United Nations A/CN.4/483

General Assembly

Distr.: General
20 January 1998

Original: English

International Law Commission
Fiftieth session
20 April-12 June 1998

Report of the International Law Commission on the work of its forty-ninth session (1997)

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

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98-00287 (E) 030298

Introduction

1. At its fifty-second session, the General Assembly, on the recommendation of the General Committee, decided at its 4th plenary meeting, on 19 September 1997, to include in the agenda of the session the item entitled "Report of the International Law Commission on the work of its forty-ninth session"[1] and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 16th to 25th, and 32nd meetings on 27, 30 and 31 October, from 3 to 7 and 19 November 1997. The Chairman of the International Law Commission at its forty-ninth session, Mr. Alain Pellet, introduced the report of the Commission: chapters I to III and part of chapter X at the 16th meeting, on 27 October; chapter IV at the 18th meeting, on 30 October; chapter V at the 20th meeting, on 3 November; and chapters VI to X at the 22nd meeting, on 5 November. At its 32nd meeting, on 19 November 1997, the Sixth Committee adopted draft resolution A/C.6/52/L.15 and Corr.1, entitled "Report of the International Law Commission on the work of its forty-ninth session". The draft resolution was adopted by the General Assembly at its 72nd meeting, on 15 December 1997, as resolution 52/156.

3. By paragraph 17 of resolution 52/156, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the Commission's report at the fifty-second session of the Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of seven sections: A. Nationality in relation to the succession of States; B. Reservations to treaties; C. State responsibility; D. International liability for injurious consequences arising out of acts not prohibited by international law; E. Diplomatic protection; F. Unilateral acts of States; and G. General conclusions and recommendations.

[1] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10).

Topical summary

A. Nationality in relation to the succession of States

1. General observations

5. Delegations generally welcomed the speedy adoption on first reading of the draft articles on nationality of natural persons in relation to the succession of States, which were considered a timely contribution to the development of international norms in a notoriously difficult area. Tribute was paid in this regard to the Special Rapporteur's clear and effective treatment of the subject.

6. The structure of the draft articles elicited favourable comments. It was, however, observed that, if article 19 were interpreted *a contrario*, then Part I of the draft would consist of peremptory provisions; there was thus the suggestion to review all the articles in Part I of the draft to determine whether they all actually fell into that category.

7. The human rights approach adopted by the Commission received widespread support. It was further felt that the Commission had struck an appropriate balance between the rights and interests of both individuals and States, taking also into consideration the interests of the international community. Nevertheless, it was observed that care should be taken to ensure that the draft articles did not impose more stringent standards on States involved in a succession. There was also a view that the Commission should not, as regards the rights of individuals, go beyond its mandate on the topic.

2. Comments on specific articles

Part I. General provisions

Article 1. Right to a nationality

8. The Commission was commended for going beyond the traditional approach to the right to a nationality as constituting mainly a positive formulation of the duty to avoid statelessness and not a right to any particular nationality, and having given such right a precise scope and applicability building on the fact that, in cases of State succession, the States concerned were easily identified. The point was made that it was justifiable to consider the right to a nationality a human right as nationality was often a prerequisite for exercising other rights, in particular the right to participate in the political and public life of a State.

9. A number of delegations expressed satisfaction with the Commission's neutral approach to the issue of multiple nationality. But some believed that the draft articles should elaborate further on this question, as did the European Convention on Nationality. There was also the view that multiple nationality raised a number of difficulties and should therefore be discouraged.

Article 2. Use of terms

10. It was suggested to define the expression "succession of States" as "the replacement of one State by another in the responsibility for the administration of the territory and its population", as the draft articles involved, to a much greater extent than the two Vienna Conventions on the Succession of States on which the current definition was based, the internal legal bond between a State and individuals in its territory rather than the international relations of the State. The view was also expressed that it was necessary to define the parameters of the concept of habitual residence.

Article 3. Prevention of statelessness

11. The importance of this provision was highlighted by several delegations. The point was made that, while it was certainly necessary to prevent statelessness, the conferral of nationality should remain the sole prerogative of the State concerned.

Article 4. Presumption of nationality

12. Some delegations endorsed the presumption in article 4. It was stated that the provision constituted a useful savings clause and an innovative solution to the problem of statelessness that could arise as a result of a succession of States.

13. The point was made that the presumption in article 4 could be rebutted not only by other provisions of the draft articles, but also by the terms of specific agreements between States concerned.

14. It was observed that the qualified presumption of nationality on the basis of habitual residence was a further application of the principle of the need for a genuine link between the State and the individual with respect to nationality. However, there was also the view that a presumption of nationality should not be based on the sole criterion of habitual residence, but rather on the well-established principles of *jus soli* and *jus sanguinis*. It was argued, in this connection, that mere residence in a State was not sufficient evidence of a genuine link with that State and did not necessarily entail loyalty, which was considered crucial.

15. Certain delegations questioned the wisdom of including article 4, pointing out that the provision had no general application: in the case of unification of States, it was superseded by the provision in article 21 that *all* persons concerned acquired the nationality of the successor State; in the case of transfer of part of a territory, which required by definition an agreement between the States concerned, such agreement would obviously contain provisions on the nationality of persons having their habitual residence in the transferred territory, which may not necessarily be consistent with the presumption in article 4; and in the case of dissolution of a federal State or separation of one of its units, there was no reason to disregard the criterion of the citizenship of such a unit, recognized under the federal constitution, in favour of that of habitual residence, which was not helpful in clarifying the situation of persons living in a third State.

Article 5. Legislation concerning nationality and other connected issues

16. No comments were made by members of the committee with regard to article 5.

Article 6. Effective date

17. The view was expressed that the retroactive effect of attribution of nationality should be limited to those cases where persons concerned would otherwise be rendered temporarily stateless, as was the case with the retroactive effect of acquisition of nationality following the exercise of an option.

Article 7. Attribution of nationality to persons concerned having their habitual residence in another State

18. Article 7 was considered useful as it clearly indicated that States had certain prerogatives as regards the attribution of their nationality in relation to State succession. While some delegations endorsed the principle in paragraph 2, others expressed reservations on the grounds that it was inconsistent with the provision in article 10, paragraph 2, and that States could thus abuse the occurrence of succession to extend their jurisdiction into the territory of other States by attributing their nationality to persons concerned residing in the territory of such other States.

Article 8. Renunciation of the nationality of another State as a condition for attribution of nationality

and Article 9. Loss of nationality upon the voluntary acquisition of the nationality of another State

19. While some considered these articles to be of practical significance since they enunciated clearly the relevant rights and obligations of States concerned, others felt that they dealt with issues not directly connected to a succession of States which were better left to national legislation, as partly recognized by the use of non-mandatory language.

Article 10. Respect for the will of persons concerned

20. Several delegations underscored the importance of article 10. The point was made that the right of option was a powerful instrument for avoiding grey areas of competing jurisdictions. It was felt, nonetheless, that the wording should make clear that article 10 only applied to rare cases.

21. It was remarked that this provision reflected a fairly well-established practice. However, there was also the view that, in the past, the right of option had usually been granted to a particular group of persons on the basis of an international agreement and entailed a choice *between* nationalities, while article 10 reflected the more recent practice of a choice to acquire the nationality of a State under its internal legislation, a phenomenon more adequately reflected by the phrase "free choice of nationality".

22. Support was expressed for the provision in paragraph 2. It was felt, however, that the terms "appropriate connection" needed further clarification. Moreover, several delegations expressed preference for the use, instead, of the well-established phrases "genuine link" or "effective link", which were considered more objective standards.

23. There was a view that paragraph 3 was superfluous and should be deleted.

24. It was felt that paragraph 5 required further clarification.

Article 11. Unity of a family

25. This provision was endorsed by several delegations. It was observed that the article should not be interpreted as meaning that all members of a family remaining together had to have the same nationality, since that would contravene the principle of respect for the will of persons concerned; but a State could consider the unity of a family as a factor for granting nationality to certain family members under more favourable terms.

26. Other delegations were of the view that the article raised a broader issue which was outside the scope of the topic.

Article 12. Child born after the succession of States

27. Support was expressed for the provision in article 12. It was observed that the granting of the nationality of the State concerned on whose territory a child was born under this article covered both options envisaged in the 1961 Convention on the Reduction of Statelessness, i.e. granting of nationality at birth by operation of law and granting of nationality upon application to the appropriate authority in the manner prescribed by national law.

28. It was suggested that the article should be adjusted so as to ensure that a child whose parents subsequently acquired, upon option, a nationality other than that of the State in which he or she had been born would be entitled to the parents' nationality. Attention was also drawn specifically to the case where the parents subsequently acquired the nationality of a State which applied the principle of *jus sanguinis*.

29. However, the article also gave rise to reservations. It was felt that a child born after a succession of States was entitled by extension to the nationality of his or her parents under the presumption in article 4, and that where such presumption was not applicable, the matter would be resolved in accordance with the general obligation of the State in which the child had been born to prevent statelessness in accordance with article 3. Moreover, the possible effect that parents subsequently acquired a nationality different from that of their child was considered undesirable. A view was also expressed that the article should be deleted as it addressed a nationality issue not directly related to a succession of States.

Article 13. Status of habitual residents

30. Several delegations endorsed this provision. It was observed that, while a change of nationality of persons habitually resident in a third State would not affect their status as permanent residents, it might affect their rights and duties. The Commission was encouraged to reconsider the issue of the right of habitual residents of the territory over which sovereignty was transferred to remain in the successor State even if they had not acquired its nationality, which it had decided to leave aside.

31. There was also the view, however, that the article addressed questions which were not directly related to the

Commission's mandate, however desirable it might be to limit massive forced population transfers as much as possible. It was felt that the Commission should rather have recalled the principle that State succession does not as such affect the acquired rights of natural and juridical persons.

