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

I. INTRODUCTION

1. The International Law Commission (hereinafter called the "ILC" or the "Commission") established by General Assembly Resolution 174 (III) of 21st September 1947 is the principal organ to promote the progressive development and codification of international law. The 34 member ILC held its fifty-fourth session in Geneva from 29 April to 7 June and 22 July to 16 August 2002. Mr. Robert Rosenstock (United States of America) was elected as Chairman for the fifty-fourth session. The AALCO was represented at that session by the Secretary General, Amb. Dr. Wafik Z. Kamil.

2. There were as many as three substantive topics on the agenda of the aforementioned session of the ILC. These included: -

(i) Reservations to Treaties;

(ii) Diplomatic Protection; and

(iii) Unilateral Acts of States.

3. Besides, the Commission also initiated its work on the following topics, some of which were a continuation of its earlier programme of work and others that were new subjects considered for the first time this year. Such topics include:

(a) International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law;

(b) Responsibility of international organizations;

(c) Fragmentation of international law: Difficulties arising from the diversification and expansion of international law; and

(d) Shared natural resources

4. With regard to the topic of **"Reservations to treaties**", the Commission adopted 11 draft guidelines dealing with formulation and communication of reservations and interpretative declarations. The Commission also considered the seventh report of the Special Rapporteur Mr. Alain Pellet and referred 15 draft guidelines dealing with withdrawal and modification of reservations to the Drafting Committee. An overview of the ILC's work on this topic during the current session is found in Part II of this report

5. As regards the topic **"Diplomatic protection**", the Commission considered the remaining portions of the second report of the Special Rapporteur Mr. Christopher Dugard relating to the exhaustion of local remedies rule, namely articles 12 and 13, as well as the third report covering draft articles 14 to 16, dealing with the exceptions to

that rule, the question of the burden of proof and the so-called "Calvo" clause, respectively. The Commission also undertook a general discussion, *inter alia*, on the scope of the study and held several open-ended Informal Consultations on the issue of the diplomatic protection of crews and that of corporations and shareholders. The Commission further adopted articles 1 to 7 [8] on the recommendation of the Drafting Committee. It also referred to the Drafting Committee draft articles 14 (a), (b), (c) and (d) (both to be considered in connection with paragraph (a)), and (e), concerning futility, waiver and estoppel, voluntary link, territorial connection and undue delay, respectively.

6. As regards the topic **"Unilateral acts of States",** the Commission considered part of the fifth report of the Special Rapporteur Mr. Victor Rodriguez Cedeno. In his report, the Special Rapporteur reviewed the progress made thus far on the topic and presented revised draft article 5 (a) to (h) on the invalidity of a unilateral act, as well as articles (a) and (b) on interpretation.

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

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

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

10. The Commission also decided to include on its programme of work the topic on **"Shared Natural Resources**" and appointed Mr. Chusei Yamada as Special Rapporteur. The Commission further recommended the establishment of a working group.

II. RESERVATIONS TO TREATIES

A. INTRODUCTION

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 [1] and second[2] 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. Following the deliberations on these reports, the Commission had provisionally adopted 42 draft guidelines by the end of its 53rd session (2001).[3]

6. 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.

7. 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.

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1 A/CN.4/470 and Corr.1.

2 A/CN.4/477 and Add.7.

3. For the text of the draft guidelines, see Report of the International Law Commission, Fifty third session A/56/10 at pp.455-464.

B CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

8. At the present session, the Commission had before it the Special Rapporteur's seventh report[4] relating to the formulation, modification and withdrawal of reservations and interpretative declarations. Further to the consideration of the first part of the seventh report, the Commission decided to refer to the Drafting Committee draft guideline 2.1.7 bis (Case of manifestly impermissible reservations).

9. It may be recalled that the Commission had referred a set of 13 draft guidelines to the Drafting Committee during its last session (53rd Session). On the basis of the Drafting Committee's report, the Commission, at its current session, considered and provisionally adopted the following draft guidelines. The text of the draft guidelines is reproduced as Annex I of this Report.

2. PROCEDURE

2.1 Form and notification of reservations

2.1.1 Written form

A reservation must be formulated in writing

10. It may be noted that article 23, paragraph 1 of the 1969 and 1986 Vienna Conventions on Law of Treaties stipulate that a reservation "must be formulated in writing and communicated to the contracting States and contracting organizations entitled to become parties to the treaty". Draft guideline 2.1.1 covers the first of these requirements.

11. The Commission discussed the idea of "oral reservations" and decided that the question of whether a reservation may initially be formulated orally can be left open. In support of this position, the Commission quotes with approval the following observation of Sir Humphrey Waldock: "A contracting party can in any event formulate a reservation up to the date of its expression of consent to be bound; thus, even if its initial oral statement could not be regarded as a true reservation, the "confirmation" in due course would serve as a formulation".

2.1.2 *Form of formal confirmation*

Formal confirmation of a reservation must be made in writing.

12. While the Vienna Conventions of 1969 and 1986 do not expressly require reservations to be confirmed in writing, draft guideline 2.2.1[5] requires that a reservation must be formally confirmed by the reserving State (or international organization) when expressing its consent to be bound by the treaty. The word

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

[5] **Formal confirmation of reservations formulated when signing a treaty**. If formulated when signing a treaty subject to ratification, act of formal conformation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty.

"formally" must be understood to mean that this formality must be completed in writing.

13. The commentary clarifies that draft guideline 2.2.1 does not take a position on the question whether the formal confirmation of a reservation is always necessary. This is decided by draft guidelines 2.2.1 to 2.2.3, which show that there are cases that do not lend themselves to such a confirmation.

2.1.3 Formulation of a reservation at the international level

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

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

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

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

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

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

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

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

14. Draft guideline 2.1.3 defines the persons and organs, which are authorized, by virtue of their functions, to formulate a reservation on behalf of a State or an international organization. Its text is based closely on article 7 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which lays down the conditions under which persons and organs could express the consent of the State or international organization to be bound. Thus, draft guideline 2.1.3 is the outcome of the Commission's view that it was logical that reservations should be formulated under the same conditions as the consent of the State or international organization to be bound.

15. However, to mitigate the rigidity of article 7 of the 1986 Vienna Convention and to accommodate the practice in international organizations (except the United Nations) which accept reservations of States transmitted by their permanent representatives accredited to such international organizations, an element of flexibility is introduced at the beginning of the draft guideline by inserting the expression "subject to the customary practices in international organization which are depositaries of treaties".

2.1.4{2.1.3 bis, 2.1.4}[6] Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations.

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

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

16. Paragraph 1 of the draft guideline reflects the position that international law does not impose any specific rule with regard to the internal procedure for formulating reservations.

17. What happens if the internal rules are not followed? Paragraph 2 of the draft guideline stipulates that a State or an international organization should not be allowed to claim that a violation of the provisions of internal law or of the rules of the organization has invalidated a reservation that it has formulated, if such formulation was the act of an authority competent at the international level.

2.1.5 Communication of reservations

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

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

18. Once the reservation has been formulated, it must be made known to other States or international organizations concerned. Such publicity is essential for enabling them to react, either through an acceptance or objection. Article 23 of the Vienna Conventions of 1969 and 1986 specifies the recipients of reservations formulated by a State/International Organization, but is silent on the procedure to be followed in effecting such notification. The object of draft guidelines 2.1.5 to 2.1.8 is to fill that gap, with draft guideline 2.1.5 referring more specifically to its recipients.

[6] The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or as the case may be the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.

