(*c*) It would appear difficult to formulate an abstract reply as to the utility of considering some less binding instrument in a particular case since this will depend entirely on the desires of the States concerncd as they emerge in the course of preparation and negotiation.

2. (*a*), (*b*) and (*c*) Once again, it would appear very difficult to reply in an abstract manner to this question as it depends very much on the origin of the initiative, the subject matter and practices of the organizations concerned. The general practice within the OECD has been for thc secretariat to draft a preliminary text, based on guidance fiven to it by the approriate body of the Organization; subsequently the text is developed by an expert body or drafting group and at a later stage by a body witli full representation.

World Health Organization (A/36/553, p. 57)

1. Before embarking on the formulation of a particular treaty, efforts should be made, in general, to:

(*a*) Collect legal and factual data relevant to the proposed treaty;

(*b*) Ascertain tlie potential interest of States in the proposed treaty, and

(*c*) Consider the utility of some less-binding instrument (e.g., a declaration).

2. The preliminary formulation of the text of a treaty should generally be entrusted to the Secretariat, or where controversial issues are involved, to an expert organ.

NOTES

[1] This is based on the summary records of the discussions on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

[2] *Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee,* 1396th meeting, para. 20.

[3] See also comments by the Netherlands.

[4] A/36/553/Add.1, p. 6.

[5] *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), chap. IX, sect. F, paras. 129-131. The General Assembly endorsed this position in its resolution 34/142 of 17 December 1979.

V. WORK OF THE INTERNATIONAL LAW COMMISSION

1. *Possible structural change*
   - (a) *Should the ILC be converted into a full-time organ, whose members would be appropriately remunerated?*
   - (b) *Should the honorarium or the per diem of ILC members be increased?*
   - (c) *Should the special rapporteurs work and be remunerated on a full-time basis?*
   - (d) *Should special rapporteurs occasionally be drawn from outside the Commission?*

(e) *Should the special rapporteurs be supported by experts working under their direction on a full-time basis?*

2. *Possible changes in agenda*
   (a) *Should certain questions not be referred to the ILC or should certain additional questions be referred to it?*
   (b) *Should the ILC have a heavier or a lighter agenda?*
   (c) *Should the ILC concentrate more on specific topics, restricted in scope, that may constitute only part of a larger subject area?*

3. *Possible procedural changes*
   (a) *Should the ILC make more of an attempt to complete all its work on each subject within the five-year term for which its members are elected?*
   (b) *Should Governments be consulted more or less frequently during the progress of work by the ILC on a particular draft?*
   (c) *Should there be working groups that meet intersessionally—with perhaps a reduction in the length of Commission sessions?*
   (d) *Should the ILC formulate preambles and final clauses for the draft articles it submits to the General Assembly?*
   (e) *Should the ILC prepare alternative texts of particularly controversial provisions?*
   (f) *Should the ILC consider the possibilty of "restating" areas of customary international law, as an alternative to codification?*
   (g) *Should the ILC consider drafting texts for instruments other than treaties?*

A. SUMMARY OF GENERAL VIEWS EXPRESSED DURING THE DEBATE[1]

1. Several representatives expressed their satisfaction with the International Law Commission's contribution to the study of the multilateral treaty-making process (A/35/312/Add.2). While a number of representatives considered it inappropriate and untimely to examine the work of the Commission in the context of this review, some delegates proceeded to comment on questions in this regard posed in section IV of the Secretary-General's report.

2. Different views were expressed on the role of the Commission with respect to multilateral treaty-making. Some representatives held the view that the Commission, being an expert group, was best suited for treaty-making on selected topics such as treaties and State responsibility, but less suitable for dealing with issues of exclusively political character. Some other representatives went on to suggest certain ways for making better use of the Commission, for example by increasing the honorarium or the per diem of its members, converting the Commission to a full time body, making better use of special rapporteurs who might be supported, as appropriate, by outside experts. Some representatives suggested that the Commission's congested, general work programme and agenda should in the future be changed to more specific programmes. Some of them thought that this could be achieved by excluding the formulation of instruments other than those in treaty form or by limiting its task to codification and progressive development of new norms of international law.

3. It was stated by some that the techniques and procedures provided for in the statue of the Commission were well suited to the tasks entrusted to it by the General Assembly and had made a significant contribution to the codification and progressive devclopment of international law. Some representatives added that other techniqucs and procedures could however also be used, either because vital national interests required draft articles to be prepared by Governinent representatives as had been the case with the Third United Nations Conference on the Law of the Sea, or because the issues were more scientific and technical than legal. Some representatives maintained the view that the Commission's study of this topic was part of the rationalization effort now procecding within the organization.

4. One representative expressed the view that the conclusion reached in the report that the techniques and procedures provided in the Commission's Statute, as they had evolved in practice, were well-suited to the tasks entrusted to the Commission by the General Assembly, seems to beg the question. He pointed out that though the report[2] had a list of important conventions concluded by the States on the basis of drafts prepared by the Commission, it did not proceed to examine their current status vis-à-vis the number of parties to them. Nor had the Commission attempted to find reasons why entirely new tcchniques had had to be evolved to deal with the question of the law of the sea, and the preparation of the Convention against the Taking of Hostages. He also expressed the view that the Commission's practice of concluding its work on a given topic by submitting draft articles which were intended to form the basis of a convention ought to be revised. In connection with this, he hoped that the Commission would explore other methods.

B. WRITTEN COMMENTS AND OBSERVATIONS BY GOVERNMENTS

Argentina (A/36/553, p. 8)

1. *Possible Structural changes*

(*a*) ILC properly performs its work in accordance with its statute, and has a broad and extremely important mandate.

(*b*) If ILC continued with its present functions, it would not be necessary to increase the honorarium of the *per diem* of its members.

(*c*) As stated previously, having a full-time Special Rapporteur would change the present structure of the Commission: as matters stand, therefore, it would not be appropriate to appoint one.

(*d*) On those occasions when highly specialized subjects originating from other organs are debated, it might be advantageous to draw a Special Rapporteur from outside the Commission.

(*e*) This is not necessary, except on very special occasions of the kind mentioned in (*d*) above.

