision is not consistent in procedure or substance with either the principles of fairness on which the United Nations conducts its affairs or with the spirit of service with which members of the Commission contribute their time and approach their work. Moreover, the Commission feels compelled to stress that the above resolution especially affects Special Rapporteurs, in particular those from developing countries, as it compromises the support for their research work.

The Commission decided to bring its concerns to the attention of Member States in the hope that the above-mentioned resolution will be duly reconsidered.

The members of the Commission, concerned about the administrative costs involved in the payment of the current symbolic honoraria, also decided that they would not collect them.

The Commission recommended also that a letter from the Chairman of the International Law Commission containing the above be sent to the appropriate authorities.

B. Date and Place of the Fifty-Fifth Session

The Commission decided to hold a 10-week split session, which will take place at the United Nations Office in Geneva from 5 May to 5 June and from 7 July to 8 August 2003.

C. Cooperation with Other Bodies

Judge Guillaume, President of the International Court of Justice, informed the Commission of the Court's activities. Further exchanges of views were had with the Inter-American Juridical Committee, the Asian-African Legal Consultative Organization, the CAHDI, and the ICRC.

D. Representation at the Fifty-Seventh Session of the General Assembly

The Commission will be represented by its Chairman Robert Rosenstock and Special Rapporteur John Dugard.

E. International Law Seminar

Fort the 38th time this Seminar was held from 21 May to 7 June 2002, with 24 participants of different nationalities.

ANNEX I

Draft articles on diplomatic protection (first reading)[104]

DIPLOMATIC PROTECTION

Titles and texts of draft articles adopted by the plenary

Part One

GENERAL PROVISIONS

Article 1

Definition and scope[105]

1. Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to the national arising out of an internationally wrongful act of another State.
2. Diplomatic protection may be exercised in respect of a non-national in accordance with article 7[8].

Article 2[3][106]

Right to exercise diplomatic protection

1. A State has the right to exercise diplomatic protection in accordance with these articles.

Part Two

NATURAL PERSONS

Article 3[5]

State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.
2. For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization, or in any other manner, not inconsistent with international law.

Article 4[9]

Continuous nationality

1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.
2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect

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[104] A/CN.4/L.613.

[105] The title to draft article 1 was amended during discussion in the plenary. The title originally read “Scope”.

[106] The bracketed numbers refer to the numeration of articles originally used by the Special Rapporteur.

of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.

Article 5[7]

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.
2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 6[107]

Multiple nationality and claim against a State of nationality

1. A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.[108]

~~2. A State of nationality shall not exercise diplomatic protection in respect of a person against a State of which that person is also a national for an injury incurred when that person was a national of the latter State and not of the former.~~

Article 7[8]

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
2. A State may exercise diplomatic protection in respect of a person who is recognized as a refuges by that State when that person, at the time of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

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[107] The plenary decided to omit paragraph (2) from article 6, as proposed by the Special Rapporteur. In the text above, the omitted portion has been stricken through.

[108] This article was amended by the plenary. The last clause of this sentence, beginning with “both”, did not appear in the original draft articles adopted by the drafting committee.

ANNEX II

RESERVATIONS TO TREATIES[109]

Titles and texts of draft guidelines adopted by the plenary in 2002

2. PROCEDURE

2.1 Form and notification of reservations

2.1.1 Written form

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation

Formal confirmation of a reservation must be made in writing.

2.1.3 Formulation of a reservation at the international level

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(a) Heads of State, heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 [2.1.3 *bis*, 2.1.4][110] Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations

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[109] See Report, Chapter IV, C.1., para. 102.

[110] The numbers in the square brackets indicate the numbers of the draft guidelines in the report of the Special Rapporteur. In the above case, for example, the Special Rapporteur's proposed draft guidelines 2.1.3 *bis* and 2.1.4 were merged into one new draft guideline now numbered 2.1.4.

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 Communication of reservations

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or as the case may be, upon its receipt by the depositary.

The 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.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In this case, the communication is considered as having been made on the date of the electronic mail or facsimile.

2.1.7 Functions of depositaries

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, where appropriate, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

2.1.8 [2.1.7. *bis*] Procedure in case of manifestly [impermissible] reservations

Where, in the opinion of the depositary, a reservation is manifestly [impermissible], the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such [impermissibility].

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

2.4.1 Formulation of interpretative declarations

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.2 [2.4.1 *bis*] Formulation of an interpretative declaration at the internal level

The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

[2.4.3 [2.4.2, 2.4.9] Formulation and communication of conditional interpretative declarations

A conditional interpretative declaration must be formulated in writing. Formal confirmation of a conditional interpretative declaration must also be made in writing.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

ANNEX III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION[111]

In response to paragraph 13 of General Assembly resolution 56/82 of 12 December 2001, the Commission would like to indicate the following specific issues for each topic on which expressions of views by Governments either in the Sixth Committee or in written form would be of particular interest in providing effective guidance for the Commission on its further work.