19. As regards the first paragraph of this draft guideline, it may be noted that the first group of recipients (contracting States and contracting Organizations) does not pose any particular problem. But, the determination in each specific case of the "other States and international organizations entitled to become parties to the treaty" is complicated, more so, when treaties do not indicate clearly which States are entitled to become parties to them. As the commentary states, this is obviously the case when depositary function's are assumed by a State which not only has no diplomatic relations with some States, but also does not recognize as States certain entities which proclaim themselves to be States. However, States, which replied on this point to the Commission's questionnaire, do not mention any particular difficulties in this area. Therefore the Commission saw no merit in proposing the adoption of any draft guidelines on this point.

20. The second paragraph of the draft guidelines concerns the particular case of reservations to constituent instruments of international organizations. The commentary to this paragraph contains helpful discussion as to the practical aspects of communication of reservations to the competent organs of international organizations, more particularly the practice of depositary bodies.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations

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

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

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

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

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification.

21. Draft guidelines 2.1.6 clarifies aspects of the procedure to be followed in communicating the text of a treaty reservation to the addressees of the communication that are specified in draft guidelines 2.1.5. It cover three different, but closely linked aspects:

- The author of the communication;
- The practical modalities of the communication;
- The effects.

22. The draft guidelines combines the text of article 78, paragraph 1(e), and article 79 of the 1986 Vienna Convention and adapts it to the special problems posed by the communication of reservations.

23. As regards paragraph 1 of the draft guideline, no explanation is required, except for the observation that, even in cases where there is a depositary, the State which is the author of the reservation may directly inform other States or international organizations concerned of the text of the reservation. But this however does not the release the depositary from his own obligations. As to the time period for the transmission of the reservation to States/international organizations, the Commission did not think it possible to establish a rigid period of time. The expression "as soon as possible" in sub-paragraph (ii) was deemed sufficient to draw the attention of the addressees to the need to proceed rapidly.

24. The expression "or as the case may be, upon its receipt by the depositary" in paragraph 2 requires to be explained. A reservation communicated, either directly by the author or by the depositary, can produce effect only when it is accepted by the other contracting parties. The commentary points out that one cannot wholly rule out situations in which a communication to the depositary may produce effects directly. This may happen, for example, where the depositary is required to transmit it "as soon as possible" and that period of time can be assessed only in terms of the date on which the depositary has received the communication. It is situations of this kind that are covered by the expression "or as the case may be, upon its receipt by the depositary".

25. As regards paragraph 3, regarding communicating reservation by modern means of communication, the Commission took the view that the time period should start as from the time the electronic mail or facsimile is sent. This, in the opinion of the Commission, would help prevent disputes as to the date of receipt of the confirmation, since as per the information available to the Commission from the depositary organizations, the written confirmation is usually done at the same time the electronic mail or facsimile is sent or very shortly thereafter.

2.1.7. Functions of depositaries

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

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

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

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

26. The draft guideline combines the relevant provisions of article 78, paragraphs 1(d) and 2 of the 1986 Vienna Convention and applying them only to the functions of depositaries with regard to reservations. In fact, the restricted power of the depositary

to examine the validity of reservations transmitted is reflective of the distrust of the depositary, prevalent among States.

2.1.8 [2.1.7bis] Procedure in case of manifestly {impermissible} reservations

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

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

27. In the opinion of the Commission, allowing the depositary to intervene in case of "manifestly impermissible" reservations constituted a progressive development of international law. The solution proposed by this draft guideline should be largely acceptable, for it does not introduce any radical alternations to the powers of the depositary, and at the same time is consistent with the logic of draft guideline 2.1.7. The commentary to the draft guideline 2.1.8 makes this point:

> "It should be understood that, if the author of the reservation maintains it, the normal procedure should resume and the reservation should be transmitted, indicating the nature of the legal problems in question. In point of fact, this amounts to bringing the procedure to be followed in the case of a manifestly "impermissible" reservation into line with the procedure followed in the case of reservations that give rise to problems of form: according to draft guideline 2.1.7, should there be a difference of opinion regarding such problems, the depositary "shall bring the question to the attention of: (a) The signatory States and organizations and the contracting States and contracting organizations; or (b) Where appropriate, the competent organ of the international organization concerned"

28. Although, to date, the Commission has used the word "impermissible" to characterize reservations covered by the provisions of article 19 of the Vienna Conventions, some members pointed out that this word was not appropriate in that case: in international law, an internationally wrongful act entails its author's responsibility, and this is plainly not the case of the formulation of reservations which are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose. The Commission decided to leave the matter open until it had adopted a final position on the effect of these inconsistencies or incompatibilities; to this end, the word "impermissible" has been placed between square brackets and the Commission proposes to take a decision on this point in due course.

2.4.1 Formulation of interpretative declarations

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

29. In view of the lack of any provision on interpretative declarations in the Vienna Conventions and the scarcity or uncertainty of practice with regard to such declarations, the Commission decided to deal with the procedure for interpretative declarations by analogy (or in contrast to) the procedures for reservations.

30. Draft guideline 2.4.1 transposes and adapts to interpretative declarations, the provisions of draft guideline 2.1.3 on the formulation of reservations. As regards the form, there exists an essential difference between interpretative declarations and reservations. Interpretative declarations purport to specify or clarify the meaning or scope attributed by the declarant to the provisions of a treaty, without subjecting its consent to be bound. Except in the case of conditional interpretative declarations (dealt in draft guideline 2.4.3), the author of a declaration is taking a position, but is not attempting to make it binding on the other contracting parties. Consequently, it is not essential for such declarations to be in writing, and there is no need for a draft guideline on the form that simple interpretative declarations may take.

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

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

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

31. Given the diverse rules and practices among States, the determination of competence to formulate interpretative declarations and the procedure to be followed in that regard is purely a matter of internal law and that a State or an international organization would not be entitled to invoke a violation of internal law as invalidating the legal effect that its declarations might produce.

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

A conditional interpretative declaration must be formulated in writing.

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

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

A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates

an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

32. In the view of the Commission, in the case of conditional interpretative declaration there are not many reasons for departing from the rules on form and procedure applicable to the formulation of reservations. Conditional interpretative declarations, as in the case of reservations, are by definition an expression of consent by a State or international organization to be bound by a specific interpretation. The procedure for formulating them should therefore be brought into line with that for reservations.

33. For these reasons, the first two paragraphs of draft guideline 2.4.3 are transposed from draft guidelines 2.1.1 and 2.1.2. Similarly the last two paragraphs of the draft guideline are modeled on the text of draft guideline 2.1.5. While the Commission did not deem it necessary to reproduce in detail draft guidelines 2.1.6 to 2.18, the commentary clarifies that the elements of these draft guidelines are transposable *mutates mutandis* to conditional interpretative declarations.

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

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

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

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

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

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

Following such a finding, the reserving State or international organization must take action accordingly. It may fulfill its obligations in that respect by totally or partially withdrawing the reservation."

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

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

35. At a general level, delegates consider the Guidelines as useful and practical recommendations that States could consider in formulating, modifying and withdrawing their reservations to treaties. While the delegate of Republic of Korea said that the draft guidelines and the accompanying commentaries were acceptable, the delegate of the Islamic Republic of Iran was of the view that the draft guidelines should be assessed in the light of their compatibility with the Vienna regime on the Law of Treaties. The delegate of Nigeria said that ILC's work on this topic should remain as a guide, and not be seen as a body of binding rules.

36. Following are the views expressed by AALCO Member States on certain specific issues addressed by the draft guidelines.

(a) Communication of reservation and 'interpretative' declaration:-

Delegates of India, People's Republic of China and Sierra Leone shared the view that reservation must be formulated in writing. The delegate of India pointed that that the draft guideline on formulation of interpretative declaration did not prescribe any form, and expressed the view that such declarations, whether simple or conditional, needed to be in writing.

