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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS FIFTY-SIXTH SESSION

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CONTENTS

REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS FIFTY-SIXTH SESSION

INTRODUCTION

1. The International Law Commission (hereafter called the "ILC" or the "Commission") established by General Assembly Resolution 174 (III) of 21st September 1947 is the principal organ under the United Nations system for the promotion of progressive development and codification of international law. The 34-member ILC held its fifty-sixth session in Geneva from 3 May to 4 June and 5 July to 6 August 2004. The Commission elected Mr. Teodor Viorel Melescanu (Romania) as its Chairman for the fifty-sixth session. The AALCO was represented at the session by the Secretary-General, Amb. Dr. Wafik Z. Kamil.

2. There were as many as seven topics on the agenda of the aforementioned session of the ILC. These were:

I. Reservations to Treaties

II. Diplomatic Protection

III. Unilateral Acts of States

IV. International Liability For Injurious Consequences Arising Out of Acts not Prohibited by International Law

V. Responsibility of International Organizations

VI. Fragmentation of Intentional Law: Difficulties Arising From the Diversification and Expansion of International Law; and

VII. Shared Natural Resources

3. Concerning the topic **"Reservations to treaties"**, the Commission considered the Special Rapporteur's ninth report[1] relating to the object and definition of objections. The Commission further considered and provisionally adopted draft guidelines 2.3.5, 2.4.9, 2.4.10, 2.5.12 and 2.5.13 and commentaries thereto.

4. On the topic of "**Diplomatic protection**" the Commission had before it the fifth report of the Special Rapporteur[2]. The Commission referred draft article 26, together with the alternative formulation for draft article 21 as proposed by the Special Rapporteur to the Drafting Committee along with a decision asking the Drafting Committee to consider elaborating a provision on the connection between the protection of ships' crew and

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1. A/CN.4/544
2. A/CN.4/538

diplomatic protection. The Commission considered the report of the Drafting Committee and adopted on first reading a set of 19 draft articles.

5. On the topic of **Unilateral acts of states** the Commission, considered the seventh report of the Special Rapporteur,[3] which contained a survey of State Practice in respect of unilateral Acts. The Commission further established an open-ended Working Group on unilateral Acts of States which focused on the detailed consideration of specific example of unilateral acts.

6. Concerning the topic **"International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)"**, the Commission had before it the second report[4] containing a set of 12 draft principles. The working group established by the Commission reviewed and revised the 12 draft principles and recommended that eight draft principles be referred to the Drafting Committee. The Commission referred the eight draft principles to the Drafting Committee along with a request to prepare a text of a preamble. Based on the report of the Drafting Committee the Commission adopted on first-reading a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.

7. With regard to the topic of **"Responsibility of international organizations"**, the Commission had before it the second report of the Special Rapporteur[5] dealing with attribution of conduct to international organizations. The report proposed four draft articles which were considered by the Commission and referred to the Drafting Committee. The Commission considered and adopted the report of the Drafting Committee on draft articles 4 to 7 and commentaries thereto.

8. In relation to the topic **"Fragmentation of international law: difficulties arising from the diversification and expansion of international law"**, the Commission reconstituted the Study Group which held eight meetings. The Study Group discussed the preliminary reports prepared by the Study Group members on different topics.

9. With regard to the topic **"Shared natural resources"**, the Commission considered the second report of the special Rapporteur which contained seven draft articles. The Commission established an open-ended Working Group on Transboundary Ground Waters chaired by the Special Rapporteur. Further the Commission held two informal briefings by experts on ground waters.

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[3]. A/CN.4/542
[4]. A/CN.4/540
[5]. A/CN.4/541

I. RESERVATIONS TO TREATIES

A. BACKGROUND

1. It may be recalled that the UN General Assembly in its resolution 48/31 of December 1993 endorsed the decision of the ILC to include in its agenda the topic "The law and practice relating to reservations to treaties." At its forty-sixth session in 1994, the ILC appointed Mr. Alain Pellet as Special Rapporteur for the topic.

2. The ILC at its forty-seventh session in 1995 and the forty-eighth session in 1996 received and discussed the first[6] and second[7] reports of the Special Rapporteur, respectively.

3. The ILC continued its work on the understanding that: the title to the topic would read as "Reservations to Treaties"; the form the results of the study would take should be a guide to practice in respect of reservations; and the present work by the ILC should not alter the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions on Treaties. As far as the Guide to practice is concerned, it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States, and international organizations. These guidelines would, if necessary, be accompanied by model clauses.

4. Since the year 1998, the Commission received the third, fourth, fifth and sixth reports of the Special Rapporteur. While the third and fourth reports dealt with the definition of reservations and interpretative declarations, the fifth report focused on the procedure and alternatives to reservations and interpretative declarations, and the sixth report concerned the modalities of formulating and publicity of reservations and interpretative declarations.

5. At the fifty-fourth session (2002), the Commission had before it the Special Rapporteur's seventh report[8] relating to the formulation, modification and withdrawal of reservations and interpretative declarations. The Commission also referred 15 draft guidelines dealing with withdrawal and modification of reservations to the Drafting Committee. On the basis of the Drafting Committee's report, the Commission, at this session, considered and provisionally adopted 11 draft guidelines dealing with formulation and communication of reservations and interpretative declarations.

6. At the fifty-fifth session (2003) the Commission had before it the eighth report[9] of the Special Rapporteur dealing with withdrawal and modification of reservations and interpretative declarations. The Commission further referred five draft guidelines dealing with withdrawal and modification of reservations and interpretation declarations to the

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6. A/CN.4/470 and Corr.1.
7. A/CN.4/477 and Add.7.
8. A/CN.4/526 and Add.1 to 3.
9. A/CN.4/535 and Add.1

Drafting Committee. The Commission adopted 11 draft guidelines (with 3 model clauses dealing with withdrawal and modification of reservations)

7. For purposes of the Guide to Practice, "reservation" means a unilateral statement, however, phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

8. An 'interpretative declaration' on the other hand is a "unilateral statement … made by a State or by an international organization … purporting to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions".

B. CONSIDERATION OF THE TOPIC AT THE FIFTY-SIXTH SESSION

9. At the 56th Session the Commission had before it the Special Rapporteur's ninth report[10] relating to the object and definition of objections. This report constituted a complimentary section to the eighth report on the formulation of objection to reservations and interpretative declarations. The Commission further considered and provisionally adopted draft guidelines 2.3.5, 2.4.9, 2.4.10, 2.5.12 and 2.5.13 and commentaries thereto, which are described below.

2.3.5 Widening of the scope of a reservation

> The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation.

10. This draft guideline is similar in nature to the late formulation of reservation as the text itself clarifies by way of subjecting this situation to same rules. In the case of late formulations, a new reservation is added intending to create new treaty relations. Similarly widening of the scope of a reservation also intends to create a different, if not new treaty relation with an intention of expanding the scope of the existing reservations. Therefore, in both cases, the effect is intended to modify treaty relations in favour of the State making such reservations. Therefore, the rules that are stated in draft guidelines 2.3.1 to 2.3.3 dealing with late formulation of reservations are applicable to this context, i.e. widening of the scope of reservations, also.

11. In the case of an objection by a contracting party to the widening of reservations, the situation existed prior to such widening remains the same. In other words, as the phrase itself denotes, the widening is intended to the existing reservation and in the event of an objection to such widening, the previous reservation remains applicable as it is. This effect is similar to that enshrined in draft guidelines 2.3.3.

2.4.9 Modification of an interpretative declaration

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[10]. A/CN.4/544

> Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time.

12. The text of this draft guideline is a combination of the texts of draft guidelines 2.4.3[11] and 2.4.6[12]. The definition provided under draft guideline 1.2, says that "simple" interpretative declarations are merely clarifications of the meaning or scope of the provisions of the treaty. They can be modified at any time, unless the treaty otherwise provides and are not subject to the requirement of confirmation.

13. It, therefore, follows that if a treaty provides than an interpretative declaration can be made only at specific times, that means that such a declaration cannot be modified at others times. In the case where the treaty limits the possibility of making or modifying an interpretative declaration in time, the rules applicable to the late formulation of such a declaration, as stated in draft guideline 2.4.6 should be applicable if a State or an international organization intended to modify an earlier interpretative declaration.

2.4.10 Limitation and widening of the scope of a conditional interpretative declaration.

> The limitation and the widening of the Scope of a Conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

14. This draft guideline is in accordance with the distinction between "simple" interpretative declaration and the conditional interpretative declaration. Unlike the simple interpretative declaration, conditional interpretative declarations can be formulated only at the time of the expression of consent to be found by the treaty and any late formulation is possible only when there is no objection from any of the contracting parties. Thus, the Commission found apt to apply rules relating to Partial Withdrawal[13] and the Widening of the Scope of Reservations.[14]

2.5.12 Withdrawal of an interpretative declaration

> An interpretative declaration may be withdrawn at any time, following the same procedure applicable to its formulation, by the authorities competent for that purpose.

15. Draft guideline 2.4.3 provides that a "Simple" interpretative declaration may be formulated at any time except where a treaty provides otherwise. Therefore a logical inference from that can be that an interpretative declaration formulated in such manner can be withdrawn at any time. However, for such withdrawal, procedures regarding competent authorities provided under draft guidelines 2.4.1 and 2.4.2 should be followed.

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[11]. Deals with the time at which an interpretative declaration may be made.
[12]. Deals with the late formulation of reservations.
[13]. See draft guidelines 2.5.10 and 2.5.11
[14]. Draft guidelines 2.3.5

2.5.13 Withdrawal of a conditional interpretative declaration

> The withdrawal of a conditional interpretative declaration is governed by the rules applicable to the withdrawal of reservations.

16. Formulation of conditional interpretative declarations is governed by the rules that are applicable to the formulation of reservations. Thus, it logically follows that rules for the withdrawal of conditional interpretative declaration are also the same that are applicable to the withdrawal of reservations as contained in draft guidelines 2.5.1 to 2.5.9.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

17. The Special Rapporteur intends to deal with the question of the "validity" of reservations in his report next year.

18. The Vienna Conventions on the law of treaties deal with cases in which a State or an international organization "cannot" formulate a reservation (art. 19)[15], but they do not contain an adjective qualifying a reservation which might nevertheless be made in one of those cases. The terms used by States in practice are not at all uniform in that regard.

19. Both in the International Law Commission and in the Sixth Committee, there were disagreements and lengthy discussions on the terminology to be used in that regard. It was pointed out, for example, that the word "lawfulness" had the disadvantage of referring to the law of State responsibility, although it was very doubtful whether a reservation that was prohibited or improperly formulated would entail its author's responsibility. Moreover, a choice must not only be made between the words "admissibility" and "permissibility", but their equivalent in French ("*recevabilité*") is not satisfactory. The term "validity", which the Special Rapporteur found neutral and sufficiently comprehensible and which offered the advantage of having an equivalent in all of the Commission's working languages, was criticized on the grounds that it created confusion between the nullity of a reservation and its opposability.

20. In 2002, the Commission "decided to leave the matter open until it had adopted a final position on the effect" of reservations covered by the provisions of article 19 of the Vienna Conventions.

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[15] Article 19 of the Vienna Convention on the Law of Treaties reads as follows: A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
(a) the reservation is prohibited by the treaty;
(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

21. Before adopting a final position, the Commission would take note with interest of the comments of Governments on this question.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-NINTH SESSION (2004)

22. The delegate of **Iran** said the definition of an objection to a reservation should be clarified before the Commission deliberated on its legal effects. The definition could be revised when the effects of objections were appropriately formulated. The term "objection" should be defined in the light of established principles of international law, including the principle of sovereignty of States. Only parties to a treaty were entitled to formulate objection to reservations made to that treaty. A signatory could be entitled to object to reservations, which it deemed as contrary to the object and purpose of that treaty.

