UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/CN.4/472/Add.1
10 January 1996

ORIGINAL: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-eighth session
6 May-26 July 1996

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (1995)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session prepared by the Secretariat

Addendum

CONTENTS

CONTENTS (continued)

CONTENTS (continued)

B. STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

1. General observations

1. The progress already achieved by the Commission on this topic, which stood at the crossroads of various branches of the law, was generally welcomed.

2. The Special Rapporteur was praised for his first report on this complex issue. One representative expressed the view that, while the report took a common-sense and cautious approach to an area where legal minefields abounded, some issues had been considered in a general manner and too much attention had been given to categorization.

3. It was stressed that the Commission's work on the topic pertained both to codification and to the progressive development of international law. The point was made, however, that the Commission should clearly distinguish between the lex lata and the lex ferenda in this field. In that connection, it was emphasized that the Commission should carefully examine State practice.

4. With regard to the Commission's method of work, one representative expressed the view that, by establishing a Working Group to consider the subject, the Commission seemed to be moving away from presenting the preliminary study requested by the General Assembly and to be embarking upon the preparation of a detailed substantive study, although the Special Rapporteur's first report supplied all the elements necessary to complete the requested study in a short period of time. Another representative observed that, although its report was a good starting-point for further work on the topic, the Working Group should have first examined the applicable rules of positive international law and relevant State practice before proceeding to the formulation of recommendations.

2. The role of international law in matters of nationality

5. It was generally recognized that, while nationality was essentially governed by internal law, certain restrictions on the freedom of action of States flowed from international law, which therefore had a role to play in this area.

6. The human rights aspect of the topic was highlighted and it was strongly emphasized that the Commission's work on the topic should aim at the protection of the individual against any detrimental effects in the area of nationality resulting from State succession, especially statelessness. The Commission was furthermore urged to consider the issue of dual nationality.

7. Views differed as to the existence, at the current stage of international law, of a right to a nationality.

8. As for the concept of genuine link, the need to determine whether its application presented certain specificities in the context of State succession was highlighted. The view was expressed that the Commission should study the

relationship between the requirement of genuine link and the principle of non-discrimination.

9. The issue of protecting the rights of the individual during the transition period, which could be quite long, before successor States adopted their nationality laws was mentioned as one calling for consideration.

10. Concern was expressed about the adoption, by successor States, of nationality laws under which they artificially extended their nationality to nationals of another independent State and which could be misused for purposes of partial or complete absorption of the population of such other State.

3. Natural persons and legal persons

11. Several representatives agreed with the Special Rapporteur's recommendation that the Commission deal separately with the nationality of natural persons and the nationality of legal persons and give priority to the former question, which was considered more urgent. To justify such separate treatment, it was argued, in particular, that natural persons constituted an essential element of statehood; that it was difficult to establish, under general international law, a duty to grant nationality to certain legal persons, as might be the case for natural persons; that conventions on the reduction of statelessness and on nationality usually referred to natural persons; that human rights norms were not applicable to legal persons; and that the regime governing legal persons in cases of State succession depended mainly on the continued application of the civil law of the predecessor State.

12. There was also the view that the question of the nationality of legal persons was an important one and deserved prompt consideration by the Commission. One representative, while recognizing that State succession could affect the exercise of the fundamental civil and political rights and, to a certain extent, economic and social rights of natural persons, but had mainly economic or administrative consequences for legal persons, observed that rules concerning the nationality of legal persons might be more common in State practice and customary law, thus lending themselves more easily to systematization. It was also observed that the status of legal persons might affect the property rights of natural persons.

4. Outcome of the Commission's work on the topic

13. The following options were suggested with regard to the outcome of the Commission's work: the elaboration of guidelines, of model clauses, of a declaration setting forth general principles, or of a more ambitious instrument covering a specific aspect of the topic.

14. One representative favoured the elaboration of a comprehensive convention on the matter. Others, however, considered this to be a time-consuming process. It was further noted that the two conventions elaborated by the Commission on the subject of State succession, i.e. the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States

in respect of State Property, Archives and Debts, had not yet entered into force.

15. One representative cautioned against the adoption of an instrument which would contain standards stricter than those of existing norms on the subject and would not reflect current practice.

5. Comments on the Working Group's preliminary conclusions

(a) The obligation to negotiate and to resolve by agreement problems concerning nationality resulting from State succession

16. The Working Group's preliminary conclusion that States concerned should have such an obligation was considered to be a good starting-point. Satisfaction was expressed in particular with the Working Group's position that negotiations should be aimed at the prevention of statelessness. The question was raised, however, as to whether a simple obligation to negotiate was sufficient to ensure that the relevant problems would actually be resolved. It was observed in this regard that the obligation to negotiate entailed neither a legal obligation to reach agreement nor an obligation to pursue the process at length if it were evident that it could not bear fruit. The view was also expressed that, however desirable the obligation envisaged by the Working Group might be, it did not appear to be incumbent upon the successor State under contemporary international law, and could not be deduced from the general duty to negotiate for the resolution of disputes.

(b) The obligation of the successor State to grant its nationality

17. The point was made that a successor State had an obligation to grant its nationality to persons residing in its territory and possessing the nationality of the predecessor State - an obligation which derived from the fact that every entity claiming statehood must have a population. One representative observed that this obligation had been embodied in his country's law on succession. While the view was expressed that the transfer of sovereignty to the successor State entailed an automatic and collective change in nationality for persons fulfilling the above two conditions, it was also argued that such was not the case in the absence of relevant domestic legislation.

18. The remark was made that existing legal instruments should be used to establish which categories of persons acquired the nationality of the successor State ex lege and which categories were entitled to acquire such nationality on a privileged basis through the exercise of the right of option. In this connection, one representative expressed the view that the mode of acquisition of the nationality of the predecessor State - as long as it was recognized under international law - and birth in the territory of what had become the successor State were questionable criteria for determining the categories of individuals to which the successor State had an obligation to grant its nationality. Another representative observed that, in addition to persons residing in its territory and possessing the nationality of the predecessor State, it would be desirable that the successor State consider granting its nationality, on an individual basis and upon request, to persons born in what became the territory

of the successor State who had the nationality of the predecessor State and who, on the date of succession, resided outside that territory as well as to permanent residents of that territory who, on the date of succession, were nationals of a third State. Moreover, he considered it desirable, for the purpose of preventing statelessness, that the successor State grant its nationality to permanent residents of what became the territory of the successor State who, on the date of succession, were or became stateless, and to persons born in such territory who resided outside that territory and, on the date of succession, were or became stateless. One representative wondered, on the other hand, why a person who had been stateless under the regime of the predecessor State and who resided in the territory of the successor State should acquire the nationality of the latter merely as a consequence of State succession.

19. The question was raised as to whether persons who had been granted the nationality of the successor State had the right to refuse or renounce such nationality and what the consequences of such refusal entailed.

20. As for legal persons, the view was expressed that those legal persons which had their headquarters in what became the territory of the successor State should automatically acquire that State's nationality on the date of succession.

(c) The obligation of the predecessor State not to withdraw its nationality

21. Some representatives expressed agreement with the Working Group's preliminary conclusion that the predecessor State had the obligation not to withdraw its nationality from certain categories of persons and under certain circumstances.

(d) The right of option

22. While there was a view that contemporary international law recognized a right of option, it was also argued that such concept pertained to the realm of the progressive development of international law.

23. Support was expressed for the Working Group's preliminary conclusions as to the categories of persons who should be granted a right of option. The remark was made that, in the case of dissolution, the principle of genuine link should be taken into consideration for the exercise of the right of option between the nationalities of the different successor States. One representative observed that, according to the practice of his country, and except in the case of union, the successor State had the obligation to grant the right of option for the nationality of the predecessor State solely to persons having ethnic, linguistic or religious ties to the latter.

(e) Non-discrimination

24. Some representatives expressed agreement with the Working Group's preliminary conclusion that States had the duty to refrain from applying discriminatory criteria, such as ethnicity, religion or language, in the granting or revoking of nationality.

(f) Consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality

25. This issue was viewed as meriting further consideration, in particular, in order to determine whether such principles could be invoked by individuals or whether the debate should concentrate solely on the question of State responsibility.

(g) The rule of continuity of nationality

26. Some representatives expressed agreement with the Working Group's conclusion that the rule of continuity of nationality should not apply when the change of nationality resulted from State succession.

27. It was suggested that the question of the applicability of the rule of continuity of nationality in the case of State succession should be examined under the proposed topic of diplomatic protection, if such topic were to be included in the Commission's agenda.

(h) The categories of succession considered by the Working Group

28. The classification of cases of State succession proposed by the Working Group was considered to be a practical analytical tool for consideration of the rights and obligations of predecessor and successor States with respect to persons whose nationality would be affected by the territorial change. The point was made in this connection that the success of the analysis depended upon whether such persons could be clearly identified in each case. Attention was drawn to the fact that some situations involving a change of sovereignty were very complex and did not fit exactly into any of the categories considered by the Working Group. It was also remarked that the Commission should deal exclusively with cases of succession considered lawful under international law.

(i) The case of federal States

29. The view was expressed that, in the case of a federal predecessor State composed of entities which granted a secondary nationality, the application of the criterion of such secondary nationality could provide an option that recommended itself on account of its simplicity, convenience and reliability.

C. STATE RESPONSIBILITY

1. General observations

30. Some representatives commented in general terms on the topic, which was described by one of them as one of the most important items on the Commission's agenda and by another as basic to maintaining harmonious international relations. Several representatives referred to the concerns that should guide the work in this area. One of them urged the Commission to ensure that its draft would command broad acceptance. After stressing that, when the Charter assigned to the General Assembly the role of encouraging the progressive development of international law, it meant by the term "progressive" that such

development should proceed at a pace that was consistent with the evolution of international society, a consistency that guaranteed respect for the rules on the part of States, he cautioned the Commission not to go beyond its mandate by inappropriately venturing into terrain that was eminently political. Another representative, after identifying the basic principles which she viewed as providing the legal framework of State responsibility, namely (a) the existence of an act or omission that breached an obligation established by an existing norm of positive international law; (b) the attribution of that wrongful act to a specific State; and (c) the existence of loss or harm resulting directly from such conduct, emphasized that the Commission would be in a better position to complete the draft articles if it concentrated on studying those points and their consequences with regard to reparation, and on analysing the legitimate mechanisms to which States affected by wrongful conduct could have recourse. She expressed concern that the introduction of ancillary elements, whatever their theoretical justification, merely created practical difficulties and hampered the completion of an important instrument which was eagerly awaited by the international community.

31. Other comments and observations on the general approach to the work were: (a) that all multilateral law-making treaties concluded under United Nations auspices should include an effective and expeditious third-party dispute settlement procedure; (b) that any codification of the rules of State responsibility would have to strike a balance between two objectives: on the one hand, the ideal of having all disputes relating to alleged wrongful acts settled by orderly and cooperative procedures; and, on the other hand, the necessity of defining the preconditions and modalities of legitimate self-help; (c) that consideration should be given to elaborating, instead of a convention, an alternative instrument endorsing principles which already had a high degree of acceptance, and trying to find compromise solutions to other issues, particularly the most controversial ones; and (d) the suggestion that a compilation of all the draft articles on State responsibility, supplemented by brief notes indicating major problems and controversies, would greatly facilitate analysis of the issues.

32. With respect to the pace of work on the topic, some delegations noted with satisfaction the significant progress made by the Commission at its last session. The approach taken was characterized as innovative and the concept of State responsibility for international crimes was described as very important because it was essentially based on the purposes and principles of the Charter and would, if successfully defined, enable States to live in harmony and small States to survive alongside large States, which had a duty to protect them.

33. Other delegations took the view that little progress had been made on the topic since the inception of the work in 1955. The Commission was urged to complete the project as soon as possible. Its decision to conclude the first reading by 1996 was noted with gratification, even though, in the words of one delegation, patient and thorough consultations would be required to find a viable solution acceptable to all States.

34. Still other delegations expressed serious disappointment with the progress of the work. One representative, after saying that the relevant chapter of the report did not appear to represent a great codification project nearing

completion, stated that the dismay engendered by the report was caused by the unresolved issue of State crimes, which had become a gaping wound infecting the whole draft. In his opinion, there was no point in expecting the Drafting Committee to remedy the situation because the matter was not one of drafting. Another representative proposed that at its next session the Commission should reconsider its work schedule on the topic with a view to completing the project in 1999 and, in particular, be requested to determine which rules were indispensable for an early establishment of a regime of State responsibility, which rules should have priority for consideration by the General Assembly or a diplomatic conference, and which issues could be codified at a later stage. He also proposed that the Special Rapporteur should be requested to prepare proposals on the topic, taking into account the comments made by States in the Sixth Committee or sent to him before March 1996.

