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Summary record of the 2933rd meeting

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2933rd MEETING

Tuesday, 10 July 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caffisch, Mr. Candioti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermeúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Cooperation with other bodies

[Agenda item 10]

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON announced that, following a well-established practice, the Commission was to receive the customary visit from the President of a unique institution—the only permanent court of international justice in non-criminal matters with general jurisdiction. He warmly welcomed Judge Rosalyn Higgins, President of the International Court of Justice. Although she saw before her a new Commission, 16 new members having been elected since her previous visit, she was a stranger to none of them. The Court and the Commission had long-established synergies in advancing international law in the service of the international community, and the Court's work had special relevance for the work of the Commission.

2. Ms. HIGGINS (President of the International Court of Justice) said she was delighted to address the Commission and congratulated its new members on their election. For the past decade, the President of the International Court of Justice had been invited to address the Commission and engage in an exchange of views. The Court greatly appreciated those exchanges, and she herself was happy to be with the Commission for that purpose for a second time. She would report on the judgments rendered by the ICJ over the past year, drawing special attention to aspects of its work that had particular relevance for the work of the Commission.

3. The Court had rendered three decisions so far in 2007: an order regarding provisional measures, a judgment on the merits, entailing some important jurisdictional issues, and a judgment on preliminary objections. The three cases had involved States from Africa, Europe and Latin America, and the subject matter had ranged from environmental issues to genocide and to diplomatic protection of shareholders. If any evidence was needed that the topics the Commission examined were of the highest relevance for the Court, it was to be found in the fact that in every one of those cases the parties had relied upon, and the Court had carefully considered, the work of the Commission.

4. She would begin with the request for provisional measures in the case concerning *Pulp Mills on the River Uruguay*. In 2006, the Court had handed down an order for the indication of provisional measures in that case. At that time, Argentina had initiated proceedings against Uruguay regarding alleged violations of the Statute of the River Uruguay,²³³ arguing that Uruguay had not respected the procedures under the Statute when authorizing the construction of two pulp mills and that the construction and commissioning of those mills would damage the environment. In its order of 13 July 2006, the Court had found that the circumstances of the case, as they presented themselves at that moment, were not such as to require the exercise of the Court's power under article 41 of the Statute to indicate provisional measures.

5. Now it was Uruguay that had submitted a request to the Court for the indication of provisional measures—the first time in 61 years that a respondent had taken such a step. It had argued that since 20 November 2006, organized groups of Argentine citizens had been blockading bridges leading to Uruguay, that the action was causing it enormous economic damage and that Argentina had taken no steps to put an end to the blockade. It had asked the Court to order Argentina to take “all reasonable and appropriate steps ... to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two States”; to “abstain from any measure that might aggravate, extend or make more difficult the settlement of that dispute”; and to “abstain from any other measure that might prejudice the rights of Uruguay in dispute before the Court” [para. 13 of the 2007 order]. By that time the owner of one of the two planned pulp mills had already decided to relocate the mill out of the River Uruguay area.

6. With regard to the first provisional measure requested, the Court had found that notwithstanding the blockades, the construction of the Botnia pulp mill had progressed significantly since the summer of 2006 and that work was continuing [para. 40 of the 2007 order]. It was not convinced that the blockades met the test for ordering provisional measures, namely that they represented an imminent risk of irreparable prejudice to the rights of Uruguay in the dispute before it [*ibid.*, para. 41].

7. With respect to the other two provisional measures sought by Uruguay, the Court had recalled that although in several past cases it had indicated provisional measures directing parties not to aggravate the dispute, it had never done so when the measure had not been ancillary to another provisional measure. It had therefore restricted itself to reiterating its call to the parties, made in its earlier order, “to fulfil their obligations under international law”, “to implement in good faith the consultation and co-operation procedures provided for by the 1975 Statute”, and “to refrain from any actions which might render more difficult the resolution of the present dispute” [*ibid.*, para. 53].

8. During the proceedings, Uruguay had argued that the blockades by Argentine citizens could not be justified as countermeasures taken in response to the alleged

²³³ Signed at Salto (Uruguay) on 26 February 1975, United Nations, *Treaty Series*, vol. 1295, No. 21425, p. 331.

violations of the 1975 Statute. Referring to the Commission's draft articles on responsibility of States for internationally wrongful acts, counsel for Uruguay had argued that the dispute fell squarely within the terms of article 52, paragraph 3, the commentary to which explained that "[w]here a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures".²³⁴ In Uruguay's view, if countermeasures were not justifiable where the responsible party was complying with a provisional measures order, then it followed *a fortiori* that they could not be justifiable when the indication of provisional measures had been refused by the ICJ and where the responsible party (Uruguay) was pursuing diplomatic dispute settlement procedures in good faith. In any event, Argentina had not claimed to be taking countermeasures and the Court had not had to resolve that question.

9. One month after the order in the *Pulp Mills on the River Uruguay* case, the Court had delivered its judgment in the first legal case in which one State had made allegations of genocide against another: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The Court had been acutely sensitive to its responsibilities and had, as always, simply but meticulously applied the law to each and every one of the issues before it. It would be impossible to recount, even in summary form, all the legal and factual findings set out in the Court's 171-page judgment. She would simply focus on the aspects of the case that seemed of particular interest, including those parts of the reasoning that had direct relevance to the work of the Commission.

10. The case had been extremely fact-intensive. The hearings had lasted for two and a half months, witnesses had been examined and cross-examined and thousands of pages of documentary evidence submitted. A substantial portion of the judgment was devoted to analysing that evidence and making detailed findings as to whether alleged atrocities had occurred and, if so, whether there was the specific intent on the part of the perpetrators to destroy in whole or in part the protected group, which the ICJ had identified as the "Bosnian Muslims". Given the exceptional gravity of the offence of genocide, the Court had required that the allegations be proved by evidence that was "fully conclusive" [para. 209 of the judgment]. It had made its own determinations of fact based on the evidence before it, but had also greatly benefited from the findings of fact that had been made by the International Tribunal for the Former Yugoslavia when dealing with accused individuals. The Court had termed the Tribunal's working methods rigorous and open, thus enabling it to treat its findings of fact as "highly persuasive" [para. 223].

11. The Court had carefully worked through each element of the definition of genocide in article II of the Convention on the Prevention and Punishment of the Crime of Genocide. With regard to the definition of the protected group, it had shared the view set out by the Commission in its commentary to the articles of the draft

code of crimes against the peace and security of mankind that the intention "must be to destroy at least a substantial part of a particular group" [para. 198].²³⁵

12. As for the question whether the deliberate destruction of the historical, cultural and religious heritage of the protected group could constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group, the Court had agreed with the Commission's conclusion in its report to the General Assembly on the work of its forty-eighth session that the *travaux préparatoires* for the Convention on the Prevention and Punishment of the Crime of Genocide clearly showed that the definition of genocide was limited to the physical or biological destruction of the group.²³⁶ Consequently, the Court had found that the attacks on the cultural and religious property of the Bosnian Muslims could not be considered to be a genocidal act within the meaning of article II of the Convention.

13. The applicant had argued that the specific intent could be inferred from the pattern of atrocities. The Court had been unable to accept that argument. The specific intent had to be convincingly shown by reference to particular circumstances; a pattern of conduct would not be accepted as evidence of the intent's existence unless genocide was the only possible explanation for the conduct concerned.

