United Nations A/C.6/53/SR.18

General Assembly
Fifty-third session

Official Records

Distr.: General
17 December 1998
English
Original: Spanish

Sixth Committee

Summary record of the 18th meeting
Held at Headquarters, New York, on Monday, 2 November 1998, at 10 a.m.

Chairman: Mr. Enkhsaikhan ..... (Mongolia)

Contents

98-82057 (E)

The meeting was called to order at 10.15 a.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session *(continued)* (A/53/10 and Corr.1)

1. **Mr. Preda** (Romania), referring to chapter IV of the report of the International Law Commission (ILC) on the work of its fiftieth session, entitled "International liability for injurious consequences arising out of acts not prohibited by international law" (prevention of transboundary damage from hazardous activities), said that it could not be denied that there was a conflict between the right of a State to engage in lawful activities, particularly in its territory, and its right to enjoy its facilities and amenities without being disrupted by the activities of another State. In order to reconcile those rights, States must exercise restraint, so as to avoid harming the environment of other States. At the same time, it was obvious that there would be situations in which significant harm or damage had actually occurred, requiring that the States concerned invoke remedial or compensatory measures, which often involved issues concerning liability. Those aspects should be borne in mind in preparing a document that commanded consensus, instead of adopting provisions which obliged States to establish an environmental impact assessment process for virtually all activities that might cause significant transboundary harm. Consequently, the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law should be limited to particularly hazardous activities. In that respect, his delegation supported the proposals that a group of legal experts within the Commission should carry out a feasibility study which would clarify the issues.

2. With regard to chapter V of the report (Diplomatic protection), his delegation supported the suggestion that the working group should focus on the issues raised in chapter one of the outline proposed in the previous year, entitled "Basis for diplomatic protection". His delegation believed that, in its future form, diplomatic protection should be a continuation of the Vienna Conventions on Diplomatic and Consular Relations, and an amendment to them. In view of the proliferation of cases of multiple nationality and the increasing complexity of economic and commercial relations, it was necessary to prepare draft rules in order to define the rights and obligations of the State that had personal jurisdiction and the State that had territorial jurisdiction. Furthermore, a clearer distinction must be made between diplomatic protection and consular assistance which States gave their own nationals abroad.

3. Referring to chapter VI of the report (Unilateral acts of States), he said that the first report of the Special Rapporteur represented substantial progress in the consideration of the topic. If agreement was to be reached on that key issue, the Commission must focus on aspects concerning the elaboration and conditions of validity of the unilateral acts of States, on the understanding that States had the right to determine the existence of such acts.

4. His delegation, which attached particular importance to chapter IX (Reservations to treaties), believed that, although the principles of the 1969 Vienna Convention should be preserved, there was a need to clarify the ambiguities in the existing regime. The Vienna Convention on the Law of Treaties did not provide any mechanism for assessing whether a reservation was incompatible with the object or purpose of a treaty, nor did it indicate which body was entitled to make such assessments. In the view of his delegation, the decision to withdraw or revise a reservation must always lie with the State and could not emanate from a monitoring body established under a treaty. Moreover, the legal regime for reservations was unitary and, therefore, there was no valid basis for applying a separate regime to human rights treaties. However, the right balance should be struck between the unitary character of the regime of reservations and the specificity of human rights instruments. Treaty bodies did not have the power to make determinations regarding the validity of particular reservations, since that was within the competence of the reserving State and other States parties to the treaty. As to the draft guidelines on reservations to treaties, a unilateral statement by which, as indicated in draft guideline 1.1.6, a State increased its commitments or its rights beyond those stipulated in a treaty, should not be considered as reservations.

5. With regard to chapter VII of the report (State responsibility), it was very important to develop a basic instrument to regulate international relations as soon as possible. Romania supported the distinction between "primary" and "secondary" rules, and believed that the latter should be codified. The concept of State crimes should not be retained in international law, although some wrongful acts — for example, acts of aggression — could be treated in a distinct manner, taking into account their serious impact on international relations. The best solution would be to recognize that individuals had penal responsibility and include special provisions for wrongful acts in cases of *jus cogens* and *erga omnes* obligations. The concept of objective responsibility should be maintained in relation to hazardous activities.

6. **Mr. Sepulveda** (Mexico) said that States carried out many unilateral acts in the context of their international relations, which made it very difficult to establish rigid limits on the study of the topic. The Commission should not concentrate on formal legal acts, since that would exclude an important area of State conduct and reduce the value of its work, the purpose of which was to promote mutual trust, confidence and security in inter-State relations. The Commission should therefore include in the study of the topic acts which, although they could not be considered as formal legal acts, gave rise to consequences in international law. He was not convinced of the need to include unilateral acts carried out by States against other subjects of international law, although he agreed with the Commission that that question could be resolved at a later stage of the study of the topic.

7. On the topic of State responsibility, he hoped that the commencement of the second reading of the draft articles would give rise to a fruitful debate and lead to the early completion of the Commission's work on the topic. Given the lack of agreement on the distinction that should be drawn between State crimes and delicts, inclusion of that distinction in the draft articles would delay the Commission's work. The notion of State crime should therefore be excluded. International law did not recognize that States could be subjects of criminal responsibility nor did any mechanism exist to enforce such responsibility. There was no reason, moreover, to include a legal concept which the international community was not yet prepared to accept. The degree of a State's responsibility depended on the nature of the rule that had been violated and the consequences of that violation. As the Commission had indicated, it was necessary to determine varying degrees of responsibility and to leave aside the controversy over the distinction between criminal and delictual responsibility. The point of departure should be that any internationally wrongful act committed by a State gave rise to the international responsibility of that State and the response to that unlawful conduct should be determined, bearing in mind the nature of the obligation that had been violated. The Commission's discussions should focus on the degrees of responsibility and the consequences of failure to fulfil that responsibility in order to establish an objective criterion based not on the damage or blame (*dolus* or *culpa*), but rather on the magnitude of the wrongful act and its effects. Even though the problem of the distinction between crimes and delicts had not been resolved at the Commission's fiftieth session, his delegation believed that the Working Group's conclusions, which were set out in paragraph 331 of the Commission's report, were for the time being the most appropriate way of ensuring the continuity of the Commission's work on the draft articles on State responsibility.