2. The question of countermeasures

35. Several representatives expressed reservations about the wisdom of including provisions on countermeasures in the draft articles. Concern was expressed that those provisions could legitimize the use of coercive measures at the expense of justice and equity, which should be the key elements of a new world order governed by the rule of law for the preservation of the sovereign equality, territorial integrity and political independence of States. Attention was drawn to the risks involved in allowing States to take the law into their own hands, and the practice of a claimant State acting as judge in its own cause was described as suspect and therefore calling for strict regulations. The remark was also made that countermeasures could interfere with the exercise by certain international organs of their mandate to consider and resolve international disputes and that the right to resort to such unilateral acts and the circumstances in which that right could be exercised, as well as prohibited countermeasures, should be clearly delineated in the draft articles. More specifically, it was said that the right of the injured State to take countermeasures must be neither unlimited nor general in nature and that any countermeasures must be in proportion to the degree of gravity of the wrongful act and the damage caused. Attention was drawn in this context to the conditions required - particularly where crimes were concerned - for legitimate resort to countermeasures, namely that an internationally wrongful act should have been committed, that cessation or reparation should have been requested and that there should have been recourse to dispute settlement mechanisms. 1/ A further remark was that the objective of countermeasures should be to compel compliance with an obligation and obtain cessation of the wrongful act, reparation and guarantees of non-repetition, and not to impose a punishment for non-compliance.

1/ It was recalled that the version of article 12 adopted by the Drafting Committee (but not yet adopted by the Commission) implied that the injured State must not be judge and party and must allow the dispute to be settled peacefully.

Article 12 (Proportionality)

36. A number of representatives expressed agreement with article 12 and its commentary, which were described as having a solid ground in both practice and theory. One of them, after pointing out that the article codified the principle of proportionality of reprisals on the basis of the concept of proportionality by approximation recognized by contemporary judicial practice, 2/ noted that it followed from the criteria established for assessment of the proportionality of countermeasures, namely the gravity of the wrongful act and its effects on the injured State, that a wrongful act of a certain gravity did not necessarily inflict major damage, and vice versa. He supported that flexible and nuanced approach as well as the explanations given in paragraphs (8) and (9) of the commentary, which stated that the effects of the wrongful act on the injured State should not be interpreted to rule out the taking of countermeasures in respect of the violation of obligations erga omnes.

37. Some representatives, while recognizing the importance of the principle of proportionality, which was described as one of the cornerstones of the entire draft since it was designed to provide a regulatory element for the establishment of a reasonable and acceptable regime on countermeasures, noted that the concept, although broadly accepted in doctrine, was difficult to apply in practice. One representative in particular noted that the concept of proportionality created the impression of a substantive and objective limitation on the freedom of States to resort to countermeasures whereas in reality it would be difficult to determine whether such freedom had been abused in a given case. He pointed out that modern-day international relations were so complex and interwoven that a breach in one area of international relations could trigger a countermeasure in another totally different area, and that it was difficult to see how the concept of proportionality could be relied upon to provide a yardstick against which the legality of the countermeasure could be judged. The remark was also made that States wishing to apply countermeasures that were within the law had no objective criteria to rely upon to establish proportionality and that a court or a conciliation commission would therefore have to assess the effects of a violation and of countermeasures after the violation had taken place and countermeasures had been resorted to.

38. The requirement in article 13 that there should be proportionality on two counts - in relation to the degree of gravity of the wrongful act and in relation to the effects thereof on the injured State - was viewed as likely to create more problems than it solved and it was suggested to merely provide that countermeasures should not be out of proportion to the internationally wrongful act.

39. Other comments on article 13 included (a) the remark that an exception should be provided for violations of human rights and of erga omnes obligations, two areas which, it was stated, should be governed by their own regimes and could not be automatically brought under the law of State responsibility, and

---

2/ See the award in the Air Services Agreement case between the United States of America and France.

(b) the observation that the negative formulation "shall not be out of proportion" might allow for the possibility of an escalation of reprisals. 3/

Article 14 (Prohibited countermeasures)

40. The delegations which commented on the article generally welcomed it, together with the commentary thereto, as being solidly grounded in practice and theory. Various aspects of the text, however, gave rise to reservations.

41. It was first of all pointed out that the title was inadequate, since in fact the article dealt with actions or conduct which were wrongful ipso jure and could not be considered countermeasures.

42. Subparagraph (a) was viewed as worthy to be retained, given the paramount nature of the prohibition of the use or threat of force among peremptory norms of international law, even though it might not be strictly necessary since it was already contained in subparagraph (e). In the view of one representative, the same observation could be made in relation to subparagraphs (b), (c) and (d).

43. Subparagraph (b) gave rise to divergent views. Some delegations supported the current formulation, except with regard to the concept indicated by the word "designed": that term, it was stated, meant that the State applying coercive measures must have the intent of endangering the territorial integrity or political independence of the other State; what mattered, however, was whether the countermeasures constituted an actual danger, whether or not that was the intent of the State applying them.

44. Other delegations considered it necessary to arrive at a more precise formulation based on the practice and interests of States, particularly the interests of the developing countries, which were not in a position to tolerate even the slightest economic or political coercion. The remark was made in this context that it was necessary to clarify what was meant by "extreme" coercion. It was also pointed out that measures of extreme coercion designed to endanger the territorial integrity or political independence of the State that had committed an internationally wrongful act were tantamount to measures of "intervention" and that, while the inclusion in the draft of the idea on which the restriction in subparagraph (b) was based was no doubt justified, its application could present considerable difficulties, particularly in determining the threshold beyond which an "intervention" was to be viewed as endangering a State's "political independence". A further observation was that measures of the type envisaged in subparagraph (b) were impermissible under article 12, so that were was some doubt as to the advisability of retaining the subparagraph; conversely, retaining it could be seen as the establishment of a new stipulation

---

3/ In response to this observation, the Chairman of the Commission drew attention to paragraph (5) of the commentary to article 13, which made it very clear why a flexible negative formulation had been used and how it was linked to determining the degree of gravity.

relating to the interpretation of the word "force" in Article 2, paragraph 4, of the Charter, which had given rise to heated debate for a long time.

45. With reference to subparagraph (c), the remark was made that while, under diplomatic law, an injured State could declare a diplomatic agent persona non grata, break or suspend diplomatic relations or recall its ambassadors without any precise justification, the question of the inviolability of diplomatic and consular agents, premises, archives and documents was an absolute rule from which no derogation was authorized. That minimum guarantee of protection was viewed as essential to ensure communication among States during crises and at other times.

46. As regards subparagraph (d), the reference to "basic human rights" was criticized as leaving much room for injustice. The view was expressed in this connection that the rights of the citizens of a State against which countermeasures had been taken to own property in the State which had taken the countermeasures should be protected as a basic human right because countermeasures were essentially a matter between sovereign States and their effect on individuals should be minimal. It was also considered inappropriate to prohibit any conduct which derogated from basic human rights, since neither the text nor the commentary indicated specific criteria for determining which human rights were basic. Along the same lines the question was raised as to whether the prohibitions in subparagraphs (d) and (e) were sufficiently precise to ensure unquestioned application, given that the mechanism for dispute settlement might be subject to particularly demanding tests.

47. With respect to subparagraph (e), the remark was made that it was highly unlikely, in most cases, that the reference to the peremptory norms of general international law would serve to identify them, the result being that those norms would continue to be a matter of preference rather than a matter of evidence based on State practice.

48. Further comments included (a) the remark that countermeasures should be expressly prohibited when they had significant adverse effects on third States, without prejudice to the right of the injured State to take other countermeasures; and (b) the observation that treaties establishing boundaries should be protected from the application of countermeasures, bearing in mind that such treaties were protected by the law of treaties against changes in circumstances.

3. Part Three of the draft articles (Settlement of disputes)

49. Several delegations commented in general terms on the advisability of including in the draft provisions on the settlement of disputes.

50. A first concern related to the principle of free choice of means of peaceful settlement embodied in Article 33 of the Charter and in General Assembly resolutions such as the Manila Declaration on the Peaceful Settlement of Disputes, under which it was for States to agree upon pacific means suited to the circumstances and the nature of the disputes. Several delegations insisted on the need for cost-effectiveness and flexibility. One of them, while

recognizing the importance of the peaceful settlement of disputes, questioned efforts aimed at channelling disputes involving matters as broad and complex as those under discussion into a narrow range of predefined settlement mechanisms. The remark was made that the legal and factual circumstances giving rise to disputes involving State responsibility were both varied and difficult to predict and that it was accordingly impossible to agree responsibly beforehand to any particular rigid form of settlement.

51. A second concern had to do with the relationship between the mechanism for dispute settlement which was to be included in the draft articles and mechanisms binding on the parties under other international instruments. One representative said in this connection that, in view of the clear trend which had recently emerged towards more frequent use of multilateral and bilateral dispute settlement mechanisms, any generalized mechanisms introduced by States should be conceived along modest lines and given a subsidiary role. He added that, while intellectual boldness counted for much, too great a departure from the solid ground of State practice could discourage acceptance by States.

52. A third concern related to the need to coordinate the means for dispute settlement and self-help. In this context, one representative proposed that a provision be included which stipulated that before taking countermeasures States must make a serious effort to reach a negotiated solution in the sense of draft article 1 of Part Three. He recognized, however, that in practice negotiations and measures of self-help would probably be undertaken simultaneously.

53. The above concerns prompted a number of representatives to recommend that any dispute settlement mechanisms which might be provided for in the draft articles should be included in an optional protocol.

54. As regards the system proposed by the Commission, some representatives expressed agreement in general terms with articles 1 to 7 of Part Three and the annex thereto, as well as with the relevant commentaries. Satisfaction was expressed with the scope of application of the proposed system, which covered not only disputes involving countermeasures but also disputes relating to the interpretation and application of all the provisions in Parts One and Two of the draft. The remark was furthermore made that, since the imperfections of contemporary international society, which had not yet succeeded in establishing an effective centralized system of law enforcement, had obliged the Commission to accept the use of countermeasures, the proposed system rightly drew a distinction between mandatory arbitration, which would begin when requested by a party against which countermeasures had been taken, and voluntary arbitration, which would be available in other cases. This aspect is addressed in more detail in the context of article 5 (see paras. 62 to 65 below).

55. Other representatives expressed doubts on the mechanism envisaged by the Commission, which one of them described as exclusionary and self-contained and purporting to obviate the need for any other mechanism, with the result that it came disappointingly close to an artificial structure unlikely to stand on its own. The proposed system was also described as excessively rigid and in conflict with the widely accepted principle of the free choice of settlement procedures. The remark was made in this connection that compulsory third-party settlement procedure would not be a realistic, acceptable alternative in the

absence of universally recognized principles of international law and of objective and impartial forums: given the decentralized system of sanctions in contemporary world society, the disadvantages of any system of jurisdiction not willingly and voluntarily accepted were obvious and it was furthermore most unlikely that any settlement of a dispute would be viable or lasting if it was perceived to have been imposed.

56. A third group of representatives, although not objecting to the proposed system, wondered if it met the requirements of the draft. One of them observed that the flexible and consensual approach adopted by the Commission had two main drawbacks: firstly, many of the substantive provisions of the draft were necessarily imprecise and therefore open to differing interpretations and it would be illogical to leave them as they were without defining dispute settlement procedures; secondly, the provisions for entrusting the decision to a third party, while reasonable since in any dispute there was a stronger and a weaker party, seemed too elaborate. Concern was also expressed that envisaging a less rigorous regime for situations where countermeasures had not been applied was an invitation to injured States to resort to countermeasures so that they could better avail themselves of the dispute settlement procedure envisaged for that eventuality - a most unfortunate result if one bore in mind that countermeasures were forms of self-help innately inimical to the development of international law into a centralized system and capable of abuse, given the differences in power among States.

57. As regards article 1 of Part Three, the remark was made that the main feature of the provision was that it offered the parties the opportunity to sort out their differences amicably through compulsory negotiations before they had recourse to stricter forms of dispute settlement.

58. With reference to article 2, it was pointed out that a provision enabling a third party to tender its good offices or offer to mediate, even when not called upon, was not uncommon and should not be viewed as an unwarranted intrusion, and that many disputes that would otherwise have escalated into conflicts had been settled in that manner. The proposed text was viewed as carefully framed to promise objectivity while balancing the interests of the third party and those of the States involved in the dispute. The question was however raised as to why the possibility of tendering good offices or offering to mediate was limited to States parties to the future convention instead of being extended to all members of the international community.

59. Article 3, providing for compulsory recourse to conciliation, was supported by several delegations. Conciliation, it was observed, did not produce a binding determination but it could clarify the issues and establish the basis for a settlement. Concern was on the other hand expressed that the conciliation commission, which functioned in the manner of a commission of inquiry rather than that of a conciliation board, did not offer the best avenue for settling a dispute, and that, given the awkward role that the conciliation commission was supposed to play, arbitration would be almost inevitable. One representative took the view that the proposed article did not go far enough. He suggested that conciliation should be supplemented by a jurisdictional procedure that could be initiated unilaterally and whose results were binding. While supporting the idea of the parties being free to waive conciliation and proceed

directly to the initiation of an arbitral proceeding, he took the view that the period of three months fixed should be extended to six.