Article 14. Non-discrimination

32. The view was expressed that the article was of the utmost importance. Support was expressed for the Commission's approach not to include an illustrative list of criteria on the basis of which discrimination was prohibited. There was also the view, however, that such a formulation was too broad, as it might, for example, prohibit any distinction, where the nationality of a successor State was being acquired, between individuals residing in the territory of that State and other persons. It was therefore found preferable to spell out the grounds on which discrimination was prohibited, and the following were suggested for inclusion in such a list: race, colour, descent, national or ethnic origin, religion, political opinion, sex, social origin, language or property status.

33. It was further observed that a clear distinction should be made between a situation in which a particular requirement, such as that of a clean criminal record, would prevent a person concerned from acquiring the nationality of at least one of the successor States and would constitute discrimination prohibited by article 14, and a situation in which such requirement constituted a condition for naturalization, which was outside the scope of the draft articles.

34. The view was expressed that the article should also prohibit discriminatory treatment of its nationals by a successor State depending on whether they already had its nationality prior to the succession of States or had acquired it as a result of such succession.

35. As regards the question whether a State concerned might use certain criteria for enlarging the circle of individuals entitled to acquire its nationality, which was not addressed in article 14, the view was expressed that in such case the will of the individual must be respected.

36. There was also the view that the article addressed a broader issue which was outside the scope of the topic.

Article 15. Prohibition of arbitrary decisions concerning nationality issues

37. Some delegations drew particular attention to the importance of the article.

Article 16. Procedures relating to nationality issues

38. It was observed that the article was of great practical relevance. The suggestion was made to include, among the procedural guarantees, "reasonable fees", as did the European Convention on Nationality, as well as the provision of reasons for any decision in writing. Attention was also drawn to the formulation in paragraph 3 of the Venice Declaration on the consequences of State succession for the nationality of natural persons, reading: "Any deprivation, withdrawal or refusal to confer nationality shall be subject to an effective remedy."

Article 17. Exchange of information, consultation and negotiation

39. The obligations set out in article 17 were considered necessary to ensure the effectiveness of the right to a nationality. It was suggested that a sentence should be added to the article stating explicitly that the States concerned were also obligated to ensure that the outcome of such negotiations was in accordance with the principles and rules contained in the draft articles.

40. The view was expressed that agreement was not an indispensable means of solving nationality problems and that legislative measures adopted by a State concerned with full knowledge of the content of the legislation of other States concerned might be sufficient to prevent detrimental effects on nationality arising from a succession of States.

Article 18. Other States

41. Support was expressed for the provision in paragraph 1. It was suggested that the phrase "effective link" should be replaced either by "genuine link" used in article 5, paragraph 1, of the 1958 Geneva Convention on the High Seas and article 91, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea, or by "genuine and effective link", which covered both terms used by the International Court of Justice in the *Nottebohm* case and was contained in article 18, paragraph 2 (a), of the European Convention on Nationality.

42. Support was also expressed for the provision in paragraph 2 and it was observed that it constituted a remedy for the violation of the right to a nationality. It was suggested that the actual text of the paragraph should provide a

clarification of the following points made in the commentary: that this provision gave third States the right to treat stateless persons as nationals of a given State, even where statelessness could not be attributed to an act of the State but where the persons concerned had by their negligence contributed to the situation; and that it was intended to redress situations resulting from discriminatory legislation or arbitrary decisions, which were prohibited by articles 14 and 15, by extending to persons referred to in that paragraph the favourable treatment granted to nationals of the State in question and protecting them from possible deportation.

43. The view was also expressed that article 18 gave third States control over matters which were within the exclusive competence of States concerned.

Part II. Provisions relating to specific categories of succession of States

44. As regards the typology of successions used by the Commission, some delegations supported the decision to omit the category of "newly independent States" used in the 1983 Vienna Convention on the Succession of States, while noting that one of the four categories of State succession in Part II would be applicable in any remaining case of decolonization in the future. Moreover, it was felt that the Commission had rightly preserved the distinction between secession and dissolution of a State while ensuring that the provisions in both sections were similar. Other delegations, however, felt that "newly independent States" should have been included as a specific category of State succession, arguing, in particular, that the process of decolonization had not yet been completed. It was stated that, at the very least, the Commission's understanding that one of the four sections in Part II would be applicable, *mutatis mutandis*, to such situations should be mentioned in the draft. Attention was also drawn to the problem that might arise when States disagreed as to the characterization of a particular case of succession.

Article 19. Application of Part II

45. It was suggested that the phrase "in specific situations" should be replaced by "as appropriate". The view was also expressed that the article would be better placed at the end of Part I.

Section 1. Transfer of part of the territory

Article 20. Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

46. It was observed that, as far as the attribution of nationality was concerned, the rule in article 20 was indeed a reflection of international law. However, the view was expressed that granting a right of option to all persons resident in the transferred territory would impose a heavy burden on the predecessor State and, moreover, could have the undesirable effect of creating in the transferred territory a large population having the nationality of the predecessor State; it was therefore suggested that the right of option to be granted by the predecessor State should be limited to persons who had retained links with the predecessor State. It was felt, furthermore, that for the sake of symmetry the successor State should also be required to offer a right of option to nationals of the predecessor State who did not reside in the transferred territory, including those residing in a third State, if they had links with that territory.

Section 2. Unification of States

Article 21. Attribution of the nationality of the successor State

47. It was remarked that article 21 embodied a mandatory rule under international law.

Section 3. Dissolution of a State

Article 22. Attribution of the nationality of the successor State

48. Support was expressed in particular for paragraph (b) of the article. A proposal was made to merge the situations envisaged in subparagraphs (b) (i) and (b) (ii).

49. The view was also expressed that article 22 gave too much prominence to the criterion of habitual residence in disregard of recent practice in Central and Eastern Europe where the primary criterion used was that of the nationality of the former units of federal States. The view was further expressed that, while paragraph (a) reflected an obligation derived from international law, the rule in paragraph (b) had its source in domestic law and was discretionary in nature; it was therefore applicable only with the consent of the persons concerned.

Article 23. Granting of the right of option by the successor States

50. The view was expressed that paragraph 2 was too broad and therefore inconsistent with the provision in article 10, paragraph 2, which limited the categories of persons to whom a successor State had the obligation to grant the right to opt for its nationality.

Section 4. Separation of part or parts of the territory

Article 24. Attribution of the nationality of the successor State

51. Paragraph (b) elicited some favourable comments. The view was expressed that, unlike paragraph (a), which reflected an obligation derived from international law, the rule in paragraph (b) had its source in domestic law and was discretionary in nature. The suggestion was made to merge the situations envisaged in subparagraphs (b) (i) and (b) (ii).

Article 25. Withdrawal of the nationality of the predecessor State

52. Reservations were expressed with respect to the issue of withdrawal of nationality as addressed in this article. Attention was drawn in this respect to the European Convention on Nationality.

Article 26. Granting of the right of option by the predecessor and the successor States

53. The point was made that reliance on the criterion of habitual residence would be appropriate in most cases, but there could exist a group of persons who, while retaining habitual residence in the successor State, had other important links with the predecessor State, and vice versa; such situations might not be adequately addressed by granting a right of option. The view was expressed that the article was too broad as it required the predecessor State to grant a right of option even to that part of its population which had not been affected by the succession.

Article 27. Cases of succession of States covered by the present draft articles

54. Support was expressed for a provision explicitly limiting the scope of application of the draft articles to successions of States occurring in conformity with international law, although a question was raised as to whether there could be a succession of States that would not meet such a qualification.

55. There were, however, a number of reservations as regards the inclusion of the phrase "without prejudice to the right to a nationality of persons concerned". It was pointed out that the Fourth Geneva Convention of 1949 prohibited any modification of the legal situation of persons and territories under occupation and therefore persons concerned should maintain the nationality they had before annexation or illegal occupation; the imposition by an aggressor State of its nationality on the population of a territory it had illegally occupied or annexed was unacceptable.

56. A view was also expressed that the article was unnecessary in a draft dealing with certain human rights issues, as such rights should be protected regardless of whether or not a succession of States had occurred in conformity with international law.

3. Eventual form of the instrument

57. With respect to the final form to be given to the draft articles, most delegations favoured a declaration, which, it was argued: (a) would provide a more rapid, yet authoritative, response to the need for clear guidelines on the subject, without precluding the subsequent elaboration of a convention; (b) could address a broader spectrum of issues than a convention establishing strict obligations for States; and (c) if adopted by consensus, might have greater authority than a convention ratified by a small number of States. It was further observed that, should the draft take the form of a treaty, States concerned that were party to it prior to the succession would be bound by the text as a whole, while new States that emerged from the succession would be bound only by provisions reflecting customary rules, hence those contained in Part I of the draft articles, and, as a consequence, different rules would apply to the different actors involved in the same case of succession.

58. Some delegations, however, expressed preference for the elaboration of a convention, which was the form taken by previous work of the Commission on the topic of State succession. Other options mentioned included a set of guidelines for national legislation or model rules.

59. A view was expressed that the draft articles should cover only those questions of nationality directly connected to a succession of States and that a title such as "Effects of the succession of States on the nationality of natural persons" or "Succession of States and nationality of natural persons" would consequently be preferable.

4. Nationality of legal persons

60. Some delegations underscored the importance of the Commission's future work on this aspect of the topic of nationality in relation to the succession of States. It was observed, in particular, that the nationality of legal persons might also have consequences for individuals' property rights.

B. Reservations to treaties

1. General observations

61. A number of delegations stressed that the topic constituted one of the fundamental aspects of international law. They agreed that the Vienna regime of reservations, representing a flexible balance between the goals of universality and integrity of treaties, functioned satisfactorily despite certain ambiguities and uncertainties which still had to be clarified. Therefore it should be preserved, as the rules which it contained could be regarded as having acquired a customary value. Moreover, the rules generally applicable to reservations were sufficiently flexible and adaptable to be applied with equal authority in the case of human rights and other normative treaties and should not be revised. A view was expressed that reservations to treaties were a useful means of obtaining the accession of hesitant States and were preferable to complete indifference to a treaty.

