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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

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

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CONTENTS

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INTRODUCTION

1. The International Law Commission (hereafter called the "ILC" or the "Commission"), established by the 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-seventh session in Geneva from 2 May to 3 June and 11 July to 5 August 2005. The Commission elected Mr. Djamchid Momtaz (Iran) as its Chairman, for the fifty-seventh session. The AALCO was represented at the session by the Secretary-General, Amb. Dr. Wafik Z. Kamil.

2. There were as many as eight topics on the agenda of the aforementioned session of the ILC. They were:

(i) Reservations to Treaties
(ii) Diplomatic Protection
(iii) Unilateral Acts of States
(iv) Responsibility of International Organizations
(v) Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law
(vi) Shared Natural Resources
(vii) Effects of Armed Conflicts on Treaties; and
(viii) Expulsion of Aliens

3. On the topic of "**Reservations to Treaties**", the Commission considered part of the Special Rapporteur's tenth report[1] and referred seven draft guidelines dealing with validity of reservations and the definition of object and purpose of the treaty to the Drafting Committee. The Commission also adopted two draft guidelines dealing with the definition of objections to reservations and the definition of objection to the late formulation or widening of the scope of a reservation together with commentaries.

4. As regards the topic "**Diplomatic Protection**", the Commission considered the Special Rapporteur's sixth report[2] dealing with clean hands doctrine.

5. On the topic of "**Unilateral Acts of States**" the Commission Considered the eighth report[3] of the Special Rapporteur, which contained the analysis of 11 cases of State practice and conclusions thereof. A Working Group on unilateral acts was reconstituted and its work focused on the study of State practice and on the elaboration of

[1] A/CN/.4/558 and Add.1
[2] A/CN/.4/547
[3] A/CN.4/557

preliminary conclusions on the topic, which the Commission should consider at its next session.

6. As regards the topic "**Responsibility of International Organizations**", the Commission considered the Special Rapporteur's third report[4] proposing nine draft articles dealing with the existence of a breach of an international obligation by an international organization and the responsibility of an international organization in connection with the act of a State or another international organization. Further, the Commission adopted nine draft articles together with commentaries.

7. With the regard to the topic "**Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law**", the Commission held an exchange of views on the topic on the basis of a briefing by the Chairman of the Study Group on the Status of work of the Study Group. The Study Group considered the memorandum on regionalism in the context of the Study on the "Function and Scope of the *lex specialis* rule and the question of 'self contained regimes'"; the study on the "Interpretation of Treaties in the light of 'any relevant rules of international law applicable in relations between parties' (article 31(3) (c) of the Vienna Convention on the Law of Treaties)"; as well as the final report on the Study of "Hierarchy in International law: *jus cogens*, obligations *erga omnes*, article 103 of the Charter of the United Nations, as conflict rules". The Study Group also received the final report on the Study "concerning the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the law of Treaties)". The Study Group envisaged that it would be in a position to submit a consolidated study, as well as a set of conclusions, guidelines or principles to the fifty-eighth session of the Commission in 2006.

8. As regards the topic " **Shared Natural Resources**", the Commission considered the third report of the Special Rapporteur[5], which contained a complete set of 25 draft articles on the law of transboundary acquifers. The Commission also established a Working Group on Tranboundary Groundwaters, chaired by Mr. Enrique Candioti to review the draft articles presented by the Special Rappoerteur taking into account the debate in the Commission on the topic. The Working Group had the benefit of advice and briefings from experts on ground waters from UNESCO and the International Association of Hydrogeologists (IAH). It also held an informal briefing by the Franco-Swiss Genevese Aquifer Authority. The Working Group reviewed and revised 8 draft articles and recommended that it be reconvened in 2006 to complete its work.

9. On the topic " **Effects of Armed Conflicts on Treaties**" the Commission considered the first report of the Special Rapporteur on the topic[6], presenting an overview of the issues involved in the topic together with a set of 14 draft articles in order to assist the Commission and Governments with commenting, including providing State practice.

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[4] A/CN.4/553
[5] A/CN.4/551 and Corr.1 and Add.1
[6] A/CN.4/552

The Commission endorsed the Special Rapporteur's suggestion that a written request for information be circulated to member Governments.

10. With regard to the topic "**Expulsion of Aliens**", the Commission considered the Special Rapporteur's preliminary report on the topic[7], presenting an overview of some of the issues involved and a possible outline for further consideration of the topic.

[7] A/CN.4/554

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[8] and second[9] 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 54th session (2002), the Commission had before it the Special Rapporteur's seventh report[10] 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 its fifty-fifth session (2003) the Commission had before it the eight report[11] 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 interpretative declarations to the

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[8] A/CN.4/470 and Corr.1.
[9] A/CN.4/477 and Add.7.
[10] A/CN.4/526 and Add.1 to 3.
[11] A/CN.4/535 and Add.1

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

7. At its fifty-sixth session (2004) the Commission had before it the Special Raporteur's ninth report[12] 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.

8. Following the deliberations on these reports, the Commission had provisionally adopted 69 draft guidelines by the end of its 56th session (2004).

9. 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.

10. 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 PRESENT SESSION

11. At the present session the Commission had before it the tenth report[13] of the Special Rapporteur on validity of reservations and the concept of the object and purpose of the treaty. The Commission considered part of the tenth report and decided to send draft guidelines 3.1 (Freedom to formulate reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2. (Definition of specified reservations), 3.1.3 (Reservations implicitly permitted by the treaty) and 3.1.4. (Non-specified reservations authorized by the treaty) to the Drafting Committee. The Commission also decided to send draft guidelines 1.6 and 2.1.8, which had already been provisionally adopted, to the Drafting Committee with a view to their revision in the light of the terms selected.

12. The Commission further considered and provisionally adopted draft guidelines 2.6.1 (Definition of objections to treaties) and 2.6.2 (Definition of objections to the late formulation or widening of the scope of a reservation), which are described below.

[12] A/CN.4/544
[13] A/CN.4/558 and Add. 1

2.6.1 Definition of objections to reservations

> "Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

13. This guideline provides a generic definition of 'objection' that can be applied to all categories of objections to reservations. The wording of this guideline is similar to the definition of reservations provided in article 2, paragraph 1 (d) of the Vienna Convention on the Law of Treaties and reproduced in guideline 1.1 of the Guide to Practice[14]. However, the draft guideline does not provide any explanation with regard to the validity of the effects that the author of the objection intends its objections to produce. This is a significant aspect of the issue as it is necessary to clarify the nature of the effect of an objection, whether it is the 'minimum effect'[15], 'maximum effect'[16], 'intermediate effect'[17] or 'super maximum effect'[18]. This matter may be explained when the issue of effects of objections are taken up by the Commission.

2.6.2 Definition of objections to the late formulation or widening of the scope of a reservation

> "Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation or the widening of the scope of a reservation.

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[14] "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.

[15] The minimum effect of an objection is in accordance with article 21 (3) of the Vienna Convention on the Law of Treaties which says "When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation". This means that the treaty would remain in force between two States excluding that part of the treaty to which reservation is made.

[16] The maximum effect of an objection is in accordance with article 20 (4) (b) of the Vienna Convention on the Law of Treaties which says "an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State". Thus this provision provides for the maximum effect of an objection i.e., the preclusion of the entry into force of the Convention between the reserving and the objecting State.

[17] There is in practice an intermediate stage between the 'minimum' and 'maximum' effects of the objection where in a State wishes to enter into treaty relations with the author of the reservation while at the same time considering that the effect of the objection should go beyond what is provided for in article 21 (3).

[18] "Super maximum effect" is such that it is not only that the reservation objected to is not valid but also that, as a result, the treaty as a whole applies ipso facto in the relations between the two States. However, the validity of such objections is questioned despite the fact that it is similar to the positions adopted by the European Court of Human Rights and the Human Rights Committee.

14. Under the draft guidelines 2.3.1 to 2.3.3, the contracting parties may also "object' not only to the reservation itself but also to the late formulation of a reservation. Thus in accordance with these draft guidelines, the draft guideline 2.6.2 defines the scope of the 'objection' as including opposition to the late formulation of a reservation or the widening of the scope of a reservation.

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

15. States often object to a reservation that they consider incompatible with the object and purpose of the treaty, but without opposing the entry into force of the treaty between themselves and the author of the reservation. The Commission would be particularly interested in Governments' comments on this practice. It would like to know, in particular, what effects the authors expect such objections to have, and how, in Governments' view, this practice accords with article 19 (c) of the 1969 Vienna Convention on the Law of Treaties.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTIETH SESSION (2005)

16. The delegate of the **Arab Republic of Egypt** agreed with the view of the Special Rapporteur on the topic of reservations to treaties, that the Commission should stick to the framework of the 1969 and 1986 Vienna Conventions on the Law of Treaties.

17. The delegate of **Japan** noted that the topic had been under consideration for 10 years and said it would be appreciated if a whole set of guidelines could be presented in the near future. He then made specific comments on terms used in the guidelines, as well as on points raised by the Commission.

18. The delegate of **Kenya** expected that, once developed, a guide to practice on reservations to treaties would reduce uncertainty and assist States, international organizations and other practitioners in their treaty practice. He preferred the use of the term "validity" as opposed to "admissibility" or "permissibility" in respect of reservations that went against the object and purpose of a treaty.