23. The delegate of **Malaysia** said a reservation contrary to the object and purpose of a treaty was ineffective or null and void. It would not produce the result intended by a reserving State. But the treaty as a whole would continue to govern the reserving State and its treaty relationship with other treaty States would not be affected. The reserving States should not be able to invoke the reservation in that relationship. States parties should be encouraged to make objections to "impermissible" reservations to convey their positions to the reserving State. However, the Committee should introduce a formulation that would state that impermissible reservations were of no force even if no objection were made. Also, the depositary charged with communicating the impermissible reservation should advise the reserving party of the legal problems raised by the reservation. The depositary's role in analyzing and drawing conclusions about particular reservations for State action should also be examined.

24. The delegate of **Pakistan** said the rules of the Vienna convention on the law of treaties had become customary norm. They were flexible and should not be tampered with. It was clearly stated that the reservation to a treaty should not be incompatible with the treaty's intent. The delegate was of the view that human rights treaties were no different from others, and reservations should be allowed; otherwise they would lose their value and universality. The treaty regime, with reservations included, should aim for universality of appeal and acceptance. The final form of the text on reservations to treaties should be used as guidelines.

25. The delegate of **China** said it was unacceptable for a State objecting to a reservation to unilaterally claim the full applicability of a treaty between it and the reserving State. The intention of both parties should be taken into account in elaborating a text on the issue.

26. The delegate of **Republic of Korea** said that her delegation believed that future work of the Commission relating to articles of the Vienna Convention on the Law of Treaties should be based on case law.

27. The delegate of **Singapore** said the subject of reservations to treaties was a matter of profound practical significance. While it was essential not to encourage late formulation of limitations on the application of a treaty, there could be legitimate reasons why a State would wish to modify an earlier reservation. Prevailing practice should be taken into account. The commentaries provided examples that were a useful reference in illustrating the principles set out in the Guide to Practice. The question of "validity" of reservations would be treated next, she noted. With regard to the related issue of the effect of reservations, she observed that the Vienna Convention on the Law of Treaties had set out the basic guidelines. While a State could not accept a reservation prohibited by a treaty, reservations could be permissible under certain conditions. The contractual character and voluntary nature of treaty agreements served as the fundamental basis for treaty relations. The International Court of Justice had said a State was a party to a Convention even if others had made objections, as long as the reservation was compatible with the object and purpose of the Convention. She further observed that some could argue that this opinion would lead to a complex legal web. On the other hand, the clarified position would contribute to greater participation and universality for treaties. It would also give greater stability to the treaty regime. If a reservation was challenged by an objecting State for failing the test of compatibility with the object and purpose of the treaty, the reserving State should reconsider the objection in good faith and decide on a course of action.

II. DIPLOMATIC PROTECTION

A. BACKGROUND

1. The ILC at its forty-eighth session in 1996 identified the topic of "Diplomatic Protection" as one of the topics appropriate for codification and progressive development.[16] By resolution 51/160, the General Assembly in the same year invited the ILC to further examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make.

2. At its forty-ninth session (1997), a Working Group was established on this topic. The Working Group attempted to clarify the scope of the topic and identify issues to be studied in the context of the topic. The report of the Working Group was endorsed by the ILC. It was decided that the ILC should endeavor to complete the first reading of the topic by the end of the present quinquennium. Mr. Mohamed Bennouna was appointed Special Rapporteur for the topic.

3. At its fiftieth session in 1998, the ILC had before it the preliminary report of the Special Rapporteur.[17] At the same session, the ILC established an open-ended Working Group to consider possible conclusions, which might be drawn on the basis of the discussion as to the approach to the topic.[18]

4. At its fifty-first session in 1999, the ILC appointed Mr. Christopher John R. Dugard as Special Rapporteur for the topic to replace Mr. Bennouna who was elected as a judge to the International Criminal Tribunal for the former Yugoslavia.

5. At the fifty-second session, the ILC had before it the Special Rapporteur's first Reports[19]. The ILC considered the first report contained in document A/CN.4/506 and Corr. 1, and for lack of time deferred consideration of A/CN.4/506/Add.1 to the next session. At the same session, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6. The Commission subsequently decided to refer draft articles 1, 3 and 5 to 8 to the Drafting Committee together with the report of the Informal Consultation.

6. At its fifty-third session (2001), the Commission had before it the remainder of the Special Rapporteur's first reports[20], as well as his second report.[21] Due to lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of the document

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16. Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 249 and annex II, addendum 1.
17. A/CN.4/484.
18. The conclusions of the Working Group are contained in Official Records of the General Assembly, Fifty- third Session, Supplement No. 10 (A/53/10), para. 108.
19. A/CN.4/506 and Corr. 1 and Add. 1.
20. A/CN.4/506/Add.1.
21. A/CN.4/514.

concerning draft articles 12 and 13, to the next session. Draft articles 9, 10 and 11 were referred to the Drafting Committee.

7. At its fifty-fourth session (2002), the Commission had before it the remainder of the second report of the Special Rapporteur (concerning draft articles 12 and 13), as well as his third reports[22]. Following its consideration of the above-said reports, the Commission decided to refer draft article 14, paragraphs (a), (b), (c), (d) and (e) to the Drafting Committee. After considering the report of the Drafting Committee, the Commission adopted draft articles 1 to 7, along with commentaries thereto.

8. At the fifty-fifth (2003) session the Commission had before it the fourth report of the Special Rapporteur[23]. Following its consideration of the above mentioned report, the Commission decided to refer draft articles 17 to 22 to the Drafting Committee. After considering the report of the Drafting Committee the Commission adopted draft articles 8(10), 9(11) and 10(14) with commentaries thereto.

B. CONSIDERATION OF THE TOPIC AT THE FIFTY-SIXTH SESSION

9. At the 56th session, the Commission had before it the fifth report of the Special Rapporteur.[24] The Commission referred draft article 26, together with the alternative formulation for draft article 21 as proposed by the Special Rapporteur to the Drafting Committee along with a decision asking the Drafting Committee to consider elaborating a provision on the connection between the protection of ships' crew and diplomatic protection.

10. The Commission considered the report of the Drafting Committee and adopted on first reading a set of 19 draft articles on diplomatic protection. The Commission further decided to transmit the draft articles through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

11. Following is an overview of the articles adopted by the Commission during the fifty-fifth session.

Article 9

State of nationality of corporation

For the purposes of diplomatic protection of corporations, the State of nationality means the State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection.

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22. A/CN.4/523 and Add.1.
23. A/CN.4/530 and Corr.1 and Add.1
24. A/CN.4/538

12. This article sets out two conditions for the acquisition of nationality by a corporation for the purposes of diplomatic protection. One is incorporation and the other is the presence of the registered office of the company in the State of incorporation. These two conditions are in accordance with the judgment of the International Court of Judgment which held: "these two criteria have been confirmed by long practice and by numerous international instruments."[25]

13. By seeking the need for the existence of registered office or the seat of its management or some similar connection, article 9 requires a relationship between the corporation and the State, which goes beyond mere formulation or incorporation and is characterized by some additional connecting factor.

14. This provision does not require the existence of a genuine link between the corporation and protecting State as advocated by Belgium in *Barcelona Traction* case. It rejects the notion of genuine link as a necessary connecting factor in the context of the diplomatic protection of corporation as this might result in the statelessness of corporations formed in one State with a majority shareholding in another State. Therefore, the requirement of having the registered office or seat of management or "some similar connection" should not be seen as a form of genuine link, particularly insofar as this term is understood to require majority shareholding as a connecting factor.[26]

Article 10
Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and is its national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of that State.

15. Paragraph 1 of this article reiterates the traditional principle that for a State to exercise diplomatic protection in respect of a corporation, the corporation must be its national both at the time of the injury and at the date of the official presentation of the claim.

16. Paragraph 2 is a kind of exception to paragraph 1 as it allows a State to exercise a diplomatic protection in respect of a corporation which no longer exists, i.e. the

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[25]. The case concerning the *Barcelona Traction, light and power company limited, 1970 I.C.J. Reports,* p.3 at p.42, para 70

[26]. The concept of genuine link was brought forward in the *Barcelona Traction* case wherein, Belgium, which was the State of nationality of majority shareholders argued that it was entitled to exercise diplomatic protection in respect of the corporation by reason of the fact that its shareholding gave it a genuine link with the corporation. International Court of Justice rejected this argument.

corporation does not exist at the time of official presentation of the claim. Paragraph 2 adopts a pragmatic approach to avoid a situation where no State may exercise diplomatic protection in respect of an injury to a corporation. However, in that regard, the claimant State must prove that it was because of the injury in respect of which the claim was brought the corporation has ceased to exist.

Article 11
Protection of shareholders

> The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:
>
> (a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
>
> (b) The corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing injury, and incorporation under the law of the latter State was required by it as a precondition for doing business there.

17. Article 11 incorporates an exception to the general rule i.e. so far as the diplomatic protection of corporation is concerned, the corporation is to be protected by the State of nationality of the corporation and not by the State of nationality of the shareholders in the Corporation. However, the International Court of Justice in the *Barcelona Traction* Case accepted that the State(s) of nationality of shareholders might exercise diplomatic protection on their behalf in two situations. First, where the company had ceased to exist in its place of incorporation; second, where the State of incorporation was itself responsible for inflicting injury on the company and the foreign shareholders' sole means of protection on the international level was through their State(s) of nationality. Thus, article 11 contains those two exceptions.

18. The exception provided under paragraph (b) is restrictive in nature as it limits it to cases where incorporation was required by the law of the State inflicting the injury on the corporation as a precondition for doing business there.

Article 12
Direct injury to shareholders

> To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

19. This provision is based on the distinction upheld by the International Court of Justice in the *Barcelona Traction* Case between the rights of shareholders and the rights of the corporation. Thus, it entitles the State of nationality of shareholders in case of direct injury to the rights of shareholders, which are distinct from the rights of the

corporation. However, it does not provide any list of rights of shareholders, leaving it to the courts to determine in each individual case.

Article 13
Other legal persons

> The principles contained in draft articles 9 and 10 in respect of corporations shall be applicable, as appropriate, to the diplomatic protection of other legal persons.

20. In the international legal parlance, generally, diplomatic protection in respect of legal persons means, mainly about the protection of foreign investment only. This is the reason why corporation as a legal person occupies center stage in the field of diplomatic protection. However, article 13 is intended to cover other legal persons under the diplomatic protection. These legal persons may be universities, non-profit making foundations etc. which do not form part of the apparatus of the State. Keeping in view the diversity of goals and structures in legal persons other state corporations, a realistic method is adopted by way of adopting a provision that extends the principles of diplomatic protection to other legal persons also, with necessary changes.

Article 17
Actions or procedures other than diplomatic protection

> The present draft articles are without prejudice to the rights of States, natural persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

21. This provision makes it clear that the present draft articles are without prejudice to the rights that States, individuals or other entities may have to secure redress for injury suffered as a result of an internationally wrongful act by procedures other than diplomatic protection.

Article 18
Special treaty provisions

> The present draft articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions, including those concerning the settlement of disputes between corporations or shareholders of a corporation and States.

22. As foreign investment is largely regulated and protected by bilateral investment treaties, this provision underlines that the present draft articles do not apply to the alternative, special regimes for the protection of foreign investors provided for in bilateral and multilateral investment treaties. However it is also noted that some treaties do not exclude recourse to diplomatic protection. Thus, the provision says that the draft articles are applicable to the extent that they are consistent with the special treaty provisions.