(b) Electronic communication of reservations

Delegates of Cyprus and Sierra Leone supported the formulation of Draft guideline 2.1.6 to the effect that communication of a reservation could be made by electronic mail or facsimile and should be confined by writing. The delegate of Republic of Korea while stating that electronic forms of communication of reservations was not the normal practice in her country, felt that it was possible that such forms could prove useful in modern times. While the delegate of Nigeria supported the formulation, he called for the inclusion of a provision to the effect that the electronic communication would only be considered as having been made if there were no dispute about its authenticity. The delegate of the People's Republic of China acknowledged the communication of reservations by electronic means, he maintained that the formal written note verbale should be adhered to.

(c) Functions of the depository

Delegates of the Islamic Republic of Iran, People's Republic of China, Nigeria, and Republic of Korea were of the view that it was for States, and not the depositary, to decide whether or not a reservation was permissible. The functions of the depositary, with a view to ensure neutrality and impartiality, should thus not go beyond transmitting reservations and should play a strictly procedural role in conformity with the Vienna conventions. More specifically, the delegate of Iran said that relegating the power of testing the compatibility of reservations to the depositary would provoke other States to react and would not be helpful in solving the problem.

The delegate of Japan said that the functions of depositaries should not affect their function to notify States of the reservations, at the earliest instance possible. In this regard, the delegate was of the view that the terms "impermissible" and "impermissibility" appearing in draft guideline 2.1.8 must be carefully examined when the ILC considered the legal consequences of reservations.

(d) Role of treaty-monitoring bodies

The delegate of Japan stated that the ILC's Guide to Practice should spell out the kind of treaty-monitoring bodies that could decide on the impermissibility of reservations. Delegates of China, Nigeria, Islamic Republic of Iran and Republic of Korea had difficulties with the role of monitoring bodies as provided for in the draft guidelines.

The Delegate of Republic of Korea sought clarification of the phrase "body monitoring the implementation of a treaty" whether it meant a treaty body with certain regulatory functions only, or did it also imply all bodies having the competence to find a reservation impermissible/inadmissible. In the view of this delegate, a treaty body should not be allowed to decide on the permissibility of reservations. The delegate of the People's Republic of China sought a definition of the concept of "monitoring" and supported the ILC's decision not to refer the draft guideline to the Drafting Committee. The delegate of the Islamic Republic of Iran said that the recent developments concerning the new role given to some monitoring bodies on assessing reservations to a treaty should be seen as an exceptional one. This should not be included in ILC's guidelines, as the Guide to Practice should conform to the legal regime of the Vienna Conventions. The delegate of Nigeria doubted if any such finding by a treaty-monitoring body would be binding on States, without their consent, and hence proposed its exclusion from the draft guidelines.

III. 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.[7] 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.[8] 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.[9]

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 Report[10]. 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 report[11], as well as his second report.[12] 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 concerning draft articles 12 and 13, to the next session. Draft articles 9, 10 and 11 were referred to the Drafting Committee.

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7 Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 249 and annex II, addendum 1.

8 A/CN.4/484.

9 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.

10 A/CN.4/506 and Corr. 1 and Add. 1.

11 A/CN.4/506/Add.1.

12 A/CN.4/514.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

7. At the present session, 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 report[13].

8. Following its consideration of the above-said reports, the Commission decided to refer draft article14, paragraphs (a), (b), (c), (d) and (e) to the Drafting Committee.

9. After considering the report of the Drafting Committee, the Commission adopted draft articles 1 to 7, along with commentaries thereto.

10. An overview of the draft articles 1 to 7 as provisionally adopted by the Commission is given below. The text of these draft articles is reproduced as Annex II of this Report.

PART ONE

GENERAL PROVISIONS

Article 1

Definition and Scope

1. Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

2. Diplomatic protection may be exercised in respect of a non-national in accordance with article 7(8).[14]

11. Article 1 defines diplomatic protection by describing its main elements and at the same time indicates the scope of this mechanism for the protection of aliens injured abroad.

12. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted.

13. It may be noted that the present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. In other words, the draft articles maintain the distinction between primary and secondary rules and deal only with the latter.

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13 A/CN.4/523 and Add.1

14 This paragraph will be reconsidered if other exceptions are included in the draft articles.

14. Paragraph 1 thus sets out the elements of the right to exercise diplomatic protection: -

(a) Right of diplomatic protection belongs to the State
(b) It is the link of nationality between the State and the injured person that gives rise to the exercise of diplomatic protection
(c) Diplomatic protection must be exercised by lawful and peaceful means.

15. Paragraph 2 recognizes that there may be circumstances in which diplomatic protection may be exercised in respect of non-nationals (Article 7 provides for such protection in the case of stateless persons and refugees). The footnote to paragraph 2 indicates that the Commission may include other exceptions (e.g. provision permitting the State of nationality of a ship or aircraft to bring a claim on behalf of the crew) at a later stage in its work.

ARTICLE 2 (3)[15]

Right to exercise diplomatic protection

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

16. Article 2 stresses that the right of diplomatic protection belongs to or vests in the State. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation. This position under international law was spelt out in the following words of the ICJ in the Barcelona Traction case,[16] which the Commission quoted with approval:

"…Within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress….

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case".

17. A proposal that a limited duty of protection be imposed on the State of nationality was rejected by the Commission as going beyond the permissible limits of progressive development of the law.

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[15] The numbers in square brackets are the numbers of the articles as proposed by the Special Rapporteur.

[16] 1970 I.C.J. Reports, p.44

PART TWO
NATURAL PERSONS

Article 3 (5)
State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

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

18. While article 2 affirms the discretionary right of the State to exercise diplomatic protection, article 3 asserts the principle that it is the State of nationality of the injured person that is entitled, but not obliged, to exercise diplomatic protection on behalf of such a person.

19. Paragraph 2 defines the State of nationality for the purpose of diplomatic protection. This definition is premised on two principles:

(a) It is for the State of nationality to determine, in accordance with its municipal law, who is to qualify for its nationality;
(b) There are limits imposed by international law on the grant of nationality.

20. The connecting factors for the conferment of nationality listed in paragraph 2 are illustrative and not exhaustive. Yet, they include the connecting factors most commonly employed by States for the grant of nationality.

21. Significantly, it is noteworthy that the commentary to this draft article clarifies that paragraph 2 does not require a State to prove an effective or genuine link, along the lines suggested in *Nottebohm*, as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationally. This conclusion was based on the Commission's opinion that there were certain factors that served to limit *Nottebohm* to the facts of the case in question. Moreover the Commission was mindful of the fact that if the "genuine" link requirement, if strictly applied, would in today's world of economic globalization and migration, exclude millions of persons from the benefit of diplomatic protection.

Article 4 (9)

Continuous nationality

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

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

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

22. Although the continuous nationality rule is well established, it has been subjected to considerable criticism on the ground that it may produce hardship in cases where an individual changes his nationality for reasons unrelated to the bringing of a diplomatic claim. Others have resisted this claim for fear that it would lead to "nationality shopping" for the purpose of diplomatic protection. The Commission, therefore, was of the view that the continuous nationality rule should be retained, but those exceptions should be allowed to accommodate cases in which unfairness might otherwise result.

23. Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim. As State practice and doctrine is unclear on whether the national must retain the nationality of the claimant State between these two dates, the Commission decided against retaining this aspect in the draft article.

24. Paragraph 2 gives form to the understanding reached within the Commission to retain the continuous nationality rule, while allowing the requisite exceptions for sake of flexibility.

