pointed out *inter alia* that these questions are not just a matter of speculation. Among the many significant questions touched were the problem related to:

(i) the effect of an impermissible reservation;

(ii) the question of objections to reservations;

(iii) interpretative declarations;

(iv) the effect of reservations on the entry into force of the Convention;

(v) the fate of objections to reservations in the event of State succession;

(vi) the specific objects of certain treaties or provisions; and

(vii) rival techniques of reservation.

(i) Impermissible Reservations

Apropos the effect of an impermissible reservation the question was posed whether it (an impermissible reservation) entailed the nullity of the expression of consent of the reserving State to be bound (by the treaty), or only nullity concerning the reservation itslef. It was pointed out in this regard that the case law of international human rights protection agencies revealed that the answers to these issues had considerable effect.

(ii) Objection to Reservations to Treaties

On the matter of objection to reservations the Special Rapporteur asked whether in formulating a reservation a State should be guided by the principle of its (the reservation's) compatibility with the object and purpose of the treaty or could the State exercise its own discretion. On this question also the debate between opposability and permissibility was obvious. The Rapporteur asked that consideration be given to the effects of an objection to reservation if, as Article 21 paragraph 3 of the 1969 and 1986 of the Vienna Conventions permitted the State objecting to the reservation had not opposed the entry into force of the treaty or between the reserving State and itself.

(iii) Interpretative Declarations

The Special Rapporteur expressed his concern about the distinction between reservations and interpretative declarations which States resort to with increasing frequency and on which the Conventions are silent. He pointed out that the conclusion to be drawn from a recent judgment is that an "interpretative declaration" must be taken as a genuine reservation if it is consistent with the definition accorded to the latter term in the Conventions. On the other hand, several other judicial decisions would testify to the fact that it is extremely difficult to make a distinction between

"qualified interpretative declarations" and mere "interpretative declarations". What is more the legal effects of the latter remained unclear.

(iv) Effects of Reservations and Objections on the Entry Into Force of a Treaty

Discussing the effects of reservations and objections on the entry into force of a treaty the Special Rapporteur observed that this important and widely debated question has caused serious difficulties for depositaries and has not been answered in the relevant Conventions. He pointed out that the practice followed by the Secretary-General in his capacity as depositary had been the subject of rather harsh criticism. Attention was invited to the opinion of the Inter-American Court of Human Rights that a treaty entered into force in respect of a State on the date of deposit of the instrument of ratification or accession whether or not the State had formulated a reservation. It was stated that while this position was accepted in some circles, others had doubted whether it was compatible with the provisions of Article 20 paragraphs 4 and 5 of the Vienna Convention.

(v) Do Successor States 'Inherit' Reservations to Treaties? Reservation Provisions of the Vienna Convention of 1978

The Special Rapporteur pointed out that the Vienna Convention of 1978 was silent on the fate of reservations in the event of State succession. He called for consideration to be given to the question whether the successor State inherited the objections formulated by the predecessor State and whether it could express its own new objections.

(vi) Issues and Problems arising from the specific object and nature and certain treaty

On turning to the problems connected with the specific object of certain treaties or provisions the Rapporteur observed that because of their general nature codification Conventions neglect the particular problems deriving from the specific object and nature of certain treaties. This is particularly true of constituent instruments of international organizations, human rights conventions and codification treaties themselves. In his view the existing regime of reservations and objections to reservations in these specific areas needed consideration. If the system provided for under the 1969 Convention was deemed unsatisfactory the ways and means of its modification would also need to be examined. Certain other areas, such as environment and disarmament, in his opinion, needed to be recognized as calling for special treatment.

Rival Techniques Formulating Reservations to Treaties

The Special Rapporteur deemed it appropriate at some stage in the work on the topic to consider 'rival' techniques of reservations whereby States parties to the same treaty could codify their respective objections by means of additional protocols, bilateral arrangements or optional declarations concerning the application of a particular provision.

Scope and form of the Commission's Work on the Subject

In Chapter III of his report the Special Rapporteur dealt with the scope and form of the Commission's work. This part of the report constituted the essence of what needed to be discussed at the present session and he called upon the Commission to take a clear stand on that score at the current session.

