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SUMMARY RECORD OF THE 40th MEETING

Chairman:	Ms. WONG (Vice-Chairman)	(New Zealand)
later:	Mr. ESCOVAR-SALOM (Chairman)	(Venezuela)

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In the absence of Mr. Escovar-Salom (Venezuela), Ms. Wong (New Zealand), Vice-Chairman, took the Chair.

The meeting was called to order at 3.10 p.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/332 and Corr.1, A/51/358 and Add.1, A/51/365)

1. Ms. STEAINS (Australia), speaking on the issue of State succession and its impact on the nationality of natural and legal persons (A/51/10, chap. IV), said that her delegation agreed with the Working Group's recommendation to consider the nationality of natural persons and that of legal persons separately. The current political upheavals in many parts of the world and the widespread disintegration of States made it a matter of urgency to address the issue of State succession and the nationality of natural persons. She urged the Commission to complete the first reading of the articles on the subject at its forty-ninth or, at the latest, at its fiftieth session. Her delegation reserved its position on the form that the final outcome of the work in question should take, but leaned towards the idea of a non-binding declaration of the General Assembly consisting of articles and commentaries.

2. Turning to the topic of international liability for the injurious consequences of acts not prohibited by international law, dealt with in chapter V of the Commission's report, she said that her delegation supported the inclusion of article 1 (b) in the draft articles. Although it might seem onerous to impose liability on States for activities with unforeseen consequences, it would be more unjust to leave innocent States to bear the losses alone. Moreover, to impose liability for unexpected losses would provide an incentive for States to be particularly vigilant, and the foreseeability of risk was factored into the draft articles as an element to be considered in negotiations for compensation. The obligations with respect to prevention contained in chapter II of the draft articles should not be applied to activities under article 1 (b), but the obligations with respect to compensation contained in chapter III should be applied to them.

3. The availability of compensation through a specific international treaty should be another factor included in draft article 22. There were several comprehensive conventions in force covering damage caused by, for example, the carriage of oil or hazardous substances. Where exhaustive compensation regimes were provided, there was no need for further State compensation. Besides, many of the compensation and liability regimes, including the International Convention on Civil Liability for Oil Pollution Damage, contained provisions which ruled out further action if compensation was payable under a specific regime.

4. On the question of reservations to treaties, she said that her delegation considered that the legal regime governing reservations to treaties should be uniform, and that there should be no difference in treatment between reservations to human rights conventions and reservations to other treaties.

The issue of impermissible reservations was long overdue for study and needed to be examined very closely.

5. Mr. HAYES (Ireland) said that the long history of the Commission's consideration of the topic "International liability for injurious consequences arising out of acts not prohibited by international law" was marked by some significant changes in its basic approach. As recently as 1992, a working group had been established to reappraise the scope, approach and possible direction of future work on the topic; and yet, at the Commission's forty-eighth session, in 1996, another working group had been established to review the topic in all its aspects, and its report provided the substantive material for the Committee's current consideration of the topic.

6. In his delegation's view, the issue was one of reconciling the right of a State to engage in lawful activities and the right of a State to enjoy its facilities without disruption resulting from the activities of another State. To reconcile those rights required the application of the principle sic utere tuo ut alienum non laedas, which inevitably led to measures to prevent harm and to liability where harm occurred. The liability must be fundamentally a no-fault liability, to ensure that the innocent victim was not left to bear the loss alone, as indicated in the introductory note to the Working Group's report (A/51/10, annex I). His delegation was pleased to note that the draft articles were limited in scope and residual in character, and that to the extent that existing or future rules of international law prohibited certain conduct or consequences, those rules would operate within the field of State responsibility and would by definition fall outside the scope of the draft articles (introductory note, para. (2)). His delegation strenuously urged the Commission to proceed with its work towards the codification and progressive development of what was a separate field of international law. The distinction so clearly identified by the Working Group would not be blurred at all by the adoption of articles comprising residual rules which imposed obligations on States without affecting the lawfulness of the activities they were concerned with.

7. In general, his delegation was satisfied with the approach reflected in the draft articles and regarded them as an adequate basis for further work. Nevertheless, a few preliminary observations were in order. Draft article 1, with paragraph (b) included, and taken together with draft article 5, gave effect to the principle sic utere tuo ut alienum non laedas. His delegation was pleased that the draft article did not list activities, for the reasons given in the commentary thereto. Article 3 was a fundamental provision which recognized the limitations on a State's freedom of action, and its precise formulation must be approached with extreme care. Article 4, which was a statement of principle, must also be carefully formulated. He noted that paragraph (1) of the commentary to article 4 spoke of preventing or minimizing harm, whereas the article provided primarily for preventing or minimizing risk; also, the term "due diligence" appeared in paragraph (4) of the commentary to article 4, but did not appear in the articles.