Article 19
Ships' crews

> The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection on their behalf is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.

23. This provision affirms the right of the State of nationality to exercise diplomatic protection on behalf of the members of a ship's crew in order to preclude any suggestion that this right has been replaced by that of the State of nationality of the ship. At the same time it is also required that the State of nationality of the ship has the right to exercise protection in respect of the members of the ship's crew. However, it is noted that the right of the flag State to protect members of the ship's crew cannot be categorized as diplomatic protection.

24. The Commission has the view that both diplomatic protection by the State of nationality and protection by the flag State should be recognized, without giving any priority to either means of protection. Therefore, article 19 provides dual protection for the members of the ships' crews.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

25. The Commission would welcome comments and observations from Governments on all aspects of the draft articles on diplomatic protection adopted on first reading.

26. The Commission would also welcome comments and observations from Governments on the commentaries to the draft articles.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-NINTH SESSION (2004)

27. The delegate of **India** said that diplomatic protection should serve the interest of nationals, and the concerns of individuals should not be stretched beyond the point where the State was obliged to espouse the claims to the exclusion of political or other sensitivities. Diplomatic protection should not be extended at present to stateless persons or refugees. The definition of "lawfully and habitually resident" with regard to stateless persons referred only to a national law and not an international standard, while the term "refugee" could be covered by certain regional instruments and, therefore, its use in this context deviated from the universally accepted definition.

28. The delegate of **Iran** said that States should avoid adopting laws which increased the risk of dual nationality, multiple nationality or statelessness. The acquisition and granting of citizenship should be consistent with international law. A criterion was required to identify a predominant nationality. The provisions of article 7 on multiple nationality and claim against a State of nationality did not reflect customary international law and might bring controversies. He said his delegation had concerns with the

provisions of article 16 regarding exceptions to local remedies rule. The draft text had the potential to jeopardize the rule and make it redundant in most of the cases. He further said that the relationship between the clean hands doctrine and diplomatic protection deserved more study and he welcomed the Commission's decision to return to it at its next session.

29. The delegate of **Japan** said that the approach adopted by the Commission on diplomatic protection was a right one. It was correct not to include the subject of functional protection provided by international organizations in the text. The treatment of foreign individuals was now covered in a more extensive and comprehensive manner through international human rights laws. Rights concerning foreign investments could better be protected by a variety of arbitration clauses in investment treaties. In its second reading of the draft principles, he hoped that Commission members would maintain their prudent and self-restrained approach and not become too ambitious in expanding the scope of their discussion. Japan was confident that the Commission would meet the expectations of governments.

30. The delegate of **Kenya** agreed with the general thrust of the articles on diplomatic protection. She observed that the application of the nationality principle raised a number of difficulties for her delegation, and the Commission should undertake further work on the issue and attempt an elaboration of rules to govern problems arising from multiple or dual nationality. She supported the retention of the traditional continuous nationality rule. However, she had difficulties with the exception provided for in paragraph 2 of the text and would prefer its omission altogether.

31. The delegate of **Nigeria** said that the State should step in to secure protection and obtain reparation for one of its nationals injured by an internationally wrongful act, once all local remedies had failed. Diplomatic protection should be extended to stateless persons and refugees under clearly stipulated conditions. The State of incorporation should have the right to exercise diplomatic protection in the case of injury to a corporation, but corporate investors as legal entities and shareholders also had a right to consideration. Corporations doing business in developing countries should reciprocate by deepening and widening their corporate social responsibilities.

32. The delegate of **Nepal,** while welcoming the adoption of the 19 draft articles also welcomed the International Law Commission's plan to deal with the issue of the clean hands doctrine on the claimant.

33. The delegate of **China** said that the matter of which rights belonged to shareholders and which to corporations should be decided by the municipal laws of the State. The article on the exhaustion of local remedies should elaborate further regarding the issues as to who was to make the decision that they needed not to be exhausted, and to whom was the injured party to prove it? The text should clarify the precedence given to special treaty provisions. The Commission should consider a separate article on a State's right to seek redress for foreign crew members on a ship of its own nationality.

34. The delegate of **Republic of Korea** said that the articles should give more guidance on determining the nationality of a corporation, so as to avoid confusion about the State's right to diplomatic protection in that regard. With regard to the criteria for identifying the corporation's State of nationality, using the standard set down in the Barcelona Traction case was acceptable, meaning the State of incorporation and the location of the company's registered office. The definition now in the principles as "the seat of its management or some similar connection" needed clarification since it was ambiguous and could expand the scope too far. He said the articles on exercising actions other than diplomatic protection and on special treaty provisions should be merged. Diplomatic protection should not be intended to interfere with existing remedies or dispute settlement mechanisms that could be resorted to by not only States but non-State entities, so there was no need to deal with the two issues separately. Finally, the right to seek redress on behalf of crew members should lie primarily in the State of a ship's nationality, not that of the crew.

35. The delegate of **Sierra Leone** welcomed the adoption of the 19 articles while expressing doubt whether the State of nationality of a ship could extend the protection to the crew. The Commission should clarify whether the nationality of the crew or ship took precedence, since that was not clear from either the Law of the Sea or international law in general.

36. The delegate of **Singapore** said, with regard to exercising the right, the Barcelona Traction case had set out the discretionary power of a State to exercise it. The views expressed on both sides of the argument should be taken into consideration while deciding whether to include provisions for stateless persons and refugees. Further comments would come later, but on the articles concerning alternatives to diplomatic protection and special treaty provisions, she asked whether that latter phrase was clearly understood and recognized in the context. For example, what was the difference between that and other treaty provisions? Was there an implied hierarchy to whether the principles of the draft articles applied? If the object was to clarify the relationship between the articles and investment treaties, could explicit reference be included in free trade agreements instead? On diplomatic protection of ships' crews, she said the Commission should further clarify the relative conditions under which a flag State could seek redress for non-national crew members.

III. UNILATERAL ACTS OF STATES

A. BACKGROUND

1. In the report on the work of its forty-eighth session the International Law Commission had proposed to the General Assembly that the law of unilateral acts of States be included as a topic for the progressive development and codification of international law. By its resolution 51/160, the General Assembly had *inter alia* invited the ILC to examine the topic "Unilateral Acts of States" and to indicate its scope and content.

2. At its forty-ninth session (1997) the ILC established a Working Group on the topic. The Working Group in its consideration of the scope and content of the topic took the view that the consideration by the ILC, of the Unilateral Acts of States, was "advisable and feasible". At its 49th session, the ILC had appointed Mr. Victor Rodriguez Cedeno, Special Rapporteur for the topic.

3. At its fiftieth session (1998) the ILC considered the First Report of the Special Rapporteur on the topic. Following consideration of that Report in the Plenary the ILC had reconvened the Working Group on the Unilateral Acts of States. The Working Group reported to the ILC on issues related to the scope and content of the topic, the approach thereto, the definition of unilateral acts of States and the future work of the Special Rapporteur. The ILC at its 50th session considered and endorsed the Report of the Working Group.

4. At its fifty-first session the ILC considered the Second Report of the Special Rapporteur[27] and decided to reconvene the Working Group on the subject. The Working Group reported to the ILC on issues related to: (a) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (b) the setting of general guidelines according to which the practice of States should be gathered; and (c) the direction that the work of the Special Rapporteur should take in the future. In connection with point (b) above, the Working Group set the guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and inquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the ILC's study of the topic.

5. The General Assembly, by paragraph 4 of its resolution 54/111, invited Governments to respond in writing by 1 March 2000 to the questionnaire on unilateral acts of States circulated by the Secretariat to all Governments on 30 September 1999 and by paragraph 6 of the same resolution recommended that, taking into account the comments and observations of Governments, whether in writing or expressed orally in debates in the General Assembly, the ILC should continue its work on the topics in its current programme.

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[27] . See *Second Report on Unilateral Acts of States* A/CN.4/500 and Add.1.

6. At its fifty-second session in 2000, the Commission considered the third report of the Special Rapporteur on the topics[28], along with the text of the replies received from States[29] to the questionnaire on the topic circulated on 30 September 1999. The Commission then decided to refer revised draft articles 1 to 4 to the Drafting Committee and revised draft article to the Working Group on the topic.

7. At its fifty-third session in 2001, the Commission considered the Special Rapporteur's fourth report and established an open-ended Working Group, which held two meetings chaired by the Special Rapporteur. On the basis of the oral report of the Chairman of the Working Group, the Commission requested the Secretariat to circulate a questionnaire to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.

8. At its fifty-fourth session in 2002, the Commission considered the fifth report[30] of the Special Rapporteur and the text of replies received from States to the questionnaire[31] on the topic circulated on 31 August 2001.

9. At its fifty-fifth session in 2003, the Commission considered the sixth report[32] of the Special Rapporteur, which focused on the unilateral act of recognition. The Commission also established an open-ended Working Group on unilateral acts of States.

B. CONSIDERATION OF THE TOPIC AT THE FIFTY-SIXTH SESSION

10. The Commission, considered the seventh report of the Special Rapporteur[33], which contained a survey of State Practice in respect of unilateral Acts. The Commission further established an open-ended Working Group on Unilateral Acts of States, which focused on the detailed consideration of specific example of unilateral acts.

11. Several members expressed their satisfaction with the seventh report and the wealth of practice it described. A view was expressed that the commission should select certain aspects on which to carry out studies explaining State practice and the applicable law. Following is the summary of views expressed on certain issues.

a. Recognition

12. One view held that great care should be taken with regard to recognition and the recognition of States or Governments should be excluded from the study because the General Assembly did not consider that that sensitive issue was part of the topic of

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28. A/CN.4/505.
29. A/CN.4/500 and Add.1.
30. A/CN.4/525 and Add.1 and 2.
31. A/CN.4/524.
32. A/CN.4/534
33. A/CN.4/542

unilateral acts. However, another view held that the legal effects of recognition and non-recognition should be included in the study.

b. Distinction between political and legal acts

13. Some members questioned whether some of the many cases of which examples had been provided did not constitute political unilateral acts. It was observed that it was very difficult to differentiate between political acts and legal acts in the absence of objective criteria. The main element of the definition chosen in recommendation 1, namely, the intention of the State which purports to create obligations or other legal effects under international law, was subjective in nature.

c. Conduct

14. One view noted that the term "unilateral act" covered a wide range of legal relations or procedures used by States in their conduct towards other States. It was observed that acts meant conduct and conduct includes silence and acquiescence. Conduct can also be intended to create legal relations or to bring the principle of good faith into play.

15. It was observed that the Working Group would be encouraged to continue its work on the basis of the recommendations made last year and to focus on the direction of future work. It was further observed that State practice should continue to be collected and analyzed, with an emphasis on the criteria for the validity of a State's commitment and the circumstances under which such commitments could be modified or withdrawn.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

16. In general, the Commission took the view that the study of practice which began this year should also cover the evolution and lifespan of unilateral acts of States. In particular, it considered that more detailed attention should be paid to various related aspects, such as: the date, author/organ and its competence, form, content, context and circumstances, objectives, addressees, reaction of addressee(s) and third parties, grounds, implementation, modification, termination/revocation, legal scope and court decisions and arbitral awards adopted in relation to unilateral acts. It might thus be possible to determine whether there are general rules and principles that might be applicable to the operation of such acts.