62. According to another view, it was debatable whether the Vienna regime had functioned adequately. That regime was unable to safeguard normative instruments and inadequate for human rights treaties and therefore the Commission should carry out a detailed study in order to review and improve it.

63. It was also observed that the Vienna regime did not provide a mechanism for assessing the incompatibility of a reservation with the object or purpose of a treaty, nor did it indicate what body was competent to make such an assessment.

2. Preliminary Conclusions on reservations to normative multilateral treaties including human rights treaties

(a) Applicability of the Vienna regime to human rights treaties

64. Several delegations welcomed the Preliminary Conclusions, which integrated the general components of the law of treaties while respecting the particular considerations applying to special treaty mechanisms. They sought to balance the preponderance of State consent in the reservations regime and the efficient functioning of monitoring bodies. It was pointed out that they were appropriately called "preliminary" since the question was debated in other forums, whose opinions should be taken into account by the Commission. Since the work was far from finished, they would still be re-examined, amended and refined, as necessary.

65. Many delegations considered that the first three Preliminary Conclusions were unquestionable: the criterion of object and purpose was paramount for determining the admissibility of reservations and the Vienna regime on reservations, thanks to its flexibility and adaptability, applied to all multilateral or normative treaties including human rights treaties. It was noted that the notion "normative treaty" should be further defined since a treaty could contain both normative and synallagmatic provisions. They also supported the reaffirmation by the Commission of the consensual basis of this regime as well as its residual nature. Exceptions could only be made through agreements in regional conventions or according to special provisions (article 20 (2) and (3)) of the Vienna Convention. It was pointed out that those principles had already been cited in the advisory opinion of the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, a quintessential human rights treaty, and there was no need to amend the Vienna regime.

66. If States agreed on the need to prohibit reservations, they could specify such a prohibition in their treaty; it was unnecessary to establish a particular reservations regime for a particular category of treaties.

67. Moreover, if an exception was made for human rights treaties, other categories of normative treaties would also constitute separate regimes. According to another view, however, the Commission should not hesitate to derogate from the unity rule if certain types of multilateral treaties genuinely required special treatment.

68. Other delegations considered the Preliminary Conclusions premature at the current stage before the study of the notion of object of purpose of the treaty or the preparation and consideration of the reports regarding the definition, formulation, acceptance and withdrawal of reservations and objections thereto as well as the effects of reservations and of objections to reservations.

69. According to one view, the Preliminary Conclusions should have dealt only with the question of the unity or diversity of the regime of reservations to treaties. It was also observed that articles 18, 19 and 20 of the Vienna Convention should be reconsidered particularly in view of the fact that most treaties did not have a well-defined object and purpose. It was also pointed out that the lack of clear and precise criteria for determining the object and purpose of the treaty was one of the weaknesses of the Vienna regime. The often inadmissible reservations made to human rights treaties were sufficient proof that this regime favoured universality at the expense of integrity. According to another view, human rights treaties were not based on reciprocity and therefore should not fall within the scope of the Convention's application. Reservations to human rights treaties should only be

temporary, thus allowing the reserving State to take the necessary steps to satisfy its treaty obligations. Moreover, it was observed that it was a misconception to think that the possibility of making reservations would lead to a higher number of ratifications and consequently it might be useful if the Special Rapporteur could check this assumption by comparing quantitative information about ratifications and reservations.

70. A view was expressed that Preliminary Conclusion 3 was superfluous since the issue was not whether the existing regime applied to all treaties but whether it safeguarded the values embodied in normative instruments. Accordingly, human rights instruments should not be singled out since similar problems, not adequately addressed by the existing law of treaties, arose with respect to conventions dealing with international humanitarian law, private international law or environmental law.

(b) Role of monitoring bodies in respect of reservations

71. As regards the role of treaty monitoring bodies with respect to reservations, two different principal positions were expressed. According to the first position, several delegations shared the views expressed in Preliminary Conclusions 4, 5 and 6 on the role of monitoring bodies and agreed that those bodies, whose development was relatively recent and subsequent to the Vienna Conventions, could and should assess the admissibility of reservations when necessary for the exercise of their functions without excluding the traditional modalities of control of contracting parties. In particular, Preliminary Conclusion 5 represented a reasonable compromise between the powers of the monitoring bodies and the sovereign will of States. According to another view this assessment should be subject to the approval of States parties.

72. It was pointed out that such monitoring bodies had the power only to express views or make recommendations on the admissibility of a reservation and could not make binding decisions unless the relevant treaty gave them that power. However, they should not exceed the powers the States parties to the treaty had recognized or conferred upon them. The view was expressed that the basic cause of the problem was the number of reservations to human rights treaties whose scope was unclear or which were contrary to the object and purpose of those treaties and the failure of States parties to object to such reservations.

73. It was suggested that even if the power to make an assessment of the admissibility of reservations was not explicitly expressed in the provisions of the treaty, it should be deduced from the mandate of the body in accordance with the doctrine of implied powers. It was felt that a monitoring body could oversee the implementation of the treaty only if it knew the exact scope of the application undertaken by the party. In this respect, it was further pointed out that the competence conferred upon monitoring bodies as suggested in conclusion 7 went beyond that derived from the treaties according to conclusion 5. However, it was suggested that the matter of extending the competence of certain monitoring bodies should be discussed further.

74. It was also observed that, in view of the proliferation of reservations incompatible with the object and purpose of the treaty, conclusions 4 and 6 struck a satisfactory balance between the competences conferred upon the monitoring bodies, the contracting parties and the dispute settlement bodies.

75. Several delegations welcomed the recommendation contained in Preliminary Conclusion 7 that States parties to human rights instruments should provide specific clauses or elaborate protocols to existing human rights treaties if they wished to confer competence upon a monitoring body to determine the admissibility of a reservation, whereas other delegations did not support this idea, arguing that it would complicate matters and increase the existing confusion in the current regime.

76. A number of delegations noted with satisfaction Preliminary Conclusion 8 regarding the powers of such bodies and supported the Commission's recommendations addressed to States parties and to States negotiating future treaties.

77. The second position was expressed by other delegations which thought that it was for States parties alone to decide on the admissibility of reservations and to determine the consequences of the incompatibility of the reservation with the object and purpose of the treaty. The issue of monitoring bodies was relatively new and posed particular problems. Their purpose was not to examine the validity of reservations and they had no competences other than those entrusted to them by the States parties. Consequently, they viewed with some concern Preliminary Conclusion 5. Monitoring bodies were composed of experts in their personal capacity and their functions should be purely advisory. Under no circumstances should such bodies assume quasi-legislative powers, take binding decisions or rule on the admissibility of reservations. Such recommendations could come into play eventually only if States failed to exercise their prerogative on reservations.

78. The monitoring bodies which were not limited to human rights treaties could not oppose or counteract the essence of the commitments made by a State party in expressing its consent to be bound by a treaty. The paramountcy of the will of States parties and the consensual nature of treaties were

reflected in customary international law. Only the reserving State was in a position to interpret and explain the nature of its reservation and its compatibility with the treaty. Therefore where treaties were silent the monitoring bodies should not be involved in the formulation of commentaries, opinions or recommendations on the admissibility of reservations or on the nature and the scope of a State's obligations in the absence of any express agreement. The theory of implied powers could not be applied to this context. At the most, they could bring reservations to the attention of the other States parties. In the event of a dispute, it was for the competent legal bodies to assess and decide on the admissibility of a reservation.

79. In future it was crucial that responsibilities of such bodies with respect to reservations should be well specified. It was suggested that the General Assembly should adopt a resolution to that effect. It was observed that Preliminary Conclusion 7 seemed to reflect this view, given its suggestion that protocols should be elaborated to existing treaties if States sought to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation.

80. According to another view, although human rights treaty monitoring bodies were entitled to formulate comments or recommendations regarding reservations, they nevertheless did not have the power to set aside a reservation or make legal determinations regarding the validity of a reservation.

81. It was also observed that monitoring bodies which could make only recommendations should consult with the reserving State. If they commented on a reservation and the parties failed to object, their decision would be taken as valid and would be considered to be competent in the matter in question.

82. According to still another view a collegiate decision mechanism should be established similar to the solution envisaged in article 20 of the International Convention on the Elimination of All Forms of Racial Discrimination to conduct the compatibility test of reservations guided by the "object and purpose" concept as a criterion for admissibility. The determination of the legal effect of reservations would continue to be left exclusively to the will of States.

83. Some delegations welcomed the invitation by the Commission to monitoring bodies of human rights treaties to submit their comments or reservations to those treaties.

(c) Results of the findings of monitoring bodies with regard to the inadmissibility of reservations

84. Several delegations agreed with the Commission's Preliminary Conclusion 10 that the rejection of a reservation as inadmissible conferred some responsibility on the reserving State to respond or to take action. Given the consensual nature of treaties, reservations were inseparable from the consent of the State to be bound by a treaty. The view was expressed that there should be scope for further exchanges between objecting and reserving States with a view to eliminating the incompatibility while retaining the options of withdrawing the reservation, modifying it or withdrawing altogether from the treaty. Monitoring bodies also had a role to play in seeing that action was actually taken and collaboration between them and States parties could provide a basis for a possible solution.

85. According to one view, a monitoring body should be able to declare itself unable to consider the reserving State as a party to the treaty. It was also pointed out that in regional contexts, bodies vested with judicial competencies (European Commission for Human Rights, Inter-American Court of Human Rights) could declare an inadmissible reservation as null and void and consider the reserving State still bound by the treaty in its entirety. According to another view, the reserving State was not even obliged to take action after the findings of the monitoring bodies.

