REPORT ON THE WORK OF THE INTERNATIONAL LAW COMMISSION AND JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Report on the Work of the International Law Commission at its Fifty-first Session

(i) Introduction

The International Law Commission (ILC) 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 Commission held its Fifty-first session in Geneva from May 3 to July 23, 1999. The seven substantive topics on the agenda of this session were as follows:

1. State Responsibility;
2. International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage from Hazardous Activities);
3. Reservations to Treaties;
4. State Succession and its Impact on the Nationality of Natural and Legal Persons;
5. Diplomatic Protection;
6. Unilateral Acts of States; and
7. Jurisdictional Immunities of States and Their Property.

The General Assembly at its 53rd Session had, by operative paragraph of its resolution 53/102 of December 8, 1998 *inter alia*, recommended that the International Law Commission continue its work on the topics in its current programme.

The Commission at its Fifty first Session considered all the above mentioned items and some notes and comments on these topics have been given in the latter part of this chapter.

As regards "State Responsibility", the Commission continued with the task of second reading of the draft articles on the basis of the comments of member States on the draft articles as adopted by the Commission on first reading and the second report of the Special Rapporteur, Mr. James Crawford.1[1] The second report of the Special Rapporteur dealt with Chapters III (Breach of an international obligation), IV (Implication of a State in the internationally wrongful act of another State) and V (Circumstances precluding wrongfulness) of Part One of the draft articles. The Commission decided to refer the draft articles in these three Chapter to the Drafting Committee and subsequently took note of the Report of the Drafting Committee.2[2] It also undertook a preliminary consideration of the question of countermeasures in Chapter III of Part II of the draft articles.

1[1] See A/CN.4/498 and Add 1 to 4.

2[2] See A/CN.4/L.574.

As regards "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (Prevention of Transboundary Damage from Hazardous Activities)" the Commission considered the second Report of the Special Rapporteur, Dr. P.S. Rao, with respect to its future work on the topic.3[3] Pending the second reading of the draft articles on the prevention of transboundary damage from hazardous activities, the Commission decided to defer the consideration of the question of international liability.

With respect to the topic of "Reservations to Treaties" it may be stated that the Commission continued with the consideration of the Third Report of the Special Rapporteur,4[4] Professor Alain Pellet, which he had submitted at the last session. The Commission also had before it the Fourth report of the Special Rapporteur.5[5] The Commission adopted eighteen draft guidelines pertaining to the first chapter of the Guide Practice. The First Chapter of the Draft Guidelines comprises sections concerning (i) the definition of reservations, (ii) the definition of interpretative declarations; (iii) the distinction between reservations and interpretative declarations; (iv) unilateral statements other than reservations and interpretative declarations; (v) unilateral statements in respect of bilateral treaties; and (vi) scope of definitions.

As regards the topic of "Nationality in Relation to the Succession of States" the Commission had before it a Memorandum prepared by the Secretariat.6[6] It established a working group to review the text of the draft articles as adopted on first reading in 1997 in light of the comments of Governments. On the basis of the Report of the Working Group7[7] the Commission decided to refer the draft preamble and a set of 26 draft articles on the Nationality of Natural Persons in relation to the Succession of States to the drafting Committee.8[8] Thereafter, having considered the Report of the Drafting Committee the Commission adopted the draft preamble and a set of 26 draft articles together with commentaries thereto. It decided to recommend to the General Assembly their adoption in the form of a declaration. It also decided to recommend to the Assembly that the work of the Commission on the topic be considered to have been concluded.

The Commission appointed Mr. Christopher J.R. Dugard to be Special Rapporteur on the topic "Diplomatic Protection", in place of Mr.M. Bennouna who had, in October 1998, been elected Judge of the International Tribunal for the Former Yugoslavia.

As regards the topic "Unilateral Acts of Sates" the Commission examined the second report of the Special Rapporteur, Mr. Rodriguez Cedeno, dealing with seven

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3[3] See A/CN.4/501.

4[4] See A/CN.4/491.

5[5] Doc. A.CN.4/499.

6[6] See A/CN.4/497.

7[7] See A/CN.4/L.572.

8[8] For the text of the draft articles on Nationality of Natural Persons in relation to the Succession of States adopted by the Drafting Committee on Second Reading see A/CN.4/L.573.

draft articles.9[9] The Commission agreed to take as the basic focus of its study - and as a starting point for gathering State practice thereon - the concept of "a unilateral statement by a State by which such State intends to produce legal effects in its relations to one or more States or international organizations and which is notified or otherwise made known to the State or international organization concerned". The Commission has requested its Secretariat to send a questionnaire to Governments inquiring about their practice and positions concerning certain aspects of unilateral acts. This follows the debate in the Commission at its fiftieth session whereat the discussion had been concentrated mainly on the scope of the topic, the definition and elements of unilateral acts, the approach to the topic and the final form of the Commission's work thereon. There had been general endorsement for limiting the scope of the topic to unilateral acts of States issued for the purpose of producing international legal effects and for elaborating possible draft articles with commentaries on the matter.

The Commission has invited views and comments on whether the scope of the topic should be limited to declarations, as proposed by the Special Rapporteur in his first report, or whether the scope of the topic should be broader than declarations and should encompass other unilateral expressions of the will of the State. Comments have also been invited on whether the scope of the topic should be limited to unilateral acts of States directed at or addressed to other States, or whether it should also extend to unilateral acts of States issued to other subjects of international law.

Finally, it may be recalled that the General Assembly had by its resolution 53/98 of December 8,1998 invited the International Law Commission to present, in light of the informal consultations held pursuant to General Assembly Resolution 48/413 of December 9,1993, any preliminary comments that it may have regarding the outstanding substantive issues related to the draft convention on the Jurisdictional Immunities of States and their properties. In fulfilment of that mandate the Commission at its 51st Session established a Working Group and entrusted to it the task of preparing preliminary comments as required by General Assembly Resolution 53/98. The Commission took note of the Report of the Working Group10[10] and adopted its suggestions relating to five issues viz. (i) the concept of State for purpose of immunity; (ii) the criteria for determining the commercial character of a contract or transaction; (iii) the concept of a State enterprise or other entity in relation to commercial transactions; (iv) contracts of employment; and (v) measures of constraint against State property.

Jurisdictional Immunities of States and their Property

The Embassy of Japan in India, through a 'Note Verbale' informed the AALCC Secretariat that the Government of Japan was concerned about the situation of state Practices with regard to State immunity. The note stated "certainly it is an established fact that a state enjoys immunity from foreign jurisdiction for acts of sovereign authority and that immunity does not apply to its commercial activities. The modalities of such restrictive immunities, however vary considerably depending on the legal tradition of the forum state".

9[9] See A/CN.4/500 and Add.1.

10[10] Doc. A/CN.4//L.576.

"Several states have enacted domestic legislation to reestablish coherence in their jurisprudence with regard to state immunity. From Japan's point of view such domestic legislation, constitutes a very significant contribution to the development of law on state immunity. Such domestic legislation, however, is not the ultimate solution to providing an international standard in the practices of state immunity. The question is how to establish basic rules governing the modalities of giving state immunity at the international law level when most countries are shifting to adopting a restrictive doctrine of immunity".

"At the sixth Committee of the UN, the discussion on drafting a treaty on jurisdictional immunity of states has just started. With that situation in mind Japan considered that AALCC should study this issue and express some views on this issue towards the international society and the UN". Thereafter the subject was taken up at the Cairo session for discussion and the same has been included in this introductory part. The text of the Explanatory Note forwarded by the Government of Japan on 28th December 1999 and Background Paper prepared by the Japanese Delegation dated 7 February 2000 on the subject have been reproduced herewith.

A. TEXT OF THE EXPLANATORY NOTE FORWARDED TO THE AALCC BY THE GOVERNMENT OF JAPAN ON 28TH DECEMBER 1999.

Government of Japan is concerned about the situation of state practice in regards to State immunity. Certainly, it is an established fact that a State enjoy immunity from foreign jurisdiction for acts of sovereign authority, and that immunity does not apply to its commercial activities. The modalities of such restrictive immunities, however, vary considerably depending on the legal tradition of the forum State. We sometimes find the local courts having hesitation and even contradictions in its judgements.

Several States enacted domestic legislation to reestablish coherence in their jurisprudence in regard to State immunity. From Japan's point of view, such domestic legislation, of course, is the implementation of principles of international law, as well as a very significant contribution to the development of law for State immunity. Such domestic legislation, however, is not the final solution to providing an international standard in the practice of State immunity, because we cannot expect many countries to take legislative measures in the near future, and there are divergences of principles among the legislations. The questions how to establish basic rules of the modalities of State immunity at the international level when most countries have shifted to adopting restrictive doctrine of immunity.

The International Law Commission formulated the draft articles of "Jurisdictional immunity of States and their property" and reported it out to the General Assembly of the UN in 1991. The Sixth Committee identified, through its deliberations in WG, several issues on which views of the governments differed .The Sixth Committee resumed its consideration on the topic this year, based on the new report prepared by the International Law Commission. It also decided to continue the work next year and to urge the governments to submit their comments.

The Government of Japan considers it very important that the member governments of the AALCC take an active role in the codification process of this topic and accordingly proposes to subscribe this topic as an agenda of the Thirty-ninth Session of the AALCC.

B. BACKGROUND PAPER PREPARED BY THE JAPANESE DELEGATION

February 7, 2000

I. Formulation of Draft Articles by the ILC

The General Assembly of the United Nations invited, in 1997, the International Law Commission to commence work on the topic of jurisdictional immunity of States and their properties (Res. 32/151 of 19 December 1977). The Commission commenced its work on codification of the topic in 1978 and completed the formulation of the articles in 1991. The draft articles reflect the transition from absolute rule to restrictive rule of jurisdictional immunity. As a rule, a State cannot invoke immunity from jurisdiction of the foreign court for commercial transaction, contract of employment, tort etc. In submitting the draft articles, the Commission recommended the Assembly to convene an international conference to conclude a convention on the subject.

II. Consideration of Draft Articles in the GA

The General Assembly considered the draft articles in the WG in 1992 and 1993 and again in informal consultation in 1994. While the Chairman of the WG and informal consultation. Ambassador Carlos Calero-Rodorigues, was not able to attain the consensus, he identified the five major problems and offered his conclusions (A/C.6/49.L.2).

The General Assembly resumed its consideration on the topic last year in the WG. It had before it the comment from the ILC on major issues identified by Ambassador Calero-Rodorigues (pp.360-419) of the Report of the ILC 1999, A 54/10). The most contentious issues are "criteria for determining the commercial character of a contract of transactions" (the question of whether purpose test could be applied in addition to nature test) "Contract of employment" (the question of clarifying the employees who are recruited to perform governmental functions and "measure of constraint against state property" (the question of on which state property prejudgment and post-judgement measure of constraint could be taken).

The General Assembly decided to reconvene the WG this year to conduct substantive discussion on these major issues. It is scheduled to meet from 6 to 10 November.

III. Role to be played by AALCC

In view of the fast increasing number of cases where states are being sued in foreign courts all over the world, it will be beneficial for members of the AALCC to have a standard rule regulating jurisdictional immunity. It is therefore, of utmost importance for the AALCC members to make an active and positive contribution in the work of the WG of the General Assembly for codification of this subject.

Therefore, with reference to the note of the Government of Japan the item "Jurisdictional Immunities of States and their Property" was included in the Agenda for Cairo Session (2000) and was taken up for discussion.

Thirty-ninth Session: Discussions

Mr. Mohammad Reza Dabiri, Deputy Secretary-General, AALCC while introducing the Secretariat brief on the topic welcomed Mr. Gerard Hafner, the Representative of the International Law Commission and stated that his presence was reflective of the strong ties of cooperation that the AALCC and ILC have developed over the years. He commended the Commission for the significant progress achieved in its work, relating to 'State Responsibility' and 'Reservations to Treaties'. On the topic of 'International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law", Mr. Dabiri informed the Commission's decision to defer consideration of the question of international liability, until the completion of the second reading of the draft articles relating to prevention.

Mr. Dabiri welcomed the conclusion of the work on 'nationality' by the ILC which was marked by the adoption of a set of 26 draft articles on Nationality of Natural Persons in relation to Succession of States. The deliberations at the Sixth Committee however revealed divergences as to the final form in which it was to be adopted.

On the item, "Unilateral Acts of States", the Commission had agreed upon a working definition of what constituted unilateral acts of States. The agreed formulation defines the concept as a unilateral statement by which a State intends to produce legal effects in its relations to States or international organizations and which is notified or otherwise made known to the State or organizations concerned. He drew the attention of the AALCC Member States to the resolution of the General Assembly reminding them to respond to the questionnaire circulated by the ILC on this subject, by 1 March 2000.

Mr. Gerhard Hafner, the Representative of the ILC complimented the President, Vice-President and Amb. W.Z. Kamil for their election to the respective offices.

Noting with sadness the death of Judge Doudou Thiam who had served the ILC for nearly 30 years, Mr. Hafner recalled his valuable contributions more particularly his work as Special Rapporteur for the topic on Draft Code of Crimes against the Peace and Security of Mankind, and said that his death was a great loss to the Commission. He also informed the election of Mr. M. Maurice Kamto (Cameroon), Mr. M. Peter Tomka (Slovakia) and Mr. M. Giorgio Gaja (Italy) as members to the ILC.

Highlighting the salient features of the draft articles adopted by the Commission on "Nationality of natural persons in relation to the succession of States", he was of view that this exercise reflected the consolidation of human rights principles relating to right to nationality, avoidance of statelessness and the protection of family unity. On the item "State Responsibility, Mr. Hafner narrated in detail the Commission's consideration of the second report of the Special Rapporteur, which dealt with chapters III, IV and V of part One of the draft articles. He identified the 'definition of an injured State" as a difficult area that would further require substantial discussion within the Commission.

With respect to the topic "Reservations to Treaties" the Commission adopted 20 draft guidelines pertaining to the first Chapter of the Guide to practice. Discussing the definitional aspects of "reservation" and "interpretative declaration", as adopted by the Commission, he acknowledged that the problem of distinguishing them was quite difficult in practice. However, this distinction, he said, must be made in good faith in accordance with the ordinary meaning to be given to its terms whereby due regard shall

be given to the intention of the State or the international organization concerned at the time the statement was formulated.

As regards the topic "Unilateral Acts of States", Prof. Hafner informed that the ILC Working Group on the subject had agreed on a working definition of 'unilateral acts' as a starting point for enabling further work as well as gathering relevant State practice. The Commission had decided to send to governments a questionnaire seeking materials and inquiring about their practice in the area of unilateral acts. He stressed the need for States to respond to this questionnaire as it would enable the ILC to truly reflect in its work the practice and interests of States.

On the item "International Liability for injurious consequences arising out of acts not prohibited by international law", the ILC at its current session examined the alternatives proposed by the Special Rapporteur as to the future course of action on the question of liability. On the basis of the deliberations that followed, the Commission decided to defer the consideration of the question of international liability, pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities. With respect to the topic of "diplomatic protection", Mr. Hafner informed that the Commission appointed Mr. J.R. Dugard as the Special Rapporteur.

Brief reference was also made to the following aspects: the Working Group on Jurisdictional Immunities of States and their property; decision of the Commission on its work programme for the remainder of the quinquenium; and the dates of the fifty-second session of ILC.

The President then opened the floor for comments.

The **Delegate of India** commended the Representative of the ILC on his excellent and concise report. He added that the report of the ILC had touched upon a number of important topics which included State responsibility, nationality of persons and reservation to treaties. As regards State Responsibility, he was of the view that it was complicated and technical subject which should be looked into seriously. He opined that the AALCC Member States must come together to be able to influence the decision making process in the Commission. The Commission he added was left with no choice but to overlook the developing country viewpoints, as they received no feedback from countries. This lack of cohesiveness among Asian African States, he said was the reason why developing countries were not able to evolve a distinct legal viewpoint on matters of common concern. On a more positive note he added that the AALCC must be active, may be, by forming smaller special groups to study the topics on the ILC agenda in detail.

The **Delegate of the Arab Republic of Egypt** thanked Prof. Hafner on his excellent presentation. He concurred with the view of the Indian delegate and said that the developing countries must make use of the Committee for airing their views to enable a common stand on matters of mutual concern.

On the issue of state responsibility he was of the view that despite the topic being on the agenda of the ILC for more than twenty years, scarce progress had thus far been made. He welcomed the consideration by the AALCC of the second report submitted by the special Rapporteur for the topic Prof. James Crawford which consisted of 5 parts, and made the following remarks on it:

Regarding the responsibility of a state for coercing another state into committing a wrongful act (Art. 28) he believed that the final draft should ensure the inclusion of all forms of coercion i.e. military, economic, political.

Regarding counter measures (Art. 30) he reiterated the view that such counter measures, if included in the draft should have the requisite guarantees against abuse or disproportionality.

As for the topic, International Liability for injurious consequences of acts not prohibited by International Law, he commended the work done by Dr. Rao and supported the concepts of "Polluter Pays" and "equity" which the special rapporteur had adopted. He further hoped that the decision of the ILC to postpone discussion on the issue of "Liability" would not lead to any undue delay in conclusion of the work.