19. The delegate of **Malaysia** said he favoured the practice of States objecting to a reservation that they considered incompatible with the object and purpose of a treaty, but without opposing the entry into force of the treaty between themselves and the author of the reservation. If a reservation were incompatible with the treaty's purpose, then it would be ineffective, irrespective of whether any State objected to such reservation r not. He made comments and proposals on specific draft guidelines, saying that the draft guidelines required further discussions from Member States and further in-depth analysis before they could be adopted.

20. The delegate of **People's Republic of China** said the conditions for permitting or for prohibiting formulation of reservations by States constituted the core question of reservations to treaties and merited more in-depth study. He endorsed the Special Rapporteur's view that the Vienna Convention on Treaties was open and flexible on the question of reservations.

21. The delegate of **Republic of Korea** said there was often a need to retain a reserving State as a party to the treaty, even if that State's reservation was incompatible with the object and purpose of the treaty. Noting the need to consider the special nature of the human rights treaties, she urged the Commission to consider the issue of differentiating what the current state of the law was and what it should be.

22. The delegate of **Sierra Leon** said the problem with the current regime on the topic was that after the adoption of "no offence to the object and purpose", there had been no consensus on who should decide whether a reservation offended the object and purpose of a treaty and was, therefore, invalid. It was left to the States themselves to decide. He recommended that all treaty drafters consider the possibility of setting up a final authority to decide the validity of a reservation.

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.[19] 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 49th 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 50th session in 1998, the ILC had before it the preliminary report of the Special Rapporteur.[20] 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.[21]

4. At its 51st 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 52nd session, the ILC had before it the Special Rapporteur's first Reports[22]. 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 53rd session (2001), the Commission had before it the remainder of the Special Rapporteur's first reports[23], as well as his second report.[24] 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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[19] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 249 and annex II, addendum 1.
[20] A/CN.4/484.
[21] 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.
[22] A/CN.4/506 and Corr. 1 and Add. 1.
[23] A/CN.4/506/Add.1.
[24] 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 54th 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[25]. 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 its 55th session (2003), the Commission had before it the fourth report of the Special Rapporteur[26]. Having considered the report of the Special Rapporteur the Commission decided to refer article 17 as proposed by the Working Group and articles 18, 19, 20, 21 and 22 to the Drafting Committee. After considering the report of the Drafting Committee, the Commission provisionally adopted draft articles 8[10], 9[11] and 10[14].

9. At its 56th session (2004), the Commission had before it the fifth report of the Special Rapporteur[27]. Following the consideration of the Special Rapporteur's report the Commission adopted on first reading a set of 19 draft articles together with commentaries on diplomatic protection. The Commission also 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.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

10. At the present session the Commission had before it the sixth report of the Special Rapporteur[28] dealing with clean hands doctrine. The Commission considered the report at its 2844th to 2846th meetings.

a. Clean Hands Doctrine

11. According to the clean hands doctrine no action arises from willful wrongdoing: *ex dolo malo non oritur actio*[29]. It is also reflected in the maxim *nullus commodum capere potest de injuria sua propria*[30]. Thus a complainant who has acted wrongly, i.e., who has unclean hands, will not be helped by a court when complaining about the actions of some one else. In the context of diplomatic protection the doctrine is invoked to

[25] A/CN.4/523 and Add.1.
[26] A/CN.4/530 and Add. 1
[27] A/CN.4/538
[28] A/CN.4/547
[29] It means that 'a right of action cannot arise out of fraud' or 'from fraud no action arises'.
[30] It means that 'no man can take advantage of his own wrong' or 'no one can take advantage of his wrong.

preclude a State from exercising diplomatic protection if the national it seeks to protect has suffered an injury as a consequence of his or her own wrongful conduct.

12. During the debate at the Commission, the Special Rapporteur noted that while the importance of the clean hands doctrine in international law could not be denied, the question before the Commission was whether it was sufficiently closely linked to the topic of diplomatic protection to warrant its inclusion in the draft articles on the topic. His conclusion was that it did not obviously belong to the field of diplomatic protection and that it should therefore not be included in the draft articles.

13. Supporting the position that this doctrine should be included in the draft articles on diplomatic protection some arguments were raised in the previous sessions of the Commission. In response to one of such arguments, that is, the doctrine did not belong to the realm of inter-State disputes, the Special Rapporteur provided a brief survey of the jurisprudence of the International Court of Justice to illustrate the fact that, while the Court had never asserted that the doctrine belonged to the realm of a State claim either for direct or for indirect injury, the clean hands doctrine had most frequently been raised in the context of inter-State claims for direct injury to a State.

14. Further, in response to the suggestion that if the individual seeking diplomatic protection had himself violated the domestic law of the respondent State or international law, then the State of nationality could not protect him, the Special Rapporteur observed that once a State took up a claim of its national in relation to a violation of international law, the claim became that of the State, in accordance with the position held in the *Mavrommatis Palestine Concessions* case[31]. Thus the misconduct of the national ceased to be relevant and the only the misconduct of the plaintiff State itself might become relevant.

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[31] The *Mavrommatis Palestine Concessions* case, decided by the Permanent Court of International Justice in 1924, was brought against Great Britain by Greece, further to the former' s refusal to recognize, as the sovereign power in Palestine under a mandate assigned by the League of Nations, the contractual rights acquired by Mavrommatis, a Greek national, through agreements signed with the authorities of the Ottoman Empire, the former sovereign power in Palestine. The Court so held:

"It is true that the dispute was at first between a private person and a state...Subsequently, the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two states... It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is sole claimant." *P.C.I.J. Ser.A,* No.2, p.11-12

15. In response to the contention that the clean hands doctrine had been applied in cases involving diplomatic protection, the Special Rapporteur noted that relatively few cases could be cited in favor of the applicability of the clean hands doctrine in the context of diplomatic protection, and upon analysis, those that were cited did not support the case for its inclusion.

16. General support was expressed for the Special Rapporteur's conclusion that the clean hands doctrine should not be included in the draft articles. Support was also expressed for the Special Rapporteur's suggestion in his report that it was more appropriate for the doctrine to be invoked at the stage of the examination of the merits since it related to the attenuation or exoneration of responsibility rather than admissibility. Another view was expressed that the lack of practice did not necessarily preclude the adoption of some version of the doctrine by way of progressive development of the law.

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTIETH SESSION (2005)

17. The delegate of **Indonesia** said he believed that a State had the right to exercise diplomatic protection and to seek a suitable remedy if one of its nationals had suffered injury caused by another State, even if that person's own conduct elicited the wrongful response by the foreign State. Putting aside the "clean hands" doctrine would allow the Commission to become more focused on matters of a practical nature that needed further elaboration.

18. The delegate of **Libya** said the draft articles did not make references to such important issues as who had the right to provide diplomatic protection, and what the effects of such protection were.

19. The delegate of **People's republic of China** agreed it was not necessary to include the "clean hands" doctrine in the draft articles.

20. The delegate of **Republic of Korea** said the argument for the "clean hands" doctrine to be included overlooked the basic nature and function of diplomatic protection.

III. UNILATERAL ACTS OF STATES

A. BACKGROUND

1. In the report on the work of its 48th 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 49th 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 Cedano,as the Special Rapporteur for the topic.

3. At its 50th 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 51st session the ILC considered the Second Report of the Special Rapporteur[32] 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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[32] 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[33], along with the text of the replies received from States[34] 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[35] of the Special Rapporteur and the text of replies received from States to the questionnaire[36] on the topic circulated on 31 August 2001.

9. At its fifty-fifth session (2003), the Commission considered the sixth report of the Special Rapporteur[37]. The Commission also considered and adopted the recommendations contained in parts 1 and 2 of the report of the Working Group on the scope of the topic and the methods of the work.

10. At its fifty-sixth session (2004) the Commission considered the seventh report[38] of the Special Rapporteur, 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 examples of unilateral acts.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

11. At the present session, the Commission considered the eighth report[39] of the Special Rapporteur on the topic. The report contained an analysis of 11 cases of State practice and the conclusions thereof. A Working Group on Unilateral Acts was reconstituted and its work focused on the study of State practice and on the elaboration of preliminary conclusions on the topic, which the Commission should consider at its next session.

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[33] A/CN.4/505.
[34] A/CN.4/500 and Add.1.
[35] A/CN.4/525 and Add.1 and 2.
[36] A/CN.4/524.
[37] A/CN.4/534
[38] A/CN.4/542 and Corr.1(French only), Corr.2 and Corr.3.
[39] A/CN.4/557

a. Report of the Special Rapporteur

12. The first part of the eighth report of the Special Rapporteur contained a detailed presentation of 11 examples or types of unilateral acts of various kinds. The examples were a fairly broad and representative sample of unilateral acts ranging from a diplomatic note on recognition of one State's sovereignty over an archipelago to statements by the authorities of a Untied Nations host country about tax exemptions and other privileges and immunities.

