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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-FIFTH SESSION (1983)

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

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INTRODUCTION

1. At its thirty-eighth session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 23 September 1983, to include in the agenda of the session the item entitled "Report of the International Law Commission on the work of its thirty-fifth session" 1/ (item 131) and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 34th, 36th to 50th, 54th and 70th meetings on 4, 8 to 22 and 25 November and 8 December 1983. 2/ At its 70th meeting, on 8 December, it adopted by consensus draft resolution A/C.6/38/L.22 entitled "Report of the International Law Commission" which it recommended to the General Assembly for adoption.

3. The General Assembly, at its 101st meeting on 19 December 1983, adopted by consensus resolution 38/138 as recommended by the Sixth Committee. By paragraph 9 of the resolution, the Assembly requested the Secretary-General, inter alia, to prepare and distribute a topical summary of the debate held on the Commission's report at the thirty-eighth session of the General Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of that debate.

4. The Sixth Committee discussed the topic dealing with a "Draft Code of Offences against the Peace and Security of Mankind" not only in the course of its debate on item 131 (Report of the International Law Commission on the work of its thirty-fifth session) but also during its consideration of the related item 125 also entitled: "Draft Code of Offences against the Peace and Security of Mankind". Therefore part B of the present topical summary has been prepared taking into account views on the topic expressed in the Sixth Committee not only during the consideration of item 131 but also during the debate held on the related item 125, at the 43rd, 49th to 54th and 70th meetings of the Sixth Committee held, respectively, on 15, 21 to 25 November and 8 December 1983. 3/

DISCUSSION

A. GENERAL COMMENTS ON THE WORK OF THE INTERNATIONAL LAW COMMISSION AND THE CODIFICATION PROCESS

5. The significance of the process of codification and progressive development of international law and the increasingly important role that process had played in the recent past and was expected to play in the future in the development of peaceful international relations, was referred to by several representatives. It was recalled that emphasis had been placed on the codification and the progressive development of international law at the time of the drafting of the Charter and again during the period of decolonisation in the late 1950s and early 1960s. International law was now a system of rules and principles which expressed, as a result of the work of the International Law Commission (ILC) the Sixth Committee and major diplomatic codification conferences, the intentions of a new international community founded on the success of decolonisation. The authority of the Charter as the main source of international law had been secured and, through the adoption of universal international conventions, the conduct of international

relations had ceased to be governed exclusively by customary law, the development of which had in the past been the privilege of the big and powerful developed countries. New prospects for the further development of international law had appeared since then; in particular, mechanisms for its implementation and for an international jurisdiction had begun to take shape. In that connection, the views expressed by the Secretary-General in his address to the thirty-fifth session of the Commission were recalled. In the current climate of international tension, the emphasis must, for the third time in the history of the United Nations, be placed on the role of its organs concerned with legal affairs.

6. Certain representatives stressed the link between the process of codification and progressive development of international law and the co-operation of States in the political field, particularly in the maintenance of international peace and security.

7. Referring to the statement made by the Secretary-General at the last session of the Commission, one representative supported the view that the process of developing and codifying international law was aimed at the fulfilment of the political aspirations, interests and needs of States and of the organized international community, with a view to facilitating international co-operation and contributing to the maintenance of international peace and security through the certainty of law.

8. Another representative expressed his conviction that the codification and progressive development of international law exerted a salutary effect on international relations. The views expressed on that point by the Secretary-General in his address to the International Law Commission were to be shared. In accordance with Article 13 (a) of the Charter, that task was linked with the development of international co-operation in the political field. It was for that reason that his delegation had never failed to underline the political significance of the activities of ILC and the intimate link between the political will of States to co-operate with one another and the strengthening of the international legal order. In view of the current state of the world and the deterioration of international relations, it was more than ever important that all international proceedings, including those of the subsidiary organs of the General Assembly, should be concentrated on finding ways and means for each organ to contribute effectively in its area of competence to the promotion of friendly relations and co-operation among States.

9. Attention was drawn to the urgent need to consolidate the international legal system, establish solid legal guarantees for international legality and security, and observe strictly the legally binding rules of conduct which States had developed together. That need was becoming steadily greater as the system of international law became broader and more complicated and the number of problems which could be settled only by expanding existing rules or clearly formulating new ones in accordance with the demands of modern international life increased. In the modern world, with the growing threat of nuclear catastrophe, the strengthening of the international legal order and the improvement and increased effectiveness of the principles and norms of international law concerning the most urgent issues were becoming exceptionally important.

10. One representative noted that despite the significant contribution made by the International Law Commission to the maintenance of international peace and security in laying down the legal basis for inter-State relations, the situation in that field still left much to be desired and the rules of international law were still violated with impunity, thus calling into question the very viability of international law. Nevertheless, the international community must not despair but must rather redouble its efforts to consolidate and strengthen international law.

11. In this connection the view was also expressed that the Organization must continue to educate the public whose scepticism and ignorance of the great potential of international law for the settlement of international disputes was constantly being fuelled by the increasing use of force as an instrument of the foreign policy of States. The authority of international law was bound to be strengthened by successes achieved in its codification and progressive development.

12. It was observed by the Chairman of the Commission that as expressed by the Secretary-General and reproduced in the Commission's report, regardless of their ideologies, social and economic systems, size and relative military and economic strength, States should acknowledge that there was no viable and long-term alternative to a policy of development and peaceful coexistence pursued within a framework of international law. He wondered whether it was perhaps a coincidence that the draft Code of Offences and the question of the peaceful settlement of disputes between States were currently be considered at the Sixth Committee or whether it was due to the existing situation that they appeared in the agenda. He asked what was the point of international law if the non-observance of its standards was constant and persistent and what were the consequences of that situation. International law currently had the same force as it had always had. Observance of the standards of international law had become imperative in the modern world if mankind was to avoid a catastrophe. Experts in international law should not keep to the traditional function of formulating and interpreting the law since they were faced with the task of starting a campaign to remind the leaders of the world's nations constantly of the truth contained in the Secretary-General's statement and to convince them of it.

13. The major role of the International Law Commission in the process of codification and progressive development of international law, the special characteristics of its contribution to that process and its significant co-operation for the establishment of legal order in the international community were also referred to in the course of the debate.

14. It was pointed out in this connection that one of the primary reasons for the Commission's success was that its members had demonstrated a high level of scholarly competence as well as a deep understanding of the realities of the international community, without being bound by the positions of their home Governments. Clearly, if its members clung to their own theoretical arguments or pursued only the national interests of their home countries, the Commission could never maintain such a high standard of performance. It was hoped that each member would respect that valuable tradition and work to further the Commission's objectives, maintaining the delicate balance between high professional standards and a keen perception of modern realities.

15. Satisfaction was expressed at the successes achieved by the International Law Commission over the past 35 years; the fact that the codification and progressive development of international law were no longer the privilege of a few "civilized nations", it was said, was convincing proof of the great historical changes which had taken place in that field. Confidence was expressed that the Commission would continue to prove to be responsive to the winds of change in the international community, which had undergone a substantial transformation over the previous 40 years, and that it would continue to meet the growing expectation of mankind, and in particular the interests of developing States.

16. Great importance was also attached by some delegations to the activities of the International Law Commission, in view of the significance that the process of codifying and progressively developing international law had for the strengthening of the legal basis for peaceful co-operation among States with different social systems.

17. The codification and progressive development of international law, it was said, were of vital importance in view of the current status of international relations and the results of the work of the International Law Commission should therefore be judged in terms of how it met the increasing demands of the dynamic development of international co-operation in various fields.

18. It was also stated that the Commission was successfully accomplishing a difficult task which required, in particular, a careful observation of the practice of States and a keen perception of the evolution of international relations, while taking into account a customary international law which was not always in harmony with the needs of a changing international society. In the final analysis, it was said, the effectiveness of the Commission's codification efforts depended on the extent to which the articles it drafted were generally acceptable and responsive to the needs of the international community as a whole. The view was held that legal instruments prepared by the International Law Commission had always been generally accepted, especially by small and medium-sized countries, so long as they were in full compliance with the purposes and principles of the Charter, were useful in promoting co-operation among States and were conducive to international peace and security. In this connection one representative stated that the Commission was continuing to fulfil its mandate in a responsible and enlightened manner. To the extent that it prepared draft articles for the conclusion of international conventions, it was contributing to the maintenance of good relations between States and the international community benefited immensely from its work.

19. In connection with the Commission's work in the codification and progressive development of international law reference was made by several representatives to the recent increase in the membership of the Commission. It was gratifying to note, it was said, that the developing countries were playing an increasing role in the codification and progressive development of international law. As the Chairman of the Commission had noted, the increase in its membership was an inevitable consequence of the increase in the membership of the General Assembly itself in the wake of the decolonization process. The enlargement of the membership, it was also said, should be welcomed since it reflected the different legal systems of the world and should enable the Commission to profit from the new currents in legal

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thinking and thus increase its contribution to promoting international law in all inter-State sectors.

20. Several representatives referred to the statement made by the Secretary-General at the Commission's last session both as a token of the Commission's importance within the United Nations system and as a reaffirmation of the Commission's role in the process of codification and progressive development of international law.

21. In this connection it was stated that the visit paid by the Secretary-General to the Commission during its last session testified to its high standing in the United Nations system and the capital importance of its codification and progressive development of international law. The visit and address to the Commission by the Secretary-General, it was also pointed out, had been a welcome and significant innovation. His remarks should serve as a standard for rethinking and rededication to the rule of law and the effectiveness of the United Nations by the international legal community as a whole. For the country of this delegation, which had had a bitter and continuing experience because of the flagrant violation of the most basic rules of international law by other States, the Secretary-General's observation that there was no viable and long-term alternative to a policy of development and peaceful coexistence except within a framework of international law acquired special significance in its ongoing struggle to restore justice to the situation which it confronted, on the basis of the United Nations Charter and the resolutions adopted on the question relating to the speaker's country. One representative particularly endorsed the Secretary-General's timely reminder that the Commission functioned against a background of interdependence and the search for common interests and stressed that the significance of the Commission's work in the clarification, codification and progressive development of international law had been highlighted by the Secretary-General's visit to the Commission. Another representative particularly endorsed the statement made by the Secretary-General concerning the concept of a coherent and generally accepted body of international law (para. 13 of the Commission's report); the task performed by the Commission therefore merited the particular attention of all States, the representative added. Other sentences of paragraph 13 of the Commission's report were also particularly endorsed.

22. The view was held that the International Law Commission had done some extremely useful work at its thirty-fifth session. In this connection the Chairman of the Commission said that its report for 1983 was an extraordinary one. It contained a proposal for a complete draft convention on one topic and addressed seven substantive topics, in addition to the item concerning methods of work. In 1983, the Sixth Committee's agenda contained 19 items and each one naturally had to be considered. The report of the Commission comprised rules or draft standards which would become laws for all time. The Committee should now find a way to consider it more thoroughly, as had been done during the current session of the General Assembly.

23. Noting the relatively small number of draft articles submitted to the Sixth Committee by the International Law Commission, one representative expressed the hope that the Commission would soon be able to overcome the obstacles which it and

its Drafting Committee had encountered and present the General Assembly with complete sets of draft articles, so as to enable Member States to contribute more concretely to the codification and progressive development of contemporary international law, that being an invaluable tool for the promotion of political co-operation between States and the creation of an international law which would better meet the needs of the international community as a whole.

24. Some representatives expressed views on the relationship between the work of the International Law Commission and the work of other legal organs of the United Nations, particularly the Sixth Committee, in the process of codification and progressive development of international law.

25. In this connection, one representative stated that the annual consideration by the Sixth Committee of the report of the International Law Commission was an important phase of the process of codification and progressive development of international law. Member States had undertaken a commitment under the Charter to co-operate in that process, and clearly all States should participate in the drafting and adoption of any instrument intended to govern international relations. The international community's attention should always be focused on building a system of law based on the principle of collective interest. Leaving aside for a moment the International Law Commission, in view of its special characteristics, he wished to point out that over the past few years the collective efforts made in the various legal organs of the General Assembly had not produced encouraging results. Member States should join together in analysing the reasons for that situation and considering ways of reforming the organs concerned, if necessary. They should look into the Sixth Committee's agenda, the quality of its debates, the objectives they were trying to achieve in the Committee and the results attained each year. He wondered how much evidence there was of constructive dialogue and consultation, for example. The Sixth Committee was a political body entrusted with the consideration of legal questions, which was a task requiring flexibility and tolerance. He wished to emphasize that the International Law Commission had, on the whole, focused on the collective interest of the international community.

26. Another representative stated that the Sixth Committee must ensure that its debate on the report of the Commission provided the latter with information on the opinions of a wide range of States and produced agreed recommendations which could guide its work on particular topics, especially the most important ones. In considering the Commission's reports all delegations should therefore co-operate in a constructive and business-like fashion in order to find the best solutions, taking into account the positions of different groups of countries and the interests of the international community as a whole.

B. DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

1. Comments on the question of the resumption of the Commission's work towards the elaboration of a draft Code of Offences

27. A number of representatives expressed their appreciation for the auspicious start the International Law Commission had made with its resumed consideration of the topic of the draft Code of Offences against the Peace and Security of Mankind. Some of them considered that resumption as a significant and timely step. It was pointed out in this regard that the Commission had an historical duty to complete a task originally assigned to its progenitor, the Committee of Seventeen, by relentlessly pursuing the goal of drafting a code and, as it became apparent from chapter II of the ILC report, the preparation of such a draft code had again made a good beginning.

28. One representative welcomed the fact that the Commission was currently considering not only the timeliness and usefulness of elaborating such a code but also its scope, content and technical and institutional implications. Another representative, while noting with interest the discussions held in the Committee on the draft Code, found it commendable that the Commission had put concrete questions to the Sixth Committee so that its work could proceed on an acceptable track in the light of the comments received.

29. Some representatives pointed out that the report presented by the Commission in chapter II was precise and concise and reflected the lucid approach of the Special Rapporteur whose first report (A/CN.4/364) on the subject had the same qualities. That first report, it was added, showed that the Special Rapporteur was fully aware of the complexity of the matter, which was demonstrated by the fact that he highlighted all the legal and political aspects of the topic.

30. On the other hand, some representatives expressed their concern over the modest progress made by the Commission. It was felt that although the Special Rapporteur's report had rightly focused on the most crucial aspects of the topic, the Commission had failed to give its elaborated view on them. By referring them to the General Assembly without an in-depth study, it had virtually placed the Assembly back at the point of departure.

31. Many representatives favoured continuation of the work on the draft Code of Offences against the Peace and Security of Mankind and its swift completion. Elaboration of a code, it was pointed out, became not only desirable but also a matter of urgent necessity in view of the present state of international relations characterized by the frequent violation of the most fundamental principles of contemporary international law and the hotbeds of tension in different parts of the world. In that connection, reference was made to what was described as the acts of aggression against the independence and sovereignty of States and the acts of brutal use of force against the weaker and smaller States, imperialist adventurism - an example of which was deployment of naval squadrons and air fleets by the leaders of the major countries to threaten small countries and launching air, aea and land attacks to suppress the peoples struggling for their liberation, sovereignty and independence - the policy of confrontation and the revival of the "cold war".

32. Mention was also made in that regard of the annexation of territories, political and economic interference in the internal affairs of States, the increasing arms race, the incredible accumulation of weapons of mass destruction, including nuclear weapons and their possible entry into outer space, serious threat of a nuclear war, the policy of racial discrimination and apartheid, acts of genocide, migrations forced upon indigenous people, and massive pollution of the human environment.

33. Several representatives referred to the specific instances of hotbeds of tension, violence and deterioration of the international situation. Some of them pointed to the apartheid régime of South Africa, which not only pursued criminal activity against its own peoples by denying them their basic human rights but also had escalated its aggressive behaviour against its neighbours. The reference was also made to the even more disastrous situation in the Middle East created by the recent military conflict in Lebanon. Specific mention in that regard was made by one representative of the massacres that had occurred in the Sabra and Shatila camps in Lebanon in 1982. Some of the representatives pointed to the struggle of the peoples of Central America for social liberation from reactionary Governments enjoying outside protection and assistance, a telling example of which was the recent action of Grenada and the constant actions and threats against Nicaragua. The attention was also drawn by one representative to the situation in Democratic Kampuchea where, as it was held, the Khmer people still lived the reality of an intense tragedy similar to the tragedy experienced in the aftermath of the Second World War.

34. The desirability of the resumption of the International Law Commission's work on the elaboration of a code of offences against the peace and security of mankind was also stressed by one representative, who considered it important at a time when the system of international relations was displaying a chronic inability to promote genuine world peace and when neither preventive diplomacy in the strength of the provision of the United Nations Charter nor the deterrent effect of Chapter VI of the Charter had prevented the unleashing of violence or had brought about peace and justice.

35. Another argument adduced by one representative in favour of the resumption and continuation of the work on the draft Code was the existence of the international institutional crisis, particularly the lack of political will, on the part of some members of the Security Council to enforce the decisions of that United Nations organ in international relations, and the need for progressive developent of international law and its codification. In that connection, it was recalled that the need for the Code had already been recognized by the General Assembly when it had instructed the Commission to identify and codify the principles which had guided the Nüremberg and Tokyo Tribunals, yet the international community had still been unable to transfer the historical judgements of those Tribunals into codified and developed rules designed to prevent the repetition of war crimes. It was pointed out, therefore, that in the interest of further precision and greater certainty of legal provisions, it was desirale that a draft code of offences against the peace and security of mankind should be prepared and adopted so as to dispel any doubt that remained in the minds of those who were still of the view that the judgements of Nüremberg and Tokyo could have been avoided or even reserved had the outcome of the Second World War been different.

36. Still another factor which was mentioned as an additional reason for continuing work on the draft Code was the development of international law since the Second World War, which vividly demonstrated the need for such a code. It was also pointed out in that regard that, with the adoption of the Code, international law would begin a new phase of development as an integrated system of international legal norms and principles. The Code would supplement norms relating to the prohibition of the threat or use of force and the struggle against aggression.

37. In the view of a number of representatives, the successful conclusion of the work on the draft Code by the International Law Commission would effectively contribute to the betterment of the existing international situation. It was stated that the adoption of such an instrument, together with the Definition of Aggression adopted in 1976, would constitute one of the crowning achievements of the United Nations.

38. A number of representatives stressed that the proposed Code would be an important means for strengthening international peace and security and co-operation among States against the most dangerous breaches of the international legal order. It was pointed out in that regard that the elaboration and development of legal rules relating to the prevention and prohibition of particularly dangerous international crimes and the punishment of perpetrators of such crimes would strengthen international peace and security, which one representative described as "the heritage of mankind", and promote the implementation of the principle nullum crimen sine lege in international relations. It was further mentioned that the adoption of a comprehensive and universal international instrument defining crimes against the peace and security of mankind, setting forth the specific forms that those crimes could take and reaffirming the principles of the international responsibility of individuals guilty of such crimes, would be an essential step towards strengthening the international legal order and protecting international legality. In that connection, the view was also expressed that the draft Code and, in particular, its full implementation, would help to enhance the effectiveness of the principle of non-use of force in international relations and also the corresponding principle of peaceful settlement of international disputes.

39. Several representatives emphasized the preventive and deterrent effect which the proposed Code would have in relation to potential offenders. One representative perceived the draft Code as a timely measure which would reinforce the existing legal order and deter the perpetrators of acts that threatened the very existence of mankind. Another representative felt in that regard that by enabling peoples, Governments and individuals to better realize the criminal character of crimes against the peace and security of mankind and warning potential offenders that they would not go unpunished, the Code could become a valuable international instrument of prevention and deterrence. It was added, in that connection, that although a Code would not be a panacea for the ills of the world, it would serve as an additional weapon in the international efforts to eliminate them.

40. Several other representatives, some of them recognizing deep concern for bringing to justice the perpetrators of the acts of terrorism and violence as it was in 1919 and 1946 and the need for further guidance for the International Law Commission from the Sixth Committee, expressed doubts and reservations concerning the need for, and efficacy of, a draft code in the proposed form.

41. One of the arguments which were adduced against further elaboration of a code was that, because of the complicated legal and political issues involved, too many differences of opinion on its possible content had arisen, making the prospects for the completion of that task not too promising. It was felt that the content of the Commission's report on the draft Code vividly illustrated those difficulties. A reference was made by one representative to the fact that his delegation still shared doubts about the suggestion that the work on the Code should be resumed which had been expressed at the thirty-fifth session of the General Assembly. At that time that delegation had referred to the vast and delicate nature of the problems at the current stage of international life and of the process of codification of international law. Another representative saw the chief difficulty in the further work on the matter in the fact that the considerations of legal logic and the rational and ideological concerns that suggested developing the draft Code in a given direction seemed to be at odds with the practical requirements and, above all, with the political context of the Code.

42. With reference to the question of the need for a code as envisaged, it was recalled that several States had already expressed reservations in view of the fact that such a code had been obviated by other instruments already adopted. The particular reference was made to the Convention on the Prevention and Punishment of the Crime of Genocide and the two Additional Protocols revising and supplementing the 1949 Geneva Conventions for the protection of victims of international armed conflicts. The observation was further made that the impossibility of the creation of an effective mechanism of implementation of a Code created a situation of no urgency in pursuing the topic again. It was pointed out in that regard that the international community could not directly punish offenders without a mechanism such as an international criminal court capable of implementing the relevant law at the international level. Under current circumstances, it was quite unlikely that such a mechanism would be established in the foreseeable future. Until it was, codification attempts might well result in providing a spurious basis for the victors to impose "justice" unilaterally upon the vanquished.

43. On the question of efficacy, it was noted from paragraph 54 of the Commission's report that emphasis had been placed on the preventive and deterrent role of the Code. However, it was felt that role of a code should not be overemphasized since the persons who committed the worst atrocities in the contemporary world were often so calculating and determined that they would not be deterred by an international code.

44. Another argument which was presented by some representatives expressing doubts and reservations to the continuation of the elaboration of the proposed Code was to the effect that since there was the obvious link between the draft Code and the draft articles on State responsibility for wrongful acts, the topic should be considered, with all the care it required, after the work on State responsibility was completed.

45. Despite their doubts and reservations, the representatives in question offered their substantial views on the questions raised by the International Law Commission in chapter II of its report.

2. Scope of a draft Code of Offences

(a) Comments on the 1954 draft Code with reference to further International Law Commission work on the item

46. In connection with the future work of ILC on the draft Code of Offences against the Peace and Security of Mankind, a number of representatives felt that the draft Code prepared by the Commission in 1954 could serve as a basis for that work, taking into account the evolution of the political situation and of international law in the 30 years that had elapsed since it was drafted. Similarly, it was stressed that the 1954 draft provided a good starting point for the elaboration of the Code which should define the concept and nature of the relevant offences and close the gaps in the 1954 draft that had become apparent as a result of developments since the early 1950s. It was pointed out in that regard that the call for further elaboration of the Code should not be construed as meaning that the Code lost its value, especially since the offences listed in it remained very serious offences. Nevertheless, in reviewing the content and framework of the 1954 draft, the Commission should make an exhaustive analysis of all recent developments in international law.

47. Views along the same lines were expressed by several other representatives. Some of them considered the 1954 draft useful as a point of departure for defining and identifying the most serious international crimes, taking into account all the politico-juridical instruments adopted by the international community since 1954 and in the light of current development in international law and State practice. It was also pointed out by several representatives that the draft prepared in 1954 should be updated, bearing in mind the legal instruments such as conventions, declarations and resolutions adopted since that date. A number of representatives specifically mentioned those instruments. They are referred to in paragraphs 71 to 89 below.

(b) Comments on the methodology to be followed by the International Law Commission

48. With respect to the question of the methodology of codification to be followed by ILC in its future work on the Code, the majority of representatives who spoke on the matter welcomed the Commission's intended approach (paras. 62-67 of the ILC report) to that question and believed that a combination of the deductive and inductive methods would be appropriate. Such an approach, it was felt, would enable the Commission to determine the limits of State practice and to define a minimum of rules for a viable and appropriate juridical régime. The combination of those methods, it was pointed out, would allow for both a dynamic and future-oriented general criterion and a sound basis in existing practice and current legal opinion. A view was also expressed in that connection that proper consideration of the offences that had been identified as a result of the progressive development of international law would be possible only if the two methods were combined. It was also felt that the Commission had rightly combined the deductive and inductive methods, for while the general criterion for identifying an offence as a crime against the peace and security of mankind should be the intrinsic seriousness

of the offence, the many conventions on the matter should also be taken into account. By following the combined methods the Commission could reach the results which would make it possible to update the material and finally produce a draft Code suited to contemporary requirements.

49. Pointing out to the fact that it would be difficult to avoid a combination of both methods, it was observed that the Commission should begin its work by reviewing international law with a view to identifying offences and that at some stage it would have to develop criteria to identify acts which could properly be called "offences against the peace and security of mankind". In that connection it was noted that the inductive method had the advantages of clarity and precision but at the same time, however, the utility of a more general definition of the essential components characterizing offences against the peace and security of mankind could not be denied.

50. Referring specifically to the advantages of applying both methods, it was observed that while the inductive method, which involved an examination of the content of other instruments, declarations and conventions on the basis of which criteria would be established for the definition of the concept of an offence against the peace and security of mankind, would mean revising the 1954 draft in light of the provisions of international legal instruments adopted since that time, the deductive method, which involved the definition of general criteria for the identification of offences against the peace and security of mankind, would ensure the necessary flexibility, which in turn would permit greater application of the Code in practice.

51. On the other hand it was not quite clear to one representative how the Commission intended to combine the "general and comprehensive criterion", referred to in paragraph 66 of its report, with the general principle of the "non-retroactivity of criminal law", referred to in paragraph 67. The principle nullum crimen, nulla poena required a precise description of criminal acts so as to leave no doubt about which acts were considered criminal. The "policy statement", referred to in paragraph 66, which would make it clear from the outset that the list of offences contained in the draft was not exhaustive and was subject to change as a result of developments in international society, might be useful, but it could not replace a previa lex poenalis. It was therefore felt that the system established by the Code could apply only to offences which were precisely described in the Code or in a later international instrument and which were committed after the adoption of the Code or the instrument in question.

52. Some representatives expressed their delegations' preference either for deductive or inductive methods. The supporters of the former considered that a definition should be established to cover the elements needed for classifying actions and omissions. It was felt, therefore, that a set of general provisions should be formulated to place the subject in its proper perspective and to define the purposes of the Code. It was also pointed out in that connection that what was considered as more appropriate was the examination by the Commission of the seriousness and consequences of the acts committed rather than confining its study to a list of offences. Admitting that although definitions could in principle be dangerous, it was nevertheless felt that it might be useful, in order to establish

the parameters of the subject, to have an introduction indicating the criterion selected for the codification.

53. Other representatives advocated a more inductive approach to the determination of those international crimes which were to be considered as offences against the peace and security of mankind, rather than an examination of conventions against the background of a subjective criterion such as "the most serious of the most serious offences". It was pointed out in that regard that such an examination might reveal crimes which warranted categorization as offences against the peace and security of mankind but which might not necessarily be considered the most serious of the most serious offences. Therefore, the examination of the relevant conventions should not be unduly tied to the pre-selected criterion. Preferably, the definition or criterion should result from the examination of the conventions. Sharing the view that it would seem difficult to begin with a general definition, it was stressed that it would be better to adopt the inductive method and define the content of the subject matter of the topic by means of careful examination of international law and practice and of the development of international relations after the Second World War. Furthermore, it was pointed out that an inductive approach would also prevent the determination that the breach of an obligation flowing from any rule of jus cogens was an offence against the peace and security of mankind. There again, a case-by-case examination would be preferable. In carrying out such an examination, one would inevitably be guided by some concept of what constituted such an offence, but there should be no hard and fast criterion. Support for an inductive method was also expressed by one representative on the grounds that too general formulae could lead to emptying the text of its precise content and excessively limiting its field of application.

54. With reference to the question of application of the inductive method, comments were offered on the structure of the future Code. In that connection it was stressed that, in the preparation of the draft Code, the International Law Commission should adopt the necessary flexibility to make it sufficiently dynamic and not a hermetically sealed instrument. Its structure should be such as to allow for the codification and development of rules for classifying new crimes against the peace and security of mankind. The view was also expressed that the most important task before the Commission was the preparation of the most exhaustive list possible of offences to which the Code would be applicable. That view was shared by other representatives who felt that the Commission should bear in mind the danger inherent in formulae of a non-exhaustive character, since they might constitute outright violation of the principle nulla poena sine lege. But in order to safeguard another fundamental principle of penal law, nullum crimen sine lege, it was felt essential to have a precise definition of such offences.

(c) Comments on the scope of a draft code of offences ratione materiae

55. A number of representatives expressed their view on the question of what category of offences should be covered by the draft Code.

56. The majority of representatives who spoke fully supported the unanimous view of the members of the Commission that the codification should cover only the category of the most serious international crimes, as indicated in paragraphs 48 and 69 (a) of the report. In that connection, the view was expressed that the

first problem confronting the Commission was therefore one of classification of international offences. It was felt in that regard that it was not yet possible to establish exhaustively what those offences were, but criteria for their determination would have to be developed in the course of further work. The view along the same lines was expressed by another representative, who believed that the Commission would be able, in the course of further discussion of the issue, to find reasonable criteria for determining such offences. Referring to the question of what constituted the most serious international crime, it was stressed that it should be left to the Commission to make such determination in the light of developents in international law.

57. With respect to the question of the criterion for classifying violations of international law as the most serious international crimes and for deliminating them from international delicts of less serious consequences, a number of representatives shared the view of the Commission that the gravity or heinousness or horrific nature of a particular offence offered an acceptable practical criterion for its inclusion in the list of offences against the peace and security of mankind. It was also felt that the criterion for clarifying violations of international law was the degree of their seriousness and of the danger they constituted for the peace and security of mankind.

58. The view that codification should relate only to those crimes which might affect the peace and security of mankind was widely shared by several representatives. In that connection, it was stressed that the very title indicated that the Code should deal with such conduct as jeopardized the peace and security of mankind as a whole. Commenting on the criteria in question, it was felt that the Code should, by definition, deal with offences that affected the peace and security of mankind and aroused unconditional and general disapproval. Similarly, an agreement with the Commission's view was expressed that the Code should apply only to those offences which, by their very nature, bore a direct relation to international peace and security in accordance with the original intention of the General Assembly expressed in its resolution 177/11 of 1947. The Commission, it was also pointed out, had the moral obligation to consider only those offences which might pose an actual threat to the peace and security of mankind, which implied that other crimes, be they of the most heinous nature, should be excluded from the draft Code. It was also stressed, in that connection, that the scope of the 1954 draft Code was broad enough, because at that time it had been conceived as an international penal code of a general nature. Currently, such an approach could entail a whole set of technical difficulties and would not meet the codification requirements expressed by the majority of States. The scope of the draft Code should, therefore, be limited to those crimes that seriously threatened the international peace and security of mankind. That would result in a clear code and make it possible to achieve concrete results in international relations.