25. Paragraph 3 adds another safeguard against abuse of the lifting of the continuous nationality rule. Diplomatic protection may not be exercised by the new State of nationality against a former State of nationality of the injured person in respect of an injury incurred when that person was a national of the former State of nationality and not the present State of nationality.

Article 5 (7)

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

26. Although some domestic legal systems prohibit their nationals from acquiring dual or multiple nationalities, the commentary to this article states that, it must be accepted that dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* (laws governing the place of birth) and *jus sanguinis* (laws based on the parentage of individual*)* or of the conferment of nationality by naturalization, which does not result in the renunciation of a prior nationality.

27. Article 5 is limited to the exercise of diplomatic protection by one of the States of which the injured person is a national against a State of which that person is not a national. As in the case of article 3, this article does not require "genuine" or "effective" link between the national and the State exercising diplomatic protection. The commentary draws support for this position *inter alia* from the *Salem* case, wherein an arbitral tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It stated that:

> "The rule of international law (is) that in a case of dual nationality a third Power is not entitled to contest the claim of one of the two Powers whose national is interested in the case by referring to the nationality of the other power".

28. Paragraph 2 recognizes that two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national against a State or which that person is not a national. The commentary identifies instances wherein the responsible State could object and problems can arise, namely: -

(a) where the claimant States bring separate claims either before the same forum or different fora; or
(b) where one State of nationality brings a claim after another State of nationality has already received satisfaction in respect of that claim; or
(c) where one State of nationality waives the right to diplomatic protection while another State of nationality continues with its claim.

The Commission noted the impossibility of codifying rules governing every situation and left it to be dealt in accordance with the general principles of law governing the satisfaction of joint claims.

Article 6

Multiple nationality and claims against a State of nationality

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

29. Article 6 deals with the exercise of diplomatic protection by the State of nationality against another State of nationality. Whereas article 5, dealing with a claim in respect of a dual or multiple national against a State of which the injured person is not a national, does not require an effective link between claimant State and national, article 6 requires the claimant State to show that its nationality is predominant, both at the time of the injury and at the date of the official presentation of the claim.

30. In the past there was strong support for the rule of non-responsibility according to which one State of nationality might not bring a claim in respect of a dual national against another State of nationality. The Commission confirmed the law on this point had undergone changes over the years, and concluded that the principle which allows a State of dominant or effective nationality to bring a claim against another State of nationality reflects the present position in customary international law. This conclusion as reflected in article 6 which accords legal protection to individuals, even against a State of which they are nationals, is consistent with developments in international human rights law.

31. Following are the other useful aspects noted by the commentary to the article:

(a) The use of the term "predominant" in article 6 is intended to convey the element of relativity, and indicates that the individual has stronger ties with one State rather than another.

(b) Article 6 is formulated in negative language: "A State of nationality may not exercise protection… unless" its nationality is predominant. This is intended to show that the circumstances envisaged under article 6 are to be regarded as exceptional; and also the burden of proof is on the claimant State to prove that its nationality is predominant.

Article 7 (8)

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

32. Article 7 is an exercise in progressive development of the law. It departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection in respect of a non-national, where that person is either a stateless person or a refugee.

33. Both paragraphs 1 and 2 provide a State "may exercise diplomatic protection". This emphasizes the discretionary nature of the right, in cases of extending such protection to a stateless person or refugee.

34. The requirement of both "lawful residence" and "habitual residence" in paragraphs 1 and 2 sets a high threshold. Whereas some members of the Commission believed that this threshold is too high, the majority took the view that the combination of lawful residence/habitual residences approximates to the requirement of effectiveness invoked in respect of nationality, and is justified in the case of an exceptional measure introduced *de lege ferenda*.

35. Paragraph 3 provides that the State of refuge may not exercise diplomatic protection in respect of a refugee against the State of nationality of the refugee. To permit this would have opened the floodgates for international litigation and deterred States from accepting refugees. Besides, it would have contradicted the basic approach of the present articles, according to which nationality is the predominant basis for the exercise of diplomatic protection.

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

36. The Commission would welcome the views of Governments as to whether protection given to crew members who hold the nationality of a third State (see *the M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, ITLOS, Judgment of 1 July 1999) is a form of protection already adequately covered by the 1982 Law of the Sea Convention or whether there is a need for the recognition of a right to diplomatic protection vested in the State of nationality of the ship in such cases? If so, would similar arguments apply to the crew of aircraft and spacecraft?

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

(1) The shareholders' own rights have been directly injured;
(2) The company has ceased to exist in its place of incorporation;
(3) The State of incorporation is the State responsible for the commission of an internationally wrongful act in respect of the company.

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

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

38. At a general level, most of the delegates welcomed the progress achieved within the ILC on this topic.

39. The delegate of **Myanmar** welcomed the Commission's work on diplomatic protection, stressing the fact that this was a topic which had undergone great changes, even more so in the era of globalization. He emphasized the need for codifying the rules on the subject. The seven draft articles adopted by the Commission, in the view of the delegate, reflected customary international law and incorporated progressive elements. The delegate supported retaining the continuous nationality rule, allowing for exceptions where unfairness might otherwise result.

40. The delegate of **Jordan** while welcoming the progress of work, cautioned that the scope of the work should not go beyond the traditional notion of the issue, as encompassing nationality of claims and exhaustion of local remedies. The delegate stressed the need for a thorough study on the right of a State to delegate its right of protection to another State. While diplomatic protection was a State's discretion, the delegate pointed out that, it involved a "mutual" relationship with the protected person, and hence the transfer of rights could adversely affected the person's rights.

41. The delegate of **Sierra Leone** said that the ILC's work on this topic recognized that, under international law, the State was the sole judge to decide whether its protection would be granted, the extent to which it would be done and when it would cease. The delegate welcomed the position that diplomatic protection must be exercised by "peaceful" means. Taking a positive view of the provision that a stateless person/refugeee could be afforded diplomatic protection, if lawfully and habitually resident in the State granting it, the delegate expressed concern about persons not technically classified as such under the 1951 UN Convention on Status of Refugees. In situations of people fleeing civil wars and taking refuge in other States, he wondered which State was entitled to afford them diplomatic protection.

42. The delegate of the **Republic of Korea** shared the Commission's view that the ICJ in *Nottebohm* case had not intended to expound the "genuine link" requirement as a general rule applicable to all States, but was limited to the practice of dual nationality. He was in agreement with the Commission's view that a strict application of the genuine link requirement would deprive diplomatic protection to millions of persons who, owing to economic globalization, have migrated and are not residing in their State of nationality. Following are the delegations views on this topic:-

(a) No necessity for a provision concerning the "Calvo Clause" to be included in the article 16 dealing with the exceptions to the rule on exhaustion of local remedies.

(b) Questions relating to protection of crew of ships, who hold the nationality of a third State could best be dealt within the framework of UN Convention on the Law of the Sea, rather then as a general rule of diplomatic protection.

(c) As regards extending diplomatic protection for companies, a criteria based on the number of shareholders or the financial value of the shares, would be discriminatory against small shareholders.

IV. 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 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, 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[17] 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.

6. At its fifty-second session in 2000, the Commission considered the third report of the Special Rapporteur on the topic[18], along with the text of the replies received

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

18 Document A/CN.4/505.

from States[19] 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.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

8. At the present session the Commission had before it the fifth report[20] of the Special Rapporteur and the text of replies received from States to the questionnaire[21] on the topic circulated on 31 August 2001.

9. At a general level, Members expressed appreciation for the fifth report of the Special Rapporteur which reviewed a number of fundamental questions on a complex topic that, although not lending itself readily to the formulation of rules, was nonetheless of great importance in international relations.