2. *Possible changes in agenda*

(*a*) Inasmuch as the specific function of ILC is the progressive development and codification of international law, that implies the deletion of certain questions and the inclusion of new ones.

(*b*) The agenda of ILC varies according to demands at a particular time, which it is impossible to determine in advance.

(*c*) This does not appear necessary, in view of the fact that larger subject areas are normally subdivided.

3. *Possible procedural changes*

(*a*) This will depend on the subject. Some may require more than five years, others less; in any event, the Commission's system of re-election allows for some continuity.

(*b*) The frequency with which Governments are consulted at present is appropriate.

(*c*) This might be useful in urgent cases, but the length of sessions should remain the same.

(*d*) This is not *necessary*, but it might be appropriate in view of the nature of the Commission's work, especially in the case of preambles. If "final clauses" means those relating to the number of ratifications required, entry into force, and so on, that might overburden the Commission's already sizable workload.

(*e*) It would be preferable to prepare a text which reflected and attempted to reconcile the views of all States, even if the drafting of such a text required an additional effort on the part of the Commission.

(*f*) Since the Commission's function is essentially legal, it formulates legal rules on the subjects referred to it in the form of articles. Any other procedure would render the progressive development and codification of international law less flexible.

(*g*) This would be appropriate in cases in which, by reflecting the views of a group, it gave the Commission a better understanding of such interests or views.

Australia (A/37/444, p. 7)

1. *Possible structural changes*

(*a*) To convert the International Law Commission into a full-time organ raises a number of important issues which should be studied further. Other alternatives should also be examined, including the question of whether there should be more than one session of the Commission a year.

(*b*) The honorarium of ILC members would appear to be insufficient considering the length of sessions, and should be reviewed.

(*c*) The question of whether Special Rapporteurs should work and be remunerated on a full-time basis is, to some extent, tied up with question (*a*). Even if the ILC were to be converted into a full-time organ this would not necessarily mean that the Special Rapporteur would have to work on a full-time basis.

(*d*) Under the existing situation, Special Rapporteurs should be drawn only from members of the ILC so that they may participate as equals in the Commission's consideration of their work.

(*e*) The question of expert help for Special Rapporteurs, if not on a full-time basis then at least *ad hoc*, should be examined further.

2. *Possible changes in agenda*

It is not possible to provide a categorical answer to questions on the ILC agenda but, in general, the Commission should give priority to the progressive development and codification of important areas of international law where agreement among the Commission's members, as well as among States, may be possible. We consider that the agenda of the Commission is generally too heavy, and the Sixth Committee should carefully consider items placed upon it. While the ILC may have success in dealing with contentious matters it will make best use of its limited time, in current circumstances, if these are not numerous. The ILC should be pre-eminently able to take broad views of major topics.

3. *Possible procedural changes*

(*a*) It would be best if ILC members could carry a topic through to completion within their period of service.

(*b*) There would seem to be no need for Governments to be consulted more than once a year on the work of the Commission. Government representatives should, in addition, continue to have the opportunity of commenting on the work of the Commission in the Sixth Committee.

(*c*) There might be scope for intersessional working groups, subject to constraints on the time of Commission members, coupled with a reduction in the length of Commission sessions. This, however, may not be necessary if the agenda of the ILC is lighter. The matter should be examined further.

(*d*) The Commission should in general attempt to formulate preambles and final clauses of draft articles it submits to the General Assembly, if it considers these should contain special features. If the Commission finds it difficult to reach agreement on such provisions it should leave the responsibility for preambles and final clauses to the General Assembly.

(*e*) Alternative texts of particularly controversial provisions, and the reasoning behind them, could be helpful for those entrusted with the negotiation of treaties and could save the time of the ILC itself.

(*f*) The restatement and codification of areas of customary international law should be secondary to its progressive development, and undertaken only if there is scope for agreement among States on the rules of customary international law in question.

(*g*) We consider that in general the ILC should not draft texts for instruments other than treaties. To attempt to do that would detract from its main purpose, over-politicize the Commission and increase its workload. In cases where the Commission believes that a particular subject-matter referred to is not ripe for inclusion in a binding instrument it should say so, stating the reasons.

Brazil (A/36/553, p. 14)

The International Law Commission considers that "the techniques and procedures provided in its Statute, as they have evolved during a period of three decades, are well adapted for the object stated in article 2 and further defined in article 15, i.e. 'the progressive development of international law and

its codification'". The Brazilian Government shares this view and considers that any suggestions for modifications in the procedures followed by the Commission, as well as in its structure, should be made by the Commission itself, if and when the Commission feels they are needed.

Byelorussian Soviet Socialist Republic
(A/35/312/Add.1, p. 13, and A/36/553/Add.1, p. 3)

1. With regard to methods of perfecting and increasing the effectiveness of techniques and procedures for the elaboration of multilateral treaties of a universal character within the United Nations, it should be pointed out that the output of the International Law Commission continues to be inadequate.

2. In the view of the Byelorussian Soviet Socialist Republic, an investigation into the multilateral treaty-making process should, among other things, lead to an enhancement of the role and significance of the Sixth Committee of the General Assembly in promoting the codification and progressive development of international law, which is its main task under Article 13 of the United Nations Charter. In particular, draft multilateral treaties and conventions prepared by the International Law Commission should be finalized and adopted by the Sixth Committee rather than by special international conferences convened for that purpose, as occurs in a majority of cases at the present time. This would also give the representatives of all countries an opportunity to participate directly in the elaboration of multilateral treaties. The representatives of many Member States, including the Byelorussian Soviet Socialist Republic, have spoken out repeatedly at General Assembly sessions in favour of such a course.

3. Consideration of the process of elaborating multilateral treaties of a universal character within the United Nations system should also serve to draw the attention of Member States to the need to increase to the greatest possible extent the number of parties to existing multilateral treaties concluded under United Nations auspices.

4. The Byelorussian SSR considers that the International Law Commission can play a bigger role in drafting treaties and should increase the effectiveness of its work, and that the Sixth Committee should play a more active role in the process of establishing norms, without convening *ad hoc* international conferences for that purpose. There should also be no time-limit on the consideration of questions. A time-limit is acceptable only with the free consent of the plenipotentiaries of States participating in the work of a conference or a United Nations body.