Regarding "Reservations to Treaties" he reiterated his country's view that the Vienna Convention regime (Art. 19-23) provided a flexible and pragmatic balance between the unity and integrity of the Treaties on one hand, and achieving universality of adherence on the other. As for the role of monitoring bodies of Human Rights instruments in determining the validity or acceptance of reservations, he was of the view that such a role would exceed the mandate of these bodies and would provide an unfounded retroactive authority and mandate to them.

On the topic relating to Reservation to Treaties he expressed the need for a flexible system which would also balance the integration of the human rights agreements. As regards unilateral acts of states, welcomed the third report of the Rapporteur and felt that the ILC should take steps in crystallizing the guidelines on the subject. In this regard, he further added that as there was no clarity of views, AALCC Member States must send in their comments to the ILC.

The **Delegate of the Syrian Arab Republic** speaking on the issue of international liability, stated that there was a need for further studies and research. On the issue of jurisdictional immunities of States and their property; he affirmed the views expressed by India and Egypt that there must be time allocated for in-depth discussion of the topics. In doing so he felt that common denominator or trends of common concern could be located and found out.

Since Prof. Gerhard Hafner, the Chairman of the Sixth Committee's Working Group on Jurisdictional Immunities was scheduled to depart from Cairo the same day, the Chair invited him to make his statement on the item "Jurisdictional Immunities of States and their Property".

Prof. Gerhard Hafner in his statement underscored the significance of the topic for the linkages it establishes between the sovereignty of States and the necessities of modern life where States are acting in economic matters. The increasing trend of sovereign States participation in economic matters coupled with the growing involvement of non-State actors in international relations, in his view were reflective of the changing conditions. Therefore he asserted that it would no longer be said that restrictive immunity infringes upon the equality of States.

Recalling the adoption by the ILC of a full set of draft articles on jurisdictional immunities and its submission to the Sixth Committee of the United Nations, Mr. Hafner outlined briefly the developments on this subject within the General Assembly from 1992

to 1994. Following the resumption of work at the General Assembly in 1997, the ILC had at its fifty-first session (1999) dealt with some of the substantive outstanding issues relating to the draft articles. The suggestions of the ILC were forwarded to the General Assembly at its 54th Session.

The Chairman gave an overview of the discussions within the Working Group, on the following issues.

(a) Criteria for determining the commercial character of a contract or transaction;

(b) Concept of a State enterprise or other entity in relation to commercial transactions;

(c) Contracts of employment; and

(d) Measures of constraint against State property.

As to the final form of the outcome of this work, Mr. Hafner said that there were differences in the Working Group. While one view supported the adoption of the draft articles in the form of a convention, some others were of opinion that formulating a 'model law' or a 'non-binding instrument was more realistic and would allow the necessary flexibility in this regard. As regards the future course of action, he drew attention to the General Assembly Resolution 54/101, whereby a Working Group will continue its work on the topic during the forthcoming session of the General Assembly.

The **Delegate of Islamic Republic of Iran** in his statement focussed on the work of the ILC relating to 'State Responsibility'. At the outset, the delegate expressed the view that it is preferable for the Commission to retain as far as possible the substance of the draft articles adopted on first reading and to change them only if there were very good reasons for doing so. Against this backdrop, he offered some preliminary remarks on certain proposals submitted by the Special Rapporteur and discussed at the 51st session of the Commission.

Supporting the distinction between 'obligations of conduct' and 'obligations of result' made out in Article 20 of the present draft, he urged the retention of this formulation as it was of particular value to developing countries which generally do not have equal means at their disposal to achieve the result required of them. As to the notion of an obligation of prevention, the delegate argued for its deletion from the draft article as it could be covered under the rubic of obligations of conduct. The delegate expressed support for Article 26 *bis* on the 'exhaustion of local remedies, as it was an established rule of general international law.

Commenting on the text of Article 27 as proposed by the Special Rapporteur, concerning "assistance or direction to another State to commit an internationally wrongful act", the delegate stated that the article presupposed the existence of a general rule in international law that prohibited the rendering of aid and assistance in the commission of an internationally wrongful act. His delegation doubted the existence of any such rule and hence favoured the deletion of this article.

Concerning the interpretation of Article 33 on 'necessity', he was of the view that the article as it stood did not cover humanitarian intervention involving the use of force on the territory of another State.

His delegation supported the inclusion in the draft articles of specific rules on the application of countermeasures. Strong support for establishing a linkage between countermeasures and compulsory dispute settlement was expressed.

The **Delegate of the Republic of Korea** expressed appreciation for the lucid and informative presentation of Mr. Gerhard Hafner. On the work of the Commission relating to 'State Responsibility" the delegate supported the 'holistic' approach preferred by the Special Rapporteur. As regards the four options offered by the Special Rapporteur on the treatment of 'countermeasures', his delegation preferred the fourth option i.e. to deal with countermeasures in Part Two, but avoid any specific linkage of countermeasures with dispute settlement. On the item "Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, his delegation was of the view that the outcome of the work could ideally take the form of a "framework convention".

As regards the work of the ILC on "Reservation to Treaties", the delegate said that the definition of reservation as found in the Vienna regime on treaties must be the starting point for discussion. With respect to the topic "Unilateral Acts of States", his delegation called for a precise delineation of the scope of unilateral acts that were intended to be addressed by the ILC. In this context, he stressed the distinction to be maintained between "treaty acts" and "unilateral acts".

The **Delegate of the People's Republic of China** while complimenting Mr. Mohammad R. Dabiri, Deputy Secretary-General, AALCC and Mr. Gerhard Hafner for their comprehensive statements, noted with satisfaction the close ties that exist between the AALCC and the ILC, and the contributions made by the Committee to the working of the Commission. He bemoaned the fact that the views of the Asian-African States on international law were not adequately reflected in the appropriate fora and hence urged States to make a conscious effort in this regard. In this connection he offered the following two suggestions.

(i) Some of the Asian and African countries are handicapped due to lack of comprehensive legal frameworks on certain aspects of international law well as language barriers inhibiting the articulation of their position. To strike a balanced reflection of the legal positions of varied legal system, the International Law Commission should, besides the national laws and judicial trends, also take into account the practice and positions of States in its work.

(ii) Within the AALCC, he urged the need to identify ways and means of substantially contributing to the work of the ILC. Stating that the consideration of the ILC's Report during the annual session of the AALCC was beset with problems of lack of time, he proposed that at its future sessions the consideration could be limited to any one particular item on the agenda of the ILC. Such focussed attention, would in his opinion facilitate an in-depth consideration of crucial topics.

The **Delegate of Sudan** in his statement expressed the view that as regards the item on State Responsibility, there was no need to maintain a distinction between 'obligations of result' and 'obligation of conduct'. Commenting on the adoption by the Commission of a set of draft articles on "Nationality of Natural persons in relation to the succession of States", he argued for the retention of dual nationality for the special value it had for millions of Asian and African nationals employed in foreign lands. He

also underscored the significance and urgency to codify the rules relating to jurisdictional immunities of States.

The **Delegate of Pakistan** expressing appreciation for the work accomplished by ILC, said that his delegation looked forward to the strengthening of the dialogue between the sixth committee and the ILC. One such way of making the dialogue meaningful, he suggested, was to ensure timely availability of the Report of the commission to States, as it would give reasonable time for governments to examine it, derive inputs from relevant governmental agencies and formulate their policies.

Speaking on the topic of Jurisdictional Immunities of States and their property, he said that Article 12 of the ILC's draft articles on the subject, makes no distinction between *acts jure imperii* and acts *jure gestionis*. Highlighting the underlying reasons marking a change from the absolute to restrictive immunity doctrine, the delegate pointed out that Article 12 provides for exemption from immunity even in respect of acts *jure imperii*. Thus this formulation, which does not take into consideration the motivation for the acts whether the acts or omission is intentional, malicious, negligent or inadvertent - would expose States to expensive litigation in some jurisdictions which have a long tradition of tortious litigation. For this reason he stated that this provision needs to be opposed.

The **Delegate of Nepal** commended the progress of work achieved by the ILC. He also expressed his appreciation for the AALCC brief on the topic.

The **Delegate of Iraq** reiterated the important role that the AALCC could play in articulating the views of developing countries and protecting their interest. More particularly the delegate pointed to the practices of extra-territorial application of national legislation and the intrusive behaviour of some major powers. He also expressed concern as to the marginalization of developing countries and called for efforts to address this trend.

The Committee then took up for consideration the item **Jurisdictional Immunities of States and their Property**.

The **Deputy Secretary-General of AALCC, Mr. Mohammed Reza Dabiri**, in his introductory statement recalled that the International Law Commission commenced its exercise of codification on the topic in the year 1978 and in 1991 completed the work with the adoption 22 draft articles.

Subsequently from 1992 to 1994, the General Assembly considered the draft articles in a Working Group and informal consultations as well. At its 53rd Session in 1998, the General Assembly decided to establish at its 54h Session an open-ended working group of the Sixth Committee to consider outstanding substantive issues related to the draft articles, taking into account the recent developments of State practice. The ILC was also invited to present at the 54th Session of the General Assembly any preliminary comments it might have in this regard.

At the 54th Session of the General Assembly, the Working Group held four meetings on this subject under the Chairmanship of Prof. Gerhard Hafner. The discussions of the Working Group also took note of the five outstanding issues related to the draft articles as identified by the ILC. These issues related to the draft articles as identified by the ILC. These issues identified are: (I) concept of a State for purposes of immunity; (b) criteria for determining the commercial character of a contract or

transaction; (c) concept of a State enterprise or other entity in relation to commercial transactions; (d) contracts of employment; and (e) measures of constraint against State Property.

The DSG said that the inclusion of this topic on the agenda of the current session within the AALCC, was based on the proposal advanced by the Japanese delegation. The background paper presented by Japan States that "in view of the fast increasing number of case where States are being sued in foreign courts allover the world, it will be beneficial for members of the AALCC to have a standard rule regulating jurisdictional immunity. It is therefore of utmost importance for the AALCC members to make an active and positive contribution in the work of the Working Group of the General Assembly for codification of this subject.

The **Delegate of Myanmar** expressing thanks to the delegation of Japan for proposing the inclusion of this item on the AALCC's agenda, narrated the evolution of the work within the ILC and the General Assembly. He highlighted the complexities inherent in the exercise, as the subject straddled the domains of public international law, corporate law and business practices. The shift from an absolute to a restrictive doctrine of immunity, was reflected in his exposition on the provision in ILC's draft articles relating to "Commercial Transactions" and the scope of immunity for State enterprises involved in business activities. Referring to the explicit provisions of the draft articles dealing with immunity of "ships owned or operated by a State", he expressed the view that air transportation could also be covered by the draft articles. He urged the need, while concluding comprehensive convention on the subject, to take into account the practice of States and the jurisprudence developed in different legal systems the civil law, common law and Islamic systems.

The **Delegate of Japan** while thanking Mr. Dabiri and Prof. Hafner for their presentations said that his delegation, in proposing the topic for inclusion on the AALCC's agenda, was guided by the desirability of drawing the attention of Member States to the importance of the subject. Characterizing the absolute doctrine of immunity as a product of a by gone era, the delegate informed that the General Assembly would continue its consideration of the subject at its forthcoming session. The aim of the exercise was to set global standards for the restrictive role of sovereign immunity.

While the subject was significant for AALCC States, he regretted that their participation in the exercise was minimal. He announced that Japan would make a positive contribution to the codification of rules relating to the subject and pledged the support of his government for any proposal aimed at facilitating exchange of views and coordination of position by AALCC Member States on this matter.

The **Delegate of the Arab Republic of Egypt** thanked Japan for the proposal and stated that the contemporary trends of privatization and the gradual obliteration of the traditional distinction between 'commercial' and 'sovereign' acts, provided the *raison d'etre* for the re-examination of the absolute position on sovereign immunity. He agreed with the views expressed by the Delegate of Myanmar, that the current exercise should take into account the practices prevailing in various Asian and African legal systems.

Speaking on the concept of a "State" for purposes of immunity, he said that it was in the interest of developing countries to seek a wider definition of the term "State" (Article 2 of the ILC draft articles). As regards "State enterprises", the delegate felt that a

State should have a say in the determination of the status of an entity, for purpose of immunity.

On the issue of determining what amounts to a 'commercial activity', he said that developed and developing countries' positions were very different. Referring to the controversies surrounding the appropriateness of employing the 'nature' or 'purpose' test in this connection, the delegate called for more focussed work on developing definite criteria to assess whether a particular activity amounted to a commercial transaction.

He was of the view that all member states of the AALCC should make their positions on this important topic known to the ILC, since the existing vacuum in this regard plays into the hands of the developed countries who unilaterally deny immunity to other States based on their own narrow definition.

The **Delegate of the Islamic Republic of Iran** drew attention to the divergences revealed by the deliberations of the Sixth Committee's Working Group and the uncertainties spring from conflicting positions prevailing in the national legislation of many countries. To obviate these disparities, he emphasized the necessity to develop an international standard for determinations of State Immunity'.

Thanking the initiative of Japan in introducing this item, the delegate urged the AALCC to monitor the developments and keep governments informed so as to enable AALCC Member States to coordinate their efforts at the forthcoming session of the General Assembly. Against this backdrop, he suggested that the AALCC could consider:

(a) the possibility of compiling national legislation and jurisprudence of Member States on jurisdictional immunities;

(b) the feasibility of organizing a workshop to give in-depth consideration to the matter; and

(c) preparing an Asian-African document on the topic, taking into account the ILC's draft articles.

The **Delegate of the People's Republic of China** while narrating the evolution of the work within ILC and the Sixth Committee of the General Assembly, informed that the topic will continue to be examined by the General Assembly at its forthcoming session. In order to ensure that the work takes into account the views of Asian-African States, he urged the AALCC to follow-up the development in this regard.

The **Delegate of the Republic of Korea** expressed the wish to see an early completion of the work relating to the codification process. He informed that the Supreme Court in his country had recently upheld the restrictive doctrine of immunity, and his government proposed to shortly enact domestic legislation on this subject. He also welcomed the approach of the ILC's working Group on the formulation of the concept of a "State". He said that this decision to merge sub paragraphs (b) (ii) and (b)(iii) in paragraph 1 of draft article 2, dealing respectively with "constituent units of a federal States" and "political subdivisions of the State", was acceptable. On the criteria for determining the commercial character of a contract or transaction, his delegation preferred the application of the 'nature test'.

The **Chair,** in its concluding remarks stated that the deliberations indicated a widely felt need to organize inter-sessional meeting for facilitating in depth consideration of the topic.

(ii) (a) Resolution on the "Work of the International Law Commission"

(Adopted on 23.2.2000)

The Asian-African Legal Consultative Committee at its thirty-ninth session,

Having taken note with appreciation of the Report of the Secretariat on the work of the International Law Commission (ILC) at its fifty-first session as set out in Document No. AALCC/XXXIX/CAIRO/2000/S.1.

Having also taken note with appreciation of the comprehensive statement of the Deputy Secretary General;

1. **Expresses** its appreciation on the comprehensive statement made by the Representative of the ILC on its work;
2. **Affirms** the significance of the contribution of the ILC to the progressive development of international law and its and its codification;
3. **Commends** the ILC on the adoption of a set of draft articles on Nationality of Natural Persons in relation to the Succession of States and on the progress of work on other items on its agenda at its fifty-first session;
4. **Requests** the Secretary-General to bring to the attention of the International Law Commission at its fifty-second session the views expressed on the items on it agenda during the thirty-ninth session of the AALCC; and
5. **Decides** to include an item entitled "The Report on the Work of the International Law Commission at its fifty-second session' on the agenda of its fortieth session.

(ii) (b) Resolution on the "Jurisdictional Immunities of States and their Property"

(Adopted on 23.2.2000)

The Asian-African Legal Consultative Committee at its thirty-ninth session

Appreciating the initiative of the Government of Japan for placing the item on its agenda;

Having heard the comprehensive statement of the Deputy Secretary General and the comments made by the delegations;

Also having heard with appreciation the illuminating statement of Prof. Gerhard Hafner, Chairman of the Working Group of the Sixth Committee of the General Assembly of the United Nations on Jurisdictional Immunities of States and their Property;

Noting that the Working Group of the Sixth Committee of the General Assembly of the United Nations will further consider the draft articles on Jurisdictional Immunity of States and Their Property;

1. **Urges** its Member States to participate actively in the Working Group of the Sixth Committee;
2. **Requests** the Secretariat to consider the feasibility of compiling national legislation jurisprudence and practices of the AALCC Member States on this item;
3. **Also** requests the Secretariat to consider the possibility of organizing workshop with the participation of legal advisers and jurists from the AALCC Member States and other interested countries prior to the meeting of the Working Group of the Sixth Committee; and
4. **Decides** to place the item "Jurisdictional Immunities of States and Their Properties" on the agenda of the its fortieth session.

(iii) Secretariat Study: The Report on the Work of the International Law Commission

Long-term Programme of Work of the Commission

It will be recalled that a Planning Group established by the Commission for the forty-ninth session11[11] had considered the Work Programme of the Commission for the present quinquennium and had taken the view that substantial progress should be made on those topics on which substantive work had already been undertaken and that it would be desirable to complete the first or the second reading, as the case may be, of those topics within the present quinquennium. It had invited the Working Groups on the respective topics to consider the matter and to make recommendations.