(a) Feasibility of codification

10. Some members reiterated the feasibility of the topic for codification and progressive development and its utility for States to know what risks they ran in formulating such acts. For some others, it was impossible to codify unilateral acts, particularly because they did not exist as such in international law and did not produce legal effects. Yet another stream of thought, while acknowledging the difficulty of the topic, felt that the approach adopted would have to be reviewed if progress was to be made. The Special Rapporteur indicated that he shared the view of the vast majority of members which believe that unilateral acts did indeed exist, that they were a well-established institution in international law and that they could be binding on the another State, subject to certain conditions of validity.

(b) Approach To Future Work On The Topic

11. Responding to the concern expressed by a member about the lack of progress made on the topic over five years, the Special Rapporteur pointed out no progress could be made until the Commission had reached a minimum agreement on how the topic was to be treated. In this context, he supported the proposal that a mechanism be set up to carry out a study of State practice with the possible assistance of an outside private institution.

12. As regards the work on substantive aspects, the Special Rapportuer proposed that, in the first stage, a Working Group try to formulate rules that were common to

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19 A/CN.4/500 and Add.1.

20 A/CN.4/525 and Add.1 and 2

21 A/CN.4/524

all acts and then, subsequently, focus on the consideration of specific rules for a particular category of unilateral act, such as promise or recognitions.

(c) Definition of "Unilateral Acts"

13. The text of the draft article 1 as proposed by the Special Rapporteur is as follows:

Article 1
Definition of unilateral Acts

For the purposes of the present articles, "unilateral act of a State" means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization.

14. Summing up the debate on this point, the Special Rapporteur stated that the Members of the Commission generally agreed that the definition of a unilateral act contained in draft article 1 could apply to all the acts in question. The Drafting Committee could deal with the doubts voiced on the use of the term "unequivocal", the need for a unilateral act to have been "known", as well as the proposal for broadening the category of addressees of a unilateral act.

(d) Classification of Unilateral Acts

15. It may be recalled that the Special Rapporteur proposed to classify unilateral acts, in the following manner, based on the legal effects criterion:

(i) Acts whereby a State undertakes obligations; (e.g. promises, waivers and recognition)
(ii) Acts whereby a State reaffirms a right; (e.g. protests).

16. Some members found this classification unacceptable. For example, a declaration of neutrality was both a source of rights for the author State and a source of obligation for the belligerent States to which it was addressed. Therefore, to treat such a declaration as a waiver or a promise was not a satisfactory solution because the author State might subsequently decide to join in the conflict on grounds of self-defence if it was attacked by one of the belligerents.

17. Another view, while accepting the legal effects criterion, proposed a classification distinguishing between:

(a) "Condition" acts – such as notification and its negative counterpart protest, which were necessary in order for another act to produce legal affects; and
(b) "Autonomous" acts – which produced legal effects, such as promise; waiver, which might be regarded as the opposite; and recognition, which was a kind of promise.

18. Some members felt that classification was premature, while others were of the view that the Commission should refrain from attempting to classify unilateral acts.

19. The Special Rapporteur responded by saying that classification could help in grouping and structuring the draft articles. He also stated that even if the classification could not be done for the time being, the Commission should take a final decision on whether to elaborate rules for a category of unilateral acts like promises, which signified the assumption of unilateral obligations by the another state.

(e) Invalidity of unilateral acts

20. In the light of the criticisms encountered to the presentation of the causes of invalidity in a single draft article (draft article 5)[22] in the third report, the Special Rapporteur in his present report presented new draft articles 5(a) to 5(h) as a desirable alternative.

Article 5(a)
Error

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

[22] In his third report, the Special Rapporteur presented draft article 5 entitled "Invalidity of Unilateral Acts". This article stipulated that a State may invoke the invalidity of a unilateral act:
1. If the act was formulated on the basis of an error of act or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound by the Act. The foregoing shall not apply if the State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error;
2. If a State has been induced to formulate an act by the fraudulent conduct of another State;
3. If the act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State;
4. If the act has been formulated as a result of coercion of the person formulating it through acts or threats directed against him;
5. If the formulation of the act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations;

6. If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law;
7. If, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council;
8. If the unilateral act as formulated conflicts with a norm of fundamental importance to the domestic law of the State formulating it.

Article 5(b)
Fraud

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

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

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

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

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

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

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

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

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

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

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

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

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

21. The Special Rapporteur had distinguished between absolute and relative invalidity. In the words of the Special Rapporteur:-

"Absolute invalidity means that the act cannot be confirmed or validated; this happens when the act conflicts with a peremptory norm of international law or of j*us* cogens or when the act is formulated as a result of coercion of the representative of the State or when similar pressure is brought to bear on the State that is the author of the act, contrary to international law. Where there is relative invalidity, on the other hand, it is possible to confirm or validate the act. Such would be the case, for example, when the author State has erred or when the will has been expressed in violation of a fundamental domestic norm regarding competence to formulate the act. The author State may, of its own free will or through behavior in relation to the act, conform or validate it.".

22. Responding to the divergent views in the Commission on the utility of this distinction, the Special Rapporteur was of the view that this concept of "absolute" or "relative" invalidity played an important role in determining who could invoke the invalidity of an act.

23. With regard to draft article 5 (a) to (h) on causes of invalidity of unilateral acts, the Special Rapporteur agreed with members who had rightly pointed out that the word "consent" referred to the law of treaties and therefore did not belong in the context of unilateral acts, as well as with the suggestion that account should also be taken of article 64 of the Vienna Convention, which related to the emergence of a new peremptory norm of general international law. Referring to the invalidity of a unilateral act as a result of non-conformity with a decision of the Security Council, he suggested that perhaps only those decisions adopted under Articles 41 and 42 of the Charter be taken into account.

24. Some members of the Commission had referred to the invalidity of a unilateral act as a result of non-conformity with an earlier obligation assumed by a State either conventionally or unilaterally. In his own view, that would not be a case of the invalidity of the act or of a defect of validity, but a case of conflict of rules, which was governed by the Vienna regime in provisions that were different from those relating to the invalidity of treaties.

25. Noting that the use of the word "invoke" in the text of the draft articles had been considered unnecessary, he recalled that that term appeared in the corresponding provisions of the 1969 and 1986 Vienna Conventions. In the text under consideration, it referred to the possibility that a State could invoke a cause of invalidity, the invocation of invalidity being something different.

(f) Termination of the obligation created by a unilateral act

26. There was a discussion in the Commission about the termination of the obligation created by a unilateral act. As against the case of a treaty where there was a procedure and an agreed methodology, which must be respected, it was noted that, in the case of a unilateral act, only estoppel, acquiescence or the existence of a treaty, custom or other obligation presented a unilateral termination.

27. In relation to the issue of whether a State could revoke a unilateral act which it had formulated, such as the recognition of a State, the Special Rapporteur was of the view that although the act was unilateral, the legal relationship established obviously was not and, therefore, a State which formulated an act of recognition would not be able to revoke it. Nonetheless, the point was also made in the Commission that a unilateral act could be terminated in good faith and that the technique of revocation deserved its place in the study of means of terminating unilateral acts.

(g) Rules of interpretation

28. It may be recalled that the Special Rapporteur had during the last session submitted the following draft articles on this point.

Interpretation

Article (a)
General rule of interpretation

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

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

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

Article (b)
Supplementary means of interpretation

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

Leaves the meaning ambiguous or obscure; or
Leads to a result, which is manifestly absurd or unreasonable.

29. Contrary to the opinion of some members, the Special Rapporteur was of the view that the rules of interpretation were essential and should be considered at the present stage. Only interpretation made it possible to determine whether an act was unilateral, whether it was legal, whether it produced legal effects and thus bound the author State and whether it was not covered by other regimes such as the law of treaties.