60. With reference to article 4, the view was expressed that the period of three months allowed for presentation of the report of the conciliation commission was unrealistic and that it would be enough to have the conciliation commission establish its own procedure, with which parties would be obliged to comply.

61. The decision to combine conciliation with fact-finding was described as correct inasmuch as separating the two functions might delay the final settlement of the dispute. The relevant provisions were on the other hand found inappropriate on the ground that they mentioned only fact-finding within the territory of one State and failed to specify the other formulas available. Concern was furthermore expressed that the commentary to the article made no mention of the principle that the receiving State must grant its consent to fact-finding missions. The remark was made in this context that, although States would refuse fact-finding missions only on exceptional grounds, consent should be required inasmuch as a dispute could not be settled by means of an inquiry carried out against the will of a State.

62. The distinction made in article 5 between voluntary arbitration (for situations addressed in paragraph 1 of the article) and mandatory arbitration (for situations covered by paragraph 2) gave rise to three types of reactions. Some delegations expressed readiness to go along with it, with some indicating that they would have preferred to see compulsory arbitration also in situations referred to in paragraph 1. The view was expressed in this connection that compulsory arbitration should extend to all disputes regarding the interpretation or application of the draft articles and that there was no reason to limit it to cases where the wrongdoing State had been the target of countermeasures.

63. Other representatives viewed the distinction made in article 5 with scepticism. One of them, while expressing sympathy for the idea of establishing a new dispute settlement obligation for States parties in relation to disputes that had arisen after the taking of countermeasures, considered it doubtful that many States would be ready to accept such a compulsory system. Another representative, while agreeing that in situations where one party had taken countermeasures it was important for the parties to seek a peaceful settlement bearing in mind that their past inability to do so might have been part of the legal justification for the countermeasures, emphasized that the wide range of potential disputes required the parties to be flexible in devising dispute settlement mechanisms appropriate to particular circumstances.

64. Still other representatives considered the distinction made in article 5 to be arbitrary and inadequate. One of them remarked that: (a) arbitral tribunals had, to date, always developed on the basis of an agreement between the parties concerned; (b) disputes about countermeasures could easily escalate into major diplomatic conflicts; (c) it was not clear whether the latest proposal was or was not similar to the provision in article 66 (a) of the Vienna Convention on the Law of Treaties; and (d) such a method of settling disputes would be criticized as a violation of the freedom of choice in selecting means of

settling disputes, which might make it difficult to achieve broad acceptance for Part Three.

65. Other comments on article 5 included: (a) the remark that compulsory competence could have been attributed to the International Court of Justice rather than to an arbitral tribunal; (b) the observation that paragraph 1 should spell out the provision suggested in article 3, namely that the parties could, by common consent, proceed to arbitration without passing through conciliation; (c) the remark that, instead of imposing on the parties a six-month settlement period after submission of the conciliation commission's report, the text should stipulate instead that the arbitral proceedings could only begin on expiry of the period in which the parties responded to the recommendations made in the report, a period to be fixed by the conciliation commission in accordance with article 4, paragraph 4; and (d) the observation that limiting the right to unilaterally request the intervention of an arbitral tribunal to the State against which countermeasures had been taken - which was usually the offending State - might find its justification in the fact that countermeasures were normally taken by powerful States but would not produce the required deterrent effect on them - which pointed to the desirability of giving both parties an equal opportunity to submit the dispute to the arbitral tribunal.

66. With regard to article 6, concerning the terms of reference of the arbitral tribunal, one representative proposed that the period of six months should be calculated from the date of completion by the parties of the oral procedure rather than from the date of completion of their written and oral pleadings and submissions. He also proposed deleting paragraph 2, since the entitlement it conferred upon the tribunal to determine the facts of the case derived from the entitlement to decide "with binding effect any issues of fact or law which may be in dispute" conferred in paragraph 1.

67. Article 7 gave rise to reservations. Concern was expressed that it gave the International Court of Justice nullifying authority: the phrase "validity of an arbitral award" was viewed as too loose and support was expressed for the proposal made in the Commission to include in the article the grounds for nullity referred to in the Model Rules on Arbitral Procedure. The remark was also made that article 7 contained a paradox inasmuch as the jurisdictional regime for which it provided would in principle be optional whereas the procedure for determining the validity of its practical findings would be binding. That, it was stated, pointed to the desirability of establishing a generalized binding arbitration procedure for the purpose. The question was further raised as to why the article failed to provide for interpretation and review of arbitral awards.

4. The Special Rapporteur's seventh report

(a) The concept of "State crime" as embodied in article 19 of Part One of the draft articles

68. Some delegations indicated that they had serious difficulties with regard to responsibility for so-called international "crimes" and objected to the retention in the draft articles of a concept which, according to them, had proved wanting, failed to gather the broad assent of States, split the Commission and brought endless trouble in its wake. In the view of those delegations, the concept of State crime did not acknowledge the range of contexts and situations in which the international community had to characterize, and respond to, State behaviour. The remark was made in this connection that the absolute dichotomy that some were trying to establish between crimes and delicts was false, since there was a continuum ranging from minor breaches to very serious breaches.

69. Other delegations supported in general terms the concept of international crimes as embodied in article 19 of Part One of the draft articles, which, in addition to introducing the concept, specified types of international crimes and distinguished between crimes and delicts on the basis of the seriousness of the consequences of the act in question and the extent of the material, legal and moral injury caused to other States. According to those delegations, a clear distinction could be made between crimes and delicts committed by States. As noted in paragraph 254 of the report, a breach of an international tariff clause could not be placed on the same level as genocide or occupation of the territory of a State by another State, and the sociology of international relations made it possible to speak of two major categories of violations of international law.

70. A number of representatives commented on the question of the criteria on the basis of which a distinction could be made between two categories of internationally wrongful acts.

71. In the view of some delegations, the basic distinction between international delicts and international crimes was that whereas a delict was simply an ordinary illegal act, a crime consisted in the violation of obligations considered fundamental by the international community. Some representatives pointed out in this connection that the mere infringement of unimportant rules provoked a response only from the injured State, whereas serious and flagrant violations of important rules aroused concern in the entire international community. International law, it was stated, must be consistent with the distinction made by the international community and attribute to international crimes special consequences such as the actio popularis. Along the same lines, another representative said that in order for an internationally wrongful act to be classified as a crime under article 19, it must infringe erga omnes and possibly jus cogens rules; injure all States; justify a generalized demand for cessation/reparation; and justify a generalized reaction by States. Concern was furthermore expressed that failure to consider wrongful acts which threatened the fundamental interests of the international community as distinguishable from "ordinary" wrongful acts would amount to recognizing that the concept of the fundamental interests of the international community was not legal but political in nature.

72. Other representatives considered as devoid of any foundation the claim that a crime was distinguishable from a delict in that it constituted a violation of an international obligation which was essential for the protection of the fundamental interests of the international community. The remark was made in this connection that, even though international obligations could be defined in principle, it was not clear who would determine that such obligations were essential in nature, particularly in relation to the international community, a concept which, although corresponding to a political reality, was an indeterminate entity from the legal point of view. Along the same lines, it was pointed out that, in the current world order, there were no ground rules for determining violations, or institutions for making objective and impartial determinations, of grave wrongs or crimes, and that it was difficult to define with precision what was meant by a fundamental norm safeguarding the interests of the international community. The point was also made that an international crime could not be equated with a breach of either an erga omnes or a jus cogens obligation, the former being a broader concept, while the latter, possibly also broader, might exacerbate rather than resolve the problem of identification. In the view of the representatives in question, State responsibility for wrongful acts should be limited to delicts, meaning violations of international law the gravity of which did not affect the interests of mankind.

73. The debate revealed a parallel divergence of views as regards the legal basis of the concept of crime in contemporary international law. According to some delegations, international crimes were not part of positive international law and found little support in contemporary State practice. One representative stressed that, in international practice, the Nürnberg and Tokyo military tribunals had tried individuals who, as State leaders, had been responsible for having planned and led crimes against the peace and security of mankind and that, consequently, it was the individual rather than the State that should bear criminal responsibility, although the State should not be immune to responsibility for providing compensation for the damage caused. In his opinion, the same considerations applied to the international tribunals established with respect to the former Yugoslavia and Rwanda, and to the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court. Another representative viewed the concept of crime as difficult to reconcile with some basic principles of international law such as the sovereign equality of States, and confusing because of its criminal law connotations and moral implications, which blurred the purpose of the draft articles, namely compensation rather than punishment. A third representative pointed out that, with the exception of the Gulf war and the consequences determined by the Security Council in its resolution 687 (1991), States had failed to corroborate their views regarding international criminal responsibility by setting in motion the substantive or instrumental consequences of a State crime in situations calling for a response by the international community.

74. Other representatives took the view that the distinction between international crimes and international delicts was based on the Charter of the United Nations, Chapter VII of which instituted a special regime for dealing with violations of the obligation not to resort to force, an obligation that was distinguished by its gravity from other international obligations. That distinction, it was observed, was also to be found in the practice of the

International Court of Justice, and specifically in the 1970 decision concerning the Barcelona Traction case and in the 1986 decision regarding military and paramilitary activities in and against Nicaragua. In the words of one representative, the concept of jus cogens and the decision of the International Court of Justice in the Barcelona Traction case had established a new dichotomy leading to different regimes of liability and consequently to an increased level of responsibility when crimes imputable to the State were involved.

(b) Question of the relationship between State responsibility for crimes and individual criminal responsibility under the future Code of Crimes against the Peace and Security of Mankind

75. The question was raised as to whether the crimes to be encompassed by the Code were the same ones the Commission considered to be crimes when discussing State responsibility and whether the only crimes giving rise to aggravated international responsibility should be those covered by the Code. The view was expressed in this connection that all crimes against the peace and security of mankind were to be considered as crimes under international law and entailing both the criminal responsibility of their perpetrators and also State responsibility. The remark was further made that inclusion of a certain type of behaviour within the scope ratione materiae of the Code did not mean that, at the international level, criminal responsibility was merely individual, since the draft Code as adopted on first reading stipulated that the prosecution of an individual did not relieve a State of responsibility.

(c) Question of the attribution of criminal responsibility to States

76. Some representatives warned against transplanting the concept of crime to the realm of State responsibility and trying to attribute crimes to States. Reference was made in this connection to the maxim societas delinquere non potest. It was pointed out that criminal justice presupposed a legislator with the authority to define crimes and establish corresponding penalties and that at the international level there were no authorities empowered to attribute criminal responsibility to States or compel them to respect criminal legislation that might be applicable to them. Attention was also drawn to the enormous difficulties that would arise if it were stipulated that a State responsible for an international delict need only compensate for the damage, whereas a State responsible for an international crime would incur a penalty. The remark was made in this connection that even if it were accepted that a State which committed a crime incurred criminal responsibility, the penalties should be in keeping with the nature of that collective entity known as the State: it was inconceivable that the consequences of a crime should jeopardize the territorial integrity or political independence of the State which had committed the crime. A further argument was that the indictment of a State could lead to the punishment of an entire people. As one representative put it, the State was, from the point of view of international law, an abstract legal entity consisting of a territory, a population and a set of institutions and, although it existed in the legal and political sense at the international level, in essence it was legally neither good nor bad, neither innocent nor guilty. For the representatives in question, the term "crime" should be abandoned because of its criminal law connotations.

77. Other representatives took the view that criminal responsibility was not necessarily limited to individuals. One of them stressed that organizations, including Governments, which engaged in criminal activities, involved many other individuals, besides the immediate perpetrators, who indirectly contributed to the commission of crimes. He took the view that such criminal organizations and agencies should be punished and dissolved, and their victims compensated by States. That, in his opinion, did not imply punishing the entire nation to which the organizations or agencies belonged. He saw no valid reason to reopen the discussion on the appropriateness of using the term "crime" in respect of States, since the Commission had accepted aggression as a crime in its discussion on the draft Code of Crimes against the Peace and Security of Mankind and since the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) indicated in its article 1 that States were potential perpetrators of the unquestionable crime of aggression under international law. 4/ He added that both legal doctrine and major judicial decisions had confirmed that not only individuals, but also organizations and States could commit crimes. In his view, that concept was deeply rooted in contemporary international law, as confirmed by the 1948 International Convention on the Prevention and Punishment of the Crime of Genocide, and once it had been accepted that States could commit crimes, many of the general principles of criminal law should apply to crimes committed by States. Another representative disagreed with the claim that it was impossible to transfer the concept of criminal responsibility from national law to international law. After stating that the maxim societas delinquere non potest applied in national societies which recognized the criminal responsibility of moral persons but did not apply in international law, he observed that the question of whether the distinction between civil and criminal responsibility was dichotomous or relative was irrelevant, adding that international responsibility for grave breaches could not be discharged solely by reparation or the payment of pecuniary compensation, as exemplified by the crime of genocide, and that a punitive element was as much a part of the concept of justice as a corrective element. In support of that position, it was recalled that articles 3 and 5 of the draft Code of Crimes against the Peace and Security of Mankind as adopted on first reading established the criminal responsibility of the individual without prejudice to the international responsibility of the State. With reference to the argument that the incrimination of States could lead to the punishment of entire peoples, the remark was made that coupling such incrimination with provisions aimed at sparing the population of the State concerned from extreme hardship would better ensure the protection of that population than leaving the whole question unregulated and de facto allowing for punishment of the population under the guise of restitution or guarantees of non-repetition. Along the same lines, it was pointed out that under the regime of the maintenance of international peace and security, States were currently subject to consequences which had the same effect as, or even exceeded, the consequences of the crimes envisaged in the draft articles and that it was useful to introduce substantive rules in order to

---

4/ Also in support of the term "crime", it was said that it had long been current in legal parlance, had a negative connotation and brought a moral element into the legal domain.

spare the populations of wrongdoing States from the excesses that might result from lack of regulation or political expediency.

