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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-THIRD SESSION (1981)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its thirty-sixth session, prepared by the Secretariat

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INTRODUCTION

1. At its thirty-sixth session, the General Assembly, on the recommendation of the General Committee, decided at its 4th plenary meeting, on 18 September 1981, to include in the agenda of the session the item entitled "Report of the International Law Commission on the work of its thirty-third session" 1/ (item 121) and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 36th, 38th to 54th, 64th and 65th meetings, on 30 October, 2 to 19 November and 1 and 2 December 1981 2/ and recommended to the General Assembly the adoption of two draft resolutions thereon. At its 64th meeting, on 1 December, the Committee adopted by consensus draft resolution A/C.6/36/L.15 entitled "International Conference of Plenipotentiaries on Succession of States in respect of State Property, Archives and Debts", relating to chapter II of the Commission's report. At its 65th meeting, on 2 December, the Committee, also by consensus, adopted draft resolution A/C.6/36/L.21 entitled "Report of the International Law Commission on the work of its thirty-third session".

3. The General Assembly, at its 92nd meeting on 10 December 1981, adopted without a vote resolutions 36/113 and 36/114, as recommended by the Sixth Committee. By paragraph 10 of the last resolution, the Assembly requested the Secretary-General, inter alia, to prepare and distribute a topical summary of the debate held on the Commissions's report at the thirty-sixth session of the General Assembly. In compliance with that request the Secretariat has prepared the present document containing the topical summary of the debate held on the Commission's report, except for the summary of that part of the debate relating to chapter II of the report entitled "Succession of States in respect of matters other than treaties", as it relates to the topic, the consideration of which has been completed by the Commission. That summary is issued as a separate document in order to facilitate its distribution at the thirty-seventh session of the General Assembly in connexion with the item of the provisional agenda entitled "United Nations Conference on Succession of States in respect of State Property, Archives and Debts" as well as to the Conference itself.

DISCUSSION

A. General comments on the work of the International Law Commission and the codification process

4. Representatives generally expressed their appreciation to the International Law Commission for the significant work accomplished during its thirty-third

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1/ Official Records of the General Assembly, Thirty-sixth session, Supplement No. 10 (A/36/10 and Corr.1, English and French only).

2/ A/C.6/36/SR.36, 38-54, 64 and 65.

session in 1981. It was pointed out that in fulfilment of the mandate given to it by the General Assembly in resolution 35/163, the Commission had at that session successfully completed its draft articles on succession of States in respect of State property, archives and debts and had advanced in the second reading of its draft articles on treaties concluded between States and international organizations or between international organizations, as well as in the consideration of the remaining topics on its programme of work. It was also enphasized that during its latest five-year term, the Commission had achieved concrete results on important topics and had realized the goals it had set at the beginning of the term. As the Commission's latest mandate came to an end, it should be noted that in the past five years it had also added to its already considerable list of achievements draft articles on such topics as succession of States in respect of treaties and the most-favoured-nation clauses. These satisfactory results, in the opinion of one representative, had been achieved despite the many pressing and not always mutually compatible recommendations emanating from the General Assembly. Many representatives commended the outgoing members of the Commission, and in particular its Special Rapporteurs, for their contribution to the Commission's successful performance. Likewise, the work of the Codification Division of the Office of Legal Affairs was praised. The hope was expressed that the Commission, in its new composition, would maintain its high standards and would continue its laudable work in order to contribute, as it had in the past, to the provision of a sounder and hence more durable basis for the rule of international law.

5. One representative, while recognizing the worth-while results achieved by the Commission at its thirty-third session, nevertheless considered that progress was still slow. Another representative regretted that despite the admirable progress the Commission had made in its work in 1981, the number of draft articles considered on some of the topics had been small.

6. A number of representatives stressed the importance of the activities of the United Nations the field of codification of international law inasmuch, it was said, as the Organization elaborated just and equitable norms which ensured the peaceful development of international relations, strengthened peace and security and promoted the peaceful settlement of disputes and co-operation among States. It was considered that, from that point of view, the work of the Commission, whose useful contribution to peace and to peaceful international coexistence was undeniable, merited unreserved praise. It was observed that the Commission, through its important work in the sphere of codification and progressive development of international law, had contributed to the strengthening of the international legal order, to the better protection of the interests of smaller and developing countries and to the promotion of the application of the principles of the United Nations Charter as the basis of legality in international relations. The view was also expressed that a responsible approach to the progressive development and codification of international law was the natural concomitant of a concern to enhance the effectiveness of international law as a means of strengthening peace. The promotion of the codification and progressive development of international law in the interest of international peace and justice was, it was said, the honourable, but arduous and challenging task before the Commission.

7. It was stated that under its statute, the Commission had been established to generate proposals and to work out drafts with a view to promoting the progressive

development and codification of international law. On the whole, the Commission had fulfilled that role; in particular, it had produced the drafts of a number of landmark conventions. Reference was made in this connexion to the Commission's achievements with regard to the law of treaties, the law of diplomatic and consular relations, and the law of the sea, which were deservedly well known and had led to the adoption of major international conventions in the 1950s and 1960s. More recently, it was noted, the Commission had also completed its studies on succession of States in respect of treaties, on special missions and on the representation of States in their relations with international organizations of a universal character, topics on which conventions had also been adopted by plenipotentiary conferences.

8. According to one representative, even if some of those conventions had not yet achieved universal acceptance or were to be replaced by new ones, their provisions had nevertheless served as basic guidelines in inter-State relations or had become customary rules of international law. He considered that the most fruitful years of the Commission's existence had undoubtedly been those in which the international climate had been most favourable. There was a close interrelationship between the characteristics of international relations and the process of international law making. The world was currently witnessing a definite increase in international tension. Without entertaining any illusions concerning the actual contribution of international law to the promotion of friendly relations and co-operation among States, he believed that the results of international law making, even if very modest, could exert a salutary effect on international relations. Therein lay the special significance of United Nations activities in that field in general and of the Commission's work in particular.

9. Another representative noted that the League of Nations had unsuccessfully undertaken the arduous task of the codification and progressive development of international law. Under the auspices of the United Nations and with the active support of Member States, the Commission had completed work on more than 20 items, including some important contemporary international conventions. The Commission's commentaries to the draft articles, as well as the relevant documents, were valuable reference materials that could help to clarify international customary norms and international practice. That was all praiseworthy. However, according to the principles and purposes of the United Nations Charter, the codification and progressive development of international law constituted more than a purely legal and technical exercise. The main purpose should be to serve the cause of international peace and security. In the view of that representative, measured against that fundamental objective, the Commission's work appeared to leave ample room for improvement.

10. One representative emphasized the empirical nature and importance of the efforts which had been made to codify international law prior to the Second World War. The codification and progressive development of international law were being hindered by opposition from States which were hostile to co-operation and détente. In his view, those States had not, however, been able to stop the continuing advance of the peace-loving forces, which had opened up unprecedented prospects for the establishment of new relationships among States. The old international law, which had recognized the supremacy of force and had given legal sanction to the colonial system, had emanated from a few States, had been based solely on their

interests and had been unjust. The coexistence of different social systems had, however, weakened many reactionary institutions while developing and strengthening long-standing democratic principles and institutions through profound changes in the international scene, such as the collapse of the colonial system, and the emergence of new independent States. International law had therefore been altered in such a way as to consolidate peaceful coexistence by strengthening the principles of respect for sovereignty and non-interference in the internal affairs of other States.

11. Some representatives stressed the value of the Commission's work as a source of customary law which reflected the prevailing legal opinion at a given time. It was said that the Commission's success in that regard should offset any discouragement caused by the difficulties and delay often involved in the formulation of conventional rules and was an additional reason to hope that its work would proceed fruitfully. As stated by one representative, the results of the Commission's work had been so successful that texts prepared by it had been used as reference documents by the International Court of Justice, even before they had been adopted by a diplomatic conference or, indeed, by the Commission itself.

12. One representative addressed, in this connexion the question of the final form to be given to the Commission's work. He pointed out that the Commission's report would appear to justify the choice of a convention in that such a document would encourage the emergence of customary law. As paragraph 63 of the report indicated, a codifying "convention has important effects in achieving general agreement as to the content of the law which it codifies and thereby establishing it as the accepted customary law on the matter". The paragraph went on to affirm that the contribution to the development of customary international law appeared to be a good reason for adopting the form of a convention. Thus, even if the idea of concluding a convention proved too ambitious, there remained the reassurance that the very process of negotiating such an instrument would lead to developments in customary law. In his view, those participating in the United Nations Conference on the Law of the Sea could confirm that progress towards a universally acceptable convention was of necessity slow, and that periods of 10 or 15 years were not infrequently required. It was the fact that such a lengthy process was, quite naturally, regarded as excessive by Governments called upon to take practical steps as a matter of urgency that led States to concern themselves with the development of customary law as an alternative. Such a trend was a reversal of the traditional pattern in that the evolution of customary law had formerly been relatively slow, based as it was on the accumulation of accepted practices, while treaty-making had seemed a fairly brisk method of introducing new law. More recent practice showed that the time needed to introduce customary law was significantly less than that required for treaty-making. Customary law on a given issue could progress prior to the entry into force of a convention, provided that States had the opportunity to state their views, their opinio juris, on that issue. It was sufficient for States to indicate their acceptance when voting on the text as a whole. Indeed, a favourable opinio juris could be regarded as sufficient even before the entire text was adopted.

13. In the opinion of the same representative, that had been the case with the negotiations on the draft Convention on the Law of the Sea. The decidedly revolutionary concept of the 200-mile exclusive economic zone had been accepted by

the States participating in the Third United Nations Conference on the Law of the Sea before any final text of the proposed convention had been arrived at and even before any preliminary draft had been accepted by Governments. It must therefore be recognized that the positions taken by Governments in the process of negotiating or adopting a convention formed part of the opinio juris required for establishing the customary law traditionally expressed in other ways. A difficulty frequently encountered in the attempt to establish a norm as part of a convention was the fact that such a norm formed part of a "package deal" of greater or lesser scope. The concept of the "package deal" meant that opinio juris could not be applied to separate issues. The concept was, however, affected in a different way by the treaty-making process and by the process of establishing customary law. When a convention entered into force it comprehended, by definition, the concept of a "package deal". In contrast, customary law was selective and proceeded by stages. It incorporated only elements of the "package deal", as circumstances dictated. In general, it was possible that establishing customary law through the formal treaty-making process could undermine the convention itself. If the rules concerned had already become customary law, there was little inducement for States to adopt or ratify a convention. Thus, Governments which showed little inclination to accept binding clauses on settlement of disputes could rely on customary law to make it unnecessary for them to accept such clauses, which frequently appeared in conventions.

14. In the opinion of another representative, jurists engaged in codification followed a scientific approach, judging States by their acts and taking their words into account only when they confirmed or prefaced such acts and emanated from the competent authorities. The Commission's Special Rapporteurs had adopted that approach, while ensuring that every legal norm was founded primarily on practice that was accepted as law. The question was, in his view, whether the non-existence of such practice denoted a legal vacuum and could justify non-recognition of new legal norms. He believed that the sources of international law referred to in Article 38 of the Statute of the International Court of Justice, and specifically the "general principles of law recognized by civilized nations", were sufficient to rule out the possibility of any legal vacuum, unless it was felt that two thirds of mankind did not yet meet the criterion of "civilized nations". The "general principles of law" made up for the inadequacy and, in some cases, the non-existence of State practice, a necessary element in the formation of international custom. The pattern of formation of such custom could thus be reversed; instead of ratifying previous practice, international legal instruments or protracted global negotiations were, more and more frequently, developing practice that inevitably led to the formation of international custom. However, the term "instant custom" did not do justice to the sociological basis for new norms. There was little to be said against the accelerated emergence of customary norms in the contemporary era. Foresight had always been a central element in matters of law.

15. Representatives commended the Chairman of the International Law Commission for his lucid and concise introduction of the Commission's report. The importance of the consideration by the Sixth Committee of the reports of the International Law Commission was generally emphasized. And it was said that the debate on the Commission's report at the thirty-sixth session of the General Assembly was all the more important as the Commission was about to begin a new five-year term.

16. Several representatives remarked that the annual discussion on the report of the International Law Commission provided a valuable opportunity for the expression of a wide variety of views on the topics under consideration by the Commission and for the formulation of generally agreed recommendations to guide the Commission in its future work. In the view of many representatives, the debates on the reports of the International Law Commission had always been the real highlights of the work of the Sixth Committee. Although a number of other items allocated to it played an outstanding role in the over-all activities of the United Nations, the Commission's reports served as a constant reminder that one of the major tasks entrusted to the General Assembly was to encourage the progressive development and codification of international law. The opinion was expressed that the annual consideration of the Commission's report was an important phase of the process of codification and progressive development of international law. While the work of the Commission represented the preparatory phase of that process, that of the Sixth Committee represented the intermediate phase, in which initial judgements were passed on form and substance and on the over-all direction of the Commission's future work. That process might seem slow but the work could not be done in haste, for the viability of any world-wide legal solution could be secured only through the harmonization of State interests on the basis of sovereign equality. It was also said that the harmonious interaction between the International Law Commission and the Sixth Committee had produced extremely satisfactory results, as attested to by the many conventions which had been the outcome. The Committee had the duty of studying the various aspects of the Commission's work and providing guidance in keeping with political realities. The fact that, as a rule, the comments made on the work of the Commission were favourable showed that the Commission was sensitive to the directives given to it. It was thus possible to combine political considerations with practical experience and technical expertise.

17. It was also observed that the Sixth Committee and the International Law Commission had grown over the years, not only in regard to their workload, which was now considerable, but more particularly in the maturity of their approach to the items entrusted to them. Several major topics had occupied their attention concurrently and would continue to do so for the foreseeable future. The growing number of substantive items assigned to them by the General Assembly reflected the latter's increasing confidence in their ability to perform their duties. In all its work, the Commission had been guided by the Committee in matters of legal policy, selection of topics and the final substance and form of its work. The Committee, in turn, had been given ample opportunity to consider and comment on the Commission's work. Both bodies thus shouldered a fair share of the burden of elaborating rules of international law and their close collaboration was in fact indispensable to the balanced growth of international law. Observation made in the Sixth Committee provided an indication of international legal developments and Governments' attitudes and inclinations and should continue to be encouraged as a means of enabling nations large and small to contribute to the formulation of rules of modern international law.

18. The Sixth Committee, it was said, had a useful role to play in making new rule of international law which were more humane and more widely accepted. Every procedural change that might affect its role should therefore be watched very closely, especially in regard to developing countries, whose views must be heard if legal rules were to develop equitably. If some of the rules of traditional law had

been noticeably intolerable, the minimum requirement of new laws was that they should at least be tolerable to the overwhelming majority of smaller and less rich nations of Asia, Africa and Latin America. Nor could the proposition be tolerated that, because a rule of law was disagreeable to a particular nation or group of nations, the community of nations must regard as binding a rule which was diametrically opposed to the one proposed by the rest of the world. Such an unhealthy attitude still persisted, although less and less so in the Sixth Committee, whose members were concerned for the future well-being of mankind rather than motivated exclusively by national, short-term interests. A legal proposition did not cease to be binding simply because one or two States stood to lose some undue advantages by it. If all members of the Committee, particularly those from developing countries, could make their views heard, that would ensure that international law was improved to serve mankind as a whole. The Committee must therefore be unfettered by procedural impediments. The opinion was also expressed that the Sixth Committee and the Commission should see to it that the Commission was seized of genuinely important topics which were accessible for codification and progressive development, while obviating the need for the Commission to intrude into the field of speculative definition of new rules.

19. According to one representative, a certain malaise existed about the Commission and, inter alia, its relations with the General Assembly through the Sixth Committee and its role with regard to the implementation of Article 13 of the Charter. There was no widely accepted view on the causes or extent of that malaise; in his opinion, it was not a matter which directly concerned the Sixth Committee or any other United Nations body or agency at the current stage or on which any agreement could be reached in a political or even an academic body. However, the General Assembly, through the Sixth Committee, could not escape its share of responsibility for that malaise, and the debate on the Commission's report provided a convenient opportunity for a re-examination of the Committee's role in that part of the codification and progressive development of international law which, according to both the Commission's Statute and a widely accepted division of labour, had become the special province of the Commission.

20. Several representatives elaborated on the nature of the Commission's main task, namely the progressive development of international law and its codification. It was said that, as in the past three decades, the Commission's basic rule should be to concentrate on general multilateral treaty making, where the conditions for codification and progressive development became discernible through a thorough analysis of State practice. The international community should not forget that the Commission's primary goal was the codification of international law and, at the same time, should not lose sight of the equally important task of progressive development. In the words of article 15 of the Commission's Statute, the purpose of codification was to find "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine". While the Commission should play a central role in the general multilateral treaty-making process, its activities should be supplemented by those of diplomatic conferences or ad hoc bodies established to deal with specific topics. The central role of the Commission could be maintained only if its approach to codification and progressive development and its methods of work set a high standard and served as a rule of conduct for the work of such other forums.

21. In the opinion of one representative, both the Commission and the Sixth Committee should remain aware that the sources of international law were still, by and large, those laid down in Article 38 of the Statute of the International Court of Justice. Nor should it be forgotten that the Commission had gained its place and its general recognition by approaching the codification and progressive development of international law in a generally balanced manner. In the twilight area surrounding international customary law, it had been guided by careful, but not over-restrictive assessments of practice and newly emerging legal conviction. At the same time, the Commission had been aware of the danger of purely speculative definitions of new rules. The general acceptance enjoyed by its work on such topics as the law of treaties, the law of diplomatic relations and the law of consular relations testified to international recognition and justified the method chosen. It was also said that the Commission had adopted a realistic conception, which deserved full approval, according to which international law was the emanation of the will of States.

22. Another representative emphasized that the progressive development and codification of international law involved a constant search for balance between the interests involved. That search for balance should not lead to mere verbal and artificial compromises, but should be aimed at substantive compromises with a view to achieving a genuinely stable legal régime. That search must also be part of the all-embracing approach which the Commission should adopt in the light of the interpenetration and complementarity between the topics before it. The balance must be dynamic, since what was involved was the codification of the changing norms of an international society in a state of flux. Without such a balance, the legal stability sought through the patient process of progressive development and codification could not be guaranteed.

23. For the same representative, the 1958 instruments relating to the law of the sea had carried the seeds of instability in that they had not been responsive to the demands of the new era. The Third United Nations Conference on the Law of the Sea had given preference to progressive development on the basis of political negotiation. Members of the Commission had made a valuable contribution to the work of the Conference in the various phases of a process of negotiation that would undoubtedly leave its mark in the annals of the progressive development and codification of international law. The international community and, a fortiori, the International Law Commission, should be mindful of the lessons derived from the revision of the law of the sea. The progressive development of that law had been possible because the concept of equity had found its rightful place as a regulative element essential to legal stability. That concept should be taken into account not only in the application of legal norms on the basis of their interpretation by judges or arbitrators, but also when they were being elaborated. During the process of elaboration, there was a need for equitable principles that would establish a close link between legal norms and all the relevant circumstances of the specific case which those norms sought to govern. It was with good reason that in Article 38 of the Statute of the International Court of Justice there was a clear distinction between the power of the Court to decide a case ex aequo et bono and the application of general legal principles. the components of international norms should not reflect an archaic vision of the world, but should cover the specific realities of the international community.

24. It was also stated by one representative that the United Nations itself was premised on the existence of a world order governed by international law; furthermore, the Commission's main task assumed the existence of international law. In his view, the Commission had demonstrated its firm commitment to sustaining international law as it had developed through the centuries, and he shared the view that it was essential to build on existing law and not to replace it by new norms, since the effectiveness of law, and particularly of international law, depended on habitual and traditional State recognition of the binding force of the law. Law must nevertheless not be static. It could not ignore the present and rely for its sustenance only on the richness of its history, the force of its precedents or the nobility of its origins.