86. It was also suggested that it might be helpful to create a procedure for altering or withdrawing inadmissible reservations and formulating new ones even after ratification. In order to promote the universality of treaties and not to sever treaty relations with the reserving State, a dialogue should be established between reserving and objecting State in what should remain an open transactional situation. According to one view, any objection should be regarded as preliminary pending the outcome of the dialogue with the reserving State or that State's practice in the implementation of the treaty.

87. According to the practice of certain Governments, an objection did not preclude the entry into force in its entirety of the treaty between the parties concerned. It was pointed out that since it was unacceptable that a State could accede to a normative treaty and, at the same time, make a reservation to nullify core provisions of that treaty, it was important to analyse the effects of an inadmissible reservation which the reserving State refused to withdraw or modify. Such reservations should not influence the legal effect of adherence to the treaty.

88. It was also observed that the absence of a body or system that would decide on the compatibility of a reservation with the object and purpose of a treaty left the matter in the hands of the States parties, with all the resulting difficulties and uncertainties stemming from various practices of States and reactions or absence thereof. It was pointed out that the

Commission should define new procedural rules in that regard: parallel to the existing decentralized mechanism for objections, there should be a centralized system which would take uniform and timely decisions on the admissibility of reservations, depending on the will and collective decision-making power of States parties. In that respect, the depositary could also play a useful monitoring role.

(d) "Savings" clause

89. As regards Preliminary Conclusion 12 allowing for the developing of specific rules and practices in the regional context, it was pointed out that such a provision should not be regarded as an invitation to fragment the unity of international law governing reservations to multilateral treaties or a differentiation from the Vienna regime but rather a sensible recognition of the possibility of regional diversity in respect of the monitoring function. According to another view, regional instruments could provide for exceptions to the reservations regime, on condition that they did so expressly. It was further pointed out that the distinction should rather be based on the powers vested in them by their constituent instruments, which might or might not give them a legally binding decision-making power, and not on the global or regional character.

3. Future organization of the study

90. Many delegations stressed that a guide to practice in respect of reservations would be useful to States and could fill gaps of the Vienna Conventions. These guidelines should not however alter the Vienna regime, but be supplementary thereto. Moreover the proposed model clauses were needed immediately and could serve as models for States in the drafting of legal instruments and should be designed to keep the possibilities of disputes to a minimum. However, other delegations felt that a guide would not seem necessary and rather that a binding document would be more useful in the interest of the stability of treaty relations.

91. It was also observed that the lacunae in the Vienna regime should be filled as far as possible within the framework of the Vienna Conventions, particularly those existing with respect to the concept of object and purpose of the treaty without distinction between human rights treaties and other treaties. The problem of reservations to rules of *jus cogens* also merited further study. Several delegations suggested that the definition of reservations and interpretative declarations which sometimes constituted hidden reservations merited more detailed study and looked forward to receiving the next reports of the Special Rapporteur on the topic. A number of delegations were also interested in the Commission's further considerations on the legal effects of inadmissible reservations and objections to them.

92. The view was also expressed that the issue of dispute settlement linked to reservations should be considered in the light of the role that monitoring bodies could play in that area. Such bodies, which were not unique to human rights treaties were qualified to give independent expert advice on the potential implications of reservations, within the limits of their authority, without their advice necessarily leading to a dispute.

93. It was also suggested that serious attention should be given to questions of law not covered by the Vienna regime, the question of reservations to bilateral agreements and the issue of objections with the possible consideration of a mechanism for monitoring their validity.

C. State responsibility

1. General observations

94. Many delegations pointed out that State responsibility was an extremely important topic, which was interlinked with certain key elements of international law. They welcomed the appointment of the new Special Rapporteur for the topic and took note of the Commission's intention to accord the topic necessary priority in order to complete the second reading by the end of the quinquennium. It was observed, however, that while adherence to timeframes was important, it must be borne in mind that codification in that area required careful attention. It was stated that the final results of that work could take the form of an international convention; however, a more flexible instrument, such as a guide for State practice, would also be possible. As for the content of the draft articles, it was stated that the content of the current draft was already too comprehensive and required some pruning. In particular, certain controversial provisions should be removed because they risked endangering acceptance of the draft.

95. A remark was made that, whatever the result of the ongoing efforts to codify the rules of international law on State responsibility, an effort should be made to realize the following three objectives: First, the rules on State responsibility should play a decisive role in resolving international conflicts. They should help to influence State behaviour by minimizing instances which could develop into serious conflicts among States. Secondly, given the long history of the Commission's efforts to codify rules on State responsibility, an early conclusion of the work on that topic

should receive high priority. The draft articles and the system adopted, in general, provided an excellent basis, and hence new and complicated elements should not be introduced into the draft. Thirdly, a flexible approach should be taken as far as the format of a future instrument on State responsibility was concerned, since all rules on State responsibility touched upon the basis of international law and should therefore strengthen it. The rules on State responsibility should therefore be set forth in the form of an instrument restating the relevant rules of international law rather than in the form of an instrument requiring ratification by States.

2. State crime

96. With respect to State crime, different views were expressed. According to one view, little could be gained from such a notion in the context of State responsibility. It was preferable to delete article 19 and the provisions on the consequences thereof, which were contained in articles 51 to 53. If the General Assembly adopted such articles, it would run the risk of making the whole set of provisions on State responsibility less acceptable. Abuse of the notion of international crimes might, in practice, provide tempting pretexts for imposing disproportionately severe countermeasures and sanctions for even minor violations of international law. The notion of international delicts had no special importance, since any violation of international law entailing the responsibility of a State technically constituted a delict. The Commission should instead take a new approach to regulating the legal consequences of violations of international law, taking into account the seriousness of the violation and its sustained negative effects. In that regard, the possibility of seeking punitive damages should be studied on the basis of existing State practice. In that context, it was further noted that the establishment of the concept of "State crime" in international law would encounter almost insurmountable difficulties, given the maxims *par in parem non habet imperium* and *societas delinquere non potest*. It would be impracticable to determine and impose punishment for a "State crime" within the international community as currently structured.

97. In that context a comment was made that the Commission's "objective" approach in other areas of the draft articles was acceptable. It was further observed that the elements of domestic criminal law, including wilful acts, were out of place in the regulation of the legal relations between States. Any approach to State responsibility should never disregard the long-standing practice of the international community concerning measures which the latter could take under Chapter VII of the Charter of the United Nations, particularly with regard to violations of international law which threatened international peace and security. Moreover, State practice, including the efforts to establish an international criminal court, which were aimed at the prosecution of individuals who had committed criminal acts could provide a more effective tool against grave violations of basic norms of international law, such as human rights and humanitarian standards, than the criminalization of State conduct as such.

98. According to another view, there was a sound legal basis for the distinction between international crimes and other internationally wrongful acts, and it was regrettable that reservations continued to be expressed concerning the very concept of international crime. Furthermore, that distinction meant that specific legal consequences applied to the relationship between a wrongdoing State and an injured State in the context of international crimes. On the basis of those premises, it was not for a single State to determine that an international crime had been committed, but for organs representing the international community, or international judicial bodies. A comment was also made that some domestic laws provided for the attribution of criminal responsibility to legal persons, including the State, and there was merit in the future development of the concept of international criminal responsibility. Nevertheless, the draft articles made no mention of any specific consequences attaching to a crime, as opposed to a mere wrongful act. That situation should be remedied in the future. It was further stated that the objective of an international sanction should be reparation, not punishment; it should be a means of bringing the offending State into conformity with the rules of international law and making it repair the consequences of its actions, not of compromising its political independence or threatening its economic stability, still less of imposing suffering on its people. In that context a request was made for additional consideration, on second reading, of the legal consequences of the Commission's distinction between international crimes and international delicts.

99. The remark was also made that it seemed unlikely that all breaches of international law could be treated on an equal footing, since certain acts could undoubtedly have more serious consequences than others and could harm the interests of many States or, indeed, of the international community as a whole. It was understood that there were practical and theoretical issues surrounding the distinction between international crimes and international delicts, including the question of the identification of a State injured by an international crime and the question of which State had the right to take *locus standi* at an international judicial body. It

had to be admitted that illegal acts which were defined by the Commission as international crimes did not necessarily affect the interests of all States with equal severity. The Commission should therefore re-examine the whole issue of international crimes and delicts with great prudence and care, taking into account the comments of Governments and international legal doctrine, which had, to a certain extent, expressed views on that sensitive issue.

3. Part One

100. Some delegations expressed satisfaction with the overall approach to the topic, particularly of Part One, and with the general structure of the draft articles, with the exception of some specific provisions. It was stated that when it revised the draft articles the Commission should take care to avoid legal terms such as "fortuitous event", the scope of which had not yet been sufficiently determined by State practice. Since the aim was to prevent conflict between States, unclear legal terms that could promote controversy should be avoided.

101. The comment was made that the draft articles in Part One, chapter II, which referred to the attribution of "acts of the State" under international law, seemed in general to be skilfully drafted. However, doubts remained as to whether the provisions of chapter II sufficiently covered the acts of natural and juridical persons who, at the time they committed a violation of international law, did not act as State organs but nevertheless acted under the authority and control of the State. Since States increasingly tended to entrust persons outside the structure of State organs with activities attributable to the State, a question arose as to whether the criteria established in chapter II for determining acts attributable to the State were too narrow. Answering that question would require a more thorough examination of recent State practice.

102. The issue of the conduct of organs of an insurrectional movement, contained in articles 14 and 15, it was noted, left considerable doubt, particularly with regard to the provision in article 15, paragraph 1, concerning the attribution of acts of an insurrectional movement to a State. The relationship between the first and second sentences of that provision could produce curious results; for example, it was observed that, with respect to the events in Bosnia and Herzegovina, the application of that provision would make that State responsible both for its own acts and for the acts of the separatist movement currently represented in the Government pursuant to the Dayton Agreement. On the other hand, the experience gained in cases of civil unrest should be studied with a view to the possible reformulation of those articles.