(d) Consequences of internationally wrongful acts characterized as crimes in article 19 of Part One of the draft articles

78. Several delegations stressed that the distinction between crimes and delicts presupposed differentiated legal regimes governing the consequences of the two categories of internationally wrongful acts. In keeping with their respective positions on the concept of State crime, some delegations felt that such differentiated regimes could be established, while others took the opposite stand. There was also a view that, while the division of internationally wrongful acts into delicts and crimes was sound, it could have disconcerting effects in terms of the consequences of each category of wrongful acts. Concern was expressed in this connection that serious breaches which did not qualify as crimes would not carry consequences commensurate with their seriousness and that, if the consequences of crimes were made radically different from those of delicts, little would be done to regulate through judicial assessment the law of State responsibility relating to delicts, which constituted the vast majority of cases of internationally wrongful acts.

79. As regards substantive consequences, some representatives agreed with the approach proposed by the Special Rapporteur, namely to envisage for aggravated responsibility in the case of crimes and to distinguish between special consequences based on the provisions of articles 6 to 14 of Part Two (concerning delicts) and supplementary consequences in the form of new consequences. One of those representatives elaborated in some detail on the proposals of the Special Rapporteur. While expressing agreement with the view that the obligation of cessation in the case of a crime was identical to the obligation of cessation in the case of an offence resulting from non-fulfilment of erga omnes obligations, he observed that the question of whether or not articles 7 and 8 of Part Two were applicable to crimes should be considered in greater depth, since it was not clear that, in the case of the violation of an imperative norm of international law, the injured State could freely choose between compensation and restitution in kind: indeed, the freedom to choose could be incompatible with the prohibition on derogating from an imperative norm by agreement among States, and if that were so, it would have to be concluded that compensation was admissible only when restitution was materially impossible. The same representative also shared the view of the Special Rapporteur that article 7 (c) and (d) of Part Two should not be applicable in the case of crimes. He noted in this connection that when State crimes were committed, the injured party was the international community as a whole, so that restitution must not be subject to more limitations than those necessary to preserve the existence of the wrongdoing State and meet the vital needs of the population. Support was furthermore expressed for the Special Rapporteur's view that limits should be placed on the reparation demanded from the State which had committed the crime. In this connection, several representatives cautioned against undue infringement upon the rules and principles of international law concerning the protection of the sovereignty, independence and stability of the offending State and insisted on the need to take into account the "vital needs of the population", a phrase which, it was pointed out, called for further clarification.

80. The Special Rapporteur's proposals concerning the substantive consequences of crimes, however, gave rise to reservations. The remark was made that, although the removal of the element of excessive onerousness was a welcome element, the differences between the proposed substantive consequences of delicts and those of crimes amounted to very little since only one new obligation would be imposed on the State having committed an international crime, namely the obligation not to oppose missions sent to its territory for the purpose of verifying whether the obligations of cessation and reparation were complied with. The remark was also made that consequences such as disarmament and the dismantling of war industries were suitable only in the case of a crime of aggression and, additionally, as part of obligations which, being imposed upon the vanquished by the victor or under a mechanism of sanctions created under Chapter VII of the Charter, could not be implemented as self-enforceable obligations under international law.

81. With reference to draft article 18, paragraph 1, as proposed by the Special Rapporteur, the question was raised as to why the obligations laid down in subparagraphs (a) and (b) (namely the obligation to refrain from recognizing as legal or valid the situation created by the international crime and the obligation to abstain from any act or omission which might assist the wrongdoing State in maintaining the said situation should be confined to crimes). Subparagraph (f) was also criticized on the ground that, inasmuch as it was mandatory in form ("... all States shall ... take part"), its adoption would amount to a tacit amendment of the constituent instruments of the international organizations concerned. As for paragraph 2 of article 18, the idea of imposing on States an obligation to accept fact-finding missions within their territory gave rise to objections.

82. As regards the instrumental consequences of crimes, the few comments which were made included: (a) the remark that since all crimes affected the community of States to a greater or lesser degree, the principle of proportionality should be applied by each State individually; (b) the observation that countermeasures against the State responsible for a crime should not have a punitive character; and (c) the remark that, in the case of crimes, subparagraphs (a) and (b) of article 14 were superfluous, since the exercise of the right of self-defence and the measures taken by the Security Council did not constitute countermeasures.

83. As regards the circle of States entitled to demand cessation/reparation and eventually take countermeasures in case of a crime, comments focused on the concept of "injured State". The representatives who addressed the issue generally felt that States should not all have the same entitlements in terms of the substantive and instrumental consequences of a crime. Thus, according to one representative, the claim that all States were injured by an international crime was generally unfounded, although some crimes, such as illicit traffic in narcotic drugs or severe damage to the environment, would directly affect or threaten more than one State or even all States. In the view of another representative, the corollary of the notion of State crime, a notion based on the rather unjuridical concept of "international community", was that all States members of that community could be deemed to be injured States; according to the same representative, such a corollary was difficult to accept and a distinction should therefore be made between directly injured States and other States.

84. Referring specifically to the substantive consequences of crimes, one representative suggested that the right to compensation should be recognized only in the case of those States having suffered material damage. In this connection, the remark was made by another representative that the question of legal interest in a case of crime should be dealt with more precisely, for it raised the question of locus standi when the matter was brought before an international judicial body.

85. As for the instrumental consequences of crimes, several representatives stressed that it would be dangerous and contrary to international law to leave them to the discretion of individual States. One of them advocated some form of control by a judicial authority. Another said that the collective response of the international community should take precedence over the countermeasures of individual States and that a choice would have to be made between an actio popularis or an actio communis carried out by the international community. A third representative took the view that, while all States should be entitled to take immediately the necessary measures to obtain cessation and avoid irreparable damage, only the most directly concerned States should be entitled to take urgent interim measures.

(e) Question of the implementation of the consequences of State crimes

86. The delegations which commented on this issue stressed that bearing in mind the substantive and instrumental consequences which crimes would entail, particularly as a result of the universalization of the status of "injured State", discretional power to implement such consequences could not be left in the hands of States which considered themselves affected. They therefore insisted upon the need for measures of control. They noted at the same time that the international community did not constitute an organic structure and that, as a result, not only law-making but verification and coercion were functions directly exercised by States. They therefore acknowledged that the lack of a mechanism to determine whether an international crime had been committed and, if so, to enforce the responsibility of the offending State made it very difficult to determine the consequences of international crimes.

87. Some among those delegations took the view that, inasmuch as the institutions and procedures necessary to implement the concept of State crime were not yet in place and could only be put in place through amendment of fundamental provisions of the Charter - a task that was difficult, if not impossible, at the current time - the concept in question was not viable. In the words of one representative, international society was not currently structured to deal with "crimes", and insurmountable difficulties would persist regarding the implementation of the articles as long as conditions of decentralization prevailed in the international community.

88. Others observed that the basis of the legal regime of international responsibility arising from international crimes was rooted in the assurance that the international community, organized within the framework of the United Nations, was the entity competent to authorize the application of countermeasures and impose collective sanctions. Attention was also drawn to the role which regional organizations could play in this context. As regards the United Nations, it was pointed out that the Charter provided States with

various ways of seeking relief and asking for sanctions and empowered the Organization's organs to act at times of crisis or when tensions had lessened and that advantage could be taken of those possibilities.

89. Still others, while recognizing that the process of institutionalization of joint action aimed at enforcing liability for wrongful acts constituting a breach of fundamental international obligations would, in all likelihood, be a slow one, and while agreeing that the lack of a mechanism to determine whether or not a crime had been committed posed a major problem, wondered whether that was sufficient reason not to spell out the consequences of wrongful acts which were detrimental to the fundamental interests of the international community and not to examine the possibility of establishing a mechanism of this nature.

90. Views similarly differed on the institutional arrangements proposed by the Special Rapporteur in his draft article 19. Some endorsed the proposed procedure according to which the General Assembly or the Security Council would carry out a political assessment of the situation, after which the International Court of Justice would decide whether or not an international crime had been committed. One representative felt that such a procedure would make full use of the opportunities afforded by the United Nations, respect the powers of the participating bodies and make possible a rapid response to an international crime. Another representative, while observing that, where the alleged crime was offensively flagrant and its scope had been delineated and acknowledged by a belligerent State, the other State might question the wisdom of seeking the Court's determination before contemplating appropriate countermeasures, supported the proposed procedure which, in his opinion, offered the international community an opportunity to be apprised of the problem and would facilitate the work of the Court, without entailing conflict of interest or competence. Emphasis was also placed on the advantages of the proposed system in terms of deterrence.

91. Other representatives, while viewing with sympathy the proposed institutional scheme, which one of them described as bold and progressive, and while welcoming the saving clause concerning the constitutional functions of the Security Council and the right of self-defence under Article 51 of the Charter, questioned the viability and broad acceptability of the scheme in question.

92. Still other representatives objected to the proposed arrangements which, in their opinion, were too much ahead of the times. Those arrangements, it was stated, raised a number of fundamental and unresolved issues, were lacking in realism, could hardly work in practice, seemed to contradict basic provisions of the Charter and might give rise to conflicts between the main organs of the United Nations.

93. Comments focused on the role assigned to the political organs of the United Nations and to the International Court of Justice. Some members queried the use of the General Assembly or the Security Council to make the initial determination of the existence of a crime. It was stated in particular: (a) that the proposed approach was inconsistent with Article 12 of the Charter and entailed the risk of conflict between the two organs; (b) that any assessment of a political nature as to the existence of a crime would affect the mandates and practice of the bodies responsible for maintaining peace and

security in accordance with the Charter; (c) that it would be inappropriate for political bodies to exercise a de facto judicial function; (d) that the bodies in question were not authorized by the Charter to exercise jurisdiction over crimes; (e) that attributing new powers to them would require revision of the Charter; 5/ and (f) that both organs were subject to political fluctuations and, as had already occurred, might adopt a complacent attitude with regard to very serious wrongful acts, especially in the case of the Council, whose members, having the right of veto, were assured full immunity.

94. As for the role assigned to the International Court of Justice in the proposed scheme, it was questioned on two opposite grounds. According to one body of opinion, the emphasis should be on the Court and there was a serious risk that, by introducing the political element inherent in decisions of the General Assembly or the Security Council, an unfortunate mixture of competences between the judicial and political bodies of the United Nations would ensue. A second deficiency was, according to that body of opinion, that jurisdictional control would not apply to all countermeasures. According to another body of opinion, it was highly questionable to grant States the right to bring a matter before the International Court of Justice by unilateral application - an approach which ran counter to the established principle that the competence of the Court hinged solely upon the consent of the States parties to the dispute. It was also pointed out (a) that States had shown themselves reluctant to accept the compulsory jurisdiction of the Court, particularly on matters with a strong political content; (b) that conferring upon the Court a kind of a priori competence by entrusting it with the task of determining whether a crime had been committed entailed the risk of provoking a conflict between the Court and the Security Council; (c) that the Court lacked the necessary technical means and independent fact-finding mechanism to determine the existence of a State crime; (d) that it might not be able to respond quickly enough to an international crime being committed by a State; and (e) that any role assigned to the Court should be carefully weighed against past experience, for instance in relation to the Vienna Convention on the Law of Treaties and its jus cogens norms.

95. There was also a view that instead of the proposed two-phased procedure, one might envisage the appointment by the Security Council or the General Assembly of an independent commission of jurists or the appointment by the International Court of Justice of an ad hoc chamber to exercise the functions envisaged in draft article 19.

96. With specific reference to draft article 19, it was said (a) that although paragraph 2 provided that a State against which a claim was made was entitled to bring the matter before the International Court of Justice, it did not specify who the respondent would be; (b) that it was not clear what would happen in the case of crimes committed by States which were not parties to the convention;

5/ One representative, however, noted that most acts that might be classified as crimes were sufficiently grave to constitute an unquestionable threat to peace and therefore fell within the competence of those two organs, especially the Security Council.