Scope of the future work of the Commission

On the matter of scope of the future work the Commission, in the view of the Special Raporteur, was not on *terra incognito*. Much had been written on the subject and three Conventions had been adopted—and they had proved their worth. The Special Rapporteur pointed out that the debate in the Sixth Committee on the inclusion of the topic in the Commission's agenda had emphasized *inter alia* that a second look at the three Vienna Conventions of 1969, 1978 and 1986, should be taken before calling into question the work of the Commission's predecessors and to which States were attached. He expressed a firm conviction that what had hitherto been achieved must be preserved, regardless of possible ambiguities. In his opinion, the rules on reservations set forth in the Vienna Conventions on Treaties operated fairly well. The potential abuses had not occurred and even if States did not always respect the rules they regarded them as a useful guide. The rules in question had now acquired customary force. The Commission, the Special Rapporteur hoped, would not begin questioning what had been achieved but that it would, instead, seek to determine such new rules as may be complementary to the 1969, 1978 and 1986 rules without throwing out the old ones which were certainly not obsolete.

Moreover, were the Commission to adopt norms incompatible with articles 19 to 23 of the 1969 and 1986 Vienna Conventions on Law of Treaties or even article 20 of the 1978 Vienna Convention on State Succession, 'States which had ratified, or would in the future ratify those Conventions would be placed in an extremely delicate position. Some of them, it was pointed out, would have accepted the existing rules and would be bound by them, while others would be bound by the new rules that would be incompatible with the rules already adopted; and yet others could

even be bound by both, depending on their partners. If recourse were had to a legal fiction it would be possible, of course, "to circumvent the situation exemplified, almost caricatured", by the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea. In the case of reservations to treaties there is no need for such an upheaval in the law. In sum, the Special Rapporteur proposed that the existing articles of the Vienna Convention should be treated as sacrosanct unless during the course of work on the topic they proved to be wholly impracticable. Where possible and desirable ambiguities should be removed and an attempt made to fill any gaps, if only to avoid anarchic developments.

Form that the work of the Commission (might take) (may be given)

Apropos the form that should be given to the Commission's work the Special Rapporteur said that the possibilities open to the Commission included:

(i) the treaty approach;

(ii) the drawing up of a guide on the practice of States and international organizations; and

(iii) proposing model clauses.

(i) The treaty approach

The treaty approach, the Special Rapporteur pointed out, could take two different forms including drafting a Convention on reservations that would reproduce the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions subject only to clarifications and completion where necessary. The second possibility was to adopt one or three draft protocols that would supplement, but not conflict with the existing 1969, 1978 and 1986 Conventions. The mere fact of repeating the existing rules would in either case, preclude any likelihood of incompatibility and would not prevent the Commission from submitting draft articles together with commentaries.

(ii) Drawing up of a guide on the practice of States and International Organizations

The second option was the drawing up of a guide on the practice of States and international organizations on the matter of reservations to treaties. Such a guide could take the form of an article by article commentary to provisions on reservations in the three Vienna Conventions prepared in the light of developments since 1969 and designed to preserve what had been achieved, along with the requisite clarifications and additions.

(iii) Formulation of Model Clauses

The third approach open to the Commission was to propose model clauses into which negotiators could delve into and draw inspiration from depending upon the purpose of a particular treaty. This approach, if adopted, would make for flexibility and be of great use to States. Model Clauses, in the opinion of the Special Rapporteur, offered two advantages. First, by furnishing a variety of clauses of derogation it would counterbalance the general trend towards precision by providing for more flexibility. Second, there were at the present time fairly strong centrifugal tensions which were reflected in the challenging of existing rules in certain areas. This was particularly true of human rights and there was no certainty that the problems which arose concerning the Human Rights Conventions could be resolved simply by interpreting the existing rules. Model clauses for human rights treaties would, therefore, in the opinion of the Special Rapporteur, provide a viable solution for the future. Admittedly though it would be difficult to draw up an exhaustive list of all the clauses relating to reservations incorporated in the existing multilateral conventions, a catalogue of such clauses, in the opinion of the Special Rapporteur, could be made on the basis of a sufficiently representative sample of the various areas covered by Conventions such as those on human rights, disarmament, international trade etc. The drafting of model clauses could thus be a useful complement to the Commission's basic task.

Having thus emphasized that there are several ways of achieving the basic objective—consolidated draft articles, a guide to practice of States and international organizations, model clauses or a combination of these approaches, the Special Rapporteur concluded by observing that "it is up to the Commission in close consultation with the Sixth Committee, to determine which are the most appropriate."