5. The existing structure of the International Law Commission has proved itself in practice and it would be inadvisable to change it. The existing way of determining how full the agenda should be and in what order individual items should be considered at sessions of the Commission has also proved itself. At the same time the Commission should fulfil General Assembly instructions with respect to the period in which it should complete its consideration of a topic.

Cuba (A/36/553, p. 18)

1. *Possible structural changes*

(*a*) We do not consider this necessary.

(*b*) No.

(*c*) No.

(*d*) Yes, for subjects where the technieal questions to be regulated are beyond the scope of the legal knowledge of the members of the International Law Commission.

(*e*) Yes, for the same reasons as in 1 (*d*).

2. *Possible changes in agenda*

(*a*) There may be certain questions that can be dealt with by the Sixth Committee without needing to involve the International Law Commission: conversely, it may be necessary to refer to the Commission some topic which is not at present before it. The matter should be considered on a case-by-case basis.

(*b*) As stated above, the agenda should be based on a work programme designed to give priority to the most important subjects and to achieve concrete results without unnecessary delays.

(*c*) It would not be advantageous to divide the study of a subject among a number of organs, although it certainly is advisable to concentrate systematically on specific topics.

3. *Possible procedural changes*

(*a*) This could be attempted, but it would depend on the complexity of the subject under consideration. Changes of rapporteur can unquestionably contribute to delay in concluding an item, and so can the replacement of most of the members of the Commission who are already familiar with the subject.

(*b*) This would be beneficial, since it would show which aspeets were most controversial before the formulation of the draft was completed.

(*c*) If work is divided among a number of working groups within the Commission, the groups should meet intersessionally, which would expedite work during the session.

(*d*) Drafts formulated by the International Law Commission should include both a preamble and final clauses.

(*e*) If, as we suggest in (*b*) above, States are consulted during the formulation of a draft, it will be possible to identify the aspects on which there are problems and alternative texts could be prepared, provided that the objective pursued is not lost sight of.

(*f*) This is not necessary and would, moreover, be contrary to the purposes of the Commission and the provisions of Article 13, paragraph 1 (*a*), of the Charter of the United Nations.

(*g*) This must depend on the importance of the subject to be regulated.

Germany, Federal Republic of (A/36/553, p. 22)

1. The techniques and procedures provided for in the Statute of the International Law Commission, as they have evolved in practice, are well suited to the tasks entrusted to the Commission by the General Assembly, i.e. the progressive development of international law and its codification. The

quality of the Commission's work is well recognized by the United Nations members. The draft articles submitted by the Commission to the General Assembly constituted the extremely valuable basis for numerous conventions, elaborated and concluded under the auspices of the United Nations. The summary records of the Commission and the Commission's Report to the General Assembly as well as the reports and studies of the Special Rapporteurs play an important role in legal research and international practice, promoting knowledge of and interest in the process of the progressive development of international law and its codification.

2. Although the Commission is a permanent subsidiary body of the General Assembly, there is a continuous need for the General Assembly as well as for Member States individually to bear in mind the *sui generis* nature of the Commission and of its work. Any endeavour to review the possibility of improving the work of the Commission should respect this special status of the Commission, considering that the Commission itself keeps constantly under review the possibility of improving its procedure and methods of work.

1. *Possible structural changes*

3. The Federal Republic of Germany does not see a necessity to convert the International Law Commission into a full-time organ. For a full-time organ, it would be more difficult to find outstanding international lawyers willing to sit on the Commission as they would have to give up all other professional obligations. Regular attendance has been a problem for some members; it would be more so, if the Commission met on a permanent basis. The honoraria or the per diem of International Law Commission members should guarantee their financial independence. If Special Rapporteurs are expected to work on a full-time basis this would exclude those members of the Commission as Special Rapporteurs who are in no position to work full-time for the Commission. Remuneration should take account of the extra work-load for a Special Rapporteur.

4. Special Rapporteurs should be drawn from within the Commission. As the Commission is composed of persons of recognized competence in international law, all its members are qualified as Special Rapporteurs.

5. Considering the need for thorough legal research as well as the ever increasing amount of legal material being available from the different legal systems of the world, it may be feasible to support the Special Rapporteurs by experts working under their direction. It will depend on the circumstances of the research to be done whether such research should be done by experts working on a permanent full-time basis or on a temporary basis.

2. *Possible changes in agenda*

6. As in the past, questions which are primarily of a political or technical nature should not be referred to the International Law Commission. The work of the International Law Commission should continue to concentrate on those issues where Member States see a general need for codification and progressive development of international law and where general agreement among the Commission's members as well as among States may be possible.

3. *Possible procedural changes*

7. The authority of the International Law Commission drafts and of the Commentaries to these drafts is based on the quality of the work. Time-pressure exerted on the Commission could affect the quality of its work.

8. Governments should be consulted in such a manner as to guarantee the widest possible acceptance by States of a particular draft.

9. Whether the International Law Commission should formulate preambles and final clauses for draft articles is to be decided in specific cases on a pragmatic basis. A general decision on this question does neither seem necessary nor feasible.

10. The International Law Commission should strive to reach a consensus. If consensus cannot be reached, the International Law Commission may prepare either alternative texts or no text at all, depending on the circumstances.

11. "Restating" areas of international law should be considered only if there is complete agreement among States on rules of customary international law. Nevertheless by restating areas of international law the International Law Commission could expose its work and its authority to challanges by States.

12. The drafting of texts for instruments other than treaties should not be excluded, but in principle the International Law Commission will best fulfil the functions by drafting texts which may form the basis of an international treaty.

Indonesia (A/37/444, p. 14)

There are many agenda items which have been considered by the International Law Commission. Due to lack of time, the Commission could not consider them in detail and fulfil its duty. If the effectiveness of the Commission is to be improved, the Sixth Committee will have to designate the scale of priority.