30. With regard to rules of interpretation, comments had been made on the reference to the intention of the author State. He repeated that its interpretation must

be done in good faith and in accordance with the terms of the declaration in their context, i.e. the text itself and its preamble and annexes. The determination of the intention of the author State was indispensable and could be deduced not only from the terms of the oral or written declaration, in the particular context and in accordance with specific circumstances, but also, when it was not possible to determine the meaning according to the general rule of interpretation, from additional means, such as the preparatory work. In order to cover the concerns expressed by some members on the difficulties raised on having access to preparatory work, the Special Rapporteur suggested inserting the phrase "when that is possible" in the draft article.

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

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

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

32. Delegates expressed mixed views as to the feasibility of continuing the work on the topic. The delegate of **Japan** felt that, in view of the few responses received from Member States on their state practice the topic was not yet ripe for codification. The delegate of **Jordan** said that, given the fact that the doctrine was not yet established under international law and the lack of a general State practice recognizing it as an independent legal doctrine, the ILC could reconsider its approach and the need to deal with this topic.

33. On the other hand, some other delegates expressed hope for achieving progress in the work on this topic.

34. The delegate of the **People's Republic of China** said the topic was a complex one and information on relevant State practice must be gathered. He felt that ILC must codify rules on the topic to enable States to clearly understand the consequences of unilateral acts.

35. The delegate of **India** was of the view that the topic was different from more traditional concepts, involving progressive development rather then codification. Since every unilateral act was not formulated to create a legal obligation or the expectation of it, a mechanism by which an inference of a legal obligation could not be provided. The delegate suggested that the Special Rapporteur should first concentrate on those unilateral acts from international practice that culminated in obligations. This approach could lead to developing new concepts and ensuring a successful completion of the work on the subject.

36. The delegate of **Cyprus** shared the Special Rapporteur's view that unilateral acts existed and could constitute a source of obligations as indicated also by the

jurisprudence of the ICJ. The delegate said that there were specific types of unilateral acts, such as promise, waiver, recognition and protest – that could be studied. A similar view was expressed by the Delegate of the **Republic of Korea.**

37. The delegate of **Nepal** was of the view that the ILC could first formulate rules common to all unilateral acts and then focus on specific rules for particular categories of unilateral acts.

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

A. INTRODUCTION

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

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

3. In accordance with the mandate of the General Assembly, the Commission at its present session established a Working Group[23] under the chairmanship of Mr. Pemmaraju Srinivasa Rao with a view to proceed with its work on the second part of the topic i.e. "International Liability for Failure to Prevent Loss from Transboundary Harm Arising Out of Hazardous Activities".

B. REPORT OF THE WORKING GROUP: AN OVERVIEW

4. The Working Group took note of the fact that the Commission had completed its work on State Responsibility and expressed its understanding that failure to perform duties of prevention addressed to the State as defined in draft articles on prevention would come under State responsibility. On the other hand, it was noted that the question of international liability would arise in such cases where harm occurred despite the fact that the State concerned complied with its duties. This could happen where the preventive measures were followed, but in the event proved inadequate or where the particular risk that caused harm was not identified at the time and appropriate preventive measures were not taken.

5. The working Group recognized the need to strike a balance between permitting States to allow desired activities within their territory or jurisdiction, and ensuring the availability of some form of relief for the actual harm that could occur despite appropriate preventive measures.

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[23] The Working Group was composes as follows: Mr. J, Baena Soares, Mr. I. Brownlie, Mr. E. Candioti, Mr. C. Chee, Ms. P. Escarameia, Mr. Z. Galicki, Mr. M. Kamto, Mr. J. Kateka, Mr. M. Koskenniemi, Mr. W. Mansfield, Mr. D. Opretti, Mr. P. S. Rao, Mr. R. Rosenstock, Ms. H. Xue, Mr. C. Yamada and Mr. V. Kuznetsov (ex-officio).

Scope of the Study

6. As regards the scope, it was understood that:

(i) Activities covered by the present topic are the same as those included within the scope of the topic on prevention of transboundary harm from hazardous activities;
(ii) A threshold would have to be determined to trigger the application of the regime on allocation of loss caused;
(iii) Loss to (a) persons (b) property, including the elements of State preliminary and national heritage, and (c) environment within the national jurisdiction should be covered.

Allocation of Loss

7. On the issue of allocation of loss among the relevant actors, agreement was reached on some issues. These issues included:

- The innocent victim should not be subjected to bear the loss;
- Any regime on allocation of loss should ensure effective incentives for all involved in a hazardous activity to follow best practice in prevention and response; and
- The regime on allocation of loss should cover various relevant actors along with States i.e. private entities such as operators, insurance companies and pools of industry funds.

The Role of the Operator

8. The operator, as one who had direct control over the operations, should bear the primary liability in any regime of allocation of loss, which would involve costs that were needed to bear to contain the loss upon its occurrence and compensation. However, the operator's share could not be conceived to be full and exhaustive if the costs of restoration and compensation exceed the limits of available insurance or his own resources. It was also suggested to consider the issues of developing proper insurance schemes and encouraging States to earmark funds to meet emergencies and contingencies.

The Role of the State

9. There was an agreement within the Working Group about the crucial role of States in designing international and domestic liability schemes for the achievement of equitable loss allocation. Thus it was suggested that these schemes should ensure that operators internalize all the costs of their operations so that the use of public funds to compensate for loss could be avoided. However, there was a difference of opinion about the situation where the private liability might prove insufficient for attaining equitable allocation. Some members expressed the view that the remainder of the loss should be borne by the State while others, without totally ruling out that possibility, held that the residual State liability should arise only in exceptional

circumstances. The discussion was further focused on the problems involved in residual State liability particularly as to which State should take part in loss sharing. The different possibilities discussed are: the State of origin; the State authorizing and monitoring the operations or receiving benefits from it; and the State of nationality of the relevant operator.

Additional Issues

10. Matters for consideration in this area would include inter-State or intra-State mechanisms for consolidation of claims, issues arising out of the international representation of the operator, the processes for assessment, quantification and settlement of claims, access to the relevant forums and the nature of available remedies.

C. DECISION BY THE COMMISSION

11. The Commission adopted the Report of the Working Group and appointed Mr.P.S. Rao as Special Rapporteur for the topic.

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

12. The Commission would welcome comments on the different points raised in the report of the Working Group, particularly with regard to the following issues:

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

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

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

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

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

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

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

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

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

13. In general, most of the delegates welcomed the ILC's decision to commence its work on the topic of liability.

14. The delegate of the **Republic of Korea** said that this topic was very important one on which the work should be carried out as it had on the draft articles adopted last year on Transboundary harm from Hazardous Activities. The delegates of **Jordan, Nepal, India, and Turkey** also welcomed the resumption of work on this topic.

15. The delegate of **Japan** wanted the Commission to limit the scope of activities to be covered and the ILC should build on its related work on the subject expressing disappointment over the lack of response from the General Assembly towards the draft articles on 'prevention' submitted by the ILC last year, the delegate said that this would undermine the Commission's efforts on the issue of liability. The delegate said that the ILC must receive a clear indication as to the fate of its draft articles on prevention to enable it to proceed decisively with its work on international liability.

16. The **delegate of India** was of the view that the scope of the work on liability, at the preliminary stage, should cover the same area as that in the topic of prevention. A threshold would have to be determined, to trigger the application of the regime in allocating the loss caused. The delegate stressed that any such regime should involve States, operators, insurance companies and pools of industry funds. Operators should bear the primary responsibility. Third party involvement would have to be kept in mind. The delegate suggested the need to study international precedents so as to determine the role of the State under the liability regime.