8. The approach taken to the issue of compensation or other relief in chapter III of the draft was in the right direction, but it was important to avoid terminological confusion. His delegation was prepared to accept the exclusion of "absolute liability" or even "strict liability", as indicated in

paragraph (1) of the general commentary to the chapter, provided that it was accepted that no-fault liability was not also excluded. There would, after all, be no basis for compensation if there were no provisions for no-fault liability.

9. His delegation shared the view expressed in the last sentence of paragraph (1) of the general commentary to the draft articles, referring to the modern circumstances in all their aspects that made the topic relevant and urgent. It also endorsed the Commission's view that the Working Group's report represented a substantial advance. Ireland therefore urged the Commission to address the topic with the expedition it deserved.

10. Mr. Escovar-Salom (Venezuela) took the Chair.

11. Mr. MAHIOU (Chairman of the International Law Commission), introducing chapter VII of the Commission's report, said that it consisted largely of a systematic and comprehensive review of the Commission's procedures and methods of work, with suggestions for the Commission's future topics. The Planning Group's report to the Commission was set out in paragraphs 144 to 244 of the Commission's report. The Commission believed that there was a continuing need for an orderly process of codification and progressive development of international law. However, the distinction between the two processes was unworkable and should be eliminated from the Statute of the Commission.

12. He now wished to draw attention to some of the recommendations intended to improve the effectiveness of the Commission. The General Assembly or other bodies of the United Nations system should be encouraged to provide the Commission with possible topics, so that the gaps in international law could be more easily identified. As the Commission relied heavily on the cooperation of the Sixth Committee and Governments, Governments should participate more actively in reviewing the Commission's work, and they should respond to requests from the Commission when replying to questionnaires and providing information.

13. The special rapporteurs' methods of work needed to be standardized and simplified, to avoid delays and misunderstandings. Special rapporteurs should be asked, for example, to specify the nature and scope of work planned for the next session, their reports should be available sufficiently in advance of the session at which they were to be considered, and they should collaborate with a consultative group of members of the Commission to test ideas. They should also, as far as possible, produce commentaries to accompany their draft articles in advance and review them in the light of changes made by the Drafting Committee.

14. The Commission's plenary debates should address the substantive issues and general policy, and greater use should be made of working groups. Moreover, the Commission should consider a more flexible timetable for its sessions; it had decided to hold a 10-week session, instead of a 12-week one, in 1997, and intended to experiment with a split session in 1998.

15. As many areas of international law required the attention of specialists with the necessary technical background, the Commission should cooperate more closely with other specialized law-making bodies, both within the United Nations system and on a regional level. Furthermore, the Statute of the Commission

required some modification to reflect the evolution of its structures and methods of work; the Commission's fiftieth anniversary, in 1999, would be an appropriate occasion to make the necessary changes.

16. With regard to the Commission's long-term programme of work, annex II of the Commission's report classified topics under 13 main areas of public international law. The three topics identified by the Commission as appropriate for codification and progressive development were: diplomatic protection; ownership and protection of wrecks beyond the limits of national maritime jurisdiction; and unilateral acts of States.

17. Cooperation with bodies such as the Asian-African Legal Consultative Committee, the European Committee on Legal Cooperation and the Inter-American Juridical Committee had continued to prove useful and beneficial for the work of the Commission.

18. The thirty-second session of the International Law Seminar had been held in conjunction with the Commission's forty-eighth session, in Geneva, and had been funded by voluntary contributions. The Commission noted with particular appreciation that the Governments of Cyprus, Denmark, Finland, Hungary, Iceland, Japan, Norway and Switzerland had made financial contributions. The sessions of the Seminar allowed young lawyers, many from developing countries, to familiarize themselves with the work of the Commission and the activities of international organizations based in Geneva. As funds for the sessions were exhausted, the Commission recommended that the General Assembly should again appeal to States to make voluntary contributions to ensure that the seminar could be held in 1997 with as broad a participation as possible.

19. Mr. LÉGAL (France) said, with regard to the programme, procedures and working methods of the Commission, that its recommendation to revert to a shorter session (para. 149 (m) of its report) was a good one and that it might even be possible to cut it down to eight weeks. The workload should determine the duration of each individual session, and flexibility was the key. France was totally opposed to holding the Commission's sessions anywhere but in Geneva: the proposed split session between New York and Geneva (para. 149 (n)) would be counterproductive, costly and pointless.