59. While agreeing with the Commission's opinion that the draft Code should cover only the most serious international offences and that an appropriate conceptual approach should first be found to the question what were to be the specific features of such offences and what distinguished them from other international offences, it was stressed that the basis for such an approach should be the nature of an offence and the threat it constituted to the entire international community.

An indication of how to elaborate that point might be found in the proposal put forward at the thirty-seventh session that the Code should contain offences that were punishable under international law regardless of the internal law of certain States (A/C.6/37/SR.54, para. 76). In that connection the view was also expressed that the gravity of an offence would primarily be determined by the extent to which it tended to jeopardize the fundamental basis of peaceful coexistence between States or the right of peoples to self-determination.

60. A number of representatives pointed out that in considering which crimes would be covered by the Code, the Commission would undoubtedly be influenced by article 19 of part one of its draft articles on State responsibility. That article reflected the view that internationally wrongful acts were to be distinguished according to the importance of the subject-matter of the obligation breached. Consequently it was held that, rather than considering all the international offences covered by article 19 of the draft articles on State responsibility, the Commission was correct in focusing on the most serious and most abominable crimes. It was felt that such an approach would settle the question of the dividing-line between the codification of offences against the peace and security of mankind and the codification of State responsibility, since the Code would cover only the most serious of the offences in the hierarchy established in article 19 of the draft on State responsibility, leaving aside the less serious international offences to be dealt with under the main heading of State responsibility under prevailing international law.

61. In that connection the view was expressed that the ideal would be to have only one international criminal code broader in content than the one currently proposed, including all categories of international crimes and not only crimes against the peace and security of mankind. The International Law Commission, however, had preferred to adopt a two-track approach in dealing with the question of international criminal responsibility. The main difficulty with such an approach laid in drawing a distinction between international crimes falling under the draft Code of Offences against the Peace and Security of Mankind and those falling under the draft articles on State responsibility. In that connection, there was a need to co-ordinate the work on the two drafts so as to avoid duplication.

62. The view that the draft should not encompass all the international crimes mentioned in article 19 of part one of the draft articles on State responsibility but only the most serious of the most serious offences was widely shared. It was pointed out in that regard that in the 1969 Vienna Convention on the Law of Treaties, a certain hierarchy of international legal norms had already been introduced by the adoption of the concept of jus cogens. The Commission, in formulating article 19 of part one of the draft articles on State responsibility, had carried the idea further by making a clear distinction between international crimes and international delicts. Therefore, limiting the draft Code of Offences to the most serious international crimes was well founded and realistic. There would be no overlap with the draft on State responsibility, because the latter dealt only with the fundamental conditions for establishing responsibility and not with the formulation of primary rules stating specific obligations. It was also stressed that the fact that the draft Code should deal only with the most serious offences or crimes that might endanger the peace and security of mankind was not

the essential difference that should distinguish the Code from the draft articles on State responsibility, the difference laid in the fact that the draft articles consisted of secondary rules while the Code would contain primary rules and would categorize the offences against the peace and security of mankind.

63. Several representatives advised against drawing too heavily on article 19, paragraph 3, of the draft articles on State responsibility in the context of criteria for determination of the most serious international offences. It was pointed out in that regard that the legal consequences of international crimes in the sense of article 19 had yet to be determined, and the provision as such had not yet gained final approval within the Commission itself. Sharing the view that it would be very difficult to base a classification on the definition of international crimes contained in article 19, it was suggested that, in order to find a solution, it was necessary to examine more closely the concept of "peace and security of mankind", which was the subject of interest on the part of all States. Because of the evolution of international relations and international law, that concept had to be given a broader interpretation than in the 1950s.

64. In that connection, it was pointed out by another representative that the concept of "mankind" was relatively recent in contemporary international law; it had been recognized in the Hague Regulations at the turn of the century, and subsequently in the Second World War under the Geneva Conventions concerning the treatment of prisoners of war and the sick and wounded. The concept of "mankind" was also vital in the context of human rights on the basis of the Universal Declaration of Human Rights of 1948. At the First Conference on the Law of the Sea, held at Geneva in 1958, "mankind" had for the first time been mentioned in the context of its common heritage. Since then, "mankind" had formed part of juridical vocabulary not only for the law of the sea and space law but also for the law of the common heritage of mankind, including its cultural heritage. Although in his view the concept of "mankind" was not new in the context of international crimes, it had not always had the broad sense attributed to it. In speaking of offences against the peace and security of mankind, no distinction should be made between different classes of man and no attempt should be made to replace the word "man" by other words such as "subject" or "citizen", or to replace "mankind" by "population", "inhabitants" or "populace". All attempts to classify man into various categories had led to confusion and disturbance of the peace and security of mankind. That salient factor should not be omitted in any serious study of the topic of international law concerning humanity.

65. The view was also expressed that the Commission should have regard for the risks which might result from over-classifying legal norms. Article 53 of the Vienna Convention on the Law of Treaties had already established the primacy of the peremptory norms of jus cogens over other ordinary norms, and the Commission's draft article 19 on international responsibility distinguished between those norms whose violation constituted a crime and those whose violation constituted a delict. The Commission was proposing to introduce a further categorization of norms by distinguishing between different crimes and their degree of seriousness, the latter being measured by the extent or the horrific character of the calamities caused, or by both at once. It was disputable, if it was reasonable, to establish three distinct régimes of responsibility with different régimes for their application and different penalties.

66. Although, it was further stressed, the establishment of a hierarchy of legal norms was acceptable and even desirable, the gradation of régimes of responsibility would give rise to numerous difficulties. The situation was further complicated by the fact that the Commission was not sure whether to proceed de lege lata or de lege ferenda, since it referred, in support of its reasoning, to article 19 of the draft on the international responsibility of States. That draft, which did not yet form part of positive law, distinguished between norms, the violation of which was regarded as a crime, and those, the violation of which constituted a delict. International law and international morality might eventually be reconciled and the concept of an international public order imposed as a result of the categorization of norms to which the Commission had given a decisive impetus but that would have to be done by stages, starting from assured positions.

67. One representative whose delegation expressed doubts on the prudence of the topic as a whole pointed out that if, in the future, it became reasonable to attempt work on the topic, there would have to be considerable selectivity and greater clarity than were apparent in phrases such as "the most serious of the most serious offences". That level of locution probably resulted at least in part from the attempt to use article 19 of part one of the draft on State responsibility an article more likely to undercut the development of the law of State responsibility than to contribute to it. To attempt to build upon a notion that had been applauded by some, formally accepted by none and expressly rejected by others was not merely a curious approach; it revealed the lack of a sound basis for what was being attempted or, more precisely, what some would want attempted. If, however, further energies must be devoted to the curious notion of the criminal responsibility of States, there was, in the view of that representative, some merit in its being done under the draft Code, since such an approach would at least decrease the risk of damage to the work on State responsibility, a field which was relevant to contemporary needs. The penchant for the construction not only of hierarchies of norms but of hierarchies within the hierarchial categories did not appear likely to promote a greater recognition of the imperative character of all legal norms or a greater respect for the law. If a time came when it would be reasonable to examine the scope ratione materiae, it would be necessary to look exclusively to acts determined by the international community as a whole to be criminal. The test suggested by the Commission in the context of part one of the draft on State responsibility, namely, that a given internationally wrongful act should be recognized as an "international crime" not only by some particular group of States, even if it constituted a majority, but by all the essential components of the international community was not rigorous enough. The more rigorous requirement of acceptance, in fact, by the entire international community would be appropriate when dealing with the "most serious of the most serious offences".

68. A number of representatives offered their comments on the question of motives of committing crimes which would be defined in the draft Code. The majority of them welcomed the agreement reached by ILC, to the effect that, in the definition of offences, the political elements should be discarded. In this connection, it was pointed out that, as indicated in paragraph 49 of the report, the motive of a crime should make no difference in determining its seriousness; acts which seriously jeopardized the fundamental interests of mankind might have complex motives, including political and economic ones; crimes against the peace and

security of mankind were the most serious of international crimes and should be dealt with in the Code, whether or not they were politically motivated. This view was also shared by another representative who felt that, although the Commission had been correct in saying that political motivation was irrelevant in the identification of offences against the peace and security of mankind, the question of a political crime might be significant in the implementation of the Code. In the establishment of a régime for the trial and punishment of persons committing offences against the peace and security of mankind, provision might be made for an exception to the rule on the non-extraditability of political offenders.

69. On the other hand, the view was also expressed that the offences against the peace and security of mankind should be limited to offences which basically contained a political element.

70. A large number of representatives indicated which acts regarded as the most serious international crimes should be included by ILC in the proposed Code.

71. A number of representatives highlighted among such acts the threat, preparation and waging of a war of aggression. Thus, a view was expressed that aggression, the most serious of all international crimes, should constitute the main feature of the future Code. It was pointed out, in that connection, that due account should be taken of the Definition of Aggression as adopted by the General Assembly in 1974 (resolution 3314 (XXIX)). The Definition of Aggression, it was felt, was very important for the specific formulation of the list of international crimes included in the draft Code. It was only on the basis of the criteria laid down in the Definition that actions of States could be classified in law as aggressive. Similarly, it was pointed out, the Code should focus on the use or threat of force in violation of the Charter. The appropriate provisions of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV)) should therefore be taken into account.

72. One representative pointed out that the category of offences against peace should also include economic aggression, which was often used to subjugate the poorest and smallest nations in the international community.

73. It was also stressed that the list of acts constituting serious international crimes should include the fomenting of civil wars and interference in the internal affairs of other States by means of coercive measures of an economic or political character.

74. Occupation and annexation of territories and other crimes related to it such as the establishment of settlements in those territories, forced emigration, the acquisition of privileges through agreements imposed by force under military occupation and the application of coercive pressure were other acts which it was felt should be covered by the Code.

75. The crime of terrorism was mentioned as relevant to the proposed Code. In that connection the need was emphasized by one representative to bear in mind the rights of peoples to legitimate defence, self-determination and sovereignty, for

which a distinction should be made between acts committed by fedayeen, acts of resistance to foreign occupation, and acts of pure terrorism.

76. The activities of mercenaries were highlighted by several representatives as a crime the draft Code should refer to. Reference was made in that regard to a draft international convention on the subject prepared by the Sixth Committee.

77. Several representatives favoured the inclusion in the proposed Code of the crime of genocide. That crime, it was felt, should be determined by the Commission with reference to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It was also pointed out that the working of that instrument already containing condemnation of such a crime should be inserted in the draft Code in order to ensure harmonization and consistency in that field.

78. Several representatives felt that the escalating arms race constituted one of the gravest threats to the peace and security of mankind and therefore should be dealt with in the Code. A number of representatives pointed out in that connection to the need of including in the future Code provisions relating to disarmament. It was further stressed that, while elaborating the part of the draft Code dealing with breaches of obligation of States in the field of disarmament, attention should be paid to auch international instruments as the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, the Treaty on the Non-Proliferation of Nuclear Weapons, the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

79. In the view of one representative, special attention should also be paid to General Assembly resolution 37/77 A, in which the Assembly had called upon the militarily significant States to make declarations concerning the refusal to create new types of weapons of mass destruction and new systems of such weapons.

80. In the view of several representatives, if the Code was to be a truly effective instrument to combat the most serious offences against peace, it should necessarily be concerned with the most urgent problem of current times, mainly the prevention of a nuclear catastrophe. It was stressed in that connection that the draft Code should include the vital principle that preparations and propaganda for, and the unleashing of, nuclear war constituted the gravest crime against the peace and security of mankind, for once a nuclear war had begun, its fatal consequences could not be limited and there could be no winners in such a conflict, which threatened to destroy human civilization as such. The deepest desire of billions of people throughout the world was therefore to prevent such a catastrophe. For those reasons it was felt that in drawing up the Code, the United Nations had a duty unambiguously to condemn nuclear war as contrary to the conscience of mankind, as the most monstrous crime against peace and security and as a violation of the primordial human right - the right to life. All plans to unleash nuclear war were criminal and should be condemned in the sternest and most comprehensive way. The Code should also declare criminal the formulation and propagation of doctrines and

concepts aimed at justifying the legality of the first use of nuclear weapons and the general acceptability of nuclear war. Such a provision would represent a major contribution to strengthening international law and its role and would help to create an international climate in which the danger of nuclear war would be significantly reduced and there would be better prospects for practical agreement on limiting and radically reducing nuclear weapons, and even eliminating them completely.

81. A view along the same lines was expressed by another representative, who also held that prevention of nuclear conflict was the greatest task facing the modern world. Once begun, a nuclear war would entail the destruction of human civilization; there could therefore be no justification for any action which might push the world towards nuclear catastrophe. All plans to unleash nuclear war and any doctrines or calculations based on its acceptability were criminal. The Code, therefore, should contain clear and unambiguous instructions to that effect. Nothing could give States the right to use nuclear weapons first. The consolidation of the relevant provisions in the Code would serve as a constant reminder to States and statesmen that they bore responsibility for the fate of the world and, at the same time, would act as a strong deterrent to those who advocated a nuclear arms race and major programmes of strategic rearmament, as well as those who put forward senseless doctrines concerning the legality of using nuclear weapons first and the general feasibility and acceptability of nuclear war. In his view it was therefore very important for the draft Code not only to condemn nuclear war as the most monstrous of crimes but also to declare criminal the formulation and promulgation of any such doctrines. It was pointed out in that connection that the most important provision, on which the draft Code would hinge, should reflect the basic idea of the Declaration on the Prevention of Nuclear Catastrophe, namely, that States that resort first to the use of nuclear weapons would be committing the gravest crime against humanity. A reference was also made in that regard to a resolution adopted at the thirty-eighth session of the General Assembly condemning nuclear war as the most monstrous crime against mankind.

82. In the view of some representatives, the draft Code as revised by ILC should define as offences against the peace and security of mankind the use of nuclear weapons, particularly against non-nuclear States. Similarly, it was felt that the deployment and use of other weapons of mass destruction, including chemical and bacteriological weapons, should be considered as serious international crimes.

83. War crimes and crimes against humanity were highlighted as falling into a separate category of crimes which should be included in the future Code. It was felt in that connection that those crimes had been defined in the Charters of the Nürnberg and Tokyo Tribunals, and the definition was reiterated in the Additional Protocols to the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War. The principles of the Charters and Judgements of the Nürnberg and Tokyo Tribunals should be more fully reflected in the Code. The need was also expressed to take into account General Assembly resolution 3074 (XXVIII) concerning the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.

84. It was further pointed out that the draft Code should expressly prohibit war propaganda that incited to hatred among peoples and created a psychological climate conducive to the preparation of such crimes.

85. A large number of representatives felt that a code of offences against the peace and security of mankind which failed to include the crime of apartheid, which was called "most heinous crime", would not be complete. The attention was drawn in that connection to the fact that article 2 of the draft Code of 1954 did not include that crime which had been declared by the General Assembly to be a crime against humanity. A number of representatives felt in that regard that the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid should be taken into account. In the view of one representative, the draft Code should cover not only the crime of apartheid but also any other form of institutionalized racial discrimination and the forcible removal of people to so-called bantustans.

86. Racism and racial discrimination were other acts which several representatives considered as ones which should be covered by the Code. It was felt in that regard that the 1977 International Convention on the Elimination of All Forms of Racial Discrimination should be taken into account.

87. Several representatives emphasized that colonialism, colonial and foreign domination were crimes to be included in the draft Code. Similarly, the denial of the right of peoples to self-determination and a homeland of their own should be considered as endangering the peace and security of mankind.

88. Furthermore, it was felt that the draft Code should include among the crimes any act by a State aimed at the forced assimilation or merciless destruction of ethnic minorities, which struck at the very roots of the heritage and the ethnic and cultural values of minority groups, leading to their virtual extinction as such. Similarly, serious offences against the permanent sovereignty of peoples and States over their natural resources should be considered by the Commission, in the view of one representative, as international crimes. In that connection the view was expressed that the Code should be without prejudice to the right of peoples to combat colonialism and to struggle for freedom, self-determination and independence.

89. Mention was made of the crime of the taking of hostages. It was felt in that regard that the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the International Convention against the Taking of Hostages should be taken into account.

90. Several representatives pointed out that the crime of piracy should be included in the Code. It was also felt by several representatives that the crimes related to slavery should be incorporated in that document. One representative expressed the hope that the Code would include the crime of torture.

91. Several representatives referred to the crime of ecocide. It was pointed out that such offences which represented a new area of international crimes sometimes had an irreversible effect on the environment and the very existence of mankind.

In that connection it was felt that, in the light of a whole range of new threatening issues and problems that had arisen from scientific and technological developments, the concept of the security of mankind should be construed in its broader sense to include also ecological security.

92. A number of representatives felt that the Code should provide for specific measures to prevent international crimes. Reference in this respect was made to the appropriate provisions of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The view was expressed that there should be no statutory limitation on the punishment of offences against peace and security of mankind.

93. The view was further expressed that the Code should contain a separate section dealing with the question of such exceptions as self-defence and actions taken in pursuance of decisions under Chapter VII of the Charter of the United Nations.

94. It was also pointed out that, given that the subject of the draft Code was a matter of criminal law, inter alia, the following general principles of criminal law, such as non-retroactivity of criminal law, attenuating, aggravating or mitigating circumstances, complicity, preparation and justified acts should be included in the Code.

95. Several representatives emphasized the need for the Code to impose an obligation on States to take effective measures at the national level to prevent such crimes and to embody mechanisms to promote international co-operation in punishing such acts.

(d) Comments on the scope of a draft code of offences ratione personae

96. With regard to the content of the draft ratione personae - in other words the subjects of law to which international responsibility could be attributed - the proposition of the international criminal responsibility of individuals, which had been unanimously accepted by the International Law Commission as indicated in paragraph 51 of its report and which, some representatives noted, was recognized both in the Nürnberg and Tokyo judgements and in the 1954 draft, was also expressly endorsed by most of the representatives who commented on the issue in the Sixth Committee. One representative noted that the laying down of international individual criminal responsibility would contribute to creating a sound legal basis and guidelines for international tribunals which might possibly be created in the future.

97. Some representatives, however, pointed to the peculiarities of the concept of the international criminal responsibility of individuals. It was stated in that connection that, from the theoretical point of view, the principle of the international criminal responsibility of individuals was an anomaly since international law was normally defined as a system of norms regulating the conduct of States. The question whether individuals could be considered as subjects of international law also gave rise to divergent opinions and the remark was made that establishing international criminal responsibility of individuals required an international society much more strongly organized than it was at present.

98. The view was, however, widely held that the general acceptance of the international criminal responsibility of individuals must prevail over considerations of a more legalistic nature and attention was drawn to ways of incorporating the concept in question at the internal level in the legal system of States. In that connection some representatives acknowledged that it made sense to impose a legal duty on a person or an entity only to the extent that that person or entity was able to discharge the obligations incumbent on him or it resulting from the relevant rules of the legal system in force and that the legal system provided the necessary machinery for enforcing those obligations. In the opinion of those representatives, the international enforcement machinery was non-existent in the case of individuals who could therefore not be held directly responsible under international law and consequently should not be regarded as being directly subject to international legal duties. While this did not mean that the individual could not have rights under international law and could not in that respect be treated as a subject of international law - and in that connection mention was made of duties of States with respect to the rules of international law concerning human rights and of the corollary rights for the individual to pursue by instituting proceedings at the international level - the fact remained, in the view of the delegations in question, that international law did not have the organs to exercise jurisdiction with regard to pirates, war criminals or mercenaries and that the rules by which the international community sought to outlaw certain activities harmful to peaceful relations between States were in fact intended to enable States in such cases to exercise extraordinary jurisdiction, which they would not otherwise be entitled to exercise because it would conflict with the rules of international law pertaining to extraterritorial jurisdiction or with the rule that the action of a State organ entailed the responsibility of the State and not that of the individual government official. Thus, it was observed, the concept of the international criminal responsibility of individuals should be combined with corollaries directed at States per se, imposing an obligation on the latter to enact and enforce the provisions laid down in the draft Code even though such an approach might create problems relating to the territorial competence of courts because of statutory limitations, or create disputes of competence between the different States involved.

99. On the question whether the Code should impute international criminal responsibility to States as well as to individuals - a question in relation to which there was, some representatives noted, an acute division within the International Law Commission - two main trends were apparent in the debate.

100. According to the first trend, the Code should provide for the international criminal responsibility of States as well as individuals - a position which, it was noted, was that taken by most of the members of the International Law Commission. In support of that approach the remark was made that in most cases of offences against the peace and security of mankind there was an unmistakable State involvement. Examples of such offences which were mentioned included aggression, annexation by force of foreign territory (which could only be effected by a State possessing an army of occupation and the organs responsible for the policy of occupied territories), the establishment of settlements on annexed territory, apartheid (which was described as a manifestation of State policy), genocide and the use of weapons of mass destruction. The representatives in question further remarked that it would be wrong to leave unpunished the aider and abettor of such crimes, the State, while the agent, the individual, was punished, and equally

inadmissible to exclude from the scope of the draft Code, as a result of the exemption of States, persons acting as a head of State or as authority of the State. Furthermore, it was stated, failure to recognize State responsibility in such cases would often be tantamount to letting those serious offences go unpunished and would deprive the Code of its deterrent effect. The view was expressed in that connection that there should be implanted in the social fibre the notion of "taboo" - the notion of a prime social rule, the transgression of which would not be tolerated by the community, and that a view of sovereign immunity which would result in deification of the State was unacceptable. Sovereignty, it was maintained, ended where the rights of other States began.

101. With regard to the claim that the absence of sanctions for the breach of an international obligation meant that States had no international criminal responsibility, the remark was made that although it was true that a State could not be imprisoned, it was possible to establish a special régime for States, consistent with their specific nature, which could include inter alia economic sanctions, political and diplomatic isolation and reprimands by the international community. Attention was further drawn to international law institutions having penal elements, namely, reprisals and the collective security arrangements under Chapter VII, and the view was expressed that, bearing in mind the shortcomings of the collective security system, States should be subject to international penal jurisdiction. Also referring to the régime of sanctions under Chapter VII of the Charter, one representative stressed that to deny States the status of subjects of international criminal law would amount to agreeing that war was the only sanction for crimes attributed to States. It was also stated that the fact that international tribunals had always treated breaches of international obligations by States as giving rise to an obligation to make reparation did not mean that such breaches could never entail other legal consequences.

102. Still another argument which was invoked in favour of providing for the international criminal responsibility of the State was that article 19 of part one of the draft articles on State responsibility made a distinction between international crimes and international delicts and that the legal consequences of that distinction had to be taken into account in drafting the Code. It was observed in that connection that the attribution of international criminal responsibility to the State was not a modern concept since its doctrinal basis was to be found in a long tradition of international treaty scholars and that, even for those who thought that criminal responsibility on the part of the State did not exist in current international law, the commentary to article 19 adduced cogent reasons for progressively developing the law in that direction. As to the relationship between the draft Code and the draft articles on State responsibility and the need to avoid any contradiction between the two texts, it was suggested to prepare one draft code covering all international crimes, ranging from the most serious to the least serious, in order to avoid duplication of effort and the proliferation of legal norms and to prevent any separation of individual and international criminal responsibility. Such an approach was viewed as particularly appropriate for cases of violation where no distinction could be drawn between the two kinds of responsibility, such as annexation of territory, establishment of settlements on annexed territory, or apartheid.

103. The view was expressed that the counter arguments reproduced in paragraph 55 of the Commission's report were more akin to the question of implementation than to the question of the attribution of international criminal responsibility. In that connection, the view was expressed that the main problem faced by advocates of the international criminal responsibility of States was the lack of machinery to deal with the perpetrators and that since international criminal jurisidiction existed on a conventional basis only in respect of individuals, as evidenced by the Charters of the Nürnberg and Tokyo Tribunals and by latter-day conventions dealing with particular types of criminal activity, such as hijacking, and since the jurisdiction established by those conventions was not the kind of international criminal jurisdiction needed to complement the provisions of the Code relating to the criminal responsibility of States and individuals, the General Assembly should request the Commission to consider the kind of jurisdiction needed in connection with its work on the Code.

104. According to the second of the trends referred to in paragraph 99 above, incrimination of the State on a level with the individual presented major problems of a theoretical and of a practical nature. Attention was drawn to the divergence of opinions among jurists on the question whether international law went beyond reparative responsibility and imposed a penal responsibility on States - including principles providing for penal damages and criminal law enforcement procedures - and to the existence in that respect of two schools of thought, one with a traditional positive approach which focused on existing State practice and judicial decisions and denied a penal responsibility of States, and another one with a value-oriented approach which would regard contemporary law as a dynamic system and support the concept of criminal responsibility as a means of increasing the preventive and deterrent role of international legislation. The remark was also made that there were no international judicial decisions applying the principle of criminal responsibility to States as such, something which was largely due to the absence of criminal tribunals entrusted with the needed competence. Thus, it was concluded, criminal responsibility of States might exist in international law as a principle de lege ferenda, but such responsibility was not upheld in the concrete practice of States and tribunals.

105. What was termed the neologistic notion of the criminal responsibility of States was viewed by one representative as an empty and dangerous concept and the remark was made that describing heinous violations of human rights as criminal could be politically meaningful but was legally meaningless. The view was further expressed that, under current international law, an abstract entity such as a State could not incur criminal responsibility in the strict sense of the term, even leaving aside the aspect of sovereignty, and that States acted through individual human beings, who alone, according to traditional legal theory, could be guilty of and be held responsible for criminal offences. The purpose of the Code, it was observed, was to punish individuals guilty of certain offences, even if they had acted on behalf of the State, and to deprive them of the possibility of hiding behind the State in whose name those offences had been committed. In the last analysis, it was observed, to refer to criminal responsibility of States would divest that term of its meaning inasmuch as imposing a penalty on a State could not be expected to have any real deterrent effect. The view was also expressed that incriminating the State implied complicity by the mass of the people in the activities of their rulers and that the concepts of joint responsibility between

the nation and the State and of complicity of the mass of individuals, particularly in starting a war, were too fragile a foundation for the criminal responsibility of States.

106. The question of the penal consequences of the hypothetical concept of the criminal responsibility of States was also raised. In that connection the view was expressed that even though most sanctions provided for by international law comprised to a variable extent some sort of punitive element, such sanctions were outside the scope of penal law, because they were imposed not with a view to punishing the offender but in order to compel him to comply with international law or to restore damage, the consequence being that, since penal sanctions did not apply to States, the idea of penal State responsibility would be an aberration.

107. Several of the delegations in question further stressed that the notion of the criminal responsibility of States did not seem to be realistic in view of the structure of international society and the characteristics of international law. In that connection the view was expressed that any development of the notion of criminal responsibility of States could be counter-productive in an unintegrated international society where the principal actors were sovereign States and where the application of international law depended on consent and acquiescence, and that it would be unrealistic to attempt to institute criminal proceedings against States or to believe that a State would agree to go before an international criminal tribunal when it was alleged to have committed an international offence. It was pointed out that since very few States had accepted the compulsory jurisdiction of the International Court of Justice for the settlement of disputes involving classical breaches of international law, it was unlikely that any State would be willing to surrender any of its officials for trial before an international criminal tribunal for something so emotionally charged as an international crime: the exercise of an international jurisdiction over officials was possible only when the offending régime was replaced by another régime as a result of defeat in war or civil commotion.

108. Also referring to the present stage of development of the international society, some delegations stressed that attempts to construct notions of the criminal responsibility of a State were far more likely to lead to excuses for breaches of the peace than progress towards a more orderly world in which there was a genuine, functioning international community to which States increasingly yielded aspects of their sovereignty and that progress towards a better world could be achieved only by strengthening and building on existing institutions by yielding manageable portions of freedom of action to the community's control and judgement. In that connection the view was expressed that the assertion in paragraph 54 of the Commission's report that failure to recognize the State as a subject of criminal law would simply mean allowing offences such as aggression or annexation to go unpunished was factually and legally incorrect inasmuch as international law already provided a variety of options to deal with the most serious transgressions by States of their international obligations. Attention was drawn in that connection to the whole range of measures of a coercive or semi-coercive nature, which could be taken by the Security Council and which, although not penal as such, could be used to restrain or penalize a guilty State and the remark was made that States which did not respond to the Charter would be unlikely to respond to a code of offences.

109. Another argument which was adduced by some of the representatives in question against the inclusion of the concept of the criminal responsibility of States in the Code related to the ongoing work of ILC on State responsibility and to the need to minimize overlapping in substance between different codification projects. One representative observed in that connection that crimes against the peace and security of mankind were often at the same time conduct for which a State was responsible under the rules of public international law governing the relationship between States. He remarked that under article 19 of part one of the ILC draft articles on State responsibility, States could commit internationally wrongful acts which constituted international crimes and that the legal consequences of such crimes were supposed to be elaborated in that draft. In his opinion, therefore, there seemed to be no reason why some of those legal consequences should also be dealt with under the Code of Offences against the Peace and Security of Mankind. Another representative stated that, rather than multiply debates on State responsibility it would be better to deal with the matter as comprehensively as possible under the specific item without ruling out the possibility of later incorporating into the draft Code offences directly attributable to States if progress on the subject of State responsibility made that appear useful or desirable. Also referring to the ILC draft articles on State responsibility, one representative recalled that a breach of an international obligation which constituted an internationally wrongful act could be either an "international delict" or, if the breach was of an obligation essential for the protection of fundamental interests of the international community, an "international crime" a concept which therefore involved an objective element (the breach) and a subjective element (the recognition by the international community as a whole that the breach constituted a crime). He further observed that since, in paragraph (7) of its commentary to article 19, the International Law Commission had stated that the distinction between delicts and crimes was not purely descriptive, but normative, resulting in the application of different régimes of international responsibility, and since, in paragraph (6) of that same commentary, the Commission had accepted the view that general international law provided for two completely different régimes of responsibility, one applying in the case of a breach by a State of one of its obligations whose fulfilment was of fundamental importance to the international community as a whole, and the other applying in cases where the State had merely failed to fulfil an obligation of lesser importance, there could be no doubt that crimes against the peace and security of mankind were subject to a special régime with regard to both substantive and procedural rules. In the view of that representative, it was possible either to deal in the Code with all the legal consequences of crimes against the peace and security of mankind, establishing besides sanctions against individuals, sanctions against States, or to limit the scope of the Code to sanctions against individuals, leaving the definition of sanctions against States to the draft articles on State responsibility. In his opinion either solution had its logic and each would be theoretically acceptable but the second would be preferable. Another solution which was offered was that the draft Code should establish criminal responsibility in relation to individuals, and sanctions in relation to States. Also commenting on the arguments derived from article 19 of the ILC draft articles on State responsibility, some of the delegations opposing the inclusion of the concept of the criminal responsibility of States in the draft Code recalled that they had entered the strongest reservations in relation to that provision, which States had not approved and which, in their opinion, did not reflect positive international

law. One of those delegations stressed that, in any case, the commission had been careful to point out, in formulating article 19, that its contents had nothing to do with the international criminal responsibility of individuals, much less of States.