14. The Court had made 45 pages of findings of fact on various atrocities, and while it had jurisdiction only to make determinations as to genocide, it was clear that it saw those as crimes against humanity. In many cases, Bosnian Muslims had been the victims of those acts, but with one exception, the evidence did not show that those terrible acts had been accompanied by the specific intent to destroy the group as such. The exception was Srebrenica, where, the Court had found, there was conclusive evidence that killings and acts causing serious bodily or mental harm targeting the Bosnian Muslims had taken place in July 1995. Those acts had been directed by the main staff of the Republika Srpska Army (VRS), who had possessed the specific intent required for genocide. That finding had been consistent with the jurisprudence of the International Tribunal for the Former Yugoslavia.

15. Having determined that genocide had been committed at Srebrenica [para. 297 of the judgment], the next step had been for the Court to decide whether the respondent was legally responsible for the acts of the VRS. That question had two aspects, which the Court had considered separately. First, the Court had had to ascertain whether the acts committed at Srebrenica had been perpetrated by organs of the respondent, i.e. by persons or entities whose conduct was necessarily attributable to it because they were in fact the instruments of its action. If that question was answered in the negative, the Court had then to decide whether the acts in question had been committed by persons who, while not organs of the respondent, had nevertheless acted on the instructions of, or under the direction or control of, the respondent. The Commission's draft articles on the responsibility of States had been central to the Court's reasoning [para. 385 of the judgment].

²³⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. (2) of the commentary, p. 136.

²³⁵ *Yearbook ... 1996*, vol. II (Part Two), p. 45 (para. (8) of the commentary to article 17 (Crime of genocide)).

²³⁶ *Ibid.*, pp. 45–46 (para. (12) of the commentary).

16. With regard to attribution on the basis of the conduct of the respondent's organs, the Court had noted that the rule, which was one of customary international law, was reflected in article 4 of the Commission's draft articles on State responsibility for internationally wrongful acts.²³⁷ Applying the rule to the present case, the Court had had to determine whether the acts of genocide committed in Srebrenica had been perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia, as the respondent had been known at the time, under its internal law as it was then in force [para. 386 of the judgment]. Although there had been much evidence of direct or indirect participation by the official army of the Federal Republic of Yugoslavia, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica, the Court had found that it had not been proved before it that the army of the Federal Republic of Yugoslavia had taken part in the massacres at Srebrenica, nor that the political leaders of the Federal Republic of Yugoslavia had been engaged in preparing, planning or carrying out the massacres. Further, neither the Republika Srpska nor the VRS were *de jure* organs of the Federal Republic of Yugoslavia, since none of them had the status of organ of that State under its internal law. There had been no doubt that the Federal Republic of Yugoslavia had been providing substantial support to the Republika Srpska, and that one of the forms that this support had taken was payment of salaries and other benefits to some officers of the VRS; however, after very careful consideration, the Court had determined that "this did not automatically make them organs of the [Federal Republic of Yugoslavia]" [*ibid.*, para. 388].

17. The issue had also arisen as to whether the respondent might bear responsibility for the acts of the paramilitary militia known as the "Scorpions" in the Srebrenica area. On the basis of the materials submitted to it, the Court had been unable to find that the "Scorpions"—referred to in those documents as "a unit of Ministry of Interiors of Serbia"—had been *de jure* organs of the respondent in mid-1995. The Court had further noted that "in any event the act of an organ placed by a State at the disposal of another public authority should not be considered as an act of that State if the organ [had been] acting on behalf of the public authority at whose disposal it had been placed" [para. 389]. That finding recalled the language of article 6 of the Commission's draft articles on responsibility of States for internationally wrongful acts.²³⁸

18. The applicant had raised an argument that required the Court to go beyond article 4 of the Commission's draft article on State responsibility. It had submitted that the Republika Srpska, the VRS and the "Scorpions" must be deemed, notwithstanding their apparent status, to have been *de facto* organs of the Federal Republic of Yugoslavia at the relevant time and that all their acts in connection with Srebrenica had thus been attributable to the Federal Republic of Yugoslavia, just as if they had been organs of that State under its internal law. The Court had addressed that question in its 1986 judgment in the case concerning *Military and Paramilitary Activities in and*

against Nicaragua, where it had held that persons, groups of persons or entities could, for purposes of international responsibility, be equated with State organs, even if that status did not follow from internal law, provided that the persons, groups or entities acted in "complete dependence" on the State, of which they were ultimately merely the instrument [see paragraphs 398–400 of the judgment of the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*]. In the *Genocide* case, the Court had found that while the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, and between the Yugoslav army and the VRS, had been strong and close in previous years, they had, at least at the relevant time, not been such that the Bosnian Serbs' political and military organizations were to be equated with organs of the Federal Republic of Yugoslavia. There had been some differences over strategic options at the time, which provided evidence that the Bosnian Serb leaders had some qualified, but real, margin of independence.

19. The Court had therefore found that the acts of genocide at Srebrenica could not be attributed to the respondent as having been committed by its organs or by persons or entities wholly dependent upon it [para. 413 of the judgment].

20. The Court had then had to address the second question, namely, that of attribution of the genocide at Srebrenica to the respondent on the basis of direction or control. On that subject, the applicable rule, which was also one of customary law, had been laid down in article 8 of the Commission's draft articles on responsibility of States: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."²³⁹ That provision had had to be understood in the light of the Court's jurisprudence on the subject, particularly that in the 1986 *Military and Paramilitary Activities in and against Nicaragua* judgment, which had set out the test of showing that "effective control" had been exercised or that the State's instructions had been given in respect of each operation in which the alleged violations had occurred, and not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations. The applicant had questioned the validity of applying that test by, *inter alia*, drawing attention to the 1999 judgement of the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case. There, the Appeals Chamber had not followed the *Military and Paramilitary Activities in and against Nicaragua* case test and had instead taken the view that acts committed by Bosnian Serbs could give rise to international responsibility of the Federal Republic of Yugoslavia on the basis of the "overall control" exercised by the Federal Republic of Yugoslavia over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts had been committed in breach of international law had been carried out on the instructions of the Federal Republic of Yugoslavia or under its effective control.

²³⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–42.

²³⁸ *Ibid.*, pp. 43–45.

²³⁹ *Ibid.*, pp. 26 and 47.

21. The President of the International Court of Justice wished to step back from the details of the law of State responsibility to reflect for a moment on the fragmentation of international law, a topic that had recently occupied the Commission. The Study Group chaired by Mr. Koskeniemi had completed its work at the previous session, and in its final report it had used the contrast between the *Military and Paramilitary Activities in and against Nicaragua* and *Tadić* cases as “an example of a normative conflict between an earlier and a later interpretation of a rule of general international law”.²⁴⁰ The report stated that such conflicts created two types of problem: first, they diminished legal security because legal subjects were no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly; and secondly, “they put legal subjects in an unequal position *vis-à-vis* each other”.²⁴¹

22. Perhaps the Court’s handling of the “*Nicaragua/Tadić*” issue in its judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* would assuage the concerns of those who saw a normative conflict between ICJ and International Tribunal for the Former Yugoslavia. The former had given careful, and respectful, consideration to the Appeals Chamber’s reasoning but had ultimately decided to follow the *Nicaragua* test. The reasoning had been meticulously laid out in its judgment. First, the Court had observed that International Tribunal for the Former Yugoslavia “was not called upon in the *Tadić* case, nor [was] it in general called upon, to rule on questions of State responsibility, since its jurisdiction [was] criminal and extend[ed] over persons only” [see paragraph 403 of the Court’s decision]. Thus, the Tribunal’s judgement had addressed an issue which was not indispensable for the exercise of its jurisdiction.