8. Special consideration should be given to Part One, chapter V, of the draft articles on State responsibility, which dealt with the circumstances that precluded wrongfulness. While it was true that that chapter contained legal concepts that were generally recognized in the internal laws of States, it could not be claimed, as had been done in draft article 30, that the wrongfulness of an act of a State was precluded if the act was in response to another wrongful act committed by a wrongdoing State, since that would subvert the system of rules which the Commission was attempting to establish in the field of State responsibility. That article and Part Two, chapter III, should be carefully reviewed to ensure that any coercive measure that might be included in the draft articles strictly conformed to the international legal order in force.

9. The dispute settlement mechanism envisaged in the draft articles represented an important contribution by the Commission. Its effectiveness should not be prejudged on the grounds that States would not accept binding settlement of disputes in that field. Nor could the objection be raised that it would be a specialized system, since there were special regimes for the law of the sea or in the field covered by the recently established International Criminal Court. In any case, any obligations which States might wish to assume in that area could be considered in a diplomatic conference.

10. The Mexican delegation agreed with the Special Rapporteur's suggestion to replace the phrase "State which has committed an internationally wrongful act" by "wrongdoing State", since that would lend greater clarity to the draft articles. It would also be necessary to review and clarify the terminology used in other parts of the draft articles, especially the definition of "injured State".

11. He agreed with the Commission's proposal that the draft articles should cover all internationally wrongful conduct constituting a breach of an international obligation, whether arising from positive action or an omission. There was no requirement of damage for a State to incur responsibility for an internationally wrongful act. Questions of damage or fault had been referred to the primary rules and should not be included in article 1. Their exclusion, however, could have a significant impact on the activation of the mechanism of responsibility. Consequently, it might be advisable to review article 1, bearing in mind the definition of "injured State" that might be adopted and the degrees of responsibility that might eventually be established in the draft articles.

12. The Mexican delegation accepted the Special Rapporteur's proposals concerning articles 2 and 4 and, in particular, the deletion of draft article 2. With regard to draft

article 5, even though there might be a justifiable need to ensure that a State did not evade its responsibility through restrictive qualifications based on its domestic laws, the mere deletion of the reference to that law would not resolve the problem. Instead, it would present difficulties, since it was precisely internal law that defined what was considered as a State organ.

13. In general, the Special Rapporteur's suggestions regarding articles 6 to 15 *bis* deserved consideration. He also agreed that the responsibility of international organizations and of States for the acts of international organizations should not be included in the current draft articles, since that subject had its own special characteristics. Moreover, a decision could not now be taken on the final form of the draft articles and would have to wait until the second reading was at a more advanced stage. However, the essence of the obligations which States would have to assume was the justification for taking up the topic of responsibility in the context of a diplomatic conference.

14. On the subject of nationality in relation to the succession of States, Mexico did not believe that it would be appropriate to expand the study of the question of the nationality of legal persons, since that would severely hamper the Commission's work. It wished to recommend that the Special Rapporteur should continue to examine the question in the context of State succession and underscored the importance of the domicile of legal persons as a determining element in any attribution of nationality.

15. On the topic of reservations to treaties, he thanked the Commission for the set of six draft guidelines that had been prepared for inclusion in the future Guide to Practice, and for the Special Rapporteur's analytic and structured reports. He also agreed with the criteria for distinguishing between reservations and interpretative declarations, which were set out in paragraphs 517 to 519 of the Commission's report.

16. On the question of the definition of reservations, he supported the text of draft guideline 1.1, which combined the elements contained in the Vienna Conventions, as well as the decision not to modify a definition which had been entrenched in the conventional legal order, since there was always some risk in altering definitions that were well entrenched in State practice. He took note of draft guideline 1.1.1, on the object of reservations, and in particular of the fact that it would be reviewed in the light of the debate on interpretative declarations. He agreed with the Commission that a reservation could refer in general to the way in which the State or international organization making the reservation proposed to implement the treaty as a whole but, because of the way in which it was drafted, the guideline could include certain types of interpretative declarations. In order to avoid that situation, reference could be made to the object of modifying or excluding the legal effects of the treaty in question. He supported the contents of draft guideline 1.1.2 and stressed the importance of maintaining the deadlines for the entering of reservations.

17. With respect to draft guidelines 1.1.3 and 1.1.4 on reservations having territorial scope, it might be necessary to limit them to so-called "colonial" situations so that they would include only those territories which, for one reason or another, were subject to the jurisdiction of the State formulating the reservation. He was not convinced that the two guidelines should encompass the rather uncommon practice of excluding all or part of the State's own territory. The point was not to ignore a situation that could arise from the application of article 29 of the 1969 Convention, but simply to ensure that the future Guide to Practice covered only situations that were well established in State practice.