20. The Sixth Committee was itself directly responsible for the improvement of the Commission's working methods. It had to respond to the suggestions, requests and concerns expressed to it by the Commission, by giving specific, realistic indications to the Commission of what Governments considered to be the priorities. General statements by the Committee on the Commission's report, culminating in a tangential resolution on the matter, were a poor way of proceeding, and the Committee bore at least equal responsibility for the inadequacy of the Commission's current methods and procedures. The free-ranging discussions during the meeting of the legal advisers to member States could be a model for the Committee's approach, and it should in future adopt a less neutral annual resolution clearly indicating the views of delegations on the various topics dealt with by the Commission.

21. As to the long-term programme of work (annex II), new topics had to be found for the Commission's consideration. France had at the previous session

endorsed diplomatic protection and the environment as topics, even though it believed the Commission was poorly equipped to embark on general codification of environmental law without a prior feasibility study. Other new topics that France would support were the ownership and protection of wrecks beyond the limits of national maritime jurisdiction, unilateral acts of States, and shared natural resources.

22. Mr. BOS (Netherlands) said that the Commission's success in the initial phase of its work had been due to the need for codification of international customary law as a result particularly of the decolonization process, but that the situation had changed. Although the normative content of a legal instrument and the extent to which it was enforced in practice were what mattered, the Commission - judging from the number of its draft conventions that had not entered into force or been widely ratified - had been less successful in the development of international law than in its codification. It was perhaps not the most suitable forum for tackling such matters, where major political interests were at stake.

23. Indeed, the Commission had applied itself first and foremost to the study of general doctrines and fundamental problems of international law, and that should be the criterion in selecting possible topics for referral to it. One of the points to be considered was whether a topic was likely to be successfully completed and whether the outcome would enjoy sufficiently wide political support. The Sixth Committee, taking into account the inevitable political urgencies, should in future clearly establish a priority among the topics on the Commission's agenda. The Netherlands endorsed as possible future topics unilateral acts of States and diplomatic protection.

24. It was for the Sixth Committee to make the final decision on the form to be taken by the drafts produced by the Commission. A convention was not always preferable to alternative types of legal texts, such as restatements or model conventions, and the same degree of thoroughness was involved in formulating them, or even guidelines or a body of principles, both of which were very important in current international legal practice.

25. The progress made on each topic depended partly on the amount of time that a rapporteur was able to spend on preparing it, and changes of rapporteur in midstream were counterproductive. Each prospective rapporteur should be asked to state clearly the feasibility of completing the task in a specified period of time and to plan his work realistically, generally within the period of the usual five-year term. Before embarking on any new topic, indeed, the Commission should conduct a feasibility study, in order to avoid the problem of having unprofitable subjects remain endlessly on its agenda. The Commission's established procedure of first and second readings was a sound working method, if properly planned.

26. The problem of the Commission's slow progress in its work and the multiplicity of subjects on its agenda were both in part attributable to the Sixth Committee. It was putting the cart before the horse to have the Commission itself propose topics for the approval of the Committee, as had become standard practice. According to Article 13 of the Charter, the General Assembly should steer the process, which meant that the Sixth Committee must

ensure that the Commission had a workable agenda. The Committee must monitor the Commission's workload and consider the urgency of the various topics, and provide clearer indications of the political need for a solution to a particular problem and the time within which that could be expected to be achieved. The Committee's leadership in that respect would depend on the quality of its members; and the innovation of having the legal advisers to Member States attend the Committee's discussions of the Commission's report added needed expertise. The main improvements would thus have to be better planning, a sharper definition of the topics to be explored and greater professional expertise.

27. Mr. AL-BAHARNA (Bahrain) said that Bahrain endorsed the recommendations in paragraph 149 of the Commission's report. Being logical and feasible, the recommendations would improve the Commission's programme of work and its relationship with the Committee, and promote the Committee's involvement in planning. It was very important, for instance, for the reports of special rapporteurs to be submitted in advance of the Commission's session (para. 149 (f) of the report); and consideration of any delayed reports should be deferred to the Commission's following session. Similarly, the Commission's own report, which should indeed be shorter and more structured (para. 149 (e) of the report), should be made available much sooner than the end of September, as was currently the case, for the Committee needed more time to study such a technical report. Of course, the Commission had to reconcile the scheduling of its session with the time required for preparing its own report, a problem that might be alleviated by the proposed shortening of the Commission's session (para. 149 (m) of the report).

28. Bahrain agreed that the current system of assigning different members of the Drafting Committee to deal with different topics should be maintained (para. 149 (j)) and further proposed, for the sake of speed, that the Drafting Committee might be split into two committees under two different chairmen, each discussing a different topic at the same time.