Italy (A/36/553, p. 28)

1. It is the Italian Government's opinion that the role of the International Law Commission should be further enhanced, and that members of the Commission should be chosen exclusively on the basis of their competence in its field of work. It would be desirable for these experts, who should be independent of their Governments, to work in and for the Commission full-time, even if this might represent a greater financial burden for the United Nations. On the other hand it does not seem necessary, if the Commission members are selected on the basis of rigorous criteria, to entrust part of the work to outside experts or to assign assistants to the Special Rapporteurs of the Commission. Assisting the ILC is the task of the United Nations Secretariat.

2. If, however, the Commission's structure remains as it is, and if its sessions maintain their present duration, it seems impossible to entrust it with further tasks. The agenda of the last few years already seems extremely heavy, and to burden the Commission further would undermine the seriousness and

efficiency of its work. In fact, some thought should be given to lightening the agenda by not burdening the Commission with minor matters on which it could limit itself to expressing an opinion.

3. Regarding the procedure currently followed or to be followed by the Commission, subpoints (*e*), (*f*) and (*g*) of point 3 are worthy of attention. It would in fact be useful for the Commission to prepare alternative texts, explaining the motives and basis of each variant. Similarly, the idea of "restating" areas of customary international law as an alternative to codification should not be discarded. Finally, a greater recourse to texts not intended to become treaties—such as recommendations, model-rules, and so forth—might often facilitate the absorption of the Commission's findings into international practice.

Mali (A/36/553, p. 31)

1. It might be preferable to increase the honorarium or the per diem of members of the Commission.

2. Certain questions should not be referred to the International Law Commission, which already has a heavy agenda.

3. The International Law Commission should make more of an attempt to complete all its work on each subject within the five-year term for which its members are elected.

4. It should formulate preambles and final clauses for the draft articles it submits to the General Assembly. This would make it easier for the Assembly to follow the progress of a topic.

Mexico (A/36/553, p. 34)

1. The International Law Commission has proved to be a suitable organ for the preparation of draft multilateral agreements. Its efficiency is due to the high professional qualifications of its members and to the fact that, although they serve in their personal capacity, most of them are fully acquainted with the positions of their Governments and the Governments of other States. For that reason, converting the International Law Commission into a full-time organ, with members whose professional lives would be bound up entirely with the Commission, would mean converting it into an academic organ remote from reality.

2. The practice whereby the General Assembly of the United Nations is the organ which decides what topics are to be considered in the International Law Commission should be maintained, because there can be no organ more capable than the General Assembly of determining which topics merit priority; however, the International Law Commission should be left free to decide how much time is to be spent on each topic, in the light of the stage of maturity which, in the opinion of the Commission, has been reached in the process of formulating the draft treaty in question and of international circumstances. It is not advisable to impose time-limits on the International Law Commission, although the General Assembly should provide guidelines in order to avoid unjustified delays of the kind which have occurred in the case of the item on State responsibility.

Netherlands (A/36/553/Add.1, pp. 6-9)

1. Inasmuch as the questions posed under this heading do suggest that the contribution by the ILC to the multilateral treaty-making process in general could be enhanced by improvements of a procedural nature of it *modus operandi*, a note of caution is in order.

2. The topics dealt with by the ILC since its inception bear witness to the fact that its task has been understood to be the formulation of the classical rules of universal *ius inter potestates* and the adaption of these rules to the requirements of present-day international society. It is therefore submitted that subjects which do not primarily coucern inter-State relations at the government level, such as international economic relations (goods, services, monetary affairs) or the unification and harmonization of national legal systems in specific areas, do not fall within the scope of activities proper of the ILC.

3. The characteristics of the activities of the ILC, set out above, do have certain consequences for the pace of work of the Commission and its composition. The requirements of universality generally cause the Commission to spend considerable time in bridging gaps between different positions. At the same time the intergovernmental nature of its projects calls for a membership of persons combining a specialist knowledge of international law with extensive experience of day-to-day intergovernmental relations.

4. Turning now to the specific questions posed, the Netherlands Government would see no merit in either converting the ILC into a full-time organ or appointing full-time Special Rapporteurs. Apart from financial considerations, this attitude is inspired by the considerations set out above. Such a set-up would of necessity interfere with the requirement that the Commission be composed of members having practical experience. This requirement is even more relevant to Special Rapporteurs. At the same time, Special Rapporteurs can function effectively only if they are integrated into the over-all work of the Commission. The ILC should therefore continue to draw Special Rapporteurs from its membership. On the other hand, the Netherlands Government would welcome a more extensive staffing of Special Rapporteurs. Assistance (not necessarily full-time) of Special Rapporteurs would enable them to concentrate more on drafting texts and commentaries. Provision should then also be made in financial terms for the necessary intersessional contacts between a Special Rapporteur and his assistant. Such assistants would have to be selected by the Special Rapporteur (from any source he deems fit), and could be placed under the authority of the codification division of the United Nations Secretariat.

5. Even if the above-mentioned improvement would be effected, the items presently on the agenda of the ILC would still keep the Commission active for a considerable period of time. As the need arises, additional questions could be added, provided they fit in within the general parameters set out above.

6. In this connection, the Netherlands Government would see considerable merit in devising a procedure through which the General Assembly, presumably at the instigation of a Main Committee or subsidiary body, would thoroughly discuss subjects which are suggested for inclusion in a legal instrument before requesting the ILC to draft such an instrument. Such discussion might well indicate that, politically, there are various solutions to the problem.

The General Assembly might then request the ILC to "translate" these options into legal language. It is then up to the Assembly to choose between the alternatives presented to it. Thus, the political discussion will be held where it rightly belongs. Furthermore, it is quite conceivable that such a request pertains to an issue which forms part of a larger subject area. In any event it would be extremely useful if those portions of a subject, which clearly are within the competence of the ILC, such as state responsibility clauses, dispute settlement provisions, etc., would be referred to it, even if the subject as a whole were being dealt with in another legal forum (*ad hoc* or permanent).

7. The Netherlands Government would certainly support any suggestions which might enable the Commission to complete a topic within a shorter time span. Certain complicated topics, such as the law of treaties or state responsibility, however, would seem to require more time than a period of five years. In this connection, it is suggested that Governments, either when nominating their candidates for the Commission or when casting a vote during the elections, give consideration to the desirability of at least some permanence in the membership of the Commission (e.g., two consecutive terms of office).