The Planning Group had established a Working Group on the Long Term Programme of Work12[12] to consider the topics that may be taken up by the Commission beyond the present quinquennium. The Working Group while emphasizing the role of the General Assembly in the selection of topics recommended that the selection of topics particularly within the Commission should be guided by the following criteria:

(a) that the topic should reflect the requirements of States in respect of the progressive development and codification of international law;

(b) that the topic is sufficiently advanced in stages in terms of State practice to permit progressive development and codification;

(c) that the topic is concrete and feasible for progressive development and codification.

It had also proposed that the Commission should not restrict itself to traditional topics but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.

It will be recalled that the Commission at its Fiftieth session had identified "The Law of Environment" as one of the topics that the Commission could consider in the future. At the Commission's 51st session, Ambassador Chusei Yamada presented a feasibility study on "Guidelines for International Control for avoidance of Environmental Conflicts"13[13] for inclusion in the Long-Term Programme of Work of the Commission.

11[11]The Planning Group was composed of Mr. J. Baeba Soares (Chairman), Mr.M. Bennouna, Mr. J. Crawford, Mr. L.Ferrari Bravo, Mr.R. Goco, Mr.Q. He, Mr. L. Illueca, Mr. J. Kataka,Mr. I.Lukashuk, Mr. V. Mikulka, Mr. D.Opertti-Badan, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. B. Sepulveda, Mr.B. Simma, Mr.D.Thiam and Mr. Z. Galicki (ex-officio member).

12[12]The Working Group on long term programme of work established at the Forty-ninth session of the Commission was composed of Mr. I.V. Lukashuk (Chairman); Mr. J. Baena Soares; Mr. Ian Brownlie; Mr. C. Dugard; Mr. L. Ferrari Bravo; Mr. R. Goco; Mr.Qizhi He; Mr. A. Pellet; Mr. B.Simma; Mr. Chusei Yamada and Mr. Z. Galiki (ex officio member).

13[13] See ILC (L1) INFORMAL/10.

Another Member of the Commission, Mr. Emmanual A. Addo, had submitted a feasibility study on the "Expulsion of Aliens"14[14] for the purpose of inclusion of that topic in the Commission's Long Term Programme of Work.

Yet another proposal advanced by Mr. Gerhard Hafner was the inclusion of the topic "The Polluter Pays Principle"15[15] for progressive development and codification of that norm.

Mr. Goco together with three other Members of the Commission proposed that the Commission could in the future undertake work on "Corruption and related Practices".16[16] Yet another proposal was the undertaking of work on "Non-discrimination in International Law". A feasibility study was prepared on the item by Mr. Galicki, Mr. Dugard and Mr. Simma.17[17]

At its fifty-first session this year, the Planning Group re-established the Working Group on the long-term programme of work to consider topics which might be taken up by the Commission beyond the present quinquennium. The Working Group was chaired by Mr. Ian Brownlie and reported to the Planning Group.18[18]

The Commission took note of the report of the Planning Group of last year in which it had identified the following topics as appropriate for inclusion in the long-term programme of work, viz., responsibility of international organizations; the effect of armed conflict on treaties; shared natural resources; and expulsion of aliens.

The Commission further took note that the Working Group on long-term programme of work had examined a number of feasibility studies on various other topics and that it intends to complete its work at the next session of the Commission. The Commission decided that the Working Group on the long-term programme of work should be re-established at the next session to complete its task.

(1) STATE RESPONSIBILITY

It will be recalled that the General Assembly at its fifty-first session had by its Resolution 51/163 drawn the attention of the Governments to the importance, for the International Law Commission, of having their views on the draft articles on State Responsibility adopted on first reading by the Commission at its forty-eighth session, and urged them to present in writing their comments and observations by 1 January 1998, as requested by the Commission.

The Commission at its 49th Session decided to establish a Working Group. The Working Group on State Responsibility, *inter alia*, proposed that the Commission

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14[14] See ILC (L1) INFORMAL/8.

15[15] See ILC (L1) INFORMAL/9.

16[16] See ILC (L1) INFORMAL/7.

17[17] See ILC (L1) INFORMAL/4.

18[18]The Working Group on the long term programme of work established at the Fifty-first session of the Commission was composed of Mr. I. Brownlie (Chairman); Mr. Q. He; Mr. Herdocia Sacasa; Mr. R. Goco; Mr. A. Pellet; Mr. Sepulveda; Mr. B. Simma; Mr. Chusei Yamada and Mr. R. Rosenstock (ex officio member).

appoint a Special Rapporteur for the topic and the Commission accordingly appointed Mr. James Richard Crawford as Special Rapporteur for the topic.

At its 52nd Session the General Assembly recommended that the International Law Commission continue its work on the topics in its current programme, including State Responsibility. At its 50th Session the Commission had before it the comments and observations received from Governments on the draft articles provisionally adopted by the Commission on first reading.19[19] Also before the Commission was the first report of the Special Rapporteur, Mr. James Crawford.20[20] The report was divided into two parts and dealt with general issues relating to the draft articles, the distinction between "crimes" and "delictual" responsibility. It also dealt with draft articles 1 to 15 of Part One of the draft articles as adopted on first reading.

After having considered articles 1 to 15 *bis*, the Commission referred them to the Drafting Committee. At the same session, the Commission took note of the report of the Drafting Committee on articles 1, 3, 4, 7, 8, 8 *bis,* 9, 10, 15 15 *bis* and A. The Commission also took note of the deletion of articles 2, 6 and 11 to 14.

Consideration of the topic at the present session

At its present session, the Commission had before it the second report of the Special Rapporteur, Mr. James Crawford21[21] and also comments and observations received from Governments on the draft articles provisionally adopted on first reading.22[22]

The report of the Special Rapporteur consisted of five parts. The first, relating to Chapter III of the draft articles dealt with the breach of an international obligation; the second related to Chapter IV and the implication of a State in the internationally wrongful act of another State; the third focussed on Chapter V dealing with circumstances precluding wrongfulness; the fourth was an annex containing a brief comparative review of the so far unexplored question of interference with contractual rights, a question that was related to Chapter IV of the draft articles; and the fifth related to certain questions of principle concerning countermeasures.

(a) Chapter III - Breach of an International Obligation

The Special Rapporteur while outlining the approach to Chapter III reiterated that the task of the Commission was restricted to secondary obligation of responsibility arising from breach. Drawing attention to the difficulties of distinguishing primary and secondary obligations, he said that if a narrow view was taken the scope of the rules of State responsibility might dwindle almost to nothing, leaving only the question of reparation and restitution. If a broad view were taken of the scope of the secondary rules, they would incorporate an enormous amount of primary material. Thus, in his view, Chapter III dealing with the rules of responsibility in relation to breach, strayed too far into the field of primary obligations. The second issue outlined by the Special

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19[19] A/CN.4/488 and Add.1 and 2.

20[20] A/CN.4/490 and Add.1-6.

21[21] A/CN.4/498 and Add.1-4.

22[22] A/CN.4/488 and Add.1-3.

Rapporteur was the relationship between Chapters I, III, IV and V. While the relationship between Chapters II and III was clearly articulated in Article 3, the question arose how Chapters IV and V fitted into that framework. He stressed the need for a holistic approach in order to identify the relationships among the different articles and parts of the draft.

The Commission then undertook an article-by-article discussion and referred the following articles to the Drafting Committee.

Draft Article 16 entitled *Existence of a breach of an international obligation* as presented by the Rapporteur included the essential elements of Article 17, paragraph 1 and Article 19, paragraph 1 adopted on first reading. This article which has both an introductory and normative function stipulates that there is a breach of an international obligation when an act of that State does not comply with what is required of it under international law by that obligation, irrespective of the 'source' or 'content' of that obligation.

Draft Article 18 on *Requirement that the international obligation be in force for the State* as proposed by the Rapporteur is in substance akin to draft article 18(1) as adopted in first reading. The Special Rapporteur suggested the deletion of the original Article 18(2) and indicated that paragraphs (3) to (5) can be discussed in conjunction with Article 24. The proposed Article 18 centered on temporal aspects of obligations provides that no act of a State shall be considered internationally wrongful unless it was performed, or continued to be performed, at a time when the obligation in question was in force for that State.

Draft Article 20 deals with the distinction between 'obligations of conduct' and 'obligations of result'.23[23] This distinction derived form civil law systems treated the former as being in the nature of "best efforts" obligations (such as those of a doctor towards a patient) and the latter as being tantamount to guarantees of outcome. The utility of retaining this distinction in the draft articles was a matter of animated discussion within the Commission. While the Special Rapporteur acknowledged that the distinction made some difference in terms of the burden of proof, he felt that it appeared to have no consequences in terms of the burden of proof, he felt that it appeared to have no consequences in terms of the rest of the draft articles. On the contrary, some other members who believed that the distinction should be retained pointed out that the distinction was 'cognitive' rather than normative and served as a tool to assess the type of obligation, without predetermining its outcome or applying qualitative standards thereto. Likewise, it was pointed out that the distinction might be of value to developing countries, which did not, all have equal means at their disposal to achieve the result required of them. As an extension of this discussion the Special Rapporteur proposed the deletion of Art. 21 (2) [as in first reading] dealing with 'extended obligations of result'.

23[23] The text of article 20 proposed by the Special Rapporteur reads as follows:

Obligations of conduct and obligations of result

1. An international obligation requiring a State to adopt a particular course of conduct is breached if that State does not adopt that course of conduct.
2. An international obligation requiring a State to achieve, or prevent, a particular result by means of its own choice is breached if, by the means adopted, the State does not achieve, or prevent, that result.

The Special Rapporteur had proposed to merge Art. 23 on obligations of prevention with Art. 20(2). Some members pointed out that obligations of prevention were more often obligations of conduct. Indeed, obligations of prevention were often 'due diligence obligations' and not obligations of result as envisaged by the Special Rapporteur. Therefore, it was suggested not to categorize the 'obligations of prevention' as 'conduct' or 'result' in the draft articles.

Draft Articles 24 on *Completed and Continuing Wrongful Acts* and 25 on *Breaches Involving Composite Acts of a State* deals with the issues of the moment and duration of the breach of an international obligation. While there was general support for the Special Rapporteur's formulation of Article 24, the view was also expressed in the Commission that all reference to the question when a wrongful act began and for how long it continued could be deleted on the grounds that it was matter for the interpretation of the primary rules and the application of logic and common sense. However, the Special Rapporteur in reply felt that a distinction must be drawn between 'completed' and 'continuing' wrongful acts, in the light of the varying effects that they give rise to.

Draft Article 25 differentiated between "composite" and "complex" acts. A composite act consisted of a series of actions relating to what article 25 called "separate acts" which, taken together constituted a breach, irrespective of the fact whether each action individually constituted a breach (e.g. the adoption of the policy of apartheid by means of a complex of laws and administrative acts). Complex acts, on the other hand, occurred in relation to the same case (e.g. a series of acts against an individual which, taken together, amounted to discrimination). Drawing attention to the difficulties in distinguishing between composite and complex acts by reference to the primary rule, the Special Rapporteur recommended the deletion of the notion of 'complex' acts entirely.

Draft Article 26 *bis* as proposed by the Special Rapporteur, in effect is a retention of Article 22 of the draft articles in first reading. This article on the exhaustion of local remedies drafted in the form of a 'savings clause' stipulates that the Draft Articles on State Responsibility are without prejudice to the requirement that in the case of an international obligation concerning the treatment to be accorded by a State to foreign nationals or corporations, those nationals or corporations should have exhausted any effective local remedies available to them in that State.

(b) Chapter IV - Implication of a State in the Internationally Wrongful Act of Another State

The Special Rapporteur outlining his approach to this chapter said the chapter essentially dealt with the question whether a State that had induced or assisted another State to commit an internationally wrongful act was itself also responsible for the commission of a wrongful act. Chapter IV should be seen as essentially concerned with situations in which a State induced another State to breach a rule of international law by which the inducing State itself was bound.

Draft Article 27 titled *Assistance or direction to another State to commit an internationally wrongful act* lays down the criteria by which a State that induces another State to commit a wrongful act is held responsible. Thus Article 27 provides that a State which aids or assists, or directs and controls another State in the commission of an internationally wrongful act is internationally responsible for doing so if, it satisfied the following two conditions:

(a) That State does so with the knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

The concurrent application of both criteria (a) and (b) is intended to ensure respect for the principle *pacta tertiis nec nocent nec prosunt* (a treaty creates neither obligations nor rights for a third State without its consent). It may be noted that this provision does not include activities carried out by States within the framework of an international organization.

Draft Article 28 on *Responsibility of a State for Coercion of another State* as proposed by the Special Rapporteur is a reformulation of Article 28, paragraph 2 as it stood at the time of first reading. The proposed article provides that a State that, with knowledge of the circumstances coerces another State to commit which would be an intentionally wrongful act of the latter (coerced) State, is responsible for the act. The debate in the Commission revealed the need to duly define the nature and scope of coercion, and making it clear that the term was not confined to the use of armed forces, but could also include economic pressure of a severe kind. A second issue that called for attention: whether, if the coercing State was not under an obligation into which the coerced State had entered with other States, it should be held responsible for the breach of the obligation.

(c) Chapter V - Circumstances Precluding Wrongfulness

At issue in this chapter are general "excuses" which are available to States in respect of conduct which would otherwise constitute a breach of an international obligation. Within the framework of secondary rules, the Special Rapporteur pointed out the need to maintain the distinction between an excuse in respect of the performance of an obligation and the continued existence of the obligation. The Chapter as formulated by the Special Rapporteur is structured as follows:

Art.29 *bis* - Jus cogens

Art. 29 *ter* - Self defence

Art. 30 - Counter measures

Art. 30 *bis* - Non-compliance caused by prior non-compliance

Art. 31 - *Force majeure*

Art. 32 - Distress

Art. 33 - Necessity

Draft Article 29 *bis* on *Compliance with a peremptory norm* stipulates that the wrongfulness of an act of State is precluded if the act is required in the circumstances by a peremptory norm of general international law. While this formulation found general support that a more general provision on the subject of *jus cogens* could be included in Chapter I thus establishing a general link between the doctrine of *jus cogens* and the subject of State Responsibility.

Draft Article 29 *ter* on *'self-defence*' as proposed by the Special Rapporteur precludes the wrongfulness of an act of a State, if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations. Preclusion of wrongfulness as stated above does not extend to obligations that are intended to be obligations of 'total restraint' even for States engaged in armed conflict or acting in self-defence. This exception is aimed at preserving certain obligations relating to

international humanitarian law and non-derogable human rights and even in self-defence.

Draft Article 30 relating *Countermeasures* was not taken up for full discussion at this stage, as the Special Rapporteur stated that the fate of the provision was linked to the outcome of the Commission's consideration of the regime of countermeasures in Chapter III of Part 2.

Draft Article 30 *bis* on *Non-compliance caused by prior non-compliance by another State* as proposed by the Special Rapporteur states that the "wrongfulness of an act of State is precluded if the State has been prevented from acting in conformity with the obligation as a direct result of a prior breach of the same or a related international obligation by another State". This formulation is based on the *maxim exceptio inadimpleti contractus*. Diverging views were expressed in the Commission as to its inclusion in Chapter V. One view that emerged at the Commission was that the article on force majeure covered the content of the provision, while others suggested that this provision could be related to the draft article on countermeasures. The Special Rapporteur however, clarified the need to retain the content of Article 30 *bis* as distinct from *'force majeure*' and countermeasures. Yet, he acknowledged that the precise formulation could be assessed only when the provisions on countermeasures had been formulated.

Draft Article 31 dealing with *force majeure* as proposed by the Special Rapporteur precludes the wrongfulness of an act of a State if the act is due to *force majeure*. *Force majeure* is defined as "the occurrence of an irresistible force or an unforeseen external event beyond the control of the State making it materially impossible in the circumstances to perform the obligation. Article 31, paragraph 2 adds that the excuse of *force majeure* does not apply if:

(a) the occurrence of *force majeure* results from the wrongful conduct of the State invoking it; or

(b) The state has by the obligation assumed the risk of that occurrence.

Draft Article 32 on *"Distress"* precludes the wrongfulness of an act of a State, if the author of the act in question reasonably believed that there was no other way, in a situation of distress, of saving that person's own life or the lives of other persons entrusted to his or her care. Distress concerned a situation where a person was responsible for the lives of other persons in his or her care (e.g. the Captain of a State-owned ship). Article 32 is a case of progressive development wherein the scope of distress has been extended beyond the narrow historical context of navigation to cover all cases in which a person responsible for the lives of others took emergency action to save life.

Draft Article 33 relating to *Necessity* as a ground precluding wrongfulness of an act of a State stipulates that the ground can be invoked if "the act is the only means of safeguarding an essential interest of that State against a grave 'and imminent peril". Yet another concurrent condition for invoking necessity is that the act must not 'seriously impair':

(i) an essential interest of the State towards which the obligation existed; or

(ii) if the obligation was established for the protection of some common or general interest.

Besides this necessity may not be invoked in the following circumstances: if the obligation in question arises from a peremptory norm; the obligation explicitly or implicitly excludes the possibility of invoking necessity; or the invoking State has itself materially contributed to the situation. The debate in the Commission favoured the formulation of the provision with strict conditions and limitations, so as to prevent abuse.