29. With regard to the long-term programme of work, there was no question that the Commission needed new topics to be assigned to it by the General Assembly and Bahrain endorsed the three topics identified by the Commission in paragraph 249 of its report, namely, diplomatic protection, ownership and protection of wrecks beyond the limits of national maritime jurisdiction, and unilateral acts of States. In addition, there was room for other topics to be selected from among those the Commission listed in annex II. The Sixth Committee should consider the possibility of setting up an ad hoc working group to choose the most appropriate topics.

30. Mr. SUCHARIPA (Austria) said that, as his delegation had pointed out at the fiftieth session of the General Assembly, the traditional mechanisms of the codification and progressive development of international law were proving less effective than in the past: since 1980 not a single convention drafted by the International Law Commission had entered into force. The Commission thus risked losing its central place in international law-making in the United Nations system. Measures to give a new momentum to the creation of legal rules in a cooperative relationship between the Commission and the Sixth Committee were an important part of the reforms in the United Nations.

31. The deliberations on the Commission's report on the work of its forty-seventh session had shown that there was indeed room for improving the efficiency of international law-making both in the Commission and in the General Assembly. The Austrian delegation had stressed the need for examination of the Commission's working methods, with a view to producing speedier results likely to be accepted by the community of States. General Assembly resolution 50/45 had echoed several of Austria's concerns in that respect. His delegation now commended the Commission for the candour of its current report, in which most of the issues raised at the previous session had been addressed. It was in agreement with nearly all of the Commission's conclusions and recommendations (paras. 148 and 149 of the Commission's report) but wished to add a few comments.

32. As indicated in conclusion (a), the distinction between codification and progressive development had lost most of its relevance. The Commission's Statute should therefore be reviewed to take account of changes in the normative processes. The orderly process of codification of international law (conclusion (b)) was vital to the very concept of international law binding on the whole international community and must be continued. With regard to the identification of new topics (recommendations (a), (b) and (c)), there was merit in even closer cooperation between the Committee and the Commission, possibly through informal contacts as at the meetings of legal advisers. The Committee bore a heavy responsibility in that respect and it could also improve the structure of its discussion of the Commission's report, including resort to open-ended working groups on the various topics and the encouragement of formal statements which facilitated the understanding of the positions of States; the submission of position papers to accompany statements might be useful. As to recommendations (f), (g) and (h), his delegation had suggested that the special rapporteurs should be backed up by assistance from the academic community and non-governmental institutions. They might well be invited to attend the Committee to answer questions about their topics.

33. In the Commission's long-term programme the topic of diplomatic protection, outlined in addendum 1 of the report, deserved special attention. The Commission should consider in particular the situation of persons affected by State succession and the exercise of diplomatic protection by a State other than that of the national concerned.

34. Mr. CALERO RODRIGUES (Brazil) said that, although the Commission's Statute envisaged two different procedures, codification and progressive development were not in fact watertight concepts. The Commission had now noted in its report that it was difficult to draw a distinction between them and that it had always worked on the basis of a composite concept. In response to doubts expressed, the Commission had offered a useful demonstration of the need to continue the work of codification and progressive development. The main branches of international law had indeed been codified, but as the pace of international relations accelerated new needs for legal regulations appeared.

35. Annex II to the report presented an updated overview of the whole field of international law, showing that there were still many topics suitable for inclusion in the Commission's programme. The selection of topics must be made carefully, with both the Commission and the Committee playing a part. Only four

topics remained on the Commission's agenda, and the Committee was to decide at the present session on the inclusion of the suggested new topics of diplomatic protection and the law of the environment. The Commission was now suggesting two further topics: ownership and protection of wrecks beyond the limits of national maritime jurisdiction, and unilateral acts of States. No decision should be taken on them until the next session of the General Assembly, by which time Governments would have submitted their comments. The Brazilian delegation believed that the Commission should be authorized to take up the topic of diplomatic protection, but it was puzzled by the fact that the Commission had not repeated its request to be authorized to undertake a feasibility study on the rights and duties of States for the protection of the environment. It had repeated such a request in relation to diplomatic protection.

36. Turning to the Commission's procedures, he said that the work accomplished at the 12-week sessions indicated that it did not pass its time in idleness. It had decided to reduce its next session to 10 weeks "as an exceptional measure" and "having regard to current financial difficulties". The Brazilian delegation, however, thought that the length of any session should be decided on the basis of the workload, with no standard duration, subject to a maximum length of 12 weeks but no minimum. It could not take a position on the question of splitting the session into two shorter sessions. It was not certain that such a move would improve the Commission's efficiency, and there was insufficient information about the financial implications. It therefore endorsed the Commission's suggestion that a split session should be tried in 1998, by which time the new members joining in 1997 would have settled in.