23. Secondly, insofar as the “overall control” test was employed to determine whether an armed conflict was or was not international, the sole question which the Appeals Chamber of the International Tribunal for the Former Yugoslavia was called upon to decide, it might well be that the test was applicable and suitable; the ICJ had been careful not to take a position on that point in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, as that was not a question at issue before it.

24. Thirdly, the Court had observed that logic did not require the same test to be adopted in resolving the two issues, which were different: the degree and nature of a State’s involvement in an armed conflict on another State’s territory which was required for the conflict to be characterized as international could very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.

25. Lastly, the Court had noted that the “overall control” test had the major drawback of broadening the scope of

State responsibility well beyond the fundamental principle governing the law of international responsibility: namely, that a State was responsible only for its own conduct, in other words the conduct of persons acting, on whatever basis, on its behalf. In that regard, the “overall control” test was unsuitable, for it stretched too far the connection that must exist between the conduct of a State’s organs and its international responsibility.

26. While deciding to follow its settled jurisprudence on the test of “effective control”, which was also the Commission’s position in its commentary to article 8 of the draft articles on responsibility of States,²⁴² the Court had emphasized that it attached the utmost importance to the factual and legal findings made by the International Tribunal for the Former Yugoslavia in ruling on the criminal liability of the accused before it and had taken the fullest account of the trial and appellate judgements of the Tribunal dealing with the events underlying the dispute.

27. Turning back to the findings on responsibility, Ms. Higgins said the Court had held that there was insufficient proof that instructions had been issued by the federal authorities in Belgrade or by any other organ of the Federal Republic of Yugoslavia, to commit the massacres in Srebrenica, still less that any such instructions had been given with specific genocidal intent. Some of the evidence on which the applicant had relied related to the influence, rather than the effective control, that President Milošević had or had not had over the authorities in Pale. It had not established a factual basis for attributing responsibility on the basis of direction or effective control.

28. The Court had then come to the question of the respondent’s responsibility on the ground of the ancillary acts enumerated in article III of the Convention on the Prevention and Punishment of the Crime of Genocide, including complicity. The Court had referred to article 16 of the Commission’s draft articles on responsibility of States, reflecting a customary rule, which provided that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

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

(b) the act would be internationally wrongful if committed by that State.²⁴³

29. That provision concerned a situation characterized by a relationship between two States, which was not the precise situation before the Court. Nonetheless, the Court had thought it still merited consideration. The Court had found no reason to make any distinction of substance between “complicity in genocide”, within the meaning of article III (e) of the Convention on the Prevention and Punishment of the Crime of Genocide, and the “aid or assistance” of a State within the meaning of article 16 of the Commission’s draft articles on responsibility of States. In other words, to ascertain whether the respondent was responsible for “complicity in genocide”, the ICJ had had to examine whether organs of the respondent State,

²⁴⁰ A/CN.4/L.682 [and Corr.1] and Add.1 (see footnote 28 above), para. 50.

²⁴¹ *Ibid.*, para. 52.

²⁴² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 47–49.

²⁴³ *Ibid.*, pp. 27 and 65.

or persons acting on its instructions or under its direction or effective control, had furnished “aid or assistance” in the commission of the genocide in Srebrenica. The Court had found that the respondent had supplied quite substantial aid of a political, military and financial nature to the Republika Srpska and the VRS, long before the tragic events at Srebrenica, and that the aid had continued during those events. However, a crucial condition for complicity had not been fulfilled. The Court had felt that it lacked conclusive proof that the respondent’s authorities, when providing that aid, had been fully aware that the VRS had had the specific intent characterizing genocide as opposed to other crimes.

30. The Court had proceeded to consider the duty to prevent genocide enshrined in article I of the Convention on the Prevention and Punishment of the Crime of Genocide. The Court had held that the respondent could and should have acted to prevent the genocide, but that it had not. The respondent had done nothing to prevent the Srebrenica massacres despite the political, military and financial links between its authorities and the Republika Srpska and the VRS. It had therefore violated the obligation in the Convention on the Prevention and Punishment of the Crime of Genocide to prevent genocide. In that regard, the Court had made a clear distinction in law between complicity in genocide and the breach of the duty to prevent genocide. The Court had found it conclusively proven that the leadership of the Federal Republic of Yugoslavia, and President Milošević above all, had been fully aware of the climate of deep-seated hatred that had reigned between the Bosnian Serbs and the Muslims in the Srebrenica region, and that massacres were likely to occur. They might not have had knowledge of the specific intent to commit genocide, but it must have been clear that there had been a serious risk of genocide in Srebrenica. Moreover, the legal issue had not been whether, had the respondent made use of the strong links it had with the Republika Srpska and the VRS, the genocide would have been averted. The Court had referred to article 14, paragraph 3, of the Commission’s draft articles on responsibility of States, a general rule of the law of State responsibility, which provided that:

The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.²⁴⁴

31. That obviously did not mean that the obligation to prevent genocide came into being only as the perpetration of genocide commenced; that would be absurd, since the whole point of the obligation was to prevent, or attempt to prevent, the occurrence of the act. A State’s obligation to prevent, and the corresponding duty to act, arose at the instant the State learned of, or should normally have learned of, the existence of a serious risk that genocide would be committed, which it could contribute to preventing. If the genocide was not ultimately carried out, then a State that had omitted to act when it could have done so could not be held responsible *a posteriori*, since the event which must occur for there to be a violation of the obligation to prevent had not happened.

32. The final obligation that the Court had considered was the duty to punish genocide. The Court had held that the respondent had violated its obligation to punish the perpetrators of genocide, including by failing to cooperate fully with the International Tribunal for the Former Yugoslavia with respect to the handing over of General Ratko Mladić for trial.

33. What the Court had sought to do in its judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case had not only been to answer the claims before it, but also systematically to elaborate and explain each and every element in the Convention on the Prevention and Punishment of the Crime of Genocide, believing, exceptionally, that the latter task was also a necessary contribution to clarity and understanding. The Court regarded as extremely important, for the future, its views on the bases of State responsibility for genocide and the precise circumstances in which the duty of a State to prevent genocide in another State’s territory might arise, as well as the scope of that duty.

34. Six weeks previously, the Court had delivered its judgment on preliminary objections in the *Ahmadou Sadio Diallo* case between Guinea and the Democratic Republic of the Congo, which concerned the diplomatic protection of nationals residing abroad. It was a classical case, perhaps, in the Western context, but somewhat unusual as an intra-African case. Mr. Diallo, a Guinean citizen, had resided in the Democratic Republic of the Congo for 32 years, founding two companies: an import–export company and a company specializing in the containerized transport of goods. Each company was a *société privée à responsabilité limitée* (private limited liability company) of which Mr. Diallo was the *gérant* (manager) and, in the end, the sole *associé* (partner). Towards the end of the 1980s, the two companies, acting through their *gérant*, had initiated various steps, including judicial ones, in an attempt to recover alleged debts from the State and from publicly- and privately-owned companies. On 31 October 1995, the Prime Minister of Zaire (as the Democratic Republic of the Congo was then called) had issued an expulsion order against Mr. Diallo and on 31 January 1996, he had been deported to Guinea. The deportation had been served on Mr. Diallo in the form of a notice of refusal of entry (*refoulement*) on account of “illegal residence” (*séjour irrégulier*).