A. Reservations to treaties

The Commission would welcome comments from Governments on the following issues:

(a) In paragraph 4 of draft guideline 2.1.6, adopted this year on first reading, the Commission considered that the communication of a reservation to a treaty could be made by electronic mail or facsimile, but that, in such a case, the reservation must be confirmed in writing. With a view to the second reading of the draft guidelines, the Commission would like to know whether this provision reflects the usual practice and/or seems appropriate.

(b) In his seventh report, the Special Rapporteur on reservations to treaties proposed the adoption of draft guideline 2.5.X, which reads:

> *"2.5.X Withdrawal of reservations held to be impermissible by a body monitoring*
>
> *the implementation of a treaty*
>
> *The fact that a reservation is found impermissible by a body monitoring the implementation of the treaty to which the reservation relates does not constitute the withdrawal of that reservation.*
>
> *Following such a finding, the reserving State or international organization must take action accordingly. It may fulfil its obligations in that respect by totally or partially withdrawing the reservation."*

Following the discussions in the Commission, the Special Rapporteur withdrew this proposal, which does not relate primarily to the question of the withdrawal of reservations. As the problem will necessarily be discussed again when the Commission comes to deal with the question of the consequences of the inadmissibility of a reservation or when it reconsiders its 1997 preliminary conclusions, the Commission would welcome comments by States on this point.

B. Diplomatic Protection

The Commission would welcome the views of Governments as to whether protection given to crew members who hold the nationality of a third State[112] is a form of protection already adequately covered by the 1982 Law of the Sea Convention or whether there is a need for the recognition of a right to diplomatic protection vested in the State of nationality of

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[111] See Report, Chapter III, paras. 25-31.

[112] See *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea),* International Tribunal for the Law of the Sea, Judgment of 1 July 1999.

the ship in such cases. If so, would similar arguments apply to the crew of aircraft and spacecraft?

In the *Barcelona Traction* case, the International Court of Justice held that the State in which a company is incorporated and where the registered office is located is entitled to exercise diplomatic protection on behalf of the company. The State of nationality of the shareholders is not entitled to exercise diplomatic protection, except, possibly, where:

(a) The shareholders' own rights have been directly injured;

(b) The company has ceased to exist in its place of incorporation;

(c) The State of incorporation is the State responsible for the commission of an internationally wrongful act in respect of the company.

Should the State of nationality of the shareholders be entitled to exercise diplomatic protection in other circumstances? For instance, should the State of nationality of the majority of shareholders in a company have such a right? Or should the State of nationality of the majority of the shareholders in a company have a secondary right to exercise diplomatic protection where the State in which the company is incorporated refuses or fails to exercise diplomatic protection?

C. Unilateral acts of States

The Commission once again encourages States to reply to the questionnaire of 31 August 2001, which invited States to provide information regarding State practice on unilateral acts.[113]

D. International liability for injurious consequences arising out of acts not prohibited by international law (International liabilityin case of loss from transboundary harm arising out of hazardous activities)

The Commission would welcome comments on the different points raised in the report of the Working Group (Chapter VII), particularly with regard to the following issues:

(a) The degree to which the innocent victim should participate, if at all, in the loss;

(b) The role of the operator in sharing the loss;

(c) The role of the State in sharing the loss, including its possible residual liability;

(d) Whether particular regimes should be established for ultra-hazardous activities;

(e) Whether the threshold for triggering the application of the regime on allocation of loss caused should be "significant harm", as in the case of the articles on prevention, or whether a higher threshold should be determined;

(f) The inclusion of the harm caused to the global commons within the scope of the current endeavour;

(g) Models which could be used to allocate loss among the relevant actors;

(h) Procedures for processing and settling claims of restitution and compensation, which may include inter-State or intra-State mechanisms for the consolidation of claims, the nature of available remedies, access to relevant forums and the quantification and settlement of claims.

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[113] A/CN.4/L.619 ft.11. http://www.un.org/law/ilc/sessions/53/53sess.htm.

E. Responsibility of international organizations

The Commission would welcome comments on the proposed scope and orientation of the study on the responsibility of international organizations. In particular, the views of Governments are sought as to:

(*a*) Whether the topic, in accordance with the approach taken in the draft articles on Responsibility of States for internationally wrongful acts, should be limited to issues relating to the responsibility for internationally wrongful acts under general international law; and

(*b*) Whether it would be preferable, as is being proposed, to limit the study to intergovernmental organizations, at least at the initial stage, as opposed to also considering other types of international organizations.