17. The Commission would like to receive comments from States on their practice in this regard, in the light of the elements referred to above, which will be duly taken into account by the Special Rapporteur in his next report on the topic, together with the practical examples that some members of the Commission will make available to him, as agreed in the Working Group established this year.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-NINTH SESSION (2004)

18. The delegate of **Japan** said the research on the topic must take into account not only the objective elements of the acts themselves, but also the subjective elements such as the will and the intent of the States in question.

19. The delegate of **Malaysia** sought the Commission to further clarify and elaborate on the comments it expected from States in relation to the elements set out in the Working Group's recommendation regarding unilateral acts. The delegate further said that the special rapporteur's report lacked an in-depth analysis of State practice. States must know when a unilateral expression of their will or intention shall be taken to be legally binding commitments or mere political statements. The nature of the act must be taken into account along with context, content and form. A study of revocability should be conducted and formulation of any legal rules should await the comprehensive analysis of State practice.

20. The delegate of **China** said that since the topic of unilateral acts of States was linked in varying degrees with the Vienna Convention on the Law of Treaties in many aspects, provisions of a procedural nature, for example, on the interpretation, modification, suspension or termination of unilateral acts, could be modelled on that instrument, so that provisions relating to unilateral acts of States would be complete. Any study on the topic should focus on the unilateral acts performed by States. He noted that the special rapporteur had cited acts of non-State entities as acts of States, which was wrong. The International Law Commission was obligated to observe the United Nations Charter and the relevant United Nations resolutions. He said that mistake could not be justified in the name of academic freedom or independence of experts.

21. The delegate of **Republic of Korea** said her delegation believed that further guidance from the Commission as to the scope and definition of unilateral acts of States was essential to facilitate the submission of comments by States. There was also uncertainty on the normative status of the concept of unilateral acts of States in international law.

22. The delegate of **Sierra Leone** said that the difficulty of differentiating political from legal aspects of unilateral acts was obvious.

IV. INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. BACKGROUND

1. It may be recalled that, the ILC at its forty-ninth Session in 1997 decided to proceed with its work on the topic "International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law" dealing first with the issue of "Prevention of Transboundary Damage from Hazardous Activities". Accordingly the Commission at its 53rd session completed its work with the adoption of the draft preamble and a set of 19 draft articles on the issue of prevention.

2. During its fifty-third session (2001), the General Assembly of the United Nations by resolution 56/82 requested the ILC "to resume its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by governments".

3. At its fifty-fourth session (2002), in accordance with the mandate of the General Assembly, the Commission established a Working Group under the chairmanship of Mr. Pemmaraju Sreenivasa Rao with a view to proceed with its work on the second part of the topic i.e. "International Liability for Failure to Prevent Loss from Transboundary Harm Arising Out of Hazardous Activities". The Commission adopted the report of the Working Group and appointed Mr. Pemmaraju Sreenivasa Rao as special Rapporteur for the topic.

4.At the fifty-fifth session (2003) the Commission considered the first report[34] of the Special Rapporteur on the topic containing certain recommendations and submissions for the consideration of the Commission, which, if found accepted, could constitute a basis for drafting more precise formulations.

B. CONSIDERATION OF THE TOPIC AT THE FIFTY-SIXTH SESSION

5. At the present session, the Commission had before it the second report[35] of the Special Rapporteur on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities. The report analyzed comments of States on the main issues concerning allocation of loss. The report also contained a set of 12 draft principles.

6. The Commission established a working group to examine the proposals submitted by the Special Rapporteur. Accordingly the Working Group reviewed and revised the 12

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[34]. A/CN.4/531

[35]. A/CN.4/540

draft principles and recommended that the eight draft principles contained in its report[36] be referred to the Drafting Committee.

7. The Commission referred the eight draft principles to the Drafting Committee alongwith a request to prepare a text of the preamble. Based on the report of the Drafting Committee the Commission adopted on first-reading a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The Commission further decided to transmit the draft principles, through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

8. An overview of the preamble and eight draft principles as adopted by the Commission is given below:

Preamble

The General Assembly

Recalling principles 13 and 16 of the Rio Declaration on Environment and Development;

Recalling also the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities;

Aware that incidents involving hazardous activities may occur despite compliance by the relevant State with the provisions of the Draft articles on the Prevention of Transboundary Harm and serious losses;

Concerned appropriate and effective measures should be in place to ensure, or far of possible, that those national and legal persons, including States, that incur harm or loss as a result of such incidents should be able to obtain prompt and adequate compensation;

Noting that States shall be responsible for infringement of their obligations of prevention under international law;

Recognizing the importance of international corporation among States;

Recalling the existence of international agreements covering specific categories of hazardous activities;

Desiring to contribute to the further development of international law in this field;

9. The first paragraph of the preamble refers to principles 13 and 16 of the Rio Declaration on Environment and Development. Principle 13 of the Rio Declaration, which reiterates the principle 22 of the Stockholm Declaration on the Human Environment, underlines the need to develop national law regarding liability and compensation for the victims of pollution and other environmental damages. Similarly principle 16 of the Rio Declaration addresses the promotion of internationalization of environmental costs, taking into account the polluter pays principle.

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[36]. A/CN.4/661

10. The Second paragraph links the present draft principles to the draft articles on prevention. The sixth preambular paragraph emphasizes an important point, which says that these draft principles do not affect the responsibility that a State may incur as a result of infringement of its preventive obligations under international law.

Principle 1

Scope of application

> The present draft principles apply in relation to transboundary damage caused by activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

11. This principle confines the application of these draft guidelines to the transboundary damage. The "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences" contain four elements in it. These are: the element of human causation; the risk element; the (extra) territorial element; and the physical element and these are adapted from the draft articles on prevention.

12. These principles only deal with the consequences of the activities that are not prohibited by international law. Therefore, these principles distinguish themselves from the questions of responsibility for internationally wrongful acts. Further these draft principles are concerned with primary rules.

13. It is relevant for the purpose of present draft principles that harm could occur despite implementation of the duties of prevention. Transboundary harm could occur for several other reasons not involving State Responsibility. For example, there could be situations where the preventive measures were followed but proved inadequate or it may be that the risk that caused transboundary harm could not be identified at the time of initial authorization and hence appropriate preventive measures could not be envisaged. Therefore, for the purposes of the present draft principles it is assumed that duties of due diligence under draft articles on prevention have been fulfilled. This is where the element of human causation is covered.

14. The second criterion is the risk element i.e. the risk of causing significant transboundary harm. This expression encompasses a low probability of causing disastrous transboundary harm or a high probability of causing significant transboundary harm. Thus, it refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. The term significant is understood to refer to something more than detectable but need not be at the level of 'serious' or 'substantial'.

15. The third criterion involved for the purpose of application of these principles is the transboundary nature of the damage caused by the activities concerned. As defined in principle two, transboundary damage is linked to the territory or other places under the

jurisdiction or control of a State other than the State in which the activity is carried out. Thus, it covers three concepts i.e. 'territory' 'jurisdiction' and 'control'. Therefore, the activities must be conducted in the territory or otherwise in places within the jurisdiction or control of one State and have an impact in the territory or places within the jurisdiction or control of another State.

17. The fourth criterion involved is that the significant transboundary harm must have been caused by the 'physical consequences' of activities in question. The transboundary harm caused by State policies in monetary, socio-economic or other fields is excluded from the scope of the topic.

Principle 2

Use of terms

For the purposes of the present draft principles:

(a) "Damages" means significant damage caused to persons, property or the environment; and includes:

(i) Loss of life or personal injury;
(ii) Loss of, or damage to, property, including property which forms part of the cultural heritage;
(iii) Loss or damage by impairment of the environment;
(iv) The costs of reasonable measures of reinstatement of the property, or environment, including natural resources;
(v) The costs of reasonable response measures;

(b)"Environment" includes: natural resources, both a biotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; and the characteristic aspects of the landscape;

(c) "Transboundary damage" means damage caused in the territory or in other places under the jurisdiction or control of a State other than the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft principle 1 are carried out;

(d) "Hazardous activity" means an activity which involves a risk of causing significant harm through its physical consequences;

(e) "Operator" means any person in command or control of the activity at the time the incident causing transboundary damage occurs.

18. This principle deals with the use of terms. Paragraph (a) defines that damage means significant damage. For every damage to be measured there is a need for a threshold from which an assessment can be done. In some cases it is "serious" or "substantial" damage which is the threshold. Similarly for the purpose of present principles it is the "significant" damage which is taken as a threshold. This determination involves both factual and objective criteria and a value determination.

19. However, the value determination is dependent on the circumstances of a particular case and the period in which it is made. Sub-paragraphs (i) and (ii) cover personal injury and property damage and aspects of pure economic loss, as well as aspects of national cultural heritage which is State property. Sub-paragraphs (iii) to (v) deal with clauses that are usually associated with damage to environment.

20. Environment is defined in many ways and there is no universally accepted definition. For the purpose of present draft principle a broader definition of environment is formulated in paragraph (h) to include environmental values such as aesthetic aspects of the landscape also along with the natural resources.

21. Transboundary damage as defined in paragraph (c) refers to the damage occurring in one State because of an accident or incident involving a hazardous activity in another State. This is based on the notion of territory, jurisdiction and control of a State. In other words it refers to damage caused in the territory or in other places outside the territory but under the jurisdiction or control of a State other than the State in the territory or otherwise under the jurisdiction or control of which the hazardous activities are carried out. This definition includes activities conducted under the jurisdiction or control of a State on its ships or platforms on the high seas, with effects on the territory of another State or in places under its jurisdiction or control.

22. Paragraph (d) defines hazardous activity by reference to any activity, which has a risk of causing transboundary harm through physical consequences.

23. The definition of "operator" provided under paragraph (c) is a functional one. There is no general definition of operator under international law. The term 'Command' connotes an ability to use or control some instrumentality. The term "control" denotes power or authority to manage, direct, regulate, administer or oversee.

Principle 3

Objective

> The present draft principles aim at ensuring prompt and adequate compensation to natural or legal persons, including States, that are victims of transboundary damage including damage to the environment.

24. This principle contains the key objective of ensuring protection to victims suffering damage from transboundary harm which has been the essential element from the inception of the topic by the Commission.

25. Apart from the above stated objective, the draft principles are also intended to serve other objectives including (a) providing incentives to the operator and other relevant persons or entities to prevent transboundary damage from hazardous activities; (b) promoting cooperation among States concerned or injured to deal with issues concerning compensation in an amicable manner; (c) preserving and promoting the

viability of economic activities that are important to the welfare of States and peoples (d) and providing compensation in a manner that is predictable, equitable, expeditious and cost effective.

26. The definition of victim for purposes of the present principles includes natural and legal person, including States or custodians of property. A group of persons or communes can also be considered as victim.

27. The importance of ensuring prompt and adequate compensation to victims of transboundary damage is related to two basic principles of international law. First one is that States while exercising their sovereign right to exploit their own resources should ensure that such activities do not cause damage to the environment or other areas beyond the limits of national jurisdiction. This is stated in the *Trial Smelter*[37] arbitration and the *Corfu Channel* [38] case and was further elaborated in principle 21 of the Stockholm Declaration. The second aspect is related to the obligation under general international law to make full reparation.

Principle 4

Prompt and adequate compensation

> 1. Each State should take necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.
>
> 2. These measures should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should not require proof of fault. Any conditions, limitations or exceptions to such liability should be consistent with draft principle 3.
>
> 3. These measures should also include the requirement on the operator or, where appropriate, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.
>
> 4. In appropriate cases, these measures should include the requirement for the establishment of industry-wide funds at the national level.
>
> 5. In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, the State should also ensure that additional financial resources are allocated.