110. Some of the delegations opposed to the inclusion in the Code of the concept of the criminal responsibility of the State urged the International Law Commission to be guided by extreme caution and to take a prudent and realistic approach. They pointed out that the 1954 draft which the International Law Commission had been instructed to review was based, in accordance with the mandate contained in General Assembly resolution 117 (II), on the notion of criminal responsibility of individuals and groups, which, those delegations observed, was at the heart of the Charter of the United Nations and the judgements of the Nürnberg and Tokyo Tribunals.

111. Referring to the trend to give the draft Code a broader scope ratione personae based on recognition of international criminal responsibility not only of individuals but also of States and other entities (national movements, armed groups, etc.) as new subjects of law in the criminal area, they pointed out that such an approach would not conform to the previously accepted norms of international law and that the existing international legal order was based on the interaction of sovereign States and on co-ordination among equal subjects of international law - which was why there were neither supranational penal institutions nor centralized organs for the implementation of their decisions: in their opinion it was practically impossible for the courts of one State to start penal proceedings against another State owing to the principle of State immunity, based on State sovereignty, and one could hardly envisage that a State accused of having committed an international crime could be forced to recognize the criminal jurisdiction of an international judicial institution.

112. While acknowledging that international crimes directed against the fundamental interests of mankind, such as the maintenance and safeguarding of peace, always entailed the responsibility of States, since they could not be committed unless States took part in their preparation and organization, they stressed that such crimes were always committed by particular persons so that their commission entailed two different forms of responsibility: the responsibility of the State and the criminal responsibility of individuals. Elaborating on those two forms of responsibility, one representative stated that the principle of the international responsibility of States meant that a State would incur primarily political and material responsibility for the commission of such crimes and that States were obliged to prevent them and take all necessary measures in accordance with the United Nations Charter and international law against such crimes, while the principle of the criminal responsibility of individuals meant that States must take criminal proceedings against persons committing such crimes. He observed that one feature of criminal responsibility was that individuals who committed crimes against the peace and security of mankind became subject to the norms of international law and to the jurisdiction of international and State tribunals, as specified, for instance, in article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid. Thus, he went on to say, the draft Code should reflect the international legal instruments which developed the principles of individual criminal responsibility for war crimes and crimes against

humanity, including the Charters and judgements of the Nürnberg and Tokyo Tribunals, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (General Assembly resolution 3074 (XXVIII)).

113. Attention was further drawn by the representatives in question to the need for a clear and conceptual delineation of the sphere of the draft Code from that of State responsibility. In their view the indispensable cohesion of State responsibility for wrongful acts could be fully preserved only if the draft Code was limited to individuals alone, since making international criminal responsibility attributable to States was not only without foundation in international law but might also lead to the creation of two overlapping systems of responsibility of States, one under public international law and another under international criminal law. In that connection, the suggestion was made that in order to establish a link with article 19 of the draft on State responsibility while preserving the independent character of both drafts, there could be included in the draft Code a provision to the effect that the legal stipulation of criminal responsibility of individuals who had committed international crime did not cover or annul the responsibility of the State concerned. In response to the concern of some members of the Commission that failure to recognize the State as a subject of criminal law would simply mean allowing grave offences to go unpunished, it was recalled that under contemporary international law, in the case of acts constituting a threat to or a breach of the peace or acts of aggression, sanctions could be imposed on a State, under Chapter VII (Articles 39-51) and other provisions of the United Nations Charter, and the remark was made tht the preventive and deterrent role of the proposed Code would be played not through its influence on the anonymous collection of individuals that constituted a State, but mainly through its influence on the consciousness of particular individuals who took decisions, including heads of State and responsible government officials, as to the criminal and punishable character of the acts concerned.

114. On the question whether the Code should be extended to subjects of international law other than States, some representatives took a positive stand while others felt that it would be preferable at this stage to await further development of the law so far as the international criminal responsibility of such subjects as international organizations were concerned.

115. In view of the divergence of views referred to above, and in the interest of progress and consensus, some delegations suggested considering the possibility of holding the decision on the issue in abeyance until it could be seen how much progress could be made under the State responsibility item in attributing criminal responsibility to States. They warned, however, that such a course of action, while it might serve as a spur for expediting progress generally on that item, should not serve as an excuse for indefinite delay on the draft Code, but only as a temporary practical expedient to get over the problem.

3. Comments on the question of implementation of a draft code of offences

116. With regard to the question of implementation of the Code, a number of representatives commented on the content of paragraph 69 (c) of the ILC report in which the Commission sought guidance from the General Assembly whether its mandate should be interpreted as extending to the preparation of a statute of an international criminal court and, if so, whether such jurisdiction should be competent with respect to States or with respect to individuals only. Various views were expressed on that question. Some representatives felt that the Commission's mandate should not include preparation of a statute. Others held the opposite view. Still others, some of them being in favour of an international criminal jurisdiction, favoured deferring until a later stage decision and subsequent work on the preparation of the statute of such a jurisdiction.

117. Several arguments were adduced against including in the mandate of the Commission the preparation of the statute of a competent international criminal jurisdiction. It was recalled in that regard that the General Assembly, in its resolution 36/106, had invited the Commission to resume its work and review the draft Code it had prepared in 1954, taking into account developments that had occurred since then. It was pointed out that the 1954 draft had not included any control mechanisms, and none had since been developed. That being the case, it was felt that the institution of an international jurisdiction did not come within the Commission's mandate.

118. Some representatives could not agree with the proposal to prepare the statute in question and categorically opposed the creation of an international tribunal on the grounds that the idea of a supranational criminal tribunal having jurisdiction over sovereign States was deeply flawed and was aimed essentially at frustrating work on the draft Code, since it had been clearly established that the idea of creating supranational judicial bodies or procedures would not gain the approval of all States. It was also pointed out that in that regard the question of an international criminal jurisdiction had sensitive political implications and that the sovereign States might not yet be ready to accept such a jurisdiction.

119. The feasibility of the establishment of a permanent international jurisdiction was also questioned on the grounds that it would be an extremely lengthy and complex process and that all international efforts in that direction had thus far failed. It was therefore recalled that when, in 1937, the League of Nations had adopted two conventions, one for the prevention and punishment of terrorism and the other for the creation of an international criminal court, only one State had ratified the former and no State had ratified the latter. It was hardly thinkable, it was stressed, that the situation would improve under current international circumstances.

120. One representative, while expressing skepticism over the establishment of a competent international criminal jurisdiction for individuals (the problem of criminal jurisdiction with respect to States, in his view, was a minor one, since States were not criminally responsible for internationally wrongful acts) observed that although a code unaccompanied by a competent criminal jurisdiction would be

ineffective, many practical obstacles would have to be overcome, such as possible competing claims of competence since the national State could also exercise criminal jurisdiction. For that reason his delegation joined those who would not recommend the drafting of rules pertaining to such a jurisdiction.

121. Some representatives who spoke against including in the Commission's mandate the preparation of the statute of a competent international criminal jurisdiction felt that the view that without a competent international criminal jurisdiction such a document would not be effective was fundmentally incorrect and stressed that a code without specific provisions for its implementation would still be a useful instrument for maintaining peace and security. It was noted that the creation of an international criminal court was not the only way of solving the problem of international criminal jurisdiction, and that the existing criminal jurisdictions should be competent to try offenders. It was pointed out in that regard that if the international community did not appear ready to accept the establishment of an international criminal jurisdiction, responsibility for enforcing the draft Code could conceivably be attributed to national courts. It was stressed in that connection that once the crimes had been defined and the penalties for them had been set, the international community could decide that application of the Code should be entrusted to national courts. Several representatives felt that guidance could be drawn from recent conventional régimes of similar type. Specific reference was made to the system followed under two existing international instruments, the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid. It was felt that such a solution would be more realistic than the establishment of an international criminal court which would be doomed to failure from its very inception.

122. Speaking in favour of the implementation of the Code on a national level, it was pointed out by one representative that as far as criminal matters were concerned, international law currently operated through the judicial systems of its subjects, namely, States. The concept of the indirect responsibility of the individual - whether a government official or a private individual - introduced through the creation of an extraordinary jurisdiction of States was not new and, in that connection, he referred to article 129 of the Geneva Convention relative to the Treatment of Prisoners of War. Following the same pattern, the international community had already adopted other conventions aimed at combating the hijacking of aircraft, attacks on internationally protected persons and, most recently, the taking of hostages. The approach adopted in those conventions had not been to define crimes to be judged by an international court or to lay down rules on State responsibility, but to harmonise national laws and intensify international co-operation for the repression of prohibited activities, with a view to ensuring that individuals who committed specific offences were brought before competent courts of national jurisdiction and suffered penalties appropriate to the seriousness of their offences. In his view, therefore, any future code should impose upon States the duty to enact the necessary legislation providing effective penal sanctions for individuals - whether private individuals or individuals acting as organs of the State - who committed the offences defined in the Code. A distinction should nevertheless be drawn between acts committed by private individuals (such as hijackers and mercenaries) and those perpetrated by individuals representing their Government (such as acts of aggression and war

crimes). That distinction would be important when it came to determining the penalties to be imposed. For example, in the second case, a combined sanction might be envisaged, a penal sanction could be imposed on the individual and the author State could be condemned to pay damages and to give assurances that such acts would not be repeated. In that connection a view was expressed that the most realistic solution lay in applying both national and international jurisdiction. Consequently, it was felt that it could be established in the Code that States were bound to enact the necessary legislation specifying cases where recourse to ad hoc international tribunals might be contemplated. The idea of the possibility of establishing ad hoc international tribunals for individuals when the need might arise was supported by several representatives who, among others, expressed the view that it would be advisable to set up special jurisdictional institutions, similar to the Nürnberg and Tokyo Tribunals, with penal jurisdiction over individuals only.

123. On the other hand, a number of representatives shared the prevailing opinion in the Commission regarding the need to establish an international criminal jurisdiction. Several representatives held that an international criminal jurisdiction was essential if the rules of law established by the Code were to be effective. Some of them considered the establishment of an international criminal court as a sine qua non for a workable and effective international code. Several representatives highlighted a close link between the drafting of the Code and the establishment of an international criminal jurisdiction and felt it essential that the Commission should prepare a draft statute of such jurisdiction. It was stressed in that regard that it was imperative to establish a special jurisdictional body to deal with cases in its own field of competence and to give it mandatory jurisdiction.

124. It was stressed by one representative that th implementation of a code could not be left to national courts. That, in his view, would be highly imprudent and dangerous since no matter how objective the national court might be in seeking to apply the Code, it would inevitably be argued that justice had not been done or had not been seen to be done. Therefore it was felt that the only feasible alternative would be an international criminal court. An international penal code which could not be enforced impartially and objectively would be worthless. Logic therefore dictated that if the international community was seeking to elaborate a code of offences against the peace and security of mankind it should, at the same time, ensure that such a code was capable of impartial and objective applications and enforcement. In that connection it was suggested that account should be taken of the fact that the most important reason for drawing up a code as an international instrument was that the offences it covered were likely not to be adequately punished on the level of national jurisdiction. Perhaps the most significant provisions of the 1954 draft Code were those laid down in articles 3 and 4 thereof. The plea of exercise of governmental authority and the plea of superior orders often prevented adequate punishment of the offender within the judicial system of the State concerned. Many of the most serious offences were committed for the sake of a so-called public interest. That was not to say that the Code should be expressis verbis limited to politically motivated crimes. The main reason for stipulating international criminal responsibility was to ensure the prevalence of the fundamental interests of mankind as a whole over what was considered vital by and for a particular group.

125. One representative, while supporting the establishment of an international criminal jurisdiction, pointed out that enforcement of a code should also be possible by action of national courts through inter alia application of the principle of universal jurisdiction. He, however, stressed that it was not satisfactory to leave implementation exclusively to national courts, since that might in many cases result in arbitrariness or in failure to take effective action against offenders. For those reasons, several representatives believed that the Commission's mandate should be regarded as extending to the preparation of a statute of an international criminal jurisdiction.

126. There was, however, a difference of opinion among representatives who spoke in favour of the preparation of the statute of a competent international criminal jurisdiction as to whether such jurisdiction should be competent with respect to States or to individuals only.

127. A number of representatives felt that a competent international criminal jurisdiction was necessary for individuals and for States. A view was also expressed that if the Commission was determined to continue to work on the question of the criminal responsibility of individuals, it was at the same time to elaborate an international criminal court with jurisdiction over natural persons. It was felt important, as one representative put it, to identify the legal consequences of offences committed, whether their perpetrators were individuals, legal entities or States.

128. On the other hand, several representatives stressed that the Commission's mandate should include preparation of the statute of a competent international criminal jurisdiction for individuals only. One representative considered that it would be more realistic if such a court was competent only with respect to offences of individuals, about whose international criminal responsibility there had been no doubt since the Nürnberg and Tokyo Tribunals. It was felt that the creation of an international criminal court was the ideal solution to the matter of implementation and one that could further the effectiveness of international law if the international jurisdiction was related to individual responsibility.

129. There was a large body of opinion to the effect that the Commission should leave the question of the status of an international criminal jurisdiction until a later stage. Various arguments were brought forward in order to justify such a solution. It was stressed that the question of implementing the Code was fairly complex because it would be extremely difficult to establish an international criminal jurisdiction at such a level. Although there had been constructive suggestions that international jurisdiction might be exercised at the national level and that a specific criminal tribunal might be set up for specific cases, the possibility of dividing the process into two stages and leaving the question of jurisdiction for later should be considered. It was further pointed out that the task of the preparation of a draft statute for an international criminal jurisdiction could be performed at a later stage. The Commission would then be in a better position to tackle the question of jurisdiction in a manner that would balance the need for effectiveness with the need for political realism. Furthermore, several representatives, while being in favour of the preparation of the statute of an international criminal jurisdiction which, in their view, would

be a logical complement to the draft Code, felt, however, that in order to make the task of the Commission not too complicated, the drafting of the Code itself should be given priority over the drafting of any statute for such a jurisdiction. Other reasons which were mentioned related to the existing State practice, the existing state of international relations and the difficulty in achieving a determined support of all States for an international criminal jurisdiction. In any case, it was stressed that ILC should phase its work, deferring until a later stage its consideration of the preparation of the statute of such jurisdiction and concentrating for the time being on the identification and development of rules and norms on the subject. In the view of several representatives, some of whom did not contest the need for an international criminal jurisdiction, for both practical and tactical reasons that issue should be postponed until the problem of the Code itself had been solved. It was added by other representatives that only after that phase had been completed should the Commission turn to the delicate and difficult task of making recommendations on the mechanism of implementations. Such decision, it was felt, would have to be settled through the collective political will of Member States.

130. Finally, on this question a view was expressed that the Commission, after completing the elaboration of the Code, should be entrusted with the task of deciding on the jurisdiction for the implementation of the Code. Another representative agreed in this regard with the Special Rapporteur's suggestion that consultation should be held on whether to elaborate a draft statute for an international jurisdiction as a supplement to the draft Code.

131. Another aspect of the implementation of the Code which was discussed related to the penalties and the question whether they should accompany a code. In that connection, a number of representatives expressed an agreement with the view of the Commission contained in paragraph 68 of its report that the draft should tackle the problem of penalties. Several arguments were adduced in favour of that idea. It was pointed out that the draft Code should lay down penalties commensurate with the crimes committed, otherwise it would become no more than a descriptive document that did not meet the objectives sought in its preparation. It was also stressed that the draft Code should not fail to provide for penalties, because only thus would it be possible to impose responsibility on those who, by their undignified deeds, had impaired the good which the law was meant to protect. Similarly, the determination of the penalties to be applied in the event of breaches was considered essential in order to guarantee the effective application of the Code as an instrument for the prevention and punishment of offences against the peace and security of mankind. In the view of one representative, the determination of a scale of penalties would be a natural extension and essential supplement to the draft Code and, in the view of another representative, it was impossible to draw up a perfect code without inter alia a penalty system. Last but not least, it was stressed that the system of appropriate penalties applicable to crimes against the peace and security of mankind would enhance the deterrent role of the Code.

132. While supporting the idea of establishing a system of penalties, some representatives felt that the penalties to be imposed should take into account the special nature of States. It was pointed out in that respect that it would be necessary to differentiate the types of punishment applicable to States and to

individuals, especially in view of the fact that certain penalties, such as imprisonment, could be not be applied to the former. On the other hand a reference was made to the United Nations Charter which spoke of economic sanctions and the severance of diplomatic relations. Similarly, it was stressed that in the case of collective persons the system of penalties would have to be made to fit their specific character, given the particular characteristics that differentiated them from individuals.

133. Other representatives, however, opposed criminal penalties encompassing States. It was pointed out that if the Commission deemed it appropriate to proceed to incorporate in the Code articles concerning sanctions, the imposition of penalties should be limited to individuals who have committed offences against the peace and security of mankind. The best solution for that problem was seen by another representative in establishing in the Code the obligation for States to enact the necessary legislation providing effective penal sanctions for individuals committing the offences defined in the Code. Such a solution, it was added, would, to some extent, resemble the concept of imposing penalties under the Nürnberg system, which had provided punishment according to the laws of those countries where crimes had been committed. Some doubts were furthermore expressed as to whether the appearance of a State before an international criminal court and the possibility of the court's imposing a penalty upon it would add to the effectiveness of the system; for it was almost unthinkable that such a court could condemn the individual perpetrators of crimes against the peace and security of mankind without at the same time condemning the State in whose name or with the active or passive assistance of which the crime had been committed, and such condemnation was in itself a "sanction". The actual application of other sanctions against a State necessarily involved the action of other States. It was felt therefore that that type of enforcement had a special character and could be dealt with in the framework of the elaboration of rules relating to State responsibility.

134. The suggestion was also made that a distinction be drawn between private individuals and individuals representing their Government and that, in the second case, a combined sanction involving a penal sanction for the individual and a condemnation to pay damages for the author State might be envisaged.

135. With respect to the question of the determination of penalties, a view was expressed that penalties could be determined by means of a gradation of offences, since some were more serious than others. It was also stressed in that regard that the legal consequences of violations committed should be different, depending on their nature.

136. With reference to the proposed Code, several other elements were mentioned as relevant to its implementation. Attention was drawn by one representative to the need for elaboration of a procedure for the acceptance and evaluation of evidence. That view was shared by another representative, who felt that special attention should be given to the evidentiary stage, including the assessments of admissible evidence. Some representatives felt that the issues which should be dealt with in the elaboration of the Code included the choice of jurisdiction and the extradition of offenders. In the latter case, one representative pointed out difficulties with the question of extradition raised by the concept of an international criminal court since the extradition of nationals from his country to a foreign jurisdiction is legally not possible.

4. Comments on the procedure to be followed in the consideration of the item

137. With regard to the procedure to be followed, a number of representatives stressed that the importance of the proposed Code from both the political and the legal points of view, as well as its special topicality, fully warranted giving the item high priority both in the Commission's future programme of work and in the Sixth Committee. The view was also expressed that the International Law Commission should act with the necessary diligence in order to conclude the undertaken task. It was felt in that regard that the General Assembly should call on the Commission to expedite its work on the draft Code, especially in view of the fact that enough material on the topic was available to it. Nevertheless, it was recognized that the Commission had a difficult task before it, but it was believed that it could surmount the difficulties and draw up an appropriate text on crimes against the peace and security of mankind. Hope was expressed in that regard that the Commission would consider simultaneously and in a co-ordinated manner the draft Code and the draft articles on State responsibility, particularly part two of the latter draft, which defined the consequences of an internationally wrongful act.

138. Sharing this approach, several representatives considered that because of both the political and the legal significance of the item, it should again be considered separately at the next session of the General Assembly. In that connection it was said by one representative that certain countries had tried to obstruct the work of formulating and approving a code of offences against the peace and security of mankind in order to be able to pursue with impunity their policies of interference and domination which had brought the world to the brink of a nuclear war. The awareness of that imminent danger had led an increasing number of countries to insist on the need to approve the Code of Offences and the International Law Commission had accorded priority to that topic in its five-year programme, which he fully supported.

139. Several other representatives expressed the view that the draft Code should not be accorded higher priority than any other item on the agenda of ILC. Similarly, they saw no need to retain that question as a separate agenda item and felt that that item could be discussed in the Sixth Committee under the general heading of the report of ILC. Those representatives believed that the Commission should be given the opportunity to make progress on the topic before it was dealt with substantively by the Committee. The latter should take no further action on the topic until it had seen the results of the Commission's work. The draft Code would of course be discussed by the Committee each year during its consideration of the Commission's report. That would in no way diminish the topic, which, as the Commission was fully aware, was of great significance to many States.

C. JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

1. Comments on the draft articles as a whole

140. Many of the delegates who spoke on that topic expressed their satisfaction with the progress made by the International Law Commission, with the contributions of the Special Rapporteurs and with the draft articles so far provisionally adopted. Many representatives, however, raised reservations relating both to opposing schools of thought on the fundamental issues involved and particular draft articles. Most of the representatives acknowledged that the subject matter was legally complex and politically sensitive, which helped explain the difficulties encountered by the Commission in its drafting work.

141. Two schools of thought on the issues involved, both of which were represented in the Commission and which reflected fundamental differences of opinion, were discussed at length. According to one school, the principle of State immunity admitted of no exceptions, save those arising from the express or implied consent of the State entitled to assert immunity. According to the other, the principle of State immunity applied only so far as to ensure that the courts of one State did not pronounce upon the validity of acts performed by another State in the exercise of its sovereign authority.

142. It was also said that the presentation of the Special Rapporteur's fifth report marked a turning-point in the consideration of the topic, since the three new exceptions to State immunity proposed in draft articles 13 to 15 dealt not with certainties but with much vaguer matters.

143. Many delegates spoke in favour of absolute State immunity as a well-established theory of international law. It was said to be of primary importance for both theoretical and practical reasons. The view was expressed that any proposed solution to the problem of achieving greater uniformity in the field of jurisdictional immunities of States and their property must not depart from the fundamental principles of international law, particularly the principle of the sovereign equality of States, which was based on the rule par in parem imperium non habet. That rule applied not only to actions brought directly against a foreign State but also to indirect actions. The draft articles should be based on the clear assumption that State immunity constituted an independent, universal principle of international law and not an exception to territorial jurisdiction. That preference involved the direction of codification and therefore that question had to be clarified first. A vast majority of States recognized State immunity as a well-established principle of international law. Even those which had gone over to the restrictive doctrine could not totally deny the principle, since it was based on the sovereign equality of States, which had been enshrined in the Charter of the United Nations as a peremptory norm constituting the corner-stone of contemporary international law. If the existence of a general principle of State immunity was admitted, as seemed to follow from draft article 6, the fact that certain States derogated from that principle in their mutual relations under a treaty in no way cast doubts on the general principle as such. If it was true, on the one hand, that the codification of the

rules relating to State immunity was not intended to exclude the conclusion of similar treaties between States, it was out of the question, on the other hand, that the entire international community should be forced to adopt as generally applicable what was appropriate only for a restricted group of States. The draft articles should therefore be revised so as to reflect the view that the jurisdictional immunity of States was a general rule, subject only to a few rare exceptions.

144. Concern was raised with regard to the developing countries under the theory of restricted immunity. The argument that the principle of restricted immunity provided a two-way street was considered unjustified since most commercial transactions were carried out in developed industrial States and most proceedings were initiated there, whereas the States involved in those proceedings were often developing countries. In reality, the latter could only be defendants in the courts of those developed countries which had adopted restricted immunity. They were thus threatened with compulsory jurisdiction and even compulsory execution, with or without their consent - an unjust situation which could only cause tension and undermine normal State relations. The secretariat of the Asian-African Legal Consultative Commission had pointed out that it was extremely doubtful whether the trend towards the restrictive doctrine of State immunity was in the interest of developing countries and whether it should be reflected in the codification being carried out by the International Law Commission. Furthermore, it was pointed out that, although certain States had recently embodied a restricted concept of immunity in their national legislation and the practice of developing countries did not indicate a firm position on the subject, it was difficult to imagine that many States would support a trend in which they were not participating. Moreover, the developing countries had some reason to fear possible excesses in legal proceedings instituted against them, even though the thesis put forward by the Special Rapporteur that a suit for reparation of damages did not necessarily call in question the sovereignty of a State seemed to constitute a viable point of departure. The hope was expressed that the Commission would pay serious attention to the opinions and recommendations of the many developing countries, so that the draft articles presented would truly be in the interests of the general membership of the international community. There was also the view that the draft articles relating to exceptions to State immunity were based on the restricted doctrine and were consistent with the legal practice of a comparatively small number of capitalist States. The concept of functional immunity of States was not only incompatible with the principle of sovereign equality of States, but also discriminated against a whole socio-economic system, the existence of which had been recognized in many international instruments.

145. Attention was also drawn to the argument that, while a general principle of State immunity was widely recognized in the practice of States as an undisputed corollary of the principle of sovereign equality and independence of States, the concept of State immunity itself was a relative principle. It was not a principle admitting of no exceptions or an imperative norm of international law (jus cogens) from which no State could depart but, rather, a principle based intrinsically on the refusal of a State to consent to the exercise of jurisdiction by a court of another State. However, although the notion of consent in that particular

connection had often been a decisive factor in the granting or refusal of immunity to a State, it had less relevance than the more absolute rule of the immunity of State property from attachment and execution, which in certain areas should not admit of derogation. Just as there was an overriding principle of permanent sovereignty over natural resources, the developing countries should be protected from the enforcement of any agreement to waive the immunity of their diplomatic or consular premises from attachment and execution. There was a risk that diplomatic relations among States would suffer it private firms or individuals could, in asserting their contractual rights, ask a court to freeze or seize the bank account of an embassy or a consulate, thereby preventing them from exercising their official functions. It might be necessary, with a view to promoting harmonious international relations, to adopt a more absolute rule, approaching jus cogens, designed to protect the developing countries from such harassment, which would impede the functioning of their diplomatic missions.

146. In favouring the restrictive theory on State immunity, some representatives noted with satisfaction that the work on the topic of jurisdictional immunities of States and their property was based entirely on the fundamental distinction between acta jure imperii and acta jure gestionis. It was pointed out that the widening functions of the State had made the problem of State immunity more complex. A working distinction had therefore to be drawn between activities of States performed in the exercise of sovereign authority, acta jure imperii, which were covered by immunity, and other activities in which States were engaged like individuals, acta jure gestionis. The fact that each State was both a granter and a recipient of State immunity should greatly facilitate the search for acceptable solutions. Jurisdictional immunity was thus a two-way street since all States were both bound by and entitled to it. The Special Rapporteur had rightly identified a restrictive view of sovereign immunity; in an increasingly interdependent world, where complex relations existed between government agencies and private entities, a restrictive view of State sovereignty ought to prevail. Despite the bogus concern expressed about developing countries in particular, no Government faced the slightest danger from such an approach and the limitation of immunities of States and their property from the jurisdiction of another State's courts should allay any alarm. It did not serve the aim of State sovereignty to refuse to recognize when a State was acting in a sphere inherently within its competence (jure imperii) and when it was undertaking a commercial or private law activity (jure gestiones). Attempts to view State commercial activities differently from those of the private sector did not accord with the pluralistic nature of the contemporary world and would not enhance respect for the immunity of States concerning acts jure imperii.

147. Other representatives, who spoke in general in favour of the theory of absolute immunity, voiced their objections to views stipulating a trend towards the concept of restrictive or functional immunity of States. It was pointed out that the concept of restricted immunity ran counter to the principle of the sovereign equality of States laid down in the United Nations Charter. Its proponents claimed that a State could act in various capacities, depending on the functions being performed. They wanted to establish a distinction between the public and private activities of a State. In their opinion, States were assimilated to private individuals when they concluded commercial transactions and, on that basis, should be deprived of immunity. There was absolutely no justification for considering

that, when carrying on economic activities, the State was acting not as a sovereign but as a private individual. States were single entities and could not be broken up into parts. The economic functions of a State were no less important than its other functions and States carried on economic activities as the holders of public power. In doing so, they possessed all the attributes of sovereignty, including immunity from the jurisdiction of another State and its courts. The distinction between sovereign and non-sovereign acts of States was unscientific and had been the subject of serious international disputes. In the words of another representative, the traditional distinction between acts of public authority and acts performed by a State jure gestionis, under the same conditions as an individual and by procedures of private law, was quite inadequate as the criterion for immunity and the legal basis for exceptions. The demarcation line between State and private activities was becoming harder to draw and the Special Rapporteur needed urgently to find more precise criteria which were better suited to current situations.

148. It was also said to have become clear that there was no real controversy over the principle of absolute sovereignty of a State over its own territory and that another State was permitted to carry out an activity or perform an act therein only with the express or implied consent of the territorial State concerned which was supreme and uncontested within its own territorial confines. It could also legislate with full effect within its own territory and in certain circumstances, with a limited extraterritorial effect. If a State decided to enact legislation restricting the granting of jurisdictional immunities to foreign Governments in respect of certain areas or certain types of activities within its own territory, such action could be construed as proof of a lack of consent on the part of that State to the carrying out of such activities or the performance of such acts by foreign States within its territory, unless those foreign States submitted to its jurisdiction. Far from promoting the harmonization of divergent State practice, such action could in fact perpetuate such divergences, while preventing any clear trend from emerging.

149. The view was expressed that the inclusion of the notion of waiver or implied consent might be an acceptable price to pay for generally tolerable conclusions - although legal fictions were hazardous and should be avoided where possible. Caution was also urged against an excessive use of presumptions of waiver of immunity.

150. But there was also the view that many countries, including the socialist countries, in strictly upholding the full and absolute immunity of States, considered that such immunity could be denied and particular matters subjected to the jurisdiction of a foreign court only when the State had voluntarily given its consent. Such consent or volition of the State concerned could be acknowledged either expressly or by implication in treaties or commercial contracts. The conclusion was drawn from evolving international legal practice that, in certain circumstances, jurisdictional immunities of States could be waived by mutual agreement or by an ad hoc decision on the part of a State, expressed either in a declaration or through an action implying a waiver of immunity. The view was expressed that for the court of one State to deny jurisdictional immunity to another State or its Government without its consent, on the basis of its own

internal law, would appear to violate the principle of the sovereign equality of States. The drafting of a document excluding vital spheres of State activity from the scope of application of the principle of jurisdictional immunity of States without that explicit consent in each particular case was therefore inappropriate.