37. The special rapporteurs were the lead players in the discussion of topics and preparation of commentaries. The Commission recognized the importance of their contribution and had suggested ways of clarifying the relationship between them and the Commission. However, while some special rapporteurs might find it useful to work with the proposed consultative groups, others might not; requiring special rapporteurs to provide commentaries to their draft articles might impose an unnecessary burden, especially as the need for further explanation was questionable; and, while it was not a bad idea to ask the special rapporteurs to indicate at each session their plans for the next reports, they normally could not know beforehand how their reports should be developed, so that all that the Commission could expect was to be informed of the general thrust of future reports. The Brazilian delegation was glad therefore that the innovations were not to be mandatory.

38. The Brazilian delegation endorsed the Commission's view that its Statute should be revised in several respects. While chapter I of the Statute, on the organization of the Commission, had passed the test of time, chapter II, dealing with its functions, had not been followed in practice. It had been conceived on the basis of a distinction between codification and progressive development, but the Commission had soon realized that it was impossible to have two different working methods. It was strange that a United Nations body, particularly a legal one, had had to deviate from its basic instrument in order to perform its functions.

39. It would also be useful to revise the provisions of chapter I concerning the election of members of the Commission. While the present system did not in

practice jeopardize continuity, the possibility existed that an entirely new membership could be elected every five years. The term of office should perhaps be set at six years, and elections held every three years for half of the membership. As the Commission had suggested, the revisions might be adopted in 1999 to coincide with its fiftieth anniversary. It should be requested to submit draft revisions of its Statute to the General Assembly in 1998.

40. Mr. HAYASHI (Japan), commenting on chapter VII of the Commission's report, said that his Government believed that the proposals on the working procedures of the special rapporteurs and the utilization of working groups deserved careful consideration, as they could enhance efficiency. It also believed that further efforts should be made to promote the codification and progressive development of international law, to which the Commission could make a genuine contribution if it improved its work methods and selection of topics. As responsibility for the recent shortcomings in that connection should be shared between the Commission and the Sixth Committee, he reiterated that their relationship should be reviewed. His Government also proposed that the Commission should conduct studies in areas such as treaty law and environmental law with a view to the refinement of international law. He commended the outline for future work on diplomatic protection and urged endorsement of the proposal concerning a feasibility study aimed at clarifying issues in the development of environmental law, as it was essential to maintain an integrated approach to the prevention of environmental destruction. His delegation believed that those two topics should receive priority and that consideration of the proposed topics "Ownership and protection of wrecks beyond the limits of national maritime jurisdiction" and "Unilateral acts of States" should be deferred.

41. Mr. AYEWAH (Nigeria), referring to chapter II of the report, said that his delegation was in favour of limiting the list of crimes included in the draft Code of Crimes against the Peace and Security of Mankind to those which would be difficult to challenge as falling under that category, the aim being to achieve consensus and facilitate international acceptance of the draft Code. However, as a more comprehensive draft Code would have greater effect, consideration should later be given to the inclusion of crimes such as institutionalized racial discrimination and the recruitment of mercenaries. While generally agreeable to the content of draft articles 16, 17, 18 and 20, his delegation believed that draft article 19 should be re-examined, as the threshold of the terms "systematic manner" and "large scale" was susceptible to subjective interpretation. The draft Code should take the form of a treaty and be linked with the draft statute for an international criminal court. He therefore strongly supported the decision to draw the draft Code to the attention of the Preparatory Committee on the Establishment of an International Criminal Court, which should endeavour to ensure the harmonization of the two drafts in question.

42. Turning his attention to chapter III of the report on State responsibility, he said that States would be reluctant to accept the problematic concept of State crimes, their main concern being that the criminalization of a State could result in the punishment of an entire people, with adverse consequences. Against that background, the distinction made in the draft articles between international crimes and international delicts was impractical, as were the

consequences referred to in draft articles 51 to 53. He viewed with interest the newly suggested mechanism that would entitle the injured State to demand reparation when it decided that a crime had been committed and the alleged wrongdoing State to challenge such decision and use the dispute settlement procedures stipulated in the draft Code. The previous proposal of a two-phased procedure involving the Security Council and the International Court of Justice nevertheless had some merit. His delegation believed that the existence of internationally wrongful acts should be determined by the Court or its ad hoc chamber. It also supported the inclusion of provisions on countermeasures, despite the controversy which they provoked, bearing in mind that draft article 47 provided safeguards against unjust results of countermeasures applied between States of unequal strength or means. It further supported the import of draft article 48, as well as the provision for compulsory dispute settlement, which was essential to the implementation of a future convention on State responsibility.