103. With respect to Part One, chapter V, which dealt with circumstances precluding wrongfulness, doubts were expressed as to the practical relevance of article 29, paragraph 2, which excluded consent as a circumstance precluding wrongfulness in the case of *jus cogens*.

104. It was noted that article 31 also required more work; its current wording, which mixed objective and subjective elements, blurred the scope of *force majeure* or other external events as circumstances precluding wrongfulness. The Commission was asked to consider to what extent the concept of material impossibility could be further developed so as to replace the notion of fortuitous events as a circumstance precluding guilt. The problems addressed by article 31 had far-reaching consequences that could relate to issues such as due diligence as a key element of the concept of prevention. Moreover, article 35 should be reformulated. To the extent that it pertained to liability for acts performed in conformity with international law, its wording should be more specific, because otherwise it could undercut the effect of circumstances precluding wrongfulness. It was observed that a provision applying the exception under article 35 only to such acts for which international law provided a legal ground for compensation would suffice. It was further noted that the rules of international law governing liability and the duty to prevent damage still required extensive work by the international community.

4. Part Two

105. With respect to Part Two, chapter I, the concept of an "injured State" was considered ambiguous and instead the emphasis should be place on the concept of "damage". It was stated that the concept had merit to the extent that States were directly affected in their rights by violations of international law. The entitlement of a State to obtain reparation, restitution in kind or compensation should be made entirely dependent on whether that State had been directly affected in its rights by the violation. However, there was doubt as to whether the concept was also workable in cases where no directly affected State could be identified, such as the case of human rights violations and breach of obligations owed to the community of States as a whole. It was felt that the content of draft article 40, paragraph 2, subparagraphs (e) and (f), and paragraph 3, should be dealt with separately. It was also stated that the concept chosen in article 40 could lead to a competitive or cumulative competence of States to invoke legal consequences of a violation of international law. That could lead to absurd results, given the absence of a world authority to decide on the competence of States to invoke violations

erga omnes. The right of States to invoke such violations should therefore be limited to specific legal consequences, such as the obligation to cease wrongful conduct or the satisfaction of the victims of violations of international law. Such a limitation on the competence of States seemed all the more preferable as the ability of the community of States, under existing international legal procedures, to react to violations of international law with effect *erga omnes* would remain unaffected by the rules governing State responsibility. In the case of violations *erga omnes*, certain problems must be addressed, such as the right of several States to invoke such violations concurrently and the legal consequences of the exercise of that right by one State for the rights of the other States concerned. The Commission was urged to revise article 40 and Part Two, chapter II, of the draft articles.

106. Regarding chapter III of Part Two on countermeasures, it was considered necessary to improve the procedures stipulated in the provisions. Given the general reluctance of States to submit to obligatory procedures for settling disputes, doubts were expressed about the efficiency of the proposed system. In the case of State responsibility, there was a danger that dispute settlement procedures, particularly those of a binding nature, might not work in practice. A comment was made that the procedure in article 48 on the obligation to negotiate could be retained, and a reference to dispute settlement procedures applicable between the injured and the wrongdoing State which already existed under international law could be inserted. As radical as such an approach might seem from a dogmatic point of view, it seemed to square with the direction followed by States in practice. It was also stated that it was necessary to take countermeasures against internationally wrongful acts. However, even if the entitlement of the injured State to take countermeasures was recognized, such countermeasures should be subject to certain restrictions. Although the draft articles in their current form were basically satisfactory in that regard, some problems remained. For example, while the injured State might consider the freezing of assets and the suspension of permission as interim measures of protection, the wrongdoing State might interpret such steps as countermeasures and unilaterally resort to arbitration. If the wrongful conduct ceased during the process of arbitration, the injured State should suspend its countermeasures. Issues such as the precise meaning of the term “interim measures of protection” would therefore need to be clarified during the second reading. The remark was also made that any regime on countermeasures should minimize differences in the ability of States to take or respond to them and in that connection importance was attached to the Commission’s role in the progressive development of international law, as referred to in Article 13, paragraph 1, of the Charter. To enlarge the scope of measures of constraint a suggestion was made to delete the words “economic” and “political” from the draft articles.

107. A comment was also made that the provisions regarding countermeasures were out of place in the draft. It was not clear that it was necessary to speak of countermeasures in a draft on State responsibility, since a text on responsibility should only include matters pertaining to that subject. The countermeasures regime could in itself justify a separate study by the International Law Commission.

108. The remark was made that the principle of proportionality admittedly remained undetermined by international judicial authorities in terms of its scope, but it could not be denied that the mere fact that its invocation by a State against which countermeasures had been taken already provided a regulating effect. Furthermore, the jurisdiction of the International Court of Justice, particularly its advisory opinion on the legality of the use or threatened use of nuclear weapons, revealed the importance of that principle. The Commission might therefore further refine the provision on proportionality, at least in the commentary to the conclusive set of draft articles.

5. Part Three

109. As regards the provisions on settlement of disputes, different views were expressed. According to one view, the articles on dispute settlement were excessively detailed and unrealistic. The third part of the draft had the effect of instituting a jurisdictional settlement of all disputes. However, there was no reason to single out disputes arising from questions of responsibility by applying an ad hoc dispute settlement mechanism to them. Moreover, most of the time there were no isolated disputes on responsibility, but rather substantive disputes with consequences in the area of responsibility. The third part was inappropriate by definition. According to this view, there was no reason why there should be a specific dispute settlement mechanism linked to responsibility. It would be preferable to refer those matters to general international law. One solution would be to make the third part indicative, if not to delete it. It could then take the form of an optional protocol. The comment was also made that the provisions relating to settlement of disputes adopted on first reading were too rigid and lacked relevance and flexibility. The parties to a dispute should be allowed freely to choose the means of settlement. A comment was also made that because of its linkage with countermeasures, the articles on means of settlement could be merged into a single article in the chapter on countermeasures.

D. International liability for injurious consequences arising out of acts not prohibited by international law

1. General observations

110. The Commission's decision to continue work on the topic was welcomed. It was stated that there was a growing need for clear rules limiting the nature of the discretion with which States interpreted and complied with certain obligations, especially those aimed at ensuring that activities carried out in areas under their jurisdiction or control did not cause damage to other States or to areas beyond the limits of their national jurisdiction. It was regrettable that only modest advances had been made, owing to the reluctance of States to contribute to the definition of the scope of a regime of liability for such activities. Reference was made to principle 22 of the Stockholm Declaration — reflected in many later international instruments — which imposed on States the obligation to cooperate in developing that area of law. It was stated that steps should be taken to put that obligation into effect. It was further stated that international law dealing with this subject was constantly evolving and had major significance at the dawn of the twenty-first century. In the modern world, the failure to prevent damage to the environment could have serious consequences. The current understanding was that the world did not have an inexhaustible supply of natural resources and that sustainable development must be promoted. Those who contributed to the codification and progressive development of international law in that field could not neglect the issue.

2. Commission's decision regarding prevention and liability

111. With regard to the decision by the Commission to address the question of prevention separately from liability, two different views were expressed. Many delegations, while agreeing with that approach, stressed the need to deal also with the question of liability. The remark was made that the Commission, in deciding to separate its study of prevention from that of liability in the true sense, had opted for an approach which on the one hand seemed fully justified and, on the other, had various far-reaching consequences. It could not be denied that the two matters, international liability and prevention, were connected only indirectly, and it was justifiable to separate them for a number of reasons. Irrespective of whether liability constituted a primary or a secondary norm, it defined the consequences resulting from damage caused by activities which were lawful under international law. In that respect, reference could be made to draft article 35 on State responsibility, a link which was also reflected in the commentary on that provision. However, the draft on liability also included rules that were purely primary in scope, for example those concerning prevention, the violation of which would not entail liability but did fall within the sphere of State responsibility. It was therefore incorrect to combine prevention with a liability regime in the same draft unless a clear conceptual distinction was made therein. A separation of the two issues was also warranted on the grounds that they often dealt with different spheres of activity: prevention addressed almost all dangerous activities . Thus, principle 21 of the Stockholm Declaration, which the Commission had already recognized as constituting existing law, did not distinguish different categories of activities. In contrast, it seemed appropriate to provide a liability regime only for those activities which were considered indispensable despite their dangerous nature. Such a regime would stipulate that damage which occurred despite precautionary measures need not be defrayed by society but should be compensated by the author of the damage. It was only in that way that the prevention and liability regimes were connected.

112. It was noted that the Working Group of the Commission had made significant progress on that topic in 1996, which had resulted in a set of draft articles on prevention. States had the obligation to prevent transboundary harm and to minimize risk, in particular through environmental impact assessments. Future work on the topic, however, should not be confined to prevention. If there was harm, there must be compensation. Prevention was merely an introduction to the crux of the topic, namely, the consequences of the acts in question. By studying each aspect of the topic with the same degree of care, the Commission would demonstrate that it was a modern organization prepared to take up the challenges of the twenty-first century.

113. The remark was also made that article 1 defined the scope of the draft articles, namely, activities not prohibited by international law which involved a risk of causing significant transboundary harm. State responsibility would arise from the occurrence of harm if the State failed to implement the obligations set out by the draft articles on prevention while engaging in activities of that nature. On the other hand, if the State fulfilled its obligations under the draft articles and harm still occurred, that would give rise to "international liability", which was the core issue. As soon as the Commission completed its first reading of the draft articles on "prevention", it should proceed to the issue of

"liability". The decision on whether there was a need to adjust the title of the topic should be made in the light of the content of the draft articles.

114. The comment was made that the Commission's confusion on the relationship between the two aspects of the topic was understandable: the "liability" aspect definitely was a key component of the topic in question and was of considerable practical import as well. However, the topic, which was relatively poorly defined in judicial practice and doctrine, was controversial and invited conflicts which sprang, *inter alia*, from differing interpretations of the matter under different systems of national law and entailed clashing theories with respect to risk, liability, abuse of rights and breaches of good-neighbourliness, to cite only a few; such clashes significantly clouded the question as to what regime was applicable at the international level. Even if the crux of the problem was defined in terms of primary rules, the fact remained that the meaning of "*sic utere tuo ...*" was very difficult to interpret in positive international law. Accordingly, the Commission's decision to separate the two aspects of the topic, at least temporarily, was appropriate and would at least allow progress on the "prevention" aspect which should be limited to hazardous activities.