(c) that the adoption of paragraph 3 would in practice amount to an amendment of the Charter which would not correspond to the procedure for amendments laid down in the Charter; and (d) that paragraph 4 regarding the right of intervention went beyond the letter and spirit of norms established, in particular, by the International Court of Justice, which required that such intervention be based on a State's legitimate interest in a case.

97. The few delegations which commented on draft article 7 on the settlement of disputes which might arise between States with respect to the legal consequences of a crime generally agreed with its content.

(f) The courses of action open to the Commission

98. Some representatives voiced concern about the Commission's focus on State crimes. The remark was made that the concept was controversial and continued to provoke dramatically divided views within the International Law Commission and the Sixth Committee. It was also said: (a) that the response to international crimes should be found not in the context of State responsibility but rather in the prosecution of criminals by a permanent international criminal court and action by the United Nations under its Charter; (b) that the concept of State crime was based on what was termed a utopian view of international relations which was of little help in finding solutions capable of effectively influencing the behaviour of States; and (c) that some of the problems with which the Commission had been struggling might be insoluble unless a radical change occurred in some of the fundamental conceptions of international life. In the meanwhile, it was observed, trying to impose notions of domestic law on States was futile and the codification of State responsibility should concentrate on approaches adapted to the specific needs of inter-State relations rather than on proposals unattuned to States' sense of international law. While respect was expressed for the idealism and intellectual commitment of those who had worked on the topic, in particular the Special Rapporteur, and while tribute was paid to the contribution made to the development of international law by the school of doctrinal thought, part of which believed that some breaches of international obligations were of such magnitude as to be in the nature of a crime, the delegations in question shared the view that if the subject of State crime again burdened its work in 1996, the Commission would be unable to reach its goal of completing the first reading of the draft articles on State responsibility before the end of the current term of office of its members. Against this background it was suggested (a) that the Sixth Committee should give precise directions to the Commission on the matter; (b) that work regarding the consequences of State crimes should be abandoned altogether; (c) that consideration of the relevant proposals should be deferred until the second reading and that the possibility of establishing the concept of State crime should continue to be explored in the process of the progressive development of international law.

99. Other representatives recalled that the concept of "international crime" was not new and that its inclusion in article 19 of Part One was not attributable to the current Commission, whose mandate was limited to considering the consequences of internationally wrongful acts, including crimes in the sense of article 19. In their view, it was unacceptable to be constantly reverting to a question already decided in an article which had been adopted unopposed.

Those representatives therefore supported the approach, taken by the Special Rapporteur and endorsed by the majority of the members of the Commission, of continuing work on the draft articles of Part Two on the basis of the decisions taken at the time of the adoption of Part One, it being understood that any reassessment of specific questions raised by the draft articles as a whole would be carried out in second reading on the basis of the comments and observations of States.

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

1. General approach to the topic

100. Many representatives expressed satisfaction with the progress of the Commission on this topic. They noted that modern international law relating to the theory of liability for transboundary harm of activities not prohibited by international law had gained ground rapidly. Furthermore, the increase of activities that might pose significant transboundary danger had underlined the necessity of establishing mechanisms capable of preventing or compensating for extraterritorial harm. They also stated that it was crucial to identify and reaffirm the emerging principles of international environmental law. It was noted that it was not always easy to make a distinction between "soft" and "hard" law in this field, but what was clear was that the "soft" law of today could become "hard" law in the future.

101. Some representatives noted that the current legal situation with regard to environmental protection was not satisfactory; the existing international instruments were inadequate in view of the fact that the activities potentially harmful to nature were growing apace with technical and technological progress. These were facts that international law could not ignore. To that end, it was suggested that any future international instrument should focus on the prevention of harm to the environment and emphasize the following: cooperation among States to protect the environment and reduce consequences harmful thereto; State cooperation in international bodies, particularly in the area of setting technical safety standards for dangerous activities resulting from technological advances; formulation of pragmatic rules governing cooperation to reduce harm caused to the environment by accidents; and determination of liability for consequences harmful to the environment. According to this view, the Commission should elaborate a declaration of principles and formulate more specific rules. The main purpose of this exercise should be to prevent damage and provide reparation when damage had occurred. It was therefore found particularly important to develop a framework for guaranteeing the protection of innocent victims from the consequences of transboundary harm.

102. The remark was made that the problem of transboundary harm had become significant as a consequence of the development of modern technology. According to this analysis activities having an impact on the environment fell into two categories. Some activities were planned and carried out with good intentions in order to "improve" nature for the benefit of human beings and of their environment; for example, States might agree by treaty to prevent the flooding of a river which formed the boundary between them. Such intervention was normal

and justified; it should not be a cause of concern to the international community, because the States were in agreement on the particular improvement of the environment. Hence such activities should not be the object of codification. Other activities were carried out, not to improve the environment, but to exploit it through the use of modern technology - for example, activities carried out in outer space, the transport of certain substances or the production of nuclear energy. Although such activities were carried out for the benefit of mankind, they were potentially harmful to the environment. Because the prohibition of such activities was not realistic, a more pragmatic solution would be to seek cooperation among States on all aspects of environmental protection and make such activities the object of codification. A reference to such cooperation, it was suggested, might also be included in the title of the future instrument on this topic.

103. It was stated that international law prescribed measures relating to the duty to prevent harm to the environment and that the obligation to make a prior assessment of the activity was already embodied in international treaties as well as in international customary law. The purpose of the impact assessment, according to this view, was to determine in advance whether an activity entailed an unacceptable degree of risk to other States and to balance the desired benefits of the activity against the risks it involved. The question remained, however, as to what the international legal consequences would be if a State persisted in an activity that entailed an unacceptable degree of risk. Therefore, while it was useful to deal with issues of prevention, it would be more useful for the Commission to focus on consequences arising from causing transboundary harm. The core of the topic, it was felt, could not be anything other than liability.

104. Some other representatives, however, expressed the view that the Commission, after 15 years of work on the topic, was still trying to deal with the fundamentals and that from the outset it had been obvious that if the topic was to be developed successfully a greater infusion of progressive development than either the Commission or the Sixth Committee were ready for was required. It was also pointed out that in seeking to fuse concepts of environmental impact assessment and liability, the Commission had raised many difficult issues, including the respective responsibilities of the State and of operators, the types of activities or substances to which any liability regime might apply and the types of harm that a regime might address. According to this view, the Commission should focus only on the areas most likely to command consensus.

105. It was also stated that the topic was misconceived in its concern with environmental issues, which narrowed the scope of the topic. According to this view, environmental protection was best achieved at a preventive phase and had nothing to do with the payment of compensation once harm had occurred, which was the cornerstone of the topic. The title of the topic illustrated that point, in that it was formulated in general terms of liability for activities not necessarily limited to environmental activities.

106. It was further stated that in emphasizing prevention, the Commission's work on the topic had lost some of its direction. Any convention on the subject, it was felt, must be based on the principle sic utere tuo ut alienum non laedas.

There was however no reference to that principle any where in the Commission's report.

107. The view was also expressed that one of the fundamental questions of contemporary international law with regard to State responsibility was that of material transboundary harm. This was an area in which judicial and arbitral jurisprudence was sparse and, except for the Convention on International Liability for Damage Caused by Space Objects, all treaty negotiations had given rise to difficulties. One representative felt that, if Governments had not manifested the will to resolve those difficulties, it was because they would have had to accept great financial liabilities, given the potentially catastrophic extent of the transboundary harm that such activities could cause. Therefore, it was felt, treaties and international custom in the field of transboundary harm had not developed in line with reality. The stagnation of the Commission's discussions on the subject might arise from its awareness of the major repercussions that any decision would have in respect of both codification and the progressive development of law in that area.

108. The remark was also made that, before preparing draft articles on the consequences of transboundary harm, the Commission should prepare a list of the legal problems involved and possible solutions thereto. In other words, the Commission could neither adopt a final decision on the subject solely on the basis of general principles of law nor draft a general set of rules on matters in which it had an insufficient number of treaties, which were in any case not applicable world wide.

109. The comment was also made that as industry in highly developed countries grew and the market economy and capitalism gained momentum in developing States, venture capital was seeking opportunities all over the world. Hence, the possibility that transboundary harm might become more prevalent and assume greater magnitude could not be ignored. The topic, according to this view, called for precise conceptualization and should be clearly understood by developing States, which had to deal with the repercussions of major economic activities.

110. The hope was expressed that the Commission would schedule enough time for an adequate consideration of the topic. It was noted that the matter was currently under consideration in several multilateral forums, including the International Maritime Organization, which was elaborating an international convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea, and the Standing Committee on Nuclear Liability of the International Atomic Energy Agency.

111. Some representatives found it unfortunate that the Commission had not allocated sufficient time to consider the tenth and the eleventh reports of the Special Rapporteur. In their view, international liability was an important matter for States and the Special Rapporteur's focus on the liability aspect was welcomed. Given the topicality and the importance of the subject, a number of representatives felt that the Commission must allow sufficient time for examination of the methodology and substance of the topic.

2. Scope of the topic

112. Some representatives felt that, in addition to a general definition, a list of activities and materials capable of causing significant transboundary harm should be prepared. The preparation of such a list, it was stated, could be deferred until the drafting of the articles on liability and reparation had been completed, as suggested by the Commission. In this connection, support was expressed for the Commission's decision to rely, at the outset, on the activities listed in the existing conventions dealing with issues concerning their harmful effects. It was further stressed that, in listing activities, the Commission should be consistent; for example, the list of activities addressed by the conventions which the Commission intended to rely on seemed to have included activities such as oil spills causing transboundary harm, while excluding transboundary flooding as a result of deforestation.

113. Some representatives expressed preference for limiting the scope of the topic in order to make it more manageable. Others, however, preferred to expand the scope of the topic in geographical terms to cover harm to the so-called "global commons" which, in their view, constituted, de facto, harm to interests common to all States.

3. Comments on the articles so far adopted

114. Many representatives welcomed the adoption of articles A to D and largely agreed with the text of those articles. One of these representatives, however, expressed concern that the reference to "significant" transboundary harm implied that harm other than significant might go uncompensated for because it failed to reach the rather high threshold of "significant".

115. A view was also expressed that the Commission was seeking to create a new legal regime, consisting of the imposition of obligations upon a State because it had engaged in an activity not prohibited by international law. According to this view, it was generally recognized that the freedom of States to act was limited by the duty to avoid using that freedom to the detriment of others. The relations between subjects of law were based on the principle that if an act of one violated a rule of law, steps must be taken to compensate the subject of law that had suffered harm as a result of that act. That clear and simple principle was a sine qua non condition for harmonizing the rights and duties of subjects of law. According to this view, the Commission had not been entirely successful in striking a balance between the right of a State to carry out an activity within the framework of its own sovereign rights and its duty not to carry out activities that might violate the sovereign rights of another State. It was plainly difficult to locate the line between those rights and duties.

116. It was further observed that the draft articles so far adopted sought to impose an obligation on States to set up procedures for the regulation and environmental impact assessment of all activities, public or private, that might potentially cause harmful transboundary effects. It could therefore be seen as implying State liability for all such harmful effects. Such a broadly drawn regulatory approach was unacceptable, according to this view; the Commission

should instead focus on particularly hazardous activities with a view to producing a consensus document.

(a) Article A [6]. Freedom of action and limits thereto

117. Many representatives agreed that article A reaffirmed principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration and that the general obligation to prevent or minimize the risk of causing transboundary harm was an implicit consequence of the obligation not to cause transboundary harm and that it provided a clear foundation for other obligations relating to prevention. The reference in article A to "specific obligations owed to other States in that regard" was welcomed, since it indicated that specific treaty regimes might contain obligations of result concerning measures to prevent or minimize the risk of transboundary harm.

(b) Article B [8 and 9]. Prevention

118. Some representatives viewed article B as establishing one of the fundamental principles of the topic, namely prevention. It was also agreed that the obligation laid down in article B was not an obligation of result but one of due diligence. In this regard, the standards of due diligence defined in the commentary to the article were found acceptable. Concern was expressed, however, over the possibility that the application of article B might run into difficulty in practice.

119. Some other representatives, however, were concerned that the standard of due diligence was misplaced. Due diligence was, in their view, an objective test and could not be used to amend or abridge the rights of States. It was also asserted that the principle of due diligence had lapsed, given that in practice it imposed upon the claimant State a burden of proof which was almost unattainable in a highly industrialized setting. It was suggested that the matter might be more easily resolved if a case of alleged transboundary harm was submitted to arbitration or judicial decision, but it would be extremely difficult to resolve the issue through negotiation.

(c) Article C [9 and 10]. Liability and reparation

120. Some representatives found article C to be in an embryonic stage and felt that it should be further developed. The comment was also made that the article advanced the general principle of liability, on which the draft articles were based. It was pointed out, however, that at the current stage of consideration of the topic, the Commission had not defined the characteristics of liability. It was also felt that article C, notwithstanding the fact that it was restrictive in its approach to liability because it was limited to harm caused by activities with a risk of causing such harm, was an initial step by the Commission towards its ultimate goal, viz. the regulation of liability. A preference was also expressed that article C provide specifically that all damage must be repaired based on the concept of no-fault liability.