13. The examples analyzed in the report of the Special Rapporteur are the following: note dated 22 November 1952 from the Minister for Foreign Affairs of Colombia; statement by the Minister for Foreign Affairs of Cuba relating to the supply of vaccines to the Eastern Republic of Uruguay; waiver by Jordan of claims to the territories of the West Bank; statement by Egypt of 24 April 1957; statements by the Government of France concerning the suspension of nuclear tests in the South Pacific; protests by the Russian Federation addressed to Turkmenistan and Azerbaijan; statements made by the nuclear-weapon States; Ihlen Declaration of 22 July 1919; Truman Proclamation of 28 September 1945. The statements or acts of the Swiss Government authorities addressed to an international organization were also considered, i.e., statements relating to the United Nations and its staff (tax exemptions and privileges). Lastly, the various types of conduct of two States in the context of a case before the International Court of Justice were considered, i.e., the positions of Cambodia and Thailand in the *Temple of Preah Vihear* case.

14. The second part of the report presented the conclusions drawn from the cases discussed. Several members voiced satisfaction over the examples analyzed in the eighth report. Some members thought it was evident from the study of the examples cited in the eighth report that the existence of unilateral acts producing legal effects and creating specific commitments was now beyond dispute. It was felt that after establishing a definition the Commission should study the capacity and authority of the author of a unilateral act.

b. Conclusions of the Working Group

15. The open-ended Working Group on Unilateral Acts of States was reconstituted. The Working Group acknowledged that while it could be stated in principle that the unilateral conduct of States could produce legal effects, whatever form that unilateral conduct might take, it would attempt to establish some preliminary conclusions in relation to unilateral acts stricto sensu. The Working Group also briefly considered questions relating to the variety of unilateral acts and their effects, the importance of circumstances in assessing their nature and effects, their relationship to other obligations of their authors under international law and the conditions of their revision and revocability.

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

16. The Commission would welcome comments and observations from Governments on the revocability and modification of unilateral acts. In particular, it would be interested to hear about the practice relating to the revocation or modification of unilateral acts, any particular circumstances and conditions, the effects of a revocation or a modification of a unilateral act and the scope of possible third party reactions in that respect.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTIETH SESSION (2005)

17. The delegate of **Japan** noted that the topic had been under consideration for nine years and that some members of the Commission had expressed their doubts as to the appropriateness of the topic for codification. He believed that the elaboration of a legal regime on the subject would contribute to the legal effect of certain unilateral acts and thereby enhance certainty and stability in international relations.

18. The delegate of **Kenya** said the examination of State practice, including actual examples as included in the report of the Special Rapporteur, could greatly assist in the quest to define and develop important concepts on unilateral acts. It was critical to formulate a clear definition of unilateral acts of States, their capability of creating legal obligations, and to distinguish such acts from those that created political obligations. A definition should be narrow in scope so as not to infringe on the rights of States to make political pronouncements.

19. The delegate of **Libya** said there were some pitfalls in its codification, notably in the nature of the subject itself. There should be agreement on the need for the study in the first place. The work on the topic should be preliminary. He said unilateral acts were often taken by States for political purposes. It would be difficult for a single text to be adopted to cover all unilateral acts.

20. The delegate of **People's Republic of China** said that intensifying the studies on unilateral acts of States, and determining the conditions under which unilateral acts of States could produce legal effects, would help maintain the stability and predictability of international relations.

21. The delegate of **Republic of Korea** said that to protect the rights of addressees and preserve legal stability in the international community, it should in principle not be permissible for States to revoke or modify unilateral acts freely, unless the State under obligation and the addressees of the acts agreed. She added that, since the topic had been on the Commission's agenda for almost a decade now, the Commission should focus on what it intended to create as the final outcome of its deliberations.

IV. 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[40]. 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 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 its fifty-fifth session, in 2003, the Commission considered the first report[41] of the Special Rapporteur and referred three draft articles to the Drafting Committee. The Commission further adopted articles 1 to 3 as recommended by the Drafting Committee together with commentaries.

4. At its fifty-sixth session, in 2004, the Commission considered the second report[42] of the Special Rapporteur and referred four draft articles to the Drafting Committee. Based on the Drafting Committee report, the Commission adopted draft articles 4 to 7 and commentaries thereto.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

5. At the present session the Commission had before it the third report[43] of the Special Rapporteur, proposing nine draft articles dealing with the existence of a breach of an international obligation by an international organization and the responsibility of an international organization in connection with the act of a State or another international organization.

6. Following the consideration of the report of the Special Rapporteur the Commission referred nine draft articles to the Drafting Committee.

7. Further the Commission considered the report of the Drafting Committee and adopted draft articles 8 to 16[15] together with commentaries thereto. These are: article 8 (Existence of a breach of an international obligation), article 9 (International obligation in force for an international organization), article 10 (Extension in time of the breach of an

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[40] Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10(A/55/10), chap., IX para.729.
[41] A/CN.4/532
[42] A/CN.4/541
[43] A/CN.4/553

international obligation), article 11 (Breach consisting of a composite act), article 12 (Aid or assistance in the commission of an internationally wrongful act), article 13 (Direction and control exercised over the commission of an internationally wrongful act), article 14 (Coercion of a State or another international organization), article 15[16] (Decisions, recommendations and authorizations addressed to member States and international organizations) and article 16[15] (Effect of this chapter).

8. An overview of the draft articles provisionally adopted by the Commission is as follows.

Article 8
Existence of a breach of an international obligation

> 1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.
>
> 2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.

9. The wording of paragraph 1 corresponds to that of article 12 on Responsibility of States for Internationally Wrongful Acts. An international obligation may be owed by an international organization, to the international community as a whole, one or several States, whether members or non-members, another international organization or other international organizations and any other subject of international law. Further, an international obligation 'regardless of its origin' is intended to convey, as mentioned in the commentary to article 12 on 'Responsibility of States for internationally Wrongful Acts'[44] that the "international obligation may be established by a customary rule of international law, a treaty or a general principle applicable within the international legal order".

10. Paragraph 2 underlines the fact that most obligations of an international organization are likely to arise from the rules of the organization which include the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization. However, the legal nature of the rules of the organization is to some extent controversial as whether all the obligations arising from rules of the organization are to be considered as international obligations. Paragraph 2 does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present draft apply.

[44] Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), p. 126.

Article 9
International Obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.

11. This provision is similar to article 13 on 'Responsibility of States for Internationally Wrongful acts'. This provision states the basic principle, that for responsibility to exist, the breach must occur at a time when the organization is bound by the obligation. This is the application of the general principle of intertemporal law in the field of responsibility of international organizations. It provides an important guarantee and in keeping with the idea of a guarantee against the retrospective application of international law in matters of responsibility. In international law, the principle stated in this provision is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility had accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty, which has been breached or of a change in international law.

Article 10
Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

12. This provision is similar to article 14 of the 'Responsibility of States for Internationally Wrongful Acts'. This draft article establishes certain basic concepts with regard to the existence and duration of a breach of an international obligation. It provides the distinction between breaches not extending in time and continuing wrongful acts and also deals with the application of that distinction to the cases of obligations of prevention.

13. In accordance with paragraph 1, a completed act occurs "at the moment when that act is performed", even though its effects or consequences may continue. The words "at the moment" are intended to provide a more precise description of the time frame when a completed wrongful act is performed, without requiring that the act necessarily be completed in a single instant.

14. Paragraph 2 applies to wrongful acts covering entire period during which the act continues and remains not in conformity with the international obligation provided that organization is bound by the international obligation during the period. Examples of

continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises.

15. Paragraph 3 deals with the temporal dimensions of a particular category of breaches of international obligations, namely the obligations to prevent the occurrence of a given event. The breach of an obligation of prevention may also be a continuing wrongful act. For example, the obligation to prevent transboundary damage by air pollution was breached for as long as the pollution continued to be emitted. However, if the obligation in question was only concerned to prevent the happening of the event in the first place, there will be no continuing wrongful act.

Article 11
Breach consisting of a composite act

> 1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
>
> 2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

16. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct. Composite acts covered by this draft article are limited to breaches of obligations, which concern some aggregate of conduct and not individual acts as such. In other words their focus is "a series of acts or omissions defined in aggregate as wrongful". Examples include the obligations concerning genocide, apartheid or crimes against humanity.

17. A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e., an act defined in aggregate as wrongful.

18. In accordance with paragraph 1 the actions or omissions must be part of a series but it does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. Further, the fact that series of actions or omissions was interrupted so that it was never completed will not necessarily prevent those actions or omissions, which have occurred being classified as a composite wrongful act if, taken together, they are sufficient to constitute the breach.

19. Paragraph 2 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as

such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act, but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission.

Article 12
Aid or assistance in the commission of an internationally wrongful act

> An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:
>
> (a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) The act would be internationally wrongful if committed by that organization.

20. This draft article provides limits on the scope of responsibility for aid or assistance in three ways. First, the organization providing aid or assistance must be aware of the circumstances making the conduct of the assisted State or organization internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting organization itself.

Article 13
Direction and control exercised over the commission of an internationally wrongful act

> An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:
>
> (a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) The act would be internationally wrongful if committed by that organization.

21. This article provides two conditions for making an organization internationally responsible for directing and controlling a State or another international organization in the commission of an internationally wrongful act. First, the directing or controlling organization is only responsible if it has knowledge of the circumstances making the conduct of the State or the other organization wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling organization itself.