151. It was observed that draft articles 12 and 15 of part III constituted in a sense exceptions to the principle of State immunity as elaborated in part II. Although those provisions could still be further improved, they had met with an appreciable measure of agreement in the Commission where an attitude of give and take had prevailed, leading to promising results. Another delegate, while referring to the general principle that a State was obliged to refrain from exercising jurisdiction against a foreign State, approved the inclusion of draft articles 10, 12 and 15 in the provisional text as such exceptional cases where the exercise of jurisdiction was admissible. It was said that provision should be made for exceptions which would make the principle viable in the modern world and would also take into account the private rights and interests of persons who had dealings with foreign States. Such exceptions should refer to cases in which the foreign State was not acting as a sovereign entity, but entering into transactions which subjects of private law could also have entered into.

152. It was emphasized that extreme caution must be shown in admitting exceptions, in order to avoid making the principle of State immunity illusory through an accumulation of exceptions. The tendency to expand the types and scope of exceptions could lead to such a limitation of State immunity as to reduce it to a sheer jurisdictional fiction. If adopted, draft articles 12 to 15 would erode the principle of the jurisdictional immunities of States and their property so that the results obtained would be the opposite of those sought by the International Law Commission. Furthermore, it was suggested that the provisions on exceptions to State immunity should be considered only after all possible exceptions which the Special Rapporteur had in mind had been formulated, so that their impact on the principle of State immunity could be thoroughly evaluated. It was also stressed that objective examination of political, economic and ideological realities did not allow restriction of the immunity of foreign States to go beyond exceptions arising from commercial activities.

153. Still other delegates expressing doubts about the general acceptance of the proposed exceptions either refrained from making comments pending further examination or regarded the notion of exceptions as inaccurate, but with willingness to keep an open mind on the matter for the time being.

154. Several representatives commented upon the Commission's study of national legislation, judicial decisions and treaty-making practice of States. This approach was supported by a delegate who said that the Commission should continue to request Member States to provide the necessary material to make its work on the draft articles less difficult. Although in the codification and progressive development of international law draft articles should not, in principle, be necessarily based on national sources, the subject of jurisdictional immunities, more than other subjects, did require that it should be so based. It was an area in which the relationship between municipal law and international law was directly relevant. It was also observed that the Commission had adopted an inductive method of work, basing its conclusions mainly on the practice of States as evidence of

customary international law on a particular aspect of the topic. It was important to note that since the topic was one of jurisdictional immunities of States and their property, it related intimately to the judicial practice of States rather than the practice of other State organs. In that connection, it was fundamentally from the jurisdiction of a court of law of another State that immunities were enjoyed. That clarification had been added in the revised version of draft article 1. That did not mean, however, that the executive and legislative branches of government had no say in the matter. State practice had shown that they had a significant, if not decisive, role to play in granting or denying jurisdictional immunity in regard to a sovereign State. Thus, the inductive method was not confined to an examination of the practice of courts of law, but might cover a study of governmental practice as reflected in the views of Governments, opinions of legal advisers to ministries of foreign affairs, and the treaty practice of a State relating to the exercise of jurisdiction by its judicial authority. The Special Rapporteur and the Commission, assisted by the Codification Division, had inevitably had to base their work on the replies of States to a questionnaire which had now been published in a United Nations document. 4/ Neither the Commission nor the General Assembly could be justly criticized for making references to the practice of selected States only. The reason why the Commission made references to the judicial decisions of only certain States was that no judicial practice existed in the other States in the area under consideration, owing to historical factors. Even though its precise scope was still unclear, the general principle of State immunity had been accepted in the practice of States since the second half of the nineteenth century, which was a time when, for obvious reasons, no distinction had been made, as it was today, between socialist and non-socialist legal theories and between the conflicting interests of the developed and the developing countries. Many Asian and African countries had initially not had any jurisprudence on State immunities since they had at the time not yet begun their existence as sovereign States, and it was against that historical background that developments in the law of immunities should be seen.

155. On the other hand, it was pointed out that there was a wide divergence of national legislation on jurisdictional immunities of States and their property. This diversity could become a cause of disputes between States. Any legal document on that question should duly reflect the existing practice of States with different social and economic systems.

156. It was also said in that context that the question of jurisdictional immunities was not only one of codification but also one of progressive development of international law. For many of its aspects, it was impossible to affirm the existence of a clear rule of international law which should be codified. The Special Rapporteur attempted in many cases to deduce the existence of such rules from the practice of States, judicial decisions and national legislation, but he was not always convincing. The materials at his disposal were in fact rather limited. Court decisions usually came from only a few countries in Europe and North America. The United States Foreign Sovereign Immunity Act of 1976, the United Kingdom State Immunity Act of 1978 and similar laws in a few other countries were the only legislative materials available and it would be imprudent to deduce from them the existence of generally accepted rules. Each situation had to be analysed more deeply before making any proposals.

157. It was also said that the national laws of certain major Western States and, under their influence, the laws of a very limited number of developing countries, as well as a number of international treaties touching upon the immunities of States, could not be interpreted as evidence of extension of the practice of exceptions to State immunity. The national legislation and court practice of a number of other States, including the socialist countries, had not been given sufficiently detailed study in the consideration of the problem. If the international legal instrument which might be adopted in that regard was to have any prospect of universal application, it would have to take full account of all existing practices. Unfortunately, the Special Rapporteur did not give the impression of having made a comprehensive analysis of the practice of different States and of having taken account of it in the latest report. He had not been able to derive a general indication of the trend of international law or of the position of the community of States. The inevitable outcome had been the wrong and one-sided conclusions contained in draft articles 12 to 15, dealing with the exceptions to the principle of State immunity. It was also emphasized that the Commission should take into account the views of the countries which had not yet developed any legal practice relating to the topic.

158. A few countries referred to their domestic legislation and Government practice relating to the topic under consideration. One representative was gratified that the approach taken by the Special Rapporteur on the jurisdictional immunities of States and their property paralleled in many respects the approach taken by his country in its domestic legislation. Another representative pointed out that legislation in his country dealt with the question of State immunity in great detail and explicitly enumerated exceptions to the jurisdictional immunity of a foreign State. According to his country's legislation, for example, all acts of missions and of State representatives carried out on behalf of a State were an expression of State sovereignty and bore the same characteristics as the State itself. It was also pointed out by another representative that the laws of his country provided that, in proceedings against a foreign State, a State authority or a State administrative agency or against a person acting in his country as a diplomatic representative or otherwise enjoying immunity from jurisdiction, the courts or other authorities of his country might not take jurisdiction unless jurisdiction had been expressly waived by the foreign State. The same rule was stated mutatis mutandis with regard to a decision rendered by a foreign court or other foreign authority in proceedings instituted abroad against his country. Furthermore, one representative stated that in the case of his country, the law of sovereign immunity from the jurisdiction of its courts was governed by a statutory provision whereby no foreign State could be sued in any court of law which was otherwise competent to try the suit, except with the consent of the central Government of his country through a certificate issued in writing by a Secretary to that Government. Consent to sue a foreign State could be given by the central Government where (a) it had instituted a suit in the court against the person desiring to sue it; (b) it traded within legal limits of the jurisdiction of the court; (c) it was in possession of immovable property situated within those limits and was to be sued with reference to such property or for money charged thereon, or (d) it had expressly or impliedly waived the privilege accorded to it. A foreign Government could also be sued, without the need to obtain the consent of the central Government, by a person as a tenant of immovable property owned by that foreign State. However, no decree could be executed against the property of any

foreign State except with the consent of the central Government. Basically, his Government had been granting absolute immunity to foreign States except in cases where reciprocity dictated otherwise. Even in cases where the statute allowed private parties to sue a foreign State or agency, his Government had been quite conscious of the need to respect the principle of sovereign immunity as far as possible and had always attempted to dissuade parties from taking a foreign State to its courts, by offering good offices and helping them to resolve amicably any disputes between them. However, it was learning by its experience in other countries and had begun to give the agencies of a foreign State the same treatment as its own agencies received from the State concerned. In view of the emerging trends, his Government intended to review its own legislative position and, in that process, would naturally look forward to the further enunciation of principles by the International Law Commission.

159. With regard to the scope of the draft articles, it was noted that with the increasing interdependence of States, it had expanded beyond its traditional framework. The Commission and the Special Rapporteur should be given every assistance to enable them to respond to the new conditions in which problems concerning jurisdictional immunities now arose.

160. A few delegates, with regard to the scope of the draft, referred to the question of jurisdiction of national courts. It was observed that the question of immunity, in keeping with the kind of immunity under consideration, did not arise in cases where such jurisdiction did not exist. A court might be without jurisdiction owing to factors other than State immunity, such as incompetence ratione materiae or ratione personae, the act-of-State doctrine or an excess of jurisdictional power ascribed to a court by legislation. Moreover, a State could, through legislation, provide for greater jurisdiction for its courts than was recognized internationally under the rules of private or public international law. There were rules attributing competence, such as the rules relating to forum prorogatum and forum non conveniens and the rules based on territorial, national and personal connections and on the direct effect in the territory of the State of the forum of damage suffered by that State. Whatever the rationale for its adoption, special legislation to expand the jurisdiction of a State's courts should not serve to attribute to a court jurisdiction that would otherwise not have existed, had the defendant concerned not invoked State immunity. There were still differences of opinion on many points, particularly concerning the areas or types of circumstances where immunity was to be accorded. Since that problem was closely linked to the internal administration of justice, the differences in legal systems also accounted for the differences in approach. In some systems, such as the common law system, a court having jurisdiction could refuse to exercise it, in accordance with the principle of State immunity. On ther other hand, in several countries with codified systems, such as the French-speaking African countries, including Zaire and Madagascar, it was inconceivable for a competent court not to exercise jurisdiction. In fact, the court had to exercise jurisdiction, and jurisdictional immunity was thus equated with lack of competence. Moreover, in French law it was difficult to distinguish between "immunité de juridiction" and "incompétence d'attribution", at least from the point of view of the practical results of those two concepts, if not from the point of view of their theoretical basis.

161. Furthermore, with regard to the question of jurisdiction, it was noted that the very title of the topic presupposed that there must exist in posse, if not in esse, a jurisdiction on the part of a court of the forum State from which immunity might, depending on the circumstances, properly be claimed. However, the Commission was not called upon to consider, much less to harmonize, the rules governing the exercise of jurisdiction by the courts of a State. Jurisdictional immunity operated as a plea in bar to prevent the institution or continuance of any proceedings that were properly within the jurisdiction of the courts of the forum State according to the jurisdictional rules applied by the courts of that State. The Commission must constantly bear in mind that its task was limited to the formulation of draft articles on jurisdictional immunities of States and their property.

162. It was becoming apparent that it was very difficult to establish rules on the immunity of States from jurisdiction, under a régime of restrictive immunity, without resolving the prior question of when a State had jurisdiction. Unless the Commission examined that question in more detail, it might end up establishing general rules on the jurisdiction of States in civil matters indirectly, as a by-product of the rather different objective of creating uniform rules on State immunity.

163. Several representatives commented upon the difficulties with the topic faced by the Commission. Although the progress might be slow and some might be tempted to think that the Commission should speed up its examination of the question, that view was not endorsed. Rather, it was emphasized that the Commission should continue its work on the topic with caution. It was said that failure to devise a widely acceptable set of rules would plunge the world into greater turmoil, especially as individual nations had started to adopt specific legislation tending to regulate the extent of State immunity and its limitations to suit their own purposes, thereby widening existing divergencies of opinion on the question and encouraging conflicting judicial decisions in practice. While legislation already adopted constituted useful source material, new legislation should await further crystallization of international practice and regulation by the international community. In that connection, consensus should be cultivated and considerable patience would be required to find solutions in areas where controversy still existed. States must bear in mind that each of them was in turn a granter and a beneficiary of immunity. Remaining difficulties resulted from divergencies in the political conception of the functions of the State and the conflict of immediate interests between countries with different economic, social and cultural structures. The interests of all States, regardless of size, level of development or economic or political system, should be taken into consideration in determining the extent of State immunity to be recognized on a world-wide basis or in deciding whether immunity should be accorded in a given set of circumstances or area of activity. At a later stage, State immunity in respect of property should be upheld, subject only to its being freely waived by express consent of a State, and only in respect of State property specially set aside for the payment of judgement debts, while public property such as diplomatic and consular premises should be beyond the reach of execution by local jurisdiction, whether or not there had been an express waiver of immunity.

164. It was suggested that a compromise solution, midway between absolute immunity and minimum immunity, would have to be adopted. It was said to be essential for the future success of the project that the Special Rapporteur should continue, as far as possible, to devise language and criteria that were sufficiently broad to accommodate variations in national legislation and case law on sovereign immunity and, at the same time, would help to reduce the gap and avoid disputes between those who admitted of no exception to the principle of State immunity, save with the express or implied consent of the State entitled to assert immunity, and those who espoused the doctrine of relative immunity. The hope was expressed that the Commission would avoid abstract arguments on principles and theories. It should take a pragmatic approach, weighing the positive and negative results of denial of State immunity and then deciding whether or not exceptions should be provided for in given cases. It was suggested that, in practice, the difference between the restrictive and absolutist approaches was perhaps not very important and the specific problems which arose could be satisfactorily solved. The question of jurisdictional immunities was precisely the sort of topic the Commission should be dealing with, since it was one in which tangible results should be attainable within a reasonable time.

165. On the other hand, the view was also held that the Commission's discussions on the topic gave little cause for optimism and that agreement had not been reached on certain important draft articles, such as draft articles 6 and 12. The reasons for the absence of agreement deserved to be analysed in depth. It was observed that the draft articles adopted on the basis of the Special Rapporteur's reports reflected widely held political and legal views. But the approach involved was not everywhere supported; in fact, views on the topic were polarized. The Commission would therefore have to consider whether or not there were real prospects for a successful codification. The Sixth Committee, in trying to follow its customary method of adopting a consensus approach, risked creating a completely false impression of underlying unanimity. In the past, such false impressions had been dispelled - for example, at The Hague in 1930 and at Vienna earlier in 1983 - when a conference of plenipotentiaries, which the General Assembly was not, appraised the results after national authorities had examined the political and legal aspects. Such a situation must be avoided if the codification work was to succeed. The Commission, it was said, had not yet faced up to the political obstacles involved. The Commission must re-examine its position and should state, in its next report, whether it thought that a set of draft articles susceptible of substantially unanimous adoption at a conference of plenipotentiaries could be prepared. Unless it thought so, doubts were expressed as to whether the General Assembly should encourage the Commission to work further on the topic. In the words of another representative, a consensus on a set of rules that fully covered the topic of jurisdictional immunities of States and their property seemed unlikely. The best that could be hoped for was a consensus on situations where the State had immunity, situations where it did not and a "grey area" of situations where the question was left for each State to decide according to its own approach.

166. The importance of the formulation by the Commission of draft articles on jurisdictional immunities of States and their property was underlined, for example with regard to their role in strengthening co-operation among States on the basis of equality under the law. It was said that the subject was one of the most important and complicated questions in contemporary international law, involving

not only the sovereign equality of States but also their immediate interests and the direction of the development of international law. There was said to be a need for harmonizing State practice through the conclusion of bilateral or regional agreements on areas in which laws conflicted, as well as through the adoption of uniform rules prepared by international bodies dealing with the unification of international private law, such as UNIDROIT.

167. The drafting of articles relating to exceptions was considered justified in order to place international law in a position to be able to arbitrate conflicting claims of States by not allowing individual national laws to be unilaterally enforced against other States and preventing that aspect of inter-State relations from being subjected to an uncontrollable application of the principle of reciprocity.

168. The aim of the Commission and the Sixth Committee should not be to add to the existing volume of litigation involving foreign sovereign States or their organs before domestic courts but, rather, to limit the possibility of bringing such lawsuits, particularly when they were brought with malicious intent, because permitting the prosecution of foreign States in any circumstances regardless of their immunities would unquestionably lead to chaos in international relations, particularly trade relations. It was perhaps in the field of jurisdictional immunities more than in any other that the call for the establishment of a new international legal order should be heeded, because the international community must make the necessary readjustments to bring about the progressive development of the relevant law. States must not be given complete and unfettered freedom to adopt legislation to suit their own particular interests and thus jeopardize the orderly conduct of international relations, peaceful diplomatic intercourse and friendly and good-neighbourly co-operation among States.

169. With regard to part IV of the draft articles, it was said that they would deal more particularly with State immunity in respect of State property or property in its possession or control from attachment and execution of judgement of the courts of another State. There appeared to be fewer differences of opinion about the nature of immunity from execution and attachment. The general principle of immunity from execution and attachment could be stated with relative ease in absolute terms, subject to the State's waiver of that immunity in an instrument which was separate from the one waiving immunity from jurisdiction and which referred specifically to the property with respect to which execution measures could be taken. In that connection, one might consider the possibility of stating the principle of the inviolability of certain types of public property of a State which should be placed beyond the reach of attachment or execution by the courts of another State, even if the State had given its express consent.

2. Comments on the various draft articles

(a) Articles provisionally adopted by the International Law Commission

Article 1. Scope of the present article

170. It was pointed out that jurisdictional immunities of States and their property were enjoyed fundamentally from the jurisdiction of a court of law of another State and that that clarification had been added in the revised version of draft article 1. That more precise wording of article 1 was welcomed.

Article 2, paragraph 1 (a) and (g). Use of terms

171. It was observed that draft article 2 would be considered by the Commission together with the rest of the draft articles. The Commission had none the less provisionally adopted paragraph 1 (a) of the article, which stipulated that the term "court" meant any organ of a State, however named, entitled to exercise judicial functions. While the subparagraphs defining the terms "territorial State" and "foreign State" had been withdrawn from draft article 2, a subparagraph (g), defining "commercial contract", had been adopted to replace the old subparagraph (f) defining "trading or commercial activity".

172. Reservations were expressed about the definition of the term "commercial contract" in draft article 2, paragraph 1 (g), feeling that the very broad meaning ascribed to the expression could lead to complications, particularly because it would affect other substantive articles such as article 3 and, more important still, draft article 12, which was probably the most controversial article in the draft. According to the definition given in paragraph 1 (g) (i), the expression "commercial contract" covered "any commercial contract or transaction for the sale or purchase of property or the supply of services". As the Commission rightly pointed out in its commentary on article 2, the translation of the expression into other official languages could pose problems because of the different terminology used in different legal systems. The term should therefore be employed with the greatest of care.

173. It was also suggested that, following the change of focus from "trading and commercial activities" to "commercial contract" in the text of article 12, it would be logical to revise the text of article 2, paragraph 1 (g).

Article 3, paragraph 2. Interpretative provisions

174. It was noted that the interpretative provisions in draft article 3 had been partially considered in connection with the term "commercial contract" and that paragraph 2, concerning the criteria for determining the existence of a commercial contract, had been provisionally adopted as an aid to the interpretation of "commercial contract" under article 12.

175. It was also observed that, while draft article 2, paragraph 1 (g), defined commercial contracts under ordinary usage, "commerciality" could be established, according to article 3, paragraph 2, by a double test of "nature" and "purpose". If by its nature a contract was non-commercial, it was entitled to immunity. However, if that test was indecisive because the contract contained elements of a "commercial contract", the "purpose" test might be used to disprove its commercial character. For example a contract for the purchase of weapons or supplies for the armed forces was not likely to be construed as a commercial contract because it was devoid of any commercial character, provided that it had not been made on a commercial basis for resale. The purchase of emergency food supplies or medicine to relieve a famine - or epidemic - stricken population was another example of a contract whose public or humanitarian purpose took precedence over its commercial nature, whether in connection with its conclusion or its execution. In that connection the view was expressed that the two criteria "nature" and "purpose" of the contract were practical and would provide adequate safeguards, particularly for developing countries in their endeavour to promote economic development. To limit the determination of a contract to its "nature" would be too restrictive and would be unjustified, considering the divergence of State practice in the area of commercial activities. The dual criterion of paragraph 2 was also called very wise, since it was difficult to overlook completely the motivation of a particular transaction or contract even though its nature was clearly commercial. In that connection, the International Law Commission had made some useful observations in paragraph 19 of its commentary on draft article 12, particularly in the last three sentences of that paragraph. It was said that without the guidance provided in paragraph 2 for determining the commercial character of a contract or transaction, it seemed that most contracts or transactions to which a State was a party would be adjudged commercial, thus depriving it of immunity. The interpretative provision allowed reference to be made primarily to the nature, and secondarily to the purpose, of a contract when determining its character. If developed, the idea could lead to acceptance of a qualification which would characterize the transactions listed in paragraph (2) of the commentary to article 3, paragraph 2, as governmental and non-commercial.

176. Furthermore, there was the view that the provisions of article 3, paragraph 2, were so important that they should not be treated as a supplementary standard, as indicated in the commentary, but should be incorporated either in article 12 itself or in article 2, paragraph 1 (g), since the commercial contract exception would not be workable without them. In any event, consideration should be given to redrafting the provisions, substituting the word "shall" for "should" and making the part relating to the purpose of the contract accord more closely with its rationale as set out in the commentary. As it stood, article 3, paragraph 2, seemed to require a State to prove that, in its legal system, a particular purpose was a relevant factor in determining the non-commercial character of a contract, thus imposing a greater burden of proof than the simpler requirement in paragraph (2) of the commentary for a State to show that its practice was to conclude a particular contract for a particular public purpose. Giving States the chance to prove that a transaction was in fact non-commercial even when it appeared to be commercial would help to alleviate concern regarding the broad use of the term "commercial contracts". In that context it was also pointed out that the Federal Constitutional Court of the Federal Republic of Germany, dealing with the

question whether the purpose or the nature of a State's activity was decisive for the determination of act jure imperii or acta jure gestionis, had found that the decision must depend on the nature of the act because in the final analysis most if not all State activities were designed to serve a sovereign purpose in some manner, however remotely. It was suggested that that argument was convincing, and it would therefore be preferable to see article 3 drafted as a subsidiary rule and not as a supplementary standard for determining whether a particular contract was "commercial" or not.

177. There was also a suggestion to the effect that, following the change of focus from "trading or commercial activities" to "commercial contract" in the text of article 12, it would be logical to revise the text of article 3, paragraph 2. Moreover, while it was clear that the text of paragraph 2 was not coextensive with that of article 2, paragraph 1 (g), paragraph (4) of the commentary made the contrary intention obvious. It would be preferable to reword the beginning of article 3, paragraph 2, to read: "In determining the commercial character of a contract as defined in article 2, paragraph 1 (g) above". The need for paragraph (4) of the commentary would thus be eliminated.

178. The Special Rapporteur was praised for his considerable effort to find compromise solutions in areas of particular sensitivity. Draft article 3, paragraph 2, for example, sought to avoid a one-sided application of a single test by providing a supplementary standard for determining whether a particular contract or transaction for the sale or purchase of goods or the supply of services was "commercial" or "non-commercial".

179. On the other hand, the view was also expressed that while it was true that the current wording of article 3, paragraph 2, combined the two concepts of "nature of the contract" and "purpose of the contract", the use of the word "primarily" gave the latter concept a secondary status, particularly in view of the qualification at the end of paragraph 2. That interpretation was confirmed in paragraphs (1) and (2) of the commentary on that provision. It was essential to take account of the purpose of the contract. The court of the forum State should consider that matter and not wait to see whether its decision was contested or not. Both concepts could be included in the draft, as the commentary as a whole apeared to indicate, but the wording of the particular part of the commentary just referred to might give rise to unnecessary controversy.

180. It was also said that, in essence, article 3, paragraph 2, implied that a prima facie commercial contract for the sale or purchase of goods or the supply of services might be considered to be non-commercial because of the purpose of the contract. Whether that was the case depended on the "practice" of the State doing the buying or selling. According to paragraph (4) of the commentary, what was said with regard to a contract for the sale or purchase of goods or the supply of services applied equally to other types of commercial contracts as defined in article 2, paragraph (1) (g). One might well ask whether the immunity of the foreign State based only on the purpose of the contract under the practice of that State was an absolute immunity ratione personae. If one looked at paragraph (2) of the commentary, one was inclined to give an affirmative answer to that question. Surely it was the practice of every State to conclude such contracts or

transactions for public ends. It was hard to see what reason any State would have to conclude a commercial contract other than to be provided with the material means to fulfil its public functions. To the extent that it did so within its own jurisdiction, a State might even, in its legislation, give to some or all of such transactions a legal status different from that of normal commercial transactions. Such legislation might be entitled to respect by the courts of other States, provided that the situation had a significant connection with the foreign State involved. It was essential that the criteria relating to the practice of the foreign State and the relevance of the purpose of the contract in determining its non-commercial character should be objective and should apply only to transactions concluded within the territory of that foreign State. That requirement was not met in article 3, paragraph 2, as provisionally adopted by the Commission.

181. Furthermore, the observation was made that reference to national law under article 3, for the purpose of determining the purpose of contracts would be a source of much dispute.

Article 6. State immunity 5/

182. It was pointed out that it had been agreed at the thirty-fourth session of the Commission that State immunity was an independent principle and not an exception and the Commission had been requested to revise the text of article 6 accordingly. But it had been unable to do so at that session, and at the following session attention had shifted to exceptions to State immunity, on which so many proposals had been received that, in the end, the concept of State immunity had been left with only a nominal existence and little significance.

183. The view was expressed that draft article 6, as currently drafted, was unacceptable because it did not clearly establish as a general rule the principle of the immunity of a State from the jurisdiction of another. Article 6 should therefore be redrafted so as to clearly establish the jurisdictional immunity of States as the general norm and non-immunity as the exception, and the number of exceptions provided for in part III should be extremely small.

184. It was also said that the revision problem concerned the precise formulation of the principle that a State was immune from the jurisdiction of the courts of another State. But it was emphasized that the article should be drafted in such a way as to indicate the framework for regulation of the subject-matter in relation to the draft articles and should not necessarily attempt a general definition of the principle. In seeking to resolve problems of a universal nature, the Commission should be well aware of its limits. The elaboration of the draft should not be reduced to the level of similar exercises aimed at regulating the question of jurisdictional immunities in relations between States with more or less the same legal systems.

185. It was stated by some representatives that there appeared to be general agreement that draft article 6 should be reconsidered. It was said this could take place after the exceptions to immunity in part III had been examined.

Article 7. Modalities for giving effect to State immunity

186. It was observed that draft article 7 stated the principle of State immunity not in terms of a right, as in draft article 6, but in terms of an obligation on a State to give effect to immunity by refraining from exercising jurisdiction in a proceeding before its courts against another State. Paragraphs 2 and 3 specified the meaning of the terms "proceeding" and "State" for the purposes of paragraph 1. It should also be noted that article 3, paragraph 1 (a), gave an even more detailed breakdown of what constituted a foreign State; that provision would have to be considered in the light of another provision adopted in connection with State responsibility, which dealt with acts attributable to the State. The Commission had drawn a distinction between acts performed by organs or instrumentalities of a State in the exercise of governmental authority, which were entitled to State immunity, and acts not performed in the exercise of such authority and therefore outside the scope of immunity.

187. It was suggested, in view of the difficulties relating to the formulation of exceptions to the principle of State immunity, that draft article 7 should be reviewed, since the modalities stipulated in paragraphs 2 and 3 of that article, according to which a proceeding before a court of a State was considered to have been instituted against another State, had a decisive influence on the scope of the exceptions to the principle of the jurisdictional immunity of States. Paragraphs 2 and 3 of draft article 7 should perhaps be rewritten in order to make them more restrictive because if the cases in which a proceeding before a court of a State was considered to have been instituted against another State were restricted, it would be easier to reduce the list of exceptions to State immunity or to accept the principle of jurisdictional immunities without any restriction.

188. Furthermore, it was noted that draft article 7 referred to only one kind of modality to be applied by a State to give effect to State immunity, namely, refraining from exercising jurisdiction in a proceeding before its courts against another State, whereas in the title of the article the word was "modalities".

Article 8. Express consent to exercise of jurisdiction

189. It was said that draft article 8, regarding express consent to exercise of jurisdiction, dealt more precisely with the absence of consent as a constitutive element of entitlement to State immunity and with the normal methods of expressing consent, such as by international agreement, in a written contract or by a declaration before the court in a specific case.

Article 9. Effect of participation in a proceeding before a court

190. It was noted that draft article 9 gave added precision to the establishment of consent by conduct and circumscribed the consequences of such consent. Paragraph 1 dealt with participation by a State in a court proceeding which it had itself instituted or in which it had intervened or taken any other step relating to the merits thereof. Paragraph 2 limited the effect of consent where the State had

intervened for the sole purpose of invoking immunity or asserting a right or interest in property at issue in the proceeding. The notion of property as covered by State immunity was thus found in article 9 as well as in articles 7 and 15. The expression "for the sole purpose of" in article 9, paragraph 2, would have to be modified, as suggested during the 1982 debate in the Sixth Committee, to read: "for the purpose, inter alia, of".

Article 10. Counter-claims

191. Although the concept of counter-claims varied in different legal systems, it was said to be gratifying to note that that provision limited the effect of permissible counter-claims against a foreign State. In a given case, therefore, a foreign State could either bring a separate claim, thus subjecting itself to possible counter-claims, or make a counter-claim, thereby submitting itself to the principal claim but only to the principal claim.

192. It was pointed out by one representative that it could be presumed that a State which had itself instituted a proceeding before a court of another State or which had intervened therein realized that it incurred the risk of a counter-claim and, consequently, had, by virtue of its conduct, given its consent to the exercise of jurisdiction by another State.

193. Most of the representatives who referred to draft article 10 expressed their approval or said they had no objection to it. It was said to have the desired precision and clarity both as regarded which counter-claims could be presented and the legal consequences that followed in each case. The observation was also made that it was a great improvement over the original text submitted in the Special Rapporteur's fourth report and considered by the Commission at its thirty-fourth session. It was, like articles 8 and 9, a logical progression from the combined effects of articles 6 and 7. One representative who approved the rule stated in paragraph 3 wondered whether that provision should not rather appear among the cases enumerated in paragraph 3 of draft article 9.

Article 12. Commercial contracts

194. It was observed that draft article 12 constituted a major breakthrough in international efforts to give recognition to the need to restrict immunity and establish a presumption of consent on the part of States entering into commercial contracts with foreigners or foreign corporations. It was pointed out that draft article 12, together with the definition contained in draft article 2, paragraph 1 (g), and the interpretative provision in draft article 3, paragraph 2, was the result of the efforts of the Working Group within the Drafting Committee. Draft article 12, which took account of the complexity of the prroblems involved, the opinions expressed and the interests of the different legal systems, was a compromise solution.