28. This principle requires State to take necessary measures to ensure prompt and adequate compensation for victims of transboundary damage caused by hazardous activities. This aspect contains four important elements. They are: 1) the State should establish a liability regime; 2) any such liability regime should not require proof of fault 3) any conditions or limitations that may be placed on such liability should not erode the requirement of prompt and adequate compensation, and 4) various forms of securities,

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[37]. *Reports of International Arbitral Awards*, vol. III, 1905

[38]. *Corfu Channel* (merits) case, *ICJ Reports 1949*, p.4 at p.22.

insurances and industry funding should be created to provide sufficient financial guarantees for compensation.

29. Paragraph 2 provides for the imposition of liability on the operator or other person or entity. Channeling of liability to the operator or a single person or entity is seen as a reflection of the "pollution pays" principle. This paragraph further provides that liability should not be based on proof of fault. The reason for this is that hazardous and ultra hazardous activities involve complex operations and carry with them certain inherent risks of causing significant harm. In such matters, it is widely recognized that proof of fault or negligence is not required to be shown and that the person should be held liable even if all the necessary care expected of a prudent person has been discharged. Strict liability is recognized in many jurisdictions when assigning liability for inherently dangerous or hazardous activities. In most of the cases of strict liability the concept of limited liability is applied.

30. Paragraphs 3, 4 and 5 provide safety mechanisms for the payment of prompt and adequate compensation. They seek to provide multi-layered mechanisms to avoid any delay or inadequacy in payment of compensation. In this case State should not only take measures whereby operator or other person or entity establish financial security but State itself, if necessary, should ensure that additional financial resources are allocated.

Principle 5

Response measures

> With a view to minimizing any transboundary damage from an incident involving activities falling within the scope of the present draft principles, States, if necessary with the assistance of the operator, or, where appropriate, the operator, should take prompt and effective response measures. Such response measures should include prompt notification and, where appropriate, consultation and cooperation with all potentially affected States.

31. This principle assigns to the State in question the responsibility of determining the methods of taking prompt and effective response measures, when an accident or incident has occurred triggering significant damage. While there is no operational sequence is contemplated between State and operator it is considered that it is reasonable to assume that in most cases of transboundary damage the State would have a more prominent role. However, the possibility of an operator, being first to react, is also not intended to be precluded.

32. The role of the operator is in no way secondary to the response measure of the State. The operator has the responsibility to maintain preparedness and when required, should give the State all the assistance it needs in discharge of its responsibilities.

Principle 6

International and domestic remedies

> 1. States should provide appropriate procedures to ensure that compensation is provided in furtherance of draft principle 4 to victims of transboundary damage from hazardous activities.
>
> 2. Such procedures may include recourse to international claims settlement procedures that are expeditious and involve minimal expenses.
>
> 3. To the extent necessary for the purpose of providing compensation in furtherance of draft principle 4, each State should ensure that its domestic administrative and judicial mechanisms possess the necessary competence and provide effective remedies to such victims. These mechanisms should not be less prompt, adequate and effective than those available to its nationals and should include appropriate access to information necessary to pursue such mechanisms.

33. This draft principle seeks to strengthen the draft principle 4 by seeking to establish required mechanisms in furtherance of obligations provided there under. As stated, it is essential to have claims settlement mechanisms and in the present case what is required is, as mentioned in paragraph 2, to create international claims settlement procedures leading to expeditious and low-cost results. These international claims mechanisms can be in the nature of negotiations, national commissions or joint commissions depending on the requirement and suitability to the case involved and also based on the understanding between the parties involved.

34. Paragraph 3 emphasizes the need for providing access to victims on par with its own nationals of the State concerned. It also requires States to endow the necessary competence on the administrative and judicial mechanisms to deal with these claims. Another significant point that this paragraph makes is the accessibility to the information to the victims, which would help strengthen the claims for compensation.

Principle 7

Development of specific international regimes

> 1. States should cooperate in the development of appropriate international agreements on a global, regional or bilateral basis in order to make arrangements regarding the prevention and response measures to be followed in respect of particular categories of hazardous activities as well as the compensation and financial security measures to be taken.
>
> 2. Such agreements may include industry and/or State funded compensation funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the losses suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry based funds.

35. This draft principle is an extension of what is provided under draft principle 4 to the international level. It seeks States to develop international agreements at global, regional and bilateral level. It further emphasizes the necessity of having such

mechanisms that are of comprehensive in nature i.e. to cover the three aspects of prevention, response measures and compensation and financial security.

36. Paragraph 2 envisages various financial security measures at the International level. This requirement is sought in addition to the similar mechanisms provided at the national level as required under draft principle 4. The underlying assumption of this requirement seems that since transboundary damage involves more than one State it is desirable to have pre-determined mechanisms at the bilateral, regional or global level, which would in a way bring uniformity and also would help settle claims expeditiously.

Principle 8

Implementation

> 1. Each State should adopt any legislative, regulatory and administrative measures that may be necessary to implement the present draft principles.
>
> 2. The present draft principles and any implementing provisions should be applied without any discrimination such as that based on nationality, domicile or residence.
>
> 3. States should cooperate with each other to implement the present draft principles consistent with their obligations under international law.

37. This draft principle obligates States to adopt legislative, regulatory and administrative measures for the implementation of these draft principles. This, in fact, is a restatement of requirements under general international law as it is only States who implement international obligations at the domestic level. This principle further emphasizes the need to implement these draft principles and implementing provisions to be applied without any discrimination based on any consideration.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

38. The Commission would welcome comments and observations from Governments on all aspects of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted on first reading. In particular, the Commission would welcome comments and observations on the final form.

39. The Commission would also welcome comments and observations from Governments on the commentaries to the draft principles. The Commission notes that the commentaries are organized as containing an explanation of the scope and context of each draft principle as well as an analysis of relevant trends and possible options available to assist States in the adoption of appropriate national measures of implementation and in the elaboration of specific international regimes.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-NINTH SESSION (2004)

40. The delegate of **India** said that the set of principles was the result of an in-depth analysis of the need to protect the interest of innocent victims of transboundary harm caused by hazardous activities. The scope of the topic and the triggering mechanism should be the same as that of preventing transboundary harm. However, the indication that transboundary damage caused to environment could be subject to compensation was not supported by State practice. Moreover, the environmental losses referred to in the principles could not be quantified in monetary terms, not to mention the difficulty of establishing the standing claim for the damage. That element needed modification. Perhaps differential standards should be applied in the matter of environmental protection, similar to extending capacity-building and technology transfer between developed and developing countries.

41. The delegate of **Japan** said the topic covered an extremely wide range of areas, which had major implications for international law in various fields. The Commission must adopt the approach of basing its present work, particularly the scope of the work, on its own recent work on the draft articles on prevention of transboundary harm. It was also appropriate for the Commission to put considerable emphasis on the primary responsibility of operators. Articles placing undue emphasis on the responsibility of States regarding the aftermath of an incident resulting in damages were likely to be both unnecessary and an inaccurate reflection of the present-day reality of international law. He said the current draft principles still remained very general in their description.

42. The delegate of **Kenya** said that the draft principles on the allocation of loss provided a solid basis for the development of an effective compensatory regime for transboundary harm. Innocent victims of transboundary harm must be adequately compensated. Her delegation would like to see greater emphasis on the "polluter pays" principle in future development of the topic.

43. The delegate of **Nepal** said that a good balance had been struck between the responsibility of State and operator in the text on international liability.

44. The delegate of **Nigeria** said that his country had suffered from the dumping of 40-50 tons of radioactive industrial wastes in its territory in 1988, a time when no relevant international legal instrument existed. The existing liability regimes should be rigorously examined to facilitate the Commission's work in the area of international liability. Also, a more elaborate but concise definition of "significant damage" should be elaborated since what was not considered significant in one country or region could be enormously significant elsewhere.

45. The delegate of **Pakistan** said that States had a right but also an obligation with regard to activities within their borders. They were responsible for actions on their territory. A list of the activities covered by the principles should be included in their

provisions. He further observed that the term "significant" transboundary harm was troublesome. The term should be deleted if it could not be more specific.

46. The delegate of **China** said that the instrument on protection was a useful guide but prevention measures could not eliminate the possibility of transboundary harm. Compensating victims and determining the liability of an operator or State were important issues still to be resolved. The provisions of the draft principles on allocation of loss were balanced and would contribute significantly to resolving compensation issues in transboundary damage. The delegate also felt that the provisions for prompt and adequate compensation to victims were useful. However, the inclusion of damage to the environment lacked adequate grounds in international law, while the strict liability regime governing transboundary damage lacked flexibility and was inconsistent with current international practice. The principles should take the final form of a declaration, a guiding principle or a model law that would form the basis for a future convention.

V. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. BACKGROUND

1. At its fifty-second session, in 2000, the Commission decided to include the topic of 'Responsibility of International Organizations' in its long-term programme of work[39]. The General Assembly in its resolution 55/152 of 12 December 2000, took note of the commission's decision and in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic.

2. At its fifty-fourth session, in 2002, the Commission decided to include the topic of 'Responsibility of International Organizations'[40] in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic. At the same session a Working Group was established and at the end of the session the Commission adopted the report of the Working Group.

3. At the fifty-fifth session, in 2003, the Commission considered the first report of the Special Rapporteur and referred three draft articles to the Drafting Committee.The Commission further adopted articles 1to 3 as recommended by the Drafting Committee together with commentaries.

B. CONSIDERATION OF THE TOPIC AT THE FIFTY-SIXTH SESSION

4. The Commission had before it the second report of the Special Rapporteur[41] dealing with attribution of conduct to international organizations. The report proposed four draft articles which were considered by the Commission and referred to the Drafting Committee. Based on the Drafting Committee report, the Commission adopted draft articles 4 to 7 and commentaries thereto.

5. Following is the overview of the draft articles: Article 4 on "General rule on attribution of conduct to an international organization", article 5 on "conduct of organs placed at the disposal of an international organization by a State or another international organization", article 6 on "Excess of authority or contravention of instructions" and article 7 on "conduct acknowledged and adopted by an international organization as its own".

Article 4
General rule on attribution of conduct to an international organization

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39. Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10(A/55/10), chap., IX para.729.

40. This topic attains significance, as there are 6415 international intergovernmental organizations and 43958 international non-governmental organizations of various kinds operating in various fields. *Yearbook of International Organizations*, 1999/2000. http://www.uia.org/

41. A/CN.4/541

> 1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.
>
> 2. For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.
>
> 3. Rules of the organization shall apply to the determination of the functions of its organs and agents.
>
> 4. For the purpose of the present draft article, "rules of the organization" means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization.

6. Paragraph1 of article 4 deals with an important aspect of attribution of conduct to an international organization. Since any organization has to act through an entity it becomes important to establish the link between the organization and the entity through which it acts. Thus, this provision contains both 'organ' or 'agent' for the purpose of attributing conduct to an international organization. It may be pointed out that the Charter of the United Nations uses the term "organs".[42] However, the international court of Justice used the term "agent" and did not give relevance to the official status of that person.[43]

7. Paragraph 2 defines the term "agent". The reasons for it seems to be that the term "agent" denotes a scope which is of inclusive in nature encompassing various entities. Keeping in view the ambivalent nature of the word this definition is included in this draft article, which is based on the ICJ advisory opinion in the *Reparation for Injuries Suffered in the Service of the United Nations* case. The Court held:

8. "The Court understands the word "agent" in the most liberal sense, that it to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out or helping to carry out, one of its functions-in short, any person through whom it acts".

9. Paragraph 2 also clarifies that the legal nature of a person or entity is also not decisive for the purpose of attribution of conduct. Thus, it is understood that organs and agents are not necessarily natural persons. They could be legal persons or other entities through which the organization operates. Thus, paragraph 2 specifies that the term "agents" "includes officials and other persons or entities through whom the organization acts".