22. In the relations between an international organization and its member States and international organizations the concept of “direction and control” could conceivably be extended so as to encompass cases in which an international organization takes a decision

binding its members. The assumption is that the State or international organization, which is the addressee of the decision, is not given discretion to take conduct that, while complying with the decision, would not constitute an internationally wrongful act.

Article 14
Coercion of a State or another international organization

> An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:
>
> (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and
>
> (b) The coercing international organization does so with knowledge of the circumstances of the act.

23. This draft article corresponds to article 18 of the Responsibility of States for Internationally Wrongful Acts. This provision is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State's or origination's obligation to a third entity. In such cases the responsibility for the coercing organization with respect to the third entity derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State or organization.

Article 15
Decisions, recommendations and authorizations addressed to member States and international organizations

> 1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.
>
> 2. An international organization incurs international responsibility if:
>
> (a) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and
>
> (b) That State or international organization commits the act in question in reliance on that authorization or recommendation.
>
> 3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.

24. Under paragraph 1, in the case of a binding decision, it is not necessary to stipulate as a pre-condition, for international responsibility of an international

organization to arise, that the required act be committed by member States or international organizations. Since compliance by members with a binding decision is to be expected, the likelihood of a third party being injured would then be high. This paragraph also assumes that compliance with the binding decision of the international organization necessarily entails circumvention of one of its international obligations.

25. Paragraph 2 deals with cases in which an international organization circumvents one of its international obligations by recommending or authorizing a member State or international organization the commission of a certain act. Under this paragraph, for international responsibility to arise, the first condition is that the international organization authorizes an act that would be wrongful for that organization and moreover would allow it to circumvent one of its international obligations. Since the recommendation or authorization in question is not binding, and may not prompt any conduct, which conforms to the recommendation or authorization, a further condition laid out as specified under sub paragraph (a), the act, which is recommended or authorized, is actually committed. Further, under sub paragraph (b), the act in question has to be committed in reliance of that authorization or recommendation. This condition implies a contextual analysis of the role that the recommendation or authorization actually plays in determining the conduct of the member State or international organization.

26. Paragraph 3 makes it clear that, unlike draft articles 12 to 14, draft article 15 does not base the international responsibility of the international organization that takes a binding decision, or authorizes or recommends, on the unlawfulness of the conduct of the Member State or international organization.

Article 16
Effects of this Chapter

> This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

27. This draft article corresponds to article 19 of the Responsibility of States for Internationally Wrongful Acts. It is a ‘without prejudice’ clause covering the whole Chapter. It preserves the responsibility of the State or international organization which has committed the internationally wrongful act, though with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing international organization does not preclude the responsibility of the assisted, directed or coerced State or organization.

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

28. The next report of the Special Rapporteur will address questions relating to
(1) Circumstances precluding wrongfulness, and
(2) Responsibility of States for the internationally wrongful acts of international organizations.

29. The Commission would welcome comments and observations relating to these questions, especially on the following points:

30. (a) Article 16 of the articles on Responsibility of States for internationally wrongful acts only considers the case that a State aids or assists another State in the commission of an internationally wrongful act. Should the Commission include in the draft articles on responsibility of international organizations also a provision concerning aid or assistance given by a State to an international organization in the commission of an internationally wrongful act? Should the answer given to the question above also apply to the case of direction and control or coercion exercised by a State over the Commission of an act of an international organization that would be wrongful but for the coercion?

31. (b) Apart from the cases considered above, are there cases in which a State could be held responsible for the internationally wrongful act of an international organization of which it is a member?

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTIETH SESSION (2005)

32. The delegate of **Arab Republic of Egypt** said Egypt agreed with the conclusions of the Special Rapporteur on the topic.

33. The delegate of **India** said the issue of whether all the obligations arising from the rules of an organization were to be considered as international obligations was controversial. He believed the relevant paragraph in the draft articles would apply only to the extent that an obligation arising from the rules of an organization had to be regarded as an obligation under international law; therefore, rules, which were merely procedural or administrative in nature, would not get covered. Also, in certain cases, determination of the responsibility of the organization on the basis of rules of the organization would lead to the assessment of the collective responsibility of the member States who set the organization's policy. He said an action at the behest of an international organization that was in breach of the international legal obligations of the State and the organization required further in-depth examination.

34. The delegate of **Indonesia** said the situation had presented a challenge in outlining a "one-fit-for-all" formula. He agreed that the draft articles should, to the extent possible, follow those in relation to "state responsibility for internationally

wrongful acts". However, the question of responsibility of an international organization had not been examined thoroughly in international tribunals, other than in the European hemisphere.

35. The delegate of **Japan** said that, given the diversity that existed with regard to the legal status, structure, activities and membership of international organizations, it was difficult to lay down guiding principles that applied to every organization. He commended the Special Rapporteur for facilitating consideration of the topic and said that he believed that the general direction being taken was the right one. While it was prudent to follow the basic structure of the draft articles on State responsibility and to modify them when they did not apply to international organizations, those draft articles could serve only as a starting point.

36. An internationally wrongful act committed by a member State of an international organization could give rise to responsibility on both the part of the organization and the State. That was one of the differences, he continued. The draft articles and commentary were somewhat ambiguous on that point and further analysis was needed. As article 15 did not specify the responsibility of the member State or States that committed an internationally wrongful act, clarification was needed. There was a particular lack of clarity on points, such as the allocation of responsibility between international organizations and their member States.

37. The delegate of **Jordan** said the draft articles provisionally adopted by the Commission generally corresponded to the relevant articles on the responsibility of States for internationally wrongful acts. He said there was limited international practice or judicial decision-making to guide States on the propriety of the approach adopted by the Commission. However, there was no reason, he said, for the Commission not to continue on that methodology, to the extent that the rules reacted to a situation involving the "judicial personality" of the international organization and its independent legal capacity. Yet, the issue became more complicated when the rules involved the special character of the international organization and its relationship with member States or other international organization. He said the same could be said about the organization's relationship with third States or organizations giving rise to the breach of the international obligation. He said the Commission should explore further the possibility of distinction between third States and international organizations which committed the breach and the situation of a breach by a member State or a member international organization. He said the draft articles should give general guidance on the determination of the existence of a breach, otherwise a gap would exist in relation to their application.

38. The delegate of **People's Republic of China** said that, on the whole, China could support the nine draft articles. However, he added a few comments on the specifics of some of them. Whether an omission on the part of an international organization constituted an internationally wrongful act depended fundamentally on whether the organization was explicitly obligated under international law to take action. He suggested further study to determine whether there was a justification in distinguishing between an organization's recommendations and its authorizations, as being different from its decisions, because responsibility arose only when the former were implemented

by member States. He said it seemed necessary to include a provision on a State's international responsibility when aided or assisted, directed and controlled or coerced by an international organization in the commission of an internationally wrongful act. As a rule, he added, decisions and actions of an international organization were under the control of or relied on the support of member States.

39. The delegate of **Republic of Korea** said the questions of aid or assistance by a State in the commission of an internationally wrongful act, and also a provision on direction, control or coercion exercised by a State, should be included in the draft articles. He added that the question of whether a member State of an international organization that had committed a wrongful act should be held responsible was still controversial. The complexity was evident when the considerable diversity among international organizations, in their membership, structure and functions, was taken into account. If a unified legal solution were not developed, injured third parties were likely to go "forum shopping". He proposed such measures as informing potential injured third parties of the scope of responsibility of member States regarding specific acts of international organizations, and the establishment of an international fund to address unforeseen situations.

40. The delegate of **Sierra Leone** referred to discussions on a proposal his country had made, namely, the responsibility of member States of an international organization for the organization's conduct, as a result of membership or their conduct associated with membership. He said he would welcome a detailed consideration of the item at the Law Commission's next session. The Commission should carefully examine the argument that members and the international organization shared "joint and several responsibility", with the possibility of adjusting it to a regime of proportionate responsibility-sharing.

V. 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.[45] 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 its fifty-fifth session (2003), the Commission decided to establish 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. The Study Group set a tentative schedule for work to be carried out during the remaining part of the present quinquennium (2003-2006), distributed among members of the Study Group work on the other studies agreed and decided upon the methodology to be adopted for that work.

4. At its fifty-sixth session (2004), the Commission reconstituted the Study Group. It held discussions on the study "Function and Scope of the *lex specialis* rule and the question of 'self-contained regimes', as well as discussions on the outlines prepared in respect of the other remaining studies.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

5. At the current session the study Group was reconstituted and it had before it the following: (a) a memorandum on regionalism in the context of the study on "the function and scope of the *lex specialis* rule and the question of self contained regimes"; (b) a study on the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna

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[45]. The members of the Study Group are as follows: E. Addo, I. Brownlie, E. Candioti, C. Dugard, P. Escarameia, G. Gaja, Z. Galicki, M. Kamto, J. Kateka, F. Kemicha, M. Koskenniemi, W. Mansfield, D. Momtaz, B. Niehaus, G. Pambou-Tchivounda, A. Pellet, P. Rao, R. Rosenstock, B. Sepulveda, B. Simma, P. Tomka, H. Xue, C. Yamada, V. Kuznetsov (ex officio).

Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community; (c) a study on the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the law of Treaties); (d) a study on the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties); and (e) a study on hierarchy in international law: *jus cogens*, obligations *erga omnes*, article 103 of the Charter of the United Nations, as conflict rules. The Study Group also had an informal paper in the "Disconnection clause".