35. Since only States could be parties to cases before the ICJ, Mr. Diallo’s case had come to the Court by virtue of Guinea seeking to exercise diplomatic protection of Mr. Diallo’s rights. The Court had recalled that under customary international law, as reflected in article 1 of the Commission’s draft articles on diplomatic protection,

diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.²⁴⁵

²⁴⁴ *Ibid.*, pp. 27 and 59.

²⁴⁵ *Yearbook ... 2006*, vol. II (Part Two), p. 26, para. 50.

36. The Court had further observed that “[o]wing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights” [para. 39 of the judgment].

37. The Democratic Republic of the Congo had challenged the Court’s jurisdiction on two bases: first, that Guinea lacked standing because the rights belonged to the two Congolese companies, not to Mr. Diallo; and second, that neither Mr. Diallo nor the companies had exhausted local remedies. The Court had examined whether Guinea had met the requirements for the exercise of diplomatic protection under customary international law in terms of three categories of rights: Mr. Diallo’s individual rights, his direct rights as *associé* in the two companies and the rights of those companies, “by substitution”.

38. In terms of Mr. Diallo’s individual personal rights, the central issue had been that of his expulsion and whether local remedies had been exhausted. The President noted that, in 2004, the Commission had included the topic of “Expulsion of aliens” in its programme of work,²⁴⁶ and that the second²⁴⁷ and third reports (A/CN.4/581) of the Special Rapporteur, Mr. Maurice Kamto, were being considered during the current session. As the third report stated, the right to expulsion was not absolute and must be exercised in accordance with the fundamental rules of international law. The report further observed that a study of national and international treaty practice and case law revealed several general principles that were applicable to the expulsion of aliens, including non-discrimination, respect for the fundamental rights of the expelled person, the prohibition of arbitrary expulsion, the duty to inform and the procedure prescribed by the law in force (para. 27).

39. Such principles were indeed the backdrop to the Court’s consideration of whether local remedies had in the *Ahmadou Sadio Diallo* case been exhausted, or had needed to be exhausted, when the expulsion had been characterized by the Government as a “refusal of entry” when it was carried out. Refusal of entry was not appealable under Congolese law. The Democratic Republic of the Congo had contended that the immigration authorities had “inadvertently” used the term “refusal of entry” instead of “expulsion”, and that the error had not been intended to deprive Mr. Diallo of a remedy. (Under Congolese law, expulsion was subject to appeal.) The Court had decided that the Democratic Republic of the Congo could not rely on its own error to claim that Mr. Diallo should have treated the measure taken against him as an expulsion [para. 46 of the judgment]. Incidentally, the Special Rapporteur’s second report on the expulsion of aliens observed that no real terminological distinction could be drawn among the three terms “expulsion”, “escort to the border” (*reconduite à la frontière*) and “refoulement”.²⁴⁸ The Commission might wish to review that in the light of the particular facts of the *Ahmadou Sadio Diallo* case.

²⁴⁶ *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.

²⁴⁷ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

²⁴⁸ *Ibid.*, pp. 246–247, para. 170.

40. The Democratic Republic of the Congo had maintained that even if the expulsion had been treated as a “refusal of entry”, Mr. Diallo could have asked the competent authorities to reconsider their position, and that such a request would have had a good chance of success. As the commentary to article 14 of the draft articles on diplomatic protection stated, such administrative measures could be taken into consideration for purposes of the local remedies rule only if they were aimed at vindicating a right and not at obtaining a favour. That was not the situation in the present case.²⁴⁹

41. With respect to the second category of rights—Mr. Diallo’s direct rights as *associé* in the two Congolese companies—Guinea had referred to the *Barcelona Traction* case and article 12 of the draft articles on diplomatic protection, which provided that

[t]o the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.²⁵⁰

The Court had thus found that Guinea did indeed have standing with respect to Mr. Diallo’s direct rights as *associé* of the two companies.

42. The most complicated issue in the *Ahmadou Sadio Diallo* case had been the question whether Guinea could exercise diplomatic protection with respect to Mr. Diallo “by substitution” for the two Congolese companies. Guinea had sought to invoke the Court’s dictum in the *Barcelona Traction* case, where the Court had referred to the possibility of an exception, founded on reasons of equity, to the general rule of the protection of a company by its national State, “when the State whose responsibility is invoked is the national State of the company” [para. 92 of the judgment of 1970 in the *Barcelona Traction* case]. In the four decades since the *Barcelona Traction* case, the Court had not had occasion to rule on whether, in international law, there was indeed an exception to the general rule “that the right of diplomatic protection of a company belongs to its national State” [*ibid.*, para. 93], which allowed for the protection of the shareholders by their own national State “by substitution”, and on the reach of any such exception.

43. Guinea had pointed to the fact that various international agreements, such as agreements for the promotion and protection of foreign investments and the 1965 Convention on the settlement of investment disputes between States and nationals of other States, had established special legal regimes governing investment protection, or that provisions in that regard were commonly included in contracts entered into directly between States and foreign investors. After careful consideration, the Court had found that this specific treaty practice could not with certainty be said to show that there had been a change in the customary rules of diplomatic protection; it could equally show the contrary, namely that special arrangements had been made to step outside of those customary rules of diplomatic protection. The Court had further observed that, “[i]n that context, the role of diplomatic protection

²⁴⁹ *Yearbook ... 2006*, vol. II (Part Two), para. (5) of the commentary, p. 45.

²⁵⁰ *Ibid.*, p. 42, para. 50.

somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative” [see paragraph 88 of the judgment in the *Ahmadou Sadio Diallo* case].

44. Ultimately, the *Ahmadou Sadio Diallo* case had not proved to be a second *Barcelona Traction* case. After carefully examining State practice and decisions of international courts and tribunals, the Court had been of the opinion that those did not reveal—at least at the present time—an exception in customary international law allowing for protection by substitution.

45. The Court had then considered the separate question of whether customary international law contained a more limited rule of protection by substitution, such as that set out in article 11, subparagraph (b), of the Commission’s draft articles on diplomatic protection, which would apply only where a company’s incorporation in the State having committed the alleged violation of international law “was required by it as a precondition for doing business there”.²⁵¹ However, that very special case had not seemed to correspond to the one before the Court, as it had not been satisfactorily established that the incorporation of Mr. Diallo’s two companies in the Democratic Republic of the Congo would have been “required” of their founders to enable them to operate in the economic sectors concerned. Therefore, the question of whether draft article 11, subparagraph (b), did or did not reflect customary international law had been, rather deliberately, left open. The Court had thus found Guinea’s application inadmissible insofar as it concerned the protection of Mr. Diallo in respect of alleged violations of the rights of his two companies [para. 95 of the judgment].

46. In terms of pending cases, after an “African year” with cases between the Democratic Republic of the Congo and Uganda, the Democratic Republic of the Congo and Rwanda, and Guinea and the Democratic Republic of the Congo, the Court was now in a “Latin American and Asian year”. It had concluded hearings in two cases involving Nicaragua, and they were both under deliberation: one was a case on the merits concerning a maritime delimitation with Honduras; the other was a case at the preliminary objections stage with Colombia, which concerned territorial sovereignty and maritime delimitation questions. In November 2007, the Court would hear arguments on the merits in a case between Malaysia and Singapore concerning sovereignty over certain areas.