25. The same representative observed that it had been asked why the formulation of a comprehensive convention on the law of the sea, which was perhaps the most significant development in comtemporary history in the field of international law, had not been entrusted to the Commission, as the existing conventions on the subject had been. Some States had deplored the fact, and had viewed it as the reason for the protracted nature of the current negotiations. Others, however, had considered that the Commission would have been incapable of responding promptly or adequately to the difficult and formidable problems arising from the various situations of States and the new uses of the sea and the sea-bed. Without giving an opinion on the effectiveness of the procedures adopted, or assessing the impact of the current negotiations on the law of the sea, it must, in his view, be recognized that, whatever came out of the negotiations, the law of the sea had changed: when the preparatory work on the Conference had begun, a number of States had regarded national jurisdiction over extensive economic zones as a legal heresy, but such zones now existed and were recognized in law and in fact. Archipelagoes had also acquired a distinct legal status. It should therefore be considered to what extent, and in what ways, the Commission should help to bring about an evolution of international law so as to enable that law to reflect the changed circumstances and to meet the needs of peoples in the light of the current world situation. While, in preserving the past and maintaining the status quo, the law ensured stability of relationships in society, a time came when law must not only adjust to circumstances and changes but must itself be an instrument of change in order to rectify what had become unacceptable and intolerable situations, since otherwise the necessary changes would be brought about by violence.

26. One representative stressed that, while international law reflected the progress made in international relations, it also had a dynamic role. It was in that sense that the United Nations Charter had helped to "liberate" international law by stipulating, in Article 13, paragraph 1, that the General Assembly should encourage "the progressive development of international law". The International Law Commission had come into being as a result of that concern and had succeeded, despite the inherent limitations of its statute and the heterogenous nature of a changing international community, in participating in the process of establishing an international legal order which recognized some of the effects of decolonization and met some of the requirements of development. In the same way that a particular form of international law had served as the chosen instrument for achieving dominance, the norms of contemporary international law must, if they were to correspond to reality, express a new function of the law required as a consequence of relations among an increasing number of subjects of law which were more

heterogenous and aspired to greater equality in their status. A new and authentic legal order which took into account the changing circumstances of politics, economics and society which determined international relations, could only be achieved after a transitional phase in which international law was adjusted: it was the task of the Commission to bring about that adaptation.

27. In the opinion of the same representative, unlike the traditional evolution of international law, in which conventional law emerged from customary law, codification sometimes resembled progressive development. Such a pattern revealed a preference for the "agreement", which resulted from a more democratic process than customary law, in the formulation of which not all States had participated. It also indicated that the Commission was aware of the urgent need to bring into being a system of law which took account of new realities. If conventional law sometimes failed to become customary law, that was undoubtedly due partly to the fact that the process by which conventional law came into being was relatively long drawn out, and partly to the fact that there could be a hiatus between the norm so laboriously arrived at and the changing reality it was intended to regulate. Due to a lack of foresight, the international norm was often doomed to obsolescence even before it had been accepted as part of positive law. He was pleased to note that the Commission was making a greater effort to meet the specific needs of the international community than to conform strictly to an "established practice" which was difficult to find in reality. Undue respect should not be accorded to tradition, and the virtues of innovation should not be ignored.

28. It was stressed by some representatives that since the Commission's establishment, the emergence of a large number of independent States of the third world had radically changed the international community, and it was therefore necessary to review some of the traditional doctrines of international law, which were a product of the colonial era. The third world countries had not been able to contribute to the formulation of customary international law, which they had been expected to follow since their accession to independence. Furthermore, the growing interdependence of States, the advances made in the field of science and technology and the growth of international trade and international markets had created circumstances which demanded the examination of new areas of law, such as the law of economic relations among States, the enlargement of the scope of international law and a shift in its priorities. In carrying out its functions, the Commission should take into account all situations which might have implications for the newly independent States. Only in that way would it be able to contribute to the progressive development of an international law conducive to ensure that balance of forces which the contemporary world so badly needed.

29. The view was also expressed that the Commission should continue its efforts and broaden the scope of its action with a view to brining international law into line with contemporary conditions. The Commission should not confine itself to considering legal problems from a purely technical point of view, but should also bear in mind the requirements and needs of the international community, the evolution of relations among States and the overriding need for détente. As stated by one representative, there were winds for change in the field of international law. The international community was continuously calling for the codification of law, for the dynamic evolution of international law and for its extension to new activities and areas. The International Law Commission should not disregard those

winds of change. If it did, it would be unable to continue occupying its high place in the international law-making process.

30. It was further stated that since the Commission's task was to promote the codification and progressive development of international law, its work should not be limited to the traditional areas of international law, but should emphasize the codification, study, and progressive development of international law in connexion with issues that emerged as the international situation evolved. Only in that way could the Commission have a promising future and retain its relevance and vitality. There was a current tendency to convene special conferences and establish ad hoc committees to work on important international conventions, thus eclipsing the Commission and weakening its role. That question deserved attention. The Commission should not monopolize the important international conventions, least of all those which involved important interests of States and required full consultations among Governments. It was obviously unrealistic to expect the Commission to assume the full burden of that work. It was, however, absolutely essential that the Commission should not be constrained by established patterns, but should be allowed to look at reality with a view to the progressive development of international law. If the laws devised by the international community were incapable of solving the problems of real life, then those laws would simply lose their meaning and effect.

31. The view was also expressed that attempts to speed up the process of codification and, especially, the progressive development of international law would not necessarily be positive and might even be counterproductive. According to that view, in cases where it had been decided not to entrust the elaboration of an international legal instrument to the International Law Commission - the interminable negotiations of the Third United Nations Conference on the Law of the Sea being an outstanding case in point - the results had been very disappointing, whereas whenever the preparation of the legal foundation of a topic had been separated from the political negotiations and entrusted to the Commission, the basic working document produced by the latter had greatly facilitated successful negotiations among States. The Commission had not, as some had asserted, remained static in its methods but had evolved and striven to adapt to the changing circumstances of a world society in constant flux. The changing membership of the Commission, particularly with the invaluable contribution of members from States which had become independent since the end of the Second World War, had also naturally, brought about gradual changes in the Commission's approach to its work, giving greater importance to the progressive development of international law, alongside the traditional work of codification. That evolution was, of course, provided for in the United Nations Charter and in the Commission's statute.

32. It was considered that the genuinely new factor was the fact that the many nations which in the past had been the passive subjects of colonial rule were now in a position to participate actively in the elaboration of international law, rendering inevitable the advent not only of the new international economic order but also of a new international legal order, adapted to the needs, interests and aspirations of the whole of the international community and not, as in the past, to those of a small privileged group. It was also said that it was gratifying that various organs of the United Nations, including the Commission, had thrown their weight behind initiatives to narrow the economic gap between rich and poor nations

and displayed the courage required to effect genuine changes in the international order, whether legal, economic or social, properly reflecting the will of all peoples. This the Commission had done by incorporating the principles of significant General Assembly declarations and resolutions in the fabric of the new international legal order. The Commission, it was further stated, had gradually eliminated certain obsolete concepts of the old international law and had striven to take State practice into account.

33. Many representatives followed the procedure which had been tried the previous year of dividing the consideration of the International Law Commission's report into parts, thus allowing members of the Sixth Committee to make more than one statement on the item. Other representatives presented their views on several of the subjects contained in the Commission's report in one single comprehensive statement, owing, in the opinion of one representative, to the fact that unlike other delegations, hers did not have a number of technical advisers at its disposal and, as explained by another representative, his belief that valuable time could thereby be saved. Nevertheless, those two representatives stated, respectively, that the practice which had become widespread during the current session, whereby delegations wishing to do so made a number of statements on the item, was sound and a logical way of tackling the Committee's work on that important item, and that each delegation was entitled to submit its observations on the item in the manner it considered most appropriate. The opinion was also expressed that that procedure should be applied in a liberal manner and should never serve to curtail the freedom of representatives to speak once only on the item. In the long run, the new procedure might prolong rather than shorten the debate but, whatever its merits or demerits, there would be no opposition to trying it out as long as representatives were not obliged to divide up their statement into separate parts dealing with different sections of the Commission's report.

B. Question of treaties concluded between States and international organizations or between two or more international organizations

1. Comments on the topic as a whole

34. Many representatives congratulated the International Law Commission on the notable progress it had achieved at its thirty-third session in its work on the question of treaties concluded between States and international organizations or between two or more international organizations. Satisfaction was expressed that the Commission had commenced the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations. Certain other representatives, however, voiced regret that the Commission had only succeeded in carrying out a second reading of the first 26 draft articles, rather than the first 60 articles as envisaged by General Assembly resolution 35/163.

35. The Special Rapporteur on the topic, Professor Paul Reuter, was praised for his scholarly contributions to the work of the Commission on the topic and for his thorough analysis of the issues under review.

36. The importance and complexity of the topic was stressed by a number of representatives. While the draft articles on the topic had not so far been approved as a whole by the Commission, and there was no certainty that a diplomatic conference would be convened with a view to embodying them in the form of a convention, none the less, those articles had been taken into account by the International Court of Justice. It was noteworthy that such texts could provide useful reference material for decision-makers at both the national and international levels. The value of the draft articles on treaties between States and international organizations or between international organizations derived from the care with which the Commission had discussed those articles and the penetrating analysis provided by the Special Rapporteur in his reports. In that instance, as in others, the Commission had shown that both customary law and the law of treaties could emerge only from a combination of legal rigour and political realism.

37. It was remarked that for the first time the Commission was dealing with international organizations as subjects of international law in a context no longer limited to specialized agencies and other major organizations in the United Nations system: hence, the initial concern felt by the members of the Commission with regard to a draft that related not only to the law of treaties but to the subjects of law. That apprehension had now been dispelled and the Commission had been able to give its undivided attention to the minimum differences that had to be recognized in order that the rules of the Vienna Convention on the Law of Treaties could be applied to treaties having international organizations as parties. Emphasis was placed on the fact that since the number of international organizations was constantly increasing, some standard rules to govern relations between States and those organizations should be framed. The elaboration of such clear rules would, it was said, undoubtedly prove useful, especially for legal advisers of smaller and newly independent States. Yet this constituted undoubtedly a difficult task because at present there was little established practice in the domain of treaty-making power on the part of entities such as international organizations. Keeping in mind the fact that State sovereignty had no limitations except those imposed by reciprocal respect for that sovereignty, whereas international organizations owed their existence to the will of States and took different forms, the Commission had endeavoured to strike a balance between the different schools of thought concerning international organizations.

38. One representative emphasized that the type of treaties under current examination by the Commission contained more inherent difficulties than had been anticipated. While the treaty practice among States had become more or less uniform and firmly established, the diversity among the international organizations was reflected in the absence of established practice concerning treaty-making power. Whereas the smallest of international organizations might have little or no governmental or sovereign power, and thus little power to bind the organization in an agreement with another international organization or a State, there were collectivities of States which partook of some of the sovereign powers of their members, including even the treaty-making power in a limited field such as trade agreements, or legislative power in fiscal spheres. The difference between the organizations themselves meant that in many cases it was difficult to identify the organ of mechanism of treaty-making, or who within the organization was empowered to express its consent to be bound by a treaty. There might be a question whether such an expression of consent could be binding without prior authorization from the

governing board or council of the organization. The question of treaties between an international organization and its member States or other States was particularly complex, as might be illustrated by various headquarters agreements. Multilateral conventions of a universal character, such as the draft Convention on the Law of the Sea, might be open to signature by participants which were mainly States, but relevant international organizations could also become bound by their provisions and acquire the rights and duties flowing from the convention by virtue of the special nature of their functions.

39. Another representative stressed that not enough international practice and experience were available and that there were international organizations of all descriptions, differing in legal forms, organizational structures and functions. Such differences made it hard, he said, to formulate general legal norms that could apply to all types of international organizations.

40. As for the future work of the Commission on the topic, most representatives who referred to the matter were of the view that at its thirty-fourth session the Commission should, taking into account the written comments of Governments and principal international organizations, complete the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations. Certain representatives urged the Commission to continue its efforts along the lines begun at its thirty-third session to improve and simplify the drafting of the various articles.

41. One representative urged that the Commission, in its second reading of the draft articles, not be held too strictly to the "final" approval accorded at its 1981 session to articles 1 to 26. There was, he said, a certain contradiction between the first sentence of paragraph 105 of the Commission's 1981 report, which referred to the final approval of articles 1 to 26, and the second sentence, which spoke of making "minor drafting adjustments" to those articles. That, together with the reference in foot-note 593 to the possibility that the new article 5 might make it possible to resolve "various other questions", and the fact that in pararaph (3) of the commentary to article 20 both article 5 and article 20 were noted as provisions to which the Commission might return at its next session, indicated that chapter III was not only partial, but more provisional than might at first have been thought. If the Commission completed its second reading of the draft articles along the present lines, something more than minor adjustments might be required to articles 1 to 26, especially in view of the enlargement and the changed membership of the Commission in the coming year.

42. The same representative was also of the view that the Commission might not be able to complete work on the topic until 1983. As indicated below (see para. 52), his delegation considered that the most appropriate method for the Commission to complete its work on the topic of treaties to which an international organization was a party would be to produce a set of guidelines for the conclusion of such treaties, rather than envisaging the elaboration of an international convention which would take even longer than the Vienna Convention of 1969. His delegation awaited with interest the final text of the Commission's analysis of the application of the Vienna Convention to the treaties in question and hoped to receive that analysis at the thirty-seventh (1982) session of the General Assembly. Even if the Commission should decide to reduce its proposals to a set of

guidelines, however it would still require another year or two to complete its work on the topic.

43. Another representative asserted that as with the Vienna Convention on the Law of Treaties, several years would be needed for the completion and adoption of another instrument governing international agreements between States and international organizations, as broadly defined to include all kinds of intergovernmental organizations. Apart from the type of treaties under current examination, there appeared to have emerged a series of treaties of a third kind, binding on States by virtue of a system of international law governing their relations with institutions which were extranational, with funds and interests transcending national boundaries. Questions of treaties with transnational agencies would also have to be dealt with in the future.

2. Comments on the draft articles as a whole

(a) Relationship to the Vienna Convention and methodological approach

44. Most representatives who spoke on the matter considered as basically sound the Commission's approach of maintaining as close a parallelism as possible between the articles of the present draft and the articles of the Vienna Convention on the Law of Treaties and of considering what drafting or substantive changes would be need for treaties concluded between States and international organizations or between international organizations. It was in particular welcomed that the parallelism with the Vienna Convention had not precluded innovations intended to reflect the specific characteristics which resulted from the differences between the subjects of international law concerned and which must of necessity give rise to provisions safeguarding, to the greatest extent possible, the principle of the equality of the contracting parties while ensuring a certain flexibility, taking into account both the conceivable limits of consensualism as applied to international organizations and the limits of their capacity to enter into contracts. In addition, the Commission had been right to use the provisions of the Vienna Convention as a guide in its work on the topic as it was thus promoting the unification of legal norms, one of the prerequisites for the progressive development and codification of international law.

45. A number of representatives also believed that the Commission had been right to cast the draft articles in a form entirely independent of that of the Vienna Convention and without any renvoi to that Convention. It was wise to refrain from drafting provisions containing additions to or refinements on the Vienna Convention which might also be applicable to treaties between States.

46. In that connexion, however, certain representatives remained unconvinced that the best approach had been followed. The argument that simplifying the draft articles by utilizing the technique of renvoi to the relevant articles of the Vienna Convention had not been used previously in codifying conventions was not decisive and the legal difficulties hinted at by the Commission seemed to be exaggerated. Nevertheless, it was noted that in the course of the second reading of the draft articles, texts had been substantially shortened and simplified.

47. In its approach to the topic, the Commission was congratulated by some representatives for having proceeded empirically, striking a balance between consensus based on equality of the contracting parties, which was the foundation of treaties between States, on the one hand, and the differences between States and international organizations on the other. While denying the organizations some of the latitude granted to States by the Vienna Convention, the Commission at the same time applied to them certain rules which States alone were entitled to apply with flexibility. In that manner, the Commission had steered a correct, middle course between the two opposing approaches, namely, that of treating international organizations as States and that of considering the differences between States and international organizations to be something fundamental which should be emphasized at every opportunity. Therefore, while the Commission should as a general rule follow the basic approach of treating the two kinds of subjects equally, it should also, in elaborating certain specific programmes, take into account the structural and functional differences between the two subjects and introduce necessary minimum modifications to the corresponding divisions in the Vienna Convention in order to ensure their effective implementation by international organizations. It was hoped that early agreement would be reached on the basis of that approach.

48. Certain representatives stressed that international organizations could not be equated with States. The latter enjoyed sovereignty, whereas international organizations were established and given their mandates by their member States. Therefore, although both States and international organizations could conclude treaties, their characteristics and competences differed. The legal principles governing the conclusion of treaties between States could not be applied wholesale to treaties concluded between States and international organizations or between international organizations. That was an important question of principle that warranted careful study in the drafting process. Although some consideration had already been given to that aspect, it would not be easy to reflect it adequately in the draft articles. The Commission, in its second reading of the draft articles, should proceed from the premise that a sovereign State was the sole original subject of international public law.

49. On the other hand, certain other representatives considered that international organizations should be equated as far as possible with States since they were, after all, equally subjects of international law. The equal footing of States and international organizations was the logical corollary to the admission of international organizations as contracting parties to treaties on the basis of the principle of equality. To be sure, States possessed the attributes of sovereignty and were equal before international law, whereas international organizations were the result of an act of will on the part of States which gave them different juridical characteristics. Although they were endowed with a separate personality distinct from that of the member States of which they were composed, international organizations remained closely tied to those States. As far as the draft articles under consideration were concerned, it was considered puzzling that the text retained certain distinctions between international organizations and States and, particularly, between treaties concluded between States and international organizations and those between two or more international organizations. In some cases, for example in the commentary to article 17, there was no attempt even to explain those distinctions, it was said.

(b) Form of the draft and final stage of the codification of the topic

50. As to the form which the final stage of work on the topic should take, many representatives who addressed themselves to the matter favoured the elaboration of a convention and expressed the hope that the Commission would so recommend. It was stated that the 26 draft articles adopted by the Commission in second reading at its 1981 session had improved the prospects for the adoption of a convention on the subject. Some representatives were of the view that such a convention should be elaborated by an international conference of plenipotentiaries.

51. One representative said his delegation had always taken the view that a thorough preliminary examination of every article of the Vienna Convention was essential, in order to establish if and how it could be applied to a treaty to which an international organization was a party, before the topic itself could be adequately and practically treated. It had never believed that that examination would be the end of the work, nor that a multilateral convention would be the only way of completing it. Indeed, the risk that such a convention might have an unwelcome impact on the 1969 Vienna Convention, by changes in wording or by new interpretations, in his delegation's view, outweighed any possible advantages. More experience had recently been gained of the practical aspects of the problem, especially from the Third United Nations Conference on the Law of the Sea, which had highlighted, among other things, the concrete implications of the participation of an internatonal organization in a new convention, an issue which demanded a fairly close examination, not only of the Vienna Convention but also of the draft Convention on the Law of the Sea, in order to establish the nature of the problems involved and how they were to be solved, both politically and technically.

52. The same representative said that, in the light of the foregoing, what the Commission needed to do after completing its close analysis of the 1969 Vienna Convention, was to produce a set of flexible guidelines for the process by which international organizations could become contracting parties to multilateral treaties the majority of parties to which were sovereign States; all other matters were either secondary or not governed exclusively by the law of treaties and therefore did not need to be included. The full analytical conclusions of the Commission on its second reading of the articles would always be useful and available for reference, probably requiring no further action other than a general debate in the Committee, but the reduction of the large quantity of articles to a series of well-conceived general guidelines would be of the greatest value. The practical details of such participation of international organizations would be a matter for negotiation in each particular case, as it had been in the Conference on the Law of the Sea. There was an additional series of problems, relating to the manner in which the international organizations to which the draft articles were intended to apply could become bound by them and be associated in their final adoption. It was possible that close examination of those aspects would in the last analysis reinforce his delegation's view that a formal convention supplementing the Vienna Convention was not the most appropriate way of resolving the topic.

53. One representative remarked in that connexion that international organizations should be invited to participate in any conference of plenipotentiaries as full members and not only as observers, thus facilitating the development of the work

and ensuring the success of such a conference. Another representative, after emphasizing that if the draft articles were not reconsidered it would be difficult for some States to ratify the proposed convention, said that his delegation would have difficulty if international organizations were to participate not as observers but as full participants on the occasion of the final consideration of the draft articles.

3. Comments on the various draft articles

(a) Articles 1 to 26 approved in second reading by the Commission at its thirty-third session

54. Many of those representatives who addressed themselves in general to draft articles 1 to 26 as finally approved by the Commission at its thirty-third session congratulated the Commission for having made significant improvements in the text of the articles in the course of the second reading thereof. The redrafted versions were considered to be an immense improvement over the articles previously adopted in first reading, the texts having been substantially shortened and simplified without loss of precision.