115. Yet another view expressed the undesirability of considering the liability aspect of the topic. It was stated that while "international liability" had been the core issue of the topic as originally conceived, that did not mean that it should be retained for further work 25 years later, in the light of the meagre understanding reached in that time. Further work on the topic should be confined to the prevention aspect alone. The comment was also made that the Commission had failed over the past 20 years to define the scope and content of the topic, so it would be better to start with what was possible and practicable. Within that framework, the Commission should confine its work to transboundary damage and to activities having a risk of causing harm. The broader issues of creeping pollution and global commons should be excluded, at least initially.

3. Prevention

116. With regard to the issue of prevention, it was stated that in view of the multifarious activities carried out by States within their borders it might be difficult to draw up an exhaustive list of activities involving a transboundary risk and that an illustrative list might be preferable. It was also noted that it might be difficult to accept the qualification of "transboundary harm" as "significant", a term which could be controversial, particularly as there was no provision for a binding dispute settlement mechanism. In the absence of such a mechanism, the adjective should be deleted. In the event of harm, the aggrieved State should be entitled to compensation by the State from which the harm emanated. It was also stated that the work on prevention should include a procedure under which the parameters and ramifications of prevention in international law would first of all be clarified and then assessed against the relevant draft articles already elaborated by the Commission. In that regard, it was impossible to ignore the difficulties of defining "hazardous acts" which would determine the scope of the provisions. At the same time, however, it was important not to lose sight of the original task, namely the elaboration of a regime of liability *stricto sensu*. The comment was further made that the Commission should take account of contemporary practice in the field, which placed more emphasis on providing incentives, including capacity-building, to promote the observance of rules of due diligence. Implementation of the due diligence obligation should be made directly proportional to the scientific, technical and economic capacities of States. Failure to meet that obligation should entail enforceable legal consequences not involving economic or other sanctions.

117. It was also observed that some activities might become hazardous only in conjunction with other activities, a fact that might necessitate an expanded exchange of information, a more liberal consultation regime and a broader assessment of risk that encompassed both the environment of other States and activities in those States. Similarly, the effects of transboundary activities in two States might combine to be felt in a third State, thus creating more than one State of origin.

4. Comments on specific articles

118. The remark was made that the proposed draft articles worked out by the Working Group in 1996 were based on the principle of customary international law, which established the obligation to prevent or mitigate transboundary damage arising out of activities that were under the control of a State. It was noted that the existence of harm was a prerequisite for the establishment of liability. However, the question of whether liability should flow from the mere existence of harm or from conduct reflecting a lack of diligence might be better determined by the nature of the activity and the risk it posed. It was also noted that reparation was preferable to compensation in the case of environmental damage. It was observed that the remaining draft articles were consistent with what national and international environmental assessment should be. Regarding the future development of the draft

articles, it would be desirable to permit States to override them where they dealt with specific issues of liability with respect to which a treaty was being negotiated. It was also noted that the general issue of relationship with existing treaty law in the field of international liability must also be addressed.

119. The view was expressed that article 4 as currently drafted was broader than its predecessor, article B. Under a rubric of prevention that went beyond prevention of risk, it now encapsulated three obligations: risk prevention *ex ante*, risk minimization *ex ante* and harm minimization *ex post*, the last of which, being related to transboundary harm that had actually occurred, might in some circumstances amount to prevention. Article 4 distinguished the occurrence of harm, which must be significant, from its effects, which might be minor. Thus, if article 4 was taken in conjunction with article 1 (b), the draft articles would apply to activities that did not involve risk of significant transboundary harm but did in fact cause it. It would be useful to clarify whether the last part of article 4 intended to impose an obligation to remove harmful effects; as drafted, some choice on the part of States could be implied, especially in conjunction with article 3, on freedom of action. In addition, the broad concept of prevention under article 4 was not commensurate with that under articles 9 to 19, on prevention or minimization of risk, being more closely related to that under articles 20 to 22, on compensation. With respect to article 4 the comment was also made that the article was important because it emphasized the importance of preventive action, and in particular draft article 1 (b), which dealt with activities that did not normally entail risk but that nonetheless caused harm.

120. It was noted that article 6, like article 4, drew a distinction between harm and effects, but referred to effects in both affected States and the State of origin. Clarification was needed as to whether both types of effects were also covered by the obligations in article 4, or only effects in affected States.

121. With respect to articles 9 and 11, it was stated that they were both concerned with the question of authorization and should be placed together. The emphasis in article 11 could be strengthened by introducing the concept of good faith. Also, the introduction of a temporal element, requiring reasonably prompt action on the part of a State in directing those responsible for pre-existing activities to obtain authorization, would reinforce the need for due diligence.

122. It was stated that under article 10 (risk assessment), the questions of who should conduct the assessment, what it should contain and the form of authorization were left to the State of origin to decide; it was in fact appropriate to avoid being overly prescriptive.

123. It was further observed that articles 13 to 18 had to be considered in the light of international regimes governing more specific areas of activity. The purpose of article 13 was to require notification and transmission of information. As currently drafted, it also required a response, but that requirement might be more appropriately placed under article 14 (exchange of information) or article 17 (consultations on preventive measures). If, on the other hand, article 13 was to involve the exchange of information and not simply transmission and notification, then articles 13 and 14 could be combined under the title “Notification and exchange of information”.

124. On the general issue of international liability, it was noted that the Commission should elaborate on joint liability arising from joint activities, and on associated issues including indemnities, rights of action and of inspection, dispute settlement principles and bodies, access, investigation and clean-up. The comment was also made that the relationship between this topic and State responsibility should be clearly defined.

E. Diplomatic protection

1. General observations

125. Many delegations supported the inclusion of the topic of diplomatic protection in the Commission’s programme of work, since there was a growing practical need to codify international law in that area. They felt that the Commission had adopted a suitably rigorous approach in its report and had wisely decided to limit the topic to codification of secondary rules. It was noted by one delegation that the comparison of diplomatic protection and State responsibility as both being confined to secondary rules was not entirely correct because, in the view of that delegation, the draft articles on State responsibility were not limited to secondary rules. Another delegation felt that the topic was difficult to codify and that the analysis of the topic by the Working Group gave an indication of the controversies which were likely to emerge.

2. Scope of the topic

126. As regards the scope of the topic, many delegations supported the decision by the Commission to confine it to the codification of secondary rules, in other words, the basis, conditions, modalities and consequences of diplomatic

protection, and would avoid the question of responsibility for injury to aliens. With regard to the inclusion of immunities granted by international organizations to their agents, three different views were expressed. According to one view, the scope of the topic should extend to the protection claimed by international organizations for the benefit of their agents, on the ground both of the precedents existing in international case law and of the basic fairness of such protection; or at least the relationship between diplomatic protection and the functional protection extended by international organizations to their agents should be examined. It was further noted that since the number of international, regional and governmental organizations had grown immensely in the past decade, the functional diplomatic protection of those organizations formed an important part of contemporary diplomatic protection. According to this view, in international jurisprudence, functional protection had been broadly based on the model of diplomatic protection, although certain specific elements had been naturally retained. According to a second view, the topic should not be extended to the protection offered by international organizations, so as not to complicate the Commission's task. Supporters of this view expressed reservations about the extent to which the principles of diplomatic protection could be applied to the protection exercised by international organizations and their agents. According to this view the Commission might consider, at the preliminary stage, the relevance of privileges and immunities accorded to an international organization in the State in which the injury had occurred, in particular, the availability of a remedy under the constituent instrument of the organization to which the respondent State was a party. Thus, a claim of diplomatic protection by a State would arise under general international law, whereas a claim by an international organization for injury to its agent might in certain circumstances arise under a treaty. According to a third view, any decision on whether the topic should be extended to include international organizations should await further study and work by the Commission, either at the beginning of its work or at the conclusion of its work on the topic. A question was also raised as to whether it was necessary to make a distinction between international organizations and regional economic integration organizations.

127. It was also stated that the Commission should also examine, in the preliminary stages, the distinction between the diplomatic protection exercised by a State in espousing the cause of its nationals where local redress had been exhausted, which was the subject of the Commission's study, and the other forms of protection afforded by diplomatic missions. It was observed that circumstances might arise in which the exercise of diplomatic or consular functions of assistance and protection provided in accordance with the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations might be viewed by the host Government as an exercise of diplomatic protection and, in cases of dual nationality, as being contrary to article 4 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. In particular the Commission's decision to examine the situation of customary international law relating to diplomatic protection in cases of multiple nationality and to determine whether article 4 of the Hague Convention was still applicable was welcomed, since it might prevent a State from rendering consular assistance to one of its nationals in the other State whose nationality such person also possessed.

3. Content of the topic

128. It was noted that the development of contemporary human rights law had inevitably altered traditional notions of diplomatic protection, although, on the international level, diplomatic protection should still be viewed primarily as the right of a State, not of an individual. The Commission should explore the subject carefully, including the legislative practice of States which already attributed the right of diplomatic protection to their nationals on the basis of domestic legislation. Another question which required detailed examination, one which the Commission had already raised, was whether a State could afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed. The comment was made that the Commission could also add refugees to the list of persons requiring diplomatic protection, as they did not need to meet the criteria, such as long residence in the State espousing diplomatic protection, nor did they need to fit into the categories of persons established by the Commission.