47. Three new contentious cases had been filed with the Court the previous year (one of which had later been withdrawn), as well as two requests for the indication of provisional measures. In April 2007, Rwanda had filed an application relating to a dispute with France.²⁵² Rwanda sought to found jurisdiction on article 38, paragraph 5, of the Rules of Court, which meant that no action would be taken in the proceedings unless and until France consented to the Court’s jurisdiction in the case. The Court’s current docket therefore stood at 12 cases.²⁵³ It had been

making every effort to maximize the throughput of its work. It was committed to a very full schedule of hearings and deliberations, with more than one case in progress at all times. It was also endeavouring to hear cases very shortly after they became ready: there was only one case on the docket which was ready for hearings but yet to be scheduled, the rest of the pending cases still being at the written pleadings stage. In terms of strategic planning, the Court tried to establish a calendar that had a mixture of preliminary objections and merits cases, always bearing in mind that if a request for provisional measures was made, it had priority under the Statute of the International Court of Justice.

48. The agenda of the International Law Commission was also a busy and interesting one. The topics the Commission was examining were of the highest relevance for the Court, which would continue to follow the former’s work with great interest. On behalf of the Court, Ms. Higgins wished the Commission every success in the work of its fifty-ninth session.

49. The CHAIRPERSON thanked the President of the International Court of Justice for her skillful statement. Speaking in his personal capacity as a member of the Commission, he noted that the work of the Court was very much focused on substantial written pleadings. However, at the end of the first round of oral hearings, it was sometimes the practice of the Court to put questions to the parties, which could be answered during the second round of oral hearings or within a few weeks after the closure of the hearings. In the former case, the second round of oral hearings was to some extent guided by the Court and the parties had some notice of where its concerns lay. He asked whether it would be practicable for the Court to put such questions on the basis of the written pleadings prior to the commencement of the oral hearings.

50. Ms. HIGGINS (President of the International Court of Justice) said that the Court had from time to time considered whether it would be possible to request the parties to provide useful information at an earlier stage of the proceedings, and had not yet decided against such a procedure once and for all. However, for the time being, it felt that such a practice might place undue constraints on the way a party wished to present its case and give too early an indication of the Court’s thinking. The working methods of the Court were regularly reviewed by the Rules Committee and she would refer the interesting idea raised by Mr. Brownlie to that body.

51. Ms. ESCARAMEIA, referring to the President’s recent statement in another forum that the International Court of Justice had not taken up regional court judgments invoked by States because the issues involved were not precisely the same, asked how the Court would react to a ruling handed down by a regional or *ad hoc* court if the issue were the same, and whether it would respect such a ruling. She wondered whether the topic had been discussed within the Court. The Commission, in its work on fragmentation of international law, had decided to defer consideration of the relationship between courts for the time being. She asked whether the Court would find any work undertaken by the Commission in that regard useful. Secondly, in view of the criticism from some

²⁵¹ *Ibid.*, p. 39.

²⁵² *Official Records of the General Assembly, Sixty-second session, Supplement No. 4 (A/62/4)*, Report of the International Court of Justice, 1 August 2006–31 July 2007, paras. 87–88.

²⁵³ *Ibid.*, para. 9.

quarters that the Court should have been more active in pursuing documents in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, she wondered whether any consideration had been given to making the Court's procedures more proactive and prosecutorial when criminal issues were at stake.

52. Ms. HIGGINS (President of the International Court of Justice) said it was extremely important that all courts respect each other and avoid any pretensions to exclusiveness or hierarchy. The International Court of Justice must, however, consider technical rules and determine what ruling might or might not apply and in what circumstances. All courts could gain much from each other. It was, therefore, hard to give a generalized answer to Ms. Escarameia's first question. For example, in a series of cases relating to the Vienna Convention on Consular Relations, in which the United States of America had been the respondent, the Court's attention had been drawn to a decision by the Inter-American Court of Human Rights that the right of an individual under article 36 of the Convention to have his or her consul notified in the event of his or her arrest or detention was a human right. The International Court of Justice had not said that the Inter-American Court had erred; it had simply determined that the individual right concerned was contained within a treaty, and whether it was classified as a human right was immaterial. In that case, therefore, the ICJ had made no use of the other court's ruling. On the other hand, in current litigation before the Court between Colombia and Nicaragua, reference was being made to a decision by the Central American Court of Justice relating to a treaty the status of which was open to question. That treaty was currently being translated and studied by the ICJ and it remained to be seen what the outcome would be.

53. With regard to the question whether the Court might change its procedures, she said that the answer was in the negative. The Court would not become more prosecutorial. It was a long-established practice that the parties were required to bring evidence before the Court. They had ample time to gather what material they understood would be needed, as a matter of law, in order to persuade the Court to decide in their favour. She understood that more cases would be coming before the International Tribunal for the Former Yugoslavia, but the ICJ had made it clear that its own decisions had been based on the evidence that had been before it at the time.

54. Ms. XUE, after commending the excellent work by the International Court of Justice over the past year, said that she had been particularly happy to hear of the importance attached by the Court, and the parties to disputes before it, to the Commission's work, which had made a great contribution to the development of international law. Indeed, it would be no exaggeration to say that the Commission's work had been put into practice since the adoption of the draft articles on responsibility of States for internationally wrongful acts, which were extensively quoted in the literature. The Court itself had cited some of the draft's provisions as evidence of customary international law. Ms. Xue wondered how the President viewed that phenomenon.

55. Ms. HIGGINS (President of the International Court of Justice) said it would not be correct to say that the Court regarded the totality of the draft articles on responsibility of States as customary international law; to date, it had had occasion only to pronounce on, agree with and find useful formulations in certain specific articles, to which it had referred as customary international law. Difficulties might arise when the Court came to deal with a provision that might be regarded by scholars as a development of international law rather than a restatement of it. A case in point was article 11, subparagraph (b), of the draft articles on diplomatic protection, regarding which she believed there was general agreement that the provision did not represent customary international law. It would be for the Commission to decide whether it represented a useful development of that area of law. Within limited parameters, however, the draft articles on responsibility of States had at times proved very useful.

56. Mr. DUGARD said he wished to raise the question of the collection and presentation of evidence. There had been a time when the Court had not been called on to deal with complicated factual disputes, but that situation had changed over recent years, with such cases as that concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* or the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case. In the latter case, the Court had been confronted by decisions of the International Tribunal for the Former Yugoslavia, which had had before it evidence gathered over many years, whereas the International Court of Justice had been called on to make a determination largely on the basis of written pleadings, without many oral statements by witnesses. He wondered whether the President thought that the Rules of Court needed to be changed to provide for such cases, or whether she believed it could manage with its somewhat outdated rules on evidence gathering.