55. Certain representatives, while appreciating the drafting improvements incorporated in the text of the draft articles during the second reading, none the less believed the wording was still too complex and cumbersome; there was room left for improvement.

56. Also, certain representatives felt it would be premature to take a position on draft articles 1 to 26, reserving the right to return to them once the final text of the draft articles had been submitted.

Article 2. Use of terms

57. Commenting on article 2 in general, one representative believed that the special nature of relations between States and international organizations justified the definitions contained in article 2. However, another representative urged the Commission to reassess the use or definition of certain terms in the draft articles. Bearing in mind, in the case of international organizations, the absence of capacity emanating from sovereignty, the Commission had seen fit to withhold the use of the term "ratification" from international organizations and to use instead the expression "act of formal confirmation". It should show equal caution regarding the terms "treaty", "reservations" and "accession". It might, however, prove difficult to find acceptable substitute expressions applicable to international organizations, but the progressive development of international law should not imply violating existing precepts.

58. Elaborating further with regard to the use of the term "treaty" set out in subparagraph 1 (a) of article 2, the latter representative said that the term "treaty" had a well-established meaning in international law: it referred only to relations among States. It had traditional connotations pertaining to the sovereignty of States which justified their capacity to enter into treaties. The

case of international organizations was different in that that capacity was lacking, even for developed organizations. Although it was true that States members of some organizations had delegated the exercise of sovereignty, so long as the level of a union of States or a federation had not been reached, the use of the term "treaty" was, he contended, inappropriate for designating the agreements to which they were parties. To his mind, international organizations could be parties only to "international agreements", not to be confused with treaties which, unlike most agreements, were subject to ratification.

59. A few representatives referred to the term "act of formal confirmation" found in subparagraph 1 (b bis). One representative said he failed to see the need for this term which appeared awkward and unwieldy in later articles, such as article 16. Another representative noted that while it was true tht the term "ratification" was traditionally reserved for States, that was not a compelling reason for departing from it. He was of the view that in any event the word "formal" was unnecessary and might create the impression that some special form was required for the act of consent of an international organization. Finally, one representative remarked that the use of the two terms "ratification" and "act of formal confirmation" had led to some duplication and had also influenced the deliberations of the Third United Nations Conference on the Law of the Sea. It appeared to his delegation that by the time the articles had been completed and submitted for consideration at an international conference of plenipotentiaries, the use of the term "ratification" might perhaps apply equally and without distinction to States and international organizations, just as the terms "acceptance", "approval" or "accession" applied equally to both.

60. Reference was also made by some representatives to subparagraph 1 (i) containing the meaning of the term "international organization". Certain representatives said they endorsed that definition, which accorded with that of the Vienna Convention and, by its flexibility, would help to ensure the continued applicability of the draft articles in changing international circumstances. It was deemed important that only intergovernmental organizations should be considered to be international organizatons for the purposes of the draft articles, namely, organizations consisting of groups of Governments which alone, to the extent that they represented their member States, could have competence in regard to the conclusion of treaties. Moreover, such provisions should be applied with a degree of flexibility.

61. Certain other representatives suggested that subparagraph 1 (i) required further consideration. The Commission was urged to specify clearly all the kinds of organizations which were covered by the term "international organization" in the draft articles, since that question would affect the drafting and interpretation of substantive provisions. Failure to differentiate among international organizations might, it was said, have the effect of vitiating the provisions of any treaty based upon the draft articles. One repreentative believed that an abstract and general definition, such as that adopted by the Commission, was not adequate to determine the specific legal personality of international organizations. The definition proposed during the Commission's work on the subject of the representation of States in their relations with international organizations would perhaps constitute a better point of departure, he said.

62. Subparagraph 1 (j) relating to "rules of the organization" was also mentioned by some representatives. One representative, speaking on behalf of States members of a regional economic community, noted that while subparagraph 1 (j) was a new provision by comparison with the Vienna Convention of 1969, it appeared prudent to maintain continuity by using a definition of the term "rules of the organization" which was identical with the existing definition of that term set forth in the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. Since the deliberations of the Commission had shown that qualifying the words "decisions and resolutions" with the adjective "relevant" and adding "established" to the words "practice of the organization" could be interpreted in a restrictive manner, the commentary was right to make clear that the use of those terms was not in any way intended to freeze the practice of an international organization at a particular moment in its history and that the descriptive terminology chosen by the Commission, by including the words "in particular", was intended to denote that the set of rules varied from organization to organization.

63. On the other hand, certain representatives believed that the definition of the expression "rules of the organization" was too broad and vague. The view was maintained that the definition left too much room for interpretation in that its coverage was not strictly confined to rules recognized by all the member States of an international organization. For example, it implied, in the context of article 6 of the draft, that violation of the sovereign rights of an organization's member States was not definitely ruled out. Since that might ultimately affect an organization's implementation of a treaty, it was necessary to further qualify the notion of "practice" in such a way as to eliminate what was referred to in paragraph (24) of the commentary to article 2 as "uncertain or disputed practice". One way to achieve greater clarity, it was urged, would be to use the phrase proposed by one Government in its written observations of 1981, namely "the organization's practice established in accordance with the constituent instruments". Such a wording in no way precluded the further development of the treaty-making capacity of an international organization in accordance with international law.

Article 3. International agreements not within the scope of the present articles

64. Some representatives supported the revised version of article 3. Its retention was favoured in the interests of clarity and usefulness, despite somewhat cumbersome drafting. In view of the increasingly frequent conclusion of unwritten agreements, it would be useful to specify the draft articles sought to govern only agreements reflected in signed instruments. Also, the fact was welcomed that the term "entities" had been replaced by the term "subjects of international law". The requirement of the generally recognized principle that international agreements could only be concluded between subjects of international law had thus been met. One representative stressed that his delegation naturally construed the phrase "subjects of international law other than States or international organizations" as referring in particular to entities of public international law which had proved their capacity to contract obligations and to honour those obligations, namely national liberation movements, and his delegation was surprised that such an

identification, which was already recognized in humanitarian law, was not mentioned in the commentary.

65. Certain representatives urged that greater efforts be made towards simplification of the drafting. One representative noted that the Special Rapporteur had made an effort at simplification by proposing in his report a wording to the effect that the draft articles did not apply to "international agreements concluded between, on the one hand, one or more States and one or more international organizations and, on the other hand, one or more entities other than States or international organizations". The wording was still somewhat heavy but it conveyed the same idea in a shorter form. With the replacement of the word "entities" by the words "subjects of international law" in the revised Commission text, the Special Rapporteur's version seemed better than the Commission's text. The scope of the draft articles in their entirety was clearly enunciated in article 1. Consequently there seemed to be no need to burden the text by constantly repeating that description. In his view, article 3 could simply say that the draft articles did not apply to "treaties to which one or more subjects of international law other than States or international organizations were parties". Another representative wondered whether a simpler and clearer solution to the present text of article 3 might not be to state briefly that only agreements concluded between States and international organizations or between two or more international organizations were subject to the draft articles.

Article 4. Non-retroactivity of the present articles

66. One representative held the view that it was not necessary to refer, in article 4, to the principle of non-retroactivity, which was a basic rule of general treaty law.

Article 5. Treaties constituting international organizations and treaties adopted within an international organization

67. Certain representatives noted that a new article 5, paralleling the corresponding provision of the 1969 Vienna Convention on the Law of Treaties had been added to the draft articles in second reading and deemed the addition to be an important one. Some doubts, however, as to the advisability of incorporating that article were expressed by certain representatives. While it was not impossible that in the future an international organization would participate in a treaty creating another organization, that possibility did not imply that such a case would require the adoption of a separate provision. In addition, it was maintained that there was no need for article 5 in so far as constituent instruments of international organizations were covered by the Vienna Convention. The same was true of treaties adopted within an international organization, such as those adopted by the General Assembly of the United Nations.

Part II. Conclusion and entry into force of treaties

68. One representative spoke in terms which appeared to relate to part II of the draft as a whole. He remarked that there seemed to be a sharp difference of view concerning the mode and effects of consent to treaties on the part of an international organization. His delegation suggested, with a view to an eventual compromise, and to the possible accession of the European Economic Community to the future convention on the law of the sea, that international organizations wishing to become parties to treaties in accordance with draft articles 6 and 7 should submit, if possible during the negotiations and in any case no later than the time of confirmation, either extracts of the text of their statutes, or a statement by a competent organ describing the established practice in the matter of their competence and procedures. That solution would obviate not only repeated questions and explanations, but also the atmosphere of uncertainty which seemed to prevail sometimes in the minds of potential States parties to the same treaty. His delegation would have no objection to the establishment of confirmation of the consent of an international organization to be bound by a treaty (article 14) more on the lines of the ratification of a treaty by a State. Thus it was preferred that that confirmation be issued, unless the constitutional instrument of an international organization stipulated otherwise, by an organ made up of States competent to deal with the organization's external relations. The same would apply to reservations and objections formulated by an international organization under articles 19 and 20. If those changes were accepted there would be a double benefit: the other parties to the same treaty would then know that the text was indeed governed by rules of international law, in accordance with the definition of a treaty in article 2, subparagraph 1 (a) of the draft, and moreover, the adoption of that solution would facilitate future discussion about the legal effects on the States members of international organizations of treaties concluded by such organizations, a question which seemed to have led to sharp divisions of opinion.

Section 1. Conclusion of treaties

69. As to the drafting of certain articles found in section 1 of part II of the draft, certain representatives believed that there was room for simplification in several articles in that section. Articles 10, 11, 12, 14 and 16 all contained separate paragraphs concerning expression of consent in the case of treaties between States and international organizations and the case of treaties between international organizations. It was suggested that in all those articles, paragraphs 1 and 2 could be combined, as had been done in other articles of the same section, such as articles 13 and 17.

Article 6. Capacity of international organizations to conclude treaties

70. Most representatives who referred to draft article 6 noted its great importance and significance in the draft. Some representatives believed it reflected the balance which the Commission had attempted to strike between different schools of thought concerning international organizations. The compromise solution arrived at in article 6 was deemed fair and capable of attracting universal acceptance.

71. According to one representative, article 6 represented a good compromise between the view that the capacity of an international organization to conclude treaties should be based on on its constituent instrument and the view that that capacity should be based on international law in general. However another representative did not believe that the wording of article 6 totally precluded the application of international law to the question of the capacity of an international organization to conclude treaties. In fact customary international law would apply to that question even if it had not been incorporated into "the relevant rules of the organization".

72. Certain representatives emphasized that article 6, which was to be read in close relation to the definition contained in article 2, subparagraph 1 (j), was accepted since it also contained the adjective "relevant" in relation to the rules of an organization. furthermore, it was urged that a broad interpretaton should be given to the words "relevant rules". Otherwise, there might be a risk of disregarding the implicit powers enjoyed by an international organization, and a large number of treaties to which international organizations whose statutes did not confer on them specific powers with regard to the conclusion of treaties were parties would be invalid, because those organizations would have exceeded their contractual capacity. The implicit powers of an international organization were determined, unquestionably, by the criterion of necessity.

73. On the other hand, doubts were expressed by some representatives concerning the present formulation of article 6. The reference in that article to the "relevant rules of the organization" as a source of an organization's capacity to conclude treaties might cause practical difficulties, it was said. Only a relatively limited number of constituent instruments of international organizations were applicable in such a context, in contrast to the considerable number of agreements concluded by international organizations. It would be useful to specify the situation which would arise when the relevant rules of an international organization were silent as to the organization's capacity to conclude treaties.

74. One representative recalled that article 2 did not contain any definition of the expression "relevant rules of the organization". He stressed that if that concept was interpreted in the light of the definition of the rules of the organization contained in article 2, subparagraph 1 (j), one reached a conclusion that was difficult to accept, namely, that the "relevant rules" mentioned in article 6 and in other of the draft articles might also be rooted in the "established practice" of the organization. His delegation considered that, in the absence of more precise elements in article 2, the capacity of the organization to conclude international treaties should be governed by its constituent instrument or conventional or other instruments accepted by all its member States, which established the powers of the organization in its specific area of activity.

75. Finally, certain representatives remarked that article 6 provided only a partial response to the question concerning the possible incompatibility of commitments made on the same subject by States as such and by an international organization on behalf of its member States. Nevertheless, according to one representative, it was clear that an international organization could only bind a member State if its statute so provided or if the State expressly accepted the commitment in question. In that connexion, another representative stressed that in

a treaty between States and international organizations, the most important element was the competence of such organizations in the subject-matter of the treaty and their related capacity to conclude such a treaty. Where such competence of an international organization was not exclusive, so that treaties might be concluded in the same subject-matter both by that organization and by its member States, or where the competence varied and grew with the passage of time, relations between States and international organizations as parties to a common treaty could become unclear and troublesome. Where the common treaty established an international institution, it might also be necessary to avoid duplication or plural representation. Such matters were currently under negotiation at the Third United Nations Conference on the Law of the Sea. Draft article 6, which provided that the capacity of an international organization to conclude treaties was governed by the relevant rules of that organization, and the definition of "rules of the organization" in article 2, subparagraph 1 (j), might need to be modified to ensure that changes in the capacity and competence of an international organization after the conclusion of a treaty did not affect the scope of the treaty relations between the parties without their express consent.

Article 7. Full powers and powers

76. A few representatives made favourable remarks with regard to article 7. It was noted with satisfaction that article 7 had been retained in the interests of clarity, despite cumbersome drafting. It was also stated that in article 7, the Commission had demonstrated realism and flexibility by providing that certain persons, in virtue of their official capacity and functions, had powers, even though the basic principle embodied in the article was that every representative must prove that he was authorized to act on behalf of the organization whose representative he claimed to be, for the purpose of validly communicating the consent of the organization.

77. Other representatives, however, were of the view that article 7 could be further refined and clarified. It did not seem necessary, it was maintained, to create new notions in article 7 to designate the full powers of international organizations, nor was it necessary to maintain separate but repetitious paragraphs. It was furthermore observed that distinctions made by the Commission, inter alia, between "full powers" and "powers" had led not only to duplication in the draft but had also influenced the deliberations of the Third United Nations Conference on the Law of the Sea. It was suggested that by the time the present articles had been completed and submitted for consideration, the use of such a term as "full powers" might perhaps apply equally and without distinction to States and international organizations.

78. In the view of one representative, article 7 was not entirely satisfactory becuase it dealt with a sphere in which the method of seeking symmetry with the 1969 Vienna Convention on the Law of Treaties was inappropriate. During the debate in the Sixth Committee which had preceded the adoption of the 1969 Vienna Convention, his delegation had stressed the principle that the will of a State expressed by or its consent to be bound by a treaty and conceived of as its real will, was regulated solely by constitutional law, for that reason, he had firmly opposed the wording of what was to become article 7 of the Vienna Convention

because it made no reference to internal constitutional law. Subsequently, the situation had been clarified and regularized by the inclusion of article 46, and the interpretation of the two articles read in conjunction with each other had allayed his concern. The principle of good faith was fundamental to international relations and in certain conditions, as was clear from article 46 of the 1969 Vienna Convention, a State remained bound by a treaty even when its organs, in expressing consent to be bound by it, had violated its constitution and exceeded their competence. On the other hand, the same logic could not be applied to international organizations which, while subjects of international law, were fundamentally different from States in that all aspects of their operation were regulated by international law. Consequently, subparagraphs 3 (b) and 4 (b) of draft article 7, should be reworded; they lacked the precision of article 7, subparagraph 1 (b), of the 1969 Vienna Convention, were not fully understandable and might be incompatible with the concept of "rules of the organiztion" as embodied in article 2, subparagraph 1 (j) of the draft. One possible solution would be to reword the beginning of the two paragraphs to read "it appears from the practice of the organization or from other relevant circumstances ..."

Article 8. Subsequent confirmation of an act performed without authorization

79. One representative observed that article 8, which allowed for the subsequent confirmation of an act performed without authorization, had the effect of consolidating situations created in good faith.

Article 9. Adoption of the text

80. Reference was made by some representatives to paragraph 2 of article 2. Attention was drawn to the situation of an organization such as the European Economic Community. Speaking on behalf of the members of that Community, one representative stressed that the Community's relationship with its member States was one of "mixed competence", a legal situation calling for participation by the Community as a full participating partner in an international conference convened for the purpose of establishing a treaty on matters within its competence: in some cases the Community had competences which excluded those of its member States, while in others it shared competences with those States. That situation should be kept in mind, he urged, when the provisions contained in article 9, paragraph 2, providing organizations with the possibility of participating in an international conference in the same capacity and under the same rules as a participating State, were finalized. In any event, in the Community's view it was inadequate, as indicated in the commentary to article 9, paragraph 2, that it should be left to States in each case to decide whether an international organization could participate in an international conference convened for the purpos of adopting a treaty.

81. Another representative remarked that the provision proposed in article 9, paragraph 2, concerning the adoption of the text of a treaty was based on the corresponding provision of the Vienna Convention. However, when the text of a treaty was considered for purposes of adoption at an international conference, with

the participation of international organizations, the application of the two thirds majority rule might place a State in a paradoxical situation, because it would be participting in the conference nomine proprio, on the one hand, and as a State member of the organization on the other. Reconsideration of article 9, paragraph 2, was therefore necessary in order to ensure concordance between the position of the organization and that of its member States.

82. Finally, one representative said that no justification had been given in the commentary for the provision in paragraph 2 that the adoption of the text of a treaty in the circumstances envisaged should be by a two thirds majority.

Article 10. Authentication of the text

83. One representative questioned the usefulness of the freedom given in article 10, subparagraphs 1 (a) and 2 (a), with regard to the authentication of the text of a treaty concluded between States and international organizations or between international organizations. According to almost universal practice, the text of a treaty became definitive as soon as it was signed, signed ad referendum or initialled by the representatives of the entities that had negotiated it.

Article 11. Means of expressing consent to be bound by a treaty

84. Article 11 was deemed by one representative to be of minor interest, since it merely adapted to the situation of international organizations the means of expressing consent to be bound by a treaty already available to States under the Vienna Convention.

Article 17. Consent to be bound by part of a treaty and choice of differing provisions

85. It was said by one representative that article 17 did not specify what majority of the other contracting States or the other contracting international organizations was required for consent to be given to a State or organization to be bound by only one part of a treaty. The question was whether consent should be given unanimously, by a simple majority or by a two thirds majority.

Section 2. Reservations

86. Referring in general to section 2 of part II of the draft articles, on the question of reservations, a number of representatives noted with satisfaction the changes made by the Commission in the course of its second reading of the draft articles making up that section (arts. 19 to 25). A very marked improvement had been made, it was said. The new versions of the articles of this section were viewed as responsive to various comments and views of Governments.

87. Certain representatives welcomed the adoption by the Commission of the so-called "liberal system" for reservations by international organizations as well

as by States. Certain other representatives, however, believed that the main drawback of the articles in their original form had been that they accorded the same status to States and to international organizations in the procedure regarding reservations, an approach which had been rightly criticized by many delegations. The new text had eliminated that shortcoming by establishing the rule that an international organization could formulate reservations on the same basis as a State, but that particular rules applied in respect of the procedure for acceptance of and objection to reservations. The issue was not the reservation itself but the circumstances and juridical consequences of its adoption or of an objection to it.

88. On the other hand, doubts were expressed concerning the draft articles contained in section 1 of part II. One representative stressed that the practice of international organizations with regard to reservations was minimal, and the examples adduced by the Commission were not typical. In first reading, the Commission had set forth two different principles in respect of reservations; it had given up that approach in second reading and had applied instead the general principle of freedom to formulate reservations. The validity of that approach required further study. Another representative considered that the text of the relevant articles was too restricted. It tended to impose limitations on States in the exercise of their right to formulate reservations. That right was the very expression of State sovereignty. His delegation therefore considered that the words "the State may formulate a reservation" should be replaced by the words "a State has the right to formulate reservations" and that articles 20 to 23 should be amended accordingly.

89. Finally, it was observed that, like the corresponding articles of the 1969 Vienna Convention, the articles of this section left open the question of the admissibility of reservations to bilateral treaties: however, a strict interpretation of the Convention would seem to indicate that such reservations were acceptable.

Article 19. Formulation of reservations

90. Some representatives who referred specifically to article 19 welcomed the new version of the article. One representative deemed it to be extremely satisfactory; the solution which had been found was simple and legally viable. Thus, the freedom to formulate reservations which was accorded to States was extended to international organizations, subject, of course, to the provisions laid down in the matter for States in the Vienna Convention.