Proposed title of the Topic

Another issue raised by the Special Rapporteur concerned the title of the topic. In his opinion, the present title viz. "The law and practice relating to the reservations to treaties" had an academic ring and was unsatisfactory. It gave the impression that the law and the practice were distinct and could be detached from each other. He proposed an accurate and "neutral" title "Reservations to Treaties".

Points for consideration by the Commission

In concluding his presentation to the Commission, the Special Rapporteur sought urgent assistance and orientation from the Commission on the following questions:

1. Did the Commission agree to change the title of the topic to 'Reservations to Treaties?'

2. Did it agree not to challenge the rules contained in article 2 paragraph 1(d) and articles 19 and 23 of the Vienna Conventions of 1969 and 1986 and article 20 of the Vienna Convention of 1978 and to consider them as presently formulated and to clarify and complete them only as necessary?

3. Should the result of the Commission's work take the form of a draft convention, a draft protocol(s), a guide to practice, a systematic commentary, or something else?

4. Was the Commission in favour of drafting model clauses that could be proposed to States for incorporation in future multilateral conventions in keeping with the field in which those conventions would be concluded?

The Special Rapporteur stated that while he would be grateful for any comments and observations on the long list of issues and problems that he had identified in the second chapter of his present report, replies to the four questions posed by him—in particular the latter three—were absolutely indispensable for the continuation of the work on the topic.

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

At its forty-seventh session the Commission had before it the eleventh Report of the Special Rapporteur, Mr Julio Barboza.[5] The Commission also had before it the tenth report of the Special Rapporteur which had been introduced at the previous session[6] and decided to consider the two reports together. That Report of the Special Rapporteur comprised of an introduction and two parts addressed to the question of harm to the environment. In the introductory section of the report the Special Rapporteur recalled that the draft article 2 on the use of terms as provisionally adopted by the Commission comprised of three paragraphs (a), (b) and (c) which defined "risk of causing significant transboundary harm"; and "State of origin" respectively. He proposed in the present report that the designation of the paragraphs of the article be altered and that paragraph (a) referring to the risk of transboundary harm be renumbered as paragraph 1 and that the existing paragraph (b) dealing with transboundary harm be redesignated.

Harm: Definition of

This restructuring of the existing provisions of article 2 was perhaps necessary because the Special Rapporteur proposed to incorporate a definition of the term "harm" which was proposed to be subdivided into three sections dealing with (i) harm to person; (ii) harm to property; and (iii) harm to the environment, i.e. the revised structure of Article 2 paragraph 3 dealing with harm would be divided into three sub-sections dealing with the abovementioned elements.

The definition of the term "harm" proposed by the Special Rapporteur to be included in paragraph 3 of draft article 2 stipulates that harm means: (a) loss of life, personal injury or impairment of the health or physical integrity of persons; (b) Damage to property or loss of profit; and (c) Harm to the environment; including

(i) The cost of reasonable measures taken or to be taken to restore or replace destroyed or damaged natural resources or, where reasonable, to introduce the equivalent of these resources into the environment;

(ii) The cost of preventive measures and of any further damage caused by such measures;

5. A/CN. 4/468.
6. A/CN. 4/459.

(iii) The compensation that may be granted by a judge in accordance with the principles of equity and justice if the measures indicated in subparagraph (i) were impossible, unreasonable or insufficient to achieve a situation acceptably close to *status quo ante*. Such compensation should be used to improve the environment of the affected region.

The Special Repporteur pointed out in this regard that it is important that the "concept of loss of earnings" be included in a definition of harm. The reference to loss of earnings, in his opinion, lends clarity to the text. Besides it was necessary to make a clear distinction between harm caused individually to persons and things, even if caused by environmental degradation and harm to the environment *per se*. In the former case, the person entitled to remedial action is the person harmed, whether directly or indirectly (through environmental degradation). In the latter instance, the Special Rapporteur argued, harm to the environment *per se* is harm caused to the community where environmental values are harmed and as a consequence the community is deprived of use and non-use of services.

It may be stated that a definition of harm to the environment has been included in several international instruments and that "harm to the environment has become punishable under the domestic laws of a number of countries viz. Brazil, France, Germany, Norway, Sweden and the United States of America."