57. Ms. HIGGINS (President of the International Court of Justice) said that the Court's procedures were clearly not sufficiently detailed to deal with the whole range of issues before it. In the run-up to the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, there had been a moment when it had seemed that one of the parties might request a very substantial number of witnesses, and the Court had started internal deliberations on drawing up rules covering that specific case in order to give the parties equal time to present their case as they wanted. The issue had lost its urgency when the number of witnesses had reverted to more manageable dimensions, but there were undoubtedly many lessons to be learned with regard to evidence. There might be a case for an initial round of evidence including affidavit evidence, followed by oral evidence at cross-examination. One anomaly had arisen in recent years: technical evidence had come to be deployed as part of a legal team's argument rather than being regarded as expert evidence available to be examined by one side or the other. That approach could give rise to its own problems, particularly if the expert spoke at a late stage of the proceedings, thus giving the opposing side no opportunity to respond. In short, the answer to Mr. Dugard's question was that the situation was not satisfactory and would have to be dealt with.

58. Mr. HASSOUNA said that, over recent years, the Court had issued a number of important judgments in cases of a highly political nature, such as the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case or the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and he wondered whether such rulings had contributed to the settlement of the disputes concerned, and whether the parties—or the United Nations, as the case might be—had implemented them. It was a fundamental issue related to the enforcement of international law.

59. Ms. HIGGINS (President of the International Court of Justice) said that the degree of compliance with the Court's judgments was surprisingly high. Since the Court had come into being, there had been only a handful of cases—a maximum of five—in which the parties' compliance had not been immediately forthcoming. She would prefer to focus on other cases, like the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, in which the Libyan Arab Jamahiriya, having been found not to be lawfully in occupation of the Aouzou Strip for 40 years, had started to withdraw within two months of the Court's ruling. She also recalled with pleasure the sight of the Ambassadors of Cameroon and Nigeria informing the General Assembly of their satisfaction at the successful outcome of the case concerning the *Land and Maritime Boundary Between Cameroon and Nigeria*. She did not recognize a distinction between the bulk of the Court's rulings, which were often very difficult for the parties to comply with, and cases that might generally be thought of as highly politicized. As for the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the Court had made some specific requests especially with regard to the return of General Mladić to the International Tribunal for the Former Yugoslavia, and she would confine herself to saying that she was confident that its findings were playing their part on the diplomatic scene. As for United Nations activity in the context of the advisory opinion cited, the Secretariat had drawn up a list of the property taken and had carried out identifications and evaluations; however, whether that would help in the medium term she was not in a position to say. Ultimately, however, an advisory opinion was just that; the question of compliance did not arise.

60. Mr. CAFLISCH noted that, in its consideration of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the Court had made a distinction between the tests to be applied in criminal international law and other matters. If he understood correctly, the International Tribunal for the Former Yugoslavia had, in the *Tadić* case, applied the "overall control" test, whereas the International Court of Justice had applied the stricter test of direct effective control. In view of the general principles of criminal law, which provide for far stricter standards to be applied, he would have expected the Court's test to be less rather than more strict. He did not seek to criticize the Court's actions but rather to draw attention to a paradox.

61. Ms. HIGGINS (President of the International Court of Justice) said that the Court had at no stage considered

what the respective tests should be for a criminal case and for a major violation of international law in an inter-State case. Rather, it had considered what the test should consist of under contemporary customary international law, in the context of State responsibility. In that connection, it had considered whether it should apply the not unreasonable test applied by another court that was deciding, in a case that was not State-to-State, whether a given conflict was international. The Court was therefore not comparing criminal law with non-criminal law, but instead had been comparing two different issues in international law for which a test was required. In doing so, it had acted according to precedent.

62. The CHAIRPERSON thanked Ms. Higgins, on behalf of the Commission, for her heartening statement and her helpful replies to members' questions.

Responsibility of international organizations (continued) (A/CN.4/577 and Add.1–2, sect. B, A/CN.4/582, A/CN.4/583, A/CN.4/L.720)

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

63. Mr. OJO said he shared the concern of the Special Rapporteur that the draft articles on responsibility of international organizations had not sufficiently taken into account the great variety of such organizations, even though that variety could hardly justify any serious criticism of the draft articles, since, in spite of their differences, all such organizations shared characteristics, values and other attributes which qualified them as international organizations in the first place. Similarly, the differences in size, language, race, culture, resources, wealth and power among States had not inhibited any concerted effort to establish general rules governing their relations with each other.

64. Draft article 2 defined an international organization only in relation to its legal personality. It was silent, however, on the effect of recognition on that personality, which was crucial, particularly where it related to the effect of non-recognition of an organization by an injured State on the organization's responsibility towards that State. It might safely be argued that recognition was presumed as soon as the act or omission of the organization affected the injured State, inasmuch as, even under the now archaic constitutive theory, recognition was a tool employed by a State to confer a benefit, material or otherwise, on the State being recognized. Non-recognition could not be a justification for exposing the non-recognizing State to any form of injury. A more accurate view was that the legal personality of an organization was an objective fact that flowed naturally from its nature, purpose, functions and, sometimes, the size of its membership.

65. Draft articles 31, 32 and 33 emphasized the need to impose on international organizations the duty to continue to perform an obligation even after it had been breached, the justification being that such a duty was a legal consequence not of the breach but of the fact that the original obligation remained. That position was

correct and merely restated the universal principle that a party should not benefit from its own wrongful act. Only when a breach effectively terminated an obligation did the duty of continued performance cease. It might be necessary to insert a proviso to that effect in draft article 32.

66. The duty to make reparation for injury caused by an internationally wrongful act was as well established for international organizations as for States, following the principle that a party was presumed to intend the natural consequences of its act. As a legal person under international law, an international organization should bear full responsibility for its acts or omissions, but such responsibility should not extend to its constituent members, whether States or other international organizations. For the purposes of the organization's responsibility, its members were unknown to international law, even though they themselves were usually international persons. The response by a preponderant number of delegations to the Sixth Committee, as noted in paragraph 28 of the report, that there was no basis for holding members of an international organization liable for injury caused by that organization was therefore a statement of the obvious. Draft article 34 also reflected general practice among States and international organizations.

67. The 1986 Vienna Convention had codified the settled rule that a party could not rely on its internal rules as a justification for the non-performance of its obligations under international law. The Special Rapporteur sought, however, to introduce a departure from that rule in cases where the relations between an organization and its member States and organizations so dictated. If, however, members of an international organization were not liable for an injury caused by that organization, the organization should not rely on internal rules or relations between it and its members to shirk its obligation under international law. The reasons offered by the Special Rapporteur for such a departure from established principles were not convincing and draft article 35 should be reworded accordingly.

68. With regard to draft article 40, there was no justifiable reason why reparation made by an international organization for injury caused by an internationally wrongful act should not follow the form already established by State practice, as reflected in the draft articles on responsibility of States for internationally wrongful acts.²⁵⁴ However, satisfaction by way of an expression of regret, formal apology or other modality was useful, where it was acceptable to the injured party; and there appeared to be no reason why such satisfaction should be given only insofar as an injury could not be made good by restitution or compensation (draft art. 40, para. 1). The draft article should be reworded to make satisfaction a full and final reparation for an injury, even where restitution or compensation would have been appropriate, provided that such satisfaction was acceptable to the injured party.

69. With regard to draft article 41, paragraph 2, although payments of interest on principal sums naturally ran until

the date the obligation to pay was discharged, there was nothing to stop the party entitled to the interest from waiving it. He therefore suggested the addition of a proviso to that effect.