17. The **delegate of Nepal** took note of the Working Group's recognition of the need to strike a balance between the need to take action and the necessity of providing relief from harm done despite preventive measures.

18. The **delegate of Turkey** said that the activities covered at this stage on liability should be the same as those included within the sub-topic of prevention. Following are the views of the delegate on some aspects of the Commission's work:-

(i) Agreed with the Working Group on the principle that States should be reasonably free to permit desired activities within their territory or under their jurisdiction or control;
(ii) It would be an useful approach to cover the loss to persons, property and the environment within national jurisdiction and beyond;
(iii) States have an indispensable role in designing appropriate liability schemes aimed at equitable loss allocation, more particularly in cases where private liability might be insufficient to cover the entire damage caused.
(iv) The delegate cautioned against certain instruments like the Convention on the Non-Navigational Uses of International Watercourses (1997) being taken as reference points for the Commission's work on the topic of "international liability" or "shared national resources" as such instruments had not been accepted by a large part of the international community.

VI. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. BACKGROUND

1. Pursuant to its decision to include the topic "Responsibility of international organizations" in its programme of work, the Commission established a Working Group[24] on the topic. Mr. Giorgio Gaja, was appointed as the Special Rapporterur, as well as, the Chairman of the Working Group. Accordingly a report[25] was prepared to facilitate future deliberations on the topic.

2. The Working Group, following its deliberations, submitted a report to the plenary for consideration. The report contains some preliminary indications on the scope of the topic and on the general orientation of the study.

B. REPORT OF THE WORKING GROUP: AN OVERVIEW

(i) The Scope of the Topic

3. The meaning of the term "responsibility", for the purpose of this topic, would have to be assigned the same concept as under the articles on "Responsibility of States for Internationally Wrongful Acts" (State Responsibility) . Thus the study was intended to establish rules of general international law, as was done in the case of State responsibility, covering responsibility of international organizations incurred for their wrongful acts.

4. Given the differences among international organizations in terms of their membership, functions, and modes of deliberation the report found it necessary to devise specific rules for different categories of international organizations. It was also agreed to provisionally exclude the responsibility of organizations established under municipal laws and non-governmental governmental organizations.

5. Despite the fact that the questions of responsibility and liability were frequently intertwined, the Working Group felt that, it was appropriate to defer the matter of liability of international organizations for the time being, as it is being considered by the Commission under the topic of International liability.

(ii) Relationship between the Topic of Responsibility of International Organizations and the Articles on State Responsibility

6. The report felt that the draft articles on responsibility of international organizations would have to be an independent text from the articles on State Responsibility. While references could be made wherever necessary, to rules adopted in the context of State responsibility, specific aspects that were unique to the context of international organizations will have to be considered with great care.

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[24] The Working Group was composed as follows: Mr. G. Gaja (Chairman), (Special Rapporteur); Mr. J. C. Baena-Soares, Mr. I. Brownlie, Mr. E. Candioti, Mr. R. Daudoi, Ms. P. Escarameia, Mr. S. Fomba, Mr. M. Kamto, Mr. J. L. Kateka, Mr. M. Koskenniemi, Mr. W. Mansfield, Mr. B. E. Simma, Mr. P. Tomka, Mr. C. Yamada and Mr. V. Kuznetsov.

[25] A/CN.4/L-622)

(iii) Attribution of Responsibility

7. The report also highlighted the issues that would need consideration with regard to attribution of responsibility for wrongful conduct. One of the questions which have been mostly considered in practice with regard to responsibility of international organizations concerns the attribution of wrongful conduct either to an organization or to its member States; and in certain cases attribution both to an organization and to its member States.

8. Beyond the usual cases where a State organ was "lent" to an international organization, questions of attributability have to be examined, in cases in which the conduct of State organ was mandated by an international organization or took place in an area that fell within an organization's exclusive competence.

9. As regards the question whether States were responsible for the activities of an international organization of which they were members it was felt necessary to examine the following aspects:

- Whether there was a joint and several responsibility or whether the Member States responsibility was only subsidiary; and

- member States responsibility in case of non-compliance with obligations that were undertaken by an international organization, which was later, dissolved.

10. The other issues the report contained regarding responsibility were: questions relating to the breach of international obligations; responsibility of an organization in connection with the acts of another organization or a State; and circumstances precluding wrongfulness, including waivers or a form of consent. It was suggested that while considering the question of attribution of conduct of an organ of a State to the same State even when the conduct was mandated by an international organization the issues to be taken into consideration should include aid or assistance, directions and control, or coercion of a State by an organization over the commission of an internationally wrongful act.

(iv) Implementation of international responsibility

11. With regard to the issue of implementation of international responsibility of international organizations a suggestion was made to leave open the question whether the study should include matters relating to implementation of responsibility of international organizations and whether it should consider only claims by States or also claims by international organizations.

(v) Settlement of disputes

12. On the issue of whether provisions relating to settlement of disputes concerning the responsibility of international organizations are needed, it was agreed to keep the matter in abeyance, without prejudice to their inclusion or not.

(vi) Recommendation of the Working Group.

13. Finally the Working Group recommended to the Secretariat to approach international organizations with a view to collecting relevant materials, especially on questions of attribution and of responsibility of member States for conduct that is attributed to an international organization.

C. DECISION OF THE COMMISSION

14. The Commission adopted the Report of the Working Group, and approved its recommendation that the Secretariat approach international organizations with a view to collecting relevant materials on the topic.

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

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

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

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

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

16. The **delegate of Cyprus** considered that an effective dispute settlement mechanism was a condition since qua non of a well-functioning legal regime of State Responsibility, and that that extended to the regime of responsibility of international organizations on which the Commission planned to undertake a study. The delegate said that this study should be limited to issues relating to the responsibility for internationally wrongful acts under general international law, and also to inter-governmental organizations, at the initial stage.

VII. FRAGMENTATION OF INTERNATIONAL LAW

A. INTRODUCTION

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 current session, the Commission established a Study Group on the fragmentation of international law chaired by Mr. Bruno Simma.[26]The summary of the discussion within the Study Group as to the role of the Commission and the potential result of its work on the subject are set forth below.

B. REPORT OF THE STUDY GROUP: AN OVERVIEW

3. The Study Group considered the issue of suitability of the study of the topic by the Commission. Despite the considerable uncertainty about the potential scope of the topic, and the substance and format of a possible final result of the Commission's work, almost all the members of the Study Group were strongly in favor of taking up the topic. The study was felt to be desirable which could provide a useful guidance in relation to specific aspects of the issue.

4. It was the general sense of the Study Group that the title of the Hafner report, "Risks Ensuing from Fragmentation of International Law" was inadequate as it depicted the phenomena described by the term "fragmentation" in too negative a light. While some members felt that an increase in fragmentation is also a natural consequence of the expansion of international law, it was also suggested that proliferation of rules, regimes and institutions might strengthen international law. Therefore the Study Group thought it important to highlight the positive aspects of fragmentation.

5. As regards methodology, there was an agreement that the topic was not suitable for codification in the traditional format of draft articles. The other suggestions included: to focus on specific subject area themes; to identify certain areas where conflicting rules of international law existed, and if possible, develop solutions for these conflicts; and to take a more descriptive approach limiting the work to an assessment of the seriousness of fragmentation of international law. There was

[26]. 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. S. Rao, R. Rosenstock, B. Sepulveda, B. Simma, P. Tomka, H. Xue, C. Yamada, V. Kuznetsov (ex officio).

another proposal to adopt a more exploratory approach letting a methodology to evolve in the process.