121. Concern was expressed that the use of the standard of due diligence to prevent or minimize the risk of causing transboundary harm, and the fact that such an obligation was not an obligation of result, did not seem appropriate

under all circumstances. Reference was made to the commentary, which explained that the initial clause of article C, which read "In accordance with the present articles", was designed to convey the understanding that the principles of liability were treaty-based, implying the absence of any basis for the principle in customary international law, which, according to this view, was not correct. A comment was also made that the formulation of article C created confusion between this topic and that of State responsibility, for it was the weakest formulation of the maxim sic utere tuo ut alienum non laedas.

122. The view was further expressed that article C rightly made no reference to the responsibility of States. Existing treaties dealing with exceptionally hazardous activities, e.g. those relating to nuclear energy, imposed strict liability on operators and States. The variety of activities intended to be covered by this topic, however, made it doubtful that State liability for any activity with extraterritorial harm would be feasible and generally acceptable.

(d) Article D [7]. Cooperation

123. Some representatives found article D fully compatible with the objectives set forth in principles 13 and 27 of the Rio Declaration regarding cooperation in good faith among States. The obligation imposed by the article was found to have support in other treaties. It was felt, however, that the drafting of the article was not entirely satisfactory, since it was difficult to see how a State of origin could be obliged to cooperate in minimizing the effects produced in its own territory by transboundary harm without its consent.

4. The Special Rapporteur's tenth and eleventh reports

(a) Approach to the regime of liability

124. Many representatives addressed the question of the liability regime proposed by the Special Rapporteur in his tenth report. The views focused on the theoretical approach to the liability regime, the content of the regime and the liable party.

125. As regards the theoretical approach to the liability regime, some representatives stated that the Stockholm and Rio Declarations confirmed an opinio juris on the question of liability for transboundary harm. They further noted that the design of a liability regime should be based on the principle that victims of injury from an incident resulting in transboundary harm should be compensated and on criteria for equitable distribution of loss. These objectives, according to those representatives, must lie at the core of any examination of the subject.

126. Some other representatives urged caution in devising any liability regime for transboundary harm. They felt that existing State practice and agreements already concluded or under negotiation suggested a need for liability regimes closely tailored to the particular circumstances of the activity in question and the parties involved. According to this view, therefore, very broad general rules or binding guidelines regarding liability might not always be appropriate.

127. It was also pointed out that it might be difficult to define the legal consequences of transboundary harm in a way that would make them different from the consequences of breach of any obligation, particularly with the establishment of the preventive obligation. Considering that State practice offered no consistent theory of accountability for transboundary harm, the Commission should ensure that it did not exceed its mandate in connection with this topic by entering the sphere of State responsibility. However, it was also noted that although the topics of State responsibility and international liability had some similar strands, it would be a mistake to confuse them. The topic of liability referred to a situation where a particular activity, although not illegal, gave rise to harmful consequences and thus entailed obligations relating to compensation or restitution as well as obligations to give prior notification of the proposed activity and to undertake an assessment of its environmental impact.

128. As regards the content of the liability regime, those representatives who approached liability from the premise that the innocent victim should not be left to bear the loss alone, opted for a regime which established a causal link between a given activity and the harm it caused. In this regard, many of those representatives supported the idea of civil liability, whereby the operator would be held liable for transboundary harm its activities caused. It was suggested that such a regime should consist essentially of the requirement to compensate where harm without fault had occurred. Therefore, a standard of strict liability should be the guiding principle; the perceptibility of harm should be relevant only to the extent that it might have an impact on the nature and degree of compensation; exonerating circumstances should be admitted to regulate the operation of the standard of strict liability; there should be room for negotiations aimed at finding modalities for implementing the substantive rules; and the procedures usually associated with civil liability should be introduced into the text. This, it was felt, would allow the Commission to work towards a clear end-product filling a lacuna in the overall system of State responsibility. Otherwise events and piecemeal developments would overtake work on the topic.

129. Many representatives, who supported the payment of compensation to innocent victims of transboundary harm as the basic goal for the liability regime, nevertheless supported State subsidiary liability in circumstances in which a private operator might not be able to pay full compensation. In their view, the principle of State subsidiary liability was consistent with the ultimate duty of the State to exercise due diligence over all activities within its territory, especially those of a dangerous nature. For that reason, proponents of this view favoured alternative A of draft article 21 or, alternatively, a formulation similar to option C in paragraph 26 of the Special Rapporteur’s tenth report, wherein the State in which the incident had occurred would be liable for any residual damage not compensated for by the operator, regardless of whether there was fault on the part of the State. It was also suggested that such State liability should not be limited to cases in which the State had failed to show "due diligence" in preventing the damage, since that was essential for differentiating liability for lawful acts from responsibility for wrongful acts.

130. Opposition was voiced to the Special Rapporteur’s view that the State should be liable only for its failure to comply with the obligations of

prevention in accordance with draft article 5. According to this view, if that were the case there would be no need for special provisions dealing with State liability, for the matter could be regulated by the rules pertaining to State responsibility. Rather, according to this view, liability should be based on the mere causing of substantial transboundary harm, which would entail the obligation of reparation by either the operator or the State, depending upon how the Commission would agree on the division of liability between the two. According to this view, the second alternative to article 21, providing that the State would bear no liability at all, was unacceptable, particularly after so many years of work on the topic.

131. The view was expressed that when a causal link could be established between the activity and the damage caused, State liability was entailed, even though the activity causing the transboundary harm had been conducted by a private operator, since the State had jurisdiction over the activity. This view was not widely shared and it was pointed out that the mere recognition of the subsidiary liability of States for the harm caused by acts not prohibited by international law would indicate considerable progress for international law, given that, so far, States had accepted it only in specific treaty instruments. Consequently, without prejudice to the final form which the draft articles should have, according to this view, it seemed useful to prepare a compendium of the principles on which States could base their efforts to establish their own liability regimes.

132. Some other representatives, who urged caution in designing a liability regime under this topic, felt that any imposition of liability on States for transboundary harm caused by activities of private individuals should be considered very carefully. In addition, taking into account the special situation of developing States, it was noted that the issue of international liability essentially pertained to the liability of States or other entities engaging in industrial and other development activities and any damage that might be caused in the process. Only entities having direct control of an operation or an activity should be held responsible for any consequential damage. According to this view, such liability should not be directly attributed to a State merely because the activity causing transboundary harm had been undertaken in areas under its jurisdiction. The concept of control required careful elaboration or clarification, bearing in mind the practices of transnational and multinational corporations. In this connection it was further noted that the general principle that a State bore responsibility for harm done to other States for activities conducted within its territory was open to serious debate in cases where a strict chain of causation had not been or could not be established. In all other cases, where individual claims were few and otherwise manageable, they should be subject to the tests of tortious liability generally applied in national legal systems. Further, in order to be effective and equitable, any international liability regime called for appropriate standards of harm against which the liability could be judged; those standards would naturally vary in accordance with a country’s stage of economic and social development. In that connection the needs, aspirations and capabilities of developing countries should be taken into account when formulating the principles of international liability, since those States represented the majority of the world’s peoples.

133. It was also pointed out that the basis of the obligation of States to compensate for transboundary harm caused by activities not prohibited by international law should be determined. No difficulty arose, it was noted, when such obligations were set forth in a treaty. In the absence of any treaty obligations, however, it was difficult to identify the basis of liability and the law which might be applicable. Therefore, according to this view, there was a need to formulate rules of public international law governing such situations, without undermining the right of claimants to institute procedures under private international law. It was further noted that considering the fact that most activities leading to transboundary harm were generally conducted by private individuals, it might be more appropriate to deal with liability issues at the level of private international law. This suggestion did not intend to obviate State liability in certain circumstances, but was made in order to ensure respect for the principle sic utere tuo ut alienum non laedas. The suggestion was made also on the understanding that the question of liability straddled the boundary between public and private international law; in so far as it concerned the former, it should be dealt with as part of State responsibility.

134. The remark was also made that the existence of harm was the basis of any liability and compensation which might be due under the topic. That made the concept of "transboundary harm" the key element in considering the topic. When a State carried out or authorized an activity, it was implicitly authorizing the predictable consequences of such activity. While some lesser harm, according to this view, should be endured by virtue of the general principle of good-neighbourliness laid down in the preamble to and Article 74 of the Charter, transboundary harm could damage the territorial integrity and inviolability of another State by breaching the obligation of non-interference laid down in customary international law and in the maxim sic utere tuo ut alienum non laedas. According to this view, the right of a State to permanent sovereignty over its natural resources and the right to development could also be affected. It was felt that in many cases such damage amounted to an export of costs, which was a clear violation of the general principle of law prohibiting unjust enrichment. Therefore, beyond the existing treaty norms, harm that was caused should be compensated for possibly on the basis of strict liability.

135. The articles dealing with the liability of the operator or civil liability were found to be well drafted and acceptable. It was felt that further consideration should perhaps be given to whether the articles on civil liability could be applied to situations in which the State was either an operator or a victim of harm. According to one view, the distinction made in paragraph 382 of the report of the Commission between reparation under this topic and reparation under the topic of State responsibility was not persuasive.

136. It was deemed reasonable to impose strict liability on private operators who were the most likely to be involved in activities causing extraterritorial harm and had the financial means, through insurance or otherwise, to pay for the harm they caused. However, the relation between rules pertaining to prevention and those on liability should further be clarified.

137. The remark was made that draft article H might run counter to the principle that the process of ascertaining the causal link should be based entirely on objective criteria. It was also noted that the articles dealing with procedural

channels for the enforcement of liability should take account of the fact that the claimants may be individuals, entities or States, and that a single procedure may not be suitable for all of them. In particular, draft article I raised delicate and complex issues relating to the enforceability of judgements. Those issues required much closer scrutiny.

138. The view was also expressed that prevention ex post should be dealt with in the chapter on prevention rather than in the chapter on reparation.

(b) Concept of the environment

139. As regards the concept of the "environment", different views were expressed. According to one view, it would be difficult to find a universally accepted concept of the environment, a problem which was certain to affect efforts to define the scope of any future instruments on the topic. According to another view, the definition proposed by the Special Rapporteur had taken a restrictive approach to the environment. As currently defined, harm to the environment was limited to harm to resources such as air, soil, water, fauna and flora and their interactions. According to this view, the concept of the environment was a changing one and could not remain static and advances in science and technology were bound to affect human understanding of the various elements of the environment and their interaction with each other. Hence, the concept of the environment should be defined in the broadest terms possible, as it had been in the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the 1992 Convention on Transboundary Effects of Industrial Accidents. It was also felt that any definition of the environment should at least include some components of the man-made environment and that the concept of "man-made environment" should not be confined to what the Special Rapporteur referred to as the "cultural environment". It was also felt that any definition of the concept of environment should take into account the human factor, an approach taken in the Stockholm and Rio Declarations.

140. As regards reparation for harm to the environment, the Special Rapporteur's view that adverse effects on the environment could not by themselves constitute a form of harm was found to be unpersuasive. It was pointed out that developments since the 1972 Stockholm Declaration had shown clearly that environmental degradation in itself constituted harm and that the environment belonged as much to States as to others interested in its preservation. It was pointed out that damage to the environment was becoming increasingly irreversible; in such circumstances, compensation should be allowed in relation to damage to the intrinsic value of a landscape.

(c) Concept of harm

141. A number of representatives pointed out that a clear concept of harm was essential to any future work on international liability. In this regard, according to one view, the definition of harm, as proposed by the Special Rapporteur in his eleventh report, was not satisfactory, since the definition was more concerned with arrangements for compensation than with the harm itself, whose own definition combined heterogeneous elements. According to another view, however, the definition provided useful guidelines by indicating that harm should cover loss of life; personal injury or other impairment of health; loss

of or damage to property; and impairment of the natural resources (including ecosystems) and the human or cultural environment of the affected State. It was noted, however, that the definition of transboundary harm omitted any reference to harm caused in a place outside the national sovereignty of any State, such as on the seabed, in Antarctica or in outer space. Since there were no international bodies administering such areas, the injured party should be considered to be the international community and entitlement to sue for reparation should be vested in an international body or a State representing it. In this regard, it was found logical that the State in the territory or under the jurisdiction of which the activity causing the harm was carried out should be held liable for the damage. It was further agreed that the most appropriate means of compensation for environmental damage was restitutio naturalis, except where that was impossible, in which case monetary compensation would have to be provided. To this end it was suggested to insert in the proposed draft article on harm (A/CN.4/468, para. 38) the words "the status quo ante" after the word "restore" in paragraph (c) (i), and to make subparagraph (iii) more stringent.