91. One representative remarked that in deciding on second reading not to maintain the previously adopted article 19 bis, paragraph 2, the Commission seemed to have taken the view that if the participation of an international organization was essential to the object and purpose of a treaty (as in the case in which the treaty gave the organization supervisory functions), any reservation formulated by the international organization would in fact be a reservation incompatible with the object and purpose of the treaty. His delegation had consistently expressed the opinion that the draft articles should be as concise as possible; but in that particular instance, it was not entirely convinced that the deletion of the paragraph was justified. The case contemplated therein had a certain importance;

and the provision, without in any way harming international organizations, would make explicit to States a guarantee which was only implied in the current draft. As far as the drafting was concernad, his delegation noted that paragraphs 1 and 2 of article 19 were practically identical, except that paragraph 1 referred to States and paragraph 2 to international organizations and paragraph 1 used the word "ratifying" and paragraph 2 the expression "formally confirming". His delegation considered that the two paragraphs of article 19 could be merged to form a single paragraph.

92. Doubts were expressed by another representative who also emphasized that as States were sovereign entities and could not be assimilated to international organizations, the formulation of reservations should not be identical in the case of treaties concluded between States and in the case of treaties to which international organizations were parties. The desire to simplify the wording of article 19 should not obscure the basic difference in nature between States and international organizations.

Article 20. Acceptance of and objection to reservations

93. Several representatives supported the revised text of article 20 as adopted in second reading, welcoming in particular the manner in which the question of tacit acceptance by international organizations of reservations was dealt with. One representative stressed that it was not permissible to establish a rule that a reservation should be considered as having been tacitly accepted by an international organization if it had raised no objections within a given period, since the competent body of the international organization must be apprised of the reservation and must take a decision on it. Once the decision had been taken by the required number of votes, it must be brought to the attention of the party which had entered the reservation. Moreover, since the competent bodies of international organizations did not all hold their sessions at equivalent intervals, it would be difficult to establish a uniform time-limit for their acceptance of reservations, as recognized by the new formulation of draft article 20. Another representative, speaking on behalf of members of a regional economic community, welcomed the fact that the Commission had maintained the exact wording of the Vienna Convention with regard to paragraph 4 of article 20, retaining for States a specified period for reaction of 12 months. The draft article did not specify the consequences for an international organization which was a contracting party to a treaty and did not react within the specified period; the question of whether it was necessary to grant international organizations a longer time period than States could be left to be solved by the practice which would evolve, as suggested in the Commission's commentary.

94. Certain representatives, however, favoured extending to international organizations the possibility of tacit acceptance of reservations as had been provided in the text of article 20 bis adopted by the Commission in first reading. It was recalled that in its 1966 report the Commission had referred to the principle in question in its comments on article 17, paragraph 5, of the draft articles on the law of treaties but had not discussed the rationale for the rule. The justification for the rule appeared to relate to the level of organization expected to exist in a State. As many intergovernmental organizations were highly

organized, it was believed that further consideration should be given to the extension to international organizations of the rule of tacit acceptance of reservations.

95. One representative referred to paragraph 2 of article 20, questioning how far that provision took account of existing practice. Moreover, the hypothesis mentioned in the draft articles, namely, the case where the participation of an international organization was essential for the object and purpose of a treaty, might arouse serious controversies. His delegation pointed out further that situations of the type envisaged in that paragraph constituted exceptions which came under the particular rules of the treaties in question.

96. A number of representatives noted that draft article 20 did not contain a provision corresponding to paragraph 3 of article 20 of the Vienna Convention. It was stated that the decision to include in the new draft article 5 provisions identical with article 5 of the Vienna Convention, thus bringing the constituent instruments of organizations of which at least one member was another international organization within the scope of the draft articles, made it logical to cover also the situation dealt with in article 20, paragraph 3, of the Vienna Convention concerning acceptance by the competent organ of an international organization in circumstances where another international organization made a reservation to the constituent instrument establishing the first-mentioned international organization. One representative said that that omission seemed strange. It was certainly not excluded that an international organization, e.g. a regional organization, could become a party to an international treaty such as a quasi-universal treaty which was also the constituent instrument of another international organization. If then the regional organization, or for that matter a State, which wished to become a party to that universal treaty intended to enter a reservation, there was no reason for not applying the rule that such reservations required the acceptance of the competent organ of the universal organization of which the universal treaty was the constituent instrument. The requirement that a collective decision be taken on the acceptability of a specific reservation entered by a prospective member was equally valid whether that prospective member was a State or an international organization.

97. According to another representative, some doubts remained with regard to the relationship between revised article 20 and new article 5 of the draft.

Article 25. Provisional application

98. It was observed by one representative that the idea of provisional application of treaties, dealt with in article 25, had already been resisted at the Ministerial Conference held at Banjul in 1981 for the purpose of elaborating the African Charter on Human and Peoples' Rights. Several delegations at that Conference had taken the view that the arbitration and mediation commission referred to in the draft Charter should not be established before the Charter entered into force.

Article 26. Pacta sunt servanda

99. Those representatives who referred to draft article 26 stressed its importance and the fact that it reproduced the corresponding provision of the Vienna Convention on the Law of Treaties. One representative emphasized that article 26 embodied a principle on which the very foundations of international life were based. However, it would be advisable to envisage a time when greater emphasis could be placed on such a principle. Times were changing rapidly and the need for peace, progress, justice, fraternity and solidarity was becoming more pressing. If international law was duly respected, there would be a greater hope of attaining those goals. One obstacle which arose in that connexion was the widespread idea that ratification of a treaty by a legislature was not enough to ensure its application within the State concerned. Clearly, a treaty which had not been implemented internally was simply a treaty which had not entered into force. It would therefore be an extraordinary event were the international community one day to accept the corollary of the pacta sunt servanda principle, namely, that every treaty in force must be observed by the organs of the State, whether judicial, administrative or even legislative.

(b) Articles 27 to 80 and annex adopted in first reading by the Commission at its twenty-ninth to thirty-second sessions

100. A number of representatives referred to the draft articles on the topic which were adopted by the Commission in first reading at previous sessions but which have yet to be approved in second reading. In that connexion, reference was made to the written comments of Governments submitted to the Commission and relating to draft articles not yet adopted in final form.

101. It was observed that in the course of the second reading the Commission would once more be faced with some intricate questions arising from the peculiarities of international organizations as contracting parties to treaties, and from the different position of such organizations before the International Court of Justice. It was imperative, one representative stressed, to put international organizations, as far as the subject-matter warranted, on the same footing as States in respect of the conclusion and implementation of treaties.

Part III. Observance, application and interpretation of treaties

102. One representative made general remarks on part III of the draft on "Observance, application and interpretation of treaties", which constituted the next stage of the Commission's work on the topic. He asked whether all the rules of the Vienna Convention on the Law of Treaties could be applied to an international organization participating in a treaty. There seemed to be no reason to interpret treaties differently according to the status of the parties. There were, however, a number of other points on which the analogous application of the Vienna rules to international organizations might create problems with respect to the coexistence of sovereign member States and the international organization to which they belonged. Some of the Vienna rules were obviously based on the assumption that a State was either a party to a treaty or a third State. Could

such a simple and sharp distinction be applied to treaties to which both an international organization and the States of that organization were parties? Alternatively, should it be affirmed that, in respect of a treaty in which an international organization participated, the member States of the latter were neither parties nor third States? His delegation was inclined to the latter view, but was fully aware that such a solution was not fully adequate to the problems involved.

103. For the same representative, there were in any case reasons for doubting the applicability of articles 34 to 38 of the Vienna Convention, which related to treaties and third States. The main point of difference was that, in the case of a treaty between States, rights and obligations of third States were derived from the treaty itself, whereas in the case of a treaty in which an international organization participated there was an additional factor to be taken into account, namely, the treaty governing the international organization itself. If the member States of an organization had rights and obligations under a treaty in which the organization itself participated, those rights and obligations were held by them as members rather than as States, a circumstance which would seem to exclude a priori the direct application of the rules laid down in articles 34 to 38 of the Vienna Convention.

104. This representative said that a comparable issue arose in connexion with article 29 of the Vienna Convention, which dealt with the so-called "territorial scope" of treaties. Since an international organization obviously did not normally have "territory", the text adopted by the Commission in first reading reproduced article 29 of the Vienna Convention only in respect of a State party to a convention in which an international organization participated.

105. A further question, he said, was whether a treaty in which an international organization participated would create rights and obligations for that organization in respect of only some of its member States. The question was of more than merely theoretical concern, and was the subject of very active discussion in the Third United Nations Conference on the Law of the Sea. Once again, it appeared that the issue was one which could be resolved within the treaty itself rather than one for which a general or even residual rule could be established.

106. Finally, the sharp dichotomy between States parties to a treaty and third States was, he maintained, also at the basis of article 30 of the Vienna Convention, which dealt with the application of successive treaties relating to the same subject-matter. In first reading the Commission had adopted an article modelled on the Vienna Convention because the "successive treaties" were all treaties in which an international organization participated. The additional problems arising from the relationship between such treaties and treaties between States, one or more of which happened to be members of an international organization, were not such as to call for the elaboration of general rules. Indeed, it might be wise to leave the negotiators of a particular treaty free to address the question and to find a solution without being forced to do so by a residual rule.

Article 27. Internal law of a State, rules of an international organization and observance of treaties

107. According to one representative, the essential issue regarding article 27 (as well as art. 36 bis) was how to deal with the structural difference between a State and an international organization as subjects of international law.

Article 36 bis. Effects of a treaty to which an international organization is party with respect to third States members of that organization

108. Some representatives mentioned the importance of draft article 36 bis and its contemporary relevance to the negotiations being held within the Third United Nations Conference on the Law of the Sea. The achievements of the thirty-third session of the Commission had laid a good foundation, it was said, for the solution of other problems relating to the draft articles, in particular in respect of article 36 bis

109. Comments relevant to article 36 bis were made by some representatives in connexion with other articles or sections of the draft (see paras. 68, 75 and 103-106 above).

Part V. Invalidity, termination and suspension of the operation of treaties

110. Concerning part V of the draft, one representative held the view that, with regard to treaties to which international organizations were party, there was no reason to apply a régime different from the Vienna Convention with regard to invalidity, in the case, for example, where such treaties conflicted with a peremptory norm of general international law. It was pointed out that the Vienna Convention did not necessarily rule out the application to other treaties of the criteria set forth in its articles 53 and 64, in addition to those already expressly provided for in article 2, subparagraph 1 (a) and article 3 (b). The invalidity of international agreements conflicting with jus cogens had derived from international law, and it was thus possible to apply that norm to treaties that were not expressly mentioned in the Vienna Convention. Consequently, nothing prevented the consideration of treaties between States and international organizations and treaties between international organizations which conflicted with certain principles of jus cogens as invalid. His delegation believed that that invalidity might be invoked by States and by all international organizations. Relative invalidity could be invoked only by the injured State or international organization. With regard to the termination of a treaty owing to the supervention of a new peremptory norm of international law, the régime to be applied to treaties between States and international organizations and between international organizations might be the same as that provided for by the Vienna Convention.

C. State responsibility (part 2 of the draft articles)

1. Comments on part 2 as a whole

111. Several representatives who spoke on the topic emphasized the fact that, in its present efforts towards preparing part 2 of the draft articles dealing with the content, forms and degrees of international responsibility, the Commission should take due account of the relevant provisions of part 1 of the draft articles it has already adopted. Part 1, as may be recalled, is concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility.

112. Certain representatives pointed out that in part 1 of the draft, it had been possible for the Commission to formulate abstract secondary rules which could in principle apply irrespective of the nature or content of the international obligation breached or of the seriousness of that breach. In part 2 of the draft, however, it would be unavoidable to have regard to those factors, since they would particularly determine the redress due to an injured State. The view that the Commission might need to look at some of the provisions of part 1 of the draft in its present work on part 2 was thus generally shared. It was observed, for example, that there was a clear link between article 5 proposed by the Special Rapporteur in his second report, and article 22 of part 1 on the question of exhaustion of local remedies. In further recognition of this particular example, another representative observed that article 22 of part 1 of the draft articles as adopted by the Commission not only envisaged an obligation of the alien concerned to exhaust local remedies, but also envisaged that through those remedies the alien concerned might obtain an equivalent treatment which again might clearly be a treatment which was not a complete re-establishment of the situation as it existed before the breach. Thus, it would rather appear that the reference to article 22 of part 1 in draft articles 4 and 5 of part 2 proposed by the Special Rapporteur had no other purpose than to make clear that in the cases mentioned in article 22 of part 1 the initiative of applying such local remedies should rest with the injured individual concerned.

113. Recognizing the difficult problems of methodology faced by the Commission in its preparation of part 2 of the draft articles, certain representatives commended the Special Rapporteur, Mr. Willem Riphagen, for the two reports in which he presented a useful conceptual approach for assisting the Commission in its present work on the topic. He was commended for his first report (A/CN.4/330) in which he identified three parameters: the first parameter is the new obligation of a State whose act is internationally wrongful, the second being the new right of the "injured" States, and the third one being the position of the "third" State in respect of the situation created by the internationally wrongful act. A number of representatives further found useful the discussion by the Special Rapporteur of the first parameter mentioned above which was the main subject of his second report (A/CN.4/344 and Corr.1 (English only) and 2).

114. In the opinion of one representative, however, the Special Rapporteur's second report was not in strict conformity with its announced intention of presenting a clear plan of work. He noted that although the second part of the

report was indeed entitled "The first parameter: the new obligation of the State whose act is internationally wrongful", and five draft articles were presented under the heading, only two of those proposed draft articles dealt with the first parameter. The representative further observed that, throughout the text of the report, and particularly in sections B and C, references were made to a plan of work for part 2 of the draft articles, yet, no such plan of work was offered in the report. Thus, the consideration of part 2 was made difficult by the format of the report itself. It seemed obvious to this representative that the task of the Commission in preparing part 2 of the draft would be far easier if some basic questions were clarified by a careful consideration of a plan of work. He noted that the Special Rapporteur had however suggested that part 2 of the draft articles should begin with a number of "general principles" or "preliminary rules" following the procedure already adopted in part 1. He further observed that the Special Rapporteur had also proposed three articles to be inserted in a special chapter under the heading "general principles", one of which (art. 2) would indicate the residual nature of the rules on content, forms and degrees of State responsibility set forth in part 2 of the draft, while the other two articles (arts. 1 and 3) would affirm that certain rights and obligations of a State would not be affected by the breach of an international obligation attributed to that State.

115. Another representative pointed out the fact the the Commission had indeed realized the inherent difficulties of the topic and that it had in effect adopted, at least provisionally, a plan of work under which part 2 of the draft articles would be divided into three sections; he explained that the three sections were to deal respectively with the new obligations of the author State, which could equally well be formulated in terms of what the insured State had the right to demand from that State; the new rights of the injured State or what action it was entitled to take, possibly in deviation from its obligations towards the author State; and the legal position, new rights and possibly even new obligations of third States in terms of remedying the wrongful situation created by the breach. In all the three sections, he further stressed, rights and obligations were closely interlinked, as they were in the so-called "primary" rules. Thus, in those circumstances, there might be merit in establishing a framework for all the three sections as a reminder to the reader of the individual articles that wherever rules were contained in those articles, the original primary obligation remained - an obligation that the State injured by the breach was not completely free to respond as it thought fit, and that there were special régimes. It was the view of this representative that, where to set forth such a framework, and the drafting of the relevant articles, were matters that the Commission would have to discuss.

116. General comments on the set of draft articles 1 to 5 proposed by the Special Rapporteur ranged from those which found the first three to be relevant and the last two defective to those which pointed out various ways by which the articles could be improved.

117. Thus, one representative expressed the view that, since according to the proposed article 1, the breach of an international obligation by a State did not as such, and for that State, affect the force of that obligation, and that the proposed article 3 also provided that the breach of an international obligation did not in itself deprive that State of its right under international law, the two articles, placed at the very beginning of part 2 of the draft, gave the impression

that undue attention was being paid to the interests of the State that had breached an obligation.

118. Several representatives expressed a similar view and suggested that the format of part 2 be changed so as to deal with the obligations of a State which has committed an international wrongful act from the standpoint of the rights of the injured State rather than from the perspective of the rights of the "author" State. Other representatives, however, found articles 1 and 3 as proposed by the Special Rapporteur, to provide acceptable, general pinciples covering all the three parameters and that they were intended as a link between the articles in part 1 and those to be included in part 2. According to this view, the philosophy reflected in draft articles 1 to 3 was commendable and was conducive to the progressive development of international law in that area. Indeed one representative was of the opinion that the provisions in articles 1 and 3 were not intended to protect the author State, but to introduce the element of proportionality in the relations between a wrongful act and the response thereto.

119. Articles 4 and 5 proposed by the Special Rapporteur to deal with various obligations of the author State provided, in the view of one representative, an example of a basic differentiation which must be made according to the nature of the international obligation breached. Thus, in draft articles 4 and 5 a differentiation was made with regard to the obligation of the author State to re-establish the situation as it existed before the breach. Dealing with the question of treatment of aliens in draft articles 4 and 5 of part 2 was viewed differently by one representative who could not support proposals aimed at extending the scope of State responsibility to include relations with alien natural or juridical persons. The same representative did not also agree that the right of option with regard to the forms of compensation should be accorded to a State which breached an obligation and not to the injured State.

120. But it was the view of other representatives that the question of the scope of State responsibility was already covered and reflected in the different régimes relating to the legal consequences of a breach of an international obligation dealt with in part 1 of the draft articles. It was pointed out that several articles of part 1, notably article 19 dealt with international crimes and international derelicts, while article 22 dealt with international obligations concerning the treatment of aliens. It was therefore logical, in the view of several representatives for articles 4 and 5, of part 2, proposed by the Special Rapporteur, to deal as appropriate with the question of treatment of aliens. Thus, one representative observed that in part 2, it might be necessary to take into account the nature of the primary rules infringed not only in the cases enumerated in article 19, but also with respect to the rules relating to the treatment of aliens and to those establishing the internationally protected rights of individuals. The representative further noted that until recently it had been possible to maintain that a human being as such had no subjective rights directly granted and guaranteed by the international legal order, because it was States that had the right to require that their citizens be treated in a particular manner. At that time it was that right, and in most cases it still was, which was violated, namely the right of the State whose citizen had received treatment different from that internationally established. That example sufficed to indicate the complexity of the subject and the inevitable link between primary and secondary rules. The

problem might possibly be solved by means of a distinction between two or three general categories, accompanied by a specification of the type of reparation appropriate in the various general cases. The new draft article 5 seemed to point in that direction.

121. Commenting also on this question of the scope of State responsibility, another representative observed that the whole concept had grown with a changing world. Thus, it could no longer be viewed in the limited context of a South-North relationship in which a poor country was obliged to pay a richer country whose citizens had suffered damage as a result of expropriation, since in the modern world nationalization was as common in the North as in the South. The representative further observed that the time dimension was significant in relation to the type of internationally wrongful acts committed. There might be a single act committed once, or there might be a series of acts, or again, there might be a longstanding positive act or an equally longstanding omission. Thus the obligation to desist from the wrongful act would not apply in the case of a single act already committed. The violation of the air space of a neighbouring State by an aircraft, for example, could not be stopped by causing disintegration of the equipment in mid-air. There would be other obligations such as the duty to leave the foreign air space, to express regret, and to guarantee that there would be no recurrence of such violations. The unlawful seizure of aircraft or diplomatic premises could be stopped by releasing the aircraft or premises. The obligation for the past was to undo the wrong committed and bring about a return to the status quo. The obligation to reduce or mitigate the damage was related to the obligation to desist from committing further internationally wrongful acts or to discontinue the internationally wrongful act. That would be followed by an obligation to perform belatedly the original obligation that had been breached or to restore the status quo. There would also be obligations for the future in the form of a substitute performance which in the final analysis would consist of reparation in financial terms. It was important that the draft articles of part 2 should take all these into consideration.

2. Comments on the various draft articles proposed by the Special Rapporteur

Article 1

122. Two questions were raised concerning the text of draft article 1 as proposed by the Special Rapporteur. There was first the question as to whether the breach of an obligation invalidated that obligation and secondly, to what extent does the breach of an obligation by a State affect, in general, the right of that State under international law. As to the first question, it was noted that there would seem to be no reason to doubt that the breach of an international obligation did not in itself nullify the obligation. The fulfilment of the obligation might consequently become impossible and the State to which the obligation was due might have the right to terminate the legal relationship of which the obligation was part, but, in principle, the obligation would continue to exist after the breach. As to the second question, it was noted that, it seemed logical to say that, while a State could not be deprived of all its rights under international law because it had breached an international obligation, it might be deprived of certain rights in

the framework of the new legal relationship created by its internationally wrongful act.