6. The Commission held an exchange of views on the topic on the basis of a briefing by the Chairman of the Study Group on the status of work of the Study Group.

a. Report of the Study Group

7. The Study Group reaffirmed its approach to focus on the substantive aspects of fragmentation in the light of the Vienna Convention on the Law of Treaties, while leaving aside institutional considerations pertaining to fragmentation. It reiterated its intention to attain an outcome that would be concrete and of practical value especially for legal experts in foreign offices and international organizations. It was also of the view that its work would be of helpful in providing resources for judges and administrators.

8. The Study Group reaffirmed its intention to prepare a single collective document consisting of two parts. Part one would contain analytical study based on the studies submitted by individual members of the Study Group and part two would contain a condensed set of conclusions, guidelines or principles emerging from the studies and the discussions in the Study Group.

1. Discussion of a memorandum on "regionalism" in the context of the study on the "Function and scope of the *lex specialis* rule and the question of 'self contained regimes'"

9. It was noted in the memorandum that the expression "regionalism" did not figure predominantly in treatises of international law and in the cases in which it was featured it rarely took shape of a rule" or a "principle". It was often raised in discussions concerning the universality of international law, in the context of its historical development and the influences behind its substantive parts. It only arose in rare cases in a normative sense as a claim about regional *lex specialis*. There were at least three distinct ways in which "regionalism" was usually understood, namely, (a) as a set of distinct approaches and methods for examining international law; (b) as a technique for international law making; and (c) as the pursuit of geographical exceptions to universal rules of international law.

10. The first, regionalism as a set of approaches and methods for examining international law was used to denote particular orientations of legal thought or historical and cultural traditions. Examples of this nature are the "Anglo-American" tradition or the

"Continental" tradition of international law, "Soviet" doctrines and "Third World Approaches" to international law.

11. The second, a regional approach to international law-making conceives regions as privileged fora for international law-making because of the relative homogeneity of the interests and actors concerned.

12. The third, regionalism as the pursuit of geographical exceptions to universal rules of international law, which could be analyzed (a) in a positive sense, as a rule or a principle with a regional sphere of validity in relation to a universal rule or principle; or (b) in a negative sense, as a rule or a principle that imposes a limitation on the validity of a universal rule or principle.

13. The Study Group expressed support for the general orientation of the memorandum. Some members noted that "regionalism" generally fell under the problem of *lex specialis*, some still felt that this was not all that could be said about it.

a. "Disconnection clause"

14. The Study Group held a separate discussion on the basis of paper submitted by one of its members about the "disconnection clause". This clause is inserted in many multilateral conventions, according to which in their relations *inter se* certain of the parties to the multilateral convention would not apply the rules of the convention but specific rules agreed among themselves. This clause had been inserted at the request of the members of the European Union.

15. Some members felt that the proliferation of such clauses was a significant negative phenomenon. Such clauses might be illegal inasmuch as they were contradictory to the fundamental principles of treaty law. Others, however, observed that whatever their political motives or effects, they were still duly inserted in the relevant conventions and their validity thus followed from party consent. It was difficult to see on what basis parties might be prohibited from consenting to them. The Study Group agreed, however, that such clauses might sometimes erode the coherence of the treaty.

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

16. According to article 31 (3) (c) of the Vienna Convention on the law of Treaties, treaties are to be interpreted within the context of "any relevant rules of international law applicable in the relations between the parties". This provision helped to place the problem of treaty relations in the context of treaty interpretations. It expressed what could be called a principle of 'systemic integration', i.e. a guideline according to which treaties

should be interpreted against the background of all the rules and principles of international law- in other words, international law *understood as a system*.

17. The revised report by the member of the Study Group offered a series of propositions for consideration. First, according to the principle of 'systemic integration', attention should, in the interpretation of a treaty also be given to the rule of customary international law and general principles of law that are applicable in the relations between the parties to a treaty. Second, whether another treaty is applicable in the relations between the parties this raises the question of whether it is necessary that all the parties to the treaty, being interpreted, are also parties to the treaty relied upon as the other source of international law for interpretation purposes? Third, the problem left open by the formulation article 31 (3) (c) concerned inter-temporality, that is, in regard to the other rules of international law in the interpretation of a treaty, is the interpreter limited to international law applicable at the time the treaty was adopted or may subsequent treaty developments, too, be taken into account?

18. The Study group welcomed the revised paper endorsing in general terms the adoption of an interpretative approach to article 31 (3) (c) that may be of practical use. The Study Group highlighted the flexibility built into article 31 (3) (c). It accepted that the rule referred to in this article included not only other treaty rules but also rules of customary law and general principles of law.

3. Discussion of the preliminary report on "Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules"

19. The report outlined relevant aspects to be considered with respect to the concept of hierarchy in international law. It was noted that norms of *jus cogens*, obligations *erga omnes* and obligations under the Charter of the United Nations (Article 103 of the Charter) should be treated as three parallel and separate categories of norms and obligations, taking into account their sources, their substantive content, territorial scope, and practical application. All three categories were also characterized by weaknesses. (a) norms of *jus cogens* lacked a definitive catalogue and the concept as such was not entirely uncontested; (b) obligations *erga omnes* were often of a very general nature, both in substance and in their application, and they involved 'the legal interests of all States', which may develop over time; (c) unlike norms of *jus cogens* ands obligations *erga omnes*, obligations under Article 103 of the Charter were formally limited to States that are members of the United Nations.

20. In regard to the complex relationship between obligations *erga omnes* and the norms of *jus cogens*, it was observed that while all *jus cogens* obligations had an *erga omnes* character, the reverse was not necessarily true. As regards the relationship between norms of *jus cogens* and the obligations under Article 103 of the Charter some members highlighted its complex nature, while others stressed the absolute priority of the former over the latter.

21. The Study Group identified the need to address the effects of the operation of norms of *jus cogens*, obligations *erga omnes* and obligations under Article 103 of the Charter. Norms of *jus cogens* were non-derogable and the effect of this operation was to produce the invalidity of the inferior norm. By contrast, obligations *erga omnes* related to the opposability of the obligations to all States, in particular to the right of every state to invoke their violation as a basis for State responsibility. It was also observed that distinction should be made between the invalidity of the inferior rule that resulted from the presence of *jus cogens* and the inapplicability of the inferior rule resulting from the operation of Article 103.

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTIETH SESSION (2005)

22. The delegate of **Arab Republic of Egypt** said practical dimensions of the subject needed to be taken into account. He suggested elaboration of guidelines.

23. The delegate of **Japan** said States involved in the rule-making process should try to avoid overlap or conflict with other international instruments. Even if such an effort was made, ambiguity in certain regulations governing the law of treaties could cause problems in producing new rules consistent with other international rules. It was essential for practitioners to have a clear understanding of the relationships among various legal instruments. He said his delegation appreciated the approach taken by the Commission's study group, in concentrating on the issues relating to the Vienna Convention on the Law of Treaties.

24. The delegate of **People's Republic of China** said that the "fragmentation of international law" was not only of theoretical significance but also of major practical importance.

25. The delegate of **Sierra Leon** proposed that the Commission formulate a set of "rules of law principles" in its work.

VI. SHARED NATURAL RESOURCES

A. INTRODUCTION

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. Chusei 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 its fifty-fifth session (2003) the commission considered the first report[46] of the Special Rapporteur on the topic. In furtherance of its work 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).

3. At its fifty-sixth session (2004) the Commission considered the second report[47] 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.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

4. The Commission considered the third report[48] of the Special Rapporteur on the topic, containing a complete set of 25 draft articles on the law of transboundary aquifers. The Commission decided to establish a Working Group to be chaired by Mr. Enrique Candioti to review the draft articles presented by the Special Rapporteur taking into account the debate in the Commission on the topic.

5. The Working Group had the benefit of advice and briefings from experts on groundwaters from UNESCO and the International Association of Hydrogeologists (IAH). It also heard an informal briefing by the Franco-Swiss Genevese Aquifer Authority. The Working Group reviewed and revised 8 draft articles and recommended that it be reconvened in 2006 to complete its work. The Chairman of the Working Group, Mr. Enrique Candioti, introduced the report of the Working Group[49]. The Commission took note of the report.

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[46] A/CN.4/533 and Add. 1
[47] A/CN.4/539 and Add.1
[48] A/CN.4/551 and Corr.1 and Add.1
[49] A/CN.4/L.681 and Corr.1

a. Introduction by the Special Rapporteur

6. While introducing the complete set of 25 draft articles outlined in the third report, the Special Rapporteur recalled that in the 2004 report of the Commission he had already indicated his intention to submit such a complete set on the basis of the general outline. The Special Rapporteur observed that the need for an explicit reference to General Assembly resolution 1803 (XVII), on permanent sovereignty over natural resources, had been advocated by some delegations in the debate of the Sixth Committee. He observed that such a reference could be made in the preamble of the draft Convention.

b. Summary of the Debate

7. Members of the Commission commended the Special Rapporteur for his third report and his continuing efforts to elaborate on the topic, taking into account the views of Governments, and to enrich its understanding by consulting and seeking the scientific advice of groundwater experts. Some members noted that some of the principles were couched with high degree of generality and abstraction, thus giving rise to doubts as to whether, in practice, they would be helpful in providing sufficient guidance to States. Others pointed out the inevitability of such formulation.