195. Some of the representatives who spoke about draft article 12 found it acceptable or did not wish to object to it. It was called a consensus formula which sought to reconcile views and theories prevalent in various legal systems, including those of the developing countries. It was also referred to as a

compromise formulation to accommodate the conflicting views of those who were prepared to admit exceptions to the general rule on State immunity in the field of commercial activities based on the theory of implied consent and those who took the position that State immunity could not be invoked to allow a foreign State to escape the jurisdiction of local courts when it was engaged in commercial activities. The reservations enunciated in paragraph 2 would therefore make the article acceptable to a larger number of States. It was also said that the final position of some countries would depend on the outcome with respect to the related parts of the draft.

196. However it was also said that, although the basic principle remained the same, the current drafting of article 12 was appreciably different from that originally proposed by the Special Rapporteur. Previously, the article had been called "Trading or commercial activity", but a warning had been issued against the difficulties of defining its contents. The article now had a new title, "Commercial contracts", and a new formulation. As a compromise, the text was said not to be entirely satisfactory. The question was also raised, while the original version would have covered torts committed in the conduct of commercial activities, how that question would be answered within the context of the proposed new formula. Paragraph (4) of the commentary to article 2 did not shed much light on the problem.

197. Reflecting comments made on the opposing schools of thought referred to in paragraph 141 above, it was said to be an established case of non-immunity when a State engaged in activities of a commercial nature. In practice, the point of balance had been set roughly midway between those States which favoured the restrictive theory of immunity and those that still adhered to the so-called absolute theory of immunity. It was also said, in that context, that account must be taken of the new interpretative provision to be included in draft article 3. States that had for many years applied the so-called restrictive theory of immunity had encountered particular difficulty in assesssing whether, and if so to what extent, that theory should be applied in the case of State contracts which, at one and the same time, were prima facie commercial in nature and yet served a typically State purpose. That situation had led to conflicting decisions by national courts. The Commission had sought to reconcile opposing viewpoints by adopting an interpretative provision permitting reference to be made to the purpose of the contract where, in the practice of the foreign State concerned, that purpose was relevant to determining the non-commercial character of the contract. The wish was expressed to give careful consideration to that significant qualification of the basic rule set forth in draft article 12. The principle of State immunity should extend only so far as to ensure protection for the acts of foreign States undertaken in the exercise of their sovereign authority.

198. With reference to paragraph 1 of draft article 12, it was observed that its wording, and in particular the concept of implied consent, clearly represented an effort to find a compromise between the still divergent views on the nature and legal basis of State immunity, but not all delegations subscribed to the theory of "absolute immunity". For those who adhered to the principle of restrictive immunity it was at least an unnecessary concept. The view was also expressed that the paragraph was perhaps too broadly formulated in terms of basing the rule of non-immunity on implied consent of the foreign State. That was clearly

incompatible with the condition that the forum State had jurisdiction by virtue of its municipal law. The resulting ambiguity could only create problems in respect of the application of that law. If the jurisdiction of the courts of the forum State was based solely on the nationality of the plaintiff and all the other elements of the situation, such as place of business, place of conclusion and place of performance, were connected with the foreign State involved, there would seem to be insufficient reason to withhold immunity from the foreign State. There might be good reason to provide generally for the jurisdiction of the courts of a State whenever the plaintiff had the nationality of the forum State. However, in the context of immunity and non-immunity of the foreign State in respect of disputes relating to commercial contracts concluded by that State, the nationality of the other contracting party could not be decisive.

199. One representative stressed that consent should be explicit, or the State should at least be given a reasonable period of time in which to express its views. Silence should be regarded as tacit consent, once the period of time in question has elapsed.

200. It was noted that under draft article 12 of the jurisdiction of local courts competent to try an action would be determined by reference to "applicable rules of private international law". The opinion of some members of the Commission was shared that the expression was "elusive, susceptible of differing interpretations leading to different results". This criterion might lead to litigation because different legal systems had varying rules of private international law and because it would be extremely difficult to ascertain what the applicable rules were. The reference was also said not to be precise enough, since the competent forum and the applicable procedure were not identified. The observation was made that the reference to the applicable rules of private international law might be misleading, as what as actually involved in that context was, rather, rules relating to conflicts of jurisdiction. Such rules were normally separated from the rules of private international law and were often to be found in different legislation. The reference to private international law also obscured the fact that, in the case under consideration, the only relevant national system was the system of the State of the forum. A general reference to the applicable rules of private international law might lead to the temptation to bring into the picture other systems of rules on the conflict of laws and/or of jurisdiction, such as the national system of the defendant State or of other countries which, in theory, might have a say in the contract in question, such as the country where the contract was concluded or was to be performed or the country whose rules were designated as governing the contract. Such an eventuality could give rise to disputes.

201. Certain misgivings were expressed with regard to the introduction in paragraph 1 of the neutral expression "applicable rules of private international law" to replace the concept of the territorial link. Although the Commission was not concerned with harmonising jurisdictional rules, the notion of implied consent embedded in the text was too important to be invoked on the basis of a tenuous relationship between the commercial contract and the State of the forum. If that relationship was seen in terms of an objective concept, namely, "a significant territorial connection", these misgivings would disappear. The foreign defendant State would thus not be left in the virtually hopeless situations that would result from a long-arm jurisdictional rule of the State of the forum. It was also said

that a readjustment seemed to be necessary in view of the fact that that provision was silent on the necessity for a territorial link between the merits of the proceeding and the forum State. In that regard, a member of the Working Group was quite right in stating that, from the purely legal point of view, consent must be presumed when the parties had not chosen the law to be applied or designated the competent jurisdiction. Of course, that solution depended on the good faith of the parties and was based on the assumption that the jurisdiction of the court was recognized under the generally accepted rules of private international law and did not exceed the limit of sovereign authority recognized by public international law. To ensure that the extraterritorial or non-territorial jurisdiction of a court did not exceed its recognized limits under international law in that particular context, it might be useful to require a close territorial link between the commercial contracts and the forum State, such as the place of conclusion or performance of the contract or the existence of a forum prorogatum. That would protect foreign States from the exercise of non-existent jurisdiction. However, the question of ultra vires assumption of jurisdiction under public or private international law could not be exhaustively considered in connection with jurisdictional immunity, although it might be studied as a separate topic.

202. With regard to paragraph 2 of draft article 12, it was observed that it provided that the exception concerning commercial contracts did not apply to contracts concluded between States or on a Government-to-Government basis, such as transactions conducted by socialist countries and, to a large extent, by developing countries. That paragraph also allowed the parties to commercial contracts to choose the applicable law, provided that their choice was not contrary to a rule of jus cogens or to the public policy of the forum State.

203. The opinion was expressed that the granting of immunity must remain essentially connected to the status of the defendant State and the nature of the act performed. Accordingly, it seemed that there was no theoretical or practical reason for stating in article 12, paragraph 2, that contracts concluded between States or on a Government-to-Government basis necessarily escaped the common rule. Given the complexities of modern economic life, the rights and the interests of private persons might be inextricably involved in such transactions. Should that be the case, the working of the rule contained in article 12, paragraph 2 (a), might lead to encroachment upon those rights and interests which would be hard to justify. The suggestion was made that it would be preferable to delete the term "Government-to-Government" from that provision.

204. On the other hand, the view was also expressed that the maintenance in paragraph 2 of draft article 12 of the new draft of the exclusion of jurisdiction in the case of contracts concluded between States or on a Government-to-Government basis or of contracts in which the parties themselves had expressly agreed otherwise was a positive element.

205. Some representatives were of the view that draft article 12 was unacceptable and that it should be revised. The article was said to promote the concept of restrictive or "functional" immunity in cases involving differences relating to a commercial contract concluded with a foreign natural or juridical person. That concept ran counter to the principle of the sovereign equality of States, set forth

in the United Nations Charter. The view was expressed that the article, which would, by virtue of the general nature of its formulation, be applicable to the entire range of the commercial activities of States, did not constitute a simple exception for clearly defined cases to the general rule of State immunity but, in reality, opened the way for doubt to be cast on the very principle of the jurisdictional immunity of States. Based on the theory of the functional immunity of States, that article introduced into the draft articles the problem of the distinction between acta jure imperii and acta jure gestionis, which was based on an already outdated concept of the dual personality of the State. The provisions of subparagraph 1 (b) of draft article 2, containing the definition of a commercial contract, and the interpretative provisions of paragraph 2 of draft article 3 could not in any way improve the character of draft article 12, which took no account of the fact that a State never acted as a private person, even in cases when it itself exercised an activity customarily reserved for private enterprise. Even in cases where State activity was subject to private law, such activity always took on a specific character since it served the policy objectives of that State. It should be emphasized that, in the practice of some States, cases in which the State itself undertook a foreign trade activity did not exist. Such activities were undertaken for the most part, although always with the consent of the State, by limited liability companies and, more rarely, by other enterprises having a different personality from that of the State and with obligations which were not those of the State. Immunity had not been claimed for such entities.

206. Draft article 12 was also criticized for taking the applicable rules of private international law as its basis for jurisdiction. Whether a foreign State or its Government was entitled to jurisdictional immunity should be decided by reference to international law. Only afterwards could it be decided which court should take up the case. The draft article presupposed the existence of jurisdiction of the court by applying the applicable rules of the State of the forum and so presumed that the defendant State accepted that jursidiction. It thus reversed the order of the primary and secondary rules. To presume that a State's action in signing a commercial contract with a natural or juridical person of another State meant that it was also signing away its immunity was arbitrary and without reasonable justification. As it stood, article 12 authorized a court where proceedings had been initiated to impose compulsory jurisdiction on a foreign State or its Government at will which was found difficult to accept. It was said that in view of all considerations, the inclusion in article 12 of the concept of "implied consent" would undermine international relations.

Article 15. Ownership, possession and use of property

207. Most of the representatives who referred to draft article 15 voiced their overall satisfaction with it. There was said to be a clear trend in case law and the legislation of States to limit immunity in that area, since in most cases, whether movable or immovable property was involved, the territorial connections entailed the applicability of the lex situs, and in the case of immovable property the forum rei sitae seemed to be the court best suited to apply the lex situs, the applicability of which in such cases was undisputed. It might be held, as some believed, that article 15 was a correct application of the principle of State

immunity and not an exception to it, since in the case in point, the State was seeking to have its rights determined and was not being proceeded against contrary to its will. In fact, a State might be deemed to have started a proceeding or to be intervening to assert its rights before the court of another State. No matter how the absence of immunity was justified in such a situation, it was in line with accepted practice.

208. The view was also expressed that the wording could be simplified, taking into account comments made in the Commission.

209. With regard to paragraph 1 of draft article 15, the point was made that subparagraph (a) stated a well-established rule of international law, namely, the exception to the principle of State immunity in respect of proceedings relating to immovable property situated in the State of the forum. It was said that a necessary distinction was made between immovable and movable property. With regard to immovable property, the article admitted the exercise of jurisdiction for the determination of rights or interests of the State or its possession or use of that property. As explained in the commentary, that was a normal consequence of the competence of the State (forum rei sitae) which applied the law in force in its territory (lex situs). With regard to movable property, all the article did was to enumerate the cases in which the existence of a right or interest of a foreign State did not prevent a court from exercising its normal jurisdiction.

210. It was also observed that subparagraph (d) raised an important legal problem; the reference to a right or interest claimed which was neither admitted nor supported by prima facie evidence naturally gave rise to the question as to which authority was empowered to assess whether a right or interest could be admitted or supported on the basis of prima facie evidence. Such a provision was liable to leave to the discretion of a foreign jurisdiction, and even jeopardize, a measure for the nationalization of exported property, and that would impinge on the sovereignty of the State putting forward the measure for nationalization.

211. With reference to paragraph 2 of the draft article, it was pointed out that it should be retained, especially having regard to the terms of draft article 7, paragraph 3, of the draft. What was proposed in paragraph 2 was entirely reasonable. The first requirement regarding the continuance of the exercise of jurisdiction - that the State itself could not have invoked immunity had the proceedings been instituted against it - was self-evident. The alternative requirement - that the right or interest claimed by the State should be admitted or at any rate supported by prima facie evidence - was wholly justifiable, since the foreign State was merely required to produce a colourable title. There was therefore no difficulty in understanding the reservations reflected in paragraph (10) of the commentary to draft article 15. The view was also expressed that paragraph 2 might at first sight cause some perplexity. Although the commentary said that "it did not give rise to any difficulty in substance", the paragraph must be read very carefully to be understood and to be accepted as not being in contradiction with the final part of draft article 7, paragraph 3. What paragraph 2 said was that the fact that a foreign State had a right or interest in or was in the possession or use of a given property should not prevent a court from exercising jurisdiction in proceedings instituted against a person other than that

State first, if immunity could not have been invoked had the proceedings been instituted against the State and second, if there was no prima facie evidence of the right or interest of the State.

212. On the other hand, another view found paragraph 2 unacceptable. With regard to paragraph 3 of draft article 15, the view was expressed that States should enjoy jurisdictional immunity for premises they owed or used for diplomatic purposes, and it was not thought that immunity would be ensured merely by declaring such premises inviolable. Contrary to what was suggested in paragraph 93 of the report, inviolability and immunity were two separate notions, and draft article 15 should be expanded accordingly. In the same context, it was said that in drafting the articles on jurisdictional immunities of States, the Commission should bear in mind that previous codifications relating to diplomatic law had not dealt with the jurisdictional immunity of diplomatic missions as organs of a State. Claims brought by private persons against diplomatic missions were increasingly being directed to the sending State in order to avoid the difficulty arising from the immunity of the mission.

(b) Articles proposed by the Special Rapporteur

Article 4. Jurisdictional immunities not within the scope of the present articles

213. It was noted that, although draft article 4 had not yet been specifically considered, the Commission had discovered during the course of its consideration of draft article 15 on ownership, possession and use of property which set out one of the least controversial exceptions to State immunity, that the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963 might not have fully covered certain situations or areas. For instance several members of the Commission had been of the opinion that the Vienna Conventions had not dealt exhaustively with all the questions that could have been resolved, such as the immunity of States in respect of diplomatic or consular premises. The members of the Commission had been unanimous in their reluctance to re-examine any of the provisions of the Conventions, but some of them had expressed the view that diplomatic and consular immunities constituted only manifestations or examples of State immunity, since they existed for the benefit of States and could at any moment be waived by them. Draft article 4 would certainly have to be re-examined in depth by the Commission in view of the shortcomings of the earlier Conventions, which had left untouched the question of immunity from execution and attachment of State property, including premises, vehicles, assets and bank accounts used for the operation of diplomatic or consular missions or other official missions.

Article 5. Non-retroactivity of the present articles

214. It was said that the purpose of article 5, concerning non-retroactivity, was to prevent the return of cases to courts for reconsideration where jurisdiction had earlier been declined on grounds of sovereign immunity.

Article 13. Contracts of employment

215. Some representatives expressed broad agreement with draft article 13. It was said that the practice of States in that area was still crystallizing, but that there seemed to be a trend in favour of recognition of immunity in respect of the appointment or dismissal of employees of the sending State under the administrative law of that State. Another question was the application of the labour law of the receiving State to ensure satisfactory working conditions for local workers and stability for the local labour market. The views of the members of the Commission varied from complete immunity from the point of view of the applicable administrative law of the sending State to no immunity from the standpoint of applicable local labour law and even of the right to work as a human right. The solution lay in giving the sending State the choice of placing its employees under the social security system of the host country or maintaining its own system. A State opting in favour of the local system was considered to have consented to the exercise of jurisdiction by a court of the host State in a proceeding relating to the contract of employment.

216. On the other hand, the view was also expressed that it was doubtful whether the jurisdiction of local courts, when recognized, should be justified by the concept of implicit consent. It was even more doubtful whether the criterion of the placing of the employee under the local social security system was a workable one. In that connection, it should be noted that, independently of the question of State immunity, many Governments requested foreign States to submit to local social security systems when engaging local personnel. It was also said that this criterion might be brought into question if the State concerned acted in bad faith or if its legislation did not provide for the application of the social security system to foreign workers, as was the case in many countries. It would therefore be preferable to adopt the type of entry visa granted to the worker as the criterion for establishing under what jurisdiction the contracts of employment came.

217. Furthermore, the Commission was urged to ensure that the criterion did not lead to a situation which was prejudicial to the local employee in the event that States were thereby discouraged from placing such employees under the social security system of the State in the territory of which the services were performed. The opinion was also expressed that the exceptions should be confined to the case of persons recruited in the territory of the State of the forum who were nationals or residents of that State and did not perform any functions in exercise of governmental authority. The special situation of persons working in diplomatic or consular missions should also be taken into account. It was also pointed out that draft article 13 could give rise to problems, if only because of its title which corresponded to a very relative legal concept. In some countries, it was pointed out, social law, through the establishment of a "general statute for workers", attempted to eliminate the traditional distinction between "public administration" and "contractual employment" and combined those different situations in the concept of "labour relations". It was inconceivable that their legislatures should be expected to define a contract of employment without indicating its intrinsic nature. The point was also made that the term "contract of employment" had to be defined and that there was a need for a test standard, such as that contained in draft article 3 relating to definition of a "commercial

contract", which referred successively to the nature and the purpose of the act. That test was extremely important, since great care must be taken to avoid misinterpreting an act of sovereignty of a State as a simple commercial transaction not covered by jurisdictional immunity or, conversely, allowing a gainful activity to be wrongly covered by such immunity.

218. With regard to subparagraph 2 (b) of draft article 13, it was said that the employer State was given preferential treatment and that the State where the employee in question exercised his functions was injured in that its sovereignty was encroached upon. The wording of that subparagraph should be made more precise by qualifying the non-appointment or dismissal of an individual as "arbitrary" in order to ensure that the employee was effectively treated in the same manner as his colleagues. If the arbitrary nature of the decision in question was acknowledged - any burden of proof being incumbent upon the injured party - the provisions of paragraph 1 of draft article 13 would effectively apply.

219. Questions were also raised about the validity, in view of the nature of the right to employment, of the preservation of immunity in cases of the dismissal of an employee; indeed, the text suggested an ideal course which the State could follow to preserve its jurisdictional immunity. It was suggested that the exemption envisaged should be limited to refusal by a State to employ a person. The idea of re-employment which appeared in the revised version of the text was only a small step in the right direction. But there was, furthermore, the view that questions which arose were basically questions of compensation, social security and pension rights, and that the article would not apply, for example, to litigation concerning appointment to a post, since such questions would fall within the exercise of governmental prerogatives and the State could not, therefore, accept the jurisdiction of another State.

220. With regard to subparagraph 2 (c) of draft article 13, it was stated that the terms on which citizenship was established pertained to the sovereignty of each State over its own territory. International custom had shown that citizenship was closely related to nationality, whether nationality of origin or acquired nationality. The provision in question therefore raised two problems. On the one hand, some persons enjoyed dual nationality, and a question might arise as to the situation of an individual employed by a State of which he was a national who exercised his functions in another State whose nationality he had acquired, or vice versa. On the other hand, the criterion to be adopted for establishing the citizenship and status of stateless persons for purposes of determining the jurisdiction governing their contracts of employment remained to be determined.

221. Another view held that the exception contained in draft article 13 was unjustified and that the article was unacceptable. It had been admitted, it was said, that cases illustrating State practice in that field were rare and that there were very few precedents in court decisions and State legislation which might support the exceptions specified in draft article 13. It was pointed out that there was hardly any customary law on the matter. Moreover, it was not possible to refer to the general opinion of scholars in that connection. The view was also held that the provisions of draft article 13, making contracts of employment subject to the jurisdiction of the courts of the State of the forum, ran counter to State practice, which recognized State immunity in such cases.

222. Finally, in connection with the question whether jurisdiction was solely a matter of domestic law, it was pointed out that the Special Rapporteur had not confronted the issue directly in draft article 13, because the scope of that provision was limited to contracts for services to be performed in whole or in part in the territory of the State taking jurisdiction. The question was whether that implied that the forum State would not have jurisdicton over contracts to be performed outside its territory. Another question was whether there were generally accepted rules of private international law according to which a State could take jurisdiction. It was doubted whether the Special Rapporteur's suggestion that the basis of jurisdiction must be territorial really solved the problem.

Article 14. Personal injuries and damage to property

223. It was said that draft article 14 gave rise to serious controversy. Opinions still differed as to the advisability of including in the draft articles a provision relating to personal injuries and damage to property. Some recent national legislation preferred to maintain silence on the question of immunity in that area. There was a general feeling that, if the exception was maintained, it should be limited to civil liability and the payment of damages and should exclude any criminal proceedings. The question had been complicated by phenomena such as letter bombs and other types of transfrontier torts. In fact, such an exception should cover only non-commercial torts or personal injuries and damage to property, as well as compensation for loss of life.

224. On the other hand the view was also expressed that the exception was too restrictive because it related only to compensation for personal injuries and damage to property in another State and only if the person responsible for or contributing to the injury or damage was present in that territory at the time of its occurrence. That exception did not take into account modern technology and should extend to cases of transfrontier torts. Since the draft article dealt with compensation for personal injury or damage to property caused by insurable accidents occurring in the course of air, rail, road or waterway transport, it would be illogical that the victims of such accidents should not receive compensation because the person responsible had never been in the territory of the State or had left the State - either by air, road, rail or waterway - by the time the injury or damage occurred. Agreement was expressed with the view of certain members of the Commission that in such cases negotiation through diplomatic channels would be preferable to the application of draft article 14, which could open the floodgates of litigation. However, it must be recognized that in practice the usual remedy of an aggrieved party in a foreign State was to exhaust the legal remedies of that State before turning to the authorities of his own State, who then went through diplomatic channels. As the Commission had stated, article 14 was not intended to discourage negotiations through diplomatic channels, rather, it was intended to expedite such negotiations.

225. Some representatives expressed their support for the general thrust of draft article 14. The article was said to be particularly important because, in practice, settlement of personal injury cases involving States were not always successfully dealt with through the diplomatic channel. That was true even though the Conference which had adopted the Vienna Convention on Diplomatic Relations had

recommended in a resolution that the sending State should waive the immunity of members of its diplomatic missions in respect of civil claims against them by nationals of the receiving State when it could do so without impeding the performance of the mission's functions and that if immunity was not waived, it should use its best efforts to bring about a just settlement of the claims. Furthermore, it was observed that the apparent fear that the inclusion of a text along the lines of draft article 14 would open the floodgates to litigation was unfounded, particularly if the draft articles as a whole contained a general safeguard preserving any immunities or privileges enjoyed by a foreign State in respect of anything done by or in relation to the armed forces of that State while they were present on the territory of the State of the forum. Such a safeguard clause, combined with the safeguards preserving the privileges and immunities enjoyed by diplomatic or consular missions under the Vienna Conventions of 1961 and 1963, would reduce the impact of article 14 to its proper proportions.

226. It was also observed that article 14 defined the conditions for the tacit consent of a State to the exercise of jurisdiction by a court of the other State, without specifying whether that jurisdiction applied to the state itself or to juridical or natural persons belonging to that State. The entity that would be involved should be specified. The second condition laid down for presuming the consent of a State to the exercise of jurisdiction by a court of another State concerned the presence in the territory in which the damage occurred of the person responsible for or contributing to such damage at the time of its occurrence. That second condition was considered to be excessive, since the State concerned might evade its responsibilities if it was established that the person effectively responsible for the damage had not been present in the territory of the other State at the time the damage had occurred. The second condition should be worded differently so that the State concerned should be confronted with its responsibilities as soon as a link had been established between the damage suffered and the person responsible and between the time the damage had occurred and that at which the causal relation had been recognized, both of which elements were necessary to establish responsibility.

227. But there was also the view that the fact that the applicable law might be - in principle or in most cases - the lex loci delicti commicci was certainly important in determining whether or not the State was responsible under its internal law with regard to a natural person, but had no bearing on the priority to be given to the competence of the courts of a State in the matter of the institution of a procedure for damages. In fact, in private international law, a clear distinction must be drawn between the question of the applicable law and the question of the competence of a court.

228. Some representatives said that they had serious doubts about article 14 and others said that they could not approve it. The article was also called unnecessary, as it might open a floodgate of litigation. The view was held that it could hardly be contended that such an exception constituted codification of a norm of international law or that it reflected general State practice. A similar provision was found in the national legislation of only four or five countries and was not embodied in any widely accepted international convention. It was also said that draft article 14 took no account of the practice of the other States,

particularly the socialist States and the developing countries. Nor did it take into account the fact that a much larger number of States, which had also covered the issues dealt with in article 14 in their own legislation, had not provided for the exception concerned and, consequently, had clearly excluded the possibility that the courts of a State could, in such cases, rule on actions brought against foreign States. The doubts were extended also to the rationale behind draft article 14, on personal injuries and damages to property, because the traditional method of settlement through the diplomatic channel, on an amicable basis and in a discreet manner, seemed more effective.

D. STATE RESPONSIBILITY

229. Representatives generally emphasized the importance of State responsibility as it formed the core of international law, encompassing all its aspects, and was fundamental to relations between States. The existence of a society, whether of individuals or of States, was dependent upon faithful observance of obligations. Responsibility was a sine qua non for obligation. Consequently, the existence of clear, well-established and generally acceptable rules of State responsibility were as important as the existence of obligations. The establishment of generally accepted norms on State responsibility would contribute to the strengthening of the international legal order and play a significant role in stabilizing relations for peaceful co-operation between sovereign States. In that connection, it was said that as the Security Council's inability to ensure the primacy of law intensified, the efforts made by the Commission to rehabilitate the purposes and principles of the Charter were of particular importance. It was further stated that the special attention accorded to the question of State responsibility in the Sixth Committee arose out of the objective need to strengthen inte tional legal means of combating the most dangerous and flagrant violatic of the United Nations Charter and contemporary international law. The principle and norms of the institution of State responsibility in international law were more important than ever, as that institution was one of the essential legal means of promoting the purposes and principles of the United Nations Charter, ensuring respect for international legality and consolidating the principles of peace and equality in international relations.

230. Several representatives indicated satisfaction with the progress of the Commission's work. The opinion was expressed that the Special Rapporteur was pursuing a very methodical course in mapping the broad contours of the subject, following a conceptually integrated framework by dealing with the origins of international responsibility, the content, forms and degrees of international responsibility, and the implementation of international responsibility and settlement of disputes. It was further stated that the wisdom of the members of the Commission would lead to the finalization of a really difficult task. It would not be wise to ask the Commission, for the sake of speed, to compromise the high quality of the work which it was doing on the topic.

231. Many representatives, however, regretted that the study of the legal consequences of internationally wrongful acts was not progressing quickly enough, and urged the Commission to speed up its work on the elaboration of an

international legal instrument on State responsibility. In that respect, it was said that the Commission had been considering the preliminary provisions of part two for three years, after which it had succeeded in adopting only four draft articles in preliminary form, containing no substantive provisions. That was scarcely any progress. The time had come for it to move on to the elaboration of substantive provisions and to begin considering, at its thirty-sixth session, concrete provisions setting out the legal consequences of internationally wrongful acts. That view, it was explained, was not meant to detract in any way from the Special Rapporteur's very useful work in clarifying the theoretical issues. It was also stated that an exercise which had taken a full decade and had resulted in the adoption in first reading of part one of the draft articles should not be allowed gradually to sink into oblivion. The ultimate responsibility for carrying on the work lay with the Commission as a whole, and the fact that it was still discussing preliminary questions was to be regretted.

232. Several representatives congratulated the Special Rapporteur on the topic, Prof. Willem Riphagen, for the fourth report he had submitted to the Commission. The report was characterized by one representative as remarkably thorough and precise and was deemed by another as a positive attempt towards the progressive development of international law. One representative considered it important for the Commission's future work even though it did not contain any new articles, because it was aimed at defining the main questions to be dealt with in parts two and three of the draft articles, such as the specific legal consequences of aggression, the consequences of crimes other than aggression and measures of self-defence.

233. In the view of some representatives, in his fourth report, the Special Rapporteur had concentrated on an outline of the possible contents of part two of the draft articles. On the other hand, it was said that it was not possible to form an idea of the content of part two because the outline on the possible contents of parts two and three promised by the Special Rapporteur in his fourth report did not, strictly speaking, constitute a general plan. It was further stated that although the Special Rapporteur had entitled chapter II of his report an "outline" of the possible contents of parts two and three, and regrets had been expressed about the absence of such an outline at the preceding session of the General Assembly, that chapter did not constitute an "outline" in the usual meaning of the word. However, such an outline no longer appeared necessary because three years had elapsed since the presentation of the Special Rapporteur's first report, during which time considerable work had been done, and it might be considered that the preliminary work had been completed and the time had come to present and study the draft articles.

234. The opinion was expressed that the Special Rapporteur on State responsibility had raised a number of queries in his fourth report, some of which would best be considered against the background of specific articles, rather than in an abstract debate. The Special Rapporteur should therefore proceed to formulate articles on which discussion could focus. In that connection, one representative considered that, at its thirty-fifth session, the Commission had a useful exchange of views on such questions as the inadmissibility of acts of reprisal involving the use of force and the legal consequences of aggression or other international crimes.

Since it was expected that the Special Rapporteur would prepare draft articles on those questions in his next report, he hoped that the Commission would examine them again in detail at its thirty-sixth session.

235. Some representatives, noting the slow progress made on the draft articles on State responsibility, said that the fourth report of the Special Rapporteur on the contents, forms and degrees of State responsibility had proceeded along the wrong lines and attempted essentially to revise the work on the subject that had been done in the Commission over a period of 20 years. The Special Rapporteur had tried to cast doubt on the feasibility of establishing international responsibility for aggression and other international crimes, using unfounded arguments which, incidentally, had been repeated by a number of delegations in the Sixth Committee. Those delegations proposed curtailing work on the draft articles on the ground that the subject was covered by the provisions of the United Nations Charter and other instruments - their usual approach whenever they objected to the codification of an important branch of contemporary international law and needed a pretext to curtail the work on it. Their line of argument was baseless, because the United Nations Charter and international law would be strengthened rather than weakened as result of the codification exercise. The Special Rapporteur must not limit or change the essential substance of the institution of State responsibility. He should consider it mainly in relation to international crimes and other gross violations of the United Nations Charter and contemporary international law.

236. Representatives referred to the link between parts two and three of the draft. In the opinion of many representatives, part two on the effects of responsibility should be elaborated before part three, which concerned implementation. That, it was said, was logical even though part three might seem to be the easier of the two. But the whole subject of the consequences of an internationally wrongful act, including the question of reparation, was of pressing concern. It was considered that the importance of defining rules relating to those consequences, including the question of reparation, had been highlighted by recent events which suggested a decline in the rule of law internationally and demonstrated that the Commission's work did not take place in a vacuum. The consequences of State responsibility were a matter of immediate concern. The development and clarification of rules on that topic would make it clear to States that, if they failed to comply with internationally recognized standards of State behaviour, they would be brought to account and be required to provide compensation for the consequences of their unlawful conduct.