43. Concerning chapter IV of the report, on State succession and its impact on the nationality of natural and legal persons, he said that he supported the decision and suggested time-frame concerning the subject of nationality in relation to the succession of States and agreed that the results of the work should be transmitted to the General Assembly in the form of a declaration. He also expressed his preference for discussion to commence with the nationality of natural persons.

44. With respect to chapter V, on international liability for injurious consequences not prohibited by international law, he said that he welcomed the establishment of the Working Group, since it regarded codification of the subject as a worthwhile venture. He supported the retention of draft articles 1 (b) and 5, but believed that the extension of State responsibility to cover violation of preventive measures, provided for in draft article 22, imposed a heavy duty on States and would be difficult to enforce in certain instances. He nevertheless saw merit in extending the principle of good neighbourliness to cover situations arising from flagrant lack of care and concern for the safety and interest of other States and supported the flexible approach contained in draft articles 20 to 22 on compensation procedures for injured parties. Lastly, he said that he supported the conclusions and recommendations contained in paragraphs 148 and 149 of the report, particularly the recommendations set out in paragraphs 149 (e), (l), (m), (n) and (q).

45. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries, said that the draft Code of Crimes against the Peace and Security of Mankind and the draft articles on State responsibility were closely linked and responded to the current demand to move from law to action. The useful indications contained in paragraphs 22 to 29 of the Commission's report represented a distinct improvement; moreover, in general the Nordic countries subscribed to the recommendations set out in paragraph 149. They believed, however, that the Commission should not use its precious time to review its own Statute, which could involve prolonged and potentially unfruitful discussions. A valuable recommendation concerned the use of working groups to assist the special rapporteurs and act in place of the Drafting Committee with a view to expediting work, although the practice of appointing special rapporteurs was nonetheless a

reasonable way of guiding work on less urgent topics which required the development of expertise over time.

46. As the main themes of public international law had generally been codified, the Commission might now assist other international agencies in the task of clarifying and articulating particular areas of law, where required. In that connection, the annual survey of ongoing legal activities prepared in the context of the United Nations Decade of International Law could serve as a useful point of reference for those agencies and for the identification of troublesome points or deadlocks which the Commission could help to resolve. Similarly, the two new topics already on the Commission's agenda and the three newly suggested topics for its future agenda all appeared to belong in the category of very specific projects supplementary to existing codifications, thus leaving scope for the Commission to accomplish other tasks, in which connection the establishment of working groups would appear to be particularly appropriate.

47. The Nordic countries looked forward to the achievement of substantial progress in the work on the topics of reservations to treaties and succession of States and its impact on the nationality of natural and legal persons. In connection with the latter topic, they endorsed the recommendation to give priority to the question of the nationality of natural persons, to which a sense of urgency was attached. The Commission's suggested working hypothesis concerning the final form of the exercise was also well taken in that it would represent a timely contribution to the progressive development of the legal principles concerning nationality. The Nordic countries saw merit in pursuing the newly suggested topic of diplomatic protection, but were more reserved in regard to those of unilateral acts of State and ownership and protection of wrecks beyond the limits of national maritime jurisdiction. In particular, they believed that it was premature to develop international regulations concerning the latter topic, given that the Convention on the Law of the Sea had not been long in force. Lastly, they envisaged that the slight change in the future work of the Commission would enable it to continue serving the international community in a timely and useful fashion.

48. Mr. HOLMES (Canada) said that his comments on the draft Code of Crimes against the Peace and Security of Mankind would be of a general nature as it still had to be considered by a Canadian interdepartmental group.

49. Some of the crimes included in the draft Code were already covered by existing instruments of international law or were considered to form part of customary law. In other instances, the international instruments might already provide for universal jurisdiction, include prosecute-or-extradite provisions, or allow for prosecution by an international criminal court. Extension of those important concepts of international law to all the crimes included in the draft Code would require careful consideration.

50. Some of the provisions appeared to go further than existing law and consideration should be given to whether and how they should be included in the draft Code: for example, institutionalized racial discrimination and severe and wilful damage to the environment. Moreover, the article setting out the extradite-or-prosecute obligation did not properly reflect the current discretion of States to consider whether there was sufficient evidence to

prosecute. Furthermore, the distinction between crimes against humanity and crimes against the peace and security of mankind needed to be clarified. His delegation was pleased to note, however, that crimes committed during non-international armed conflict were included in the article on war crimes.