123. There was also the view that the text of article 1, when read together with that of article 3, and placed, as they were, at the very beginning of part 2, gave the impression that undue attention was being paid to the interest of the State that had breached an international obligation. It was accordingly suggested that draft articles 1 and 3 be combined into a single provision as had been suggested by a member of the Commission as follows: "A breach of an international obligation by a State affects the international rights and obligations of that State, of the injured State, and of third States only as provided in this part". Such a text would be preceded by another general provision at the beginning of part 2, as also suggested by another member of the Commission. Part 2 would thus begin with a provision stating that "an internationally wrongful act of a State gives rise to obligations for that State and to rights for other States in accordance with the provisions of this part of the present articles".

Article 2

124. There was the view that, if a primary rule of international law, which created an obligation, prescribed the legal consequences of breach of that obligation, it would be reasonable to admit that in the case of a breach, the régime thus established would apply rather than the régime created under part 2. However, draft article 2 proposed by the Special Rapporteur, by affirming that the particular régime of responsibility could derive from any rule "whether of customary, conventional or other origin and could be determined explicitly or implicitly" in that rule, went too far in accepting the pre-eminence of the régime established by the primary rule and reduced considerably the application of part 2, thereby creating a highly undesirable legal uncertainty. It was stressed under this view that the legal consequences of an internationally wrongful act should be governed by the draft articles, unless a primary conventional rule explicitly established a different régime for the breach of an obligation created by that rule. Thus draft article 2 proposed by the Special Rapporteur was to be reviewed and redrafted accordingly.

Article 3

125. Several representatives welcomed the suggestion for combining the text of draft article 3 proposed by the Special Rapporteur with that of draft article 1 into a single provision whose text is given in paragraph 123 above, dealing with similar observations on draft article 1.

Article 4

126. There was the suggestion that reference to remedies permitted by the State's internal law in paragraph 1 (b) of draft article 4 as proposed by the Special Rapporteur be deleted. There was also the view that the entire draft article 4 was lacking in clarity. It was observed that while paragraph 1 (c) referred to the

obligation to re-establish the situation as it existed before the breach, and while paragraph 2 mentioned the obligation of financial compensation, the re-establishment of the situation as provided in subparagraph (c) was presented as a follow-up to the measures envisaged in subparagraphs (a) and (b) of the same paragraph 1, and thus seemed to be both a whole and a part of the whole. In order to re-establish the previous situation, a State which had committed an internationally wrongful act was required under subparagraph (a) and subparagraph (b) of paragraph 1 respectively, "to discontinue the Act" and to "prevent continuing effects of such act", and also to "apply such remedies as are provided for in, or admitted under, its internal law", "subject to article 22 of part one of the present articles".

127. This particular provision, in the view of the sane representative gave rise to concern on two accounts. In the first place, it doubted the appropriateness of the reference to article 22, which dealt with the exhaustion of local remedies, that being a necessary condition before a breach of an international obligation was recognized, because if local remedies had not been exhausted the breach did not legally exist, whereas part 2 of the draft articles dealt precisely with a situation in which such a breach existed. Was one to understand that a State responsible for a breach had the right to delay the fulfilment of its (secondary) obligation to stop that breach (lato sensu) until such time as new local post breach remedies had been sought and exhausted? Secondly, the description in subparagraph 1 (b) of the obligation of the author State to "apply such remedies as are provided for in, or admitted under, its internal law" could be questioned; it might suggest that, if no remedies existed, there was no obligation to stop the breach (lato sensu). Even though the additional obligations of the author State could be enunciated under the second and third parameters, it would seem necessary, since the Special Rapporteur had chosen to start part 2 of the draft articles with the obligations of the author State, to spell out those obligations as clearly as possible, and in particular to specify that a State that had breached an international obligation was bound first and foremost to re-establish the situation which would have prevailed if no breach had occurred. If that was impossible for the author State, then - and only then - was the possibility of a "substitute" performance (the obligation to make compensation and provide satisfaction to the injured State) to be contemplated, as stated in article 4, paragraphs 2 and 3.

Article 5

128. It was observed that, according to draft article 5 proposed by the Special Rapporteur, the State which had committed a breach of an international obligation had an option between restitutio in integrum and compensation. The obligation of restitutio in integrum reflected in the draft article seemed to be an application of the principle of proportionality. This caused some uneasiness for certain representatives who essentially raised the question of whether or not restitutio in integrum is a normal legal consequence of the breach of an international law. It was the view of the representative that the application of draft article 5 as proposed by the Special Rapporteur would in fact authorize a State to breach an international obligation for a price, the price of compensation, and the State, having failed to perform that obligation, could free itself from the duty of performance through the payment of a sum of money to the injured State. He cited

article 13 of the International Covenant on Civil and Political Rights and said that, according to the proposed article 5, a State would not be obliged to live up to its obligation under that provision of the Covenant. By conduct not in conformity with that obligation - for instance, by expelling an alien without due process of law - the State would breach the obligation but would at the same time free itself from it. Even if the re-establishment of the situation that had existed before the breach would not be at all materially impossible, the only consequence of the breach for the author State would be that a sum of money would become due to the injured State. Not much was required of the State under the Covenant: the obligation to apply due process of law existed only in the case of aliens lawfully in the territory of the State and where compelling reasons of national security could not be invoked. Such being the case, was it really necessary or justified in that situation to give the State the benefit of the option envisaged in article 5? He would favour keeping in part 2 of the draft articles as in part 1 the essential unity of the concept of international responsibility, avoiding the creation of exceptions or special régimes unless it was absolutely necessary to do so.

129. According to another representative, however, article 5 proposed by the Special Rapporteur provided that, in the case of a breach of an international obligation relating to the treatment of aliens, the author State had the option of either restoring the situation as it had been or paying a sum of money to the injured State corresponding to the value which the fulfilment of the obligation bears. Thus, if the author State chose the second option and the special circumstances mentioned in article 5, paragraph 2, prevailed, the author State should also provide satisfaction in the form of an apology and appropriate guarantees against repetition. The representative did not believe that that proposal would enable the author State to opt out of the primary obligation in exchange for payment of a sum of money, since it could not be said that a sanction was a price paid for making an infringement of the law lawful. The real point, he observed, was that to re-establish the original situation, though not physically impossible, might require retroactive national legislation, which in international practice States were unwilling to envisage for the sake of the private interests involved.

130. According to the same representative, in international practice there were no clear examples of such measures being demanded by injured States, even less awarded by an international court. Neither the Chorzov Factory case nor the award in the Topco-Calasiatic case envisaged in the inoperative parts was anything other than the payment of a sum of money, which was in fact what had happened in both cases. He did not also believe that the theoretical example given by another representative, involving article 13 of the International Covenant on Civil and Political Rights, was really relevant. It was doubtful, he noted, that that provision really contained an obligation relating to the treatment of aliens as such, in other words, as nationals of a foreign State. The Covenant dealt with human rights, and not with the rights of States in the person of their nationals. Moreover, in that case the primary obligation was an obligation to provide procedural remedies under internal law for the national person concerned. If such procedural remedies were not provided for in national legislation, and if there were no compelling reasons of national security for the situation of the person concerned, there was a breach of an obligation. That breach did not necessarily

entail a new obligation to readmit the person concerned to the territory. He noted that even in the more elaborate European Convention on Human Rights the absence of a required procedural remedy did not necessarily entail a claim for compensation for the damage, far less a restoration of the original situation. That was established by the judgement of the European Court of Human Rights in the case De Wilde, Ooms en Vensyp.

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

131. A few representatives found the distinction between the terms "liability" and "responsibility" untranslatable into some languages. In Spanish, for example, one representative stated both were translated by the single word "responsabilidad".

132. Most representatives underlined the importance of the topic. It was recognized that in modern international life, owing to the development of modern technology, there existed a vast array of new activities which could have adverse consequences well beyond the territory of the State in which they were being carried out. The situation could not be allowed, in their view, to continue without jeopardizing the peaceful coexistence and interdependence of States. For these representatives, international law must continue to evolve to meet new circumstances if it was to respond to the expectations of the international community. One representative found the topic important enough to be regarded as a touchstone of a new international order.

133. Regardless of the general support, some representatives expresed concern over the content of the topic. Some found the content unclear. A few representatives were concerned that the content was much too close to that of responsibility of States for wrongful acts. In their view once an international rule was established for a certain conduct, deviation from those rules entailed wrongful acts and consequently State responsibility. Thus, some representatives found the question whether it would be possible at the current stage to formuate "auxiliary rules of a procedural character" somewhat inchoate.

134. The report (A/CN.4/346 and Add.1-2) of the Special Rapporteur, Mr. R. Q. Quentin-Baxter, on the topic was considered well structured by some representatives, and broad enough not to force any final conclusions on the readers. These representatives stated that the difficulty in developing a general rule of liability was that such rules appeared to presuppose specific contractual or otherwise agreed regulations. Thus they supported the view of the Special Rapporteur that the concept of strict liability could not be taken as a basis for the work on the topic. They further agreed with the view expressed in paragraph 174 of the report that two classes of cases - unforseeable accidents and circumstances precluding wrongfulness - should be reserved for further consideration.

135. In reference to the difficulties involved in the development of this topic, some representatives pointed out that State practice in this area had not developed to the point where it had been able to engender customary law; nevertheless they believed that precisely for this reason a convention dealing with such modern

problems was necessary. In the view of one representative, the intellectual problems involved were not insurmountable, but the point was to what extent were States prepared to recognize, in concrete terms, the consequences of the interdependent nature of the enhanced technological capacity to cause harm across borders.

136. Views expressed by representatives on the scope of the topic as suggested in draft article 1 proposed by the Special Rapporteur, were diverse. Some found the scope usefully defined because it was broad enough not to exclude any activities. Particularly at this time, they stated, when the content and the direction were not yet clearly determined, definition of the scope as formulated in draft article 1 was sufficient.

137. Some representatives, however, found the proposed definition of the scope not quite clear and broad enough. A number of representatives explicitly stated that the topic should not be limited to its traditional scope, namely protection of the environment, but also it should include modern international problems such as, for example, economic and monetary questions.

138. Some other representatives, on the other hand, found the scope of the article much too broad to be relevant to the topic. It was stated that the concept of "potential loss or injury" was too extensive, since it could be interpreted as covering almost the whole spectrum of activities within a State. Thus it was mentioned that there were a number of treaties, in addition to the regulations being developed within the framework of the United Nations Environment Programme (UNEP), managing environmental problems. Therefore, doubt was expressed as to the advisability of considering a general scope of application for the formula "common heritage of mankind" since this term appeared to be too vague to be useful in the present context.

139. The omission of "lawful acts" in draft article 1 was noted by one representative as adding to the vagueness of the scope of the topic. Another representative referred to the ambiguities in the term "legally protected interests" mentioned in paragraph (b) of draft article 1. From a purely theoretical point of view, he found it difficult to draw a distinction between "legally protected" and non-legitimate interests. He stated that in order to identify the relevant interests, the social costs and inherent harmfulness of the activities must be evaluated.

140. Some representatives expressed concern over the proximity of the topic to that of State responsibility. It was noted that although the link between the two topics was highlighted by the Special Rapporteur, it had not yet been possible to fix precisely the point of intersection of harm and wrong. Thus it was mentioned that the time element was crucial in the interaction between the subjects of the two topics. Acts not prohibited could become prohibited at one period; the act concerned would then become an internationally wrongful act, for which there would be State responsibility.

141. Some other representatives did not see the proximity of the two topics as destructive. On the contrary, one representative stated that the consideration of this topic in the context of State responsibility was valuable. In the view of a

few representatives, State responsibility should be considered in terms of secondary rules of obligation, whereas liability for damage caused by lawful activities should be dealt with in the context of primary rules. Thus the liability rules were auxiliary, additional or procedural rules, which should be applied in those instances where a primary rule of liability existed. One representative expressed doubts as to the existence of such rules in customary law and wondered whether those rules could be formulated in such an abstract form that it could be applied to all conceivable circumstances. If not, it was noted, then such rules could be developed only for those partial issues which were either not covered, or insufficiently covered, by a special treaty régime. Perhaps, another representative suggested, the new topic could be supplementary to draft articles on State responsibility. Taking as a starting-point the principle that in order to impose on a State the obligation to make reparation for any injuries arising out of its activities it was necessary to be able to charge that State with a lack of due care, it obtained that a breach of an obligation deriving from primary rules of international law is involved.

142. The concept of "duty of care" was found by some representatives to be insufficiently precise to be capable of general application. Some even considered it as a "moral" and not a "legal" obligation. Thus even if such a legal obligation existed, it would be a primary rule, and its violation would entail responsibility for an internationally wrongful act. One representative stated that although a few legal texts regulating certain aspects of "duty of care" did exist, in his view, they were all, with one exception, concerned with private liability not directly involving the State.

143. Some other representatives supported the usefulness of the concept of "duty of care" and considered it an appropriate starting point to formulate concrete rules. It was stated that whether the "duty of care" was a substantive obligation or a function of an existing obligation, it could provide a basis for notification, prior negotiation, consultation, etc.

144. The view of the Special Rapporteur on the inadequacy of the concepts of "violation of sovereignty", "strict liability" and "ultra-hazardous" activities was supported by some representatives. It was further mentioned that the above concepts had developed within the regional practices of a small number of States; therefore it would be difficult to refer to them as to those accepted globally by custom. It was, however, stated by a few representatives that the utility of "strict liability" and "ultra-hazardous activity" concepts should not be underestimated and they may prove to be found useful in the future development of the topic.

145. It was pointed out by one representative that the concept of "duty of care" should indeed modernize the traditional régime of liability to cope with modern needs. The 1969 Convention on Civil Liability for Oil Pollution Damage was given as an example of "new liability" which provided for an international compensation fund along the lines of mutual insurance. It was mentioned that international law should provide an appropriate legal framework aimed at preventing the negligence which would result from irresponsibility, thus reducing risks and guaranteeing prompt reparation.

146. It was stated by some representatives that the most important task at the current stage of the Commission's work on the topic was to strike a balance between the need to pursue certain activities, especially constructive activities essential for development, and the minimization of harmful consequences which might result from those activities. That goal could, in their view, be attained if the Commission continued in its new five-year cycle to pursue its current cautious approach. In order to facilitate the formulation of new rules on the subject, some proposed that the Commission should, first, formulate in precise terms a general principle of international liability for injurious consequences arising out of non-wrongful acts; secondly, devise a flexible system for the implementation of that principle, retaining the competence to select solutions for different situations which might arise; and, lastly, identify a set of rules generally acceptable to States. Thus, one representative suggested to avoid placing, at this stage, too much emphasis on the concept of potential loss or injury, which might lead to a deadlock in the discussion.

147. One representative, referring to the inadequacies of the doctrine of risk, commended the concept of balancing of interests. In doing so, he mentioned, factors such as the conditions peculiar to developing countries should be taken into account. One method of activating a balancing of interests, it was suggested, was the prior establishment of civil liability conventions and compensation funds. In this respect, utilization of the principles of good neighbourliness and sic utere tuc ut alienum non laedas was cited as useful.

148. The concepts of prevention and compensation as a whole were accepted by the representatives who spoke on the subject. Comments were primarily made on the specific content of the terms and their relative importance. One representative was of the view that while activities with transboundary effects should be regulated, this should be realized with minimal recourse to a rule of prohibition. In this respect, some suggested, consideration should be paid to principle 23 of the Stockholm Declaration on the Human Environment, relating to the circumstances of developing countries. It should be considered whether it was possible for the government of a developing country to ensure that all industries present in its territory, including transnational corporations, complied with minimum safety standards; many governments lacked the necessary administrative machinery and resources.

149. It was further mentioned by a few representatives that emphasis should be put on both prevention and compensation. If the Commission focused exclusively on compensation, one representative stated, it would be giving States licence to cause harm, and that would hardly be constructive as far as the development of international law was concerned. It was stated that there was a growing tendency among States to conclude bilateral agreements which emphasized the duty to avoid causing harm and include compensatory provisions only in cases where prevention was impossible or too costly. It was mentioned that compensation is complementary to the principle of duty of care; since States do not have an "absolute" duty of care, when they failed to do so the principle of compensation repaired injuries to the other party.

150. Clarification regarding the meaning of "loss or injury" was also requested by one representative. It was suggested that "loss or injury" should be understood as

a relative concept, to be determined through comparison of the relevant interests involved; it should not form the basis for determining an equitable compensation.

151. The continuation of work on the topic gained general support among representatives. It was stated that the Commission should continue its work on the topic with the cautious approach followed thus far.

152. Two representatives suggested that general principles, in the light of State practice, be formulated, with a willingness to venture cautiously into the realm of progressive development, before elaborating the draft articles.

153. Careful examination of multilateral treaty practice, State practice and judicial decisions was pointed out as essential to further development of the topic.

154. Perhaps, it was noted, the Special Rapporteur should focus his attention on State practice, with a view to indicating trends in the development of international law on the topic. Examination and comparison of the various bilateral and multilateral legal instruments which had emerged over the past two decades was also regarded important and useful. Examination of other legal instruments such as the Stockholm Declaration and the law of the sea draft Convention was considered as contributing to providing guidelines.

155. The decision as to whether the nature of the rules on the topic should be of a procedural character or otherwise, it was suggested by a few representatives, should be postponed until the Special Rapporteur had submitted further reports. Thus the Special Rapporteur should continue to provide food for thought in his reports to enable a full debate on the general questions involved, including the nature of the topic. Only after that should the Commission, in the view of one representative, try to come to grips with draft articles.

E. Jurisdictional immunities of States and their property

1. Comments on the draft articles as a whole

156. Most of the representatives who spoke on this topic considered it one of the most important subjects in the current programme of work of the Commission. They commended the Special Rapporteur, Mr. Sompong Sucharitkul, for the synthesis of the rich material concerning the State practice found in his first and second reports to the Commission. They also found acceptable the inductive approach already adopted by the Commission for the study of the subject.

157. While a number of the representatives noted with satisfaction the progress so far made by the Commission towards elaborating a set of draft articles on the topic, on the basis of the reports prepared by the Special Rapporteur, others expressed difficulties in giving an assessment of the Commission's work at this stage. Some reserved their judgement because they were specifically awaiting the submission by the Special Rapporteur of part III of the draft articles intended to deal with the exceptions to or limitations upon the general principles of State immunity. Others experienced difficulties in giving a reasonable assessment at this stage because, for the reasons stated in paragraphs 7 and 226 of the

Commission's report, the Commission itself had not taken a position on the redrafted text of the new set of draft articles 7 to 10, submitted by the Special Rapporteur, on the basis of the Commission's comments on the revised versions of those articles as originally formulated in his second report (A/CN.4/343 and Add.1).

158. It was indeed noted that, after the Commission had discussed his draft articles 7 to 11, as described in his second report, the Special Rapporteur revised those draft articles. Article 7 was revised to focus upon "obligation to give effect to State immunity" instead of concerning itself with the question of "rules of competence and jurisdictional immunity". Articles 8, 9 and 11 originally dealing with consent, voluntary submission, and waiver, respectively, were combined into two articles 8 and 9, both dealing with various forms of consent to the exercise of jurisdiction by another State. Then in the new versions, draft article 10 on counter-claims became the last article in part II of the draft articles. It was observed that part II dealing with General Principles would be made up of five articles altogether: article 6 stating the rule of "State immunity" as provisionally adopted by the Commission, and the new versions of draft articles 7 to 10 yet to be discussed by the Commission. The result of the Commission's consideration of these four articles, at its next session, were thus eagerly awaited.

159. Several views were, however, expressed with respect to the nature and the scope of the topic, in an effort to establish the kind of problems that the Commission faced and which it must accordingly avoid or overcome in order to deal successfully with the topic.

160. There was the view that the main legal basis for the jurisdictional immunities of States was the important principle of respect for national sovereignty. Thus, the draft articles must be aimed at harmonizing the interests of all States to promote normal international intercourse and development, taking fully into account the current international realities and the specific conditions of States. Another view also stressed the fact that, on this topic, the Commission was faced with a conflict of sovereignties which could, however, be resolved by one sovereign giving in to another through consent. Under this view, it was observed that the rules of international law on jurisdictional immunities of States and their property had never been claimed as rules of jus cogens. The main point was, therefore, to provide for the resolution of the conflict by the rules of international law where there was no consent, in other words, to define the rules of international law relating to the scope of immunity.