237. The opinion was expressed that parts two and three should not be considered together and that the formulation of part two, which was all that was currently covered by the mandate entrusted by the General Assembly to the Commission, should not be subordinated to the solution of problems which might arise in the context of a part three. It was stated that, three years after the General Assembly had given the Commission the clear mandate of preparing part two of the draft, not only had it made little substantial progress in its work, but there was a clear movement in the wrong direction. The Special Rapporteur's attempts to reduce that cardinally important part of the draft to provisions of minor significance and to revise the basic approach to the topic was a matter of great concern. His fourth report had, on a number of occasions, been rightly criticized, especially for its proposal that

a part three dealing with the implementation of responsibility should be formulated immediately. The argument that the prospects with regard to the implementation of State responsibility influenced the way in which part two would be elaborated was unconvincing. It was further considered that it would serve no useful purpose for the Commission to proceed, at the current stage, to the consideration of the possible content of part three of the draft articles. Since the content of the secondary rules relating to State responsibility could be deduced from existing customary international law, the formulation of the rules of part two was not indissolubly linked to the question of the procedure for ensuring the implementation of State responsibility. It if proceeded to consider part three at the present stage, the Commission would dissipate its efforts, instead of concentrating on resolving the question of determining the legal consequences of the internationally wrongful conduct of States.

238. The opinion was expressed that, having avoided the mistake of introducing primary rules into the draft articles of State responsibility, which now dealt only with the conditions for establishing the international responsibility of a State, it was necessary to avoid the other trap of trying to incorporate into the draft the "tertiary" rules of law establishing the procedures to be adopted with regard to implementation and the settlement of disputes. The Commission should complete part two before forming an opinion on the possible content of part three. Some representatives stressed that unless sufficient progress was made in elaborating part two of the draft, a definite opinion on the possible contents of part three would not be possible. Obviously, part three, which would deal with the question of implementation, was interlinked with part two; but the mechanisms of implementation, which were variable, surely depended in large measure upon the different cases which would be dealt with in part two. It was stated by one representative that part three of the draft, was of great importance because it would facilitate the effective enforcement of the articles in part two. It was for that reason that he shared the view of several members of the Commission on the necessity of elaborating part two before deciding the content of part three.

239. Some representatives considered that the Commission should concentrate on part two without losing sight of the problems which would arise at a later stage concerning the "implementation" of international responsibility and other matters, including machinery and procedure for the settlement of disputes. It was recalled, in that connection, that when the Commission had discussed the question as to whether it should not begin consideration of part three of the draft some members had emphasized the importance of those provisions for the elaboration of part two. The opinion was expressed that, from a strictly organizational point of view, a step-by-step approach might seem more logical, but it was obvious that, in determining the consequences of a wrongful act, account must also be taken of the need to make the régime workable in State practice. From that point of view, the best way of proceeding would perhaps be to concentrate on part two but take into consideration relevant questions of implementation. In the last analysis, however, it would be wrong to exaggerate the importance, though real, of those questions. The lack of an effective enforcement mechanism in no way diminished the binding force of a rule of law, and the very existence of such a rule incited States to ensure its proper implementation.

240. Other representatives stressed the importance of part three for further work on the draft. It was said that in view of the conceptual framework of the subject of State responsibility, it would be helpful if the Commission were to give early consideration to the possible contents of part three. An examination of the total scheme would help a more judicious appraisal of its scope, and the place and linkage of draft articles in all three parts. One representative expressed the hope that, in his next report, the Special Rapporteur for the topic would submit draft articles for the two parts still to be elaborated. He supported the proposal that the process of peaceful settlement of international disputes, covered by part three of the draft articles, should in every case be initiated as soon as the first signs of an internationally wrongful act were detected. He drew attention to the question of penalties for attempts to commit such acts, a question which arose whenever there was the danger of a violation, or the beginning of a violation, of a norm of international law. For another representative, it might be helpful to the Commission if the Special Rapporteur could indicate, even in a preliminary way, the contents of part three, so that the elaboration of the provisions of part two could be kept in line with the implementation provision of part three. In that connection, the view was expressed that it should not be too difficult to establish a close link between parts two and three of the draft articles, provided that part two was formulated on the basis of the Charter of the United Nations and other relevant international instruments giving a clear and reasonable statement of the consequences of internationally wrongful acts.

241. In the opinion of one representative, a decision to provide for an effective and compulsory system for the settlement of disputes, at least with respect to certain areas of the project, would facilitate the work of the Commission in the search for consensus. He agreed with the Special Rapporteur that it was unlikely that the majority of States would accept a rule such as that contained in article 19 of part one if there was no legal guarantee that they would not be accused by other States of having committed international crimes and would not be faced with demands and counter-measures by other States without being able to count on an independent system for assessment of the facts and application of the law. In that respect, there was a clear analogy with the treatment accorded in the Vienna Convention on the Law of Treaties to the concept of jus cogens. The States parties to the Vienna Convention undertook to submit to the International Court of Justice disputes arising from the termination or nullity of a treaty on the ground that, at the time of its conclusion, it conflicted with an existing or new rule of jus cogens. There should also be a system for the settlement of disputes on the question of reprisals and counter-measures, the taking of which entailed the danger of escalation towards illegality, including commission of the most serious of international offences, the illegitimate use of force. Another representative agreed with the Special Rapporteur that one way of making draft article 19 of part one acceptable to States would be to propose secondary and tertiary rules to the primary rules stated in part one; the second rules embodying the legal consequences of international crimes should be clearly set out in part two and the tertiary rules on the implementation of the secondary rules should be set out in part three.

242. One representative considered that in preparing part two and a possible part three of the draft articles, the Commission should ensure the coherence and consistency of the draft as a whole. Another representative expressed his hope for

speedy progress in the first reading of parts two and three of the draft articles, so that the Commission could begin the second reading of part one, with a view to simplifying it.

243. With reference to internationally wrongful acts which are not international crimes, one representative pointed out that, as indicated by the Special Rapporteur, three aspects of their consequences had to be developed, namely, the determination of the injured State or States, the content of the new legal relationships created by the international delict (reparation, suspension or termination of existing relationships, measures of self-help) and the possible phasing in of those legal consequences. In a general and preliminary way and until those points were set out in draft articles, he considered the concepts of the Special Rapporteur elaborated in paragraphs 77 and 78 of his report acceptable. Another representative, noting that three types of new legal relationships were distinguished in paragraph 113 of the report, expressed the belief that, in addition to the suspension or termination of existing relationships on the international plane, account should be taken of the possibility of changes in existing relationships and the establishment of new relationships.

244. Some representatives emphasized that the main elements of the modern institution of State responsibility were the principles and norms relating to responsibility for the preparation and commission of the most serious crimes against peace and security. A State incurred the gravest responsibility under modern international law for preparing, advocating and unleashing nuclear war. That important principle was bound up with the very existence of mankind and of international law as such, and the Commission should study and develop, as a matter of priority, a detailed formulation of it. The United Nations Charter and modern international law prohibited aggression and provided for responsibility for the commission of acts of aggression. Regardless of the excuses advanced, a State incurred responsibility in international law for acts of aggression against another State. In considering the question of State responsibility, the Commission should also devote much attention to the principles of responsibility for policies of genocide, colonialism and apartheid, for the training and use of mercenaries and for other criminal violations of the United Nations Charter and modern international law.

245. Some representatives commented on paragraph 111 of the report which referred to international crimes other than aggression and enumerated four "elements" of legal consequences which were common to all international crimes. One representative was of the view that among the different elements of legal consequences which were common to all international crimes, as enumerated by the Special Rapporteur, particular attention should be accorded to the erga omnes character of the wrongfulness of the act and to the duty of solidarity between all States other than the author State. Another representative, while generally approving the elements of legal consequences common to all international crimes listed in the Special Rapporteur's fourth report on State responsibility, would like a more precise definition of the basis and implications of concepts such as "erga omnes" character. Another representative considered that the last two elements could in fact be merged; the violation of the principle of non-intervention in matters within the domestic jurisdiction of another State could be combined with the duty of solidarity between all States other than the author State.

246. On the other hand, one representative doubted whether all those four elements found a clear basis in customary international law, at least in the way in which they had been expressed. If the intention was to develop new principles of international law, the report should say so and provide reasons. He also doubted whether it was true, as a matter of law, that there was a "duty of solidarity between all States other than the author State". It would be interesting to learn what the "duty of solidarity" meant in practical terms. Another representative was of the view that those elements could be regarded only as a general and minimal characterization of such legal consequences and that, in order to continue work on part two of the draft, it would be necessary to draw up a specific list of the typical legal consequences of violations of international law, with a distinction made between acts of aggression and other international crimes, as well as between international crimes and other internationally wrongful acts, with emphasis placed on the rights of the injured State and not on the position of the responsible State.

247. Some representatives considered that the legal consequences of internationally wrongful acts should vary, depending upon their seriousness, and that the idea of categorizing them in order to distinguish between their legal consequences was therefore justified. It was said that classifying such acts, which was necessary because the legal consequences could be different, was understandably difficult. Furthermore, the method of categorization described in paragraphs 110 and 112 of the report was deemed by certain representatives to be a suitable approach to the problem. It was stressed that the idea of drawing a clear distinction between the legal consequences of international crimes, on the one hand, and internationally wrongful acts which were not international crimes, on the other hand, was a logical consequence of the distinction which had been made between international crimes and international offences in article 19 of part one and was therefore fully justified.

248. In the view of one representative, the more fundamental question was what was an "international crime" and what consequences flowed from it. Although "international crimes" were already dealt with in part one of the draft articles on State responsibility, he continued to believe that that was an area where analogies with private law were inappropriate. A State was internationally responsible for the violation of an international obligation. He could not see what benefit was to be gained by categorizing international responsibility as "criminal" or "delictual" depending on the nature and gravity of the offence. Attempts to do so might well be counter-productive in practice. In relations between sovereign States, it was important to have some co-operation from the State which was responsible for a violation of international law, if reparation was to be obtained. The chances of obtaining such co-operation were not good if the defendant State was accused of an international crime, because any co-operation by that State could be perceived as a tacit acknowledgement of guilt. That was likely to be one of the real problems in characterizing certain violations of international law as international crimes.

249. Also, another representative noted once again that the introduction of concepts of criminal law into the field of international responsibility made the work of the Commission more difficult and that the notion of international law should be separated from the notion of criminal responsibility under domestic law. The concept that one of several States could punish another State might lead to the elimination of the sovereign equality of States and be used to justify imperialist

claims. Its result would be not to strengthen but to weaken the international legal system, which was based on the duty of peaceful co-operation among equal, albeit very different, sovereign States. International crimes had special legal consequences, and it was for that reason that part one of the draft made a distinction between those crimes and other violations of international law. Chapter VII of the Charter made reference to those special legal consequences, but the coercive measures provided for in that Chapter, to ensure the implementation of international obligations which were so essential for the protection of the fundamental interests of the international community that their breach was recognized as a crime by that community as a whole, were not punitive in nature. He was therefore opposed to the introduction of any element of domestic criminal law into the concept of State responsibility.

250. One representative wondered whether the approach had been complicated by too much attempted categorization. For example, the notion of differences in degree of responsibility might be useful but it was hard to see how a concept of different kinds of responsibility could be established, since the concept lacked any basis in current law, was questionable even in theory and did not help de lege ferenda; and even if the notion of international crime was retained, the Commission would have to work for decades to deal with measures relating to the consequences of actual aggression and self-defence.

251. Representatives referred to the question raised by the Special Rapporteur whether part two should deal with the specific legal consequences of aggression and the corresponding notion of individual and collective self-defence, considering that those notions were already set forth in the Charter and other international instruments, that the Charter had already provided for machinery for their implementation, and that there was a close connection between that topic and the draft Code of Offences against the Peace and Security of Mankind. In the view of some representatives, such consequences of the international crime of aggression could be indicated in general terms. In that connection, one representative considered that the draft articles should spell out the legal consequences of aggression without necessarily going into the details of what constituted aggression.

252. Other representatives, however, were of the opinion that although the notions of aggression and self-defence were dealt with in the Charter of the United Nations, the Definition of Aggression and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, it was necessary that the legal consequences of aggression should be dealt with specifically in part two, and not only in general terms. In that connection, it was said that while there was room for not setting excessively ambitious targets and also for caution and avoidance of duplication, there should be no compromise on questions of principle. The concept of an international crime, having been established after a great deal of debate in part one of the draft articles, should not be allowed to be deprived of real meaning, downgraded or bypassed in part two, which was currently under consideration.

253. One representative, noting that the Commission had not yet touched on the substance of the matter, reserved the right to comment at an appropriate time on the question of individual and collective self-defence, which involved the implementation of Chapter VII of the Charter.

254. A number of representatives did not share the view of the Special Rapporteur and felt, on the contrary, that, in considering the legal consequences of international crimes, it was not possible to set aside aggression which was referred to as the gravest of those crimes in draft article 19 of part one. That crime should be stressed in particular, since it was characterized by a number of specific legal consequences, among them the right of individual and collective self-defence, which could be exercised solely in cases of aggression. There was no contradiction whatsoever between the need to take account of the legal consequences of the crime of aggression in part two of the draft and the fact that the basic international rules defining the measures to be taken in the case of aggression were contained in the Charter of the United Nations. On the contrary, it was necessary to consider the relevant provisions of the Charter in the draft articles, since the codifiction of such an important topic as State responsibility, which was global in character, should be based on generally recognized international norms. The draft should, naturally, take into account the relevant provisions of the Charter relating to the institutionalization of a system of collective restraints as well as its other provisions, so that the Charter would not be affected by the draft articles. Needless to say, the Commission could not interpret or alter the Charter. Such a procedure would not involve either a re-interpretation or an amendment of the Charter. On the other hand, a draft codification which fell short of the Charter would not comply with the mandate of the International Law Commission.

255. It was also said that it was difficult to accept the limitations which some delegations wanted to impose on the legal consequences of aggression when aggression was one of the internationally wrongful acts described as international crimes under article 19 of part one of the draft. Moreoever, if a "categorization" of internationally wrongful acts could be useful for the purposes of identifying and classifying their legal consequences, the question arose as to whether it was wise to define hierarchized groups and subgroups of crimes even before their foundations had been established.

256. On the other hand, some representatives rejected the view that the draft articles should deal with the specific legal consequences of aggression and the corresponding notions of individual and collective self-defence. In the case of aggression, that was so difficult and controversial a task that the Special Rapporteur had suggested that an article on the special legal consequences of acts of aggression should not be included. Aggression was in fact more than a mere breach of an international obligation, and self-defence was more than a mere legal consequence of such a breach. Special provisions on aggression and self-defence were contained in the Charter of the United Nations, and to duplicate the special provisions on that subject in a separate convention on State responsibility would therefore entail the considerable risk of either being repetitious or interfering with the Charter régime. The convention should be primarily concerned with the narrower technical issues of State responsibility. The Commission's resources

could be spent more profitably in areas other than the consequences of aggression as an international crime and the question of reprisals and, therefore, the Special Rapporteur should be encouraged to direct his attention to issues on which consensus was more likely.

257. Representatives referred to the question of the order in which work on part two should proceed. Some expressed concern at, and others regretted, the lack of consensus on the point, since that created difficulties for the codification of the concept of international responsibility. It was said that the Commission appeared to have lost its way in its consideration of the problems of State responsibility, being divided between those who wished to start with the questions which might arise from the distinction between international crimes and international delicts introduced by article 19 of part one and those who would prefer to start with less controversial issues. Without expressing a preference for either approach, the hope was expressed that the Commission and the Special Rapporteur would emerge from the current uncertainty and stalemate. A codification endeavour which had already had an impact on international practice at the highest possible level should not be allowed to die. The Commission should make a clear choice as to methodology at its next session. It was also said that legal logic should guide the Commission in its consideration of the order in which the articles in part two should be examined. The nature of the subject-matter, the content of the rules in question and their interrelationship must form the basis of decisions on those questions. However, the Sixth Committee did not have to take a position on those aspects of the question at the present stage.

258. Certain representatives indicated that they had no preference regarding the order in which work should proceed, provided that the legal consequences of international crimes be dealt with in part two.

259. The opinion was expressed that, since the consequences of internationally wrongful acts, which were common in bilateral relations, had already been covered in general customary law and existing international legal instruments, the codification exercise should be focused on international crimes, particularly crimes of aggression. In fact, article 19 of part one of the draft articles made it clear that the concept of international crimes primarily covered crimes of aggression, and it would therefore be logical to include provisions on the consequences of aggression in part two.

260. A number of representatives expressed agreement with the majority view in the Commission that the aim, as far as part two was concerned, should be to prepare draft articles dealing, inter alia, with the legal consequences of the category of wrongful acts designated as "international crimes" as well as with legal consequences of "international delicts" or simple breaches of bilateral obligations in observance of the distinction made in article 19 of part one. For purely practical reasons, the Special Rapporteur should start with the legal consequences of international delicts, which would probably be easier to define, because they were of a more general character and gave rise to fewer controversies. In its consideration of part two, the Commission should examine the less controversial issues before attempting to deal with the more difficult ones.

261. The view was emphasized that part two should take as its starting-point the fact that the internationally wrongful act entailed a new bilateral relationship between the author State and the injured State only. It was said that it might be appropriate to start with the more typical situations involving State responsibility in international law, such as when a State failed to abide by its international obligations in relation to an injury suffered by an alien in its territory or when officials or property of another State suffered injury or damage. In those types of situation, the injured State was entitled to some relief measures, subject to the principle of proportionality, which had not yet been clearly defined. It would be desirable to place greater emphasis on the question of reparation and to consider including a general rule setting out the principle of the quantitative proportionality between the seriousness of a wrongful act and the measures which affected States were entitled to take against the author State.

262. Certain representatives insisted that it would be wise for the Special Rapporteur and the Commission as a whole to concentrate initially, in the prepration of part two, on the concept of reparation as a legal consequence of breach of a bilateral obligation. The Commission could then proceed to a consideration of permissible counter-measures - where the notion of proportionality became particularly relevant - before going on to the more challenging task of formulating provisions on the legal consequences of international crimes. It was said that such an order of work would in no way reflect on the fundamental importance of the concept of international crimes, as introduced in part one of the draft, but would take into account the fact that the Commission, while working on State responsibility, was and would be actively engaged in elaborating a new code of offences against the peace and security of mankind, thereby paying attention to the most serious international crimes. It should also be recognized that other United Nations organs were continuously trying to protect the fundamental interests of the international community. Under those circumstances, the Commission would be well advised to deal first with internationally wrongful acts which entailed new bilateral legal relationships between States and with the impact of "objective régimes" on relationships between States participating in such régimes, in the case of a breach of an obligation under such a régime.

263. It was further stated that there was a danger that the topic might become all-embracing and unrealistic. It might be useful to concentrate on some main features first and then proceed to consideration of particularities, exceptions and side aspects. As suggested by the Special Rapporteur, the draft articles of part two should take as a starting-point the "normal situation" - in other words, bilateral reciprocal obligations and the legal consequences of their violation. Once the conceptual work on the "normal situation" had been completed, it would be possible to tackle special and exceptional situations, in particular the legal consequences of an international crime as described in article 19 of the draft. As regards the "normal situation", it was said that the primary aim of the legal relationship created by the wrongful act was "reparation" in the broadest sense. It did not appear out of place to study the various forms that could be taken by reparations and relate them to specific cases of breach. As expressed in the Commission, more emphasis should be placed on the question of reparation. In that connection, the view was expressed that article 4 as proposed in the Special Rapporteur's second report was only a first step, and the rules it contained needed further elaboration.

264. One representative pointed out that it was argued by some that the responsibility of States for international crimes should be considered only in the context of their international delictual responsibility, which gave rise to an obligation to make reparation, and that the absence of sanctions for the breach meant that they had no international criminal responsibility. But the fact that international tribunals had always treated breaches of international obligations by States in that way did not necessarily mean that such breaches could never give rise to an obligation other than that of making reparation. In his view, regrettably, international instruments appeared reluctant to refer explicitly even to the duty of a State to make reparation for breaching an international obligation, and the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries had more or less agreed not to provide for the international criminal responsibility of States. There seemed to be some difficulty in reconciling that approach with the strong provisions in the proposed convention concerning the international delictual responsibility of States and their duty to make reparation for involvement in mercenary activities.

265. With regard to the question of the parties to the new legal relationship created by an internationally wrongful act, and in particular the question of defining the injured party, the view was expressed that the latter was the one in respect of which an international norm had been reached and which was actually being affected by the violation and could therefore enforce legal consequences. According to that principle, it was relatively easy to determine which was the injured State in bilateral or bilaterally structured normative relations. But there were also multilateral normative structures, in which the obligations of the States concerned were parallel rather than reciprocal; the Special Rapporteur had described them as "objective régimes", distinguishing between universal and regional objective régimes. It was to be doubted whether it was appropriate to derive special provisions concerning the inadmissibility of reprisals from a concept as vague as "objective régime". It was likewise to be doubted whether that concept could be used to determine which were the injured parties in the case of a multilateral treaty, for if such a treaty was violated by one of the parties, the other parties were not all affected alike. Such questions required further consideration.

266. Certain representatives indicated that on the matter of "objective régimes" they shared the doubts of some members of the Commission on the possibility and necessity of making a distinction between objective régimes of a universal character and objective régimes of a regional character. Those terms were vague and might cause confusion; a more precise definition of their basis and implications would be welcomed.

267. One representative considered that as for the existence of internationally wrongful acts erga omnes, the existence of the "objective régimes" referred to in paragraph 119 of the report would assert itself as soon as the idea of an "international crime" was definitively accepted. The existence of such a régime had been recognized by the International Court of Justice in the Barcelona Traction case, a decision which had marked a complete change of direction in the Court's rulings by comparison with its decision in the South-West Africa case.

268. Another representative pointed out that regarding the so-called "objective régimes" where obligations of States were parallel rather than reciprocal, the Commission had indicated in paragraph 119 of its report that such régimes protected extra-State interests, meaning that any violation affecting a State also affected all the other States participating in the régime and that such a régime could provide for collective decision-making with a view to collective enforcement action. He felt that the question was extremely delicate, in view of the obvious implications for the independence and sovereignty of States. In that connection, the provisions of Chapter VIII of the Charter of the United Nations, in particular Article 52, paragraph 1, should be borne in mind. The mere fact that a regional agency had been established in accordance with that provision and that regional action had been taken against a State under a regional agreement did not automatically make the action legal. It should be compatible with the purposes and principles of the Charter; moreover, it could not be undertaken without the due authorization of the Security Council (Art. 53, para. 1). Thus, States which had concluded a regional agreement were not free to take coercive measures against another State, and when their obligations under that arrangement conflicted with their obligations under the Charter, the latter prevailed (Art. 103 of the Charter). The Commission had rightly stressed that important limitation in relation to so-called predetermined legal consequences, when it had emphasized, in paragraph 2 of its commentary on draft article 2, that "States cannot, inter se, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law, nor escape from the supervision of the competent United Nations organs by virtue of their responsibilities relating to the maintenance of international peace and security."

269. A number of representatives referred to the question of reprisals. One representative, while welcoming the importance attached by the Special Rapporteur, in his report, to that question, wondered whether there were grounds for identifying countermeasures with reprisals or whether countermeasures had a much broader meaning, including, inter alia, the termination and suspension of obligations. The Commission should therefore look into the matter more closely, in the light of articles 60 and 65 of the Vienna Convention on the Law of Treaties. It was said that as to the terminology used, a rigorous and cautious attitude must be taken in using concepts such as "countermeasures" and "reprisals", for which detailed definitions would be welcome, as well as in determining the conditions sine qua non which would underlie their receivability in contemporary international law. In that respect, while the Commission did not believe that the prohibition of armed reprisals fell within the purview of the subject under study, it should at least avoid encouraging that practice, even indirectly, by endowing it with moral worth, since it was alien to the United Nations Charter. One representative stressed that he was in favour of the prohibition of acts of reprisal involving the use of force otherwise than under Chapter VII of the Charter.

270. As far as the concept of "acts of reprisal" is concerned, one representative reiterated the position stated by his delegation at previous sessions on the subject of proportionality and endorsed the comments in paragraph 128 of the report reaffirming the purely conservatory nature of such acts and the need for prior exhaustion of existing remedies. Several representatives indicated that in the

context of the rights of the injured State, the report suggested that resort to reprisals should be admissible only after exhaustion of available international remedies. It was said that within the framework of the draft convention a rule along those lines might prove to be a useful limitation. One representative explained that he favoured the inadmissibility of reprisals, before the exhaustion of international remedies, since reprisals could consist of a breach of an obligation under an "objective régime", where the obligations of the States concerned were parallel rather than reciprocal. Furthermore, an act that was apparently wrongful might subsequently turn out not to be so. It was also said that, in tackling the question of reprisals, an appropriate balance had to be struck between the necessity for the establishment of law and order and the need of the injured State to take appropriate measures for self-preservation.

271. Some representatives emphasised that questions relating to "responses" or "reprisals" should be handled with extra care. The Commission should be careful in dealing with the delicate question of reprisals as a response to an internationally wrongful act. The idea of reprisals as conservatory measures mentioned in paragraph 128 of the report indicated the dangers of allowing recourse to such procedures. It was stated that with respect to possible provisions on reprisals, extreme caution should be exercised in dealing with the admissibility of countermeasures in the form of reprisals, which, in contravention of the basic norms of international law, were frequently used as a cover-up for internationally wrongful acts.

272. One representative stated that he agreed with the majority of the members of the Commission that the question of reprisals should not be dealt with under the topic.

273. One representative stated that although he had no objection to the Special Rapporteur's suggestion that the legal consequences of a material breach of a treaty obligation with respect to the termination or suspension of the treaty's operation should not be dealt with in the draft articles, because they had been established in the Vienna Convention on the Law of Treaties and could be reserved by a clause corresponding to article 73 of that Covention, he had doubts as to the advisability of two other exclusions suggested by the Special Rapporteur. The first concerned the legal consequences of a situation created by an internationally wrongful act, to the extent that the injured State alleged that the situation justified the invocation of a fundamental change of circumstances or a state of necessity as grounds for the non-performance of its obligations towards the author State. The second exclusion referred to the special régime of diplomatic law. In the first case, he did not understand the meaning of the second sentence of paragraph 80 of the Special Rapporteur's report and considered more complete explanations necessary. With regard to diplomatic law, he was not convinced by the argument put forward by the Special Rapporteur in paragraph 81 of his report that the fact that the State injured by the abuse of diplomatic privileges and immunities could at all times declare a diplomat persona non grata and break off diplomatic relations removed the need to determine other legal consequences. The abuse of diplomatic privileges and immunities was not the only possible internationally wrongful act in the domain of diplomatic law. In some cases that law might be the subject of violations so serious as to justify responses other than those contemplated in that body of law. Unless, therefore, a more convincing

argument could be presented, he considered that the legal consequences of violations of diplomatic law should be defined in the draft articles.

274. Some representatives referred to the relationship between the topic of State responsibility and the draft Code of Offences against the Peace and Security of Mankind. Although not denying that it was close, one representative did not agree that an overlap between the two topics should be inevitable if the latter topic included crimes committed by States. It was his contention that the draft Code should apply to States as subjects of international law. In the view of another representative, any possible connection between the work of the Commission on the topic and on the draft Code should not obstruct the independent elaboration of draft articles in those two fields, as any possible overlap could be eliminated at a later stage.

275. In that connection, the view was expressed that the doubts of the Special Rapporteur on the advisability of dealing in part two with the legal consequences of aggression were not founded. While there was no doubt that that aspect was closely connected with the draft Code of Offences, it was very important to determine the substance and form of that connection. For example, the existence of article 19 of the draft on State responsibility, the correct interpretation of which was of vital importance for the draft Code, indicated that the Commission must be consistent in recognizing that the Code concerned the responsibility of individuals, while the topic entitled "State responsibility" covered internationally wrongful acts committed by States as such.

276. For one representative, there seemed to be a risk that the draft articles on international responsibility would infringe on other instruments which already existed or were being drawn up, such as the draft Code. The inclusion of aggression and its specific consequences should therefore be carefully weighed and, so far as possible, other questions which did not fall within the Commission's mandate, such as the law of war or the system of the Charter of the United Nations in maintaining peace and international security, should be avoided. In the opinion of another representative, an examination of the items that were being considered by the Commission revealed that there was room for the Commission to avoid duplication of efforts. In the interest of economy and efficiency, the Commission could consider the possibility of dealing with more general concepts under the topic of State responsibility and with specific concepts and consequences of State responsibility in the context of the other categories of subject, like the draft Code of Offences against the Peace and Security of Mankind, the law of the non-navigational uses of international watercourses and liability for injurious consequences arising out of acts not prohibited by international law.

277. Representatives referred to the question of how the final outcome of the Commission's work on State responsibility should be envisaged. Many agreed with the main trend in the Commission that, at least for the time being, it should work from the perspective of drafting articles which would ultimately be embodied in a general convention covering every aspect of the topic and, in particular, dealing with the legal consequences of aggression, of other international crimes, as well as of simple breaches of bilateral obligations. It would be regrettable if the result of an undertaking which was so important for States did not take the form

most suited to give it the highest possible legal authority. The importance of a general convention on State responsibility would be comparable to that of the 1969 Vienna Convention on the Law of Treaties. Even if such a convention was not to enter into force soon, it could still influence the conduct of States and constitute a reference text for international courts and tribunals, and other international bodies faced with the questions dealt with in such a convention. In that connection, one representative stated that, like many others, he had been surprised that the Special Rapporteur should, at the current stage, have asked whether the Commission should envisage, as the final outcome of its work, a convention or a mere guideline, since the Commission had for many years been working on the elaboration of a convention. It was also said that the Commission should continue to approach its work on the topic with the ultimate goal of drafting articles for inclusion in a convention as that should be consistent with the assumptions on which it had proceeded thus far and would offer the continuing prospect of careful drafting and rigorous thinking which the subject demanded. Only if major legal or political difficulties stood in the way of further progress should the Commission examine other alternatives, such as a set of guidelines for Governments to follow.

278. One representative emphasized that draft articles emerging from the Commission's work could become part of a detailed international legal instrument reflecting the basic elements of State responsibility in accordance with contemporary international law. That was the main task before the Commission.

279. In the opinion of some representatives, the Commission should first concentrate on elaborating a draft convention, leaving its final form to be considered by the Sixth Committee. It was said that the idea of a convention deserved particular attention and more thorough consideration. One representative stated that it would serve no useful purpose to discuss whether the Commission should envisage as the final outcome of its work a convention or a form of endorsement of the draft articles as a mere guidance for States. While he was convinced that the work of the Commission should, as in many other cases, culminate in the adoption of an international convention, the Commission should, in accordance with its traditions, proceed with the elaboration of the draft articles, leaving in abeyance the question of the forms which they should be given; the latter issue would be resolved in the final stages of the work.