51. Further work was required on the draft Code and his delegation was prepared to consider the different options, such as the negotiation of a convention or declaration on the matter, or incorporation of the draft Code into the statute of the proposed international criminal court, in view of their common roots in the international community's reaction to events of the Second World War.

52. The establishment of two international criminal tribunals for the former Yugoslavia and Rwanda had renewed enthusiasm for the establishment of a permanent international criminal court. His delegation believed that it was important to benefit from such revived interest and that it would unduly delay negotiations on the court if the draft Code were to be directly incorporated into its statute. The statute should, however, include a provision allowing for periodic review to permit changes reflecting improvements to its substantive or procedural content or developments in international law; at such time, it could also be amended to incorporate relevant provisions of the draft Code that were ultimately accepted by the international community.

53. His delegation believed that the draft articles on international liability for injurious consequences arising out of acts not prohibited in international law provided a good basis for further work by the Drafting Committee. Nonetheless, in some instances, points mentioned only in the commentary should be brought into the text of the articles while, in others, additional articles were required. His delegation would be presenting detailed suggestions in writing. It considered, for example, that there should be a separate article on monitoring and article 9 should explicitly state that States must not authorize activities involving a risk of transboundary damage unless measures were taken to prevent such damage from occurring.

54. More serious was a fundamental flaw that had impeded progress on the topic since its inception: the question of its theoretical basis and its relationship to State responsibility. His delegation believed that the fact that certain activities were not prohibited by international law was irrelevant to the question of liability and compensation. Most activities that caused harm were not illegal. In order to eliminate some of the conceptual confusion, his delegation proposed that the title of the topic should be changed to something like "The prevention of and compensation for transboundary harm".

55. His delegation was surprised to read in the commentary to draft article 22 that the Commission considered that the obligations to prevent transboundary harm were not "hard" obligations and that their breach did not entail State responsibility. Canada agreed with the inclusion of the issue of prevention in the draft articles. The articles on prevention were important in distinguishing the liability topic from the articles on State responsibility. However, the obligation of prevention was a primary rule and once that rule was breached, the realm of secondary rules was entered, which meant State responsibility. The obligation of prevention was not an innovation, but a general principle of law deeply rooted in the international system. Thus, his delegation considered that

the obligation to prevent transboundary harm was a long-standing "hard" obligation of positive international law, and a breach of such an obligation would entail State responsibility. The subsequent obligation of mitigation and elimination of significant transboundary harm should also be developed more thoroughly in the draft articles.

56. Another important issue was whether compensation was due even if the State of origin had diligently attempted to prevent transboundary harm. Draft article 22 (b) seemed to suggest that an important factor in compensation negotiations was the extent to which due diligence was exercised; that implied that there was an obligation of due diligence to prevent harm, and not an absolute obligation to prevent it. A due diligence standard was certainly not appropriate for all activities that might cause significant transboundary harm, as there were certain ultra-hazardous activities that might demand a strict liability standard. The use of the phrase "due diligence" would seem to entrench unnecessarily a standard of liability that was subject to development in the international legal regime - for example, as environmental crises became more acute - leading to a stricter approach to liability, and could be replaced by "all appropriate measures".

57. His delegation did not believe that undertaking a feasibility study on the topic of international environmental law would be a productive use of the Commission's time and resources as work on the topic would simply duplicate other work already being done within the United Nations system.

58. The Commission's recommendations regarding the working methods were well-considered and useful. Timely reports were essential for the fruitful exchange of information and ideas on international law. The proposals regarding future sessions should lead to additional savings in operating costs and allow for the greater use of time and resources.

59. Mr. HILGER (Germany), referring to the recommendations set out in chapter VII of the Commission's report, said that there was a perceived need for a more comprehensive review of the codification process within the United Nations system. His delegation agreed that the distinction drawn in the Commission's Statute between progressive development of international law and codification was difficult to apply in practice. However, in future, the Commission should base its work on any given topic on international conventions and custom, and the recognized principles of law, and then proceed to consider what contributions to progressive development might be acceptable to the international community, in close consultation with the latter. Consultation was equally essential for the selection of new topics. The General Assembly and other bodies in the United Nations system should be encouraged to submit proposals to the Commission.

60. The issue of codification had not been completely exhausted. Today, there was rarely need for codification on a grand scale. However, United Nations codification to date had provided the international community with many important conventions and current work on the establishment of an international criminal court and on the draft Code of Crimes against the Peace and Security of Mankind clearly indicated its importance.

61. Clarification, development and articulation were also important tasks for the Commission which needed to be undertaken in close consultation with Governments; it was difficult for Governments to remain interested and to have a clear idea of where the Commission stood at a particular time when work on certain issues had been going on for many years. In that regard, he noted that the Commission's report provided such information on certain long-standing issues.