18. The guideline on reservations formulated jointly was appropriate; he understood that it was necessary to establish the permissibility or impermissibility of the reservations. Although the Commission had adopted a provisional text on the subject, it would be useful to clarify and specify the scope of the entire set of draft guidelines adopted thus far. In relation to the request contained in paragraph 41 of the report, his delegation felt that unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself should not be considered as reservations, since the latter concept reflected instead the idea of limiting or restricting the scope of a treaty's provisions. Moreover, such unilateral statements were not binding on the other parties to a treaty.

19. Mexico congratulated the Commission on the organization of the seminar commemorating its fiftieth anniversary, awaited with interest the publication of the proceedings of the seminar and also congratulated the Commission's secretariat for having organized the seminar and issued the publications referred to in paragraphs 548 and 549 of the report. It would be very useful to include, on the International Law Commission Web site, advance copies of forthcoming reports as soon as possible after each session and even before the printed versions were issued in all the official languages. That would facilitate the analytical work of Governments, since the report was published only a short time before the item was discussed in the Sixth Committee.

20. He took note of the topics which the Planning Group had selected for the long-term programme of work, and stressed his particular support for the idea that the Commission should take up issues related to international environmental law.

States had recognized, on a number of occasions, the need to promote the codification and progressive development of environmental law. One of the topics that could be studied was that of transboundary resources, a term which he preferred to "shared natural resources", which was used in the report. Specifically, the Commission could study, in the near future, the issue of groundwater and transboundary deposits, in which it already had some experience. Lastly, the session held in New York had been very useful in that it had promoted communication between the International Law Commission and the members of the Sixth Committee, and he hoped that that arrangement would be repeated in the future.

21. **Mr. Hilger** (Germany) said, in relation to unilateral acts of States, that it was reasonable to limit the scope of the topic from the outset so that the analysis would be more thorough and could progress more rapidly; it would also be desirable to distinguish among various types or categories of unilateral acts and to focus on statements directed towards other States. His country therefore supported the Special Rapporteur's proposal that the study should be confined to unilateral acts of States performed with the intention of producing specific effects in international law, and that other unilateral acts, such as those of a non-legal nature, those of other subjects of international law or acts and conduct of States not performed with the intention of producing specific effects in international law, should be excluded. For the same reason, issues such as silence, acquiescence and estoppel should be taken up at a later stage, when the Commission had made further progress on the issue of statements directed towards other States.

22. He welcomed the adoption, at the Commission's forty-ninth session, of a set of 27 draft articles, with commentaries, on the nationality of natural persons in relation to the succession of States, and supported, in general, the Working Group's conclusions on the nationality of legal persons in relation to the succession of States. The issues involved in that topic were too specific and the practical need for their solution was not evident. Moreover, he questioned the effectiveness of studying the nationality of legal persons in international law in general, as the Working Group had proposed as a first option, since it would overlap with other topics which the Commission was currently considering, such as diplomatic protection, and would make it difficult to keep the study within reasonable limits. Therefore, the second option proposed by the Working Group seemed more practical and should be chosen by the Commission. Nonetheless, he questioned the need to extend the study to problems such as that of the status of legal persons and, possibly, the conditions of operation of legal persons. The diversity of national laws on the subject was another reason for limiting the topic to ensure that the Commission's work was effective. Germany therefore supported the Working Group's conclusion that the Commission should not study the second part of the topic of nationality in relation to the succession of States.

23. With respect to reservations to treaties, he recalled that he had already indicated the preceding year that he supported the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, and welcomed the Commission's consensus on the maintenance of the so-called Vienna regime established in three conventions on the law of treaties. The Commission's recent activities on the subject of reservations to treaties had already had a considerable impact on the attitudes and practices of States. The importance of ensuring that treaties included specific provisions limiting reservations was increasingly recognized, as illustrated by the work done on the topic by the Asian-African Legal Consultative Committee and the Council of Europe's Committee of Legal Advisers on Public International Law. He accepted the six draft guidelines on the definition of reservations and interpretative declarations adopted by the Commission on first reading, which constituted an introduction to the much-needed Guide to Practice. Undoubtedly, the question of the definition of reservations and interpretative declarations was interesting, as shown by the Special Rapporteur's impressive legal analysis and the Commission's debate. However, it must be borne in mind that most of the real problems that arose in connection with reservations, interpretative declarations and possible objections to them were not related to their definition. The elaboration of complicated definitions could be of merely theoretical interest and could even be counter-productive from a practical standpoint; that applied most particularly to draft guidelines 1.1.5 and 1.1.6 and to the attempt to define so-called "extensive" reservations.

24. With regard to reservations relating to non-recognition (draft guideline 1.1.7), his delegation shared the Commission's view that such statements should be governed by the rules on recognition of States and not by those on reservations. Any reservation assumed a treaty-based or contractual relationship between the reserving party and the other parties to the treaty, while in the case of statements of non-recognition, it was in fact the contractual capacity of a party that had been denied. He supported the suggestion by the Special Rapporteur concerning a parallel discussion of reservations and interpretative declarations, which would highlight similarities and differences between the two categories, especially in view of the fact that a great number of so-called interpretative declarations constituted full-fledged reservations, some of which were inadmissible.