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[42] . Article 7 of the Charter of the United Nations refer to "principal organs" and to "subsidiary organs". The latter term is referred also in articles 22 and 30 of the Charter

[43] . *Reparation for injuries suffered in the service of the United Nations, I.C.J. Reports 1949*, P.174 at p. 177

10. Paragraph 3 is somewhat general in nature that it clarifies that the relevant international organization establishes which functions are entrusted to each organ or agent.

11. Paragraph 4 is a logical clarification and continuation to paragraph 3 as it defines "rules of the organization". This definition is largely based on the one included in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations. However, one addition to the definition included in the above mentioned convention is "the acts taken by the organization" also along with "decisions" and "resolutions".

12. Another significant feature of the definition of "rules of the organization" is the importance given to practice. The definition appears to provide a balance between the rules enshrined in the constituent instruments and formally accepted by members of the organization, on the one hand, and the need for the organization to develop as an institution, on the other.

Article 5
Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

13. This provision deals with the attribution of conduct of an organ or agent, as this is a significant legal aspect whenever there is a dispute regarding the conduct of such organs or agents. Normally when an organ or agent of a State or an international organization is placed at the disposal of an international organization, the organ or agent's conduct would clearly be attributable only to the receiving State. In such cases the general rule set out in article 4 would apply. However, article 5 deals with a different situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organization.

14. According to this provision the criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal. Thus, as emphasized at various occasions, the decisive question in relation to attribution of a given conduct is who has the effective control over the conduct in question.

Article 6
Excess of authority or contravention of instructions

> The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.

15. Article 6 deals with *ultra vires* conduct of organs or agents of an international organization. It may happen that this conduct may exceed the competence of the organization. Further, it may be within the competence of the organization, but exceed the authority of the acting organ or agent. The key element for attribution of conduct, in the context of present article is the requirement that the organ or agent "acts in that capacity". In other words, to establish an attribution there is a need for a close link between the *ultra vires* conduct and the organ's or agent's functions. It is in accordance with the practice of international organizations which confirms that *ultra vires* conduct of an organ or agent is attributable to the organization when that conduct is linked with the organ's or agent's official functions.

Article 7
Conduct acknowledged and adopted by an international organization as its own

> Conduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own

16. This provision deals with a situation wherein an international organization "acknowledges and adopts" as its own a certain conduct, which would not be attributable to that organization under the preceding articles. Thus, this provision is applicable when an organization takes a position to accept attribution of certain conduct which otherwise, under other articles, is not attributable.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

17. In 2003 the Commission adopted three draft articles concerning general principles relating to the responsibility of international organizations and in 2004 four draft articles on attribution of conduct. In so doing, the Commission has followed the pattern of the articles on responsibility of States for internationally wrongful acts. Broadly continuing with the same pattern, the Special Rapporteur intends to address in his third report, which is due in 2005, the following topics: breach of an international obligation; circumstances precluding wrongfulness; responsibility of an international organization in connection with the wrongful act of a State or another organization. For this purpose, views expressed on the following questions would be particularly helpful:

(a) Relations between an international organization and its member States and between an international organization and its agents are mostly governed by the rules of the organization, which are defined in draft article 4, paragraph 4, as comprising "in particular: the constituent instruments, decisions, resolutions and other acts taken by the

organization in accordance with those instruments; and established practice of the organization". The legal nature of the rules of the organization in relation to international law is controversial. It is at any event debatable to what extent the Commission should, in its study of responsibility of international organizations under international law, consider breaches of obligations that an international organization may have towards its member States or its agents. What scope should the Commission give to its study in this regard?

(b) Among the circumstances precluding wrongfulness, article 25 on Responsibility of States for internationally wrongful acts refers to "necessity", which may be invoked by a State under certain conditions: first of all, that the "act not in conformity with an international obligation of that State […] is the only way for the State to safeguard an essential interest against a grave and imminent peril". Could necessity be invoked by an international organization under a similar set of circumstances?

(c) In the event that a certain conduct, which a member State takes in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that State and of that organization, would the organization also be regarded as responsible under international law? Would the answer be the same if the State's wrongful conduct was not requested, but only authorized, by the organization?

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-NINTH SESSION (2004)

18. The delegate of **India** advised the Commission to avoid developing rules for international organizations that mirrored the rules set out with respect to States in the draft articles on State responsibility.

19. The delegate of **Iran** noted that the present draft articles on international organizations were not intended for situations in which the conduct of a member State could not be attributed to the organization. His delegation understood the reasons and had some sympathy for them. The delegate also noted the growing cooperation among international organizations and between States and international organizations, and the confusion that might arise in respect of the attribution of conduct in cases of request or authorization. The issue should be dealt with properly in the draft articles. He observed that his delegation believed that cases in which an international organization gave authorization to its members for a certain conduct should be differentiated from those in which the organization requested them to take very similar conduct. He said in the past decade there had been a number of cases in which the United Nations Security Council had authorized Member States to take necessary measures in respect of certain situations. There were no cases in which the United Nations had been held responsible for conduct of a Member State in performing that authorization.

20. The delegate of **Japan** said that the diversity of international organizations made the articulation of common guiding principles difficult. Rules of the organization differed widely from one to the other, and needed case-by-case analysis. Further, the

standard of "effective control" needed further work. While it was useful to have a generalized criterion for determining responsibility that could be applicable to each organization, he asked whether the standard of "effective control be applied in an actual situation? The effectiveness of a vague criterion was questionable, while a detailed sub-criterion could render it impractical for across-the-board application.

21. The delegate of **Jordan,** while welcoming the approach adopted, said that the draft articles addressed an area where there was less legislative guidance than with regard to State responsibility. An explicit provision should be included to bar the possibility of multiple attributions in future interpretations. For the purposes of attribution, a factual test rather than an "official status" test should be applied to provide that the rules of an organization were not exclusive in determining the functions of its organ or agent. The factual test should apply not only to conduct but also whether the organ or agent had been placed under the disposal of the organization. The commentary confused the issue of "under the command" with "effective control". Further, he said, attribution in a situation of joint operation had not been addressed. The text on exceeding of responsibility was confusing because it dealt with the distinction between on-duty and off-duty conduct. There was no useful reason for attributing an action to an organization that acknowledged or adopted conduct as its own, and there was no jurisprudence or practice to support the approach taken in the article dealing with the question. Assuming responsibility was different from attribution.

22. The delegate of **Libya** said that the topic of responsibility of international organizations was a complex one and that priority should be given to it. He said there was no responsibility when there was no wrongful act. If there were wrongful acts, should an organization be held responsible? he asked. He also spoke about the economic sanctions imposed on his country. He said that when international organizations took action that inflicted damage, States involved should bear responsibility.

23. The delegate of **Malaysia** said the draft articles on responsibility of international organizations were timely and the recent changes improved the text. Further clarifications should be made to phrases such as "other entities" in the draft article on the use of terms. The article dealing with conduct exceeding authority should be reconsidered. It would be unjust to attribute the conduct of organs or agents to international organizations when the conduct exceeded the authority or when the conduct contravened the organization's instructions.

24. The delegate of **China** said that China could support the draft articles on the topic. Responding to questions posed by the Special Rapporteur, he said the Chinese delegation believed that breaches of obligations that an international organization might have towards member States or its agents fell within the purview of the topic and should be studied by the Commission. The Commission could do so from the perspective of conduct in breach of international obligations, which was a premise for responsibility of an international organization for its conduct. The Chinese delegate further said that necessity to preclude wrongfulness should not be invoked by an international

organization. While States were entitled to do so to safeguard their essential interests, it was inappropriate for international organizations to do the same.

25. The delegate of **Republic of Korea** said that the article on the rules of an organization in the text on responsibility should be further clarified so that the term "other acts" was more exact. The article on attribution should reflect recent jurisprudence with regard to the phrase "effective control". In particular, the International Criminal Tribunal for the Former Yugoslavia had held that the overall control test did not necessarily include the requirement that a State give specific orders for specific acts, but it did include a State supervising and planning acts by an agent or organization. The article should be reconsidered and the test of control should be pivotal in resolving the question of attribution. Two separate provisions should be formulated based on the threshold of control that an organization exercised over a State's organ; one setting out the attribution of an organ's acts to an organization and the other to a State.

26. The delegate of **Sierra Leone** welcomed the draft articles and said the topic should be broadened to "responsibility of international organizations and members".

27. The delegate of **Singapore** said that the principles governing attribution of conduct to international organizations were a key component of responsibility. The articles now before the Committee defined a set of criteria and set out the broad range of circumstances under which the issues could occur. The article on conduct of organs placed at an organization's disposal seemed relevant to military contingents with the United Nations. The issue should be examined more closely in relation to troop contribution agreements, contributing-state responsibility and international humanitarian law. On breach of international obligations, she said it was inappropriate to include the question of breaches of obligations by an international organization toward its Member State or agents. There was no consensus on the legal nature of an organization's rules in relation to international law. Indeed, the relations between an organization and its member States or agents were largely governed by the organization's rules. Such internal rules could provide the consequences of breaches. On circumstances precluding wrongfulness, it would be useful to explore the context for applicability and the specific principles to be invoked. The question of an organization's responsibility for acts of Members was an important one. The critical factor was the link to a clear organizational obligation that would be violated if the conduct were performed by the organization itself.

VI. FRAGMENTATION OF INTERNATIONAL LAW

A. BACKGROUND

1. It may be recalled that, in the course of the last quinquennium the topic 'Risks ensuing from fragmentation of international law" was identified as a subject that might be suitable for further study by the International Law Commission's Working Group on the long-term programme of work. After consideration of the feasibility study conducted by Mr. Gerhard Hafner the Commission decided at its fifty-second session (2000) to include the topic in its long-term programme. The Commission, at its fifty-fourth session (2002) established a study Group on the fragmentation of international law, which held discussion on the topic. This study by Mr. Hafner formed the starting point for consideration of the topic by the newly elected Commission at its present session.

2. At its fifty-fourth session (2002), the Commission decided to include the topic in its programme of work and established a Study Group on the fragmentation of international law chaired by Mr. Bruno Simma. It also decided to change the title of the topic to "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". The commission further decided to undertake a series of studies commencing first with a study on "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" to be undertaken by the Chairman of the Study Group.

3. At the fifty-fifty session (2003) the Commission established an open-ended Study Group on the topic, and appointed Mr. Martti Koskenniemi as Chairman to replace Mr. Bruno Simma who was no longer in the Commission. It set a tentative schedule for work to be carried out during the remaining part of the present quinquemnium (2003-2006). It also distributed among members of the study group work on the other topics agreed upon in 2002 and decided upon the methodology to be adopted for that work.

B. CONSIDERATION OF THE TOPIC AT THE FIFTY-SIXTH SESSION

4. At the present session the Commission reconstituted the study group which held eight meetings. The Commission had before it the preliminary report on the study on the "Function and scope of the *lex specialis* rule and question of self contained regimes"[44] by Mr. Martti Koskenniemi, Chairman of the Study Group, as well as outlines on the "study on the application of successive treaties Relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties)"[45] by Teodor Melascanu; on the "Study on the interpretation of treaties in the light of any relevant rules of international law applicable in relation between parties "(Article 31 (3) cc) of the Vienna Convention on the Law of Treaties) in the context of general developments in international law and concerns of the international community"[46] by Mr. William Mansfield; on the "Study concerning the modification of multilateral treaties between certain of the parties only"

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[44] . ILC(LVI)/SG/FIL/CRD.1 and add.1
[45] . ILC(LVI)/SG/FIL/CRD.2
[46] . ILC(LVI)/SG/FIL/CRD.3/Rev.1

(Article 41 of the Vienna Convention on the Law of Treaties)[47] by Mr. Riad Daoudi; and on the "Study on hierarchy in international law: *jus cogens*, obligations *erga omnes,* Article 103 of the Charter of the United Nations, as conflict rules"[48] by Mr. Zdzislaw Galicki.