8. Some members underlined the paucity of State practice in the area and its impact on the work of the Commission. It was doubted whether there was sufficient State practice on which the Commission could proceed with codification exercise. It was considered that the law in the area was still in its rudimentary stages and thus, the work would largely proceed as a matter of progressive development or analogously taking the 1997 Convention as a point of departure.

9. Some members noted that, in the elaboration of the draft articles, the overriding consideration was the utilization and protection of aquifers, which could effectively be accomplished through bilateral and regional approaches. The Commission should therefore not aim at providing universal solutions but general principles that would guide and encourage bilateral or regional solutions.

10. On the issue of reference to General Assembly resolution 1803(XVI) concerning the permanent sovereignty over natural resources some members supported the Special Rapporteur's suggestion of including in the preamble. However, some other members felt that the principle was central to the topic and deserved full treatment in a separate draft article. Such a reference would dispel any criticism that groundwaters were a common heritage of humankind. Some other members doubted that there was any role for the principle in the draft articles.

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

11. Under this topic, the Commission is now focusing for the time being on the codification of the law on transboundary groundwaters (aquifers and aquifer systems).

The work is progressing in the form of the elaboration of draft articles on the basis of the proposals by the Special Rapporteur contained in his third report and Corr.1.

12. In its 2004 report, the Commission requested States and relevant intergovernmental organizations to provide information in reply to the questionnaire prepared by the Special Rapporteur. The responses received from 23 States and 3 intergovernmental organizations were very useful for the Commission in its current work. Accordingly, the Commission requests those States and intergovernmental organizations that have not yet responded to submit detailed and precise information on the basis of the questionnaire prepared by the Special Rapporteur.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTIETH SESSION (2005)

13. The delegate of **Arab Republic of Egypt** noted that the draft articles constituted a framework convention, including guidelines. He proposed an addition of a paragraph in the preamble about the obligation for all countries that shared aquifers. Those countries should conclude an agreement in respect to international law. The agreement would be binding for the parties and also serve as a reference point for third parties. It would be useful to draw a link between the draft articles and the 1997 Convention on the Transboundary Navigational Uses of Watercourses. The equitable utilization of shared aquifers could prevent conflicts. It was necessary that a distinction was drawn between "recharging aquifer" and "non-recharging aquifer" in article 2(e) and (f).

14. He proposed the rewording of article 3 on bilateral and regional arrangements, to read: "The parties to an arrangement referred to in para 1 shall consider harmonizing such arrangement where necessary with basic principles of the present convention… This convention shall not alter the rights and obligations of States parties which arise from agreements compatible with this convention and which do not affect the enjoyment by other States parties of their rights or the performance of their obligations under this convention."

15. He noted that the provisions of article 5(2) reflected those of article 311 of the United Nations Convention on the Law of the Sea. The draft articles should not align themselves to those provisions. As regards article 13, on the protection of recharge and discharge zones, he said a compulsory notice should be given to aquifer States, regarding detrimental impacts on the recharge process.

16. The delegate of **India** said that difficulties arose from modeling the draft articles on provisions in the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses. The draft articles, he added, were not supported by sufficient State practice. Context-specific agreements and arrangements were the best way to address questions relating to transboundary groundwaters or aquifer systems.

17. The delegate of **Indonesia** said that permanent sovereignty over natural resources was exercised in the interest of national development and well-being of the people of a State. Transboundary aquifers should be subject to the national jurisdiction of the States in whose territory the aquifer was located.

18. The delegate of **Japan** said it was appropriate for the Commission to have chosen "transboundary groundwaters" as the first subject of its study on the topic of shared natural resources. The shortage of groundwater resources, as a result of overexploitation and pollution, was now one of the clear and imminent environmental threats. The Commission should avoid being overly ambitious by trying to incorporate premature rules and instruments into a text. He expressed concern that the incorporation of provisions on the precautionary principle or the duties of non-aquifer States might result in long years of unnecessary debate; he suggested that to hasten its pace, the Commission address the issue in a realistic manner. He supported the proposal by the Special Rapporteur on differentiating the treatment between recharging and non-recharging aquifers. If a reference to "compensation" were to be made in the instrument, it should be kept in a non-obligatory form. He also agreed that it was more appropriate at this stage to concentrate on the substance of the topic rather than the final form of an instrument.

19. The delegate of **Jordan** said that, as there was no existing special legal regime on transboundary aquifers, the Commission's work on the topic was predominantly progressive development of international law. While there were certain similarities between the issues, the legal framework between transboundary aquifers and the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses should be sufficiently distinct.

20. Commenting specifically on the draft articles, he said it was important to include an explicit reference to the General Assembly resolution on the permanent sovereignty over natural resources. It should be made clear that groundwaters, whether subject to one national jurisdiction or transboundary, were not a common heritage for mankind. The utilization of transboundary aquifers should be the core of the scope of the articles. Measures of protection, preservation and management should be part of the scope to the extent they were related to the rights OF other aquifer States in utilization. Later on, he said, it might be necessary to add other definitions, especially in relation to scientific thresholds describing certain activities. He supported the approach to encourage bilateral and regional arrangements among aquifer States. It should be clarified that an agreement among aquifer States prevailed over the draft articles in case of conflict. The general obligation to cooperate among aquifer States should be studied more carefully because it entailed legal consequences for States which otherwise would have unqualified sovereign right to utilization of the aquifer.

21. The delegate of **Kenya** expressed the hope that future work on shared natural resources would include such resources as oil and gas. Given the potential impact of the exploitation of groundwaters on the environment, the Special Rapporteur should consider expanding the scope of the consultations to include international bodies such as the United Nations Environment Programme (UNEP) that dealt with environmental issues.

He welcomed the emphasis given to bilateral and regional arrangements, and proposed that the convention should include guiding principles that would enable States to elaborate more specific bilateral and regional arrangements. Noting the paucity of State practice on the use and exploitation of transboundary groundwaters, especially in developing countries, he appreciated the inclusion of the article on scientific and technical assistance to developing States.

22. The delegate of **Libya** said international practice on the topic of shared natural resources was extremely limited, and he drew attention to the lack of universality of the 1997 United Nations Convention on the Transboundary Uses of Watercourses.

23. The delegate of **Malaysia,** referring to article 2 of the text on shared natural resources on the law of transboundary aquifers, supported a definition of aquifer (or aquifer system) that recognized that aquifers could consist not only of rock formations but also sand, gravel and soil. He proposed that the term "harmonized" be deleted from article 10, saying it may impose too high an obligation upon aquifer States to establish standards and methodologies for monitoring transboundary aquifer or aquifer systems that were applicable across the board. He supported the use of the word "encouraged" in article 14 in relation to the taking of a precautionary approach by aquifer States in respect to pollution. He recommended that the protection under article 21 be extended to industrial secrets and intellectual property.

24. The delegate of **Nigeria** appreciated the fact that draft article 18 provided for scientific and technical assistance to developing countries.

25. The delegate of **People's Republic of China** said that a legal text should make an explicit reference to the sovereign rights of States over their aquifers as a natural resource. Since the topic of "transboundary aquifer systems" was no longer limited to transboundary confined groundwaters, which might communicate with surface waters, it should be noted that there was no overlap with the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. Concerning the meaning of several principles related to the topic, he suggested that the Commission study the practice of relevant States and make further proposals based on ample scientific evidence. He also recommended proceeding cautiously in deciding upon the form of a final legal instrument, so as to avoid imposing unreasonable constraints on the sovereign rights of States in utilizing aquifers and in resolving questions relating to transboundary aquifer systems through consultations.

26. The delegate of **Republic of Korea** said the issue of transboundary groundwaters affected only a limited number of States, and was not especially relevant to many others. She urged the Commission also to move on to other topics, such as oil and gas, which might be more complex and difficult to handle, but were relevant to a much greater number of States. She said she thought she was expressing the common wishes of the many silent non-aquifer States. As to an instrument on transboundary groundwaters, she suggested that the Commission codify a model regional convention that would be acceptable to all States in a given region.

27. The delegate of **Turkey** said the titles of the topic "shared natural resources" might give rise to misunderstanding and recommended changing the name. She questioned whether the 1997 Convention on the Non-Navigational Uses of International Watercourses, as a model for the subject of shared natural resources, was the best choice. That Convention had not been adopted by consensus, and it had not yet entered into force, indicating that it did not enjoy broad support. As to the form of a final legal instrument, she said she supported that of non-binding guidelines. She also fully supported the condition to establish a threshold for damages caused, and the inclusion of the word "significant" in that context.

VII. EFFECTS OF ARMED CONFLICTS ON TREATIES

A. BACKGROUND

1. At its Fifty-second session (2000) the Commission identified the topic "Effects of Armed Conflicts on Treaties" for inclusion in its long-term programme of work. A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission. In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion.