Environment, Definition of

The Special Rapporteur, Mr Julio Barboza, however rightly observes that there is "at present no universally accepted concept of environment" and that elements considered to be part of the environment in some conventions are not in others. It is this lacuna in the *lex lata* which led him to consider the possibility of incorporating a definition of environment into the draft articles and to take the view that the definition of environment will "determine the extent of harm to the environment; and that "the broader the definition the greater will be the protection afforded to the object thus defined, and vice-versa."

A definition of the environment, in the opinion of the Special Rapporteur, does not necessarily have to be scientific and until the present time the definitions that have been tried have simply enunciated the various elements that were considered to be part of the environment. Thus, a limited concept of environment has hitherto limited harm to the environment exclusively to natural resources, such as air, soil, water, flora and fauna, and their interactions. On the other hand, a broader concept covers landscape and

what are usually termed "environmental values". Thus, it is that one speaks of service values and non-service values. Finally, the broadest definition of environment also embraces property forming part of the cultural heritage. Against this backdrop, the Special Rapporteur has proposed that the following definition of the term "environment" be included in article 2 of the draft articles:

> "The environment includes ecosystems and natural, biotic and abiotic resources, such as air, water, soil, fauna and flora, and the interaction among these factors.

It would have been observed that while the Special Rapporteur has opted for a broader definition of the concept of environment he has not gone so far as to include a reference to monuments and other structures of value as expression of the cultural heritage of a group of people. Mr. Barboza explains that by excluding the reference to a kind of "cultural environment" he does not "mean to detract from this value by suggesting that such structures should not be included in the concept of "environment" for the purposes of compensation". However, for purposes of definition of the term environment' a reference to cultural heritage needs to be excluded because of the risk of broadening the concept of environment indefinitely by introducing disparate concepts. Mr. Barboza's effort is to seek a "definition which contains a unitary criterion, such as the national environment" and besides such structures, monuments etc. are already protected through the application of traditional concept of damage obviating the need to include them in the definition of environment. Nor does the Special Rapporteur favour the inclusion of the characteristic aspects of the landscape and damage to human health in the definition of environment.

Entitlement for Remedial Action for Harm to the Environment

Having dealt with the elements of the environment the Special Rapporteur turned to the question of what was meant by harm to the environment. In his opinion, harm to the environment *per se* is a change in the environment which causes people loss, inconvenience, or distress and it is this injury to people which the law protects against in the form of compensation. In any case harm to the environment *per se* would injure a collective subject such as a community which would be represented by a State. Mr. Barboza observes that under international law, a State whose environment is damaged is also the party most likely to have the right to take legal action to obtain compensation, and this right may also be granted to non-governmental welfare organizations. He accordingly proposed the following definition on "Entitlement to remedial action for harm to the Environment" to be included as paragraph 5 of article 2.

> "The affected State or the bodies it designates under its [illegible] shall have the right of sanction for reparation of environmental damage."

During the preliminary debate on the eleventh report the views of the Special Rapporteur on the evaluation and restoration of damaged natural resources were generally endorsed. One member of the Commission commented that in the proposed definition of harm, in the paragraph concerning remedial action for harm to the environment, the Special Rapporteur had recognised the right of action by the State or by the bodies which it designated under its domestic laws. It was stated that this issue, while important, went beyond the ordinary meaning of the definition. It was suggested that this provision could perhaps be placed in the part on regulation of the conduct of the State or operator.

One member observed that the Special Rapporteur had referred to "non-governmental welfare organizations" and to "the competence of certain public authorities" as "the bodies" designated by the State. However, it was not clear why the bodies designated by the State were entitled to have recourse to the right of action. One member of the Commission asked whether individuals would have a *locus standi* to make a claim for harm to the environment where a State or the institution designated by the State refused to bring a claim.

Draft Articles adopted by the Commission

The Commission at its forty-seventh session provisionally adopted four draft articles addressed to principles of the question of international liability for injurious consequences arising out of acts not prohibited by international law. It may be recalled in this regard that the Special Rapporteur had in his fifth report[7] proposed the text of articles on certain principles such as the freedom of action and the limits thereto, cooperation, prevention and reparation. Those draft formulations were considered by the Drafting Committee and have now been adopted together with commentaries thereto.