C. REPORT OF THE STUDY GROUP: AN OVERVIEW

5. The Study Group, inter alia, discussed the question concerning the eventual result of its work. There was agreement that the analytical exercise would already be useful and that at the least the study group should give its own conclusions, based on the studies, as to the nature and consequences of the phenomenon of "fragmentation" of international law. The study group confirmed that its intention was to develop a substantive, collective document as the outcome of its work. It would incorporate much of the substance of the individual reports produced by members of the study group which would consist of two parts: (a) a substantive study on the topic as well as (b) a concise summary containing the proposed conclusions and, if appropriate guidelines on how to deal with fragmentation. Following is the overview of the discussions on the studies prepared by the study group members on various topics as decided during the last session.

a. Discussion on the study concerning the "function and scope of the *lex specialis* rule and the question of "self-contained regimes"".

6. The study prepared by the chairman on "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes' was in two parts, first part containing a discussion of the *lex specialis* maxim while the second part focused on 'self-contained regimes'.

1. *Lex specialis*

7. On the question of *lex specialis*, the Chairman of the Study Group emphasized that recourse to the lex specialis rule was an aspect of legal reasoning that was closely linked to the idea of international law as a legal system. He underlined the relational character of the distinction between the general and the special. A rule was never 'general' or 'special' in the abstract but always in relation to some other rule. A rule's "speciality" might follow for instance, from the scope of the States covered by it, or from the width of its subject matter. The adoption of a systemic view was important precisely in order to avoid thinking of *lex specialis* in an overly or rigid manner.

8. The Study Group endorsed the "systemic" perspective taken in the study and the conclusion that general international law functioned in an omnipresent manner behind

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47. ILC(LVI)/SG/FIL/CRD.4
48. ILC(LVI)/SG/FIL/CRD.5

special rules and regimes. The Study Group agreed that there was no reason, indeed no possibility – to lay down strict or formal rules for the use of the maxim.

9. The Chairman noted that the principle that special law derogated from general law was a traditional and widely accepted maxim of legal interpretation and technique for the resolution of conflict of norms. The Chairman attributed the acceptance of the *lex specialis* rule to its argumentative power i.e. it was pragmatic and provided greater clarity and definiteness and, therefore, it was considered "harder" or more "binding" than the general rule.

10. The Chairman distinguished between four situations in which the *lex specialis* rule has arisen in case law: (a) it may operate to determine the relationship between two provisions (Special and general) within a single instrument, (b) between provisions in two different instruments, (c) between a treaty and a non-treaty standard and (d) between two non-treaty standards.

11. The Chairman further suggested that while there was no formal hierarchy between sources of international law, there was a kind of informal hierarchy while emerged pragmatically as a "forensic" or "natural" aspect of legal reasoning, preferring the special standard to the more general one. He suggested that this pragmatic hierarchy expressed the consensual basis of international law. However, some members of the Study Group doubted the suggestion that the *lex specialis* maxim denoted an informal hierarchy.

12. The Chairman pointed out that there were two ways in which the law took account of the relationship of a particular rule to a general rule. First was, a special rule could be considered to be an application, elaboration or updating of a general standard. Second was, a special rule was taken as a modification, overruling or setting aside of the general standard. The Chairman further said that most of general international law was dispositive i.e. that it could be derogated from by *lex specialis*. However, such derogation is prohibited in some cases, particularly, in the case of *jus cogens*.

13. The discussion in the study group largely endorsed the conclusions of the study. However, it was stated that the time dimension i.e. the relationship between the *lex specialis* and the *lex posteriori* had not been discussed extensively within the study. It was agreed that how this should be dealt with was also dependent on the context, including by reference to the will of the parties.

2. Self-contained (special) regimes

14. The chairman of the Study Group noted that there were three somewhat different senses in which the term "self-contained regimes" had been used. He referred to article 55 of the Commission's Draft articles on State Responsibility which gave two examples. The first one was the judgment of the Permanent Court of International Justice in the *Wimbledon* case,[49] which referred to a set of treaty points on a single issue. The second

[49]. Case *of the SS "Wimbledon", P.C.I.J. Ser. A. No.1* (1923) pp.23-4

sense was the judgment of the International Court of Justice in the *Hostage* case[50] which denoted a special set of secondary rules claiming primacy to the general rules of state responsibility concerning consequences of a wrongful act. He noted that the distinction made by the Commission in its commentary between "Weaker" and "Stronger" forms of lex specialis and associating self-contained regimes with the latter was unfortunate. Self-contained regimes were neither stronger nor weaker than the other forms of *lex specialis*.

15. The Chairman further noted that the third sense in which it was used it was sometimes employed in academic commentary and practice to describe whole fields of functional specialization or teleological orientation in the sense that special rules and techniques of interpretation and administration were thought to apply. The Chairman further opined that the term "Self contained regimes" was a misnomer in the sense that no set of rules – whether in the narrower or the broader sense – was isolated from general law. He doubted whether such isolation was ever possible. He was of the view that a regime can receive legally binding force only by reference to rules or principles outside it.

16. The Study Group agreed that the notion of "self-containedness" did not intend to convey anything more than the idea of "speciality" of the regime. It was noted that the distinction between a "strong form" and weak form of special regime ought to be abandoned. There was a broad agreement that general law continued to operate in various ways even within special regimes. It was pointed that that the relationship between the special regime and the general law could not be settled by any general rules.

b. Outline concerning study on the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties)

17. The Study Group discussed on the basis of the outline and an oral presentation by Mr. Teodor Melescanu. The outline considered the preparatory work leading to the adoption of article 30 of the Vienna Convention[51] and analyzed the basic principles

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[50]. Case concerning the United States Diplomatic and Consular Staff in Tehran (United States v. Iran) Hostage Case", ICJ Reports,1980, p.41

[51]. Article 30

Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applicable only to the extent that its provisions are compatible with those of the latter treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
   (a) as between States parties to both treaties the same rule applies as in paragraph 3;
   (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

relevant in its application, namely, the principle of hierarchy in paragraph 1, the principle of the *lex prior* in paragraph 2, and the principle of the *lex posterior* in paragraphs 3 and 4(a). It was noted that article 30 was based on relevant concerns and did not create serious problems of fragmentation. Only paragraph 4(b) of article 30 did set off a situation of relevance for future consideration. Three points were underlined. First, the mere conclusion of a subsequent inconsistent treaty would not *per se* give rise to a breach of international law. This would take place only through its application. Secondly, article 30 did not expressly address the question of the validity of the two inconsistent treaties, only of their relative priority. Thirdly, the provisions of article 30 were residual in character and in that sense not mandatory.

18. The Study Group acknowledged that most of article 30 did not pose dramatic problems of fragmentation except that an unresolved conflict of norms would occur in the case of paragraph 4(b). The Study Group endorsed the focus to be given on whether limits could be imposed on the will of States to choose between the inconsistent treaties to which it was a party which it would comply with and which it would have to breach. In addition to paragraph 4(b), two other instances of possible relevance were identified, namely, (a) the case of successive bilateral treaties relating to the same subject matter, and (b) the case of a treaty, multilateral or bilateral, which differs from customary international law, the Study Group agreed that the provisions of article 30 had a residual character.

c. Outline concerning Study on the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties)

19. The outline considered the context in which an *inter se* agreement under article 41[52] of the Vienna Convention on the Law of Treaties applied, giving rise to two types of legal relations: "general relations" applicable to all parties to a multilateral treaty and "special" relations applicable to two or more parties to the *inter se* agreement. The

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5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

[52] . Article 41

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
   (a) the possibility of such a modification is provided for by the treaty; or
   (b) the modification in question is not prohibited by the treaty and;
      (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
      (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

relationship between the general and the particular is similar to the relationship between the *lex generalis* and the *lex specialis*.

20. During the course of discussions the Study Group noted that article 41 reflected the understandable need for parties to allow the development of the implementation of a treaty by *inter se* agreement. The relationship between the original treaty and the *inter se* agreement could sometimes be conceived as those between a minimum standard and a further development thereof. It did not then normally pose difficulties by way of fragmentation. The conditions of permissibility of *inter se* agreements reflected general principles of treaty law that thought to safeguard the integrity of the treaty. However, it was also pointed out that the conditions of *inter se* agreements were not always connected to the nature of the original agreement but also to the nature of a provision thereof. It was observed that the consequences of impermissible *inter se* agreements were not expressly dealt with in article 41 and should be further analyzed.

d. Outline concerning the interpretation of treaties in the light of "any relevant rules of international law applicable in relations between the parties" (Article 31(3)(c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community

21. The outline addressed the function of article 31 (3)(c),[53] in particular its textual construction, noting that it refers to rules of international law; it is not restricted to customary international law; that it refers to rules that are both relevant and applicable; and that it is not restricted by temporality.

22. During the discussion the Study Group emphasized that article 31(3)(c) became applicable only where there was a problem of interpretation. In such case, the provision pointed to certain rules that should be "taken into account" in carrying out the interpretation. It did not however, indicate any particular way in which this should take place. The Study Group focused on the question of what rules were covered by the reference in article 31(3)(c). It was noted that while it was clear that provision referred to other treaty rules that were relevant and applicable, it did not exclude the application of other sources of international law, such as, customary law and general principles recognized by civilized nations.

23. The Study Group further discussed the relationship of article 31(3)(c) to other rules of treaty interpretation, for instance those referring to good faith and the object and purpose of the treaty and suggested that attention might be given to its relationship in general with article 32.

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[53] . Article 31
General rule of interpretation

2. There shall be taken into account, together with the context.
(c) any relevant rules of international law applicable in the relations between the parties.

e. Hierarchy in Implementation of Law: *jus cogens*, obligations *erga omnes*, article 103 of the Charter of the United Nations, as conflict rules.

24. The outline addressed the nature of the topic in relation to fragmentation of international law with a suggestion that future work would analyze the above three categories of norms and obligations.

25. During the discussions the Study Group concentrated on the future orientation of the study. It was underlined that the study should be practice oriented and refrain from identifying general or absolute hierarchies. Hierarchy should be treated as an aspect of legal reasoning within which it was common to use such techniques to set aside less important norms by reference to more important ones. This was what it meant to deal with such techniques as conflict rules. It was suggested not to overstretch the discussion on hierarchy but to limit it to its function in resolving conflicts of norms.

26. The Study Group recognized that an overly theoretical discussion on this topic would raise issues, which were complex and controversial. Focus should be on giving examples of the use of hierarchical relationships in practice and doctrine in order to solve normative conflicts. It was observed that while hierarchy might sometimes bring about fragmentation, in most situations it was used to ensure the unity of the international legal system.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-NINTH SESSION (2004)

27. The delegate of **India** said that the study of fragmentation should ensure the strengthening of a stable international legal system. In his delegation's view, problems and conflicts of fragmentation should serve to enhance the effectiveness of international law. The main focus of the study should be on the substantive aspects, rather than institutional facets of fragmentation. The study should capture State practice and jurisprudence developed by national and international judicial bodies.