2. During at its fifty-sixth session (2004), the Commission decided to include the topic "effects of Armed Conflicts on Treaties" in its current progarmme of work and to appoint Mr. Ian Brownlie as Special Rapporteur for the topic. The General Assembly, in paragraph 5 of its resolution 59/ 41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

3. The Commission considered the first report[50] of the Special Rapporteur on the topic. The report presented an overview of the issues involved in the topic together with a set of 14 draft articles in order to assist the Commission and Governments with commenting, including providing State practice. The Commission also had before it a memorandum prepared by the Secretariat entitled, 'The effect of armed conflict on treaties: an examination of practice and doctrine"[51].

4. The Commission endorsed the Special Rapporteur's suggestion that a written request for information be circulated to member Governments requesting information about the practice with regard to the topic, in particular the more contemporary practice as well s any other relevant information.

a. Introduction by the Special Rapporteur

5. The Special Rapporteur observed that he had produced an entire set of draft articles providing an overall view of the topic and of the issues that it involves, in order to assist the Commission and Governments with commenting, including providing State practice, on the topic. The basic policy underlying the draft articles was to clarify the legal position and to promote and enhance the security of legal relations between States.

6. The Special Rapporteur explained that the draft articles were intended to be compatible with the Vienna Convention on the Law of Treaties. There was a general assumption that the subject matter under examination formed a part of the law of treaties, not a development of the law relating to the use of force and recalled that the Vienna Convention, in article 73, had expressly excluded the subject.

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[50] A/CN.4/552
[51] A/CN.4/550 and Corr. 1

b. Summary of the debate

7. There was a general support for the Special Rapporteur's decision to provide an entire set of draft articles. Reference was also made to the memorandum prepared by the Secretariat which was considered extremely helpful in understanding the substance and complexity of the issues at hand.

8. A view was expressed that the Special Rapporteur's report was too concise in that it provided little guidance as to how the solutions proposed related to past or existing State practice. It was pointed out that a thorough analysis of available practice could prove catalytic by inducing Stats to produce possibly divergent practice.

9. Some members pointed out that the draft articles should be compatible with the purposes and principles of the Charter of the United Nations. In particular, they should take into consideration the illicit character of recourse to force in international relations and fundamental distinction between aggression and legitimate individual or collective self defence or the use of force in the context of collective security system established by the United Nations.

10. Support was expressed for the Special Rapporteur's desire to encourage continuity of treaty obligations in armed conflict in cases where there was no genuine need for suspension or termination, as well as for the view that the Commission should not be bound by some of the rigid doctrines of the past that would inhibit such continuity.

11. Some members expressed support for approaching the topic within the context of the Vienna Convention on the law of Treaties. Others felt that it was not necessary to specify the location of the topic within the broader field of international law. Reference was also made to the fact that it was in the nature of the topic that it had undergone significant developments over time owing to changes in the formalities and modalities of modern armed conflict as well as in the international legal regime governing the recourse to armed force, particularly since World War II.

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

12. The Commission would welcome any information Governments may wish to provide concerning their practice with regard to this topic, particularly more contemporary practice. Any further information that Governments consider relevant to the topic is also welcome.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTIETH SESSION (2005)

13. The delegate of **India** said he agreed with the approach of the Special Rapporteur. The topic presented several difficulties, since the nature of the subject was dominated by doctrines and supported with sparse practice.

14. The delegate of **Indonesia** said they were only applicable to armed conflict of an international character. He said he was open to the suggestion of broadening the scope of application to include treaties concluded between States and international organizations.

15. The delegate of **Iraq** said the draft articles on the effects of armed conflict on treaties formed a good basis for the discussion. However, the draft articles limited the scope of their application to treaties between States and did not extend to those concluded with international organizations. He found that approach to be very restrictive. Concerning draft articles 2, he favoured the inclusion of non-international armed conflicts in the draft. As to draft article 3, on the termination or suspension of a treaty during an armed conflict, he said that while continuity of treaties was an important factor in an examination of the study, continuity actually ran counter to the practice of States. Armed conflict usually led to the suspension of treaties between States. He therefore believed that the draft articles were lacking in realism in that regard, and needed to be redrafted taking the practice of States into account.

16. The delegate of **Islamic Republic of Iran** said he supported the Special Rapporteur's basic approach on the topic of the "effects of armed conflicts on treaties", in presenting a set of draft articles to clarify the legal position and to promote the security of legal relations between States. However, the subject was not limited to the law of treaties; it had a close relationship with other domains of international law.

17. Referring to draft article 2 (b) which defined the term "armed conflict", he said the scope had been broadened to include internal conflicts. However, those conflicts should not have any effect on treaties concluded between the State which is facing such a situation and the third State(s). In a case where such State failed to meet its treaty obligations, it should be dealt with under the law of State responsibility. Moreover, the impossibility of performance for a State, which is facing such a situation, should be duly considered. He also offered observations on several other articles, including article 10, saying that it was quite clear and beyond question that the State which exercised the right of self-defence could not be put on the same footing with a State that committed an act of aggression. The draft article was not appropriately drafted, in that it would assist a State in perpetrating a wrongful act.

18. The delegate of **Japan** said his delegation was not certain whether it was correct, under the United Nations Charter, to assume that there was no difference in the legal effect concerning treaty relations between an aggressor State and a self-defending State. That point needed careful consideration at the Law Commission session next year. As regards article 4, he said the Commission should consider other criteria than "intention", as proposed by the Special Rapporteur. It was not clear whether it was appropriate to deal with concepts of mode of suspension or termination, proposed in article 8 of the draft articles. The Commission should study the possible difference between the legal

effects of suspension and those of termination in that context, and decide whether there was a need to distinguish those concepts.

19. The delegate of **Jordan** said the challenge for work on "effects of armed conflicts on treaties" was for the International Law Commission to elaborate an instrument that best served the common interest of States in respect for the rule of law. Once that principle was established, the various doctrines on the issue would become useful, with all the relevant elements being considered, including: the nature and scope of the conflict, the content of the treaty rules affected by such a conflict and the intent of the parties to the relevant treaty.

20. The delegate observed that Jordan agreed that the topic was distinct from the issue of legality of the use of force. If the rules of international law did not prohibit termination or suspension of a treaty, then the exercise of such a right should not be affected by the characterization of the use of force. He said that creating a relationship in the draft articles between the legality of the use of force and the right to suspend or terminate a treaty would lead to pronouncements on the authority of certain United Nations bodies to decide on the application of treaties. He went on to examine some of the draft articles, stating that, for instance, with regard to article 1, his delegation favoured the possible inclusion, in the scope of the draft text, treaties to which international organizations were parties. The application of treaties during wartime affected such organizations, he said.

21. The delegate of **Nigeria** believed the draft articles on effects of armed conflict on treaties should take into account the wrongful character of recourse to force in international relations, and the fundamental distinction between aggression and legitimate individual or collective self-defence. He agreed that the scope should include both internal and international armed conflicts, taking into account that some internal conflicts usually ended up with wider regional and/or international repercussions.

22. The delegate of **People's Republic of China** said the Special Rapporteur's approach of limiting the study to treaties between States was too narrow, because some treaties entered into by international organizations were also affected by armed conflicts. Also, as to the scope of "armed conflict", it was so broad that it was possible that military action taken by a State internally against rebel groups might be inappropriately included. He basically agreed with the view that the outbreak of armed conflict did not necessarily terminate or suspend the operation of treaties. However, he added that comprehensive consideration was needed to determine whether a treaty continued to be valid, and one of the important elements in that consideration was the intention of the States parties when they concluded the treaty. He added that the legitimacy of the use of force had a bearing on treaty relations.

23. The delegate of **Republic of Korea.** said the Law Commission should restrict the topic of effects of armed conflict on treaties to agreements between States. Differing effects on the parties to treaties, depending on whether they were States or organizations, would make the draft more complicated and unmanageable. As to defining the concept of armed conflict, it would be superfluous and unnecessary for the Commission to try to

codify the concept which would be further developed in the field of international humanitarian law. He made several observations on the scope of the term “armed conflict” in articles 1 and 2. He suggested that article 4 could be improved upon, since the mere criteria of the intention of the parties might not be enough to determine the termination or suspension of treaties.

VIII. EXPULSION OF ALIENS

A. BACKGROUND

1. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, inter alia, the topic of "Expulsion of Aliens" for possible inclusion in the Commission's long term programme of work and which was subsequently done at the fifty-second session (2002). A brief syllabus describing the possible overall structure of and approach to the topic was annexed to that year's report of the Commission. In [paragraph 8 of 55/152 of 12 December 2000 the General Assembly took note of the topic's inclusion in the long-term programme of work.

2. During its fifty-sixth session (2004), the Commission decided to include the topic 'Expulsion of Aliens" in its current programme of work, and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic. The General Assembly, in its resolution 59/ 41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

3. The Commission considered the preliminary report[52] of the Special Rapporteur on the topic. The report presented an overview of some of the issues involved and a possible outline for further consideration of the topic.

a. Introduction by the Special Rapporteur

4. The Special Rapporteur observed that the expulsion of aliens was an old question closely linked to the organization of human societies in the form of States. The subject raised important questions of international law and, because of the diversity of practices, which it had generated on every continent, lent itself to codification. Expulsion of aliens affected all regions of the world, and accordingly, there existed a significant body of national legislation, which made it possible to ascertain general principles.