25. Leaving the consequences of inadmissible reservations to a system of declarations and objections between the parties to a multilateral treaty, as provided for in articles 20 and 21 of the Vienna Convention on the Law of Treaties, was not completely satisfactory in the case of a reservation that was clearly excluded under article 19. Considering a prohibited reservation null and void so that the State would be bound by provisions which it expressly excluded from its consent would contradict the very essence of treaty law. His delegation supported the Special Rapporteur's conclusion that it was always the exclusive responsibility of the State itself to rectify the defect in the expression of its consent to be bound. To do so, the State could withdraw altogether the inadmissible reservation, amend it along lines compatible with the object and purpose of the treaty, or refrain from becoming a party to the treaty. The incompatibility of a reservation with the object and purpose of a treaty and the consequences resulting therefrom must be decided in an objective way. As the International Court of Justice had stated in its advisory opinion on the Convention on Genocide, where a State's reservation was not compatible with the object and purpose of a convention, that State could not be regarded as being a party to the convention. That principle created considerable difficulties when applied in practice. The lack of a mechanism for objectively deciding the question of whether a reservation was compatible with the object and purpose of a treaty left the matter in the hands of the States parties. It should be asked whether, if in the case of a reservation contrary to article 19 of the Vienna Convention, States had to object at all in order to prevent it from being effective. State practice in that field differed. States rarely objected to reservations no matter how far-reaching their content might be. His Government hoped, therefore, that, at the fifty-first session the following year, the Special Rapporteur and the Commission would try to find convincing solutions to that very complex problem, which stemmed from ambiguities and lacunae in the Vienna regime. A guide prepared by the Commission offering practical solutions to the problem of inadmissible reservations and its effects would necessarily be of a residual nature and leave the Vienna system intact, but might fill in gaps and in the course of time become a well-respected code for that question.

26. **Mr. Monagas-Lesseur** (Venezuela) said that the nationality of legal persons was a question that should be considered more broadly than in the context of succession of States.

27. The report of the Special Rapporteur rightly underscored the importance of unilateral acts of States in the international sphere and determined those which might be called purely unilateral acts, or those acts which, performed by one or several States as a sole manifestation of will, could impose, without any necessity to do so, acceptance or any reaction on the part of another State. The Commission pointed out that one of the main characteristics of that category of acts was its autonomy from two different points of view; the unilateral legal act under consideration by the Commission was an act that differed from other previous, simultaneous or subsequent legal acts. Furthermore, in separating the norm from the instrument which established it and the right and obligation resulting from the norm established, the purely unilateral legal act entailed autonomous application in the sense that it did not specify acceptance by the other State. The Special Rapporteur separated the formal act from its content and concluded that it was possible that there were purely unilateral obligations and, more importantly, that the declaration was a unilateral act which could be codified since it could have diverse content with regard to substance. Under treaty law, a treaty was not the only instrument or formal legal act through which legal norms were established in the international field; in the same way, it could be considered that a declaration was not the only unilateral legal act of States. Accordingly, it could be said that a declaration was, with regard to the law of unilateral acts, what the treaty was in relation to treaty law.

28. Venezuela shared the view that those legal acts existed and functioned in international relations and that, in fact, a State might contract legal obligations with regard to another State without the consent of that State being necessary. He also agreed that the basis of its obligatory nature might be founded on a principle with the same content, scope and importance as that of *pacta sunt servanda*: the principle of *declaratio est servanda*, which was broader and more acceptable than that of *promissio est servanda* since, although there was a reference to that principle in international jurisprudence and doctrine, it would be limited to a category of material acts which might be performed through a formal act, such as a unilateral declaration. Venezuela believed that the Commission should not definitively discard the possibility that it might extend its consideration to acts of international organizations, although for the time being it was focusing its attention on unilateral legal acts of States. The Commission's work on that question should be conducted in the form of draft articles with commentary since that would foster stability and security in international relations and promote clear, concise and systematic codification, without prejudging the final form of the draft. Venezuela hoped that the Special Rapporteur would be able to submit, the following year, a second report containing articles and commentary on some basic aspects of that category of international legal acts of States; to that end, the declaration as an instrument establishing international

legal norms should be basically taken into account. It was possible to conclude a draft set of articles with commentary in the period envisaged by the Commission, considering the norms related to the law of treaties set forth in the 1969 Vienna Convention as a methodological and substantive reference, even though unilateral acts had specific characteristics.

29. With regard to reservations to treaties, it was not a matter of calling into question the provisions of the Vienna Conventions: reservations were unilateral statements from a formal point of view, which did not preclude the possibility that they might be made jointly by two or more States and furthermore might be included in the context of a treaty relationship, for which reason they required a specific regime regulating their functioning. That was a question of a unilateral statement made by a State or international organization at a specific moment, which was limited to the moment when a reservation was formulated, as indicated in draft guideline 1.1.2, which had been provisionally adopted by the Commission. Venezuela attached great importance to the guide to practice as well as the guidelines provisionally adopted by the Commission, and considered the definition of reservations in guideline 1.1 acceptable in principle. In addition to its strictly unilateral form, a reservation could also be formulated in a concerted or joint manner, which did not affect its unilateral nature. Nevertheless, the question arose whether the withdrawal by one of the States of its reservation gave rise to effects for the other States which had formulated it.

30. The question of the differences between reservations and interpretative declarations was also important. A reservation was formulated at a specific time, while an interpretative declaration could be made at any time. Furthermore, whereas the purpose of a reservation was to modify or exclude the legal effect of certain provisions of a treaty, a State would use an interpretative declaration to clarify certain provisions, with a view to the treaty's implementation. A conditional interpretative declaration could only constitute a reservation, in the strict sense of the term, if it was made at the right time and was authorized by the treaty or, failing that, did not contradict the spirit and purpose of the treaty. Venezuela also understood that it was impossible under any circumstances for a State to formulate a reservation to a bilateral treaty or agreement, for that would entail the amendment or revision and renegotiation of a specific text. Lastly, as stated in the Commission's report, the approved guidelines were interdependent, so that they could not be examined in isolation from each other.