129. On the issue of forms of protection other than claims, the question was raised as to whether article 4 of the Hague Convention might prevent a State from making diplomatic representations or exercising consular protection in circumstances involving matters which were precursors to a claim for diplomatic protection. The Commission might therefore wish to examine the issue of protective measures taken by a diplomatic or consular mission which might be precursors to a claim for protection. A question was also raised as to whether the term "diplomatic protection" in article 4 of the Hague Convention did not cover a wider range of activities than the issue of "diplomatic protection" as it was currently understood, perhaps extending to the protection of

human rights. The effective nationality criterion under that article also appeared to be applied with increasing frequency in determining the admissibility of a claim of diplomatic protection brought by a person with dual nationality. On the other hand, the traditional view, at least in certain common law countries, was that a State's right to exercise diplomatic protection was discretionary and that there was no individual right to such protection under domestic law. It was noted that a different approach might consist of analysing the basis on which a national might claim a right to diplomatic protection. If such a right had become a human right, then it would accrue only to natural legal persons. It should also be borne in mind that it was States that determined the basis on which they attributed their nationality. In any case, an analysis of the views and practices of States was required before the rights of individuals to demand diplomatic protection could be recognized.

130. The view was also expressed that diplomatic protection was a new topic which touched upon very complicated issues. When a legal person, such as a corporation, requested diplomatic protection, claims for compensation were usually brought by the State of nationality on behalf of the legal person. However, given that corporations, particularly multinational corporations, tended to have very complex structures, it could be extremely difficult to apply the rules of nationality in the context of a claim for compensation or other international laws to them. It was observed that, in accordance with international customary law, diplomatic protection should be invoked only after local remedies had been exhausted, and when it was invoked, State sovereignty and jurisdiction should be fully respected. Otherwise, aliens might actually enjoy privileges in their relationship with the host country and might be able to secure diplomatic interference at an unduly early stage by requesting their State of nationality to exert political pressure immediately, thereby jeopardizing the host State's sovereignty and judicial powers over persons under its jurisdiction. Of particular importance was the principle of the exhaustion of local remedies in the context of diplomatic protection. In this context, some delegations expressed the view that the draft articles on the topic should fully safeguard the exhaustion of local remedies as a precondition of the exercise of protection of its nationals by a State, and account should be taken of Drago and Calvo doctrines. Chapter three of the preliminary plan of work did not give sufficient attention to that; indeed, other criteria tending to diminish its relevance were given more weight. The resulting imbalance should be corrected.

131. It was stated that the alternative international remedies provided for in the general outline of the topic, including the right of recourse to human rights treaty bodies and to international tribunals competent in the field of foreign investment, were relevant. Nevertheless, according to article 41, paragraph 1 (c), of the International Covenant on Civil and Political Rights, the Committee responsible for monitoring the Covenant could deal with a matter referred to it only after it had ascertained that all domestic remedies had been invoked and exhausted, in conformity with the generally recognized principles of international law. Again, on the issue of recourse to arbitration to settle investment disputes, a comment was made that although certain States might conclude arbitration agreements in that regard, that did not mean that the generally applicable principle of exhaustion of local remedies would automatically be put aside. On the contrary, all local administrative and legal remedies should be exhausted before resorting to arbitration. Explicit provision should be made for that principle.

132. It was also stated that that attention should be paid in the context of the topic to the "law peculiar to" the State of which a private victim was a national, which formed the basis of diplomatic protection, by taking into account recent criticisms of the "law peculiar to" concept and the implications for different aspects of diplomatic protection, including the question of the consent of a private victim, "class action" cases, the extent of damage, the distribution of settlements, or the applicability of the transaction with respect to a private victim where the latter had not yet exhausted its direct legal remedies against the State concerned.

133. The comment was also made that recourse to the criterion of effective nationality was crucial for resolving the issues arising from special cases, such as cases of double nationality. Even when an individual declined diplomatic protection from his or her State of nationality, that State could nevertheless exercise diplomatic protection, as such protection was a right of the State.

134. The view was also expressed that the Commission must ensure that its study on diplomatic protection did not extend to the substantive rules of international responsibility. It was in no way necessary, or even possible, to prove internationally wrongful behaviour to justify the exercise of diplomatic protection, contrary to the indication in the Commission's report, since the existence of such behaviour was a substantive problem. The only obligation to be placed on the protecting State was that it must allege an internationally wrongful act. Similarly, if nationality or the exhaustion of local remedies were points which undoubtedly related to the diplomatic protection of shareholders and other company officials, the question of establishing whether such persons had a right protected by international law and that of whether that right had been infringed by an international delict were substantive. The same reasoning applied to insurers

subrogated for holders of an internationally protected right, as well as in the case, not mentioned expressly, of creditors and trustees.

135. Regarding the heading "Legal persons", one view did not support its consideration by the Commission. According to that view, the term referred to corporations and associations under local law and partnerships. It was far from certain that those two categories embraced every kind of legal person. Moreover, under some national legal orders, partnerships had no legal personality and were not legal persons. With regard to the heading "Non-nationals forming a minority in a group of national claimants", a question was raised as to whether that wording meant that the protecting State would be empowered to endorse claims by either and whether, with regard to a national corporation, it would have the right to intervene on behalf of foreign shareholders of that corporation, which the delegate found disquieting.

4. Form of the instrument

136. It was considered too soon to decide whether the draft articles on diplomatic protection should take the form of a convention or of guidelines, although the latter alternative would have the advantage of not putting the exercise on too formal a footing.

F. Unilateral acts of States

1. General observations

137. Many delegations expressed support for the Commission's undertaking work on the topic, there being widespread agreement that codification and progressive development by the Commission of the applicable rules of international law in this field was both feasible and desirable. In this connection, the importance and contemporary relevance of the topic were emphasized. It was also observed that there was sufficient material, in the form of State practice and jurisprudence, for the Commission to analyse and to serve as a basis for its work.

138. With regard to the title of the topic, a suggestion was made that it be changed to "unilateral legal acts of States". There was some opposition to such a change, however, it being remarked that, as it stood, the title reflected general usage among international lawyers and that the proposed change was both unnecessary and confusing. A preference was also voiced for the title to be changed to "unilateral acts of States having international legal effects".

2. Scope of the topic

139. Some delegations stated that they agreed with the Preliminary Conclusions regarding the scope of the topic which had been formulated by the Working Group established by the Commission at its forty-ninth session. Some other delegations, however, expressed concern regarding the breadth of the topic, as conceived by the Working Group; thus understood, the topic was potentially so wide-ranging or so uncertain in scope as to make it essential to set clearer and more specific limits to the work which the Commission was to undertake. In this context the need for a narrower, more focused study of the topic was underlined.

140. With regard to the specific conclusions of the Working Group, there was general agreement that the Commission's work on the topic should not encompass unilateral acts performed by subjects of international law other than States, in particular by international organizations. At the same time, the view was expressed that "collective" or "joint" unilateral acts should not be excluded from study.

141. It was agreed that acts which had no legal consequences should be excluded from the scope of the study; it was stated that only those unilateral acts which have legal effects at the international level should be the subject of examination.

142. In this regard the view was expressed that the study should be confined to those acts which were intended, or whose main purpose it was, to produce legal consequences in international law; and furthermore that, of those acts, only those should be studied which were truly autonomous in nature and were intended to produce by themselves some normative effect, thus excluding acts whose normative effect arose from the performance or existence of some other act or treaty, particularly those acts which simply triggered the application of a legal regime which was defined independently of them. In this connection, the view was expressed that declarations accepting the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court should not be included within the scope of the study. There was also opposition to the inclusion of internal acts which might have effects in the international sphere, such as those establishing or fixing the limits of national maritime jurisdiction, as such acts and their effects were already governed by well-defined regimes of international law, which should not be encroached upon, disrupted or destabilized. A view was however expressed which was favourable to the inclusion of such acts within the ambit of the study. It was also observed that, while the study should focus initially on acts intended to produce effects in international law, the

Commission might at a later stage proceed to a consideration of the phenomenon of acquiescence.

143. Some support was expressed for the view of the Working Group that internationally wrongful acts should not be included within the scope of the study, but should be addressed within the context of the Commission's work on State responsibility. At the same time, some sympathy was expressed for the inclusion of such acts within the ambit of the study.

144. A view was expressed which was favourable to the inclusion of acts of recognition within the scope of the study. It was also observed however that that subject was a vast and complex one, which merited independent study by the Commission.

145. Support was expressed for the exclusion from the scope of the study of unilateral acts whose characteristics and effects were governed by the law of treaties. It was also observed however that there were certain unilateral acts performed in relation to treaties which were not governed by the rules of treaty law, and the view was expressed that such acts should be included within the ambit of the study. Mention was made in this connection of interpretative declarations; it was indicated that the nature and characteristics of such acts should be carefully examined within the framework of the Commission's study of the topic: the Commission would then be in a better position to decide whether to deal with them in the context of its work on unilateral acts or within the framework of its work on reservations to treaties.

146. A view was expressed that account should be taken of the role of unilateral acts in the process of the formation of rules of customary international law.

3. Content of the topic

147. There was agreement with the Working Group's conclusion that the main objective of the Commission's study of the topic was to identify the constituent elements and legal effects in international law of the unilateral acts of States and to set forth the rules which were generally applicable to such acts, as well as those special rules to which particular categories of such acts might be subject. In this connection, emphasis was placed upon the importance of the formulation of a precise definition of unilateral acts of States as well as the need to establish a clear distinction between acts which gave rise to legal relationships under international law and those which did not.

148. The outline for the study of the topic prepared by the Working Group was said to be complete and well conceived and to constitute a useful point of departure for future work on the topic.

149. With regard to particular features of that outline, the view was expressed that its most important part was its chapter IV, entitled "General rules applicable to unilateral legal acts", particularly section (b), relating to the "effects" of such acts, and sections (d) and (e), on "Conditions of validity" and "Consequences of the invalidity of an international legal act". It was observed in this regard that the list of elements in section (d) was complete and satisfactory.