70. Turning to draft article 44, he said that, since no derogation was permitted from peremptory norms of general international law, it was in the interests of the international community to ensure that any derogation from or breach of such norms was terminated as soon as possible. Draft article 44 imposed a duty of cooperation to that end on States, but, since States already had such an obligation under the draft articles on responsibility of States, the draft article should restrict itself to imposing a duty on international organizations to cooperate with States in achieving that end.

71. Mr. McRAE said that, as a new member of the Commission, he found it somewhat difficult to comment on the fifth report on responsibility of international organizations since a thorough understanding of the issues raised in it required familiarity with earlier debates on previous reports. His trepidation was increased by the fact that Mr. Pellet had described his views on reservations to treaties as "positivist", while Mr. Brownlie had characterized his statement on the effects of armed conflict on treaties as "post-modernist heresy". He was therefore unsure how his opinion on the responsibility of international organizations would be perceived.

72. The Special Rapporteur and the Commission were right to embark on the challenging task of establishing rules on the responsibility of international organizations by first determining whether the concepts of responsibility found in the draft articles on responsibility of States were appropriate for international organizations. In the process, the Commission was both building on and contributing to the notion of international legal personality and how it applied to international organizations, by highlighting the way in which that concept had progressed from the somewhat qualified view of the legal personality of international organizations expressed in 1949 in the advisory opinion of the ICJ on *Reparation for Injuries* to the more absolute view propounded in its 1980 advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.

73. Some of the difficulties in that area were connected with the questions of how absolute the legal personality of international organizations should be and also to what extent it was necessary to look behind that personality and to deal not with the organization as such, but with the member States themselves. That question appeared to be implicit in some of the issues discussed at the previous meeting.

74. In paragraph 7 of his fifth report, the Special Rapporteur had responded to criticism that the rules developed to date took insufficient account of the great variety of international organizations by suggesting that this was a minor defect, because most of the rules adopted to date operated at a level of generality that did not make them appropriate only for a certain category of organizations. He had likewise suggested that a provision along the lines of draft article 55 of the draft articles on responsibility

²⁵⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

of States²⁵⁵ could possibly be added in order to exclude circumstances where an organization had particular or special rules governing its responsibility.

75. He agreed with Ms. Escameia that this response required further discussion. While it was true that some rules on responsibility would, in practice, apply only to certain organizations that operated in a narrow sphere of competence, the argument that the rules on responsibility operated only at a level of generality tended to break down when it came to the subject matter of the draft articles currently under consideration, in other words those on reparation and the provision of compensation. Those were obligations of potentially much greater specificity, and since any international organization could potentially violate some international obligation, the rules relating to reparation would potentially apply to any international organization. For that reason, the question whether those rules were appropriate for all organizations was important.

76. The incorporation of an article similar to draft article 55 on responsibility of States would not really go far enough; although it would preserve such particular rules as an organization might have on responsibility, it would not offer an answer to what might be the more problematic case of organizations possessing no rules at all and no procedures or capacity for dealing with the consequences of being held internationally responsible. The Commission might be creating rather than solving problems by treating smaller international organizations with limited capacities and processes for dealing with the consequences of international responsibility in the same way as the United Nations, an organization that could clearly handle issues of responsibility. In fact, the Commission might be formulating rules that would work admirably for some international organizations, but which would be unrealistic for many smaller organizations.

77. In that respect, the approach outlined by Mr. Pellet the previous day illustrated the flaw inherent in the Commission's logic. In starting with the principle that international organizations must be held responsible for their wrongful acts, then adding the principles that responsibility entailed the obligation to provide reparation for the wrongful act and that member States not responsible for the internationally wrongful act of the organization were not responsible for compensating the injured party when the organization was not in a position to do so, the Commission was faced with a dilemma, since some organizations simply might not be in a position, either constitutionally or financially, to provide reparation.

78. If the Commission's model of an international organization was the United Nations, the World Bank, the European Community or even the World Trade Organization, those rules on responsibility and reparation could work, but in the case of a much smaller organization, with less institutional capacity, the likelihood of reparation being provided might be rather remote.

79. Although Mr. Pellet's solution, that of crafting draft articles imposing on member States an obligation

to provide international organizations with the means (which presumably would mean funding in many cases) to allow them to fulfil their international responsibilities, seemed to be a good idea in theory, it was questionable whether it was really practical. What would be the consequences of such an obligation and would it mean that injured parties were more likely to receive compensation for the internationally wrongful acts of organizations? Would a member State that was reluctant to accept an independent obligation to compensate for an international organization's wrongful act for which it was not responsible be willing to achieve what was, in effect, the same result by accepting an obligation to furnish the organization with the means to provide compensation?

80. An approach treating all international organizations in the same way would probably run into problems. It was understandable that member States did not wish to be independently responsible for providing injured parties with compensation for organizations' actions for which they bore no responsibility as a State, and that position seemed all the more defensible in the case of large multi-lateral organizations where the actions of the organization could be more readily distinguished from those of the States themselves and the organization might be in a position to provide redress. That would not, however, be true of many international organizations.

81. The crucial issue was therefore the extent to which States could hide behind the "corporate veil" of an international organization, with the result that a party injured by a wrongful act of the organization went uncompensated. Mr. Pellet's proposal was an attempt to avoid that predicament by imposing on States an obligation to act within the organization to ensure that reparation was provided. A possible alternative solution would be to distinguish between different organizations, or different types of organizations. Would it not be more appropriate to have differing rules on responsibility, at least as far as reparation was concerned, given that organizations themselves differed vastly in scope, mandate and capacities?

82. It might be advisable to revisit the whole question of whether member States bore direct responsibility to provide reparation when the scope, capacity and institutional structure of an organization made the provision of reparation difficult, if not impossible; it could well be that in such cases, the member States should bear an obligation to compensate. Of course that approach conflicted with the notion of legal personality and was contrary to the ideas put forward by the Institute of International Law in 1995, but the Institute's report had been concerned with international organizations as a whole.²⁵⁶ It was questionable whether looking behind the legal personality of a more limited group of organizations would produce undesirable consequences—such as active interference by States in the working of the organization—of the magnitude predicted by the Institute of International Law.

²⁵⁵ *Ibid.*, pp. 30 and 140.

²⁵⁶ "The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties", Institute of International Law, *Yearbook*, vol. 66, Part I, Session of Lisbon (1995), Paris, Pedone, 1995, pp. 251 *et seq.*

83. Another way of tackling the obligation to provide reparation would be in terms of the subject matter of the wrongs committed. The practice of international organizations was a useful guide in that context. He sympathized with the Special Rapporteur, who was dealing with limited practice and with criticism—often from those who were in a position to provide information on practice, but who were not doing so. Two striking facts emerged from the report: first, notwithstanding the lack of practice, Governments seemed to believe that international organizations should be held responsible for their wrongful acts; secondly, the cases where responsibility was most commonly acknowledged involved the treatment of individuals by international organizations, with regard either to the wrongful treatment of employees or to injuries to individuals in the course of peacekeeping operations. Perhaps wrongs committed in relation to individuals formed an identifiable category of responsibility which could itself be subject to some more specific treatment, in the same way as breaches of obligations under contemporary norms, regarding which the Special Rapporteur had formulated specific draft articles.

84. He had raised those questions, not because he was in fundamental disagreement with the Special Rapporteur over the draft articles he had produced in the past, or in his fifth report, but because he thought that the issue of the breadth of application required more debate in the Commission. While one law professor's fantasy about the Commission's approach to the topic, to which the Special Rapporteur had alluded the previous day, did not, unfortunately, reflect reality, the concern that the Commission was ignoring the variety of organizations and the diversity in their abilities to address questions of responsibility, especially the specific problem of reparation, was one that deserved fuller discussion.