161. How to resolve the conflict of sovereignties in modern circumstances then became the critical question. It was suggested that, with respect to this question, the maxim par in parem non habet imperium was a valid starting point, provided that it was clearly understood that the maxim worked both ways, namely, a State could not use the territory of another State for the exercise of its imperium without the consent of that other State. Thus another technique was needed to resolve a conflict, apart from the consent approach worked out through "waiver", "irrevocable waiver", "implied consent" and "constructive consent". Such a technique involved a differentiation of the sovereignties of both States involved. It was necessary to examine the ways in which that sovereignty was exercised by one State, and the ways in which that affected the exercise of sovereignty by the other

State, and to distinguish what was "principal" and what was "incidental" in the various situations. That was not easy, and it might be sometimes necessary to accept a certain amount of arbitrariness in the abstract resolution of the conflict. The problem was illustrated by the general tendency to treat immunity from the jurisdiction of the courts differently from immunity from the direct application of the public force, as in the cases of attachment and execution; non-immunity in the former case did not necessarily imply non-immunity in the latter. Moreover, immunity from the jurisdiction of the courts did not mean that the substantive legal rules of the State of the forum were applicable to the foreign State.

162. Another point was that the applicability of some types of substantive rules of the forum State must imply the jurisdiction of its courts to administer those substantive rules irrespective of the status of the persons interested in a given situation. On the other hand, where a legal relationship between States which was governed by municipal law was involved, it might be argued that in case of dispute the defendant State should enjoy immunity from the jurisdiction of the courts of the plaintiff State provided that the courts of the defendant State were competent to settle the dispute. More generally, immunity of a State should perhaps be regarded more as a matter of a forum privilegiatum than as the absence of any forum. In many cases decided by national courts attention centred on the differentiation between the various ways the defendant State acted; consequently, the functional distinction between acta jure imperii and acta jure gestionis was often applied, and the status of a foreign government agency as an entity separate from the foreign State as such was often considered relevant. The separability of imperium and gestio, and the separability of foreign State and State agency, were often doubtful, and it might prove necessary to cut the Gordian knot in some way. It was significant that the United States Foreign Sovereign Immunities Act of 1976 and the United Kingdom State Immunity Act of 1978, although both founded on a perception of what the existing rules of existing customary international law were, had in several instances chosen different solutions.

163. Another general question on which those two national legislations, and indeed the practice of national courts in other countries, differed was the question whether immunity or non-immunity depended on the factors connecting the situation with the forum State, and if so, which connecting factors were relevant. Thus, for example, the United States legislation provided for non-immunity of a foreign State in any case in which the action was based on an act outside the territory of the United States in connexion with a commercial activity of the foreign State elsewhere and that act caused a direct effect in the United States. On the other hand, the United Kingdom Act established a rule of non-immunity for commercial transactions without requiring any factor connecting the transaction with the United Kingdom. In both the United States and the United Kingdom there were other rules which, regardless of the involvement of a foreign State, limited the possibility of bringing a case before a United States or a United Kingdom court if there was no connecting factor whatever. Nevertheless, the question of the limits of national jurisdiction in general was different from the question of State immunity, if only because the latter question was more directly linked with the prohibition under general international law of the exercise of imperium in the territory of another State.

164. All those observations raised the question whether it was really possible to draft a complete set of rules on the topic suitable for inclusion in a world-wide international convention. It should be noted that even the European Convention on State Immunity did not ensure complete uniformity of the rules on State immunity to be applied in the States parties; those States could go further in the restriction of foreign State immunity than the Convention stipulated, although they had to respect immunity for acta jure imperii. That meant that the States parties to the Convention reserved the power to cut the Gordian knot in different ways.

165. The Commission, it was then suggested, might best approach the topic simultaneously from two sides, on the one hand trying to formulate a number of reasonably precise rules relating to cases in which every State was ready to recognize the immunity of any other State, and at the same time trying to formulate similar rules relating to cases in which every State was prepared not to enjoy immunity. That double approach, which might narrow the gap, obviously excluded the staging of a general rule followed by exceptions, since that would imply a complete resolution of the conflict in all cases. If general agreement could be reached on such complete resolution, so much the better, but if that proved difficult the double approach seemed worth trying.

166. But there was also the view that too much importance had been attached to the consent of States. It was noted that, although the views about the scope of immunity from jurisdiction of States varied considerably, it did not appear, at least from the terms used by States themselves, that consent was regarded as the basic element. What was clearly evident was the existence of different interpretations of certain customary rules and of their scope and exceptions. Where, however, a State agreed that it should grant immunity from jurisdiction to another State, or when a State claimed such immunity for itself, it did not do so on the basis of consent except of course in the case of an existing agreement · but because the State considered that there was an obligation to admit such immunity. Thus, in the final analysis, what was being accepted was not the immunity as such, but the content of the law that established it and the interpretation of that law. But even under the view in which emphasis was placed upon consent as a means of resolving the conflict of sovereignties, the point was made that it was necessary to avoid giving the impression that consent, even constructive consent, was the only legal basis for non-immunity.

167. Other representatives also stressed the fact that both the substantive and procedural aspects of State immunity were changing and that it would accordingly be a difficult task for the Commission and the Sixth Committee of the General Assembly to codify and develop the law on the subject. It was observed that the principal consideration would be evaluation of the status of the rules on State immunity. The changing pattern of international relations required a new look at old practices and rules particularly since international trade in the widest sense had become vital for all States and Governments of all persuasions were increasing their direct participation in economic activities.

168. Taking these into account, another view stressed that a distinction should be made in the context of the activities of States covered by jurisdictional immunity and activities resulting from the State's exercise of its public power and other activities of the State. It was noted that the suggested distinction was important

because only the activities of the first type were regulated by general international law. Thus, although it was possible to speak of jurisdictional immunity for activities regulated by private law, trade law and, generally, activities which a State carried out iure gestionis as opposed to iure imperii, the source of that immunity was either internal law or treaty. It was admitted, however, that the distinction just suggested between acta iure imperii and acta iure gestionis was a difficult one to draw precisely. The Commission was thus cautioned to give the matter very careful consideration and to reply upon the numerous judgements of internal courts for criteria suitable for use in a codifying convention. Under this view, let it be pointed out, it was not the rule of jurisdictional immunity in general international law that had changed as compared to the custom of the past; it was States which had undergone a striking transformation engaging increasingly in forms of action which, like the public management of commercial enterprises, were not essentially different from the comparable activities carried out by private persons and no longer so closely linked to the exercise of sovereignty, even though designed to provide for the well-being of the territorial community of the State concerned.

169. The call for the evaluation of the rules on State immunity for the reasons stated above brought to focus once again the two conceptual approaches to the subject. It was asked whether the rules on State immunity should be treated, as hitherto, as general rules with specific exceptions based on the sovereign equality of States and the protection and promotion of friendly relations and co-operation between States or should the rules be treated as an exception to the territorial sovereignty of States. It was then noted that the Special Rapporteur had indeed opted for the former viewpoint treating State immunity as a rule with respect to which specific exceptions would be elaborated. Thus, once the draft articles on the exceptions to or limitations upon State immunity had been formulated, it was hoped that the draft articles on the subject as a whole would reflect a generally acceptable compromise. According to the view of certain representatives, it was important to guarantee immunity of foreign States. They found it inappropriate that the draft articles prepared by the Special Rapporteur tended to suggest that jurisdictional immunity existed solely in so far as it was established in the articles themselves. This view preferred the adoption of the approach reflected in article 15 of the 1972 European Convention on State Immunity, which established that a State was entitled to immunity from jurisdiction, except in a number of cases mentioned in articles 1 to 14 of that Convention.

170. There was, accordingly, the fear which had also been pointed out in paragraph 221 of the Commission's report (A/36/10) that the Commission was establishing absolute or unqualified immunity. While this was not the case, some representatives still felt a certain uneasiness about draft articles 7 and 8 as originally submitted in the Special Rapporteur's second report, which they considered as implying that the underlying principle was absolute immunity, from which deviations were possible only with the consent of the State concerned. It was observed, according to this view, that general international law currently required States to grant immunity to foreign States and their property of all activities connected with official functions. On the other hand, it was asserted, the modern trend of international law was to include business activities of foreign States within the competence of domestic courts. Thus, draft articles 7 and 8 were unacceptable since they were considered as going in the opposite direction of

establishing absolute immunity. It was clear that further clarification with regard to the underlying policy of the rule as formulated by the Commission would be necessary.

171. Another view was also expressed to the effect that proceeding on the premise that part II of the draft articles would exhaust all the forms in which consent might be manifested was not a sound basis for the Commission's future work. Under this view, specific reservations were voiced about the treatment by consent in draft articles 8 and 10, which did not adequately explain the interrelationship that was intended between "consent" and "waiver". The problem was accentuated, it was further noted, by article 9 which restricted "waiver" to instances of State conduct in relation to a particular legal proceeding, thus narrowing wrongly the means by which immunity may be waived. Thus, the draft articles, according to this view, also failed to make it clear whether the various forms of consent described were intended to operate independently at varying stages of a legal proceeding or whether consent, once found, was to be effective for all subsequent stages. The answer to this, it was noted, might well be different in particular cases. The view also maintained that the draft articles in general did not give sufficient attention to the difference in the various forms of jurisdiction - adjudicative, legislative and enforcement - that may be relevant to the consideration of immunity. In this connexion, it was observed that draft articles 2 (b), 2 (g) and 3 (b), proposed by the Special Rapporteur, and article 6, provisionally adopted by the Commission, presented different formulations of the questions whereas the draft should consistently make clear that their focus is upon adjudicatory jurisdictions.

2. Comments on the various draft articles

(a) Articles provisionally adopted by the International Law Commission

Article 6. State immunity

172. In the opinion of some representatives, draft article 6, provisionally adopted by the Commission, should state the rule on State immunity in the same way as article 15 of the 1972 European Convention on State Immunity. According to this view, it was desirable therefore to delete from paragraph 2 of draft article 6 the phrase "in accordance with the provisions of the present articles". But there was the view that draft article 6, as provisionally adopted, accurately defined the orientation and scope of the rule. It was thus emphasized that the phrase "in accordance with the present articles" was intended to establish beyond doubt that the applicable law would be the law of the convention being elaborated and not the customary law. Accordingly, the retention of that phrase was considered important since its deletion would defeat the purpose of developing the applicable law under the convention. Another view supporting the retention of that phrase was that, if the draft articles envisaged were formulated to reflect accurately State practice on the subject, then the phrase in question would not have the effect of disqualifying the norm stated in draft article 6 from being a basic rule of international law.

(b) Articles proposed by the Special Rapporteur

Article 7. Obligation to give effect to State immunity

173. Draft article 7, proposed by the Special Rapporteur, was correctly seen as a corollary to draft article 6. Thus, having established the rule on State immunity in article 6 (a State is immune from the jurisdiction of another State), article 7 set forth a corresponding obligation (a State shall refrain from subjecting another State to its jurisdiction). Nevertheless, one representative questioned the need for such a provision in the two alternatives A and B of the new version of article 7 put forward by the Special Rapporteur. In paragraph 1 of alternative A, he questioned the usefulness of the phrase "notwithstanding its authority under the rules of competence to conduct proceedings". Similarly, in alternative B, he expressed doubt over the phrase "notwithstanding the existing competence of the authority before which the proceedings are pending". These two phrases, it was argued, tended to present the "authority" or "competence" of the State or its judicial and administrative authorities to conduct proceedings under its or their own rules as a preliminary basis for the application of the rule of State immunity. This was considered as more of an effort at emphasizing the theoretical aspect of State immunity rather than the elaboration of practical rules of law.

174. The aim of article 6 and of paragraph 1 of article 7, it was asserted, should be to set forth as clearly as possible the general principle that, under certain conditions to be specified in the draft articles, a State was immune from the jurisdiction of another State and that, consequently, no State could subject another to its jurisdiction. If a State had no competence under its own rules to conduct proceedings in a given case, it was of course impossible for another State to be subjected to its jurisdiction in that particular case. It hardly mattered, however, whether theoretically a State was immune from the jurisdiction of another State not by virtue of the rule of State immunity but rather by virtue of the fact that the other State was not competent under its own rules, and until those two situations could be shown to have different legal consequences, he would continue to have doubts as to the usefulness of the second part of paragraph 1 of article 7.

175. Doubts over the above two phrases in alternatives A and B of draft article 7 were expressed by another representative who, however, found alternative B as a whole to be simpler and clearer than alternative A. His objection to the two phrases was based on his understanding that the question as to whether a given court was competent or incompetent was determined by the domestic law of the State concerned and not by international law. Thus, if one State respected the immunity of another State, no court should be entitled to exercise jurisdiction in a proceeding against that other State, regardless of whether a court was otherwise competent under national law to deal with the question concerned. Where a court proceeding was instituted against another State, it was further observed, the objections which that State might raise would derive solely from the violation of its right to the jurisdictional immunity.

176. While paragraph 3 of draft article 7, alternative B, was unacceptable to one representative because the paragraph raised the problem of the clash between absolute and functional immunity, and possibly opening the way for the concept of functional immunity, it was, however, preferred by another representative for

precisely that same reason. In the opinion of yet another representative, draft article 7 was broadly acceptable. Nevertheless, the notion of direct or indirect impleading found in paragraph 2 of alternative B required further consideration. The article should focus mainly upon legal proceedings before the courts and the respect to the independence of the judiciary.

Article 8. Consent of State

177. According to certain representatives, draft article 8 as proposed by the Special Rapporteur should be amended so as to eliminate completely any impression that it was intended to establish the notion of absolute or unlimited immunity. One representative even went further to suggest that reference should be made to the idea of "complete immunity". However, other representatives had no difficulties with the article as it was, while some suggested that it could be combined with draft article 9 so that the entire question of consent and various means of expressing it should be in a single article.

Article 9. Expression of consent

178. In the opinion of one representative, the phrase "voluntary submission" used in the article proposed by the Special Rapporteur was objectionable. To another representative, the phrase "or taken part or a step in the proceeding" found in paragraph 4 of the article was unclear. To make the paragraph clear, the representative suggested that the text be confined to such presumption of consent to cases in which a State had by itself instituted legal proceedings in a court of another State.

Article 10. Counter-claims

179. In the opinion of one representative, although paragraph 1 of the Special Rapporteur's draft article 10 seemed quite adequate in covering cases in which a State had by itself instituted legal proceedings in a court of another State, it was still open to question as to whether a State's participation in a proceeding with respect to a counter-claim presupposed that it was a party to the main dispute. Moreover, the same problem with the phrase "taken part or a step in the proceeding" found in paragraph 1 of the article, as paragraph 4 of article 9, still existed. In general, this representative found jurisdiction with regard to counter-claims to be going too far in all cases where the State concerned had not itself instituted proceedings. The article, accordingly, required more careful attention and further clarification.

F. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier

1. Comments on the topic as a whole

180. Many representatives who spoke on the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" noted with

satisfaction the progress made thereon, as reflected in chapter VII of the Commission's report. They commended the Special Rapporteur, Mr. Alexander Yankov, for his excellent second report. While some of the representatives reserved comments on the topic until the Commission had made further progress on the draft articles, others made detailed observations on a number of issues relating to the study of this topic.

181. Several representatives attached great practical importance to the topic and expressed hope that the Commission would continue consideration of the question with a view to elaborating a definitive legal text. It was stated that such an instrument would promote co-operation and friendly relations among States, would perhaps put an end to the breaches of provisions relating to the diplomatic courier and the diplomatic bag and would reduce the risk of conflict in that area. The view was also expressed that, as the facts of international life indicated, the problems involved in ensuring strict observance of the rules of diplomatic law and increasing their effectiveness were not only topical but demanded additional efforts by the international community and, therefore, that the formulation of an international convention on this topic had to be considered an important and useful means to that end. Some representatives expressed hope that the Commission would accord priority to the consideration of this topic.

182. In support of the Commission's continued work on the topic, several representatives shared the view that provisions of existing multilateral conventions and regional and bilateral agreements regulated many of the questions involved but said it appeared expedient to formulate and adopt a convention devoted exclusively to the subject. In the first place, it was very important that the rules should be concentrated in one convention of a universal nature. Secondly, the process of drafting a convention would provide an opportunity to perfect appropriate general rules on the basis of those already existing, by systematizing them and stating them more precisely. Thirdly, that process would make it possible to ascertain more accurately the needs for new rules which unquestionably existed in practice.

183. However, some representatives expressed reservations about the desirability of continuing with the topic since it would be, in their view, a quite unjustifiable waste of the Commission's limited time and resources for it to embark on what would amount to little more than a restatement of existing conventional rules. One representative stated in this regard that if there was any topic that justified the thought that the Commission did not focus on the useful issues, the question of the status of the diplomatic courier and the diplomatic bag unaccompanied by diplomatic courier was surely such a topic: the area was already governed by settled rules; there had been no fundamental problems with them, except perhaps for some abusive uses of the bag which did not affect their validity, and there had been no suggestion that there was any urgent need to expand their scope. Thus he maintained that it was not a topic which responded to contemporary needs, nor did it represent an intellectually essential counterpart to any existing work.

184. One representative, noting that in the debate in the Commission there had been conflicting observations as to the necessity and desirability of the exercise in question, stated that he would wait further developments before deciding between the two points of view.

185. The over-all approach and the method of work adopted by the Special Rapporteur were generally endorsed by the representatives who touched on these points. It was noted with agreement that the Special Rapporteur's method was based on the comprehensive analysis of the practice of all official communications and legal instruments relating to the topic as a whole such as the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions, the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. This method allowed for the implementation of a comprehensive approach to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier stricto sensu, as well as to all other couriers and bags used by States in their official communications. It was also stated that the Special Rapporteur had successfully demonstrated that the comprehensive and uniform treatment of the problem was possible and that his presentation had done much to alleviate uncertainty as to why the General Assembly and the Commission had considered the topic of such importance, given the body of law which already existed.

186. Some representatives emphasized the need to maintain a purely functional approach to the question. It was oberved that the superstructure envisaged for the topic so far was too complex; what was needed was an empirical study leading to the formulation of such additional rules as might be necessary to deal with the real problems confronting States, such as the growing abuse of bag privileges.

2. Comments on the various draft articles prepared by the Special Rapporteur

187. Commenting generally on the six draft articles submitted in the second report of the Special Rapporteur, several representatives expressed the view that the Commission had made a good start when it had based itself on those draft articles, which were envisaged as elaborating specific rules based on existing practice and were designed to facilitate the administration of couriers and diplomatic bags and reduce the difficulties arising between States in that field. The special merit of the draft articles submitted by the Special Rapporteur, it was said, was that they established the principle that the status of the diplomatic courier and that of the diplomatic bag, as established in the relevant multilateral, regional and bilateral conventions, were identical; that assumption provided a firm basis for the elaboration of a general set of draft articles containing provisions which were not specifically affirmed in existing rules. It was noted with satisfaction that those draft articles submitted by the Special Rapporteur had advanced the consideration of the topic into a phase involving the study of specific issues which gave promise of successful completion in the very near future. The view was expressed, however, that the draft should also be kept within strict limits, since it represented a supplement to a question which was already largely regulated by other conventions that had also been drafted by the International Law Commission.

188. One representative indicated that the receiving State should have the right to prescribe the maximum size of a bag. Another representative suggested that the Commission should consider whether the persons other than diplomatic couriers such as the captain of an aircraft, who were given custody of a diplomatic bag in transit, should be accorded some degree of functional immunity.

189. One representative stated that his delegation supported the Special Rapporteur's suggestions on the further course of action to be followed and on the proposed format of the future legal instrument as set out in his second report and also agreed with the Special Rapporteur that detailed discussion of the general provisions should take place at a later stage.

Article 1. Scope of the present articles

Article 2. Couriers and bags not within the scope of the present articles

190. With regard to the scope of draft articles proposed by the Special Rapporteur (arts. 1 and 2), many representatives agreed with his decision to limit the draft articles for the time being to diplomatic couriers and bags used by States, and not to include those employed by international organizations. It was stated that many international organizations would have no need for elaborate protection of their communications, their immunities and privileges being based on the concept of functional and demonstrable need and regulated in each case by Headquarters and other agreements. It was added that the same was true of special missions. The view was expressed further that exclusion of international organizations was fully justifiable from the standpoint of expediency; in all probability, it would be more expedient for the legal codification of the official communications between international organizations to seek the elaboration of a formula which would correspond to article 3 of the Vienna Convention on the Law of Treaties.