6. There was an agreement not to deal with question of the creation or relationship among international judicial institutions. It was also agreed not to draw analogies to domestic law as it was thought that such analogies introduced a concept of hierarchy that was not present on the international legal plane. It was suggested that the Commission, instead of acting as a referee in the relationships between institutions and in areas of conflicting rules, should address issues of communication among such institutions.

7. Another suggestion was made to organize a seminar for the purpose of gaining an overview of Sate practice as well as to provide a forum for dialogue and potential harmonization. In this regard it was suggested to the seminar at the beginning of each annual session of the Commission. There was another proposal for a more institutionalized and periodical meetings on the lines of the meetings of chairpersons of human rights treaty bodies and the annual meeting of national legal advisers at the United Nations. Regarding the final outcome of the work the Study Group felt that it should be a study or research report though there was no agreement on the exact format or scope of any such report.

8. In the light of the discussion, the Study Group made the following recommendations:

(i) The title of the topic could be changed to "Difficulties arising from the diversification of international law".

(ii). A series of studies, *inter alia*, on the following topics could be undertaken as the subject of study:

a. the function and scope of the *lex specialis* rule and the question of "self-contained regimes";

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

c. the application of successive treaties relating to the same subject matter (Article 30 of the Vienna Convention on the Law of treaties);

d. the modifications of multilateral treaties between certain of the parties only (Article 421 of the Vienna Convention on the Law of Treaties);

e. Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules.

C. DECISION OF THE COMMISSION

9. The Commission adopted the Report of the Study Group, *inter alia*, approving the proposed change of the title of the topic, as well as the recommendation that the first study to be undertaken will be on the issue entitled "The function and scope of the *lex specialis* rule and the questions of 'self-contained regimes'".

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

10. Delegates generally recognized the importance of the work on this topic. The **delegate of Jordan** said that the risks and complexities of fragmentation of international law justified the work of the Commission on the topic.

11. The **delegate of Nigeria** said "fragmentation of international law" was a natural consequence of its expansion. It was a healthy indication of its vitality and versatility. The delegate hoped that the Commission's work would assist international judges and practitioners to cope with the consequence of fragmentation.

12. The **delegate of Nepal** was of the view that the Commission's work on the topic should strengthen international law, its rules, regimes and institutions. He suggested the holding of a seminar to gain an overview of State practice and provide for a dialogue towards achieving harmonization.

VIII. CONCLUDING REMARKS

1. An overall assessment of the Commission's work reveals that the present session was a constructive and satisfactory one, both in terms of progress achieved in respect of reservations to treaties and diplomatic protection, as well as the initiation of work on the newly identified topics.

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

A. Reservations to treaties

3. To begin with, compliments are due to the Special Rapporteur Mr. Allain Pellet for informative and analytical reports, which surveys the expensive jurisprudence of States practice and the functions of international organizations on the topic.

4. With regard to draft guidelines adopted by the Commission, the following observations may be made:

(a) The recognition of the competency of representatives accredited to an international organization and the Heads of permanent missions to an international organization, under draft guideline 2.1.3, is nuancely formulated. In the view of the AALCO Secretariat, this formulation is in line with the prevailing practice among international organizations and hence a welcome attempt at limited progressive development.

(b) As regards the role of the depositary, draft guidelines 2.1.7 and 2.1.8, faithfully adheres to the views expressed by States in the Sixth Committee of the UN General Assembly. Draft guideline 2.1.7 reflects the position that the depositary performed an essentially information function, consisting in communicating to the other parties any reservation submitted by a State, and it was for the parties to determine whether such reservation was admissible or not. Similarly draft guideline 2.1.8, allowing a depositary to examine the "manifest" impermissibility of a reservation and if so, to bring it to the notice of the author State, is to be welcomed as constituting a progressive development of international law.

B. Diplomatic protection

5. The Commission in adopting draft articles 1to 7 has largely been successful in mitigating the excessive intrusion of human rights principles into the essentially discretionary domain of diplomatic protection. This approach, in the opinion of the AALCO secretariat, is in keeping with the views expressed by States in the Sixth Committee and hopefully could ensure a wider acceptance by the international community of the final draft articles. At the same time, the commendable efforts of the Special Rapporteur Mr. Christopher Dugard and the Commission, in taking into account developments in international human rights law provides a requisite space to address the gaps and shortcomings of the legal framework on diplomatic protection.

6. As regards draft articles 1to7, the Secretariat offers the following observations:

(a). As regards articles 1 and 2, the recognition that the exercise of diplomatic protection should be through peaceful means; that the right of diplomatic protection is the discretionary right of the State, are to be welcomed.

(b). As regards Article 3, the Commission's decision to refrain from imposing a requirement of an effective or genuinely (along the lines suggested in *Nottebohm* case) as an additional factor for the exercise of diplomatic protection seems appropriate. This is in keeping with the views expressed by some States in the Sixth Committee that the requirement of genuinely espoused by the ICJ in *Nottebohm* case was unique to the facts of that case and also its jurisprudence had not been unanimously accepted.

(c). The AALCO Secretariat welcomes the retention of customary rule of continuous nationality in draft Article 4, subject however to the reasonable exceptions provided for in paragraph 2 of that article.

(d). Article 7 is to be viewed necessarily as an exercise in progressive development of international law. It should be noted that this article as adopted by the Commission emphasizes a discretionary nature of the right (as seen in the wordings of paragraphs 1 and 2 which provide that State "may exercise diplomatic protection".). Possibly, this formulation could allay the fears expressed by some States that according diplomatic protection to stateless persons and refugees would place an additional burden on States.

C. Unilateral acts

7. Given the inherent complexities of this topic, the AALCO Secretariat takes note with appreciation the critical and intense deliberations within the Commission, to reach an agreement on an acceptable methodology. The Secretariat supports the proposal of the Special Rapporteur to first try to formulate rules common to all unilateral acts and then focus on the consideration of specific rules for the particular category of unilateral acts. With a view to facilitate the work on this topic, the Secretariat urges AALCO member States to reply to the Commission's questionnaire of 31st August 2001, which invited States to provide information regarding State practice on unilateral acts.

ANNEX-I

RESERVATIONS TO TREATIES

Titles and texts of the draft guidelines adopted by the Drafting Committee

2. PROCEDURE

2.1 Form and notification of reservations

2.1.1 *Written form*

A reservation must be formulated in writing

2.1.2 *Form of formal confirmation*

Formal confirmation of a reservation must be made in writing.

2.1.3 *Formulation of a reservation at the international level*

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

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

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

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

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

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

(c) Representatives accredited by States to an international organization or

one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

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

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

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

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

2.1.5 *Communication of reservations*

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

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

2.1.6 [2.1.6, 2.1.8] *Procedure for communication of reservations*

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

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

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

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

[*] The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or as the case may be the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification.

2.1.7 *Functions of depositaries*

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

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

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

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

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

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

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

2.4.1 *Formulation of interpretative declarations*

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

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

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

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

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

A conditional interpretative declaration must be formulated in writing.

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

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

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

ANNEX – II

DIPLOMATIC PROTECTION

Titles and texts of draft articles adopted by the Drafting Committee

Part One

GENERAL PROVISIONS

Article 1

Definition and scope

1. Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

2. Diplomatic protection may be exercised in respect of a non-national in accordance with article 7 [8].[27]

Article 2 [3][28]

Right to exercise diplomatic protection

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

Part Two

NATURAL PERSONS Article 3 [5]

State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by

[27] This paragraph will be reconsidered if other exceptions are included in the draft articles.

[28] The numbers in square brackets are the numbers of the articles as proposed by the Special Rapporteur.

birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

Article 4 [9]

Continuous nationality

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

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

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

Article 5 [7]

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 6

Multiple nationality and claim against a State of nationality

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

Article 7 [8]

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.