31. **Mr. Politi** (Italy) said that recent years had seen a spectacular increase in the number and types of unilateral acts, which had traditionally been limited to the unilateral acts of States but now included a considerable number of acts of international organizations. The study should be limited to the acts of States which were "strictly" unilateral, i.e. whose purpose was to produce international legal effects and which had an autonomous character, such as for example unilateral acts of promise, recognition, renunciation and protest; that would mean excluding unilateral political acts linked to a specific legal regime, acts of other subjects of international law such as international organizations, and the attitudes, acts and conduct of States not intended to produce specific effects in international law. He agreed with the Special Rapporteur that formal declarations were the basic instruments employed by States to accomplish transactions by means of unilateral acts. Thus, in the initial phase of the Commission's work at least, the topic of unilateral acts should be limited to those acts which were also unilateral declarations, although at a later stage, and in the light of the results achieved in relation to "strictly" unilateral acts, the Commission might examine other less formal expressions of the will of States which were particularly relevant in international practice, such as acquiescence, silence and estoppel. As to whether the topic should be limited to the unilateral acts of States affecting other States or should include such unilateral acts affecting other subjects of international law, Italy did not see any reason for making a new distinction, especially as in contemporary practice many unilateral acts of States were addressed both to States and to international organizations. Italy endorsed the Commission's decision to proceed with the elaboration of draft articles with commentaries on the topic and to invite the Special Rapporteur to produce several such articles, without prejudging whether they would take the final legal form of a convention or a set of guidelines.

32. The Special Rapporteur's fourth report on nationality in relation to the succession of States dealt with the question of the nationality of legal persons. In its preliminary conclusions, which were endorsed by the Commission, the Working Group had considered two options: one would be not to limit the study to the succession of States but to make a general examination of the nationality of legal persons under international law; the other would be to keep the study within the context of the succession of States but to include questions other than nationality, such as the status of legal persons and possibly the conditions of their operation. The Commission should continue to study the question of the nationality of legal persons in order to contribute to the codification and progressive development of the relevant international law, which was becoming increasingly important with the emergence of the phenomenon of multinational corporations. At the same time, the study should not be excessively long;

from a practical point of view, preference should be given to the second option proposed by the Commission. Italy had recently submitted its observations on the draft articles on the nationality of natural persons in relation to the succession of States.

33. Turning to the topic of reservations to treaties, he said that the criterion of the object and purpose of the treaty was fundamental in determining the admissibility of reservations, although Italy was not convinced that the solutions offered by the Vienna Convention with respect to the effects of impermissible reservations were satisfactory in the case of human rights treaties, owing to the indivisible nature of their obligations; ultimately, that system might enable States to become parties to human rights treaties without really committing themselves to their implementation. On the other hand, the Vienna regime did not exclude the establishment of special regimes to fill in its gaps and resolve its uncertainties. By their very nature human rights treaties constituted a special category, one which deserved further in-depth study by the Commission in connection with the possibility of establishing a reservations regime adapted to the aims and characteristics of such treaties. He agreed that the definition of reservations and interpretative declarations should be dealt with in parallel. Against that background, the work on the Guide to Practice appeared very promising, and the guidelines adopted on the basis of the text prepared by the Special Rapporteur would be a useful tool since, without altering the provisions of the three Vienna Conventions, they were intended to dispel confusion and provide definitions to fill in the gaps in the Vienna regimes. That approach would also allow the Commission to innovate in the cases not mentioned in the Conventions, in the case of interpretative declarations for example.

34. With regard to guideline 1.1.1, on the object of reservations, if a reservation could relate to the way in which a State, or an international organization, intended to apply the treaty as a whole, the risk of across-the-board reservations would increase substantially. Notwithstanding the *caveat* contained in the additional guideline, it would be difficult to say that a reservation was impermissible when it was consistent with the definition provided by such an influential body as the Commission. His delegation agreed with the inclusion of guideline 1.1.8, on reservations having territorial scope, and guideline 1.1.4, on reservations formulated when notifying territorial application, since in both cases the practice recognized that such unilateral declarations constituted reservations within the meaning of the Vienna Convention. The Commission had taken a rather innovative approach to reservations formulated jointly, for although there were no examples of reservations of that type in the international practice, it was foreseeable that there would be frequent recourse to joint reservations in the near future, especially as a result of the participation of the European Union in an increasing number of multilateral treaties. Italy shared the view of the Special Rapporteur that so-called "extensive reservations" did not constitute reservations within the meaning of the Vienna definition, since their binding force could not be based on the treaty; the Italian Government had never had recourse to unilateral statements of that kind.

35. **Ms. Alajbeg** (Croatia) thanked the Special Rapporteur for his attempt to define and clarify the problem of the nationality of legal persons in relation to the succession of States. The topic was of the utmost interest to the States which had emerged from the dissolution of their predecessor States. Neither existing international instruments nor the draft articles contained in the Commission's 1997 report addressed the topic of the nationality of legal persons, and there were no rules of international law on the subject; the Commission should therefore continue its consideration of the question. As a first step it should produce a comprehensive study of the topic, and she supported the view stated by the representative of Israel at an earlier meeting that, before the study was undertaken, some consideration should be given to the various approaches taken in the national legislation of States. Croatia was ready to provide the Commission with information about its practices during and after the dissolution of its predecessor State.