191. However, a few representatives stated that they did not understand why international organizations were excluded from the scope of the draft articles. It was noted that such organizations played an increasingly active role in current international relations: a relative measure of secrecy or confidentiality in some communications by international organizations might be crucial to the attainment of the objectives of such organizations. In the opinion of these representatives, diplomatic bags and diplomatic couriers used by international organizations might be given certain privileges and facilities in accordance with the criterion of the needs and official responsibilities of such organizations. The reference to national liberation organizations deserved consideration, one representative added. The view was also expressed that the Commission should for the time being not exclude the bags of international organizations and should study the question in depth before taking any decision.

192. With regard to the Special Rapporteur's proposal that the draft articles should include communications between different States and between States and international organizations, some representatives observed that it would be an undue extension of the established concept of diplomatic courier and diplomatic bag. It was said that the draft articles should apply only to the traditional "endogenous" field of communications between a Government and its agents. Other representatives also cautioned that the Commission should consider this point carefully.

193. A few representatives questioned the desirability of including within the scope of draft articles "official oral messages" transmitted by diplomatic courier, as they did not understand the different between such a person, entrusted with

transmitting an oral message to another States, and a special envoy, whose status and function had already been dealt with in other instruments.

Article 3. Use of terms

194. As regards the use of terms, many representatives generally agreed with the tentative proposal of the Special Rapporteur. A few representatives, however, were rather uneasy about the length of the draft article. It was observed that the number of terms defined was staggering, being far greater than the number of definitions included in the Vienna Convention on Diplomatic Relations (9), the Vienna Convention on Consular Relations (11), and the Convention on Special Missions (11); at the same time, it was far less than the number contained in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (34). However that might be, it was felt that some of the 23 definitions in draft article 3 were superfluous and that, in the case of many of the terms, either they were self-explanatory or their meaning was so well established in international law that their mention only burdened the text.

195. Many representatives were in agreement with the Special Rapporteur that the already well-established terms "diplomatic courier" and "diplomatic bag" should be used to cover all kinds of couriers and bags used by States in official communications with their missions abroad, since any new terms might create confusion. A few representatives maintained, however, that the terms "official courier" and "official bag" were flexible enough and reflected in a more precise manner the general approach to the scope of the draft articles. One representative expressed the view that the provisions of draft article 3 should relate exclusively to definitions and that all substantive elements in the subparagraphs regarding "diplomatic courier", "diplomatic courier ad hoc" and "diplomatic bag" should be eliminated.

196. Another representative indicated that he was worried by the point at which the privileges and immunities accorded to the "diplomatic courier ad hoc" ceased under the terms of article 3: those privileges should cease on his re-entry of the sending State, unless the return journey had a private character and included countries other than the receiving or the transit State. Still another representative suggested that the definition of the term "diplomatic bag" might require careful examination to ensure that the bag contained only official communications between the sending State and its missions or delegations and not other articles which had no bearing on such communications. Furthermore, it was stated by one representative that, in view of the aforementioned importance of the national liberation organizations, there should be an appropriate addition to article 3. Finally, the suggestion was made that the elaboration of the draft articles should be an opportunity to establish a definition for the concept "official correspondence", so as to preclude the kind of abuse often reported.

Article 4. Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags

Article 5. Duty to respect international law and the laws and regulations of the receiving and the transit State

Article 6. Non-discrimination and reciprocity

197. Several representatives indicated that the "general principles" proposed by the Special Rapporteur (draft articles 4 to 6) were sound, expedient and well-balanced. It was said that those principles were already to be found in several international instruments and, accordingly, their inclusion in the draft articles could be easily accepted. It was noted that those three principles could not be taken separately, and constituted a framework of rights and obligations for all the States involved: the sending State, the receiving State and transit States. Two of those principles, that of freedom of communication and that of non-discrimination and reciprocity, were presented as creating duties or obligations for the receiving and transit States, while the third principle, on respect for international law and the laws and regulations of the receiving and transit States, would create duties only for the diplomatic courier.

198. Some representatives, however, expressed the view that there seemed to be a certain imbalance in that presentation. It was believed that the articles should set forth clearly that the duty to respect international law and the laws and regulations of the receiving and transit States was a duty not only of the diplomatic courier but also of the sending State itself. This point was considered particularly important in connexion with the treatment of diplomatic bags. As was pointed out by one representative, it was a highly controversial question whether, in the case of justified suspicion of abuse of the privilege to freedom of communication, the receiving State should have the right to open the diplomatic bag, either in the presence of a representative of the mission of the sending State or in his absence, or to return that bag to its place of origin. Another representative observed that it was necessary to find a balanced compromise between the rights and obligations of the sending and receiving States, and between the principle of the inviolability of the diplomatic bag and the justifiable need to prevent abuses. To that end, the Commission should base its work on article 35, paragraph 3, of the Vienna Convention on Consular Relations of 1963, which provided that the bag could be opened under certain circumstances. A few other representatives agreed with this observation and stressed that such a provision would be particularly necessary if the articles laid down the principle of the unconditional inviolability of diplomatic bags.

199. In this connexion, it was pointed out that the question would arise as to the extent to which the draft articles were consistent with the provisions of the 1963 Vienna Convention on Consular Relations; article 30 of the 1969 Vienna Convention on the Law of Treaties, concerning the application of successive treaties relating to the same subject matter, would apply. The problem posed by article 35, paragraph 3, of the 1963 Vienna Convention also raised the more important issue of the use which was to be made of the four conventions in drafting the articles on the issue. The report did not disclose a clear Commission concept

of the relationship between those conventions and the draft articles. That aspect of the Commission's work, it was said, would require further consideration.

200. It was emphasized by a few other representatives that most States had reservations regarding the idea of restricting immunity of the diplomatic courier and the diplomatic bag in view of the fact that the majority of bilateral conventions expressly provided for full immunity to be accorded thereto. It was noted that the Special Rapporteur had stated that there was widespread support for the unconditional inviolability of the bag, and that the likelihood of abuses should not be exaggerated.

G. Other decisions and conclusions

1. The law of the non-navigational uses of international watercourses

201. Most representatives who referred to the law of the non-navigational uses of international watercourses noted that the Commission had not been able, at its thirty-third session, to consider the question due to the resignation of the Special Rapporteur on the topic, Mr. Stephen M. Schwebel, upon his election to the International Court of Justice. Representatives favoured the Commission continuing its work aimed at the preparation of draft articles on the law of the non-navigational uses of international watercourses and took note of the intention of the Commission to appoint a new Special Rapporteur on the topic, stressing the desirability of doing so at the commencement of its 1982 session, thus ensuring continuity of its work on the topic.

202. A number of representatives regretted that the Commission had had to defer consideration of a topic of such practical and urgent importance in the modern world and expressed disappointment that it had not been able to appoint a new Special Rapporteur, thus delaying work on the topic. It was also stated, however, that while the reasons why it had not been feasible for the Commission to continue its consideration of the law of the non-navigational uses of international watercourses might be understood, there was concern that the delay might be viewed as according the item less priority than it deserved. The importance of the subject, both in terms of promoting the formulation of rules aimed at establishing balanced and effective régimes for international watercourses and in terms of its broader implications for co-operation among States and for the rules governing international conduct generally, could hardly be over-emphasized. Certain representatives suggested that the Commission should rapidly resume its work on the topic and accord it a high degree of priority. The suggestion was also made that the Commission should complete its consideration of the topic during its next term of office.

203. One representative drew the attention of the Sixth Committee to the recent Ad Hoc Meeting of Senior Government Officials Experts in Environmental Law held at Montevideo. That meeting had concluded its proceedings by adopting a number of conclusions and recommendations, one of which had a direct bearing on the question of the law of the non-navigational uses of international watercourses. The recommendation was a request to the Governing Council of UNEP to adopt a programme for the development and periodic review of environmental law. One of the items

enumerated in that connexion concerned protection of rivers and inland waters against pollution. The Governing Council was asked to invite the General Assembly to accord greater priority to the question of non-navigational uses of international watercourses as one of the topics dealt with by the International Law Commission. His delegation hoped that the Sixth Committee would endorse that recommendation.

204. The vital importance of water to some countries was highlighted by certain representatives. One representative stressed the deep interest of his country in the progressive development and codification of the legal provisions relating to the non-navigational uses of international watercourses inasmuch as 96 per cent of the water of its rivers came from neighbouring countries.

205. Another representative recalled that the Commission itself had observed that the problems of fresh water were among the most serious issues confronting mankind and that it was therefore necessary to codify and develop the rules of international law on the subject. That topic was of special significance to his country, which was primarily an agricultural country and was largely dependent on river water. His delegation therefore proposed the following principles for the consideration of the Commission: the waters of an international river should be equitably apportioned among the riparian States, having due regard to special circumstances, such as heavy dependence on the water by a particular riparian State and the traditional use of such water; the exercise of rights within its territory by a riparian State should not result in ecological or physical changes that could cause grave danger in the territory of other riparian States; each riparian State should exercise the utmost care within its territory to prevent water pollution; in cases where the utilization of water was likely to cause damage or hardships to other riparian States, the prior consent of those States should be necessary; a right which could be exercised in more than one way should be exercised in such a manner as to cause no damage to any other riparian State; an aggrieved riparian State should be adequately compensated for the loss it suffered as a result of the violation of its rights or the damage caused by the misuse of waters by another riparian State; lastly, riparian States should be under a legal obligation to settle their disputes peacefully and, if bilateral efforts were unsuccessful, the international forums available for that purpose should be approached.

206. Yet another representative stressed that water was vitally important for the prosperity and development of her country, as for other riverine countries. It went against all principles of justice if an upstream State interfered with the flow of a watercourse to the detriment of a downstream State. Problems concerning the sharing of water resources had reach conflagration point between some countries, while between others it remained a continuing source of misunderstanding and conflict. Of the 200 river basins in the world, only a third were governed by bilateral agreements. The utilization of shared water resources was vital in achieving a new international economic order. For all those reasons, it was considered essential for the Commission to make progress in its work by appointing a new Special Rapporteur immediately so that the ambiguities of the legal provisions relating to international watercourses might be sorted out and a rational solution of the problem found.

207. Turning to the work accomplished on this topic by the Commission at its 1980 session, the same representative contended that the tentative interpretation of the term "international watercourse system" given by the Commission in its report thirty-second session (A/35/10, para. 90) was legally unsound and self-contradictory and would, if not given due consideration, create enormous difficulties in many respects in the future. An "international watercourse system" was geographically situated in two or more States, irrespective of whether it was used by the States or not. However, the Commission's treatment made it a relative concept; the watercourse system became international or not international according to whether waters in one State were affected by or affected uses of waters in another State. That view was totally unsatisfactory, would be prejudicial to the interests of many countries and ran counter to the concept of an international river and drainage basin developed in international law over the years. The overwhelming body of legal authorities spoke not of an "international watercourse system" but of an "international river basin" as an indivisible unit regardless of the fact that it embraced two or more States and as a basic norm governing international rivers generally; an international river basin could not be international in part or in relative terms but only in an absolute sense. The United Nations Water Conference held in 1977 had adopted a resolution, unanimously endorsed by the United Nations Conference on Desertification in the same year, that in the absence of treaties on the question States should apply generally accepted principles of international law in the use and management of shared water resources. Moreover, in his report on the law of the non-navigational uses of international watercourses the first Special Rapporteur, Mr. Richard D. Kearney, had proposed that for the purpose of drafting articles the Commission should accept "international river basin" as the appropriate meaning of the term "international watercourse" (A/CN.4/295, para. 49).

208. When introducing draft resolution A/C.6/36/L.21 (subsequently adopted by the General Assembly as resolution 36/114) on behalf of 34 sponsors, their spokesman drew the attention of the Sixth Committee to the fifth preambular paragraph 3/ and stated that it reflected the concern and interest expressed by most delegations regarding the question of the law of the non-navigational uses of international watercourses, for which it would be desirable for the International Law Commission to appoint a new Special Rapporteur in order to ensure the continuity of its work on the topic.

209. Following the adoption by consensus of draft resolution A/C.6/36/L.21 by the Sixth Committee, one representative, in explaining his delegation's position, said that during the consultations on the formulation of draft resolution A/C.6/36/L.21 his delegation had expressed doubts as to the advisability of mentioning in the text the appointment of a new Special Rapporteur on the topic "the law of the non-navigational uses of international watercourses". Emphasizing that point, he

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3/ "Taking note of the intention of the International Law Commission to appoint a new Special Rapporteur on the topic 'the law of the non-navigational uses of international watercourses' and stressing the desirability of the Commission doing so at the commencement of its thirty-fourth session, thus ensuring continuity of its work on the topic".

said, might give the impression that the Sixth Committee was arbitrarily assigning greater or lesser importance to a particular question.

2. Programme and methods of work of the Commission

210. Concerning the programme of work for the thirty-fourth session of the International Law Commission, members of the Committee agreed that at that session the Commission should complete the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations, taking into account the written comments of Governments and principal international organizations, as well as views expressed in the General Assembly.

211. In addition, members of the Sixth Committee endorsed the conclusion reached by the International Law Commission regarding the establishment, at its thirty-fourth session, of general objectives and priorities which would guide its study of the topics on its programme of work within the term of office of Commission members elected at the thirty-sixth session of the General Assembly.

212. Certain representatives believed that as the International Law Commission approached the beginning of a new five-year cycle, it was appropriate to assess the role which it played in fulfilling the purposes set out in Article 13 of the Charter. Despite the positive and impressive achievements of the Commission since its inception in 1949, it had occasionally been argued that in recent years it had allowed itself to concentrate unduly on topics of peripheral interest to the international community. In view of the Commission's overcrowded agenda and the breadth of the topics involved, it was considered essential for both the Sixth Committee and the Commission to be more discriminating in selecting priorities and in the treatment of topics. It was necessary to establish a viable work programme for each five-year cycle, which should embrace the completion of work on certain items on the long-term programme of work but also leave room for new but narrowly-framed items which could be completed in one or two sessions. It was also stated that the Commission's long-term programme of work should make provision for the short-term treatment of topical political subjects.

213. One representative suggested that the Commission should be encouraged to proceed as it had done after its last enlargement at its 1962 session. On that occasion, the Commission had adopted a comprehensive programme of work for the remainder of the term of office of its members elected in 1961. That had been based on the presence of one major topic, two smaller topics in reserve and preliminary action on other topics still on the original work programme of the Commission as adopted in 1949. That assumed a non-competitive coexistence between about five topics and their Special Rapporteurs. That programme of work, backed by the General Assembly and Governments, had carried the latter for 10 years and had produced the 1969 Vienna Convention on the Law of Treaties, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. It had laid the basis for the work on State succession, now partly completed with the 1978 Vienna Convention on Succession of States in Respect of Treaties and the draft articles on State succession in respect of State property, archives and debts

contained in the 1981 report. General discussions held during the first two weeks of the Commission's 1962 session, and the conclusions reached thereon a year later, had laid the foundations for the complete change of direction in the treatment of State responsibility. There had been a certain degree of single-mindedness about those decisions which had made it possible for the members of the Commission, and scholars generally, to concentrate intensively on the topics under consideration, instead of having great intellectual capacities and talents dispersed, often willy-nilly, over wide and disconnected spheres of the law.

214. At its 1981 session, this representative continued, the Commission, besides devoting its atttention to the priority topic relating to treaties to which international organizations were parties, would also have to indicate one other major topic which it would hope to be able to complete before the end of the term of office of the members to be elected shortly. With regard to the quantitatively small topics, the Commission should take a what was already on its agenda or had been mentioned in the General Assembly, the state of work and the known political reactions and submit to the Sixth Committee in 1982 its considered conclusions and recommendations. He recalled in that connexion that in the period 1962-1966, when the Commission had found there was a risk that it might not be able to complete its adopted programme within the limited time normally allocated to its session, its members had voluntarily agreed to hold several extrasessional meetings and had extended its 1966 session. During that period, the Commission had added the equivalent of one whole session in extra work in order to complete a programme which it had freely adopted and recommended to the General Assembly. The substantive secretariat and the administrative and budgetary organs had co-operated in that unusual augmentation in the number of meetings of the Commission.

215. A number of representatives supported and welcomed the Commission's conviction, expressed in paragraph 257 of its report, that it could do better work and in the longer run achieve greater results by concentrating its attention on a smaller number of topics at any one session. It was said that that approach would also go a long way towards easing the Sixth Committee's difficulties in evaluating the merits of the Commission's work each year. The number of topics undertaken by the Commission and their complexity sometimes led to serious delays in the work. The Commission should, it was suggested, concentrate on three or four priority topics, rather than conducting six studies at the same time, as in 1981. It was considered essential for the Commission to try at each of its sessions to concentrate on a limited number of topics, so as to be able to submit comprehensive and internally consistent sets of articles to the Committee. On the other hand, it was remarked that the growing number of topics referred to the Commission reflected the confidence of all Member States in that body.

216. One representative voiced the opinion that there were many and complicated reasons for a feeling of malaise about the Commission, its work, its methods of work, its programme and other matters. The General Assembly had been at fault in not giving the Commission adequate guidance with regard to choice of topics and the orientation of its work. The Sixth Committee had piled too many tasks on the Commission without fully weighing the political pros and cons, for the codification of any branch of law was not a technical plaything of lawyers but a political operation, sometimes of major implications. The Committee had been too liberal in establishing priority requirements for specific items without adequate examination

of the intellectual burden thereby imposed on the members of the Commission and especially on its Special Rapporteurs, as well as on the highly qualified specialized services of the Codification Division of the Secretariat called upon to assist them, without even considering the capacity of the overworked legal departments of most foreign ministries to cope with the burden.

217. As to the topics currently on the Commission's programme of work, a number of representatives stressed that priority consideration should be given to, or that work be expedited on, certain topics. In that connexion, the following topics were mentioned: State responsibility; the law of the non-navigational uses of international watercourses; status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier; and jurisdictional immunities of States and their property.

218. According to one representative, during the next five years, the Commission should complete work on three of the topics currently before it: the question of treaties concluded between States and international organizations or between two or more international organizations; the law of the non-navigational uses of international watercourses; and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It should be possible to complete work on those topics during that period if the Commission set itself a fixed time-table. With respect to other topics, in particular international liability for injurious consequences arising out of acts not prohibited by international law and jurisdictional immunities of States and their property, this representative suggested that the Special Rapporteurs for those topics should, on the basis of their practical experience, present proposals to the Commission at its first meeting of the next session concerning those areas on which tangible progress could be made during the next five years. Another representative, noting with satisfaction that the objectives laid down by the Commission in 1975 and reaffirmed in 1977 had been largely achieved, stressed that the Commission should expedite its work on topics already on its agenda, with a view to completing its consideration of those topics within a determined time-limit and within its five-year term.

219. The time had come, in the view of some representatives, to review the Commission's long-term programme of work with a view to tackling new and pressing issues which were of concern to all States Members of the United Nations. It was essential that the Commission's programme of work should be sufficiently flexible to include new topics of importance to the international community. One representative felt that the Commission should go further than establishing general objectives and priorities which, at its future sessions, would guide its study of the topics on its current programme of work; it should take a fresh look at the programme of work itself. Even though the programme of work followed the recommendations of the General Assembly, one of the duties of the Commission under article 18 of its statute was to survey the whole field of international law with a view to selecting topics for codification and, when it considered that the codification of a particular topic was necessary or desirable, to submit recommendations to the General Assembly. It must be admitted, in that respect, that some of the topics in the programme of work of the Commission were of relatively minor significance, while others of major importance were not included and were sometimes considered by other bodies. Without any intention of reserving for the Commission a monopoly on the codification of international law, his

delegation was of the opinion that enhancing the role of the Commission would be in the best interest of the international community; to that effect, the Commission's programme of work should more accurately reflect the present-day needs of the international community. He was confident that if the International Law Commission showed its willingness to play a more dynamic role, the General Assembly would be prepared to make fuller use of the Commission's potentialities.