Draft Article 34 *bis* is a new provision put forth by the Special Rapporteur dealing with *Procedure for invoking a circumstance precluding wrongfulness*. Paragraph 1 of this article states that a State invoking a circumstance precluding wrongfulness should, as soon as possible, and after it has notice of the circumstance, inform the other State or States concerned in writing of it and of its consequences for the performance of the obligation. Members of the Commission welcomed this information and consultation procedure as a contribution to the progressive development of international law. While acknowledging this, the Special Rapporteur cautioned against giving any impression of creating a new primary obligation to inform. As regards paragraph 2 of this provision, which spelt out the dispute settlement process to determine the existence of the circumstance or its consequences for performance of the obligation, the Commission deferred its consideration for a later stage along with Part 3 of the draft articles.

Draft Article 35 as proposed by the Special Rapporteur is titled *Consequences of Invoking a Circumstance Precluding Wrongfulness*.24[24] The provision expressly dealing with cessation (as reproduced in paragraph (a) in the footnote here at) was included to reflect the findings of the International Court of Justice in the *Gabcikovo-Nagymaros Project* - case.25[25] Pursuant to the views expressed in the Commission, the Special Rapporteur took cognizance of the view that Article 35(b) should not be limited to Article 32 (distress) and 33 (necessity). He also deferred to the view that the Commission should not attempt to elaborate in detail the content and basis for compensation.

(d) Debate on "Countermeasures"

It may be recalled that following its preliminary debate on Article 30 (countermeasures) in the context of Chapter V of Part One, the Commission deferred finalizing the text of the article until its consideration of countermeasures in Chapter III of Part Two.

Continuing with the discussion on this topic, the Special Rapporteur drew attention to the fact that it was difficult to take a view on countermeasures without forming a view on dispute settlement. He noted that under the draft articles, if countermeasures were taken, the "target" State (i.e. the State against whom they are taken and which have been said to have committed the internationally wrongful act) was

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24[24]Article 35 as proposed by the Special Rapporteur reads as follows:

> The invocation of a circumstance precluding wrongfulness under this Chapter is without prejudice:
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> (a) To the cessation of any act not in conformity with the obligation in Question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
>
> (b) In the case of articles 32 and 33, to the question of financial compensation for any actual harm or loss caused by that act.

25[25] ICJ Reports 1997.

entitled to unilaterally force the State taking the countermeasures (i.e. the "injured State") to go for compulsory arbitration. From a policy standpoint, the Special Rapporteur observed, that it was undesirable to limit the right to settlement of disputes to the State, which had *ex hypothesi* committed a wrongful act. Hence he felt it was better to formulate the provisions in a way that would require State to do whatever they could to resolve disputes, but which would not link the taking of countermeasures to judicial settlement.

The Special Rapporteur identified four options with regard to the formulation of Article 30.26[26]

1. to retain article 30 in essentially its present form, but to delete the treatment of countermeasures in Part Two;
2. not to deal with countermeasures in Part Two, but to incorporate substantial elements of the legal regime of countermeasures into article 30;
3. to engage in a substantial treatment of countermeasures in Part Two, including the linkage with dispute settlement; or
4. to deal with countermeasures in Part Two but avoiding any specific linkage with dispute settlement.

He expressed his preference for the last option.

The Commission thereafter referred the articles in Chapter III, IV and V to the Drafting Committee27[27] and subsequently took note of the report of the Drafting Committee.28[28]

(2) INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

The Commission at its 49th Session had resumed its work in order to complete the first reading of the draft articles relating to the activities that risk causing transboundary harm and had established a Working Group which *inter alia* recommended that the Commission appoint a Special Rapporteur. The Commission had accordingly appointed Dr. P.S. Rao, Special Rapporteur, for "prevention of Transboundary Damage from Hazardous Activities". The Commission at that session had decided to divide the topic of International Liability for Injurious Consequences

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26[26]Article 30 as proposed by the Special Rapporteur reads as follows:

Countermeasures in respect of an internationally wrongful act.

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if and to the extent that the act constitutes a lawful countermeasure as provide for in articles (XX) - (XX).

27[27]The Drafting Committee on this topic established at the Fifty-first session of the Commission was composed of Mr. E. Candioti (Chairman), Mr. J. Crawford (Special Rapporteur), Mr. H. Al-Baharna, Mr. A. Al-Khasawneh, Mr. I. Brownlie, Mr. C. J.R. Dugard, Mr. C.P. Economides, Mr. G. Gaja, Mr. G. Hafner, Mr. Q. He, Mr. Herdocia Sacasa, Mr. I.I.Lukashuk, Mr. G.Pambou-Tchivounda,Mr. P.S.Rao, Mr. B.Simma, Mr.C.Yamada and Mr. R. Rosenstock (ex officio).

28[28] A/CN.4/L.574.

Arising Out of Acts Not prohibited by international law into two parts. It had decided to first address the "Problem of Prevention of Transboundary Effects of Hazardous Activities" and then consider the "Question of Liability".

The Commission at its 50th Session considered the First Report of the Special Rapporteur, Dr. P.S. Rao.29[29] The report on the "Prevention of Transboundary Damage from Hazardous Activities" was divided into three parts, the first of which dealt with the concept of prevention and scope of the Draft Articles. In his report Dr. Rao had emphasized that the Commission's work on the subject of prevention be placed in the context of sustainable development for it was in the broader context of sustainable development that the concept of prevention had assumed great significance and topicality. The objective of prevention of transboundary harm arising from hazardous activities had been incorporated in Principle 21 of the Rio Declaration and confirmed by the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* as forming a part of the corpus of international law.

The text of the draft articles adapted on first reading at the 50th Session address the first set of problem, that is, the question of prevention.30[30] The Special Rapporteur had proposed a complete set of articles on the subject - a total of 17 articles. The Commission after consideration of the report of the Drafting Committee adopted on first reading the set of 17 draft articles on prevention of transboundary damage from hazardous activities and transmitted the draft articles to Governments for comments and observations.

Work of the Commission at the Current Session

At the present session, the Commission had before it the second report of the Special Rapporteur, Dr. P.S. Rao.31[31] The report comprised of five sections:

- Sections I and II, *inter alia*, dealt with the questions raised in the 1998 report of the Commission on the nature of the obligation of prevention and the type of dispute settlement procedures that may be suitable for the draft articles.
- Section III elaborated on the salient features of the concept of 'due diligence' and ways in which that concept could be implemented in the light of State practice and doctrine.
- Section IV reviewed the treatment of the 'concept of international liability' in the ILC since the subject was placed on its agenda as well as negotiations on liability issues in other forums.
- In section V of the Report, the Special Rapporteur offered three options as regards the future course of action on the question of liability. The three options were:

29[29] A/CN.4/487 and Add.1.

30[30] See Document A/CN.4/L.554 Add.1.

31[31] A/CN.4/501.

(i) To proceed with the topic of liability and finalize some recommendations, taking into account the work of the previous Special Rapporteurs and the text prepared by the Working Group in 1996;

(ii) To suspend the work on international liability, until the Commission finalizes its second reading of the draft articles on the regime of prevention; and

(iii) To terminate the work on the topic of international liability unless a fresh and revised mandate is given by the General Assembly.

Following the request of the Special Rapporteur seeking comments on the three options, as a matter of immediate focus for discussion, the Commission opted for the second option. Accordingly, it decided to defer consideration of the question of international liability, pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities.

(3) RESERVATIONS TO TREATIES

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 1994, the Commission appointed Mr. Alain Pellet as Special Rapporteur the topic.

The Commission at its forty-seventh session in 1995 and the forty-eighth session in 1996 received and discussed the first and second reports of the Special Rapporteur, respectively.

The International Law Commission had, at its 49th session, adopted a set of Preliminary Conclusions on Reservations to Normative Multilateral Treaties, including Human Rights Treaties. The General Assembly, at its 52nd session, had taken note of the Commission's preliminary conclusions and of the invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide their comments and observations on the conclusions.

The General Assembly had by its Resolution 52/156 drawn the attention of Governments to the importance for the International Law Commission of having their views on the Preliminary Conclusions on reservations to normative multilateral treaties, including human rights treaties.

Work of the Commission at its Fiftieth Session

At its 50th Session the Commission considered the Third Report of the Special Rapporteur Professor Alain Pellet, on the reservation to treaties.32[32] The Third report of the Special Rapporteur was divided into two chapters, the first of which surveyed the earlier work of the Commission on the topic. The second chapter of the Report of the Special Rapporteur addressed the question of definition of reservations (and interpretative declarations), and reservations (including interpretative declarations) to bilateral treaties.

In his survey of the earlier work of the Commission on the topic, the Special Rapporteur had drawn attention to two decisions of the Commission: (a) that in principle and subject to an unlikely "State of necessity", the Commission would not call into question the provisions of the Vienna Conventions on reservations and would simply try to fill the lacunae and if feasible to remedy the ambiguities and clarify the obscurities in them; and (b) that its work would lead to the preparation of a Guide to Practice, which would be grafted on to the existing provisions, filling the lacunae therein and would be accompanied by model clauses relating to reservations which the Commission would recommend to States and international organizations for their inclusion in treaties they would conclude in future.

As to the definition of reservations to treaties and of interpretative declarations the Special Rapporteur, Mr. Alain Pellet, had observed that none of the three Vienna Conventions furnished a comprehensive definition of reservations and he had therefore drafted a composite text. The definition, he had suggested, could be used at the beginning of the Guide to practice and could be called the "Vienna definition".

32[32] A/CN.4/491 and Add.1-5.

Due to lack of time, the Commission could not consider the third report of the Special Rapporteur in its entirety. It only considered part of it and referred to the Drafting Committee 10 draft guidelines included in the third report. On the recommendation of the Drafting Committee, the Commission at its 50th Session had provisionally adopted the text of 7 guidelines of the guide to practice relating to the reservations to treaties together with commentaries thereto.33[33] The text of the provisions provisionally adopted had included the guidelines relating to:

(i) the definition of reservations;

(ii) object of reservations;

(iii) cases in which reservations may be formulated;

(iv) reservations having territorial scope;

(v) reservations formulated when notifying territorial application;

(vi) reservations formulated jointly; and

(vii) a provision relating to unilateral statement of reservation.

Consideration of the topic at the present session

At the present session, the Commission considered the part of the Special Rapporteur's third report, which it could not consider at its fiftieth session, and the first part of the fourth report34[34] on the topic. The Commission referred draft guidelines 1.1.9 to 1.3.1 to the Drafting Committee.35[35]

Subsequently, after considering the Report of the Drafting Committee, the Commission at this session (51st Session) adopted on first reading 18 draft guidelines. Following is the brief overview of the draft guidelines as adopted by the Commission.

Draft Guidelines on Reservations to Treaties Provisionally adopted by the Commission on First Reading

The 25 draft guidelines as provisionally adopted by the Commission at its 51st session could be classified under six broad headings or sections viz. (i) Definitions of Reservations;36[36] (ii) Definition of Interpretative Declarations;37[37] (iii) Distinction Between Reservations and interpretative Declarations;38[38] (iv) Unilateral Statements

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33[33] See A/CN.4/L.561 and Add 1-4.

34[34] A/CN.4/499.

35[35]The Drafting Committee on this topic established at the Fifty-first session of the Commission was composed of Mr.E. Candioti (Chairman), Mr. A Pellet (Special Rapporteur), Mr. A. Al-Khasawneh, Mr. C.P. Economides, Mr. N. Elaraby, Mr. G. Gaja, Mr. Herdocia Sacasa, Mr.M. Kamto, Mr.T.V.Melescanu, Mr. B. Simma, Mr. P. Tomka and Mr. R.Rosenstock (ex officio).

36[36] This section would comprise the text of draft Guidelines 1.1; and 1.1.1 to 1.1.7.

37[37] This section would comprise the text of draft Guidelines 1.2; and 1.2.2 to 1.2.3.

38[38] This section would comprise the text of draft Guidelines 1.3; and 1.3.1 to 1.3.3.

other than Reservations and Interpretative Declarations;39[39] (v) Unilateral Statements in Respect of Bilateral Treaties;40[40] and (vi) Scope of Definitions.41[41]

Definitions

Draft Guideline 1.1 defines the term reservations as 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.

The Special Rapporteur has pointed out that the definition incorporates three formal components viz. (i) a unilateral statement; (ii) the moment when the State or international organization expressed its consent to be bound by the treaty; and (iii) its wording or designation. The definition of reservation must also contain the substantive element that the reservation was intended to exclude or to modify the legal effect of certain provisions of the treaty.

The aim and function of the definition of reservations contained in the first part of the Guide to Practice is to distinguish between reservations and other unilateral statements with respect to a treaty. The largest group of such unilateral statements is that of interpretative declarations, but the two are subject to different legal regimes.

Object of reservations

Draft Guideline 1.1.1 which addresses the issue of the *Object of reservations* stipulates that a "reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation".

Instances in which reservations may be formulated

Draft Guideline 1.1.2 stipulates that the instances in which a reservation may be formulated under draft guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the Law of Treaties. It is felt that the provisions of articles 2, paragraph 1 (d) on one hand and article 11 on the other both of the `1969 and 1986 Vienna Conventions are not formulated in the same terms and may give rise to confusion. The primary purpose of the present draft guideline is to seek to remedy that in those formulations.

Reservations having territorial scope

Draft Guideline 1.1.3 on *Reservations having territorial scope* provides that a unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

39[39] This section would comprise the text of draft Guidelines 1.4; and 1.4.1 to 1.4.5.

40[40] This section would comprise the text of draft Guidelines 1.5; and 1.5.1 to 1.5.3.

41[41] This section would comprise the text of draft Guidelines 1.6.

Reservations formulated when notifying territorial application

Draft Guideline 1.1.4 relating to *Reservations formulated when notifying territorial application* lays down that a unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation. While draft guideline 1.1.3 deals with the scope *ratione loci* of certain reservations the present guideline deals with the time factor of the definition. It thus relates to the moment when certain: "territorial reservations" can be made.

Statement purporting to limit the obligations of their author

Draft guidelines 1.1.5 provides that a unilateral statement formulated by a State or international organization, at the time when it expresses its consent to be bound by a treaty, by which its author purports to limit the obligations imposed by the treaty would constitute a reservation. The emphasis of the unilateral statement here is centered on the author's intention to "limit his obligations".

Statements purporting to discharge an obligation by equivalent means

Draft Guidelines 1.1.6 declares that a unilateral statement formulated by a State or international organization, which purports to discharge an obligation under a treaty in a manner different from but 'equivalent' to that imposed by the treaty, constitutes a reservation. The originality of the reservations referred to in these draft guidelines lies in the expression "in a manner different from but equivalent to". This 'equivalence' can be assessed only by the contracting parties, and where assessments differ then the parties must resort to means of peaceful settlement.

Reservations formulated jointly

Draft Guideline 1.1.7 entitled Reservations formulated jointly lays down that the joint formulation of a reservation by several States or international organization does not affect the unilateral nature of that reservation. A fundamental characteristic of reservations is that they are unilateral statements and nothing prevents a number of states or international organizations from formulating a reservation jointly, that is to say in a single instrument addressed to the depositary of a multilateral treaty in the name of a number of parties. This stipulation reinforces one of the three formal components of the definition of reservations incorporated in draft guideline 1.1, mentioned above.

Definition of interpretative declarations

Draft Guideline 1.2 defines 'interpretative declarations' to mean "a unilateral statement however phrased or named, made by a State or by an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions". It may be recalled that the 1969 and 1986 Vienna Conventions on Treaties are silent on interpretative declarations. State practice reveals that it had been difficult to distinguish on the one hand interpretative declarations and reservations, and on the other hand interpretative declarations and other unilateral statements of States.

The present draft guideline seeks to distinguish 'interpretative declarations' from reservations by defining the central element of interpretative declaration in terms of the intent of a State "to specify or clarify the meaning or scope attributed by the declarant to a treaty". Secondly, while the definition of a 'reservation' has a temporal element, the

definition of 'interpretative declaration' is silent on this. The Commission in its commentary to this draft guideline clarifies that the silence about the moment at which an interpretative declaration may be made, is out of concern not to limit unduly the freedom of action of States and not to go against a well established practice. The Commission noting the possibility of abuse inherent in this formulation, suggests that it might be expedient for the parties to a treaty to avoid anarchical interpretative declarations by specifying in a limitative manner when such declarations may be made (e.g. Article 310 of the 1982 Montego Bay Convention on the Law of the Sea; and Art. 26(1) of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal).

Conditional Interpretative Declaration

Draft Guideline 1.2.1 defining conditional interpretative declaration provides that a unilateral statement formulated by a State when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty *whereby the State subjects its consent to be bound by the treaty to a specific interpretation of the treaty* shall constitute a conditional interpretative declaration. In contrast with the definition of interpretative declaration (1.2) this draft guideline refers to the time element in the definition. Unlike 'simple' interpretative declarations, which merely attempt to anticipate any dispute that may arise concerning the interpretation of a treaty, the 'conditional' interpretative declaration places conditions for a State to be bound by the treaty.

Interpretative declarations formulated jointly

Draft Guideline 1.2.2. stipulates that the joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration. This formulation is reflective of the State practice in this area.

Distinction between reservations and interpretative declarations

Draft Guideline 1.3 clarifies that the character of a unilateral statement as a 'reservation' or an 'interpretative declaration' is determined by the legal effect it purports to produce. A comparison of draft guidelines 1.1 and 1.2 reveals that the distinction is to be based primarily by reference to the 'objective' pursued in both cases by the State or international organization. In formulating a reservation, the State purports to exclude or modify the legal effect of the provisions of the treaty, whereas the object of an interpretative declaration is to specify or clarify the meaning or scope of a treaty.