142. It was observed that any definition of harm should be comprehensive and, in view of the fact that a number of legal systems recognized the concept of harm to the environment, should include a full definition of harm to the environment, taking account of the aesthetic and cultural value of natural resources and goods damaged as a result of a given dangerous activity. As regards the threshold of harm, it was found essential to make a clear distinction between "substantial" or "significant" harm and any other type of harm which may have no consequence under the proposed liability regime.

E. THE LAW AND PRACTICE RELATING TO RESERVATIONS TO TREATIES

1. General observations

143. Many representatives who referred to the topic noted that it was one of the most difficult and controversial areas of international law. Part of the difficulty stemmed from certain deficiencies in the rules relating to reservations set down in the Vienna Convention on the Law of Treaties and drawn upon in the Vienna Convention on the Succession of States in respect of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. While the Vienna Convention on the Law of Treaties contained relatively detailed provisions in that regard, many gaps nevertheless remained to be filled because of differing State practice with respect to that Convention and other instruments.

144. A number of representatives, while acknowledging that the question of reservations to treaties was an integral part of contemporary legal order, pointed out that the right to make reservations and to become a party to multilateral treaties subject to such reservations derived from the sovereign right of every State.

145. It was pointed out by some representatives that the main elements for reservations to treaties enjoyed by every State were provided for in article 19, paragraphs (a) and (b), of the Vienna Convention on the Law of Treaties. That

regime, it was noted, reconciled two fundamental requirements: the need to facilitate for States the ratification of or accession to multilateral treaties of general interest and the need to recognize the right of a State to preserve its position at the time of signing, ratifying or acceding to such treaties. The view was expressed that since the technique of entering reservations facilitated wider participation in such treaties, coupled with the need to balance the rights and obligations of the reserving State with those of other States parties to a treaty in order to maintain the integrity of the treaty, a flexible and pragmatic approach was required.

146. It was observed further that articles 19 and 20 of the Vienna Convention on the Law of Treaties had a sequential relationship in that article 19 set out the circumstances in which a State could formulate a reservation while article 20 specified the conditions for the acceptance of or objection to a reservation that met the requirements for formulation in article 19. The wording of article 20, it was noted, suggested that it was the contracting States that would determine whether the requirements of article 19 had been met. Of the three criteria in article 19, it was observed, compliance with those in paragraphs (a) and (b) could be determined with some certainty, but the question of whether a reservation was incompatible with the object or purpose of the treaty was difficult to ascertain.

147. According to many representatives, although the Vienna Conventions had certain shortcomings, it was important not to jeopardize international legal stability by formulating new provisions. General support was expressed for the Special Rapporteur’s proposal that previous achievements in the field should therefore be preserved and that the aim of the Commission in undertaking this work should only be to clarify ambiguities and to fill in the gaps. Moreover, it was said, the rules set out in the Vienna Conventions were constantly being applied by States and innumerable State practice had already developed on the basis of those rules. An attempt to revise them would cause unnecessary confusion. Therefore, the approach of the Commission, which was aimed at compiling detailed guidelines for the practice of States in respect of reservations, would not only produce a balanced approach to safeguarding the current legal system, but would also provide a solution for existing problems.

148. Some representatives, while expressing agreement with the approach of the Commission, namely to fill in the gaps in the existing legal regime, called upon the Commission to clarify the following points: the effects of non-permissible reservations; the regime of objections to reservations; and both the precise difference between reservations and interpretative declarations and the exact definition of the legal effect of the latter.

149. Some representatives referred to the unanimity rule, which traditionally meant that a reservation was not effective unless it was accepted by all the other parties to the treaty in question. According to them, a more flexible approach had been adopted in the Vienna Convention, however, following on the advisory opinion of the International Court of Justice on the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. That approach, it was said, appeared to put a State making a reservation in a more favourable position.

150. With regard to the question of whether reservations should be examined from the point of view of their permissibility or opposability, one representative stated that those issues had long been laid to rest by the Vienna Convention on the Law of Treaties. He was therefore opposed to any approach that was inconsistent with the pragmatism of that Convention and felt that the questions raised by the Special Rapporteur with regard to the gaps and ambiguities in the Convention were impractical and would probably not lead to a consensus within the Commission.

151. According to another representative, both the "permissibility" and "opposability" schools neglected the integral, sequential relationship between articles 19 and 20, which together set the conditions for the validity of a reservation. The question of the implementation of a reservation did not arise until the requirements for formulation in article 19 had been met. However, a reservation which met those requirements was not inherently valid in the sense that it could not be implemented, since its validity was ultimately tied to the system of acceptance of an objection to reservations provided for in article 20. The same representative agreed with the permissibility school that an objection to a reservation could be made only to a permissible reservation, if that meant a reservation that had met the requirements of article 19. He could not agree, however, with the view that there was a unilateral right to determine whether the article 19 requirements had been met, since a reservation that one State held to be plainly incompatible with the object and purpose of a treaty might not be viewed in the same way by another State.

152. Moreover, in the view of the same representative, it was clear from articles 76 and 77 of the Vienna Convention on the Law of Treaties that, in the absence of any express provision in the treaty or any developed practice, the depositary of a treaty did not have the competence to settle disputes as to whether the requirements of article 19 had been met. The depositary's function was to transmit the reservation to the other States parties without passing judgement on it. In the absence of mechanisms in treaties to resolve disputes between parties as to the validity of reservations, monitoring bodies such as the Human Rights Committee therefore saw the need to arrogate to themselves the right to pass judgement on reservations to treaties. For that reason, his delegation welcomed the identification by the Special Rapporteur of dispute settlement as one of the substantial issues arising out of the Commission's debate.

153. In the view of one representative, a comprehensive approach should be adopted to the issue of reservations and reservations should be accepted as valid only when they did not frustrate the purpose of the treaty to which they related. In that regard, opposability could be accepted only in the case of reservations that were not related to essential aspects of a treaty.

154. According to one representative, one omission from the Vienna Convention was a clear guide as to the consequences of a State's failure to comply with article 19 in formulating a reservation. It was not clear whether a State which made a reservation that was prohibited by article 19 was bound to accept a treaty without reservation, or how it would be determined that a reservation contravened article 19. The Commission's study of the "permissibility" and "opposability" schools would provide guidance on those questions.

2. Question of reservations and human rights treaties

155. Many representatives commented on the question of reservations and human rights treaties. Most speakers expressed the view that the Commission should not concern itself with reservations to human rights treaties. According to those speakers, human rights treaties were not different from other treaties and should therefore also be governed by the general principles of the law of treaties as well. While it would be preferable if reservations were not made to those treaties, such universality however called for scrupulous respect for the norms accepted by States with regard to reservations to treaties. If international bodies and institutions specializing in the matter failed to respect either those norms or the effects of reservations, they would, in the view of those representatives, be altering the consensual basis of the law of treaties as a whole, and would thus not be doing a favour to the cause of human rights. The result of such actions would be that States would be unwilling to participate in treaties that did not conform to generally accepted practice.

156. For that reason, some representatives expressed disapproval with the position adopted by the Human Rights Committee, which tended to limit the right of States to formulate reservations in order to protect interests that they considered essential. The consent of States to be bound by treaty provisions remained a basic principle. Therefore, the rules concerning reservations set forth in the Vienna Conventions of 1968, 1978 and 1986 could not be called into question, even if it sometimes seemed essential to complement or clarify them.

157. One representative, moreover, wondered whether the position adopted by the Human Rights Committee was not ultra vires the International Covenant on Civil and Political Rights. The Human Rights Committee had felt that it, rather than States parties to the International Covenant, should determine whether a specific reservation was compatible with the Covenant. It also maintained that an unacceptable reservation was severable in that the Covenant would be operative for the reserving party without the benefit of the reservation. He believed that the position adopted by the Committee could be ultra vires, since no provision of that instrument authorized the Committee to take such action. Competence to pass judgement on the acceptability of a reservation to the Covenant was, in his view, neither appropriate nor necessary for the Human Rights Committee in the performance of its functions. Nevertheless, while the Committee's approach was counter to the consensual regime set out in the Vienna Convention, it illustrated the need for mechanisms to resolve differences relating to reservations.

158. The same representative, although not opposed to the settlement of reservation disputes by a third party, even a human rights monitoring body, questioned the appropriateness of the settlement of disputes by a body which did not have that competence under the relevant treaty. While his delegation favoured a special system for reservations to human rights treaties, that system must however balance respect for the consensual basis of any treaty with the fundamental imperative of a human rights treaty. Although it might be difficult to settle reservation disputes exclusively on the basis of the Vienna Convention, the possibility of an initial attempt at a resolution on that basis, he said, should not be excluded. Moreover, the special circumstances of human rights treaties should not divert attention from the need to establish a system

of reservations that was compatible with the object and purpose of treaties in general.

159. With regard to the question of whether a single set of rules should be established or whether there was a need for separate regimes for different types of instruments, one representative stated that the issue should be considered with great care in the light of new realities. Human rights were fundamental, universal and inalienable and served to protect the individual. Consequently, the instruments relating to them could not be subject to reservations. Nevertheless, his delegation was not entirely convinced of the value of establishing separate regimes for human rights treaties.

160. Another representative stated that since the provisions on reservations established under the Vienna Convention on the Law of Treaties worked well, that system should not be abandoned in order to accommodate the recent positions adopted by some international human rights bodies with regard to human rights treaties. Those positions moved too far from the generally accepted norms of international law and could make it difficult for some States to accede to human rights instruments.

161. According to one representative, however, the Commission should devote special attention to reservations to human rights conventions. The need to fill in the gaps in the Vienna Convention regime with respect to those treaties was, in his view, particularly urgent.

3. Distinction between interpretative declarations and reservations

162. A number of representatives referred to the question of the distinction between interpretative declarations and reservations. Some representatives expressed the view that interpretative declarations were widely but wrongly used in modern times. Many such declarations, it was said, were in fact disguised reservations, since they excluded or modified the legal effect of certain provisions of a treaty in their application to the author State. According to those representatives, declarations which met the substantive criteria for reservations set forth in article 2, paragraph (d), of the Vienna Convention on the Law of Treaties must be subject to the same legal regime as reservations. The same representatives observed, however, that the result of such an approach might well be an increase in the number of reservations made to multilateral treaties or a decrease in the number of States becoming parties to such treaties.

163. As for the distinction between an interpretative declaration and a reservation, the view was expressed that an interpretative declaration differed from a reservation in that it had no legal effect on the other parties even if they raised no objection. If it was not accepted by the other parties, an interpretative declaration would not have any consequence on the interpretation of a treaty within the meaning of article 31 of the Vienna Convention on the Law of Treaties. If an interpretative declaration was accepted by one or more parties to the treaty, it might qualify under article 31, paragraph 2 (b), as an instrument which was part of the context for the purpose of treaty

interpretation. It was therefore considered that an interpretative declaration belonged more to the legal regime of treaty interpretation.

164. In view of the prevailing confusion concerning the distinction between interpretative declarations and reservations, several representatives felt that it was necessary to draw a clear distinction between interpretative declarations and reservations to treaties, since State practice had often blurred the distinction between the two by deliberately using interpretative declarations as reservations. According to the same representatives, the time had come to define the nature, limits and legal effect of both concepts clearly so that they could play a useful role as normative rules of general international law. The Commission needed to make a careful study of the validity and effect of interpretative declarations, international practice with regard to reservations and international jurisprudence in that area.

165. One representative considered that the main problem with respect to this issue was that a number of conventions prohibited reservations to all or some articles. Thus, some States made interpretative declarations regarding certain articles or treaties at the time of accession or ratification, some of which, in effect, amounted to reservations. In his view, the relationship between States expressing reservations and other States parties, including States parties expressing opposition to those reservations, and the legal effects of the convention as a whole on States expressing reservations needed to be clarified.

166. According to another representative, however, the distinction between reservations and interpretative declarations was an academic one since the Vienna Convention on the Law of Treaties provided an adequate definition of reservations, which were acceptable as long as they facilitated wider acceptance of treaties.

167. Yet another representative expressed the view that the practice of making interpretative declarations, considered by some to be hidden reservations, should be more closely linked to States' internal legislation rather than to their desire to establish a treaty relationship with other signatories on the basis of such declarations.

4. Reservations to bilateral treaties

168. One representative suggested that the International Law Commission's consideration of this topic should be limited to reservations formulated by States to multilateral treaties, since considering reservations to bilateral agreements would be equivalent to renegotiating those instruments.

5. Final form of the work

169. With regard to the final form of the Commission's work, given the number of possibilities that had been suggested by the Commission, namely, a convention that would reproduce the relevant provisions of the three Vienna Conventions with appropriate modifications; a draft protocol; a guide on the practice of States and international organizations; and model clauses from which inspiration could be drawn when negotiating a treaty, several representatives supported the Commission's suggestion to adopt a guide to practice in respect of reservations, which would take the form of draft articles with commentaries. In the view of those representatives, the preparation of model clauses for particular types of treaties would assist States and international organizations in the negotiation of new treaties and would help to harmonize international practice. If it later became apparent that a separate legal instrument would be viable, the guidelines could be transformed into a convention or protocols.