8. A possible suggestion for speeding up the consideration of subjects might be for the ILC not to deal with all items on its agenda at the same time but to concentrate instead on one or two items. Experience teaches that discussion of *all* items during the 12-week session has various disadvantages. Special Rapporteurs can present only a few draft articles each year, whereas discussion of those articles is necessarily hampered by the lack of an over-all view. In retrospect a good many questions posed during such discussions are premature or even irrelevant in the light of articles which have been presented by the Special Rapporteurs later on. Discussion of the draft as a whole (or substantive part thereof) during a major part of the session would in the opinion of the Netherlands Government constitute a considerable improvement of the Commission's *modus operandi*. Such a procedure would at the same time allow for improvement of the system of consultation of Member States. For the same reasons as given above for discussion by the ILC itself, comments by Member States on only small portions of a draft are probably not as useful as they would be if the draft were to be submitted as a whole (or in parts suitable for scrutiny, independently of other parts).

9. The Netherlands Government is aware that such procedure might deprive the Commission of the necessary guidance by Member States. It is therefore submitted that all Special Rapporteurs should report to the Commission each year, even if their subject is not up for discussion. Through its report to the General Assembly, the Commission would keep Member States informed on all topics. To the extent feasible and necessary, Member States could then react during the debate on the ILC report in the Sixth Committee thus providing guidance for the Commission.

10. Intersessional meetings, even if combined with a reduction in the length of the Commission's session, will presumably be attended to by less than the full membership. Being less "representative" such meeting can hardly be expected to serve the objectives sought.

11. Most certainly the ILC must present as complete a text as possible (see A/35/312, E, 3 (*d*)). In the opinion of the Netherlands Government many provisions, usually referred to as final clauses, are of such importance that they

can rightly be considered as substantive. Thus dispute settlement provisions, which have to be tailor-made taking into account the text as a whole, would certainly qualify as substantive provisions. This is equally the case with provisions regarding the relationship to other treaties. Even final clauses of a more technical nature should be included in the draft before it is presented as a whole to the General Assembly. On the other hand it would seem to be within the province of the (political) forum which is to finalize the text to draft the preamble.

12. In accordance with its Statute (article 23), the Commission operates on the presumption that the drafts it prepares will eventually take the form of a convention. It would seem to be up to the General Assembly to decide on the final form once the draft articles have been presented to it. Depending on the nature of the topic which is suggested for inclusion in a legal instrument, however, it is conceivable that the Assembly would decide to request not the drafting of a convention but of model rules or guidelines.

13. This decision might also be prompted by indications during discussions of the subject that the time was not ripe for such a relatively final formulation of legal rules as would be implied by the form of a convention. This would seem to answer in the negative both questions posed in paragraphs (*f*) and (*g*).

Qatar (A/37/444, p. 16)

1. It would be appropriate to consider the possibility of increasing the honorarium or the *per diem* of ILC members.

2. Care should be taken to avoid referring too many questions to the International Law Commission so as not to overload its agenda.

3. The International Law Commission should make more of an attempt to complete all of its work on each subject within the five-year term for which its members are elected. It should formulate preambles and final clauses for the draft articles it submits to the General Assembly, so that the latter may follow up the progress of the topic.

Republic of Korea (A/37/444, p. 20)

The International Law Commission, being an expert group, has proved to be an efficient organ for the preparation of draft multilateral agreements. Therefore, there would be no particular need to convert the Commission into a full-time body which might distance itself from reality were it to be transformed into a kind of academic organ. Besides, it is widely recognized that the Commission is less suitable for purely political matters.

Spain (A/36/553/Add.1, pp. 15-16)

1. *Possible structural changes*

(*a*) Yes, especially if its workload is to be increased.

(*b*) Yes, in principle.

(*c*) The Rapporteurs should at least work on a full-time basis. They should in any case be properly remunerated.

(*d*) No.

(*e*) The Rapporteurs should be supported by experts, but it would not seem necessary for such experts to work on a full-time basis.

2. *Possible changes in agenda*

(*a*) The question is not very clear. The General Assembly decides where to refer items. The desirability or otherwise of referring a question to ILC would have to be considered in each individual case.

(*b*) Generally speaking, the agenda is all right as it is. It could be heavier if ILC members devoted more time to their work and States' absorptive capacity was increased.

(*c*) Depending on the case, it could agree to deal with a global topic exhaustively or to adopt a sectoral approach. This would also depend on the time available. In any case, it would not seem advisable to assign overly specific topics to ILC.

3. *Possible procedural changes*

(*a*) Yes, in principle.

(*b*) The present situation seems satisfactory. It would however, be desirable, for States to receive the text of the ILC report further in advance so that they can comment on it in the corresponding debate in the Sixth Committee.

(*c*) No.

(*d*) That might be desirable. Standard clauses could be included, leaving a blank for points which required a political decision, such as the admissibility or otherwise of reservations, the number of instruments needed for entry into force, etc.

(*e*) Yes. When controversial topics are at issue, ILC should prepare more than one alternative, especially when one or more States have made conflicting proposals.

(*f*) The question is not very clear. In general, the existing process of codification and development of interuational law appears to be adequate.

(*g*) No. The current process of politicization should not be allowed to affect ILC.

Ukrainian Soviet Socialist Republic (A/36/553, p. 39)

There is no need to introduce any structural changes in the International Law Commission, and it would also be undesirable to conduct an internal reorganization of its work. The correct system for determining the order of consideration by ILC of particular questions ensures that the agendas for its sessions are filled. In its attempts to activate the consideration of individual questions, ILC should be guided by the General Assembly recommendations determining the time-limits for completion of the consideration of those questions.

Union of Soviet Socialist Republics (A/36/553/Add.I, p. 2)

The present structure of the International Law Commission has justified itself and it would seem undesirable to change it. The existing way of

establishing the order of consideration by ILC of particular questions ensures that the agendas for its sessions are filled. Attempts by ILC to activate the consideration of individual questions should not run counter to the General Assembly recommendations on time limits for completion of the consideration of those questions. It would also be undesirable to make any new changes to the Commission's interual organization of work.