36. Problems concerning legal persons arising from the dissolution of a predecessor State could be divided into two groups: those relating to the status of legal persons which were usually dealt with by applying the criterion of the place of registration for the determination of nationality, and those relating to property issues, which were more complex, particularly in economies where State ownership prevailed, and when there were specific rules on the organization and status of legal persons and their branches in predecessor States. In the absence of international legal instruments that would provide a uniform solution to such problems, for the most part bilateral agreements were negotiated to settle questions relating to ownership. In that connection, Croatia had initialled bilateral agreements with Macedonia and Slovenia and was in the process of finalizing negotiations with Bosnia and Herzegovina. An agreement on mutual recognition and the normalization of relations had been negotiated with the Federal Republic of Yugoslavia, in which the parties agreed in principle to guarantee equal legal protection for the property rights of their respective legal persons. However, the status of legal persons and their branches had not yet been resolved.

37. Since Croatia had not participated in the previous debates on the draft articles on the nationality of natural persons in relation to the succession of States, she wished to make some comments on the attribution of nationality to the "persons concerned". In accordance with the general rule of presumption of nationality, the principle of habitual residence was accepted as the dominant criterion for determining the nationality of natural persons. That meant that in all cases of the dissolution of States, habitual residence was to be recognized as the genuine link between the "person concerned" and the respective successor State.

38. However, in the case of the dissolution of federal States, the criterion of the nationality of the former constituent unit of the federation tended to be more convincing than that of habitual residence. In such cases, unless otherwise agreed, the constituent units of the former State became successor States with equal rights and obligations. By virtue of application of the principle *uti possidetis*, the boundaries of a constituent unit became the international boundaries of the successor State. It should be noted that in cases of the dissolution of federations in Europe, the nationality of natural persons of constituent units had coexisted with the nationality of the former federations, for example, in the former Socialist Federal Republic of Yugoslavia. In fact, the nationality of the constituent unit was recognized as the closest connection (genuine link) for the determination of the nationality of the populations of the successor States, although the criterion of habitual residence was also embodied in the legislation of those States. The legislation of the successor State generally contained provisions which made it easier for persons habitually resident in that State to choose its nationality. Her delegation was of the view that the proposed principle of habitual residence as a dominant criterion for the automatic attribution of nationality constituted a departure from existing practice in the successor States of a dissolved federation, and would be difficult to implement systematically in international legal practice. She therefore proposed that a specific provision recognizing the nationality of the constituent unit, in addition to habitual residence, should be included in the draft articles as one of the general criteria for the automatic attribution of nationality in dissolved federations.

39. **Mr. Sergiwa** (Libyan Arab Jamahiriya), referring to the topic of unilateral acts of States (chap. II of the Commission's report), underlined the importance of the study undertaken by the International Law Commission on that issue and said he supported the comments of the Special Rapporteur on the need to clearly define unilateral acts of States and the various conditions and legal consequences of such acts. His delegation agreed with others which had pointed out that it was difficult to distinguish between unilateral acts of States having legal consequences and political acts. It was therefore essential that the study by the Commission should cover not only unilateral acts by States but also political acts.

40. The promulgation by some States of laws which had transboundary effects was incompatible with the principles enshrined in the Charter of the United Nations and in international law, violated economic and social rights and hampered the process of liberalization of the world economy. He hoped that the working group on the subject would establish legal principles concerning the consequences of the application of national rules and laws to the territory of other States.

41. With regard to the topic of reservations to treaties, he said that States had a sovereign right to enter reservations in respect of multilateral agreements and treaties, including human rights conventions; he called on Member States to encourage other countries to accede to such conventions in order to make them truly universal. It was also important that reservations should not affect the spirit or objectives of treaties.

42. Referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that after the first reading of the draft articles, which had concentrated on measures to prevent the transboundary efforts of atomic or nuclear activities, the Commission should continue to study the subject in depth. It should not confine itself to preventive measures and cooperation among States in order to limit transboundary hazards and their consequences, but should include international liability for damages, or the obligation of States responsible for causing the damage to compensate affected countries. It was also important that risks such as the dumping of nuclear material in outer space and on the high seas should be included, since they could have serious effects on the environment and the development of States.

43. Turning to the topic of nationality in relation to the succession of States, he said the system for granting nationality should establish a balance between the right to nationality of natural persons and that of legal persons, as well as emphasize the sovereign right of States in the granting of nationality. The draft articles which the Commission was preparing in that regard should only deal with the succession of States which had decided to unite of their own free will and in accordance with international law, and should not include acts prohibited by international law, such as the annexation of territories or the military occupation of any State.

44. **Mr. Pérez Giralda** (Spain) said that the topic of diplomatic protection had a solid and adequate basis in customary international law and the Commission should base

its work on the generally recognized rules of State practice. The importance of the topic, which was complementary to the topic of State responsibility, warranted a codification exercise with a view to drafting an international convention on the subject which would encompass current State practice. Codification should be possible if special attention was paid to the definition of secondary rules.

45. The exercise of diplomatic protection should continue to be considered a right of States. There was no doubt that that right was based on past violations by States of the rights or interests of individuals. He nevertheless believed that the distinction, albeit artificial or fictitious, between the right of the State and the right of the individual should be maintained, as was the case even among States which had gone further in their domestic legislation in defining diplomatic protection as a right of their nationals. Those States had always reserved the possibility of invoking the absence of diplomatic protection in cases where the vital interests of the State were involved. In such situations nothing prevented States from using other types of compensation unique to their domestic law, insofar as they might wish to grant their citizens the right to hold the State responsible for not exercising diplomatic protection. Such was the case in Spain, whose courts, invoking a provision of the Constitution, had recognized that individuals had the right to ask the judge to grant them automatic indemnification for any violation of their rights as a result of a failure to exercise diplomatic protection. His delegation would provide the Commission with the materials related to that issue, as requested in paragraph 28 of its report.