170. According to one representative, in view of the problem of reservations and the need to have a uniform regime, it would be preferable to draft a binding instrument.

171. Some representatives however were of the view that the decision with regard to the form which the results of the Commission's work would take should be left to a later stage.

6. Title of the topic

172. Several representatives supported the Special Rapporteur's suggestion to change the title of the topic from "The law and practice relating to reservations to treaties" to "Reservations to treaties".

7. Questionnaire

173. A number of representatives supported the Commission's proposal of preparing a questionnaire as a method of studying the problems arising in the practice and operation of reservations by national Governments and international organizations. They welcomed the Commission's decision to authorize the Special Rapporteur to prepare a questionnaire on the practice of States and international organizations in the field of reservations to treaties. The replies to the questionnaire would, in their view, be extremely useful in clarifying the problems encountered in that area and in identifying possible solutions.

8. General conclusion

174. Some representatives endorsed the conclusions drawn by the Special Rapporteur on the basis of the general debate in the Commission, which are contained in paragraph 491 of the Commission's report.

F. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

1. Current programme of work

175. The Commission's intention to give priority at its next session to the completion of the second reading of the draft Code of Crimes against the Peace and Security of Mankind and to the first reading of the draft articles on State responsibility and to continue its work on the topic of liability so that the first reading of the draft articles on activities that risked causing transboundary harm could be completed by 1996 did not give rise to any objection.

176. As regards the topic "The law and practice relating to reservations to treaties", one representative endorsed the timing proposed by the Commission while another questioned the wisdom of specifying a five-year period for completion of the Commission's consideration of the topic and/or deciding at such an early stage on the form which the outcome of the work would ultimately take, a decision which, in his opinion, should be left to the General Assembly.

177. As for the topic "State succession and its impact on the nationality of natural and legal persons", satisfaction was expressed at the establishment of a working group which, it was stated, should be reconvened to continue studying the topic at the forty-eighth session of the Commission.

2. Long-term programme of work

178. Some members doubted the wisdom of including new topics in the Commission's agenda at a time when the current members were reaching the last year of their term of office and before the first reading of the draft articles on State responsibility and the second reading of the draft Code of Crimes against the Peace and Security of Mankind had been completed. The view was expressed in this connection that the fewer the items on the agenda, the more conscientious and comprehensive a study could be made of each topic and that additional tasks would result in more time constraints and a reduction in quality, particularly as the forthcoming session would be one of intense work. A decision to include new topics should, it was stated, be postponed until after the next elections to the Commission had taken place.

179. Other representatives said they had no difficulty in endorsing the recommendation of the Commission to include "Diplomatic protection" as a new topic in the agenda and to prepare a feasibility study on a topic provisionally entitled "Rights and duties of States for the protection of the environment". Disagreement was expressed with the proposal to defer action on the recommendation until after the elections to the Commission. That recommendation, it was stated, came perhaps one year too late but should none the less be endorsed in order to improve the Commission's productivity in forthcoming years. One of the representatives in question added that his favourable reaction was without prejudice to the position he had previously taken on the need to clarify in an appropriate way the substantive contents of jus cogens.

180. Some representatives, while supporting the inclusion in the Commission's programme of work of the topic "Diplomatic protection" (one of them subject to a broadening of the title, which he viewed as too laconic), expressed reservations on the topic "Rights and duties of States for the protection of the environment" on the ground that international environmental law had not yet developed sufficiently to sustain the proposed study. Other representatives welcomed the proposed undertaking of a feasibility study on a topic concerning the law of the environment, pointing out that an integrated approach to preventing further deterioration of the global environment might be necessary. One representative in particular pointed out that the Commission's proposal on this point recognized the need for an integrated approach to prevent the continuing deterioration of the global environment. After noting that the study would encompass the following topics: general principles, substantive and procedural rules, measures for the implementation of obligations for the protection of the global environment, duties erga omnes, "global commons" and shared (or transboundary) resources, he pointed out that while over the previous decades the international community had followed a sectoral approach in regulating environmental situations through a series of international agreements, the feasibility study would depart from that traditional approach. He recommended that in the preparation of the study close cooperation should be established with international institutions concerned with environmental law in order to avoid duplication of work, and that advantage should be taken of the experience gained by the group of legal experts in environmental law of the World Commission on Environment and Development and the United Nations Conference on Environment and Development. In his view, the study would provide an overall picture of the state of international environmental law and would help to identify general principles which could then be further elaborated. Another representative observed that international environmental law had developed enormously, mainly through the conclusion of a great number of international agreements dealing with the conservation and protection of the oceans, seas, rivers, the atmosphere, the ozone layer, climate, biological diversity and the cultural and natural heritages, or with the relationship between the protection of the environment and other matters such as trade, development and armed conflict. He further observed that other issues such as the liability for harm caused to the environment had become the subject of agreements and negotiations and that the Commission itself had dealt with and continued to deal with the codification and progressive development of certain aspects of the law of the environment. He referred in that regard to the concept of State crime in article 19 of Part One of the draft articles on State responsibility as well as to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. After stressing that environment agreements had mostly been concluded on a sectoral basis, many of them on a regional or subregional basis, even though more recent conventions (on the ozone layer, desertification, climate or biodiversity) tended to be of a global nature, he stated that the time had come to scrutinize the fragmentary corpus of international environmental law and to develop common concepts and general principles which would provide the foundation for the future development of international environmental law, focusing not only on the substantive rules of environmental law but also on the law on cooperation, the settlement of disputes and liability. He expressed support for the development by the Commission of a set of draft articles laying down common concepts and general principles of international environmental law, provided that that task was

achieved within a reasonable period of time, and advocated an integral approach addressing the environment as a whole, namely not only shared natural resources or the global commons, but also the environment within the territory of a State.

3. Methods of work

181. Some representatives felt that existing procedures for the codification and progressive development of international law needed to be reconsidered. Mention was made in this context of the radical changes in international relations which had shifted the focus of the codification effort from reciprocal relations between States to the rights and duties of States vis-à-vis the international community as a whole or to the position of individuals under international law in specific areas. It was also stated that new challenges had emerged which necessitated a quick and effective response to legal emergencies. Concern was expressed that the Commission was still using procedures developed many years before and that, as a result, a certain stagnation had crept into the classical codification process.

182. According to another view, the logic of the arguments reflected above was clear but not entirely without flaws. The remark was made in particular that the changes which had occurred in international relations were not necessarily radical. Attention was also drawn to the need to pay due regard to the current situation in the area of codification and to bear in mind that the Commission was not the only body that participated in the standard-setting work of the United Nations, nor the only one affected by the current impasse in that task. The crisis in the area of codification and progressive development of international law was viewed as the result of many factors, including the exhaustion of the established topics for codification, and therefore not exclusively attributable to the Commission's methods of work. It was also recalled that the Commission had demonstrated that it was capable of applying innovative methods of work, as shown by its increasingly frequent use of working groups and its capacity for innovation in terms of the forms which the final results of its work could take.

183. Some delegations commented on the form which the end product of the Commission's work should take. According to one body of opinion, the classical codification procedure of elaborating draft articles as a basis for the adoption of binding instruments of international law had of late proved rather inflexible and should be reconsidered. The remark was made in this context that multilateral conventions were an appropriate format only when a high level of acceptance was anticipated and that limiting their scope to provisions based on well-established customary law and practice might have the drawback of limiting their comprehensiveness and leaving lacunae in areas where there were conflicting views on the applicability of customary law and practice. One solution, it was stated, would be to allow for the posting of reservations to provisions specifically identified as resulting from compromises and not based on universally accepted State practice and customary law. Mention was further made of the alternative of "soft codification", namely General Assembly resolutions, declarations of a universal character and "restatements" of customary law and existing practice which could have a harmonizing effect on the

behaviour of States while avoiding the laborious procedures involved in transforming them into legally binding instruments under the law of treaties.

184. According to another body of opinion, it was doubtful whether international law should move in some of the directions indicated. The view that multilateral conventions should be replaced as the primary instruments of codification by alternative instruments of "soft codification" such as General Assembly resolutions, declarations or restatements of customary law was considered questionable. The remark was made in this connection that "soft law" was a contradiction in terms: what characterized law was the constraining nature of its norms - the fact that they gave rise to "hard" obligations. Other possibilities which had been suggested, such as making wider use of reservations and "opting-out" procedures, also gave rise to doubts on the ground that they would weaken international law. If anything, it was stated, international law needed to be strengthened in order to meet the needs of the international community, and additional protocols, soft codification and restatements, while they might be useful in regulating international relations, could neither play the role of multilateral conventions nor adequately satisfy the demands of public international law.

185. Other issues related to the methods of work which were identified included the following: schedule and structure of meetings; use of outside resources; interaction with States and their competent authorities; financing of, and support for, special rapporteurs. It was also suggested that consideration should be given to the possibility of holding two or more sessions of the Commission per year, which would permit more focused concentration on the topics on the agenda, provided, however, that the Special Rapporteurs presented their reports regularly at the very beginning of each session. The remark was made in this context that, in view of the crucial importance of those reports, due attention should be given to financing research programmes at prominent academic institutions and enlisting the services of competent non-governmental organizations, in order to meet the needs of the Rapporteurs. The Commission was furthermore encouraged to show restraint in its commentaries to draft articles, bearing in mind that the resources and time of Governments were limited, and to adopt a flexible and realistic approach to article 20 of its statute, along the lines of paragraphs 511 and 512 of the report.

186. Some representatives took the view that some of the above suggestions for reform were inspired by legitimate concerns, bearing in mind that the Sixth Committee did not always issue clear guidelines to the Commission when requesting it to prepare draft articles on specific topics. The view was expressed in this context that the dialogue between the two bodies as well as between the Commission and Member States should be strengthened. One representative in particular remarked that cooperation with States and their legal advisers could be crucial in expediting speedy acceptance of the final draft of an instrument and that new means for such cooperation should be explored. After pointing out that the dissemination of questionnaires was too cumbersome and that more informal and flexible forms of dialogue with States should be employed, and after suggesting that the routine consideration of the Commission’s reports by the General Assembly should be re-examined and new methods identified for providing the Commission at an earlier stage with a more comprehensive overview of the positions of States, he advocated encouraging

delegations to state their countries' positions on given projects in a detailed and comprehensive fashion inasmuch as their comments, if sufficiently precise in legal terms, would help guide the Commission in dealing with the key issues of a given draft. He added that the General Assembly might choose to intervene more boldly in the organization of the Commission's work, identifying priorities among its topics and even removing items from its agenda as the need arose.

187. Other representatives took the view that the task of the Sixth Committee was not to involve itself in the details of the work of the Commission or make drafting recommendations to it but to make general observations and provide evaluations on matters of legal policy, thus offering the Commission political direction and guidance. In this context concern was expressed that the Sixth Committee's consideration of the Commission's report should consist almost entirely of prepared statements at the expense of genuine, less informal, debate which could offer real guidance to the Commission. With reference to the suggestion that the General Assembly might choose to intervene in the organization of work of the Commission in a bolder fashion than before, doubts were expressed on the wisdom of depriving the Commission of the prerogative of conducting its own affairs. In any event, it was stated, nothing should be done without consultations with the Commission.

188. On the method to be followed in conducting the suggested review of the Commission's procedures, one representative proposed that the General Assembly at its fifty-first session should decide to establish an open-ended sessional ad hoc working group of the Sixth Committee with the broad mandate to review the codification process in the United Nations system and that States should be invited to offer comments on that issue in time for consideration by the ad hoc working group in 1996. Another representative, while recognizing that the above concerns merited consideration, pointed out that a working group with a broad mandate to review the codification process in the United Nations system would, to the extent it considered conceptual issues, engage in an academic exercise of limited value and, to the extent it addressed procedural issues, face an impossible task as the methods of work of the Commission could hardly be improved from the outside. He suggested that if a working group were to be established, its mandate should be defined more clearly and that the Commission should be asked to provide, in its next report, a concise description of the procedures it currently followed and an assessment of the extent to which alternative procedures might make its work more effective. He added that if such an assessment were not completed in 1996, it might be necessary to wait until the new members of the Commission had become fully familiar with existing procedures and were in a position to evaluate any proposed changes. In the long run, he concluded, it might be useful to consider the possibility of revising the statute of the Commission, which was almost 50 years old.

4. International Law Seminar

189. Satisfaction was expressed at the successful holding of the International Law Seminar, the value and utility of which was now established beyond any doubt.

5. Relationship with other bodies

190. It was noted that the Commission had continued its fruitful cooperation with regional bodies, which played an important role in developing rules of international law in the regional context, and the remark was made that groups such as the Movement of Non-Aligned Countries and the Commonwealth could help in a broader context to develop rules of international law on appropriate topics. Reference was made in this connection to the United Nations Decade of International Law. Mention was also made of the convening of a peace conference at The Hague in 1999.