Method of implementation of the distinction between reservations and interpretative declarations

Draft Guideline 1.3.1 indicates the method that should be employed to determine whether a unilateral statement is a reservation or an interpretative declaration. For making this distinction, the guideline stipulates that it is appropriate to interpret the unilateral statement of a State or an organization in good faith in accordance with the ordinary meaning to be given to its terms, in the light of the treaty to which it refers. Due regard shall be given to the intention of the State concerned at the time the statement was formulated. The commentary to this guideline clarifies that in determining the legal nature of a state formulated in connection with a treaty, the decisive criterion lies in the effective result that implementing the statement would have. If it modifies or excludes

the legal effect of a treaty it is a reservation; if the statement simply clarifies the meaning or scope of the treaty, it is an interpretative declaration.

Phrasing and name

Draft Guideline 1.3.2 states that the phrasing or name given to a unilateral statement provides an *indication of the purported legal effect*. This is the case in particular when a State or an international organization formulates several unilateral statement in respect of a single treaty and designates some of them as reservations and others as interpretative declarations. To obviate the scope of abuse in this formulation, the commentary to this guideline clarifies that though the name a declaring State gives to its declaration is an indication of what it is, it does not however constitute an irrefutable presumption.

Formulation of a unilateral statement when a reservation is prohibited

Draft Article 1.3.3. provides that a unilateral statement formulated by a State to a treaty that prohibits reservations shall be presumed not to constitute a reservation. The guideline also contains a proviso that such unilateral statements would constitute a reservation if the statement purports to exclude or modify the legal effect or certain provision or the whole of the treaty in its application to the State.

It goes without saying that the presumption is not irrefutable and that if the statement constitutes a reservation, then it would attract the consequence of Article 19(1)(b) of the Vienna Conventions of 1969 and 1986, thus rendering it impermissible.

Unilateral Statements other than reservations interpretative declaration

Draft Guideline 1.4 may be regarded as a "general exclusionary clause" which purports to limit the scope of the Guidelines. Thus guideline 1.4 states that unilateral statements formulated in relation to a treaty which are not 'reservations' or 'interpretative declarations' are outside the scope of the present Guide to Practice. As the commentary to this guideline explicitly states, unilateral statements formulated by States or international organizations in respect to a treaty are so numerous and so diverse that it is futile to make an exhaustive list of them.

The Guide to Practice therefore simply tries to present the main categories of such unilateral statements, in an illustrative manner. The following are the categories of statements, which fall outside the scope of the Guide. They include unilateral statements formulated by a State or an international organization in relation to a treaty:

(a) whereby it purports to undertake obligations going beyond those imposed on it by a treaty and thus constituting a "unilateral commitment" (Draft guideline 1.4.1).

(b) whereby it purports to add further elements to a treaty and thus constituting a proposal to modify the content of the treaty (Draft guideline 1.4.2).

(c) whereby a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize, thus constituting a 'statement of non-recognition (Draft guideline 1.4.3).

(d) whereby it expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, thus constituting a 'general statement of policy' (Draft guideline 1.4.4.).

(e) whereby it indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other contracting parties, thus constituting an 'informative statement' (Draft Guideline 1.4.5).

Unilateral statements in respect of bilateral treaties

The commentary to the yet unformulated draft guideline 1.5 sets out the reason for discussing unilateral statements in respect of bilateral treaties.

Reservations to bilateral treaties

Draft Guideline 1.5.1 stipulates that a unilateral statement, formulated by a State or an international organization after signature but prior to the entry into force of a bilateral treaty, which purports to obtain from the other party a modification of the provisions of the treaty does not constitute a 'reservation' within the meaning of the present Guide to Practice.

The 1969 and 1986 Vienna Conventions on Treaties are silent on the subject of reservations to bilateral treaties, while the 1978 Convention on Succession of States explicitly contemplates only reservations to multilateral treaties. In this context it is pertinent to cite the distinction as elaborated by the Commission between reservations to multilateral treaties and reservations to bilateral treaties. A 'reservation to a multilateral treaty', if accepted, has the consequence of *modifying the legal effect of specific provisions* vis-?vis the State that formulated it. On the other hand, a 'reservation to a bilateral treaty', if accepted by the other party, has the effect of *amending the treaty itself*. (Emphasis supplied).Thus a "reservation" to a bilateral treaty is more akin to a proposal to amend the treaty in question or an offer to renegotiate it. For the above reasons, the draft guideline declares such unilateral statements as not constituting a reservation.

Interpretative declarations in respect of bilateral treaties

The silence of the Vienna Conventions on the Law of Treaties extends to interpretative declarations made in respect of bilateral treaties. The Commission reviewed the extent and consistency of the practice of interpretative declarations in respect of bilateral treaties and declared it as a "general practice accepted as law".

Draft Guideline 1.5.2 lays down that draft guidelines 1.2 (definition of interpretative declarations) and 1.2.1 (conditional interpretative declarations) are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

Draft guideline 1.5.3 states that the legal effect of the acceptance of interpretative declaration in respect of a bilateral treaty. Thus when the other party accepts an interpretative declaration made in respect of a bilateral treaty, it becomes an integral part of the treaty and constitutes the authentic interpretation thereof. As the Permanent Court of International Justice (PCIJ) noted in one of its advisory opinions, "The right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it". However in the case of a bilateral treaty the power belongs to both parties. Accordingly, if they agree on an interpretation, that interpretation prevails and itself takes on the nature of a treaty, regardless of its form.

The Drafting Committee has also adopted an untitled and as yet unnumbered Guideline, which reads "The definition of a unilateral statement as constituting a reservation does not prejudge its permissibility or its effects in the light of the rules governing reservations". This guideline has been adopted provisionally and its title and placement within the guide to practice is to be determined at a later stage. The Commission also proposes to consider the possibility of referring both to reservations and to interpretative declarations which pose identical problems.

In its Report to the General Assembly the Commission has invited comments and observations from Governments on whether unilateral statements by which a State purports to increase its commitments or its rights in the context of a treaty, beyond those stipulated by the treaty itself, ought or ought not to be considered to be reservations. The Commission would appreciate receiving any information or materials relating to States practice on such unilateral statements.

(4) STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

AT its 45th Session in 1993, the Commission decided to include this item in its agenda and the General Assembly at its 48th Session endorsed the Commission's decision on the understanding that the final form to be given to the work on the topic shall be decided after a preliminary study is presented to it (the General Assembly). Thereafter, at its 46th Session the Commission appointed Mr. Vaclav Mikulka Special Rapporteur for the topic. The Commission considered the Special Rapporteur's first report at its 47th Session.

At its 48th Session the Commission had considered the second report of the Special Rapporteur, Mr. Vaclav Mikulka. The purpose of that report was to enable the Commission to complete its preliminary study of the topic and to thus comply with the request of the General Assembly. The report was designed to facilitate the task of the Working Group on the topic, which the Commission had established at its 47th Session.

The Commission at its 48th Session decided on the recommendation of the Special Rapporteur to reconvene the Working Group it had established at its previous Session. The Group42[42] was to complete its task of identifying issues arising out of the topic, categorizing issues which are closely related thereto, give guidance as to which issues could be most profitably pursued given contemporary concerns, and present the Commission with a calendar of action.

Upon the recommendation of its Working Group the Commission at its 48th Session had recommended to the General Assembly that the General Assembly take note of the completion of the preliminary study on the topic and that it request the Commission to undertake the substantive study of the topic entitled *Nationality in Relation to the Succession of States* on the understanding that:

42[42] The Working Group consisted of Mr. Vaclav Mikulka (Special Rapporteur and Chairman), Mr. Hussain El Baharna,Mr. Derek William Bowett; Mr. Edmundo Vargas - Carreno; Mr. James Crawford; Mr. Salifou Fomba; Mr. Kamil Idris; Mr. Awn - Al-Khasawneh; Mr. Igor Lukashuk; Mr. Robert Rosenstock, Mr.Albert Szeksley, Mr. Christan Tomuschat; and Mr. Chusei Yamada.

(a) Consideration of the question of nationality of natural persons will be separated from that of the nationality of legal persons and that priority will be given to the former;

(b) For present purposes and without prejudicing a final decision - the result of the work on the question of nationality of natural persons should take the form of declaratory instrument consisting of articles with commentaries;

(c) The decision on how to proceed with respect to the question of the nationality of legal persons will be taken *upon completion* of the work on the nationality of natural persons and in light of the comments that the General Assembly may invite States to submit to it on the practical problems raised by a successor State in this field.

The General Assembly at its 51st session *inter alia* took note of the completion of the preliminary study of the topic "State Succession and its impact on the nationality of natural and legal persons "and requested the Commission to undertake the substantive study of the topic "Nationality in Relation to the Succession of States" in accordance with the modalities in its report to the Assembly.

Work of the Commission at its forty ninth session

At its 49th Session the Commission had before it the Third Report of the Special Rapporteur,43[43] containing a set of 25 draft articles together with commentaries on the "Nationality of Natural Persons in Relation to the Succession of States".

Following the scheme proposed by the Special Rapporteur the Commission at its 49th Session adopted a preamble and a set of 27 draft articles. The draft articles adopted on first reading by the ILC were divided into two parts. Part I of the draft articles which incorporates the text of draft articles 1-18 set out the **General Provisions** and Part II consisting of the text of draft article 19-26 had set out the **Provisions Relating to Specific Categories of Cases.** The Commission had also adopted the text of a draft article 27 but had left the decision on its final placement for the second reading.

Draft Articles Adopted on Second Reading at the Fifty-first Session

The Commission at this session decided to establish a Working Group to review the text adopted on first reading taking into account the comments by Governments. On the basis of the report of the Chairman of the Working Group,44[44] the Commission decided to refer the draft preamble and a set of 26 draft articles to the Drafting Committee.45[45]

43[43] See A/CN.4/480 and Add.1.

44[44]The Working Group was composed of : Mr. E. Candioti (Chairman), Mr. Z. Galicki (Chairman of the Working Group),Mr. E.A. Addo, Mr. I. Brownlie, Mr. G. Hafner, Mr. Herdocia Sacasa, Mr. T.V. Melescanu, Mr. G. Pambou - Tchivounda, and Mr. R. Rosenstock (ex officio).

45[45]The Drafting Committee was composed of : Mr. Z. Galicki (Chairman), Mr. I. Brownlie, Mr. E. Candioti, Mr. C.P. Economides Mr. G. Hafner, Mr. Herdocia Sacasa, Mr. P. Tomka, and Mr. R. Rosenstock (ex offico).

Having considered the report of the Chairman of the Working Group, the Commission adopted on second reading the text of a preamble and a set of 26 draft articles which it has recommended to the General Assembly to be adopted in the form of a declaration. The first of the eight preambular paragraphs indicates the *raison d'etre* of the draft articles, the concern of the international community as to the problems of nationality arising from succession of States. The preamble then goes on to emphasize that internal law within the limits set by international law essentially governs nationality. The third preambular paragraph recognizes that in matters concerning nationality the legitimate interests of both States and individuals should be considered. Preambulary paragraphs 4, 5, and 7 refer to international instruments of relevance viz. The Universal Declaration on Human Rights, 1948; Convention on the Reduction of Statelessness, 1961; the International Covenant on Civil and Political Rights, 1966; the Convention on the Rights of the Child, 1989; the Vienna Convention on Succession of States in Respect of Treaties, 1978; and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1983. Paragraph 6 of the preamble corresponds to the Special Rapporteur's formulation on guarantee of the human rights of persons concerned and emphasizes that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be respected. Preambular paragraph 8 of the proposed declaration reiterates the conviction for the codification and development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security for States and for individuals.

Part I, entitled *General Provisions*, of the draft articles as adopted by the Commission on second reading addresses such issues as (i) right to nationality; (ii) use of terms; (iii) cases of succession of States covered by the present draft articles; (iv) prevention of statelessness; (v) presumption of nationality; (vi) legislation concerning nationality and other connected issues; (viii) effective date; (viii) persons concerned having their habitual residence in another State; (ix) renunciation of the nationality of another state as a condition for attribution of nationality; (x) loss of nationality upon the voluntary acquisition of the nationality of another state; (xi) respect for the will of persons concerned; (xii) unity of family; (xiii) child born after the succession of states; (xiv) status of habitual residents; (xv) non-discrimination; (xvi) prohibition of arbitrary decisions concerning nationality issues; (xvii) procedures relating to nationality issues; (xviii) exchange of information, consultation and negotiation; and (xix) other States.

Needless to say, draft article 1 on the *Right to Nationality* is, the key provision concerned with the right to nationality in the exclusive context of State succession. It confers on every individual the right to the nationality of at least one of the "States concerned". The term "state concerned" for the purpose of draft articles would refer to the Predecessor State or the Successor State as the case may be. This provision, however, is given further specific form in subsequent provisions and cannot therefore be read in isolation. The mode of acquisition of the predecessor's State's nationality has no effect on the scope of the right to nationality of the individual. It is irrelevant whether the nationality of the predecessor State was acquired by *jus soli* or *jus sanguinis* or by naturalization or even as a result of a previous succession of States.

Draft article 2 on the *Use of Terms* set out the definitions of seven terms viz. (a) succession of States; (b) predecessor State; (c) successor State; (d) State concerned; (e) third State; (f) person concerned; and (g) date of the succession of States. Five or

these definitions are identical to the respective definitions embodied in Article 2 of the Vienna Convention on the Succession of States referred to above. The Commission decided to leave them unaltered so as to ensure consistency in the use of terminology. While these may require little or no consideration, the definitions of the terms "State concerned" and "person concerned" have been added for the purpose of the present subject.

Draft Article 2(d) defines the term "State concerned" to mean, depending upon the type of territorial changes, the states involved in a particular succession of States. These are the predecessor State in the case of a transfer of part of the territory;46[46] the successor state alone in the case of unification of States;47[47] two or more successor States in the case a dissolution of States;48[48] and the predecessor State and one or more successor State in the case of a separation of part of the territory.49[49] The term has nothing to do with the concern that any other State may have about the outcome of a succession of States in which its own territory is not involved.

The term "person concerned" is defined in draft article 2(f) as an individual who on the date of succession of States had the nationality of the predecessor State and whose nationality may be affected by such succession. The term encompasses only individuals who, on the date of succession of States, had the nationality of the predecessor State and whose nationality may thus be affected by that particular succession. It includes neither the nationals of third States nor stateless persons who were present in the territory of any of the States concerned.

These two terms, to some extent, implicitly determine the scope of the draft articles. They delimit the scope *rationae personae* of the draft articles and what is more the term "person concerned" also determines the scope *ratione materiae*. Accordingly, the draft articles deal both with the loss and acquisition of nationality although in the exclusive context of State succession. In that respect, following the right to nationality provided for in draft article 1, it also determines the scope of the draft articles *ratione temporis.*

Draft article 3 addresses the *Case of succession of States covered by the present draft articles*. It will be recalled that article 6 of the Vienna Convention on the Succession of States in respect of Treaties and article 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts explicitly limit the scope of their application to succession of States occurring in conformity with international law. Although it is very evident that the present draft articles address the question of nationality of natural persons in relation to the succession of State which take place in conformity with international law, the Commission decided, for the purposes of consistency with the aforementioned Conventions, to include a similar provision in the present draft articles. As mentioned earlier the Commission had, in the course of the first reading of the draft articles, adopted the text of such a provision but had at that

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46[46] See draft article 20.

47[47] See draft article 21.

48[48] See draft article 22 and 23.

49[49] See draft article 24 to 26.

stage deferred the decision on its final placement, in the draft articles, until the second reading.

Draft article 4 on the *Prevention of statelessness* is a corollary of the right of the persons concerned to a nationality. It may be stated that draft article 2 as formulated by the Special Rapporteur in his third report to the Commission had been termed "Obligation of States concerned to take all measures to avoid statelessness".50[50]

Draft article 5 on the *Presumption of nationality* addresses the problem of time lag between the date of succession of states and the adoption of legislation or the conclusion of a treaty between States concerned on the question of nationality of persons following the succession. Since such persons run the risk of being treated as stateless during this period the Commission deemed it important to express as a presumption the principle that on the date of the succession of States the successor state attributes its nationality to persons concerned who are habitual residents of the territory affected by such succession. While it is refutable presumption, its limited scope is clear from the restrictive formulation of the provision, it underlies the solutions envisaged in Part II for different types of succession of States.

Draft article 6 entitled *Legislation concerning nationality and other connected issues* as proposed by the Special Rapporteur in his third report to the Commission comprised two paragraphs. The text of these two paragraphs proposed by the Special Rapporteur had furnished the basis of draft articles 5 and 6 as adopted on first reading by the Commission. Introducing the draft article the Special Rapporteur had observed that it presupposed that nationality was essentially an institution of the internal laws of States and that the international application of the notion of nationality in any particular case had to be based on the internal laws of the state in question. Draft article 6 is based on the recognition of that fact. Its main focus, however, is on timeliness of internal legislation. It sets out a recommendation that States concerned enact legislation concerning nationality and other connected issues arising in relation with the succession of States.