United Kingdom of Great Britain and Northern Ireland
(A/35/312/Add.1, pp. 29-30)

In this connection, the Goverument of the United Kingdom would like to take this opportunity of paying tribute to the work of the Interuational Law Commission. In the 30 years since its creation, the Commission has played a key role in the codification and progressive development of international law. The Governnient of the United Kingdom are conscious that the Conimission has under constant review improvements in its working niethods, and stand ready to consider sympathetically any proposals which the Conimission inay niake with a view to improving the efficiency of its procedures, as well as its working relationship with the Sixth Committee. In this context, the Governnient of the United Kingdom would suggest that, within the framework of this iteni, consideration might be given to an examination of the scope of topics placed or proposed to be placed on the active work programme of the Comnission. The scope of sonie of the topics currently on the active work programme of the Coinmission is so broad that it is hardly surprising that the Coinnission has had to devote many years to the elaboration of a first set of draft articles on only part of a particular topic. It is possible that concrete results could be achieved niore quickly if the Coinmission were to restrict itself, at least initially, to the consideration of specific aspects of a topic whose scope was generally acknowledged to be so broad as to preclude comprehensive treatment within a reasonable time-scale. The Government of the United Kingdoni would likewise suggest that consideration could be given to possible nieasures to ease the burden put upon special rapporteurs appointed by the Commission to work on a particular topic. The special rapporteur system is a central and valuable feature of the Commission's procedures, and the Government of the United Kingdom would not wish to see the role of the special rapporteur dimmished in any way. But conceivably the work of the special rapporteur on a particular topic could be speeded up if the Secretary-General were empowered to rccruit qualified experts from outside the ranks of the Commission who would be entrusted with the task of preparing preliminary studies on particular aspects of a topic entrusted to a special rapporteur and otherwise of assisting the special rapporteur in the preparation of his reports. Whether such an innovation would be of value would depend on the Commission's assessnient of its usefulness. The Governnient of the United Kingdoni would stress that these are simply suggestions that could warrant further consideration within the framework of this item. Their sole aim is to bring about inprovements in the functioning of the Commission as the body whose central task is to engage in studies directed towards the progressive developnient and codification of international law. It is self-evident that the views of the Commission on these and any other ideas that may be advanced for the enhancement and more effective discharge of the role entrusted to it would be of paraniount importance.

United States of America (A/35/312/Add.1, pp 32-37)

1. *General observations*

1. With the benefit of hindsight, it may well be that reference to the International Law Commission of the law of the sea issues in the late 1960s would have materially expedited matters. While certain basic political and economic issues might have had to have been thrashed out in a larger forum before remission of a draft treaty to a conference of plenipotentiaries, many problems might have been settled more expeditiously and the issues which needed political disposition clarified by the preparation of a basic, comprehensive text at an earlier stage than proved to be the case. The comparative experiences of the International Law Commission in the 1950s and of the First and Second United Nations Conferences of the Law of the Sea so suggest. Nor should the capacity of the International Law Commission to negotiate accommodation of differences of policy be underestimated, the process of codification inevitably demands that capacity, which is enhanced in the Commission's case by participation in its work of some members of political and diplomatic experience who hold or have held senior official positions.

2. To take another example of the professionalism and relative expeditiousness of the International Law Commission, it proved able to complete the draft articles on the prevention and punishment of crimes against diplomatic agents and other protected persons[3] in one session whereas the *Ad Hoc* Committee on the Drafting of an International Convention against the Taking of Hostages has taken three sessions to bring a treaty draft almost to completion.[4] Again, a recent plenipotentiary conference on asylum which did not have the advantage of a draft convention prepared by the Commission did not succeed in elaborating a convention (it was provided with a draft prepared by a specially convened committee of experts, which, however, did not have the benefit of the Commission's ripening processes).[5] No criticism of the path actually followed in these or other cases is advanced; but it is suggested that, in the future, the unique professionalism and potential of the International Law Commission should be borne fully in mind in all cases. Where a subject has large legal content and is of broad interest to the international community, recourse to the Commission should be the first course to be considered.

3. At the same time, it is important that the current agenda of the International Law Commission not be overloaded, and that the Commission be afforded considerable discretion in the priority and pace which it attaches to various topics. The Commission—and the General Assembly in agenda advice to the Commission—should concentrate on subjects of substantial, practical importance. It is reassuring that the Commission has taken up the most substantial and practical subjects of the law of the non-navigational uses of international watercourses and the jurisdictional immunities of States and their property. By the same token, it is not reassuring that the Commission has devoted the time it has to the subject of treaties concluded between two or more international organizations. Nor is it clear that the Commission will do well to address the subject of the immunities of the officials of international secretariats, in view of the greater significance of other subjects. It is equally important that when the Commission is charged with subjects of large dimensions, it emphasizes those aspects that pose real problems in the conduct of

international affairs. It would, for example, be a most positive development if the continuing preoccupation of the Commission with the vital subject of State responsibility would focus on those aspects of it that are of moment in the affairs of States and their nationals.

4. As noted, it may not be assumed that the present international system as it is now fashioned and funded is capable of absorbing a markedly increased flow of draft conventions. It may be that, in order to do so, foreign ministries and national legislatures will have to devote larger resources to the international legislative process. That would require not a restructuring of the system but a model re-allocation of resources within it, a re-allocation that may be overdue. As it is, how many foreign ministries have lawyers functionally and primarily assigned to dealing with the processes and product of the codification and progressive development of international law? Nevertheless, it would seem appropriate to consider whether there are adaptations that could be made by or to existing institutions to the end of enlarging the production and ratification of draft conventions.

5. It is worth reiterating that the quality and quantity of output of the International Law Commission as well as its demonstrated ability to respond expeditiously in special circumstances are such as to require caution before taking any action which would adversely affect the functioning of its system. The process of progressive development and codification is a delicate one requiring the studied application of learning and judgement, as well as of political accommodation. It requires time for reflection both of experts and Governments. It requires opportunity for States to comment in the course of the process in order to maximize the likelihood that the final product will be generally acceptable and, indeed, in order for States to learn the intricacies of the subject matter as the process progresses so they do not face its subsequent phases with insufficient background to take the decisions required in a timely fashion. Accordingly, it may well be that the final conclusion of the examination of the multilateral treaty-making process, insofar as it concerns the International Law Commission, is that the International Law Commission substantially, as it stands and with its current methods of work, is the best system that can be devised at this juncture.