220. It was said that the basic principles selected by the Commission were, by and large, taken from the practice of States and that that was a guarantee of their future acceptance. The law formulated by the Commission should not, however, be limited to reflecting the past. Despite the International Law Commission's undeniably impressive list of achievements in the codification and progressive development of international law, there was, it was maintained, a growing conviction that it had somehow failed to keep pace with developments in international law and advances in science and technology. Reference was made in that connexion to the publication by UNITAR entitled "The International Law Commission: The Need for a New Direction" (E/81.XV.PE/1) which had indicated that many areas, in particular areas of concern to third-world countries, had remained outside the field of activity of the Commission, thus necessitating the establishment of various ad hoc bodies whose activities had supplemented those of the Commission, for example, in connexion with outer space, the protection of the environment, the law of the sea and action against international terrorism and the taking of hostages. It was said that the Sixth Committee had shown itself reluctant to entrust legal topics to the Commission, not because results might not be forthcoming in the short term, but because the Commission itself had encouraged the impression that certain topics were too "political" to be suitable for its consideration and that it would prefer to concentrate on the precise formulation of rules of international law in fields where extensive State practice already existed. It was hoped that that trend could be reversed, and that the Commission would in future resume its central role in the international law-making process by responding to new challenges and expanding the scope of its activities.

221. One representative believed that in order to better fulfil its mandate, the Commission should gradually adapt to the requirements of the development of international relations. As far as the substance of its work was concerned, it should ensure that the draft articles reflected the shared aspirations and reasonable demands of the developing countries. While his delegation was pleased with the commendable improvements made in recent years, it felt that in that area the Commission still fell far short of expectations. The developing countries had suffered from aggression and oppression for long periods. They were currently playing an increasingly important role on the international scene. Upholding justice was an important principle in the progressive development of international law, and his delegation hoped that the Commission would make greater contributions in that respect in its future work.

222. The law developed by the Commission should, it was stressed by another representative, be directed primarily to the future, and, in that regard, a prominent place should be reserved for all matters relating to the emergence of new States on the international scene. The international law which the Commission had to formulate under its mandate should be situated midway between the interests of the old societies and those of the new nations - that was a sine qua non of its

practicability. The Commission was, moreover, well aware of the need to give particular attention to the situation of new States since, in the draft articles on succession of States in respect of State property, archives and debts, it had in each case given special coverage to the situations created by decolonization.

223. One representative expressed the belief that the work of the United Nations in the field of the peaceful settlement of disputes and good-neighbourly relations among States could give the International Law Commission a useful new course to follow. The appeal for disarmament and peace launched by his Government recapitulated the rules and principles on which international relations were based. The achievement of the objectives set forth in that appeal presupposed the evolution and further development of international law, and the strengthening of its role in the promotion of peace and international co-operation and in the establishment of a new economic order. It was in those areas that the International Law Commission should be called upon to make an even more substantial contribution.

224. Other representatives stressed that the International Law Commission had undoubtedly fulfilled the expectations of those who had created it and had played to the full the role of promoting the progressive development and codification of international law, as attested to by the noteworthy conventions which had resulted from its work. Much of its work in the past had focused on the codification and illumination of traditional topics of international law, while at the same developing that law when State practice was unclear or when the traditional norms required modification to meet a changing situation. It should not be reluctant to embark on projects requiring it to explore largely uncharted legal territory. Indeed, although the Commission had been the target of a certain amount of criticism, it must be acknowledged that it had introduced and elaborated upon some very substantial elements, such as the jus cogens concept in the law of treaties and several new elements in the field of international responsibility. Certain subjects, however, might be too technical or of insufficient legal significance to be dealth with by the Commission, and the Sixth Committee had a collective responsibility to ensure that the Commission focused on subjects in the greatest need of codification and development, it was stated.

225. Furthermore, certain representatives indicated specifically that they did not share the approach or conclusions set forth in the UNITAR publication noted above. One representative recalled that the authors of that publication had concluded that if the Commission continued to avoid such areas as economic and technological development, environmental protection, violence control and human rights, it would become a backwater in the development of international law. But, he stressed, the Commission was being accused of a crime it had not actually committed. It was being accused of the failure to initiate studies relating to the progressive development of international law. Those making that accusation were disregarding the mandate that the Commission had been given by its statute. According to the statute, the Commission itself could select topics for codification (art. 18). However, proposals for the progressive development of international law were not formally initiated by the Commission, but were referred to it by the General Assembly, individual Member States or other authorized organs, agencies or bodies (arts. 16 and 17). It would appear from the statute that the General Assembly retained for itself and the individual Members of the United Nations the right to initiate topics involving the progressive development of international law, perhaps

because of the political character that such topics might have. In practice, the Commission had found that it did not rquire one method for codification and a different one for progressive development, since the articles it prepared on particular topics combined elements of both lex lata and lex ferenda.

226. Whether the topics on the Commission's current programme of work did in fact touch upon the most pressing problems requiring legal regulation on the international plane was a matter, according to this representative, that had been authoritatively determined year after year, in resolution after resolution, by the democratic process in the General Assembly. If the Commission, as was alleged, was not working on items relating to new fields of international law, that failure had to be attributed to the General Assembly, the Sixth Committee and Member States. However, a dispassionate look at the type of topics dealt with by the Commission and the content of its work on those topics revealed that, even in those areas of international law in which extensive State practice, precedent and doctrine already existed, the rules formulated by the Commission following its consolidated procedure were attuned to the concerns and needs of the international community. That was indicated by the large measure of acceptance of the Commission's drafts that had been submitted to the scrutiny of States - old and new - in the context of plenipotentiary conferences of the General Assembly. It might be wondered whether, in view of the incorporation of certain provisions in texts currently being elaborated, such as article 19 of the draft on State responsibility or article 36 bis of the draft on treaties to which international organizations were parties, the implied criticism was indeed one of excessive or even regressive development.

227. Another representative who was unable to share the basic approach of the authors of the UNITAR publication remarked that while it was true that the Commission had been conceived as a body that would have primary responsibility for the progressive development of international law, article 17 of its statute envisaged other "official bodies established by inter-governmental agreement to encourage the progressive development of international law and its codification". Furthermore, under Article 13 of the United Nations Charter, the task of encouraging the progressive development of international law and its codification rested with the General Assembly and, accordingly, with the United Nations system as a whole. Immediately after the establishment of the Commission, an equally important place in State practice had been accorded to diplomatic conferences, convened with a view to concluding conventions without the prior preparation of drafts by the Commission. In the 1960s and 1970s, other instruments that had contributed greatly to the codification and progressive development of international law had been elaborated and adopted outside the scope of the Commission. There was also the human factor to be considered, he said. The Commission comprised a number of distinguished lawyers; yet even such outstanding experts in international law could not be expected to pay proper attention to such different topics as the legal implications of remote sensing in outer space, the intricacies of a new international sea-bed authority, environmental problems and the theoretical and practical issues of State responsibility. There should be a certain degree of division of labour among the various forums.

228. As far as the methods of work followed by the International Law Commission were concerned, representatives expressed satisfaction with the Commission's

conclusion that it would continue to keep under review the possibility of improving further its present procedures and methods with a view to the timely and effective fulfilment of the tasks entrusted to it.

229. Certain representatives felt that improvements could be made in the Commission's methods of work. Regret was expressed that the Commission had had to conclude its consideration of certain questions at its 1981 session without resolving the divergence of views among its members. It was important for the Commission to strive to reach a consensus on any substantive question and to ensure that the draft articles it prepared adequately reflected the actual world situation so that they would be acceptable to as many States as possible.

230. It was also said that while the drawing up of a legal text had to pass through several stages and could not be an expeditious process, some draft articles prepared by the Commission were verbose. That lack of conciseness appeared to be a technical problem, and did not affect considerably the efficiency of the Commission's work. The purpose of law-making was to secure the broadest compliance by States. If the substance focused on real needs and the drafting was made more precise, there would be minimal waste of time and improved efficiency.

231. One representative, while supporting the Commission's practice of appointing Special Rapporteurs, recommended that it should seek a practical method of continuing its work on all items on its agenda under all circumstances, even if the Special Rapporteur for a specific topic was absent for any reason. The Commission might perhaps appoint a deputy for every Special Rapporteur in order to avoid a repetition of what had happened at its 1981 session in connexion with the law of the non-navigational uses of international watercourses.

232. Another representative regretted that the participation of the members was no longer covered in the Commission's reports as it had been before. The reports on the work of the thirty-second and thirty-third sessions merely gave the membership of the Commission without indicating whether all the members had actually participated in its work. Whatever the reason for that choice, his delegation wished the Commission to resume providing information on the participation of its members, a matter which had a direct bearing on its effectiveness.

233. Certain representatives referred to possible changes in the Commission's methods of work mentioned in the UNITAR publication noted above. The possibility of the Commission becoming a full-time body was raised but not supported. It was said that while the Commission's output might be increased and its work speeded up by adopting such a proposal, it would be difficult to implement because of its financial implications and because the Commission was composed of persons who occupied important posts in their own countries, either in universities or in government, who would therefore be unable to devote their full time to the work of the Commission. Nevertheless, it would be possible, according to one representative, to find a compromise solution whereby the Commission continued to meet only part of the year, while the Special Rapporteurs worked full time.

234. Another possible change mentioned by one representative was to make the Commission an intergovernmental body, on the theory that the Commission would then be able to tackle difficult and pressing contemporary world political questions and

thus make faster progress in the development of the law. However, experience had shown that negotiations between States were less arduous when based on a draft prepared by an independent body, such as the Commission. In the case of the Third United Nations Conference on the Law of the Sea, he said that there was a widespread feeling that many of the difficulties could have been avoided if there had been an initial draft prepared by independent experts. His delegation therefore had doubts on that suggestion, and also felt that it would go against the very nature of the Commission; Governments already had enough ways of making their reactions known and giving guideliness, either through the Sixth Committee or in written comments.

235. The possibility of the Commission not confining itself to the preparation of draft articles as a basis for concluding conventions was also mentioned. According to one representative, as for topics which obviously did not lend themselves to formulation in international conventions, it would be useful if the Commission were to prepare a compilation of international practice and reaffirm the principles of customary law. The Commission had abandoned the draft convention method at least once since its establishment, in the case of the Model Rules on Arbitral Procedure which had been published when the General Assembly had refused to convene a plenipotentiary conference on the topic. Those rules had proved useful and were often referred to by States in connexion with the conclusion of bilateral or multilateral conventions on arbitration. The adoption of methods other than the preparation of draft conventions would also, it was contended, help to speed up its work, which was no small advantage.

236. However, another representative believed that there appeared to be a great deal of misunderstanding concerning the precise effect of the technique used by the Commission in elaborating a set of draft articles. The drafting of articles was merely a technique for the preparation of legal texts. The elaboration of draft articles, incorporating and combining elements of lex lata and lex ferenda in such a manner as to enable them to serve as a basis for the conclusion and adoption of an international instrument, whether a convention or not, was the reflection of the consolidated procedure that had evolved in the practice of the Commission on the basis of the provisions of its statute. Because of the strict requirements which that procedure imposed upon the preparation of texts, it had proved to be the most adequate and effective technique for identifying and embodying the rules of international law relating to a given topic. The fact that the work was in the form of a set of draft articles in no way prejudged the recommendations that the Commission could make under article 23, paragraph 1, of its statute regarding further action once the work was completed. For example, the set of draft articles prepared by the Commission on arbitral procedure had been brought to the attention of Member State as a set of "model rules" for their consideration and use in General Assembly resolution 1262 (XIII). In that connexion, it should also be borne in mind that the value of draft articles, even those in the process of being elaborated by the Commission, as evidence of customary international law, might be independent of the fact that they had not yet been embodied in a convention. That was graphically shown, with reference to the Commission's current draft on treaties to which international organizations were parties, by the advisory opinion given by the International Court of Justice on 20 December 1980 on the interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt.

237. Other representatives, moreover, stressed the efficiency, appropriateness and flexibility of the existing working methods and procedures of the Commission. The view was expressed that various ideas had been mooted to make the task of the Commission easier; some of them, such as turning the Commission into a full-time body, were extreme and would be counter-productive; despite the considerable burdens imposed on it, the Commission had made an outstanding contribution to the development of international law by preparing carefully-thought-out drafts which had served as a basis for the adoption of important international conventions.

238. It was recalled that the suggestion had been made that the Commission's working methods rendered it unsuitable for the consideration of questions on which rapid action was necessary. While certain representatives indicated they understood that the amount of work entrusted to the Commission by the General Assembly, and its conscientious approach to that work, precluded its proceeding at greater speed, it was also noted that the Commission must continue to be responsive and receptive to the needs of the international community and be prepared to review its working methods and to envisage new techniques so as to make more effective use of its collective wisdom and experience. The Sixth Committee had an equal responsibility in terms of setting realistic targets and being supportive, as well as offering constructive criticism. It was observed that given the fact that the Commission was not in session throughout the year, that its members did not serve on a full-time basis and that it generally had several questions before it simultaneously, its achievements exceeded all expectations.

239. One representative stressed in particular that the Commission had proved to be a most efficient instrument for the discharge by the General Assembly of its Charter obligations concerning the progressive development of international law and its codification. The Commission had shown the requisite flexibility to adapt its methods to the demands of the international community and had maintained those methods under constant review in order better to achieve that objective. By relying on Special Rapporteurs, the Commission was able to focus its attention on a small number of topics at any one session, without slowing down the work on other topics. Special Rapporteurs for topics of lower priority could continue their individual research for the preparation of their successive reports, while the Commission advanced in other areas until circumstances called for a full debate on those topics. Over the 33 years of its existence, the Commission had proved to be a remarkably efficient mechanism for the elaboration of legal texts. Those texts had served, in most cases, as the foundation for the adoption of international conventions by the General Assembly or by plenipotentiary conferences. The record of the Commission's achievements showed that its speed of production had been geared to the capacity of States to absorb written law. The situation currently facing the General Assembly vividly illustrated that assertion. The General Assembly had before it two final drafts prepared by the Commission in response to insistent requests by the Assembly. In 1982 it was expected that the Assembly would have before it yet another final draft. In other words, in the short interval between 1978 and 1982 the Commission would have adopted three final drafts relating to disparate and complex topics, on the final disposition of which the Assembly had to pronounce itself. The accumulation of final drafts emanating from the Commission at the request of the Assembly indicated that the Commission worked at a satisfactory pace.

240. The conclusion reached by this representative was that it was generally recognized that the Commission had served the international community well, had done exactly what had been expected of it and had successfully filled the gap in treaty-making by producing fundamental texts, which the family of nations had readily accepted. While there was talk about various improvements which should be made in the working methods of the Commission so that it could better meet the needs of a changing world, the Commission itself, in its observations regarding the review of the multilateral treaty-making process, had suggested, inter alia, that its Special Rapporteurs should be provided with more assistance and facilities to enable them to perform their duties satisfactorily in the future. It had also suggested that its progress might be faster if it had more time and resources at its disposal and more assistance from Governments at all stages.

241. It was said that the Commission should, at its thirty-fourth session, consider ways and means of improving its methods, including the need to increase the assistance that had traditionally been given to the Commission and its Special Rapporteurs. Concern was expressed regarding access by the Commission to adequate resources and support was voiced for the proposal to establish an international legal research centre which would call on experts in economic, technical or scientific fields closely linked with legal questions, as well as in law. The services of the experts would also be available to the Special Rapporteurs and the members of the Commission; the Commission would thus be able to venture into areas which it had hitherto regarded as outside its scope and to adapt its work more effectively to the needs of the contemporary world. It was also said that it would be desirable, in order to speed up work, for the Commission to have a larger and full-time secretariat.

242. Regarding the relationship between the International Law Commission and the Member States of the Organization, the opinion was expressed that with time and resources at a premium, there was also a collective responsibility to find more effective, efficient and economical ways of developing the Commission's relationship with Governments, through the General Assembly. In that connexion, it was said that the report could still be improved, especially by identifying clearly the decisions on each topic taken at the session under consideration. The task of seeking views from Governments on the substantive issues might also be facilitated by the greater use of questionnaires as an alternative to, but not a substitute for, detailed comments. Governments were urged to respond as fully and expeditiously as possible to the requests of the Commission for comments and observations on its draft articles and questionnaires and for materials on topics on its programme of work.

243. A number of other representatives also referred to the question of the documentation of the International Law Commission. Concerning the report of the Commission, certain representatives said it would be helpful if the complex form and content of the report could be modified to make it more easily understandable. A simple synopsis at the beginning of each chapter of the decisions taken at the current session of the Commission, with cross-references to the texts or commentaries where appropriate, would, it was suggested, enormously facilitate the task of delegations in preparing their statements.

244. One representative reiterated his delegation's earlier appeals that the Commission's annual reports should be much less repetitive, especially when they were interim reports, and the commentaries much less discursive. There was no need, he said, for a repetition of the detailed considerations which had led the Commission to its conclusions; those were a matter for the reports submitted to the Commission by its Special Rapporteurs and other documents. None the less the same representative also stated that if several delegations, including his own, had complained at the length and strucutre of some of the recent reports, it should not be forgotten that the multiplicity of topics placed on the Commission's work programme and the degrees of priority accorded to them had all combined to compel the Commission to report on each one each year; at least that was how the Commission had interpreted its duties.

245. Concerning the publication and distribution of the report of the Commission, it was noted with satisfaction that the voluminous report of the International Law Commission had been distributed at the start of the session of the General Assembly, which had greatly facilitated the work of delegations. On the other hand, the view was expressed that in order to facilitate the consideration of the Commission's work the report should be completed immediately after the closure of its session and distributed well in advance of the session of the General Assembly. One representative criticized what was termed the excessive delay, worsening from year to year, in the publication and distribution of the Commission's annual report, which was regrettably attributable, in his view, to defective administrative arrangements. The report of the 1981 session of the Commission had not been distributed until after the Sixth Committee had started its substantive work, and under those circumstances it was all but impossible for delegations to obtain the views, however preliminary, of those whom they represented. With modern techniques of document reproduction it should be possible to speed up considerably the preparation and publication of the Commission's report, regardless of its length. He therefore hoped that, in a spirit of co-operation, something would be done to effect the necessary improvement in the distribution of reports in the future.

246. Some representatives regretted that some Commission documents, in particular the reports of Special Rapporteurs, were no longer systematically distributed at Headquarters or were otherwise not readily available to delegations in New York. The reports of the Special Rapporteurs served as a basis for discussion in the Commission and would clearly assist delegations in having a better understanding of the evolution of the Commission's work. They often, it was said, only became available after considerable delay and some delegations had not even seen the reports produced in 1980. Those reports were moreover the last documents to be published in the Yearbook of the International Law Commission. Although that was due in large measure to the need for technical revision of the reports, which was undertaken by the Organization with very great competence, the delay in making the reports available to the academic community and Governments was none the less worrying.

247. One representative stressed that both the Sixth Committee and the International Law Commission should be aware of the comments of the Secretary-General on the report of the Joint Inspection Unit on control and limitation of documentation in the United Nations system (A/36/167/Add.2); while it

was not practical or desirable to establish rules for the maximum length of its reports, the Commission would do well to keep in mind the general problem of the quantity of current documentation and draw the implications of the Secretary-General's observation that the General Assembly might alternatively "decide that reports submitted to it by anybody that received written meeting records (verbatim or summary) should not, save in exceptional cases, include a summary of the debates".

248. Representatives favoured a reaffirmation of previous General Assembly decisions concerning research projects and studies required by the work of the International Law Commission and the increased role of the Codification Division, as well as of those concerning the need for continuing provisions of summary records of the Commission's meetings.

3. Co-operation with other bodies

249. Representatives expressed satisfaction with the close co-operation maintained between the International Law Commission and the International Court of Justice as well as with such regional legal bodies as the Arab Commission for International Law, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee. It was said that such co-operation would make an increasingly constructive contribution to the attainment of the common objectives of the Commission and the other bodies concerned. The hope was expressed that the Commission would continue to enhance its co-operation with legal organs of intergovernmental organizations whose work ws of interest for the progressive development of international law and its codification.

4. International Law Seminar

250. Representatives noted with satisfacion the success of the seventeenth session of the International Law Seminar, organized by the Office of Legal Affairs during the thirty-third session of the International Law Commission. A number of representatives reaffirmed the importance of the Seminar, particularly for participants from developing countries, and indicated their appreciation to those Governments and private organizations which had contributed financially to the holding of the seventeenth International Law Seminar. The wish was expressed that seminars would continue to be held in conjunction with sessions of the International Law Commission and that an increasing number of participants from developing countries would be given the opportunity to attend those seminars.