46. With regard to the relationship between diplomatic protection and human rights, he said that the increasing recognition of individual rights had not been accompanied by a parallel extension of the legal means of securing such rights. Indeed, human rights and diplomatic protection usually operated at different levels in terms of the substance or content of the rights concerned, which in the latter case were largely of a patrimonial nature. His delegation therefore considered that the two institutions were developing along parallel lines and that the separate regulation of diplomatic protection as an appropriate vehicle for inter-State relations was not incompatible with the growing importance of human rights in modern international law.

47. An in-depth examination of the topic of unilateral acts of States could be of great assistance in the orientation of State practice. The scope of guidelines on unilateral acts could be extended to acts directed at other subjects of international law, on the basis that the subject in question was a State. It would also be very useful if the Commission undertook a study of the consequences of silence and acquiescence as unilateral acts which, if only implicitly, could have legal consequences for other subjects of international law. It would be most valuable to continue studying the development of the consolidated rules of the law of treaties in order to determine how far they could be adapted to the regulation of unilateral acts. It was important to establish a definition of rules of interpretation, both those governing unilateral acts and those that could be applied equally to unilateral acts and international treaties.

48. The topic of State responsibility had featured in the Commission's agenda practically since the beginning. The valuable contributions of successive special rapporteurs and the constant interest shown by States confirmed its relevance to international law. His delegation firmly believed that the process should culminate in a draft convention, since State responsibility was one of the central elements of international law, and to have it established in binding terms, with wide acceptance, would serve to strengthen confidence in the legal dealings between States. He shared the Commission's view that the doubts expressed as to the advisability of drawing up an international treaty before establishing guidelines or guides to practice were concerned not so much with the level of acceptance of most of the rules governing responsibility as with the distinction between international crimes and delicts contained in draft article 19.

49. At previous sessions his country had defended the notion that such a distinction existed in law, not only in terms of doctrine but in terms of the sociology of international relations. The international community's reaction to a simple failure to comply with one clause of a trade agreement was obviously different from its reaction to a serious, massive and persistent violation of human rights. On the other hand, it had been emphasized how difficult it was to obtain adequate institutional guarantees for determining the distinction in law between a crime and a delict, with the associated risk that the notion of "international crime" would be subject to political manipulation. With regard to the five possible approaches suggested by the Special Rapporteur in relation to the international crimes of States, his delegation had preference for the second, which involved replacing the expression "international crimes" with "exceptionally serious wrongful acts". Such a solution would avoid the connotations of domestic criminal law. Some legal codes, indeed, could not provide for the criminal responsibility of a State, inasmuch as they did not even have provision for the criminal responsibility of legal persons generally. The new approach would also necessitate prioritizing the consequences of various categories of wrongful acts that had not been adequately spelled out in the draft as it stood.

50. **Mr. Rodríguez Vidal** (Cuba) said, with regard to international liability for injurious consequences arising acts not prohibited by international law, that the prevention of transboundary damage from hazardous activities raised important questions about the delicate balance between rules on prevention and rules on liability, which should constitute an indivisible whole. The obligation to prevent harm should be seen as an obligation of conduct, not an obligation of result.

51. In spite of globalization there were major differences between the levels of economic and social development attained by nations. Agenda 21 and, in particular, the principle of common but differentiated responsibilities had thus assumed more importance than ever. In that context it would have been most useful if the draft articles had contained provisions on international cooperation and on specific commitments to provide technical and financial assistance to developing countries, which needed to gain access to economic and scientific activities at the international level.

52. Diplomatic protection should not be sidelined in the process of developing international law, which should acknowledge its past history, its customary nature, the binding norms that had been established and the work that had gone into existing legal texts. Although the recognition of fundamental human rights created obligations *erga omnes*, there could be no doubt that diplomatic protection was a legal concept entailing discretionary prerogatives and powers for States in their capacity as subjects of international law. The conditions for the exercise of diplomatic protection and the ability of the discretionary law of States to provide diplomatic protection should not be subject to new and controversial interpretations. No distinction should be made between primary and secondary rules of diplomatic protection, given that the matter was broadly governed by international law. Any new approach to the topic by the Commission should be based on the legal practice of States and on the fact that diplomatic protection formed part of the wider regime of State responsibility.

53. With regard to unilateral acts of States, he said that the Commission was not in a position to adopt a decision on the issue, since some of its members considered unilateral acts to be a source of international law while others saw it as a source of international obligations. Neither the Special Rapporteur nor the Commission itself could therefore establish a real or meaningful distinction between the two concepts.

54. With regard to the Special Rapporteur's suggestion that the Commission should concentrate on unilateral legal acts and not unilateral political acts, the possibility of determining the category to which a given act belonged was doubtful, insofar as all unilateral acts were political, regardless of their effects. The concept of an autonomous action was artificial, as was the distinction that some made between a formal act and a substantive act. His delegation shared the view of various members of the Commission that a compilation should be made of decisions of the International Court of Justice and examples drawn from the national practice of States as a basis for elaborating rules on unilateral acts. Other sources related to the progressive development of international law in that area should also be consulted, particularly General Assembly resolutions.

55. The definition of reservations to treaties, and their various categories, raised some legal and political questions. The legal and political force, usefulness and practicality of the general rules on reservations in the Vienna Convention on the Law of Treaties lay precisely in their sensible recognition that there were very fine relative distinctions between reservations and their various categories. In that context, defining reservations and the various types of declarations need not necessarily lead to the adoption of an instrument governing them.