280. Some representatives expressed doubts on a convention as the final form that the codification should take. It was said that what would be the final outcome of the Commission's work on the topic was a fundamental question. For one representative, the incomplete state of the draft articles made it extremely difficult to judge their usefulness as a whole. In his view, they were of a rather theoretical character and quite firmly rooted in one conception, so that it was doubtful whether they could survive intact an eventual codification conference. A single successful amendment to one of the key articles could change the whole meaning of the draft. Experience had shown that a codification project could be successful only if the adopted text reflected a genuine balance of interests on the basis of reciprocity among the members of the international community. A codification of international law in the form of a convention might give rise to problems and be of very limited usefulness if it led to a polarization of

interests. That might well be the case with respect to the draft articles on State responsibility. In his opinion, consideration should therefore be given to alternative methods of putting the finished draft to use. For example, the Commission, at a later stage, might be entrusted with a third reading of the draft articles, after their thorough discussion by the Sixth Committee. The final aim of such a procedure could be the adoption of the draft articles in the form of guidelines for States and international bodies confronted with the problem of State responsibility.

281. For one representative, although it was too early to comment on the final form of the Commission's work, it was not always wise to seek to put every topic into the form of a convention; a convention which departed radically from existing law would fail to attract the requisite ratifications and would most likely be worthless. A lot could usefully be done to codify the law of State responsibility - a much more useful sphere for the Commission's efforts. Theoretical constructs and attempts to legislate new concepts would hamper the strengthening of the law on State responsibility. In the opinion of another representative, the high level of abstraction and theorising, and the complexity of some of the terminology used, caused him to question the direction which the debate in the Commission had taken. If the Commission's ultimate objective was to elaborate a draft convention, then it should prepare a concrete set of draft articles on the consequences of internationally wrongful acts and codify the topic of reparations in general, including the various forms of indemnification and compensation, as well as the principle of proportionality. It should also cover the questions relating to international crimes and delicts and the consequences of aggression.

1. Draft articles on part one adopted by the Commission

282. One representative welcomed the adoption by the Commission in first reading of part one of the draft articles on State responsibility. Of particular importance were draft articles 33 and 34, which referred to a state of necessity and self-defence as circumstances precluding wrongfulness. Those two provisions were justified both by the actual inequality existing among States and by the need for the strict application of such principles of positive international law as the right of peoples to self-determination, non-interference in the internal affairs of States and non-aggression. The Commission should be on its guard against tendentious interpretations aimed at distorting the meaning of those two provisions and at changing their purpose, which was to impose a new type of international relations based on justice and equity.

2. Draft articles on part two adopted by the Commission

283. A number of representatives referred in general to the four draft articles (1, 2, 3 and 5) provisionally adopted by the Commission at the session on the basis of the drafts proposed by the Special Rapporteur in his second and third reports. Some representatives welcomed their adoption as an initial step towards the formulation of substantive provisions dealing with the consequences of

internationally wrongful acts, an essential part of the law of State responsibility. The four draft articles were well suited to serve as the first of a number of introductory and framework articles for part two. They looked forward to the adoption of more draft articles.

284. Other representatives considered that, taken in isolation, the four draft articles appeared uncontroversial and, hence, acceptable. It was stressed that the draft articles were of a general nature and formed a link between parts one and two of the draft. However, it was said, their real impact could only be understood in the light of what would follow. The texts were still only preliminary and might need to be re-examined and could even be modified, depending on the content of the subsequent provisions dealing with substantive obligations to be adopted in part two of the draft. It was also said that the draft articles under consideration should be seen in the light of those adopted earlier.

285. Certain representatives considered that the four draft articles did not call for any particular comments at the current stage. Doubts were expressed whether any comments should be made on articles which did not form a coherent whole. Two of them referred to article 4, which did not yet exist; furthermore, two articles were to be added to complete a set of "general principles" which was to constitute a framework introduction to part two of draft articles. It was difficult to make any new assessment of the work done on part two. Rather than duplicating the comments made on those framework articles at the thirty-seventh session of the General Assembly, or making fragmentary comments on fragmentary texts, it was preferable not to comment on section C of chapter IV of the report until those draft articles had been submitted in their entirety.

286. One representative expressed regret that the commentary to the draft articles was not more detailed.

Article 1

287. It was pointed out that article 1 would seem to correspond substantially to draft article 1 proposed by the Special Rapporteur in his third report, with the marked difference that, instead of placing the emphasis on the internationally wrongful act and the rights and obligations arising therefrom, a reference had been made to "legal consequences", which was intended to avoid any problems of interpretation that might arise in connection with the original emphasis. That seemed to be quite appropriate, since, as several representatives had observed, the sole object of the article was to make a link between parts one and two of the draft.

288. That being the case, one representative did not oppose its inclusion in the draft, provided that its wording was improved. It was the wrongful acts for which a State was responsible that had the legal consequences to be dealt with in part two of the draft. In the view of another representative, the wording of article 1 was not particularly convincing since the legal consequences of an internationally wrongful act were not determined solely by the provisions of part two of the draft but were governed by specific rules or rules of customary

international law (arts. 2 and 3) and were subject to jus cogens norms (future art. 4) and the provisions of the Charter (art. 5). It would be advisable to combine articles 1 and 2.

289. Several representatives referred to the Commission's observation, in paragraph (4) of its commentary to article 1, to the effect that the article did not exclude the possibility that an internationally wrongful act might entail legal consequences in the relationships between States and other "subjects" of international law. Some agreed with that statement. On the other hand, it was considered as misleading and superfluous, since the draft dealt only with relations between States. In that connection, it was said that it would have been desirable to clarify, in the text of draft article 1, that point made only in the commentary, having in mind the situation envisaged in draft article 19, paragraph 3, subparagraphs (b) and (c) of part one, relating respectively to colonial domination and practices such as slavery, genocide and apartheid.

Article 2

290. It was pointed out that article 2, which was clearly residual in character, set out to determine the legal consequences of an internationally wrongful act by rules of international law other than those contemplated in part two. Obviously, the saving clause at the beginning of the article was quite appropriate, since it was intended to preserve the application, where necessary, of the provisions yet to be elaborated, of article 4 on jus cogens, and article 5 on the provisions and procedures of the Charter of the United Nations, both of which permeated the application of the whole corpus of contemporary international law.

291. In the view of one representative, provided that the supplementary nature of the provisions of part two was recognized, the principle of sovereignty of States, which was similar to the principle of free will in private law, would be safeguarded. In accordance with the principles of good-neighbourliness, co-operation among States and the maintenance of international peace and security, States had the power to determine the consequences of a wrongful act entailing State responsibility before that act was committed. However, agreement on such matters could also be reached as a result of negotiations taking place once a wrongful act had been committed. Moreover, the legal consequences agreed upon by the parties must not be contrary to peremptory norms of international law. The guiding principles of the United Nations, particularly those relating to the maintenance of international peace and security, must therefore be taken into account.

292. Another representative, in order to better emphasize the complementarity of the provisions of part two and part three, suggested that in article 2 the words "other rules of international law" should be replaced by the words "an international convention in force".

Article 3

293. It was pointed out that that article dealt with the parameters of the application or rules of customary international law in regard to legal consequences of an internationally wrongful act not set out in part two, subject to the two limitations envisaged in articles 4 and 5. The need for such an article was obvious, it was said, since part two might not be exhaustive as to legal consequences.

294. Several representatives were in favour of the inclusion in article 3 of a reference to the rules of customary international law. The view was expressed that the draft article rightly suggested that the legal consequences of internationally wrongful acts were not necessarily limited to those that were set out in the provisions of part two. Nevertheless, the misgivings voiced at the Commission regarding the exclusive function accorded to the rules of customary law seemed well-founded; the general principles of law and other branches of conventional international law, such as humanitarian law, seemed thereby to be ipso facto rejected in favour of a questionable pre-eminence of customary law. One representative suggested that the word "customary" should be replaced by "public" since the term "public international law" covered all internationally-recognized rules. It could not be said that the examples cited in the commentary to the article represented customary rules, particularly since the entry into force of the Vienna Convention on the Law of Treaties.

295. As understood by one representative, the "fault" in the commission of the breach was no determining factor for the arising of State responsibility. Yet it would appear evident that established "fault" must have some influence on the legal consequences of the wrongful act, or at least on the performance of rights and duties flowing from it.

Article 5

296. In the opinion of one representative, the addition of the clause "the maintenance of international peace and security" in article 5 was felicitous, since it made the reference to the supremacy of the provisions and procedures of the Charter of the United Nations more precise. Paragraph (2) of the commentary was apt in that connection.

297. Another representative felt that the Special Rapporteur had been too cautious in article 5. If the legal consequences of aggression were subject to the provisions and procedures of the Charter relating to the maintenance of international peace and security, it would be pointless to define those consequences, because those provisions and procedures should obviously be implemented when aggression occurred. It was well known that in that regard the conflicts of interest between the permanent members of the Security Council and the exercise of the right of veto made the Security Council and the provisions of the Charter ineffective. A provision such as the one set forth in article 5 would limit the scope of the future convention to international crimes other than aggression and to international delicts.

3. Draft articles on part two proposed by the Special Rapporteur

298. In the opinion of one representative, it might be a good idea to add to the provisionally approved introductory articles in part 2 a provision based on articles 1 and 3 in the second report of the Special Rapporteur, which had been referred to the Drafting Committee.

299. Another representative, recalling that among the articles referred to the Drafting Committee was article 2 of the second set of articles, dealing with the concept of quantitative proportionality between the seriousness of the wrongful act and the exercise of the legal consequences it entailed, was of the view that a general rule on quantitative proportionality should be included in part two. In particular, it would be interesting for States to know what kind of "circumstances" the Commission would be prepared to regard as "aggravating" or "extenuating".

300. One representative stressed that the effects of jus cogens, dealt with in article 4 of the second set, and of international crime should not be ignored or compromised. Public policy, dictated by the higher common interests of the international community, was a concept which had an important place in contemporary international law and should be given weight in that subject also. He favoured the retention of the elements on the effects of jus cogens. The fact that, in the current state of development of the international community, that concept might not be easy to apply neither detracted from its validity nor constituted a reason for abandoning it. To do so would be a retrograde step.

301. In the opinion of certain representatives, an article in the nature of a framework provision, along the lines of article 6 proposed by the Special Rapporteur in his third report, was necessary for the completion of the overall provisions of a general character in part two of the draft articles. Reference would have to be made in the draft articles to the position of third States in exceptional cases of particularly serious breaches of international obligations. For one representative, the question whether and under what circumstances third States could claim the right to take reprisals was of some practical importance. The question was not urgent, but it should not be forgotten once the relevant rules were discussed. It was to some extent interrelated with the complex and thorny problems surrounding the notion of "international crimes". In his view, article 6 as proposed in the second set of articles was not satisfactory in that respect. On the other hand, another representative indicated that he shared the widely held view that draft article 6, referred to in paragraphs 86 and 101 of the Commission's report on its thirty-fourth session (A/37/10), had no place in the codification of State responsibility.

E. STATES OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

1. Comments on the topic as a whole

302. Several representatives commented favourably on the progress achieved on the topic by the International Law Commission at its last session and expressed their

appreciation to the Special Rapporteur for the steady pace of his work which had produced very satisfactory results. It was pointed out in the Committee that the Special Rapporteur had been able to submit to the Commission the full set of 42 articles envisaged and it was remarkable that after producing six articles in 1981 and eight articles in 1982, he had been able to produce 28 articles in 1983 without sacrificing quality. Each article was solidly reasoned and well documented and demonstrated the great flexibility of the Special Rapporteur who was always prepared to revise his suggestions in the light of observations made by the Commission and the Committee. The Commission, for its part, had also proceeded without undue haste by considering the first six articles in 1981 and then again in 1982 at the same time as the eight other articles submitted to it that year. In 1983 it had considered only nine of the 28 articles, but had been able to approve the first eight articles on first reading.

303. Some representatives stressed the importance of the topic and the need for its codification. It was said in that connection that, given the developments in international relations and the situation of the developing countries, there was a need for an improved system to protect the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The codification of the topic would help to strengthen the effectiveness of diplomatic relations and would contribute to the establishment of effective legal guarantees to ensure freedom of communication between States and their diplomatic and consular missions. It was pointed out that the relevant provisions of the 1961 Vienna Convention on Diplomatic Relations and of the 1963 Vienna Convention on Consular Relations were too general and needed more clarification. In that respect, the effort currently under way was necessary in supplementing and harmonizing the existing international legal instruments.

304. One representative stressed the timeliness of the topic from the political as much as from the legal point of view. It could be argued that in view of the basic provisions already laid down in the 1961 Vienna Convention on Diplomatic Relations, it was not absolutely necessary to draft new provisions. He considered, however that the amplification of those rules already embodied in the relevant international conventions in the light of modern State practice would serve to alleviate the uncertainty which still persisted and which often gave rise to practical problems. The adoption of such rules in an appropriate legal instrument would contribute greatly to strengthening the legal authority and effectiveness of the rules governing inter-State relations and co-operation. Another representative was particularly pleased with the pragmatism, sense of compromise and meticulousness displayed by the Commission in the drafting of the articles. It had been argued that some articles went into too much detail. His delegation, which had always believed that legal texts should be as general as possible, believed that in the particular case in question more details were required, because that was the only justification for the draft articles since the general rules governing the diplomatic courier and diplomatic bag had already been established in other international instruments.

305. Other representatives, while not denying the progress made by the Commission on the topic, expressed doubts and reservations as to the urgency and detailed manner in which the Commission had undertaken its codification. For one

representative, since the existing legal framework covering the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was not inadequate, there appeared to be no urgent need to draft a separate convention regulating the legal status of the diplomatic courier and unaccompanied bag. What was required was further efforts on the part of all Governments to ensure that the existing rules were observed. Rather than formulating such detailed provisions as those contained in the draft articles on the topic and conferring upon the diplomatic courier and unaccompanied bags more privileges and immunities than were recognized under the existing legal régime, the Commission should examine the régime established by the Vienna Convention on Diplomatic Relations and how it was being implemented in order to find out whether there were any problems, especially regarding the need to guarantee freedom of communication. Only when any such problem was identified should the Commission proceed to rectify it by preparing new provisions, and then only within the particular area concerned. It was stated by several representatives that the aim of the codification of the topic should be the filling of the small gaps in existing conventions supplementing and completing the few unsettled items of the basic arrangements contained in those conventions.

306. Support was expressed for the Special Rapporteur's commitment to an empirical, functional and pragmatic approach, and close examination of State practice in the field of diplomatic communications. One representative stated that the existing body of international law on the topic had for a long time past assured the relatively smooth functioning of international official communications and he was pleased to see that the Commission had resisted the temptation to adopt a novel approach, which would inevitably have created difficulties, and had borne in mind the inherently reciprocal nature of the rights and duties of States in that area.

307. Various representatives addressed from a general point of view several aspects related to the contents of the draft articles or to solutions adopted by it with regard to specific problems. It was pointed out that the central point of the codification of the topic was the granting of privileges, immunities and facilities to diplomatic couriers and bags. It was logical, stated one representative, that the facilities accorded the diplomatic courier should not be greatly different from those enjoyed by diplomatic agents.

308. On the other hand, the view was also expressed that it was appropriate not to go too far in assimilating the status of the diplomatic courier to that of diplomatic staff, although provision should be made for adequate protection of the courier in the exercise of his functions. In that connection it was pointed out that the temporary nature of the diplomatic courier's assignment made it comparable with a special mission and led to the conclusion that, while he should be accorded certain diplomatic privileges, it would not be proper to assimilate his status wholly to that of a diplomatic agent. Care should be taken not to equate the status of the diplomatic courier with the status of a permanent, semi-permanent or even temporary diplomatic agent. The personal inviolability of the diplomatic courier, it was also said, should be based on the principle of functional necessity. Another representative expressed the view that the principle of reciprocity should be taken into account in the draft articles, since, according to State practice, problems that arose in connection with the status of diplomatic couriers were usually settled confidentially through diplomatic or bilateral channels.

309. The need for achieving in the draft articles a balance between apparently conflicting interests was stressed by several representatives. Thus the view was held that an appropriate balance must be maintained in the draft articles between the sending State's request for confidentiality and the receiving and transit State's need for an assurance of safety. There must also be a balance between ensuring safe and speedy delivery of diplomatic bags and guaranteeing compliance with the receiving State's laws and regulations. Moreover, possible abuses of rights by either the sending or the receiving State must be prevented. Although freedom of movement and travel was indispensable for the performance of the functions of the diplomatic courier, it was equally important to recognize, as the Commission did in paragraph 159 of its report, that States had the right, for reasons of national security, to prohibit or regulate access to particular areas of their territories. In the words of another delegation, the goal was to find a balance between the rights and obligations of the sending and receiving States, on the one hand, and the principle of the inviolability of the diplomatic bag and the need to prevent abuses, on the other. In that connection some representatives stressed a need for a stronger guarantee of the inviolability of the diplomatic or consular bag than the one contained in the Vienna Convention on Diplomatic and Consular Relations. The Commission, it was said, should give more attention to the problem of abuses of the diplomatic bag, which were the most pressing threat to the orderly functioning of the system of communication. In connection with the diplomatic bag, one representative pointed out that the draft articles must conform to article 27 of the Vienna Convention on Diplomatic Relations. He also considered that the obligations of the transit State must remain in conformity with the provisions of article 40, paragraph 3, of the Vienna Convention.

310. It was also said that the Commission should, at some stage, take a decision regarding the relationship between the draft articles and the relevant conventions on diplomatic and consular relations.

311. A number of representatives addressed the question of the form of the future instrument to be adopted on the topic. Several among them supported the view that the draft should take the form of a binding instrument or an international convention. In support of that position, the view was held that only a legal instrument having binding effect could overcome the problems and fill the legal loopholes which still existed, despite the four Vienna Conventions dealing with diplomatic privileges and immunities. The importance of the topic, and the fact that other aspects of diplomatic and consular relations were already covered by international conventions, were among the arguments also mentioned in support of that stand. Another view held that the final product of the Commission should take the form of a short and simple protocol that did not depart from the relevant conventions. The view was also expressed that the Commission's draft articles, if limited to the diplomatic bag and courier, could provide a useful basis for a General Assembly recommendation to States with a view to supplementing and spelling out the provisions of the 1961 Vienna Convention. Another representative had no firm views as to the final form the draft articles should take and did not consider that question particularly urgent.

312. As to the future work of the Commission on the topic, the above-mentioned progress achieved by the Commission at its last session led several representatives

to express the hope that the Commission might be able to finalize its consideration of the topic in the near future, some of them stating that the first reading of the draft articles might be finalized at the 1984 session of the Commission. One representative also expressed the hope that the Commission would finalize the second reading of the draft before the current term of office expired in 1986. In the view of another representative, however, it would of course be desirable for the Commission to present a finished product every five years, but that would not justify giving the draft articles priority over other more important topics.

313. The possibility was also mentioned of referring the draft articles to an ad hoc working group on the topic, whereby the Commission might assure a decisive impetus to its work on that area.

2. Comments on the various draft articles provisionally adopted by the Commission or proposed by the Special Rapporteur

314. Comments were made on the following draft articles provisionally adopted by the Commission: 1, 2, 3, 5 and 6; comments were also made on the following articles proposed by the Special Rapporteur: 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22 and 23. Some comments addressed to certain groups of articles have been assembled and appear inserted in the present topical summary immediately before the first article of each group concerned.

(a) Articles provisionally adopted by the International Law Commission

[Articles 1 to 8]

315. One representative stated that articles 1 to 8 were entirely satisfactory to his delegation.

Article 1. Scope of the present articles

316. Several representatives expressly supported the uniform approach and the comprehensive manner of dealing with all types of couriers and bags adopted in draft article 1. This approach, it was said, constituted a sound legal basis for a uniform régime governing the status of the courier and bag. In identifying rules applicable to all types of official couriers and bags, the Commission had acted correctly, it was said, since any differentiation in the privileges, immunities and facilities established in existing conventions on diplomatic law was based primarily on the difference in the nature or degree of the functions performed by the different categories of official representatives. The view was also expressed that a comprehensive approach to the granting to the diplomatic courier of the necessary facilities represented the essence of the law relating to the status of the diplomatic courier and would ensure the sound conduct of diplomatic relations and strengthen co-operation and understanding at the diplomatic level. Another representative expressly stated that the protection granted by international law to couriers and bags should be extended to consular couriers and bags.

317. One representative, on the other hand, expressed serious reservations regarding the uniform approach adopted by the Special Rapporteur. In the view of that representative, applying the same basic rules to diplomatic couriers and bags, consular couriers and bags and the couriers and bags of special and permanent missions to international organizations seemed dangerous and apt to jeopardize the success of the draft. In the first place, it might raise problems for States which were not parties to the 1969 Convention on Special Missions or to the 1975 Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character. In addition, and above all, that approach disregarded the specific character of the diplomatic bag as compared with the consular bag. Article 27 of the Vienna Convention on Diplomatic Relations differed greatly on that point from article 35 of the Vienna Convention on Consular Relations and, as a result, the consular bag was currently subject to certain restrictions which did not apply to the diplomatic bag. Treating the two in exactly the same way, as envisaged in the draft articles, would constitute a radical change in the law and might not be acceptable to all States. That was a danger to which his delegation wished to draw the attention of the Commission. The Commission itself had perceived the difficulty and had decided to include in the text a provision permitting States to designate those types of couriers and bags to which they wished the new rules to apply. But although such a provision might introduce useful flexibility into the draft, it could lead to real complications, since the status of each type of bag would depend on the position taken by the sending State, the transit State and the receiving State. Such a system might impair the rules that were now universally accepted for the diplomatic bag and the consular bag, respectively. This representative therefore considered that the draft articles should cover only the diplomatic courier stricto sensu and the unaccompanied diplomatic bag. Along the preceding lines it was also stated by one representative that the inclusion of an article permitting States to designate those types of couriers and bags to which they wished the articles to apply, as suggested in paragraph (2) of the commentary to article 1, would not promote uniformity in the treatment of diplomatic couriers; it might be better to try to draw up a compromise text which could eliminate the need for such an optional procedure.

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

318. Several representatives pronounced themselves in favour of extending the scope of the draft articles to international organizations. It was said in that connection that, for practical considerations, the Commission had resumed its discussion of whether or not the draft articles should deal with couriers and bags used by international organisations, a possibility which the Special Rapporteur had envisaged in his preliminary report. The same report had also referred to the inclusion in the scope of the draft articles of official communications of national liberation movements. The Commission should rise above the political aspects of the problem and should take into account the reality of international relations. Throughout the world, States were granting full diplomatic status to the representatives and offices of national liberation movements. Such practices already existed, and it was to be hoped that the Commission would consider the

question seriously. With specific reference to extending the scope to international organizations, one representative stated that there was no justifiable reason why the provisions of the draft should not be extended to cover the bags of international organizations. The main object of codification of the topic was to ensure the expeditious and safe dispatch of diplomatic bags. Some regional organizations, including the Organization of African Unity, found the diplomatic bag a useful and expeditious way of sending messages, particularly in countries where postal communications were slow.

319. Some representatives, although basically in favour of the extension of the scope of the draft, advised caution before the undertaking of such a step. Thus, one representative stated that the Commission must display great caution and realism in studying the possible extension of the scope of the draft to the communications of international organizations and liberation movements, so as not to create difficulties that would obstruct progress and prevent the completion of its work. His delegation took that view, notwithstanding its position concerning the right of liberation movements to benefit from the status of the diplomatic bag. Another representative pointed out that, while his delegation was generally in favour of the inclusion of couriers and bags used by international organizations and national liberation movements, it agreed that no decision should be taken as yet, so as to avoid any difficulties that might hamper progress.

320. Another representative felt that it was neither necessary nor desirable to include international organizations or other non-State entities in the scope of the draft. However, he would be prepared to reconsider his position in respect of international organizations if most States felt that existing conventions and headquarters régimes were inadequate, but he continued to think that the inclusion of international organizations could significantly complicate the drafting work.

321. One representative expressed grave reservations about expanding the scope of the draft in that way. To do so would seriously limit its possible acceptability to many States. It would also result in considerable delay in completing the project. At the very least, the Commission should complete its first reading of the draft as a whole on the basis of the scope indicated in article 1. The Commission and Sixth Committee could then review the position, so that a final decision could be reached.

322. Still another representative frankly opposed any broadening of the scope of the draft articles which, he said, should in no circumstances exceed those of the Vienna Conventions of 1961 and 1963 on diplomatic and consular relations, respectively, because of the political obstacles involved.

Article 3. Use of terms

323. Commenting both on the definitions of "diplomatic courier" and "diplomatic bag" contained in article 3 as adopted on first reading by the Commission, one representative pointed out that they differed from the previous versions proposed by the Special Rapporteur in that those terms had now been assigned the meanings they had in the four relevant Conventions on diplomatic and consular law. That

approach could lead to difficulties in interpretation if there were an inconsistency between the régime of the draft articles and that of the four Conventions. It might therefore be necessary to include in the draft articles a provision dealing with their relationship to those Conventions.

324. With specific reference to the definition of "diplomatic bag", another representative was of the view that it was essential, as the Commission recognized in paragraph (7) of its commentary to article 3, to distinguish the diplomatic bag from other travelling containers, such as the personal luggage of a diplomatic agent or an ordinary postal parcel. On the other hand, his delegation did not share the view expressed in the same paragraph that so long as the diplomatic bag bore visible external marks of its character as such, it should continue to get the protection accorded the diplomatic bag even if its contents were found to be objects other than those which were permitted to be carried in a diplomatic bag. Adoption of such a provision might encourage abuse of the diplomatic bag.

325. In connection with the diplomatic bag, the view was also expressed that, when defining it, the Commission should ensure that its use was restricted to official communications between the sending State and its missions or delegations. It would be desirable to include articles on the right of a receiving State to prescribe and apply in a non-discriminatory manner the maximum allowable size of a diplomatic bag and on the duties of a sending State to prevent misuse or abuse of the diplomatic bag.

326. Furthermore, one representative pointed out that the provisions concerning the diplomatic bag should conform with article 27 of the Vienna Convention on Diplomatic Relations. In that respect, he wished to draw attention to certain innovations which did not seem to be compatible with the Vienna Convention. The Convention stipulated that the diplomatic bag must bear visible external marks of its character and might contain only diplomatic documents or articles intended for official use. The Commission's draft made those requirements part of the definition of the bag. His delegation wondered whether there might not be drawbacks in such a change.

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

327. One representative stressed the importance of that provision since it was not inconceivable that a diplomatic courier might interfere in the internal affairs of the receiving State or the transit State, for example by carrying in the diplomatic bag subversive propaganda directed against the Government of the receiving State and to be distributed in that State.

328. Another representative noted some differences in wording between draft article 5 and article 41, paragraph 1, of the Vienna Convention for which he failed to see the justification. According to paragraph (1) of the commentary to draft article 5, the specific means whereby the sending State might exercise control over the use of its own bag would be spelt out in later articles. In the opinion of his delegation, that was a question solely within the competence of the State in question.

Article 6. Non-discrimination and reciprocity

329. The view was expressed in connection with draft article 6 that it would be justified in principle only if a new convention were prepared. As currently worded, it did not settle the question of the scope of the rule of reciprocity for the transit State.

(b) Articles proposed by the Special Rapporteur

Article 9. Appointment of the same person by two or more States as a diplomatic courier

330. Characterizing as "rare" the situation of a person appointed as a diplomatic courier by two or more States, one representative stated that the principle behind that article was acceptable to him. He believed, however, that the provision could be included in a paragraph of draft article 8 which deals with the appointment of the diplomatic courier, instead of forming a separate draft article.

Article 10. Nationality of the diplomatic courier

331. Speaking in connection with draft article 10, one representative stated that the question of the diplomatic courier ad hoc was important to his delegation, because it was its Government's practice either to hand the diplomatic bag over to the captain of an aircraft or to send it through a regular diplomatic courier. That question should be covered in draft article 10, he added.

Article 12. Commencement of the functions of the diplomatic courier

Article 13. End of the functions of the diplomatic courier

332. Speaking jointly on draft articles 12 and 13, one representative was of the opinion that the courier's functions terminated only when he had delivered the bag to its final destination and returned to his country.

[Articles 15 to 23]

333. Some representatives referred generally to draft articles 15 to 23. Several of them expressed the view that the draft articles were generally acceptable and presented no substantial difficulties. However, the possibility of drafting changes was also suggested. One representative, in particular, stated that the draft articles should be condensed and amalgamated, since the substance was largely covered by practice and by positive diplomatic law. It agreed that the Commission should, above all, identify areas in which practical problems had arisen and then regulate those areas, bearing in mind the duties of the diplomatic courier and the peripatetic nature of his activities. Summarizing the debate on those draft articles held in the Commission, another representative stated that the comments

made on them by members of the Commission had related mainly to their form, and it did seem that several of them could be amalgamated and shortened.

Article 15. General facilities

334. One representative favoured adding the phrase "having regard to the nature and task of the diplomatic courier" at the end of draft article 15, since it was an important qualification to the requirement to grant facilities to the courier and made the term "facilities" less objectionable.

335. Several comments were made concerning the possible amalgamation of this draft article with other draft articles, particularly draft articles 18 and 19 (see comments under those draft articles).

Article 16. Entry into the territory of the receiving State and the transit State

336. One representative suggested that, in paragraph 2 of the draft article, the work "quickly" should be replaced by "expeditiously".

Article 17. Freedom of movement

337. It was suggested by one representative that the concept of the promotion of the speedy and efficient performance of his duties by a diplomatic courier could be made more explicit by the insertion, at the appropriate place, of the words "speedy and efficient performance".

Article 18. Freedom of communication

338. The same representative who made the comment on draft article 17 pointed out that draft article 18 covered much the same ground as paragraph 1 of article 4, which deals with freedom of official communications; but if the draft article was to be maintained, he would favour keeping the words "where necessary", the purpose of which was convincingly explained in paragraph 41 of the Special Rapporteur's fourth report. One representative felt that the draft article (as well as draft article 19) could be dispensed with provided that some additional language was incorporated in the commentary to draft article 15.

339. Another representative felt that article 18 did not duplicate article 4 and had a place of its own in the draft.

Article 19. Temporary accommodation

340. Some representatives found draft article 19 generally acceptable, although it could be subject to some drafting changes. It was pointed out in that connection

that the draft article followed the pattern of existing conventions and State practice. It was necessary to ensure the safety of temporary accommodation, which was essential for the speedy delivery of the diplomatic bag. The Special Rapporteur might therefore consider redrafting the article to cover the question of security.