6. Before reaching that conclusion, however, it is believed that there are possibilities that might be examined which relate to such matters as the duration of the Commission's sessions and its methods of work.

2. *Duration of sessions*

7. It is believed that the current 12-week session is the longest time period that is consistent with the nature of the Commission as a part-time entity made up of members elected in their personal, expert capacities. Quite apart from other professional demands upon them, it is not reasonable to anticipate that the Commission's members could be expected to devote more time to a body which does not serve as a source of income (the current "honorarium" of $1,000 for participation in a 12-week session is so minor as to be discounted). There is indeed a strong case, within the current length of the Commission's sessions, for giving its members a larger per diem and compensating its special rapporteurs more adequately, perhaps under contractual

arrangements which are adjusted to the special rapporteur's charge and product.

8. Alternatively, there is room for considering whether the Commission should be converted into a full-time or quasi-full-time institution with adequate remuneration provided to the members, e.g., in the same manner and scale as Judges of the International Court of Justice. There can be no doubt that such a step would markedly facilitate the task of the Commission in producing a greater volume of work in a shorter period of time. It should be recalled that the report of the Committee on the Progressive Development of International Law and its Codification[6] which proposed the creation of the Commission recommended that it be a full-time body. In 1947, when the General Assembly decided in favour of the current system (resolution 174(II) of 21 November 1947) there was less certainty than there is today that the Commission was viable and could produce important work. In any re-examination of the desirability of such a step (which the United States raises rather than recommends) consideration should be given, in addition to the absorptive capacity of States, to the following questions that conversion of the Commission into a full-time body would pose: will there be a sufficient volume of work over a long period of time to justify such a step, can the quality of the membership of the Commission be maintained, and are States Members willing to absorb the costs in terms of salaries of the members and the increased secretariat staff that would be required to service a full-time Commission? Would the useful relations of many Commission members with their Governments be sustainable if members were to become full-time officials responsible only to the organization? For its part, the United States is not prepared at this juncture to take a position on the relative advantages and disadvantages of a full-time International Law Commission. It would note, however, that what might be a desirable compromise between the current status and that of a full-time Commission would be for selected special rapporteurs to work full-time for the Commission during part or possibly all of their service as special rapporteur. That would markedly expedite the work of the Commission and might exploit what practical margin there is for its improvement. Full-time rapporteurs would have to be compensated appropriately, if not at commercial levels then at those of Judges of the International Court of Justice or the most senior officials of international secretariats.

3. *Working methods*

9. The working methods which the Commission has evolved, and which are lucidly expounded in a Report of a Commission Working Group on Review of the Multilateral Treaty-Making Process of 23 July 1979 (see A/35/312/Add.2), appear to be admirably suited to the achievement of its purposes. Nevertheless, a few comments may be in order.

(*a*) The Codification Division of the Secretariat should continue to be strengthened, particularly with a view to its lending to special rapporteurs of the Commission the necessary specialized assistance.

(*b*) During a particular five-year term, the Commission should endeavor to concentrate upon and complete a few topics, rather than dissipating its efforts among several. Such concentration will permit the Commission to

accomplish more, and will reduce the impact which a succession of special rapporteurs produces.

(*c*) When the Commission undertakes a very large subject, it should consider from the outset whether it should be broken down into two or more components, to be addressed by two or more special rapporteurs.

(*d*) The Commission should consider establishing working groups for particular topics which might meet for two or three weeks between sessions. Sessions of the Commission itself might then be reduced in length. This pattern has worked well for UNCITRAL and perhaps is applicable to the Commission.

(*e*) Consideration should be given in appropriate cases to the use by the United Nations, at the initiative and with the concurrence of the Commission, of special rapporteurs drawn from outside the Commission's membership.

(*f*) Governments might increasingly be requested to submit written comments on draft articles prepared by the Commission in the course, and before the final completion, of a first reading of an entire set of draft articles.

(*g*) Questionnaires might more often be addressed by the Commission to Governments to elicit their views on the direction and content which Commission drafts should take.

(*h*) The Commission should give renewed consideration to the preparation of instruments other than articles designed to compose a treaty (as it did in its earlier years).

(*i*) The mode of adoption of the Commission's annual report might be adjusted. As it is, the whole of the report is adopted during the last week of a session of the Commission. Commission members often receive drafts of the passages proposed for adoption so shortly before they are moved that time is not always adequate for their consideration. Yet these commentaries can play an important role in the understanding and interpretation of the draft articles proposed, and can be given significant weight by Governments and other interpreters. It may be that the Commission could consider draft chapters of its report at various stages of a session rather than in its final week, or perhaps commentaries should be provisionally adopted at one session and subject to revision and final adoption at the succeeding session.

(*j*) There is some tendency for the Commission in its comments on draft articles to repeat *in extenso* the passages to be found in the pertinent report of its special rapporteur. The Commission should consider to what extent cross-referencing or other approaches might minimize this practice which, however understandable, is not economical.

(*k*) The content of the commentaries on draft articles to be found in the Commission's reports may require more rigorous and objective treatment than the Commission has always manifested, particularly in recent years, when it has occasionally permitted the adoption of passages which are of questionable relevance or which even are tendentious. The Commission also has appeared to assign legal weight to certain controverted and controversial resolutions of the General Assembly, despite the fact that the General Assembly generally lacks legislative authority and despite the fact that the resolutions in question cannot reasonably be evaluated as declaratory of international law. The International Law Commission is a subsidiary organ of the Assembly, but it does

not follow from that fact that the Commission is justified in treating as the law what a majority of the Assembly may believe or wish the law to be. Should the Commission include in its commentaries—and, *a fortiori* in its draft articles—passages and provisions which, however congenial to many States of the Assembly or to certain of its special rapporteurs, are not consonant with existing international law or with the progressive development of that law as the international community as a whole wishes it to be, it will risk prejudicing its authority.