The Special Rapporteur had in his report pointed out that if "the legislation enacted after the date of the succession of States did not have a retroactive effect, statelessness, if only temporary, could ensue".51[51] The Commission while recognizing the principle of non-retroactivity of legislation considered that in the case of succession of States the benefits of retroactivity justify an exception to that general principle. While draft article 7 on *Effective Date* is thus closely connected to the issue dealt with in draft article 6, it has a broader scope of application as it does cover "attribution of nationality" not only on the basis of legislation but also on the basis of a treaty. The retroactive effect of a legislation or treaty extends to the acquisition of nationality following the exercise of an option, provided that persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of exercise of such option. Draft article employs the term "attribution of nationality' for the first time. The Commission preferred using this term rather than the term "granting" as it felt that

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50[50]This provision of the draft articles as adopted on first reading had been draft article 3.

51[51]See Third Report on Nationality in Relation to the Succession of States. Document A/CN.4/480.

the former expression best conveyed the point that the acquisition of nationality upon a succession of States is distinct from the process of acquisition of nationality by naturalization.

Draft articles 8 and 9 as adopted by the Commission must be read as exceptions to the basic premise concerning the attribution of nationality. Draft article 7 on *Persons concerned having their habitual residence in another State* corresponds to paragraph 1 of draft article 4 as proposed by the Special Rapporteur places clear limitations on the power of the successor State to attribute its nationality to persons concerned. Paragraph 2 of the draft article likewise restricts the power of a successor State to impose its nationality on persons who had their habitual residence in another state against the will of such persons, unless such persons would become stateless.

Draft article 9 entitled *Renunciation of the nationality of another State as a condition for attribution of nationality* addresses the issue of eliminating dual and multiple nationality. Introducing this draft article the Special Rapporteur had observed that "While it was not for the Commission to suggest which policy States should pursue in the matter of dual/multiple nationality, its concern should be the risk of statelessness related to the requirement of prior renunciation by the person concerned of his or her current nationality as a condition for the granting of the nationality of the successor State".

Draft article 10 on the *Loss of nationality upon the voluntary acquisition of the nationality of another State* incorporates a provision that derives from a rule of general application adapted to the case of succession of States. It recognizes that a successor or a predecessor State is entitled to withdraw its nationality from persons concerned who in relation to the succession of States voluntarily acquire the nationality of another State. The provisions of draft article 9 would apply in all types of succession of States save that of unification where the successor State remains the sole State concerned. For reasons of clarity the rights of the predecessor and the successor State are spelled out separately. It does not however, deal with the question as to when the loss of nationality should become effective and also leaves aside the question of the voluntary acquisition of the nationality of a third State.

Draft article 11 on *Respect for the will of the persons concerned* establishes the general framework of the right of option and the consequences of the exercise of that right. The provisions of this draft article correspond to the Special Rapporteur's proposals on "the right of option" and "Granting and withdrawal of nationality upon option". The provisions of this draft article are in essence based on a number of treaties regulating nationality questions in relation to the succession of States as well as national laws which provided for the right of option or an analogous procedure enabling the individuals concerned to establish their nationality by choosing either between the nationality of the predecessor State and that of the successor State or between the nationalities of two or more successor States.

The draft articles as adopted on first reading, which set out a general obligation, recognize the principle of family unity, in relation to the succession of States. Draft article 12 entitled the *Unity of Family* provides that where the acquisition or loss of nationality would impair the unity of a family States concerned are to take "appropriate measures" to allow that family to remain together or to be united.

In dealing with the problem of children born to persons concerned after the date of the succession of State the Commission recognized the need to make an exception from the rigid definition ratoine temporis of the draft articles. Draft article 13 entitled *Child born after the succession of States* corresponding to paragraph of draft article 1 as proposed by the Special Rapporteur envisages that a child of a persons concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.

The place of habitual residence is an important criterion for the determination of nationality, particularly in specific categories of State succession. Draft article 14 on the *Status of habitual residents*, as adopted on first reading, incorporates the rule that the status of habitual residents is not affected by the succession of states. In other words persons concerned who are habitual residents on the date of the succession retain their status. In specific cases, addressed in paragraph 2, where succession of States is the result of events leading to the displacement of a large number of the population the State concerned is to take all necessary measures to ensure the effective restoration of the status of habitual residents.

The principle of *Non-discrimination* set forth in draft article 15 seeks to prohibit discrimination on "any ground" resulting in the denial of the right of a person concerned to a particular nationality or to an option. The forms of discrimination, the Special Rapporteur had observed, vary considerably.

The principle of *Prohibition of arbitrary decisions concerning nationality issues* set out in draft article 16 had first been included in the Universal Declaration on Human Rights. In its present application to the specific situations of succession of States it contains two elements viz. (i) the prohibition of the arbitrary withdrawal by the predecessor State of its nationality from persons concerned who were entitled to retain such nationality following the succession of States and of the arbitrary refusal by the successor State to attribute its nationality to persons concerned who were entitled to acquire such nationality; and (ii) the prohibition of the arbitrary denial of a person's right of option, that is an expression of the right of the person to change his or her nationality.

Draft article 17 sets out the *Procedures relating to nationality issues* and requires the States concerned to process applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right to option without undue delay and to issue relevant written decisions. The processing of applications is to be open to effective administrative and judicial review. The provision represents minimum requirements in procedural matters.

The provisions on the *Exchange of information, consultation and negotiation* set out in draft article 18 incorporates the obligation of States concerned in this regard, in very general terms. The precise scope of the questions, which are to be the subject of consultations between States concerned, is not indicated. The aim of the Special Rapporteur was to provide for the obligation to consult and through negotiations seek a solution for a broad spectrum of problems not merely statelessness. The recommendation of the Working Group to expand the scope of the negotiations to such questions as dual nationality; the separation of families; military obligations; pensions and other social security benefits; and the right of residence had met with the approval of the Commission. It is to be noted however that the obligation to negotiate to seek a

solution does not exist in the abstract and it is not presumed that every negotiation must lead to the conclusion of an agreement.

Draft article 19, the last of Part I of the draft articles as adopted on second reading, is concerned with the problem of the attitude of *Other States* where a State concerned did not cooperate with the others concerned and where the effects of its legislation conflicted with the provisions of the draft articles. Paragraph 1 of draft article 18 safeguards the right of other States to give effect to nationality attributed by a State concerned in disregard of the requirement of an effective link. In this it sets out the principle of non-opposability of nationality acquired or retained following succession of States.

Introducing Part II of the draft articles the Special Rapporteur had said that it set out the principles applicable in specific situations of succession of States, in contrast to the draft formulations of Part I, which applied in all cases of State succession. The specific cases of State succession envisaged were: (i) "Transfer of Part of the Territory"; (ii) the "Unification of States"; (iii) the "Dissolution of States; and (iv) the "Separation of Part of the Territory". Part II of the Draft articles termed *Provisions Relating to Specific Categories of Succession of States* as adopted by the Commission on second reading comprises the text of 7 draft articles (draft articles 20-26) and is divided into the above mentioned four sections. This typology followed is in principle that of the Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts, 1983.

Whilst draft article 20 relates to the application of Part II of the draft articles, the draft articles 20-26 are intended to furnish guidance to states concerned both in their negotiations as well as in the elaboration of national legislation in the absence of a treaty.

Section 1, the 'Transfer of Part of the Territory' of Part II of the draft articles consists of a single draft article incorporating the rule relating to the *Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State*. Draft article 20 provides that when part of the territory of a State is transferred by that State to another State, the successor State shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which such persons shall be granted. It further stipulates that the predecessor State shall not withdraw its nationality before such persons acquire the nationality of the successor States.

Section 2 entitled, *Unification of States*, of Part II of the draft articles addresses the two possible scenarios i.e. where following the unification of two or more States the successor State (i) is a new State; or (ii) has a personality identical to that of one of the States which have united. Draft article 21 comprising this section of Part II of the draft articles provides that in either case in principle the successor State shall attribute its nationality to all persons who, on the date of the succession of States had the nationality of a predecessor State. The provision however makes an exception in respect of persons who have their habitual residence in another State and also have the nationality

of that or any other State. This exception is borne out by the use of the opening phrase "without prejudice to the provisions of Article 8".52[52]

The specific case of the *Dissolution of a State* is dealt with in Section 3 of Part II of the draft articles. The case of dissolution of States has been carefully distinguished from that of the separation of part or parts of the territory. This is by reason of the fact that the nationality of a State is extinguished or disappears with the dissolution of that State. On the other hand, in the case of a separation of part of the territory both the predecessor State and its nationality continue to exist.

The texts of draft articles 22 and 23 together with commentaries thereto comprise this section. While draft article 22 deals with the issue of the *Attribution of the nationality of the successor State*, the provisions of draft article 23 relate to the *Granting of the right of option by the successor State*. Read together these provisions provide for the attribution of nationality of the successor State to persons concerned and the granting of the right of option to certain categories of persons concerned. The core body of nationals of each successor State has been defined by reference to the criterion of habitual residence. Draft article 22 explicitly states that when a State dissolves and ceases to exist and the various parts of the territory of the predecessor State from two or more successor States, each successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to (a) persons concerned having their habitual residence in its territory; and (b) subject to Rules have also been formulated for the attribution of the nationality of States to persons concerned having their habitual residence outside the territory of the successor State. The criterion employed is an "appropriate connection with the predecessor State" that has become a part of the successor State.

The fourth and last section of Part II of the draft articles addresses the issue of the *Separation of Part or Parts of the Territory*. Section 4 consists of 3 draft articles. Draft article 24 on the *Attribution of nationality of the successor State* lays down the basic rule that the successor State shall attribute its nationality to persons concerned habitually resident in its territory. For the rest it follows the formulation of draft article 22.

As a corollary to the acquisition of the nationality of the successor State, draft article 25 deals with the question of *Withdrawal of the nationality of the predecessor State*. The withdrawal of the nationality of the predecessor State is subject to two conditions viz. (i) that the persons qualified to acquire the nationality of the successor State did not opt for the retention of the nationality of the predecessor State; and (ii) that such withdrawal shall not occur prior to the effective acquisition of the successor State's nationality. It aims at reducing statelessness, howsoever, temporally which could result from withdrawal of nationality.

Draft article 26 on the *Granting of the right of option by the predecessor and the successor State*. It covers both the option between the nationalities of the predecessor State and a successor State as well as the option between the nationalities between two or more successor States.

Recommendations of the Commission

52[52]Article 8 of the draft articles is entitled Persons concerned having their habitual residence in another State.

With the adoption of the draft articles on second reading, the Commission recommended to the General Assembly the adoption, in the form of a declaration, of the draft articles on nationality of natural persons in relation to the succession of States. The Commission also decided to recommend to the General Assembly that with the adoption of the draft articles on nationality of natural persons in relation to the succession of States, the work on the topic "Nationality in relation to the succession of States" be considered concluded.

(5) UNILATERAL ACTS OF STATES

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.

At its 49th session the Commission 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 Commission, of the Unilateral Acts of States, was "advisable and feasible". At its 49th session the Commission had appointed Mr. Victor Rodriguez Cedeno, Special Rapporteur for the topic.

At its 50th session the Commission had considered the First Report of the Special Rapporteur on the topic. Following consideration of that Report in the plenary the Commission had reconvened the Working Group on the Unilateral Acts of States. The Working Group had reported to the Commission 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 Commission at its 50th session had considered and endorsed the Report of the Working Group.

At its 51st session the ILC had before it the Second Report of the Special Rapporteur53[53] which presented draft articles together with the commentaries thereto concerning (i) the scope of the draft articles; (ii) the definition of unilateral acts (declarations) of States; (iii) the capacity to formulate unilateral acts; (iv) the Representatives of a State who can engage the State by formulating unilateral acts; (v) the subsequent confirmation of acts formulated without authorization; (v) the expression of consent; and (vii) the formulation of reservations and conditional unilateral acts. In presenting his Report the Special Rapporteur had emphasized that the draft articles set out in his Second Report were merely intended to serve as a basis for discussion.

Following consideration of the Second Report of the Special Rapporteur the Commission decided to reconvene the Working Group on the subject. It also decided to appoint Mr. Victor R. Cedeno as Chairman of the Working Group.54[54]

53[53]See *Second Report on Unilateral Acts of States*, A/CN./500 and Add.1.

54[54]The Working Group comprised Mr. Victor R. Cedeno (Chairman, Special Rapporteur), Mr. H. Al-Baharna, Mr. J.C. Baena Soars, Mr. G. Gaja, Mr. G. Hafner, Mr. N. Elaraby, Mr. Q. He, Mr. P.C. Kabatsi, Mr. J.L. Kateka, Mr. I.I.Lukashuk, Mr.G.Pambou - Tchivounda, Mr.A. Pellet, DR. P.S. Rao and Mr. R. Rosenstock. (ex-officio). See A/CN.4/L578. Corr1.

The Working Group had agreed that its task was not to repeat the debate in the plenary and that, rather, its task was threefold i.e., (i) to agree on 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; (ii) to set out the general guidelines according to which the practice of States should be gathered; and (iii) to point to the direction that the work of the Special Rapporteur should take in the future.

As regards a working definition the Special Rapporteur had proposed that "for the purposes of the present draft articles 'the unilateral legal act' means an unequivocal, autonomous expressions of will, formulated publicly by one or more states in relation to one or more other States, the international community as a whole or an international organization, with the intention of acquiring international legal obligations".

Doubts were expressed regarding four of the elements constituting the working definition as proposed by the Rapporteur. These related to the term "legal" qualifying the expression "unilateral acts"; the use of term "unequivocal"; the element of "publicity"; the concept of "international community as a whole", and element "with the intention of acquiring international legal obligations". Views were divided on the element of autonomy of the act included in the definition formulated by the Rapporteur. As a basic point of focus and as a starting point for the gathering of State practice, the Working Group agreed upon the following concept of unilateral acts of States.

"A unilateral statement by which such State intends to produce legal effects in its relations to one or more States or international organizations and which is notified or otherwise made known to the State or organization concerned". 55[55]

The Working Group also noted that one or More States could make a unilateral statement jointly or in a concerted manner.56[56]

Apropos the setting general guidelines according to which the practice of States should be gathered the Working Group agreed that the Secretariat in consultation with the Special Rapporteur should elaborate a questionnaire which should start from the concept of unilateral acts set out above and should refer to specific kinds of unilateral acts such as promise, protest, recognition, waiver or notification concerning which

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55[55]The Commission at its 50th Session had in the course of outline of the study of the topic observed that the title of the topic Unilateral Acts of States implies ruling out from the purview of the study unilateral acts carried out by other subjects of international law particularly "the very important and varied category of such acts by international organizations". The study of such unilateral acts of States as are governed by the law of treaties and do not need to be dealt with further or such acts as have a treaty base were accordingly excluded.

56[56]The fundamental characteristic of unilateral legal acts is their unilateral nature. They emanate from a single side or from one or several subjects of international law acting unilaterally and the participation of another party is not required. While this characteristic leaves plurilateral international legal acts, such as treaties, outside the scope of the study it does not exclude the collective or joint acts. The collective or joint acts are within the scope of the study in as much as they are performed by a plurality of states not with an intention to regulate their mutual relations but to express as a unitary block the same willingness to produce certain legal effects without any need for the participation of the subjects or parties in the form of acceptance, reciprocity and the like.

materials would be sought. The questionnaire it was recommended should also inquire about the practice of States concerning the following 8 aspects viz. (i) who has the capacity to act on behalf of the State to commit the State internationally by means of an unilateral act; (ii) to what formalities are unilateral acts subjected: written statements, oral statements, context in which they may be issued, individual or joint acts;57[57] (iii) the possible contents of unilateral acts; (iv) the legal effects which the act purports to achieve; (v) the importance, usefulness and value each State attaches to its own and other's unilateral acts on the international plane; (vi) which rules of interpretation apply to unilateral acts;58[58] (vii) the duration of unilateral acts;59[59] and (Viii) the possible revocability of an act.

The Working Group decided that the questionnaire should also contain some questions concerning the general approach or scope of the topic such as the extent to which the principles and rules of the 1969 Vienna Convention on the Law of Treaties could be adapted *mutatis mutandis* to unilateral acts.

(6) JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

The General Assembly had by operative paragraph 1 of its resolution 53/98 of 8 December 1998, decided to establish at its fifty-fourth session an open-ended working group of the Sixth Committee open also to participation by States members of the specialized agencies. The Open-ended Working Group was intended to consider outstanding substantive issues related to the draft articles on Jurisdictional Immunities of States and their property adopted by the International Law Commission, taking into account the recent developments of State practice and legislation and any other factors related to this issue since the adoption of the draft articles, as well as the comments submitted by States in accordance with paragraph 2 of resolution 48/61 and paragraph 2 of resolution 25/151.

Operative paragraph 2 of that resolution had invited the International Law Commission to present any preliminary comments it may have regarding outstanding substantive issues related to the draft articles in the light of the results of the informal consultations held pursuant to General Assembly decision 48/413 of 9 December and taking into account the recent developments of State practice and other factors related

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57[57]This would appear to conform to chapter III entitled "Criteria for classifying unilateral legal acts of States" (i) in terms of their substantive content and their effects; (ii) in terms of the addressee (acts addressed to one, several or all subjects of international law); and (iii) in terms of form (written or oral, explicitly or tacit) of the Outline for the study of Unilateral Legal Acts of States adopted by the Commission at its 50th Session.

58[58]Chapter V. Rules applicable to specific categories of unilateral legal acts of States.