150. The view was also expressed that the most important part of the topic was addressed by chapter IV, section (f), part (I), of the outline, namely, the power of the author of a unilateral act to revoke or to modify by its own action the legal relationship to which its act gave rise. In this regard, it was pointed out that the binding character of a unilateral act would be illusory if the legal relationships which it created were to be terminable unilaterally and at will by the author State. It was also stressed that it was important to take into account the rules of the law of treaties regarding the revocation or modification of rights arising for a third State from a provision of a treaty.

151. With regard to its working methodology, it was important for the Commission to compare and take fully into account the analogous rules of the law of treaties. At a more basic level, the question was raised as to whether the categories of acts listed in chapter III of the outline possessed sufficient elements in common to be treated alike or to be subjected to the same legal regime. A doubt was also voiced regarding the feasibility of analysing unilateral acts in isolation from the general fields of international law in the context of which they were performed. At the most fundamental level, doubts were expressed regarding the capacity of the principle of good faith to explain the legal effects of unilateral acts or to serve as the basis of the regime to which they were subject. The question was raised as to whether it might not be preferable to view the engagements arising from such acts as akin to treaty relationships involving the presumed tacit acceptance of the State of the act conferring legal rights or as being created by virtue of some kind of estoppel. The view was also expressed that the Commission should examine the question of the extent to which unilateral acts might be understood to constitute sources of international law.

4. Outcome of work on the topic

152. There was general agreement that it was still too early to decide, or even to suggest, what form the Commission's

work on the topic might take, whether draft articles, guidelines, recommendations or a doctrinal study. Different views were voiced, however, as to whether the last of these possibilities would represent a desirable outcome. It was, nevertheless stressed that, whatever form its work might ultimately take, the study of the topic by the Commission would in itself contribute to the progressive development and codification of international law on the subject, inasmuch as it would help to clarify the legal regime to which such acts were subject.

153. Agreement was expressed with the Commission's view that work on the topic should proceed in such a way that first reading of a draft would be completed within the current quinquennium.

G. General conclusions and recommendations

1. General observations

154. The Commission was commended for making a major contribution to the growth and development of the role of international law in the postwar era. Its success, however, had not come easily, nor had it always been as productive as it had been over the last two years. It was further observed that at one time it had been seen in some government and academic circles as a remote institution, at some remove from the main concerns of Governments. It had sometimes continued to work on topics for many years, in the face of sceptical questions or even outright opposition from a growing number of Governments.

155. The remark was made that the Commission had recently appeared to take on a new lease on life. It had completed some long-running projects and laid the groundwork for the efficient completion of others. It had given serious study to its own programme and methods of work, making some useful improvements, and had sought more energetic and effective dialogue with Governments and the Committee. Much remained to be done, however, by all the parties concerned. It was also noted that a careful reading of chapters III and X of the report of the International Law Commission showed that the Commission was fully committed to playing its part in the reform of the codification process within the United Nations system.

2. Work programme of the Commission for the remainder of the quinquennium

156. The view was expressed that the proposed programme of work of the Commission for the remainder of the quinquennium should proceed as outlined in its report. Its efforts to improve the efficiency of its working methods with a view to completing all the draft texts before it by the end of its quinquennium was also welcomed, and it was noted that the Commission had already shown itself capable of completing some drafts efficiently and rapidly. It was further noted that its stringent programme of work and its ambitious timetable, also testified to the eagerness of the Commission, and its new composition, to carry out its mandate. The hope was expressed that, in view of its heavy workload, the schedule could be kept.

157. The view was also expressed that the Commission's work programme for the quinquennium would be difficult to carry out, in the light of the number of items of wide scope and great complexity already before it and the limited length of its sessions. It was suggested that the Commission should approach the work programme with flexibility, to enable it to conclude its work on some topics that had been on its agenda for several decades or those whose importance was unquestionable. A suggestion was made that the Commission should confine itself to a limited number of questions on which it could complete its work within the established time-frames.

158. Another suggestion made was that the Commission should address, in order of priority, the topics of State responsibility, reservations to treaties and diplomatic protection, and that the topic of international liability for injurious consequences arising out of acts not prohibited by international law should be dealt with as an aspect of State responsibility.

159. The Commission was commended for the improvements made to its report. The 1997 report was said to be handy, usable, economical and well focused. The inclusion of chapter III dealing with specific issues on which comments would be of particular interest to the Commission and of the Commission's programme of work for the remainder of the quinquennium was particularly welcome. Moreover, it was noted, the list of issues outlined therein implicitly suggested a structure for the comments to be made by States and clearly set out such aspects of the Commission's work as called for political decisions. The "question and answer" pattern was itself an effective mechanism for activating dialogue between States and the Commission. An explanation of State practice and customary law on given questions was very much needed.

160. A suggestion was made in connection with chapter II containing a summary of the work of the Commission at its forty-ninth session and chapter III of the report that those

chapters could perhaps in the future be prepared and translated as a matter of priority and circulated to States in advance of the report as a whole.

3. Methods of work

161. Reference was made to the question of the relationship between the Commission and the Sixth Committee in the codification and progressive development of international law. The view was expressed that closer cooperation was needed between the Commission, other United Nations organs and other bodies concerned with the development of international law. It was stressed that such a relationship, particularly between the Commission and the Sixth Committee, should be strengthened. It was suggested that the Commission should adopt a more proactive stance, which would enable real dialogue to take place between the two bodies. Furthermore, since the Commission's work related directly to the concerns of States, the latter should give the Commission guidelines through the Committee. It was furthermore observed that the Commission was free to submit to Member States its analysis of different points of international law and to make pertinent suggestions.

162. The view was also expressed that the necessary interaction between the Commission, as a body of independent legal experts, and the Sixth Committee, as a body of government representatives, formed a tandem whose proper functioning was of the utmost importance for the advancement of codification and the progressive development of international law within the United Nations system. The new dynamism in the working methods of the Commission had no parallel as yet in the Committee. The Committee, it was suggested, should consider some structural reform of its own. Such reform could contain the following elements:

163. First, rather than retaining the tradition whereby delegations made oral statements, which in fact were often accompanied by written versions handed out during the debate and were generally lengthy, sometimes technical and often resembled academic lectures, the Committee could achieve more through dialogue by encouraging delegations to structure their statements to be as concise as possible, stressing the key legal position of their Governments on the topic and the consideration and leaving it to a written memorandum to outline the legal points in greater detail. Such written presentations could be circulated simultaneously with the oral presentation. Precious time would be saved and the oral statement would be more user-friendly, in that in a short and well-focused statement the relevant State position could be easily identified.

164. Secondly, in order to stimulate real discussion, a less formal set-up for open exchanges among States representatives, open to all delegations, might be envisaged. Such consultations, to which sufficient time should be allotted, could take place under the authority and leadership of the Chairman of the Committee.

165. Thirdly, a rule could be established that, whenever a topic was under discussion directly involving a particular member of the Commission, that member should be available during the consideration of the relevant issue, so as to allow the Committee to receive clarification directly from a current member of the Commission.

166. As regards cooperation, in particular with other bodies, the Commission was commended for having expanded its contacts with other learned societies all over the world. The hope was expressed that these contacts would be further intensified with a view to streamlining the codification process and thereby avoiding duplication of work.

167. With regard to new topics, a suggestion was made that the topics chosen for the codification or progressive development of international law should not be the result of random selection but should be identified on the basis of the careful study of all legal viewpoints. In order to enhance dialogue, it was suggested that the Sixth Committee should receive the Commission's documents prior to and not during its session.

168. Regarding open-ended informal meetings, support was expressed for the convening of periodic open-ended informal meetings between members of the Commission and the Sixth Committee, particularly at the outset of the Commission's work on a topic.

169. With regard to the establishment of consultative groups to assist the special rapporteurs in their tasks, a remark was made that although in the real world there might be the danger of potentially divergent views within such groups, the advantages outweighed the disadvantages overall, since consultative groups made it possible to make better use of the available resources and facilitate a sharing of responsibility within a collegiate body of proven experts in the field.

170. As regards the chairmanship of the Commission, support was expressed for the suggestion that every region should have an opportunity to assume the chairmanship during a different year of each quinquennium.

171. Regarding the low number of replies received to questionnaires, it was observed that this could be attributed to a number of factors, including short deadlines and a lack of experts, rather than a lack of interest. It was suggested that the questionnaires could be made more user-friendly if they

were broken down into several sub-topics with different deadlines assigned to each.

172. With regard to the question of the revision of the Commission's statute, which was considered at the forty-eighth session in 1996, the hope was expressed that the question would be explored further with a view to submitting recommendations to the General Assembly at a future session.

173. In that connection, a remark was made that it was not intended that the membership of the Commission should be based on political representation but rather that it should reflect the principal legal systems of the world. Under the current electoral methods, which were linked to the regional group system, as set out in amended article 9 of the statute, a candidate from a State not associated with a regional group was excluded from the electoral process. That was a situation which deserved to be examined and rectified by the Committee.

174. Reference was made to the colloquium on the progressive development and codification of international law held during the fifty-second session of the General Assembly. The view was expressed that the colloquium had been a source of great satisfaction. It was noted that, for developing countries in particular, the holding of seminars under the auspices of the International Law Commission had proved beneficial for students and professors of international law as well as government officials.

4. Split session

175. With regard to the holding of a split session in 1998, the view was expressed that while the idea of holding a split session was indeed an experiment, that did not invalidate the outcome. It was further observed that even though the need to hold a split session in 1998 had been dictated by demanding circumstances, it would nonetheless be fruitful to do so. Moreover, convening one of the split sessions in New York in 1998 would help to offset some of the financial costs and would establish closer links between the work of the Commission and that of the Sixth Committee. It would be useful, for example, to hold informal briefings and meetings between the Sixth Committee and the Commission. The point was also made that although the experiment for the split session might prove worthwhile, the large number of conferences to be held in 1998 did not allow for sufficient flexibility for scheduling Commission sessions. The duration of its session of 10 weeks was said to be reasonable; a longer session might be considered during the final year of the quinquennium.