62. He acknowledged that the Commission had been able to respond promptly when given mandates with a sense of political urgency, although there was still room for improvement in interaction between the Commission and Governments.

63. He welcomed the proposal that at its following session the Commission should consider ways and means to make its report more "user-friendly", and suggested that new computer technology could be used to improve presentation. States could be encouraged to make their views known if questionnaires were more concise and confined to the essential.

64. His delegation believed that special rapporteurs still played a justifiable role. One person should continue to be responsible for a given topic, retaining responsibility for reports, but working in conjunction with a consultative group.

65. In plenary meetings, the debate should be structured and limited to the point under discussion. While every effort should be made to reach consensus, the proposal of indicative votes merited consideration. The Drafting Committee generally worked well and the working groups were a very useful means of bringing collective wisdom into play, sharing the burden of the special rapporteur and accelerating work.

66. With regard to single or split sessions, the Secretariat should advise the Commission and the Sixth Committee as to whether a split session was practicable; his delegation agreed to the proposal to try a split session in 1998.

67. The German Government agreed with the basic principles of State succession and its impact on the nationality of natural and legal persons, outlined in the Commission's report (para. 86). It was essential that every individual should have a right to the nationality of at least one of the successor States. Furthermore, the question of the nationality of natural persons should be given priority. The complex question of the nationality of legal persons should not delay work. The proposed form of a General Assembly declaration consisting of articles with commentaries appeared appropriate.

68. His delegation would not take a definite stand on the work on international liability for injurious consequences arising out of acts not prohibited by international law, as the report merited further consideration by the German Government. However, he proposed that written comments should be requested, to be submitted before the Commission's following session, so that it would know whether the international community agreed to continue with the work as suggested.

69. With regard to the newly proposed items, his delegation believed that diplomatic protection would be a useful amendment to the rules of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. In view of the increase in cases of multiple nationality and the growing complexity of international trade and economic relations, it appeared reasonable to start work on draft rules to define the rights and obligations of the State that had personal jurisdiction and the State that had territorial jurisdiction. Work on the topic of the ownership and protection of wrecks beyond the limits of national maritime jurisdiction would be useful, especially in view of potential environmental dangers, but the relevant work of other bodies should be taken into account. As to unilateral acts of States, his delegation was less certain as to the practical implications of such work, although it might be useful to have some indications as to when a State was considered bound and for what period of time.

AGENDA ITEM 151: MEASURES TO ELIMINATE INTERNATIONAL TERRORISM (continued) (A/51/336; A/C.6/51/6 and A/C.6/51/9)

70. Mr. JESSEN-PETERSEN (Director of the Liaison Office of the United Nations High Commissioner for Refugees) said that the High Commissioner shared Governments' concerns about international terrorism and agreed that individuals resorting to terrorist acts should not be protected as refugees. The Committee's draft declaration on the implementation of the 1994 Declaration on Measures to Eliminate International Terrorism had received much attention from the Office of the United Nations High Commissioner for Refugees (UNHCR), since it created a link between the Declaration and the 1951 Convention relating to the Status of Refugees. UNHCR wished to clarify its views on the Convention as it related to the present initiative.

71. There should not be any unwarranted linkage between refugees and terrorists and the Convention should not be portrayed as standing in the way of the prosecution of terrorists. It did not provide protection for terrorists or any immunity from prosecution. It did provide for expulsion and return, actions which might be taken by States when there was a threat to national security or public order or with respect to refugees convicted of a particularly serious crime. Terrorists acts committed by refugees or asylum-seekers should generally be prosecuted under the laws of the host country. Refugees were also bound to conform to the laws of the host country and might be prosecuted to the full extent thereof. The Convention's exclusion clauses were intended to be applied restrictively. In particular, the provision on acts contrary to the purposes and principles of the United Nations was rarely used, primarily because the issues were broad ones of international peace and security which overlapped with the exclusion categories of crime against peace, war crimes and crimes against humanity. Proper application of the existing provisions would make it unnecessary to expand the scope of article 1, section F (c). Indeed, proper application of the Convention, coupled with enforcement at the national level, would both exclude asylum-seekers involved in terrorist acts from refugee status and prevent the protection of persons committing or conspiring in the commission of terrorist acts.

72. UNHCR certainly wished to contribute to a comprehensive legal framework covering all aspects of international terrorism. The best way to deal with the issue as it affected refugees was to call for more vigorous application of the existing instruments and not to introduce ambiguity in the application of the 1951 Convention.

The meeting rose at 6.30 p.m.