59[59]Item f of Chapter IV "General Rules Applicable to Unilateral Legal Acts "of the outline of the study adopted at the 50th Session of the commission had provided for the study of "Duration, amendment and termination: (i) Revocability, Limitation on and conditions of the power of revocation and review; (ii) Amendment or termination because of external circumstances: Termination as a result of fundamental change of circumstances; Termination as a result of impossibility of application; the existence of a new peremptory norm; and (iii) the effects of succession of States.

to this issue since the adoption of the draft articles, in order to facilitate the task of the working group.

Pursuant to that mandate the Commission at its 51st session decided to establish a Working Group on Jurisdictional immunities of States and their property,60[60] and entrusted it with the task of preparing preliminary comments as requested by operative paragraph 2 of General Assembly resolution 53/98 of 8 December 1998.

The Working Group had before it the draft articles on the topic, submitted by the Commission to the General Assembly in 1991;61[61] comments submitted by Government, at the invitation of the General Assembly, on different occasions since 199162[62] the reports of two Working Groups established by the Sixth Committee of the General Assembly at its 47th (1992)63[63] and 48th (1993) session64[64] and an informal document prepared by the Codification Division of the Office of Legal Affairs containing a summary of cases on jurisdictional immunities of States and their property occurring between 1991 and 1999 as well as a number of conclusions regarding those cases; an informal background paper as well as a number of memoranda prepared by the Working Group's Rapporteur, Mr. C. Yamada, on various issues related to the topic; the text of the 1972 European Convention on State Immunity; the resolution of "Contemporary problems concerning the immunity of States in relation to questions of jurisdiction and enforcement" adopted by the Institute of International Law at its 1991 session; and the report of the International Committee on State Immunity of the International Law Association session held in Buenos Aires in 1994.

In considering possible approaches as to how to organize its work, the Working Group took into account the wording of paragraph 2 of General Assembly resolution 53/98 which had invited the Commission to present any preliminary comments it may have "regarding outstanding substantive issues related to the draft articles?in the light of the results of the informal consultations held pursuant to General Assembly decision 48/413 of 9 December 1993".

It accordingly decided to concentrate its work on the five main issues identified in the conclusions of the Chairman of the above-mentioned informal consultations,65[65] namely (1) Concept of a State for purposes of immunity; (2) Criteria for determining the Commercial character of a contract or transaction; (3) Concept of a State enterprise or

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60[60]The Working Group was composed as follows: Mr. G. Hafner (Chairman), Mr. C. Yamada (Rapporteur), Mr. H. Al-Baharna, Mr. I. Brownlie, Mr. E. Candioti, Mr. J. Crawford, Mr. C. Dugard, Mr. G. Gaja, Mr. N. Elaraby, Mr. Q. He, Mr. M. Kamto, Mr. I. Lukashuk, Mr. T. Melescanu, Mr. P. Rao, Mr. B. Sepulveda, Mr. P. Tomka and Mr. R. Rosenstock (ex officio).

61[61]Document A/C.6/40/L.2.

62[62]See Documents A/53/274 and Add.1; A/52/294; A/47/326 and Add.1 to 5; A/48/313; A/48/464 and A/C.6.6/48/3).

63[63] See Document A/C.6/47/L.10.

64[64] See Document A/C.6/48/L.4.

65[65] See Document A/C.6/49/L.

other entity in relation to commercial transactions; (4) Contracts of employment and (5) Measures of constraint against State property.

In its report the Working Group set out the provisions of the ILC draft articles with regard to each of the above-mentioned issues. It also included an examination of how the issue had evolved, a summary of recent relevant case law, as well as the preliminary comments in the form of suggestions of the Working Group regarding possible ways of solving each issue and as a basis for further consideration.66[66] The suggestions often contain various possible technical alternatives, a final selection among which requires a decision by the General Assembly.

In addition, the report contained, as an annex, a short background paper on another possible issue which may be relevant for the topic of jurisdictional immunities, which was identified within the Working Group, stemming from recent practice. It concerns the question of the existence or non-existence of jurisdictional immunity in actions arising, *inter alia*, out of violations of *jus cogens* norms. Rather than taking up this question directly, the Working Group decided to bring it to the attention of the Sixth Committee.

Comments and suggestions by the Working Group

1. Concept of state for purpose of immunity

When examining the issue of the Concept of State for purposes of Immunity, the Working Group established by the Commission considered its possible relationship with the question, under State responsibility, of the attribution to the State of the conduct of other entities empowered to exercise elements of governmental authority. While some members of the Working Group felt that there should be a parallelism between the provision concerning the "concept of State for purpose of immunity" in the State immunity draft and the provision on "attribution to the State of the conduct of entities exercising elements of the governmental authority" in the State responsibility draft, other members felt that this was not necessarily the case. Although some members felt that it was not necessary to establish total consistency between the two sets of draft articles, it was considered desirable to bring this draft article into line with the draft articles on State responsibility.

Taking into account all the elements the Working Group agreed that the following suggestions could be forwarded to the General Assembly:

(i) Paragraph 1(b) (ii) of article 2 of the draft could be deleted and the element, "constituent units of a federal State" would join "political subdivisions of the State" in present paragraph 1(b) (iii).

(ii) The qualifier "which are entitled to perform acts in the exercise of the sovereign authority of the State" could apply both to "constituent units of a federal State" and "political subdivisions of the State".

It has further suggested that the phrase "provided that it was established that that entity was acting in that capacity" could be added to the paragraph, for the time being, between brackets. It may be stated that the Working Group also suggested that the expression "sovereign authority" in the qualifier should be replaced by the expression

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66[66] See Document A/CN.4/L.576 of 6 July 1999.

"government authority", to align it with the contemporary usage and the terminology used in the State responsibility draft.

The above suggestions seek to assuage the particular concern expressed by some States. It allows for the immunity of constituent units but, at the same time, addresses the concern of States, which found the difference in treatment between constituent units of federal States and political subdivisions of the State confusing.

A reformulation of subparagraph (b) of paragraph 1 of article 2, for suggestion to the General Assembly, would thus read as follows:

1. For the purposes of the present articles:

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(b) "State" means:

(i) the State and its various organs of government;

(ii) constituent units of a federal State and political subdivisions of the State, which are entitled to perform acts in the exercise of the governmental authority of the State, [provided that it was established that such entities were acting in that capacity];

(iii) agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the governmental authority of the State;

(iv) representatives of the State acting in that capacity.

2. Criteria for determining the commercial character of a contract or transaction

The Working Group observed in its Report that the following activities had hitherto been held to be "commercial activities": (i) the issuance of debt, transporting of passengers for hire, conclusion of a contract of sale, negotiation and placating majority shareholder, the lease of premises to conduct private business, the issuance of bills of exchange by a State owned bank as guarantee for construction of public works, the guarantee under the charter party for the charter of a ship to a governmental corporation and the hiring of services from a private company for advice in the development of rural areas of a State.

It also found that the activities that have been held not to have been "commercial activities" included: the acceptance of caveats, decisions to lift them, notification of the public, conduct of labour relations at a naval base, issuing currency, chartering of companies, regulation of companies, oversight of companies, the exercise of police powers, the imposition and collection of charges for air navigation services in national and international airspace, the power to seize property to collect a debt without prior judicial approval, implementing the general State policy of preserving law and order and keeping the peace, and keeping for disposal and actual disposal of one State's bank notes in another State.

After discussing the issue in the light of the foregoing elements, the Working Group agreed to forward the following two suggestions to the General Assembly that (i) the issue concerning which criteria to apply for determining the commercial character of a contract or transaction arises only if the parties have not agreed on the application of a

specific criterion, and the applicable legislation does not require otherwise, and that (ii) the criteria contemplated in national legislation or applied by national courts offer some variety including, *inter alia*, the nature of the act, its purpose of motive as well as some other complementary criteria such as the location of the activity and the context of all the relevant circumstances of the act.

While considering this issue, the working Groups examined the following seven possible alternatives:

(i) The nature test as the sole criterion;

(ii) The nature test as a primary criterion ([second half of paragraph 2 of article 2 would be deleted];

(iii) Primary emphasis on the nature test supplemented by the purpose test with a declaration of each State abut its internal legal rules of policy;

(iv) Primary emphasis on the nature test supplemented by the purpose test;

(v) Primary emphasis on the nature test supplemented by the purpose test with some restrictions on the extent of "purpose" or with some enumeration of "purpose". Such restrictions or enumeration should be broader than a mere reference to some humanitarian grounds;

(vi) Reference be made in article 2 only to "commercial contracts or transactions", without further explication; and

(vii) Adoption of the approach followed by the Institut de Droit International in its 1991 recommendations which are based on the enumeration of criteria and a balancing of principles, in order to define the competence of the court, in relation to jurisdictional immunity in a given case.

As a result of this examination and in view of the differences of the facts of each case as well as the different legal traditions, the members of the Group felt that alternative (vi) above was the most acceptable. It was felt that the distinction between the so-called nature and purpose tests might be less significant in practice than the long debate about it might imply. It was noted that some of the criteria contained in the draft article of the Institut de Droit International could serve as useful guidance to national courts and tribunals in determining whether immunity should be granted in specific instances.67[67]

67[67]It may be recalled that Article 2 of the 1991 draft of the "Institut de Droit Internationale" reads as follows: **"Article 2 Criteria indicating the Competence of Courts or other Relevant Organs of the Forum State in relation to Jurisdictional Immunity:**

1. In determining the question of the competence of the relevant organs of the forum State, each case is to be separately characterized in the light of the relevant facts and the relevant criteria, both of competence and incompetence; no presumption is to be applied concerning the priority of either group of criteria.
2. In the absence of agreement to the contrary, the following criteria are indicative of the competence of the relevant organs of the forum State to determine the substance of the claim, notwithstanding a claim to jurisdictional immunity by a foreign State which is a party:

(a) The organs of the forum State are competent in respect of proceedings relating to a commercial transaction to which a foreign State (or its agent) is a party;

(b) The Organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships of a private law character to which a foreign State (or its agent) is a party; the class of relationship referred to includes (but is not confined to) the following legal categories: commercial contracts; contracts for the supply of services, loans and financing arrangements; guarantees or indemnities in respect of financial obligations; ownership, possession and use of property; the protection of industrial and intellectual property; the legal incidents attaching to incorporated bodies, unincorporated bodies and associations, and partnerships; actions in rem against ships and cargoes; and bills of exchange.

(c) The organs of the forum State are competent in respect of proceedings concerning contracts of employment and contracts for professional services to which a foreign State (or its agent) is a party;

(d) The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships which are not classified in the forum as having a "private law character" but which nevertheless are based upon elements of good faith and reliance (legal security) within the context of the local law;

(e) The organs of the forum State are competent in respect of proceedings concerning the death of, or personal injury to, a person, or loss or damage to tangible property which are attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State;

(f) The organs of the forum State are competent in respect of proceedings relating to any interest of a foreign State in movable or immovable property, being right or interest arising by way of succession, gift or bona vacantia; or a right or interest in the administration of property forming part of the estate of a deceased person or a person of unsound mind or a bankrupt; or a right or interest in the administration of property of a company in the event of its dissolution or winding up; or a right or interest in the administration of trust property or property otherwise held on a fiduciary basis;

(g) The organs of the forum State are competent insofar as it has a supervisory jurisdiction in respect of an agreement to arbitrate between a foreign State and a natural or juridical person;

(h) The organs of the forum State are competent in respect of transactions in relation to which the reasonable interference is that the parties did not intend that the settlement of disputes would be on the basis of a diplomatic claim;

(i) The organs of the forum State are competent in respect of proceedings relating to fiscal liabilities, income tax, customs duties, stamp duty, registration fees, and similar impositions provided that such liabilities are the normal concomitant of commercial and other legal relationships in the context of the local legal system.

3. In the absence of agreement to the contrary, the following criteria are indicative of the incompetence of the organs of the forum State to determine the

3. Concept of a state enterprise or other entity in relation to commercial transactions

The draft recommended by the Commission on the General Assembly in 1991 had contained the following provisions:

Article 10. Commercial transactions

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3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by the State which has an independent legal personality and is capable of:

(a) suing or being sued; and

(b) acquiring, owning or possessing and disposing or property, including property which the State has authorized it to operate or manage.

The Working Group considered, in particular, the possible basis for a compromise contained on this issue in the report of the Chairman of the informal consultations held in the Sixth Committee in 1994. It concluded that the following suggestions could be forwarded to the General Assembly.

Paragraph 3 of draft article 10 could be clarified by indicating that the immunity of a State would not apply to liability claims in relation to a commercial transaction engaged in by a State enterprise or other entity established by that State where:

(a) the State enterprise or other entity engages in a commercial transaction as an authorized agent of the State;

(b) the State acts as a guarantor of a liability of the State enterprise or other entity.

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substance of the claim, in a case where the jurisdictional immunity of a foreign State party is in issue:

(a) The relation between the subject-matter of the dispute and the validity of the transactions of the defendant State in terms of public international law;

(b) The relation between the subject-matter of the dispute and the validity of the internal administrative and legislative acts of the defendant State in terms of public international law;

(c) The organs of the forum State should not assume competence in respect of issues the resolution of which has been allocated to another remedial context;

(d) The organs of the forum State should not assume competence to inquire into the content or implementation of the foreign defence and security policies of the defendant State;

(e) The organs of the forum State should not assume competence in respect of the validity, meaning and implementation of intergovernmental agreement or decision creating agencies, institutions of funds subject to the rules of public international law.

It has been suggested that this clarification could be achieved either by a characterization of the acts referred to in (a) and (b) as commercial acts or by a common understanding to this effect at the time of the adoption of this article.

The Working Group also considered the third for State liability suggested as basis for a compromise, namely "where the State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim".

The Working Group considered that this suggestion went beyond the scope of article 10 and that it addressed a number of questions such as: immunity from jurisdiction, immunity from execution, and the question of the propriety of piercing the corporate veil of State entities in a special case. The Working Group was of the view that this suggestion ignores the question whether the State entity, in so acting, acted on its own or on instructions from the State.

The Working Group was aware of the fact that the problem of piercing the corporate veil raises questions of a substantive nature and questions of immunity but it did not consider it appropriate to deal with them in the framework of its present mandate.

4. Contracts of employment

The draft recommended by the Commission to the General Assembly contained the following provision:

Article 11. Contracts of employment

(1) Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

(2) Paragraph 1 does not apply if:

(a) the employee has been recruited to perform functions closely related to the exercise of governmental authority;

The Working Group noted in this regard that under article 11, (2) (b) a foreign State does enjoy immunity in cases concerning contract of employment where the subject of the proceeding in cases concerning contract of employment where the subject of the proceeding is recruitment, renewal or reinstatement. But the immunity does not exclude jurisdiction for unpaid salaries or, in certain cases, damages for dismissal.

It also noted that there was a distinction between the rights and duties of individual employees and questions of the general policy of employment, which essentially concern management issues about the public service of the forum State.

After discussing the issue in the light of the elements of recent case law the Working Group agreed that the following suggestions could be forwarded to the General Assembly.

As regards subparagraph (1) of paragraph 2 of article 11, the Working Group provisionally agreed that in the expression "perform functions closely related to the exercise of governmental authority", the words "closely related to" could be deleted in

order to restrict the scope of the subparagraph to "persons performing functions in the exercise of governmental authority".

The Working Group also agreed that the subparagraph could be further clarified by stating clearly that paragraph 1 of article 11 would not apply if the employee has been recruited to perform functions in the exercise of governmental authority", in particular: (i) Diplomatic staff and consular officers, as defined in the 1961 Vienna Convention on diplomatic relations and the 1963 Vienna Convention on consular relations, respectively; (ii) Diplomatic staff of permanent missions to international organizations and of special missions; and (iii) Other persons enjoying diplomatic immunity, such as persons recruited to represent a State in international conferences.

As regards subparagraph (c) of paragraph 2 of article 11, the Working Group agreed to recommend to the General Assembly that it would be advisable not to delete it, as it could not be reconciled with the principle of nondiscrimination based on nationality. This deletion, however, should not prejudge on the possible inadmissibility of the claim on ground other than State immunity, such as, for instance, the lack of jurisdiction of the forum State. In this respect, the Working Group notes a possible uncertainty in paragraph 1 of article 11 as regards, for example, the meaning of the words "in part".

The Working Group noted that it might be desirable to reflect explicitly in article 11, in respect of the distinction between the rights and duties of individual employees and questions of the general policy of employment, which essentially concerns management issues about the public services of the forum State.

5. Measure of constraint against state property

The relevant provisions of the draft recommended by the Commission to the General Assembly in 1991 had contained the following provisions:

Article 18. State immunity from measures of constraint.

1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

   (a) the State has expressly consented to the taking of such measures as indicated:

   (i) by international agreement;

   (ii) by an arbitration agreement or in a written contract; or

   (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;

   (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

   (c) the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.

After examining the issue in the light of all the elements above, the Working Group agreed that the following suggestions could be forwarded to the General Assembly.

The Working Group concluded that a distinction between prejudgment and post-judgement measures of constraint may help sort out the difficulties inherent in this issue. It was however stressed that both types of measures are subject to the conditions of article 19 [property for governmental noncommercial purposes].

As regards **prejudgment measures** of constraint, the Working Group was of the view that these should be possible [only] in the following cases:

(a) Measures on which the State has expressly consented either ad hoc or in advance;

(b) Measures on property designated to satisfy the claim;

(c) Measures available under internationally accepted provisions *[leges specialis]* such as, for instance, ship arrest, under the International Convention relating to the arrest of seagoing ships, Brussels, 24 February 1956;

(d) Measures involved in property of an agency enjoying separate legal personality if it is the respondent of the claim.