(*l*) The report of the Commission should be drafted so as to focus the attention of the members of the Sixth Committee on the particular questions on which interim governmental comments are most desired. As it is, the report tends to be so long and distributed so late that it is difficult for the members of the Sixth Committee to assimilate it and comment upon it in a considered, and even less, instructed way. Thus misapprehension may arise in the Commission about what really are considered governmental reactions to its drafts.

4. *Character of the Commission*

10. The character of the Commission as an expert body composed of persons of recognized competence in international law has been accepted from the outset. The experience of three decades fully justified the continuation of the Commission as an expert body comprised of individuals serving in their personal capacity. Not only has this permitted the Commission to attract to its membership eminent scholars who might not otherwise have served, it also has promoted a valuable continuity of membership. Moreover, the members of the Commission serving in their expert capacities do not manifest the caucus consultations, bloc voting and ritualistic expressions of position that often characterize governmental bodies of the United Nations.

11. It is recognized that UNCITRAL, which is composed of representatives of Governments, has been successful in doing somewhat similar work. However, the nature of the work of UNCITRAL has been such that it is unlikely that many individuals would have sufficient expertise in all the specialized fields covered and, consequently, many members send different representatives to the various working groups, whose mandates are technical and specific. These considerations do not equally apply to the International Law Commission. It is believed that the work of various *ad hoc* and special committees within the United Nations system over the years demonstrates that, while there are often benefits in having governmental involvement at an early stage of work, there is some loss in that representatives may feel obligated to assert governmental views in a manner that is often not consistent with the expeditious examination of the legal issues. Indeed, pressures of representational responsibility may lead to compromises of the lowest common denominator with insufficient attention paid to the technical legal issues or, indeed, the interests of the international community as a whole. Bloc politics may impede the early processes of codification; they have sufficient (if not excessive) influence in later stages.

12. In sum, there appears no reason to change the Commission from a body of uninstructed experts to a body of governmental representatives.

C. WRITTEN COMMENTS AND OBSERVATIONS BY INTERNATIONAL ORGANIZATIONS

Council of Europe (A/36/553, p. 43)

1. While the idea of converting ILC into a full-time organ is attractive, it gives rise to certain problems, including, in particular, the danger of bureaucratizing the Commission.

2. Regarding possible procedural changes:

(*e*) No. In the Council of Europe, the Committee of Ministers usually has a final draft before it. In the view of the secretariat, proposals for alternative texts would result in a reopening of the whole debate and be conducive to a hardening of the positions of the various States. Such alternatives should be proposed only if the issue is so controversial that no majority can be discerned on either side.

(*f*) The idea of "restating" international law seems interesting and would certainly make genuine codification possible in the longer term. It might also provide a basis for regional action, even if action at the world level seems to be ruled out.

Organisation for Economic Co-operation and Development (A/36/553, p. 52)

1. The first two questions are not applicable.

2. With regard to possible procedural changes:

(*a*) The answer to this question will depend entirely on the subject matter and political context.

(*b*) The establishment of model rules of procedure for plenipotentiary conferences could be of interest to the extent sufficient flexibility were provided to allow adaptation to the type of subject, the context of the negotiation and the intergovernmental organization concerned.

(*c*) The utility of establishing negotiating committees would have to be left to the discretion of each conference.

(*d*) The utility of inter-sessional meetings of certain conference bodies must also be left to the discretion of each conference.

(*e*) Not applicable.

(*f*) Participation of intergovernmental and non-governmental organizations at plenipotentiary conferences is clearly very useful as they are often in a position to provide expertise on the subject at hand.

World Health Organization (A/36/553, p. 57)

With respect to possible procedural changes, it would be very much welcome if the ILC could make more of an attempt to complete all its work on each subject within the five-year term for which its members are elected, to formulate preambles and final clauses for the draft articles it submits to the General Assembly, and to consider the possibility of "restating" areas of customary international law, as an alternative to codification.

NOTES

[1] This is based on the summary records of the discussion on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

[2] A/34/10, para. 195.

[3] *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 10* (A/8710/Rev.1), chap. III, sect. B.

[4] *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 39* (A/34/39), sect. IV.

[5] See Report of the United Nations Conference on Territorial Asylum (A/CONF.78/12).

[6] *Official Records of the General Assembly, Second Session, Sixth Committee, annex 1* (document A/331).

VI. FINAL NEGOTIATION AND ADOPTION OF MULTILATERAL TREATIES

1. *Should the negotiation of multilateral treaties of concern to the General Assembly, such as those emanating from the ILC or UNCITRAL, normally be completed in a Main Committee of the General Assembly, or is it preferable to convene* ad hoc *plenipotentiary conferences?*
2. *If negotiations are normally to be completed in the General Assembly:*
   (a) *Will it be necessary or desirable to extend the preliminary preparatory stage so as to submit to the Assembly more nearly completed texts?*
   (b) *Should special procedural rules be adopted to assist the Assembly in acting as a treaty-formulating organ, e.g., providing for the participation of non-member States, special voting procedures, the establishment of drafting committees, etc.?*
   (c) *Should the Sixth Committee normally be involved in such a process even if the substance of the treaty is considered by some other Main Committee (e.g., disarmament in the First Committee; economic relations in the Second, human rights in the Third):*
      (i) *Through joint meetings of the Sixth with other Main Committees?*
      (ii) *Through the consideration of all formal and legal clauses by the Sixth Committee?*
      (iii) *Through the review of the text as a whole by the Sixth Committee?*
3. *To the extent the completion of multilateral treaties is assigned to plenipotentiary conferences:*
   (a) *Should such conferences be scheduled for longer periods, to make it less likely that additional sessions would need to be convened, or does a series of successive sessions enable preparation of a better text supported by a broader consensus?*
   (b) *Should uniform or model rules of procedure be established for such conferences?*
   (c) *Should such rules provide for the establishment of negotiating committees?*
   (d) *Should there be intersessional meetings of certain conference bodies (negotiating or drafting committees)?*