5. The Special Rapporteur informed that the report provided a basic sketch of the concept of the expulsion of aliens followed by a basic exposition of the concept of the "right to expel" in international law., in his view, such customary international law right, inherent in the sovereignty of States, was not in question. The reasons for expulsion, however, could vary and not all were permissible under international law. Expulsion of an alien brought into play rights, particularly fundamental human rights, to which international law attached legal consequences to their violation.

b. Summary of the debate

6. Several members commended the preliminary report of the Special Rapporteur and underlined the importance of the subject. Support was further expressed for the

[52] A/CN.4/554

Special Rapporteur's formulation of the key issue underlying the topic, i.e. how to reconcile the right to expel with the requirements of international law, particularly those relating to the protection of fundamental human rights.

7. Some members raised doubts about the scope of the future study. This was considered problematic because of the connections between expulsion and admission of aliens, especially with regard to the return of irregular immigrants. It was maintained that an attempt by the Commission to address questions relating to immigration or emigration policies would negatively affect the prospects for the Commission's work.

8. As regards questions to be excluded from the scope of the topic, it was suggested that the issues of refoulement, non-admission of asylum-seekers or refusal of admission for regular aliens should not be considered. Agreement was also expressed with the Special Rapporteur's preference to exclude internally displaced persons (IDPs). It was further suggested that the topic would not cover measures of expulsion taken by a State vis-à-vis its own nationals of an ethic, racial or religious origin that is different to that of the majority of the population.

9. Opinion was expressed that the right of a State to expel was necessary as means of protecting the rights of the society, which existed within the territory of the State. However, while a State had a wide discretion in exercising its rights to expel aliens, this discretion was not absolute and had to be balanced against existing fundamental human rights protections.

10. It was further underlined that contemporary international law recognized the rights of individuals to just and fair procedures for expulsion and placed requirements and obligations on the State to ensure such procedures. It was suggested that the act of expulsion must be formal in order for the person concerned to be afforded an opportunity to appeal.

11. Opposition was expressed as to the existence of the right of collective expulsion. It was observed that, in the twenty-first century, collective expulsions should be treated as prima facie prohibited. It was underlined that while an expulsion may involve a group of people sharing similar characteristics, the decision to expel should be taken at the level of the individual and not the group.

12. Many members expressed support for the Special Rapporteur's proposal that the focus be on drafting articles covering all aspects of expulsion, and not merely providing a set of residual principles. It was suggested that a future set of draft articles could include a provision allowing for the application universal and regional treaties giving further protection to the individuals concerned. It was also suggested that the topic should not cover other settled rules, and that the task should be limited to bridging the gaps where these could be clearly identified.

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

13. The Commission would appreciate receiving any information concerning the practice of States on the subject, including national legislation.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTIETH SESSION (2005)

14. The delegate of **Arab Republic of Egypt** said the Commission should take account of State practice and customary international law.

15. The delegate of **Indonesia** said, the topic was particularly relevant in the contemporary world where globalization had made transboundary movement of people more intensive. The topic should include migrant workers as they could be considered aliens from the perspective of the hosting countries, irrespective of the regular or irregular status of their presence in the receiving country. States were obligated to ensure just and fair procedures for expulsion. Expulsion should not be carried out with hardship, violence or unnecessary harm. He did not believe, however, that the draft should include the question of refusal of admission, internally displaced persons, and extradition for the purpose of prosecution.

16. The delegate of **Islamic Republic of Iran** said that it was a sovereign right of States to do such. However, a State should exercise that right in accordance with established rules and principles of international law, particularly those of human rights. Expulsions should also be based on legitimate grounds, as defined in domestic law. He said Iran supported the idea of some Commission members that the status of aliens who had been resident in the territory of the expelling State for a long time, and had lost almost all of their interests to the original State or had acquired special interests in the expelling State, should be thoroughly examined.

17. On the issue of expulsion in occupied territories by the occupying Power, he said it was a matter which fell under the realm of international humanitarian law and was clearly beyond the mandate of the topic.

18. The delegate of **Japan** said the topic of expulsion of aliens was particularly relevant in a contemporary world in which the transboundary movement of people had intensified. There was still much to be considered on matters such as the scope and definition of the problem and what grounds there might be for legitimate expulsion. The rules to be applied were not limited to customary law. They were closely related to the human rights regimes and were interwoven with other fields of international law. Examination of the topic should take those relevant regimes into account. Stating that the problem was of concern to many countries, he said that in order to make a meaningful

contribution, the Commission should be encouraged to complete its work in a timely manner.

19. The delegate of **Jordan** said his delegation welcomed its inclusion in the Commission's work programme. Jordan recognized that expulsion was a right of a State, and that it should be within the confines of international law. The right was limited and not absolute. In examining the principle of legality of expulsions, he said attention should be paid to national laws and procedures of the expelling State. The study being carried out by the Commission's Special Rapporteur should examine that issue. The scope should include the issue of whether the measure (expulsion) was lawful under the national law of the State and whether access to the national judicial system was available to the person being expelled. His delegation was of the view that the approach to the topic should be the preparation of draft articles covering specific aspects of expulsion

20. The delegate of **Libya** said that there should be agreement on the definition of the term "expulsion". A stricter draft article would have to be adopted, with the reasons for expulsions being included. A State had a right to expel foreigners, but the reasons should be given.

21. The delegate of **Nigeria** said that while the right of sovereign States to expel aliens had been guaranteed in law, the exercise of that right must follow due process. The act of expulsion must also be formal, in order to make room for appeal, and must be in accordance with law. Those expelled must not be subjected to any form of torture or abuse. Compulsion and detention should be avoided, except in cases where the alien refused to leave or tried to escape from the control of State authorities. Furthermore, the decision to expel should not be based on any religious, ideological, ethic or racial consideration.

22. The delegate of **People's Republic of China** said he agreed with the focus of the study. A comparative study should be conducted, as a priority, drawing on the rules and practice of domestic law of all States, relevant rules of international law and jurisprudence of international and regional judicial bodies so as to produce a whole set of general and complete underlying rules of international law. He expressed the hope that the Commission would give equal consideration to developed and developing countries when gathering information. Refusal of entry was a highly complex issue that could not be addressed with an across-the-board approach. Expulsion of a population on a large scale as a result of a territorial dispute should not be covered under the topic, since it brought in sensitive political issues and did not lend itself to such treatment from the legal point of view. The right to expel was an inherent right of States, but States should safeguard basic human rights and dignity to ensure humanitarian treatment of the aliens expelled.

23. The delegate of **Republic of Korea** agreed that in this era of globalization barriers hindering the movements of persons seemed somewhat outdated and even contradictory to the spirit of the age. He said that in the preliminary stage he agreed with the approach by the Rapporteur that priority be given to understanding the concept, including the scope of the term "expulsion of aliens". The fundamental issue was the

concept of expulsion versus non-admission, and the "legal limbo" status of those who had entered a territory without authorization. Expulsion should cover aliens who were physically in the territory of a State, whether lawfully or not. At some point in the future, the issue of non-admission should be examined by the Commission as well. He preferred the wider term of "aliens", since refugees and migrant workers were both then covered. If there was any sub-categorization needed, it was with regard to permanent residents.

24. The delegate of **Sierra Leon** said the issue affected a large number of people around the world, including in his own country. He agreed that the key underlying factor was how to reconcile the right to expel with the requirements of international law, especially those relating to the protection of human rights. The international legal order had faced serious challenges, especially after 11 September 2001. There was no clarity in State practices as to domestic laws and their relationships to international human rights law.

CONCLUDING REMARKS

1. The work of the Commission at the present session was satisfactory and resulted in some fruitful outcome in respect of some topics. Apart from the adoption of 9 draft articles with commentaries thereto on the topic of 'Responsibility of International Organizations', the significant aspect during this session was the inception of the work on two important topics i.e. 'effects of armed conflicts on treaties' and 'expulsion of aliens'.

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

Reservations to treaties

3. The draft guideline 2.6.1 providing definition of what constitutes an objection is an addition to existing law of reservations as it clarifies an important aspect of this branch of international law. Having formulated based on the definition of reservations, the draft guideline's emphasis on the effect of the unilateral statement rather than on mere nomenclature is a significant aspect of this provision. Similarly, draft guideline 2.6.2 further defines the scope of the term 'objection' while clarifying its extension to late formulation of reservations. Thus these two draft guidelines effectively contribute to the further clarification of issues involved in the law of reservations.

Diplomatic protection

4. On the topic of diplomatic protection the report submitted by the Special Rapporteur on clean hands doctrine comprehensively covered the issues involved in it. In this regard it may be suggested that further discussion on the issue and the responses of States should be relied upon while taking a decision on inclusion or non-inclusion of the doctrine in the articles on diplomatic protection.

Responsibility of international organizations

5. The majority of the draft articles adopted during this session on the topic correspond to the articles on the Responsibility of States for Internationally Wrongful Acts as the issues covered by the draft articles are similar to what has been dealt with under the Responsibility of States for Internationally Wrongful Acts. This is keeping with its previous work and the progress achieved in the work of the Commission is commendable.

Fragmentation of international law

6. The discussions on the topic are noteworthy and the reports presented by the members of the Study Group contain useful analysis with sufficient information. With its current pace of work it may be expected that the Commission would come out with a substantive outcome on the topic, which is of significant value as the it encompasses some important aspects of international law.