Apropos **post-judgement** measures, the Working Group was of the view that these should be possible [only] in the following cases:

(a) Measures on which the State has expressly consented either ad hoc or in advance;

(b) Measures on designated property to satisfy he claim;

Beyond this, the Working Group explored three possible alternatives, which the Assembly may decide to follow:

Alternative I

(i) Recognition of judgement by State and granting the State a 2-3 months grace period to comply with it as well as freedom to determine property for execution;

(ii) If no compliance occurs during the grace period, property of the State, [subject to article 19] could be subject to execution.

Alternative II

(i) Recognition of judgement by State and granting the State 2-3 months grace period to comply with it as well as freedom to determine property for execution;

(ii) If no compliance occurs during the grace period, the claim is brought into the field of interstate dispute settlement; this would imply he initiation of dispute-settlement procedures in connection with the specific issue of execution of the claim.

Alternative III

The Assembly may decide not to deal with this aspect of the draft, because of the delicate and complex aspects of the issues involved. The matter would then be left to State practice on which there are different views. The title of the topic and of the draft would be amended accordingly.

In an Annex to the Report of the Working Group the Commission has drawn attention of the Sixth Committee to recent development in State practice and legislation on the subject of immunities of States since the adoption of the draft articles which the ILC considered necessary. The development concerns the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogns*, particularly the prohibition on torture.

It has pointed out that in the past decade, a number of civil claims have been brought in municipal courts, particularly in the United States and United Kingdom, against foreign Governments, arising out of acts of torture committed not in the territory of the forum State but in the territory of the defendant and other States.

In support of these claims, the Commission has observed, plaintiffs have argued that States are not entitled to plead immunity where there has been a violation of human rights norms with the character of *juscogens*. While National courts, in some cases, have shown some sympathy for this argument inmost cases, however, the plea of sovereign immunity has succeeded.

The Commission has also drawn attention to two important developments that have occurred, which give further support to the argument that a State may not plead immunity in respect of gross human rights violations, since the handing down of these decisions.

The first of these relates to the amendment of the United States Foreign Sovereign Immunity Act (FSIA) incorporating a new exception to immunity. This exception, introduced by section 221 of the Anti-Terrorism and Effective Death Penalty Act of 1996, stipulates that immunity will not be available in any case: "in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extra-judicial killing, aircraft sabotage, hostage-taking?quot;. A Court will decline to hear a claim if the foreign State has not been designated by the Secretary of State as a State sponsor of terrorism under federal legislation or if the claimant or victim was not a national of the United States when the act occurred. This provision has been applied in two cases.

Secondly, the *Pinochet case* has emphasized the limits of immunity in respect of gross human rights violations by State officials. Although the judgement of the House of Lords in that case only holds that a former head of State is not entitled to immunity in respect of acts of torture committed in his own State and expressly states that it does not affect the correctness of decisions upholding the plea of sovereign immunity in respect of civil claims, as it was concerned with a criminal prosecution, there can be no doubt that this case, and the widespread publicity it received, has generated support for the view that State officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions.

The Commissions has emphasized that these developments are not specifically dealt with in the draft articles on Jurisdictional Immunities of States and their Property. It has recommended that recent developments relating to immunity should not be ignored.

68[1] See A/CN.4/498 and Add 1 to 4.

69[2] See A/CN.4/L.574.

70[3] See A/CN.4/501.

71[4] See A/CN.4/491.

72[5] Doc. A.CN.4/499.

73[6] See A/CN.4/497.

74[7] See A/CN.4/L.572.

75[8] For the text of the draft articles on Nationality of Natural Persons in relation to the Succession of States adopted by the Drafting Committee on Second Reading see A/CN.4/L.573.

76[9] See A/CN.4/500 and Add.1.

77[10] Doc. A/CN.4//L.576.

78[11]The Planning Group was composed of Mr. J. Baeba Soares (Chairman), Mr.M. Bennouna, Mr. J. Crawford, Mr. L.Ferrari Bravo, Mr.R. Goco, Mr.Q. He, Mr. L. Illueca, Mr. J. Kataka,Mr. I.Lukashuk, Mr. V. Mikulka, Mr. D.Opertti-Badan, Mr. G.

Pambou-Tchivounda, Mr. A. Pellet, Mr. B. Sepulveda, Mr.B. Simma, Mr.D.Thiam and Mr. Z. Galicki (ex-officio member).

79[12]The Working Group on long term programme of work established at the Forty-ninth session of the Commission was composed of Mr. I.V. Lukashuk (Chairman); Mr. J. Baena Soares; Mr. Ian Brownlie; Mr. C. Dugard; Mr. L. Ferrari Bravo; Mr. R. Goco; Mr.Qizhi He; Mr. A. Pellet; Mr. B.Simma; Mr. Chusei Yamada and Mr. Z. Galiki (ex officio member).

80[13] See ILC (L1) INFORMAL/10.

81[14] See ILC (L1) INFORMAL/8.

82[15] See ILC (L1) INFORMAL/9.

83[16] See ILC (L1) INFORMAL/7.

84[17] See ILC (L1) INFORMAL/4.

85[18]The Working Group on the long term programme of work established at the Fifty-first session of the Commission was composed of Mr. I. Brownlie (Chairman); Mr. Q. He; Mr. Herdocia Sacasa; Mr. R. Goco; Mr. A. Pellet; Mr. Sepulveda; Mr. B. Simma; Mr. Chusei Yamada and Mr. R. Rosenstock (ex officio member).

86[19] A/CN.4/488 and Add.1 and 2.

87[20] A/CN.4/490 and Add.1-6.

88[21] A/CN.4/498 and Add.1-4.

89[22] A/CN.4/488 and Add.1-3.

90[23] The text of article 20 proposed by the Special Rapporteur reads as follows:

Obligations of conduct and obligations of result

1. An international obligation requiring a State to adopt a particular course of conduct is breached if that State does not adopt that course of conduct.

2. An international obligation requiring a State to achieve, or prevent, a particular result by means of its own choice is breached if, by the means adopted, the State does not achieve, or prevent, that result.

91[24]Article 35 as proposed by the Special Rapporteur reads as follows:

The invocation of a circumstance precluding wrongfulness under this Chapter is without prejudice:

(a) To the cessation of any act not in conformity with the obligation in Question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) In the case of articles 32 and 33, to the question of financial compensation for any actual harm or loss caused by that act.

92[25] ICJ Reports 1997.

93[26]Article 30 as proposed by the Special Rapporteur reads as follows:

Countermeasures in respect of an internationally wrongful act.

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if and to the extent that the act constitutes a lawful countermeasure as provide for in articles (XX) - (XX).

94[27]The Drafting Committee on this topic established at the Fifty-first session of the Commission was composed of Mr. E. Candioti (Chairman), Mr. J. Crawford (Special Rapporteur), Mr. H. Al-Baharna, Mr. A. Al-Khasawneh, Mr. I. Brownlie, Mr. C. J.R. Dugard, Mr. C.P. Economides, Mr. G. Gaja, Mr. G. Hafner, Mr. Q. He, Mr. Herdocia Sacasa, Mr. I.I.Lukashuk, Mr. G.Pambou-Tchivounda,Mr. P.S.Rao, Mr. B.Simma, Mr.C.Yamada and Mr. R. Rosenstock (ex officio).

95[28] A/CN.4/L.574.

96[29] A/CN.4/487 and Add.1.

97[30] See Document A/CN.4/L.554 Add.1.

98[31] A/CN.4/501.

99[32] A/CN.4/491 and Add.1-5.

100[33] See A/CN.4/L.561 and Add 1-4.

101[34] A/CN.4/499.

102[35]The Drafting Committee on this topic established at the Fifty-first session of the Commission was composed of Mr.E. Candioti (Chairman), Mr. A Pellet (Special Rapporteur), Mr. A. Al-Khasawneh, Mr. C.P. Economides, Mr. N. Elaraby, Mr. G. Gaja, Mr. Herdocia Sacasa, Mr.M. Kamto, Mr.T.V.Melescanu, Mr. B. Simma, Mr. P. Tomka and Mr. R.Rosenstock (ex officio).

103[36] This section would comprise the text of draft Guidelines 1.1; and 1.1.1 to 1.1.7.

104[37] This section would comprise the text of draft Guidelines 1.2; and 1.2.2 to 1.2.3.

105[38] This section would comprise the text of draft Guidelines 1.3; and 1.3.1 to 1.3.3.

106[39] This section would comprise the text of draft Guidelines 1.4; and 1.4.1 to 1.4.5.

107[40] This section would comprise the text of draft Guidelines 1.5; and 1.5.1 to 1.5.3.

108[41] This section would comprise the text of draft Guidelines 1.6.

109[42] The Working Group consisted of Mr. Vaclav Mikulka (Special Rapporteur and Chairman), Mr. Hussain El Baharna,Mr. Derek William Bowett; Mr. Edmundo Vargas - Carreno; Mr. James Crawford; Mr. Salifou Fomba; Mr. Kamil Idris; Mr. Awn - Al-Khasawneh; Mr. Igor Lukashuk; Mr. Robert Rosenstock, Mr.Albert Szeksley, Mr. Christan Tomuschat; and Mr. Chusei Yamada.

110[43] See A/CN.4/480 and Add.1.

111[44]The Working Group was composed of : Mr. E. Candioti (Chairman), Mr. Z. Galicki (Chairman of the Working Group),Mr. E.A. Addo, Mr. I. Brownlie, Mr. G. Hafner, Mr. Herdocia Sacasa, Mr. T.V. Melescanu, Mr. G. Pambou - Tchivounda, and Mr. R. Rosenstock (ex officio).

112[45]The Drafting Committee was composed of : Mr. Z. Galicki (Chairman), Mr. I. Brownlie, Mr. E. Candioti, Mr. C.P. Economides Mr. G. Hafner, Mr. Herdocia Sacasa, Mr. P. Tomka, and Mr. R. Rosenstock (ex offico).

113[46] See draft article 20.

114[47] See draft article 21.

115[48] See draft article 22 and 23.

116[49] See draft article 24 to 26.

117[50]This provision of the draft articles as adopted on first reading had been draft article 3.

118[51]See Third Report on Nationality in Relation to the Succession of States. Document A/CN.4/480.

119[52]Article 8 of the draft articles is entitled Persons concerned having their habitual residence in another State.

120[53]See *Second Report on Unilateral Acts of States*, A/CN./500 and Add.1.

121[54]The Working Group comprised Mr. Victor R. Cedeno (Chairman, Special Rapporteur), Mr. H. Al-Baharna, Mr. J.C. Baena Soars, Mr. G. Gaja, Mr. G. Hafner, Mr. N. Elaraby, Mr. Q. He, Mr. P.C. Kabatsi, Mr. J.L. Kateka, Mr. I.I.Lukashuk, Mr.G.Pambou - Tchivounda, Mr.A. Pellet, DR. P.S. Rao and Mr. R. Rosenstock. (ex-officio). See A/CN.4/L578. Corr1.

122[55]The Commission at its 50th Session had in the course of outline of the study of the topic observed that the title of the topic Unilateral Acts of States implies ruling out from the purview of the study unilateral acts carried out by other subjects of international law particularly "the very important and varied category of such acts by international organizations". The study of such unilateral acts of States as are governed by the law of treaties and do not need to be dealt with further or such acts as have a treaty base were accordingly excluded.

123[56]The fundamental characteristic of unilateral legal acts is their unilateral nature. They emanate from a single side or from one or several subjects of international law acting unilaterally and the participation of another party is not required. While this characteristic leaves plurilateral international legal acts, such as treaties, outside the scope of the study it does not exclude the collective or joint acts. The collective or joint acts are within the scope of the study in as much as they are performed by a plurality of states not with an intention to regulate their mutual relations but to express as a unitary block the same willingness to produce certain legal effects without any need for the participation of the subjects or parties in the form of acceptance, reciprocity and the like.

124[57]This would appear to conform to chapter III entitled "Criteria for classifying unilateral legal acts of States" (i) in terms of their substantive content and their effects; (ii) in terms of the addressee (acts addressed to one, several or all subjects of international law); and (iii) in terms of form (written or oral, explicitly or tacit) of the Outline for the study of Unilateral Legal Acts of States adopted by the Commission at its 50th Session.

125[58]Chapter V. Rules applicable to specific categories of unilateral legal acts of States.

126[59]Item f of Chapter IV "General Rules Applicable to Unilateral Legal Acts "of the outline of the study adopted at the 50th Session of the commission had provided for the study of "Duration, amendment and termination: (i) Revocability, Limitation on and conditions of the power of revocation and review; (ii) Amendment or termination because of external circumstances: Termination as a result of fundamental change of circumstances; Termination as a result of impossibility of application; the existence of a new peremptory norm; and (iii) the effects of succession of States.

127[60]The Working Group was composed as follows: Mr. G. Hafner (Chairman), Mr. C. Yamada (Rapporteur), Mr. H. Al-Baharna, Mr. I. Brownlie, Mr. E. Candioti, Mr. J. Crawford, Mr. C. Dugard, Mr. G. Gaja, Mr. N. Elaraby, Mr. Q. He, Mr. M. Kamto, Mr. I. Lukashuk, Mr. T. Melescanu, Mr. P. Rao, Mr. B. Sepulveda, Mr. P. Tomka and Mr. R. Rosenstock (ex officio).

128[61]Document A/C.6/40/L.2.

129[62]See Documents A/53/274 and Add.1; A/52/294; A/47/326 and Add.1 to 5; A/48/313; A/48/464 and A/C.6.6/48/3).

130[63] See Document A/C.6/47/L.10.

131[64] See Document A/C.6/48/L.4.

132[65] See Document A/C.6/49/L.

133[66] See Document A/CN.4/L.576 of 6 July 1999.

134[67]It may be recalled that Article 2 of the 1991 draft of the "Institut de Droit Internationale" reads as follows: **"Article 2 Criteria indicating the Competence of**

Courts or other Relevant Organs of the Forum State in relation to Jurisdictional Immunity:

1. In determining the question of the competence of the relevant organs of the forum State, each case is to be separately characterized in the light of the relevant facts and the relevant criteria, both of competence and incompetence; no presumption is to be applied concerning the priority of either group of criteria.

2. In the absence of agreement to the contrary, the following criteria are indicative of the competence of the relevant organs of the forum State to determine the substance of the claim, notwithstanding a claim to jurisdictional immunity by a foreign State which is a party:

(a) The organs of the forum State are competent in respect of proceedings relating to a commercial transaction to which a foreign State (or its agent) is a party;

(b) The Organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships of a private law character to which a foreign State (or its agent) is a party; the class of relationship referred to includes (but is not confined to) the following legal categories: commercial contracts; contracts for the supply of services, loans and financing arrangements; guarantees or indemnities in respect of financial obligations; ownership, possession and use of property; the protection of industrial and intellectual property; the legal incidents attaching to incorporated bodies, unincorporated bodies and associations, and partnerships; actions in rem against ships and cargoes; and bills of exchange.

(c) The organs of the forum State are competent in respect of proceedings concerning contracts of employment and contracts for professional services to which a foreign State (or its agent) is a party;

(d) The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships which are not classified in the forum as having a "private law character" but which nevertheless are based upon elements of good faith and reliance (legal security) within the context of the local law;

(e) The organs of the forum State are competent in respect of proceedings concerning the death of, or personal injury to, a person, or loss or damage to tangible property which are attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State;

(f) The organs of the forum State are competent in respect of proceedings relating to any interest of a foreign State in movable or immovable property, being right or interest arising by way of succession, gift or bona vacantia; or a right or interest in the administration of property forming part of the estate of a deceased person or a person of unsound mind or a bankrupt; or a right or interest in the administration of property of a company in the event of its dissolution or winding up; or a right or interest in the administration of trust property or property otherwise held on a fiduciary basis;

(g) The organs of the forum State are competent insofar as it has a supervisory jurisdiction in respect of an agreement to arbitrate between a foreign State and a natural or juridical person;

(h) The organs of the forum State are competent in respect of transactions in relation to which the reasonable interference is that the parties did not intend that the settlement of disputes would be on the basis of a diplomatic claim;

(i) The organs of the forum State are competent in respect of proceedings relating to fiscal liabilities, income tax, customs duties, stamp duty, registration fees, and similar impositions provided that such liabilities are the normal concomitant of commercial and other legal relationships in the context of the local legal system.

3. In the absence of agreement to the contrary, the following criteria are indicative of the incompetence of the organs of the forum State to determine the substance of the claim, in a case where the jurisdictional immunity of a foreign State party is in issue:

(a) The relation between the subject-matter of the dispute and the validity of the transactions of the defendant State in terms of public international law;

(b) The relation between the subject-matter of the dispute and the validity of the internal administrative and legislative acts of the defendant State in terms of public international law;

(c) The organs of the forum State should not assume competence in respect of issues the resolution of which has been allocated to another remedial context;

(d) The organs of the forum State should not assume competence to inquire into the content or implementation of the foreign defence and security policies of the defendant State;

(e) The organs of the forum State should not assume competence in respect of the validity, meaning and implementation of intergovernmental agreement or decision creating agencies, institutions of funds subject to the rules of public international law.