Freedom of Action and the Limits Thereto

Draft Article A (Formerly draft article 6) on freedom of action and the limits thereto incorporates the principle that the freedom of States to carry on or permit activities in their territory or otherwise withnin their jurisdiction or control is not unlimited. Such a freedom must be compatible with any specific legal obligations owned to other States with respect to transboundary harm and with the general obligation with respect to preventing or minimizing the risk or causing transboundary harm. The Secretariat of

7. A/CN. 4/423. The proposals advanced in the Fifth Report were subsequently modified by the Special Rapporteur in his Sixth Report on the subject.

the AALCC is of the view that the provision A as adopted manifests a fair balance between the interests and rights of the sovereign State to act freely within its territory on the one hand and the inviolability of the territories of other States from adverse effects of activities undertaken in the territory of another State on the other hand. The stipulation needs to be read as an element of the principle of friendly and good-neighbourly relations rather than as an encroachment of State sovereignty.

Cooperation

Draft provision B (formerly article 7) on cooperation stipulates that States shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm, and if such harm has occurred, in minimising its effects both in affected States and States of origin. It would have been observed that this provision envisages cooperation among three categories of action or personae viz. the State of origin, the affected State or States and international organizations. Further such cooperation is contemplated both in preventing or mitigating the risk of significant transboundary harm and in cases where such harm occurs in minimizing the effects of such harm in the territories of the affected State as well as the State of origin. Thus the provision addresses itself to distinctly and explicitly, deals with cooperation both for prevention and reparation.

Prevention

Draft Article C entitled Prevention requires States to take all reasonable measures or actions necessary to prevent or minimize the risk of significant transboundary harm. It would appear that the duty to take all reasonable measures or action necessary to prevent or minimize the risk of significant transboundary harm is perhaps, absolute. In the formulation advanced by the Special Rapporteur in his fifth report in 1989, the duty of prevention was limited to the utilization of the best practicable, available means. Be that as it may, the present formulation appears to be based on the recommendation of the Sixth Committee that the Commission "examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised text of the draft article."

Liability and Compensation

Draft Article D on Liability and Compensation as adopted reads:

"Subject to the present articles, there is liability for significant transboundary harm caused by an activity referred to in article1.

Such liability shall be met by compensation, financial or other[illegible] in accordance with the present articles."

Report of the Working Group

At its forty-seventh session the Commission *inter alia* decided to establish a Working Group and to entrust to it the task of identifying the activities which fall within the scope of the topic "International Liability for Injurious Consequences Arising Out of the Acts Not Prohibited by International Law." The Working Group comprised of the following members: Mr. Julio Barboza (Special Rapporteur and Chairman), Mr. John de Saram; Mr. Gudmunder Eirikisson; Mr. Nabil Elaraby; Mr. Salifon Fomba; Mr. Igor I. Lukashuk; Mr. Robert Rosenstock; Mr. Albert Szekely and Mr. Chusei Yamada.

In examining various ways of identifying the activities covered by the topic the Working Group examined several multilateral conventions and found that most of the instruments addressed issues of transboundary harm, particularly the issue of liability for such harm were designed to deal with a specific type of activity or substance such as oil or nuclear material or carriage of such material. Treaties in this group defined their scope and subject matter, viz. the substance or activities to which they applied with no need for any further clarification. Some other treaties, the Working Group observed, define their scope in the general terms and provide a list of activities or substances, either in the text of the treaty or in an annex thereto. Treaties in this group address either a specific type of activity or substance or a broader category of activities or substances. It also found that some international instruments, particularly those that have a narrow scope, contain a standard amendment clause but do not include a provison for a meeting of the Parties to update the list of activities of substances. Some treaties include a provision on conditions and procedures for reviewing and updating the list of activities or substances to which they apply.

Again this backdrop of current practice the Working Group studied and evaluated three alternatives viz. (i) to leave the current definition in articles 1 and 2 as it was considered sufficient to enable States to determine whether a particular activity falls within the scope of the articles; (ii) to draw up a list of activities or substances that are to be covered by this topic and to annex the list to the draft articles; and (iii) in view of the close nexus between the liability regime and the need for specification of the scope of the topic to defer the consideration of this issue until the Commission has completed its work on the next stage of the liability regime. The Working Group after due deliberation decided to revisit the question of providing more specificity to the scope of the articles once the Commission has completed its work on issues dealing with liability. The Commission