28. The delegate of **Japan** said his Government continued to pay close attention to that very ambitious topic. As the number of bilateral and multilateral treaties had increased dramatically in recent years in various areas, including trade, environment, development, human rights and humanitarian issues, it was becoming more and more difficult to maintain coherence among the different legal regimes. To avoid conflicts of law during the treaty-making process, as well as in interpretation, it was essential for practitioners to have a clear understanding of the potential impact of a particular treaty on the other related rules of international law. He said that Japan believed that the topic of fragmentation provided a good opportunity for reflection on the relations among different areas of international law, and supported the current direction that the International Law Commission was taking. On the selection of topics for study by the Commission, he said

the Commission should be careful in applying such guiding principles drawn from a few specific cases or areas, since they might be relevant only in certain specific settings.

29. The delegate of **Republic of Korea** said the topic of fragmentation was highly theoretical in nature and, however, anticipated that the work of the Commission's study group would be of a practical use for States in their future legal activities.

30. The delegate of **Sierra Leone** said that the Commission would provide a great service by proposing a set of guiding principles for law making on the topic.

VII. SHARED NATURAL RESOURCES

A. BACKGROUND

1. At its fifty-fourth session (2002), the commission decided to include the topic "shared natural resources" in its programme of work and accordingly appointed Mr. Chusie Yamada as Special Rapporteur for the topic. The General Assembly, in paragraph 2 of resolution 57/21 of 19 November 2002, took note of the Commission's decision to include the topic in its programme of work.

2. At the fifty-fifth session (2003) the Commission considered the first report[54] of the Special Rapporteur on the topic. The Commission also had an informal briefing by experts on groundwaters from the Food and Agricultural organization (FAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

B. CONSIDERATION OF THE TOPIC AT THE FIFTY-SIXTH SESSION

3. At the 56th session the Commission considered the second report of the special Rapporteur which contained seven draft articles. The Commission established an open-ended Working Group on Transboundary Ground Waters chaired by the Special Rapporteur. Further the Commission held two informal briefings by experts on ground waters from the Economic Commission of Europe (ECE), United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agricultural Organization (FAO) and the International Association of Hyderogeologists (IAH).

4. Taking into consideration the views expressed within the Commission and the Sixth Committee on the use of the term "shared resources", which might refer to a common heritage of mankind or to the notion of shared ownership, the Special Rapportur proposed to focus on the sub-topic of "transboundary ground waters" without using the term "shared".

5. The Special Rapporteur further said that although the second report contained several draft articles, it should not be construed as indicative of the final form the Commission's work would take. He said that he did not intend to recommend to refer any of the draft articles to the Drafting Committee at this initial stage.

6. Acknowledging the criticism on his statement in 2003 that almost all the principles embodies in the 1997 Convention on the Law of the Non-navigational Uses of International Water courses would also be applicable, the special Rapporteur stated that he continued to believe that 1997 Convention offered the basis upon which to elaborate a regime for ground waters. The Special Rapporteur noted that he continued to use the term "groundwater" in the report, he opted to use the term "aquifer" in the draft articles as it is a scientific and precise form.

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54. A/CN.4/533 and Add. 1

C. SUMMARY OF THE DEBATE

7. Members of the Commission welcomed the changes made to the term used in the report in accordance with the availability of scientific data.

8. On the scope of the work of the Commission support was expressed for the position of the Special Rapporteur to exclude those aquifers which were not transboundary in nature. It was also pointed out that reference should be made to those ground waters, which were excluded from the scope of the draft convention.

9. Regarding the object of its work, it was observed that the exercise the Commission had embarked upon did not seem to entail the codification of State practice nor the progressive development of international law, but was rather legislative in nature. It was stated that the primary purpose of the endeavour of the Commission was to establish the proper use of a natural resource, not to elaborate an environmental treaty or to regulate conduct.

10. Particular emphasis was made that water must be regarded as belonging to the State where it was located, along the lines of oil and gas which had been recognized to be subject to sovereignty. It was felt that it could not be considered a universal resource and the commission's work should not convey the impression that ground waters are subject to some special treatment different from that accorded to oil and gas. It was also suggested that the text could clearly state, possibly in preamble, that the sovereignty over the ground waters was in no way being questioned.

11. During the discussion it was observed that some caution was urged in relying upon the 1997 Convention as the basis for the Commission's work on ground waters, since that Convention was not in force and had a bond number of signatures and ratifications. It was also stated that similar caution was warranted in relation to being guided by the draft articles on the prevention of transboundary harm from hazardous activities, since they had not yet been adopted by the General Assembly.

D. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

12. Under this topic, the Commission is now focusing for the time being on the question of transboundary groundwaters.

13. Next year, the Special Rapporteur aims to submit his third report, including a full set of draft articles on the law of transboundary aquifer systems on the basis of the general framework that he proposed in his second report, which is reproduced in the footnote to paragraph … in Chapter VI of this report. The Commission would welcome the views of Governments on this general framework.

14. The Commission would also welcome detailed and precise information which Governments can provide on their practice that may be relevant to the principles to be incorporated in the draft articles, in particular:

(a) Practice, bilateral or regional, relating to the allocation of groundwaters from transboundary aquifer systems; and

(b) Practice, bilateral or regional, relating to the management of non-renewable transboundary aquifer systems.

E. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-NINTH SESSION (2004)

15. The delegate of **India** said that India had consistently maintained that context-specific agreements and arrangements were the best way to address questions relating to transboundary groundwaters or aquifer systems. That would also enable States concerned to take appropriate account of the various relevant factors in any specific negotiation. On the question of the final form of the topic, he said he favoured a form that gave States appropriate flexibility to tailor agreements or arrangements to suit individual circumstances.

16. The delegate of **Japan** said the focus of the work should not be limited to those groundwaters not covered by the 1997 watercourse convention; some aquifer systems covered by that convention had characteristics of groundwaters, and they should be governed by a new convention on groundwater. Problems of dual applicability should be addressed through a provision. The legal framework should fully take into account the unique characteristics of groundwaters. The question of final form should be decided later.

17. The delegate of **Kenya** said her delegation was convinced of the need for an elaboration of an international legal framework to guide the use, allocation, preservation and management of transboundary groundwaters. She said that a critical consideration should be given to the management and sharing of confined aquifers. The Commission's approach should be informed by the non-renewable nature of such aquifers. It might be worth examining whether the principles of the 1997 Convention on Non-navigational Uses of International Watercourses were suited to non-renewable underground water resources, or whether those aquifers should be governed by a regime akin to other depletable shared natural resources such as oil or natural gas. In view of the delicate nature of the subject, she said, a comprehensive study of State practice might be a useful point of reference in future work. She encouraged the Commission's continued efforts in addressing the subject. She expected that the outcome might take the form of a framework document or guiding principles that would enable States to elaborate more specific national and regional arrangements.

18. The delegate of **Malaysia** said the new terminology in the articles on shared natural resources showed sensitivity to important considerations such as the implications of "shared" and "groundwater". The term "aquifer" should be defined to mean a permeable water-bearing rock formation composed of sand, gravel or soil, which was capable of yielding exploitable quantities of water. "Aquifer system" should be defined to indicate that the aquifers were hydraulically connected. Significant harm should be further defined. Exchange of data and information between aquifer system States should be subject to considerations of national interest, including security.

19. The delegate of **China** said that they supported the framework and draft articles on it. The question of relationship between the proposed articles and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses should not arise. "Transboundary aquifer systems" were no longer limited to "confined transboundary groundwaters", but could be connected to surface waters.The Chinese delegate said the final form of the draft articles could be decided after progress was achieved on substantive matters.

20. The delegate of **Sierra Leone** said that while the most useful form for the principles on transboundary groundwaters could not yet be determined, a model law, a framework Convention or guidelines should be considered.

CONCLUDING REMARKS

1. The work of the Commission at the present session was satisfactory and resulted in fruitful outcome. The commendable result of the present session was the adoption of a set of 19 articles on the topic of 'Diplomatic Protection' and adoption of eight draft principles on 'International liability for Injuries Consequences arising out of Acts not Prohibited by International Law'. Progress of the work on other topics was also noteworthy.

2. As regards some of the topics considered during the current session, the AALCO Secretariat offers the following observations.

A. Reservations to Treaties

(a) The draft guidelines 2.3.5 dealing with widening of the scope of a reservation is an addition to the existing corpus of law relating to reservations. It is aptly subjected to same rules that are applicable to the late formulation of a reservation as it intends to modify the existing treaty relations and creates new ones as it is in the case of late formulation of reservations. The Commission also rightly applied similar rules in respect of widening of the scope of a conditional interpretative declaration as adopted under draft guideline 2.4.10.

B. Diplomatic protection

3. The AALCO Secretariat commends the work of the Special Rapporteur and the Commission on having adopted a set of 19 articles on first reading. The Secretariat offers the following comments on some of the articles adopted during the present session.

(a) Regarding the nationality of a corporation, emphasis on requirement of having the registered office or the seat of its management or some similar connection in draft article 9 is in accordance with the international practice. Therefore, it aptly rejects the "genuine link' criterion, which is also in accordance with the view of the International Court of Justice in the *Barcelona Traction* case.

(b) In the view of the AALCO Secretariat the rule regarding continuous nationality as provided under article 10 is also in consonance with the established practice and it is the codification of an existing rule. Paragraph 2, by way of exception to paragraph 1, in effect strengthens the rule of continuous nationality dispite the demise of the concerned corporation due to the operation of law as a result of injury.

(c) Draft article 11 and 12 are, in a way, exception to the general rule, which requires that only the State of nationality of the corporation can exercise diplomatic protection. In the view of the AALCO Secretariat these provisions serve well the interests of the foreign investment as they assure diplomatic protection to the

shareholders by their own State in specified circumstances. It also fills the legal vacuum and avoids a situation wherein the shareholders are left with no remedy.

(d) Draft article 13 on other legal persons is a significant addition to the legal regime on diplomatic protection. Though this provision does not elaborate on the diplomatic protection of other legal persons, it would certainly mark a beginning for the future codification and progressive development in this direction.

(e) Draft article 19 is a significant provision as it accords dual protection to the members of a ship's crew. In the view of the AALCO Secretariat it is timely that the exercise of diplomatic protection by the State of nationality of a ship's crew is asserted keeping in view the developments as in *the M/V "Saiga"* case. Therefore, the right to exercise diplomatic protection by the State of nationality of members of the ship's crew co-exists with the right of the flag state to protect members of the ship's crew irrespective of their nationality.

C. International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law

4. Compliments are due to the Special Rapporteur and the Commission as the Commission has adopted a set of 8 draft principles during the present session. The Secretariat offers the following remarks on some of the issues.

(a) Principle 1 of the draft principles talks about the application of these principles to the activities involving the risk of causing significant transboundary harm. As described in the commentary, this formulation of risk covers both low probability of causing disastrous transboundary harm or a high probability of causing significant transboundary harm. Thus, the nature of risk described here comprehensively covers both situations. In the view of the AALCO Secretariat the threshold of "significant" harm is well suited in respect of present draft principles.

(b) In the opinion of the AALCO Secretariat the measures sought to be provided under the principle 4 for the purpose of meeting the objective of prompt and adequate compensation to victims as provided under the principle 3 are comprehensive in nature so far as covering the foreseeable transboundary damage is concerned. Similarly, the response measures provided under principle 5 are dual in nature as it obligates equally both the State and the operator to respond to an accident. Therefore, it may be viewed as a best possible measure in mitigating complacency from either of them.

(c) In the opinion of the AALCO Secretariat development of specific international regimes as provided under principle 7 would be a precursor to international and domestic remedies as provided under principle 6 and combined effect of these two initiatives would yield the respected results in achieving the prompt and adequate compensation to the victims of transboundary damage.