56. His delegation maintained its interest in the work of the progressive development of international law in the Sixth Committee and the International Law Commission. It was, however, important to keep a balance of reciprocal influence between the Commission and Member States, which should not be dislodged from their role as the principals and primary subjects of international law.

57. **Mr. Doudech** (Tunisia), referring to reservations to treaties, said that the Commission had acted sensibly by not calling into question the relevant provisions of the Vienna Conventions. The preparation, for purposes of simplification, of a Guide to Practice in respect of reservations to treaties was of the greatest interest. Honing the concepts and clarifying certain legal aspects in respect of reservations should avoid disputes that would impede the preparation of the Guide. The objective was not to depart from the Vienna regime, but rather to strengthen it. The definition of reservations formulated by the Commission was completely in keeping with that objective. The fundamental characteristic of reservations was their purpose of excluding or modifying the legal effects of certain provisions of a treaty; that distinguished them from interpretative declarations, whose only purpose was to clarify the meaning and scope of a treaty or of some of its provisions. Interpretative declarations must in turn be distinguished from conditional interpretative declarations, which resembled reservations in their purpose and in the time at which they were formulated. As the Special Rapporteur had indicated, if any uncertainty existed in that

respect, the general rule of interpretation set out in article 31 of the Vienna Convention must be used.

58. With regard to "extensive" reservations, Tunisia agreed with the Special Rapporteur that a unilateral commitment to go beyond what the treaty imposed was not a reservation because its possible binding force was not based on the treaty. The fact that one party to a treaty had unilaterally extended its obligations did not mean that the other parties were automatically required to honour obligations not set out in that treaty. Likewise, even if in logic a reservation could limit the rights that the parties would normally derive from the treaty, it was inconceivable that a reservation should extend the rights of the reserving State and the obligations which the contracting States derived from general international law.

59. In respect of unilateral acts of States, Tunisia noted that the Special Rapporteur had opted for a strict concept by limiting his analysis to acts of an autonomous nature. That should not result in complete exclusion of unilateral acts linked to a conventional or a customary norm. The definition of "unilateral act" proposed by the Special Rapporteur contained very pertinent elements. Tunisia shared the view that the basis of the binding nature of unilateral acts was the principle of good faith and the desirability of promoting security and confidence in international relations. Also, for there to be a unilateral act, the author must have clearly demonstrated the will or intention to produce legal effects, and that prevented silence from being considered a unilateral act. The Commission's next report should provide a better structured and more developed overview of the topic.

60. The Commission's work on the topic of prevention of transboundary damage from hazardous activities should culminate in the establishment of a legal regime of international liability in respect of prevention of such damage, and the obligation to prevent harmful consequences of hazardous activities should be stressed. He recalled that the principle of prevention had been set out in various multilateral instruments and that the duty of prevention had been embodied in the Rio Declaration and confirmed by the International Court of Justice. It was reasonable that the text prepared by the Commission should not specify the activities to which the articles applied, because it was difficult to establish an exhaustive list. He agreed that States were subject to an obligation of prevention, as established in draft article 3 but also agreed with the Commission that the economic level of States was one of the factors to be taken into account in determining whether a State had complied with that obligation. Similarly, he believed that a State's capacity to prevent or minimize the risk of causing harm should be a fundamental criterion in determining its obligations and liability with regard to prevention.

61. The Commission played an essential role in promoting the codification and development of international law, and its input was vital for guiding the debate on the evolution of the international legal order.

62. **Mr. Rodríguez-Cedeño** (Special Rapporteur on unilateral acts of States) said that there was a consensus as to the existence and importance of unilateral acts of States, which could be subject to specific rules that promoted security and confidence in international relations. There was also a clear consensus that there were certain acts which were purely unilateral and fell outside the bounds of conventional law. To provide a definition of the concept it had been necessary to classify unilateral acts of States by distinguishing between political and legal acts and, within the latter category, acts which came within the ambit of the law of treaties and were therefore not truly unilateral. Those distinctions had been generally accepted. It had been deemed preferable not to deal with unilateral acts of States giving rise to international responsibility, so as not to interfere with the consideration of the latter topic. The unilateral acts of international organizations could be divided into two categories: unilateral acts addressed to international organizations, which should not be examined at the same time as unilateral legal acts of States, and unilateral acts of international organizations themselves. Acts of the latter type should not be studied together with unilateral acts of States, in view of their procedural differences. All those issues would be covered in his second report, which he expected to submit to the Commission the following year. Concerning the difficulty of distinguishing between political and legal acts, he said that as the definition of unilateral legal acts became clearer, political acts would be defined by their exclusion from it. In order to define unilateral legal acts precisely, criteria would have to be developed; work on those criteria, especially intent, was under way.

63. Concerning estoppel, silence and acquiescence as unilateral acts of States, he referred to the relevant sections of the report and said that the comments of delegations would be taken into account in order to see how far they dovetailed with the definition that was being prepared.

64. Unilateral legal acts relating to reservations and interpretative declarations warranted detailed scrutiny as some were reservations and others were interpretative declarations, including "extensive" ones.

65. The distinction between a formal act and a substantive or material act took into account the fact that a declaration could be a formal act which, although not unique, could nevertheless be important, especially for contracting unilateral obligations. It had been said that a declaration could

be subject to specific rules and also that it would give rise to a restrictive concept: both possibilities would have to be considered in the second report.

66. Even though the best course at the current stage would be to prepare a series of articles with commentaries for presentation the following year, that did not prejudge the final form of the draft. He favoured formulating preliminary, general commentaries in response to the comments of delegations.

The meeting rose at 12.55 p.m.