85. Mr. PELLET, responding to Mr. McRae's comments, said that the paucity of material supplied by international organizations when they had been requested to illustrate their practice in the field of responsibility was probably due more to the absence of such practice than to any unwillingness to provide examples.

86. Mr. McRae had asserted that some international organizations might be unable to provide reparation for constitutional or financial reasons, but in his own opinion, those were two entirely different matters. There was no need to spend time examining constitutional obstacles, since it was plain that international organizations were responsible for their wrongful acts and had to provide redress. There was no reason why they, any more than States, should find shelter behind their constitutions. His practical and financial concerns were prompted by the fact that no international organization had the resources to offer reparation if it caused substantial injury or damage.

87. He feared that Mr. McRae was indeed a positivist rather than a post-modernist, since it was not the Commission's task to ascertain whether member States were prepared to be held directly or indirectly responsible for the wrongful acts of an international organization to which they belonged. Their responsibility in that event was governed by objective rules of international law.

88. Lastly, he still maintained that treating international organizations differently according to their size and functions was a bad idea. Should States be treated differently depending on whether they were large or small, rich or poor? Of course not; States were responsible because they had legal personality under international law, and when they caused injury through an internationally wrongful act, they therefore had to provide compensation. He failed to see why a different reasoning should be applied in the case of international organizations. Moreover, he was profoundly disturbed by the idea of varying levels of responsibility contingent on the size of the organization. In point of fact, the dangers should not be overstated: a very large organization such as the United Nations, which engaged in intensive practical activity, was far more likely to cause substantial damage than a small organization with one specific function and few resources. Hence he saw no other solution than the one he had outlined the previous day.

89. Mr. GAJA (Special Rapporteur) said he wished immediately to clarify a number of points raised by Mr. McRae. First, the term "special rules", if it were incorporated in a future article along the lines of draft article 55 on responsibility of States, would not refer only to the relevant rules of the organization, but could also refer to special rules developed by international law for certain types of organization such as integration organizations. The real question was whether a reference to something which was as yet unexplored was really helpful.

90. Secondly, when looking at remedies, it was necessary to bear in mind that it could not be taken for granted that member States were never responsible. At the previous session, the Commission had adopted some draft articles which were relevant to some of the issues raised by Mr. McRae. One of those draft articles provided for the responsibility of member States when they had led the injured party to rely on their responsibility, a situation which was likely to arise when the organization causing the injury was very small and member States played a more prominent role in its activities.

91. Mr. NOLTE said it was impossible, at the current stage, to expect the Special Rapporteur to propose more highly differentiated rules given the relative lack of discernible practice. In general, he endorsed the draft articles although, like Mr. McRae, he was uncertain whether future practice would bear out all the abstract rules which had been formulated.

92. He wished to draw the Commission's attention to what he considered to be a lacuna. In 2005, the Commission had provisionally adopted a draft article 16 (now 15), entitled "Decisions, recommendations and authorizations addressed to member States and international organizations",²⁵⁷ which had been based on the Special Rapporteur's third report²⁵⁸ dealing with the responsibility of an international organization in connection with the act of a State or another international

²⁵⁷ *Yearbook ... 2005*, vol. II (Part Two), p. 47, para. 206.

²⁵⁸ *Ibid.*, vol. II (Part One), document A/CN.4/553.

organization. According to that draft article, an international organization incurred responsibility not only if it adopted a decision which bound member States to commit an internationally wrongful act, but also if it issued recommendations and authorizations to do so. That provision raised the obvious question of whether an international organization should bear the same amount of responsibility for wrongful acts committed on the strength of a recommendation or authorization as for those resting on a binding decision. The Special Rapporteur had broached that question in paragraph 43 of his third report, where he had concluded that “since the degree of responsibility concerns the content of responsibility, but not its existence, the question should be examined at a later stage of the present study”.

93. The time had come to deal with that important issue, as the Commission was currently debating the content of responsibility. He would have expected the Special Rapporteur to address the matter in the context of draft article 42 concerning contribution to the injury. That draft article should play a much more important role than its counterpart in the draft articles on responsibility of States, namely, draft article 39,²⁵⁹ because the responsibility of an international organization was often accompanied by the additional or contributory responsibility of another State or international organization, precisely because of the division of labour which international organizations made possible. The draft articles on responsibility of international organizations should therefore include some general guidance as to the distribution of responsibility, at least with respect to acts stemming from such different categories of sources of authority as binding decisions and mere recommendations.

94. Such guidance should bear in mind the fact that States were not generally held responsible for instigating an internationally wrongful act committed by another State. Unless there were pertinent reasons to the contrary, the situation should not be fundamentally different for international organizations. It was doubtful whether there was always justification for holding international organizations responsible for making their recommendations in the first place. If, however, the Commission thought that it could identify such a rule, it should make it clear that the responsibility was relatively limited in comparison to that of the States which had actually committed an internationally wrongful act on the basis of that recommendation. His opinion in that respect had been confirmed by the statement of the President of the International Court of Justice regarding the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, in which she had emphasized that the strict standard of responsibility as formulated in *Military and Paramilitary Activities in and against Nicaragua* meant responsibility for actual acts and not responsibility for some form of general influence or control. There was no reason to impose stricter standards of responsibility on international organizations than on States.

95. Mr. Nolte did not endorse Ms. Escarameia’s argument that non-State actors should be covered by the draft articles and he also disagreed with Mr. Pellet’s submission that member States had a duty to provide an international organization with the means to fulfil its obligations arising from its international responsibility. In that connection he, too, had a positivist streak and was of the opinion that the Special Rapporteur had convincingly demonstrated that such a duty had not been accepted in international practice to date, and, indeed, had been openly contradicted thereby. On the other hand, it might be advisable to give some consideration to Mr. McRae’s suggestion that exceptions might be allowed for certain kinds of organization.

96. He recommended that the draft articles should be referred to the Drafting Committee, subject to the reservations he had just expressed.

97. Mr. GAJA (Special Rapporteur) said he wished to make it clear that the text of draft article 15 did not follow the proposal he had put forward in his third report, because the Commission had taken a different view. Draft article 15 made an international organization’s responsibility for an internationally wrongful act committed by a State conditional upon the fact that, when the State had carried out the act in question, it had relied on the organization’s recommendation or authorization. The situation was complicated by the simultaneous responsibility of various subjects. Draft article 42 concerning contribution to the injury would not be the appropriate place to address the question of degrees of responsibility, because it dealt with the contribution of the injured party and not that of the many subjects involved in the commission of the act. As the issue of levels of responsibility had not been covered in the draft articles on responsibility of States in view of its complexity, he would therefore welcome suggestions from other members.

Organization of the work of the session (*continued*)*

[Agenda item 1]

98. Mr. CAFLISCH (Chairperson of the Working Group on effects of armed conflicts on treaties) announced that the Working Group comprised Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue and Mr. Yamada, together with Mr. Brownlie (Special Rapporteur) and Mr. Petrič (Rapporteur), *ex officio*. He invited any other members who wished to join the group to do so.

The meeting rose at 1 p.m.

²⁵⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 29 and 109.

* Resumed from the 2929th meeting.