341. Other representatives found the article unnecessary. It was felt that it could easily be combined with, or its contents considered to be included in, draft article 15, since assisting the courier in finding temporary accommodation fell within the general obligation to accord him the facilities required for the performance of his official functions.

[Articles 20 to 23]

342. Some representatives supported generally draft articles 20 to 23 without prejudice to some drafting changes. One representative expressed his support for the Special Rapporteur's statement that the inviolability of a diplomatic courier had to be seen in relation to all the facilities, privileges and immunities granted to the courier for the efficient performance of his duties. It was also pointed out that the Commission's decision to resume consideration of draft articles 20 to 23 at its thirty-sixth session, before referring them to the Drafting Committee, would give it an opportunity to improve their formulation and make them more acceptable.

Article 20. Personal inviolability

343. Comments were made with particular reference to paragraph 2 of the draft article. One representative stated that the obligation therein contained for the receiving State to prosecute and punish infringements of the personal inviolability of the diplomatic courier was in conformity with the general principles on which the responsibility of States for ensuring the normal functioning of diplomatic communication was based. Such an obligation would provide effective protection of the personal inviolability of the courier.

344. Other representatives questioned the above-mentioned aspect of the draft article. One of them wondered whether that provision should be included in the draft articles since there was no such provision in the Vienna Convention on Diplomatic Relations or in the Vienna Convention on Consular Relations. In his view, it was a question which exceeded the scope of diplomatic and consular law as such and which touched on the problem of State responsibility for infringements of the provisions of the future instrument. Another representative supported the criticism recorded in paragraph 179 of the Commission's report concerning paragraph 2 of draft article 20, and one representative stated that the remarks contained in that paragraph seemed to argue for a reconsideration of that aspect of the paragraph, especially as it already provided that the receiving or transit State should take all appropriate measures to prevent any infringement of the person of the diplomatic courier. Another representative stated that there did not seem to be any need for establishing an obligation to prosecute as envisaged in the

paragraph. It was proposed by one representative to redraft paragraph 2 of draft article 20 as follows:

> "The receiving State or, as applicable, the transit State, shall treat the diplomatic courier with courtesy and shall take all reasonable steps to prevent any infringement of his person, freedom or dignity."

The current wording of that paragraph, he added, seemed to impose an absolute obligation on States, which was unacceptable.

Article 21. Inviolability of temporary accommodation

345. In the view of one representative, draft article 21 should be incorporated into the set of draft articles, even though the situations to which it was applicable might be rare. It could subcribe to the derogations from the inviolability of the temporary accommodation of the diplomatic courier prescribed in paragraph 3 of the draft article only under the specific circumstance envisaged in the provision.

346. Other representatives criticized either part of the draft article or its entirety. Thus, one representative stated that although paragraph 3 of the draft article was acceptable to his delegation, he believed that the second sentence should be deleted. Once there were serious grounds for believing that there were in the temporary accommodation articles which were prohibited by the law of the receiving State or the transit State, then the courier had breached his part of the obligation, and it would be illogical to obtain his consent before searching such premises. Referring generally to the draft article, another representative stated that his delegation had reservations about providing for the inviolability of the temporary accommodation of a diplomatic courier, since there was a significant difference between the position of such couriers and that of the administrative and technical staff of missions. Whereas the latter resided in premises on a long-term basis, the diplomatic courier's stay was short-term. Long-term residence involved the staff of a mission in a network of relationships with the receiving country which gave their accommodation a character different from that of a diplomatic courier's and justified providing for its inviolability. Moreover, the temporary nature of the courier's accommodation might provide opportunities which made breaches of the law more likely to be committed and more difficult to detect. The draft article was also criticized for other reasons. Thus, it was said that its provisions were hardly enforceable, particularly in States where everyone, including a foreigner, was free to choose the hotel where he would stay. Another representative agreed with the suggestion contained in paragraph 180 of the Commission's report that the draft article could be omitted.

Article 22. Inviolability of the means of transport

347. Different views were also expressed on draft article 22. One representative, as he had done with draft article 23, subscribed to the view that the draft article should be incorporated in the text, even though the situations to which it was

applicable might be rare. His delegation could subscribe to the derogation from the inviolability of the means of transport of the diplomatic courier prescribed in paragraph 2 of article 22 only under the specific circumstances envisaged in that provision. Another representative applied to paragraph 2 of draft article 22 a reasoning similar to the one he applied to paragraph 3 of draft article 21. Once there were serious grounds for believing that there were in the means of transport used by the courier articles which were prohibited by the law of the receiving State or the transit State, then the courier had breached his part of the obligation, and it would be illogical to obtain his consent before searching the means of transport concerned. Therefore, although the paragraph was in principle acceptable to that delegation, it also believed that everything after the word "transport" in the sixth line of the paragraph (as reproduced in footnote 199 of the 1983 Commission's report, A/38/10) should be deleted. Another representative stated that his delegation did not think that the need to provide for the inviolability of the courier's means of transport had been demonstrated, and it was not clear what was meant by "individual means of transport". The reservations it had expressed on the provision of inviolability for temporary accommodation in draft article 21 applied equally to draft article 22.

348. Also with reference to draft article 22, one representative agreed with the suggestion contained in paragraph 180 of the Commission's report that the draft article could be omitted.

Article 23. Immunity from jurisdiction

349. One representative regarded draft article 23 as an acceptable basis for future work and supported the provision contained in paragraph 4, as currently worded.

350. Other representatives expressed doubts concerning paragraphs of the draft article or the draft article in its entirety. In connection with paragraph 1, one representative believed that the correspondence of the courier's status to that of a diplomatic agent warranted providing for absolute immunity from the criminal jurisdiction of the receiving or transit State. But he did not see how the giving of evidence would ordinarily disturb the discharge of the courier's main function; if the exemption from the obligation to give evidence was to be retained in paragraph 4 of the draft article, it should be qualified by the addition of the phrase "concerning matters involving the exercise of his official function". In the view of another representative, since the idea of functional necessity had been rightly applied to the immunity of the courier from jurisdiction and his main task was the speedy delivery of the bag, paragraph 3 of the draft article should also state that measures of execution should not infringe upon the inviolability of his means of transport. For the same reason, the usefulness of paragraph 5 of the draft article might be questioned. Another representative expressed doubts about the need for the draft article as a whole. There could be few, if any cases, he said, in which a diplomatic courier might be subjected to the jurisdiction of the courts of the receiving or transit State. If functional necessity was the criterion for the grant of privileges and immunities, there must at least be a question as to the need for the draft article.

F. THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

351. The Commission was congratulated for having resumed its work on the topic "The law of the non-navigational uses of international watercourses" on the basis of the first report presented by the new Special Rapporteur, Mr. Jens Evensen. The Special Rapporteur was singled out for special commendation for having submitted in his first report an entire set of draft articles on the topic reflecting new and interesting ideas, an unprecedented achievement which enabled all the political, economic and legal aspects of that important and delicate topic to be viewed as a whole. It was also remarked with satisfaction that the new Special Rapporteur had built upon the work of his two illustrious predecessors, as well as upon the previous work of the Commission on the topic, thus allowing continuity and facilitating early completion of work on the topic. The report of the Special Rapporteur was thus viewed as a suitable basis for continued work on the topic by the Commission. Confidence was expressed that in his future work the Special Rapporteur would take fully into account the observations made in both the Commission and the Sixth Committee in revising some of his proposals and would be able to find compromise solutions acceptable to all.

352. Most representatives who addressed themselves to the topic noted its special characteristics and stressed its vital and fundamental importance for States and their peoples who depended on the uses of water for agricultural, energy and domestic requirements and for life itself. The importance of water in improving the quality of life could not be overemphasised; it was thus of particular importance for developing countries. The uses of water resources directly affected the interrelated problems of development, population and environment from the point of view of the objectives of the Third United Nations Development Decade. The progressive development and codification of the law of the non-navigational uses of international wateroourses would do much to provide a legal framework designed to reconcile competing interests, preserve harmonious relations among States and peace and security throughout the world; the task was thus an urgent one.

353. The difficult and controversial nature of the topic was highlighted by certain representatives. The complex and technical nature of the subject-matter, as well as its correlation to State interests, made solutions difficult. An aggregation of conflicting State interests should therefore be sought and solutions worked out which were capable of wide acceptance and which achieved a balance between the general and the specific. It was recalled that the United Nations had been dealing with the subject of the non-navigational uses of international watercourses since the 1960s, but the discussion really involved the basic rules relating to the status of international rivers, which dated from the time of the Congress of Vienna. With the introduction of modern means of exploitation of international watercourses, however, new problems had arisen. Unless account was taken of both the historical aspects and the future needs, little progress would be made on that subject. In a way, it was a subject which belonged to the twenty-first century, and a start must be made now on trying to combine the traditional types of regulation with ones that would suit the future.

354. Progress in developing the topic would depend on achieving compromises that

took into account the rights, interests and practice of States as sovereign subjects of international law and gave due consideration to the geographical, political and economic peculiarities of States, as well as to the peculiar characteristic of each international watercourse.

355. A number of representatives also stressed that the topic involved a unique physical phenomenon. The physical facts needed to be recognized in deciding upon the legal rules. It could be said that the task before the Commission consisted essentially in the application of a number of legal concepts to a physical phenomenon. It was said that, in his first report, the Special Rapporteur had outlined in a generally satisfactory manner the juridical infrastructure for international co-operation reflecting the physical interdependence of States in the non-navigational uses of international watercourses. Because of that interdependence, international co-operation was the solution for the rational and just exploitation of resources, such as fresh water, which were rapidly becoming scarce. It was urged that there were several practical reasons why that must be the case: the hydrological cycle imparted a natural unity to the treatment of international watercourses, many watercourses were remarkably unstable, and one objective of regulating them must be to mitigate the effects; the rate of technological change might interfere radically with the régime of international watercourses; the cost of projects was rising at an exponential rate, and without international co-operation the full potential benefits of international watercourses could not in many cases be realized; and, lastly, water had become an increasingly scarce input for food production. Belief was expressed in the theory of absolute geographical unity, according to which it was an absolute right of each State through which an international watercourse ran that that watercourse should remain qualitatively and quantitatively unaltered. A watercourse from its source to its estuary constituted a geographical unity unaffected by political borders, and no State could exercise absolute sovereignty over any part thereof flowing through its territory. Consequently, all States were entitled to make use of the part of a watercourse flowing through their territory in whatever manner they wished, as long as such use did not infringe the rights of other States to benefit from that watercourse.

356. Certain representatives suggested that, in view of the technical nature of the subject-matter, scientific and technical advice should be sought at an early stage of the Commission's work in order to achieve practically oriented legal texts. It was moreover noted that the experience of the Third United Nations Conference on the Law of the Sea was relevant since the subject-matter of the law of the sea Convention was likewise a physical phenomenon subject to variations.

357. The link between the present topic and that of "international liability for injurious correspondence arising out of acts not prohibited by international law" waa noted by certain representatives. It was suggested that the law of the non-navigational uses of international watercourses had importance as a first application to a specific problem of the idea of liability for non-wrongful acts and that there must be close co-ordination of the work carried out on that topic and on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

358. The suggestion was also made that, in dealing with those two topics, the Commission was entering the vast and varied domain of good-neighbourliness.

Constructive good-neighbourliness was based on a commitment to values that transcended immediate individual interests and required a vision of mutual prosperity. Accordingly, the principles such as permanent sovereignty over natural resources and territorial sovereignty clearly favoured co-operation in its many forms. Therefore, the Commission should not limit its work to codifying the two topics in question only on the basis of the relationship between the rights of one side and the duties of the other.

1. Comments on the general approach suggested by the Special Rapporteur

359. With regard to the methodology of work to be followed, many representatives who addressed the question agreed with the suggestion of the Special Rapporteur that the Commission should follow the course begun in 1980: the preparation of draft articles for inclusion in a framework agreement which would contain general, residual rules of uniform application, designed to be supplemented where necessary by distinct and detailed agreements between States of an international watercourse which would take into account their particular needs and the characteristics of the watercourse concerned. It was said that such an approach would encourage system States to draw up system agreements among themselves, as it would make it possible to preserve the unique nature and legal circumstances of each international watercourse. The framework agreement coupled with system agreements approach constituted, it was emphasized, a pragmatic and flexible procedure that would encourage co-operation among riparian States and seemed to meet the objection raised by certain members for whom the current draft did not sufficiently stress the sovereign rights of riparian States to use the water resources within their territories. Co-operation and the conclusion of system agreements among riparian States in fact implied that they would use their sovereign rights to negotiate and agree on solutions to the problems affecting them. The concepts of co-operation and sovereignty were complementary, not contradictory. The general principles of international law to be included in the framework agreement should, it was urged by some representatives, contain principles that were precise and detailed enough to demand recognition and to safeguard the rights of interested parties in the absence of specific agreements which States might not wish to conclude.

360. Other representatives, however, stressed that the instrument envisaged would have to limit itself to the establishment of general rules and should not be so specific as to impose massive limits on the freedom of movement of States in their bilateral or multilateral contacts. Since the draft articles would have to cover a somewhat extensive range of activities, there was all the more reason for a certain degree of restraint and flexibility in drafting the proposed provisions. It was also remarked that the Commission shouly apply itself to a prior study of the solutions already established in positive international law and expressed in the obligations of riparian States in different parts of the world; it would be useful if the Commission and the Sixth Committee could be supplied with such references as the practice of States on non-navigational uses of international watercourses, so that they would have a global view of the situation when elaborating the draft principles.

361. While it was recognized that there was a great diversity of watercourse systems, it was none the less maintained that such diversity did not prevent uniform treatment; certain common watercourse characteristics existed. Drawing inspiration from the experiences of the law of the sea Conference, it was possible to group States of an international watercourse system according to similar interests, with the aim of finding a balance between those interests and those of other groups of States.

362. According to one representative, there was another feature of international watercourses which had never been brought to the forefront, namely, the fact that the relationships between States members of an international watercourse varied greatly from one situation to another. The question that arose was what legal rules should govern those relationships between States, taking into account the fact that they shared a common watercourse system. The problem went beyond the scope of differences among jurists. Basically, it was the result of the way in which States perceived their own interests vis-à-vis those of other States with which they shared a common watercourse; it was, perhaps, the result of the particular political relationships existing among riparian States. Differences of a political nature had a greater bearing on attempts to find ways of regulating the non-navigational uses of international watercourses than the geographical and physical peculiarities of particular watercourses. It was in that area that the framework agreement approach was justified.

363. On the other hand, certain representatives expressed doubts or reservations regarding the suggested methodological approach. It was stated that the distinction made between the framework agreement and the system agreements seemed to involve some intricate problems concerning, in particular, the priority of the rules established in those agreements and their mutual relationship and, in that respect, the draft articles should perhaps be re-examined. Doubt was expressed whether the topic as a whole was either mature or manageable for codification, except perhaps for some guideline rules. It was stressed that work on the topic of the law of the non-navigational uses of international watercourses would be meaningful only if it was aimed at producing general rules and recommendations which riparian States might include in agreements concerning particular international rivers. Every international river and the legal régime governing its non-navigational uses necessarily had their own peculiarities. Consequently, the formulation of a universal régime, which the Special Rapporteur was aiming at in the complete draft he had submitted, was viewed as a hopeless task.

364. According to certain representatives, the difficulty lay in the mere fact of drafting a convention containing only residual rules in the area under consideration. It was doubtful whether States that were already parties to an important system agreement would wish to be bound by a framework agreement. Moreover, States that had not yet concluded a system agreement might wish to become parties to a framework agreement only if all States sharing the same international watercourse system also became parties. It would therefore be preferable, according to this view, to draft model rules for adoption by the General Assembly not as a binding convention, but rather as a recommendation or as guidelines. Each individual watercourse had its particular characteristics and its particular problems and, while watercourses had common characteristics, those characteristics

led to general principles for the administration and management of international watercourse systems and not to mandatory rules in the strict sense. Therefore, the future instrument should contain general rules constituting guidelines for the conduct of States which would help them to draft system agreements for special watercourses, for special uses, for specific installations or for specific parts of a watercourse.

365. Certain other representatives, however, were in favour of preparing the framework instrument as an international convention containing binding rules. That approach, it was said, was warranted to ensure the progressive development and codification of the law in question in accordance with Article 13 of the Charter. That task had been facilitated by the draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States approved by the Governing Council of the United Nations Environment Programme (UNEP). It was also emphasized that the draft articles were based on the assumption that States members of an international watercourse system were ready to co-operate for the better utilization of their common watercourse. But it was difficult to pursue that approach in situations where such co-operation could not be presumed. The notion of "good-neighbourly relations" was of little use in such cases, nor could the Charter provide a firm legal basis for imposing positive and specific obligations on States for co-operation in the management, utilization and administration of common watercourse systems. In that connection, codification would provide a binding legal instrument against which the activities of riparian States in respect of the common watercourse system could be measured.

366. In that connection also, reference was made to the character of the provisions to be included in the envisaged framework agreement. Support was expressed for the Special Rapporteur's approach of including both obligatory provisions and other legal principles or standards constituting guidelines aimed at helping co-riparian States to establish system agreements. The draft, it was urged, had to cover a wide variety of situations and should therefore contain enough mandatory provisions defining the mutual rights and obligations of States parties, without necessarily obliging them to conclude specific agreements on co-operation or joint management. In cases where the political will for co-operation existed, the role of the Commission as the provider of general guidelines, open to amendment to suit a particular situation, was undoubtedly a useful one. In cases where the existence of the political will which was the basis for co-operation could not be taken for granted, the role of the Commission would be to delineate the rights and duties of States as clearly as possible and in so doing to minimize the possibilities of disputes between States.

367. One representative maintained that with regard to the aim and legal nature of the provisions of a new convention, three views had emerged; for some, including the Special Rapporteur, the draft should include not only binding rules but also general guidelines; for others, the draft should not contain recommendations or guidelines; for still others, the draft convention should contain nothing other than a set of guidelines for drawing up system agreements. In his view, neither of the last two positions corresponded to the terms of reference given to the Commission by the General Assembly which, in the relevant resolution, had requested

that the study of the law of the non-navigational uses of international watercourses should be taken up with a view to its progressive development and codification. That double objective was confirmed by the fact that the General Assembly had recommended to the Commission that it take account of work carried out on the topic by certain international governmental and non-governmental bodies, and there could be no doubt that the results of that work, for example the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association in 1966, the resolutions adopted by the Institute of International Law at Madrid, Salzburg and Athens, the Montevideo Declaration of 1933 and certain texts prepared by the Council of Europe and the Asian-African Legal Consultative Committee, to mention only the most important, contained rules and provisions that reflected generally accepted principles of customary international law and were therefore suitable for codification. At the same time, those texts contained other provisions which were merely guidelines or recommendations and which were clearly aimed at the progressive development of the law in that field. That dual approach, combining codification with progressive development of the law, which was the approach used by the Special Rapporteur in preparing his draft, seemed to offer the best prospects for settling the existing problems in the field in question.

368. Another representative, however, issued a word of caution. Even if the inclusion of guidelines in the context of a framework agreement such as that envisaged could be considered useful, it should not be forgotten that the main task of the Commission was to further the codification and progressive development of international law by drawing up draft articles which could later form the basis for treaties setting out legal rights and obligations. The Commission was the only body which had that as its main responsibility, whereas there were many international bodies competent to adopt recommendations and guidelines.

369. In commenting on the general principles and legal standards included in the Special Rapporteur's draft, certain representatives referred to the need to transform certain optional provisions into mandatory ones or vice versa. One representative took note of the principles and legal standards set forth by the Special Rapporteur, particularly the need to consider the international watercourse system as a shared natural resource to be used in a reasonable and equitable manner, the obligation to co-operate in the management and administration of the system, and the requirement that States should refrain from activities that caused appreciable harm to the rights and interests of neighbouring States. Nevertheless, those principles and standards were optional and did not make it possible to define the rights and duties of the system States; they should, therefore, be defined clearly and made mandatory, particularly with regard to the following points: co-operation aimed at ensuring optimum utilization, prohibition of activities likely to cause appreciable harm, and reasonable and equitable utilization; with respect to the last point, account should be taken of geographic, hydrographic, hydraulic and climatic factors, and of the requirements of economic development and the current and future vital needs of each system State. Certain representatives also made suggestions in that connection regarding the placement of certain articles in the various chapters. (See comments on the various chapters and articles below.) It was urged that a clearer distinction be made between binding rules and mere guidelines.

370. Some representatives stressed the importance of reflecting certain principles in the framework agreement to be prepared. Among those mentioned by representatives were the following: the principle of good-neighbourliness; the obligation to negotiate in good faith; the duty to co-operate in accordance with the United Nations Charter; the principles of equitable and reasonable sharing and participation; the right of States to utilize their water resources within the limits of their respective territories to their own benefit, pursuant to their own policies, provided that they did not thereby cause damage or appreciable harm to other States; sic utere tuo ut alienum non laedas; the principles of sovereign equality of States, renunciation of the threat or use of force, and non-interference in the internal affairs of States; the principle of the permanent sovereignty of States over their national resources; the principle of territorial sovereignty; the fundamental principles of international law concerning friendly relations and co-operation among States; the acquired right of States to the quantities of water which they customarily took from an international watercourse.

371. As to whether the Special Rapporteur had, in his approach to the general principles to be included and to the specific provisions, struck a reasonable balance between the interdependence of riparian States in that field and their sovereignty and independence, some representatives felt that he had in large measure managed to balance political interests and legal principles. A balance between the rights and responsibilities of States was necessary in view of the correlative nature of the territorial rights of sovereign States, which induced States to make accommodations with regard to their respective rights and obligations. Support was expressed for continued efforts to strike the delicate balance between the conflicting and competing interests at stake. Solutions would have to be found which would sufficiently reconcile those conflicting interests but would, at the same time, accord with overriding considerations of equity, fair dealing and reasonableness.

372. Other representatives believed that although the Special Rapporteur had attempted to maintain a balance between the interests of upstream and downstream States, the draft articles seemed to stress the duties of the former and the interests of the latter; thus, they might limit rather than promote the use of international watercourses. It was stressed by one representative that when dealing with a subject as complex and controversial as the one under consideration, the Commission should seek to achieve the elaboration of norms that, reflecting the actual international practice of States, would receive the widest possible acceptance. A convention in that field would be effective only if it gave all States, regardless of their geographical location with respect to one or more watercourses, the necessary guarantees that their rights would be truly recognized, whether the right was that of utilizing the watercourse for their own benefit or that of not being substantially harmed by the use of the watercourse by another State. The main purpose of a convention should not in any way be the consecration of principles and concepts that, despite not meeting with general acceptance, were nevertheless regarded by some as the ones that should rule over national watercourses. Such an instrument would only make more difficult the conclusion of agreements between States. Unfortunately, it was said, it appeared that those considerations did not figure at all in the Special Rapporteur's report and that in spite of the consensus which had emerged from the Commission's previous

debates - that the principles formulated should not be too detailed to be generally applicable, nor too general to be effective - the Special Rapporteur had drafted excessively detailed formulations, apparently losing sight of the fact that the instrument being prepared would have to provide a general framework for the guidance of States in their activities.

373. According to another representative, a general criticism voiced in the Sixth Committee had been that the Commission should only seek to elaborate international norms which reflected the actual practice of States since only such norms would receive the widest possible acceptance. He noted that it had been said that a convention could only be effective if all States, regardless of their geographical location with respect to one or more watercourse systems, were given the guarantee that their rights would be recognized. In his view, that position involved the rejection of any approach based on a balance of interests as a mode of progressive development. The critics therefore needed to show that the current practice of States contained all the necessary norms which guaranteed to all States recognition of their rights. Failure to do so would mean that the codification of State practice was insufficient to resolve the type of problems arising in connection with the topic. Such guarantees were clearly impossible. That fact was inherent in the approach adopted by the Commission. The latter should codify the existing law and develop it progressively to the appropriate extent which should indicate to States the further direction of development they might opt to take in their system agreements.

374. Some representatives referred to certain issues which they felt had been omitted from the draft prepared by the Special Rapporteur but which warranted inclusion. It was urged by certain representatives that the Commission should consider the question of the diversion of the flow of an international watercourse. Modern technology had already engendered such diversions and made further attempts of the kind likely. Attention needed to be given to the nature of such diversions, particularly of inter-basin transfers. That would clearly have implications for the principles termed "legal standards" and for the peremptory norms contained in the scheme proposed by the Special Rapporteur.

375. Certain other representatives noted that the fundamental distinction between successive and contiguous watercourses and the legal consequences of that distinction had been totally ignored in the Special Rapporteur's draft. That was one fact which could not be disregarded, since it bore on the very nature of the rights and obligations of States with regard to international watercourses: the classical distinction between contiguous and successive watercourses, which was contained in a number of instruments, such as the Declaration of Asunción of 3 June 1971, and was implicitly or explicitly recognized in many other legal texts, some of them mentioned in the reports submitted in 1981 by the previous Special Rapporteur.

376. One representative highlighted that any codification of the law of the non-navigational uses of international watercourses must be based primarily on State practice in the matter of navigation, that being one of the main uses of international watercourses, and in other matters. An examination of State practice in those matters showed that the riparian States of international watercourses had

concluded co-operation agreements based on strict respect for the sovereign rights which they possessed over their territory.

377. Finally, with regard to articles 1 to 5 and X provisionally adopted by the Commission at its 1980 session (see A/38/10, para. 202), it was noted by some representatives that the Special Rapporteur had resubmitted those texts, in some cases slightly modified, as articles 2 to 6 and 39 of his tentative draft of a convention. Some of those representatives felt that at the current stage there was no need to reopen the debate on those draft articles previously adopted, in particular those now included as articles 2 to 5 in the Special Rapporteur's outline of a framework agreement. There would be an opportunity to re-examine them during the course of the second reading of the draft articles; in the meantime, the principles contained in those articles, which were based on State practices and customary international law, should continue to form the basis of the proposed convention. It was deemed to be thoroughly unwise to reopen texts already agreed upon, even if provisionally.

378. Other representatives, however, urged a review of those articles so as to ensure that they reflected a generally acceptable approach to the topic. It was doubted that the 1980 texts constituted a sound basis for a satisfactory instrument on the topic; resorting to concepts provisionally adopted at that time not only limited the possibility for wide acceptance of the draft articles but also, to a certain extent, put a strait-jacket on the Commission's work because it prejudged the final results of the drafting of certain provisions.

2. Comments on the chapters and articles included in the outlined presented by the Special Rapporteur

CHAPTER I. INTRODUCTORY ARTICLES

Article 1. Explanation (definition) of the term "international watercourse system" as applied by the present draft Convention

379. Regarding the use and explanation of the term "international watercourse system", some representatives expressed approval of the term and of the explanation thereof provided in article 1 of the Special Rapporteur's draft. It was noted with satisfaction that that term was to be distinguished from the concept of "international drainage basin" which had not been accepted by some States. It was noted with appreciation that the Commission had departed from the very controversial concept of "drainage basin". The change from a "drainage basin" concept to the idea expressed in the Special Rapporteur's report of an "international watercourse system" would provide an appropriate basis for the development of a coherent and rational body of general principles dealing with international watercourses, without impinging upon those watercourses that were regulated by their own particular régimes. It was, moreover, said that "the key to the success of the Commission's work on that item lay in the formula 'international watercourse systems'".

380. A number of representatives commended the Special Rapporteur's approach of drafting article 1 in a purely descriptive manner, from which no legal rules could be deduced. That approach left room for the evolutionary development of the definition as the debate went on. It was also based upon the very nature of things. The description of an international watercourse system was in the last analysis anchored in the unity of the hydrological cycle, a fact that a glance at any hydrographic map would confirm. The purpose of article 1 was not to create a superstructure from which legal principles could be distilled; the expressions "international watercourse system" and "system States" were convenient descriptive tools sufficiently comprehensive to provide the necessary guidance. That conception, which clearly avoided any concrete definition of concepts, tallied well with the understanding reached in the Commission in 1980 as to what was meant by the term "international watercourse system" (see A/38/10, para. 202). It was therefore simply a formulation which would help the work of the Commission to get under way. Its final form would depend to a large extent on the final shape which the other draft articles took as the work proceeded.

381. The question was raised whether article 1 was successful in its attempt to provide a purely descriptive definition. According to one view, the attempt was not entirely successful since it also contained the idea of the interdependence of system States and since paragraph 2 of the article was purely normative. A greater effort must be made to arrive at a strictly descriptive definition, which would help to eliminate a number of difficulties, and the idea of interdependence should be expressed in the most relative possible terms, so as not to affect autonomous uses of watercourses. According to another view, while the intention was not to create a superstructure from which legal principles could be distilled, the definition of the term "international watercourse system" would necessarily lead to the inclusion in the draft articles of a number of legal concepts and rules, such as the concept of a shared natural resource, the requirement that negotiations be held, and equitable sharing. All those points needed further study by the Commission and by Governments, and it was to be hoped that their final form and place in the draft convention would not be prejudiced by the definition in article 1. It was remarked that there seemed to be doubt as to whether article 1 should be deemed a definition or a description; in view of the nature of the topic, the general structure of the proposed rules and the close link between substantive rules and procedure rightly proposed in articles 10 to 19, definitions should be avoided in article 1. In the last resort, problems cconcerning the non-navigational uses of international watercourses could be settled only between the States directly concerned - which meant that the substantive rules were bound to be suppletive rather than absolute in approach. It was hoped that that view already reflected in the text, would be brought out more clearly.

382. According to certain representatives, the notion of a watercourse "system" embodied in draft article 1 was satisfactory, but it was considered preferable that its wording should be brought more closely into line with the terminology of the note adopted by the Commission in 1980. In that connection, and to that effect, it was urged that, for greater clarity, the necessary elements of any international watercourse system, such as tributaries, glaciers and groundwater, should be specified in article 1.

383. The approval expressed for the article did not, explained certain representatives, preclude the possibility that drafting changes might be useful to meet certain doubts expressed and the objective of flexibility which was of such importance to the article. It was said that as the question was a complex one, time would be needed to tackle it in a more comprehensive and equitable manner. More specifically, it was suggested that the concept of an "international watercourse system" must be further refined, first, to spell out more precisely the scope of the term "international" and, secondly, to make it more distinct from the geographical notion of a "drainage basin".

384. Certain representatives, however, indicated a preference for the notion of "international drainage basin" which, scientifically, was more comprehensive and sounder than the term "international watercourse system". Attention was drawn to the fact that the concept of an "international drainage basin" was the basis of the Helsinki Rules, the Treaty of the Plate River Basin and the Treaty for Amazonian Co-operation. It was suggested that the term "international watercourse" be defined as the waters which intermingled in a natural basin whenever any part of those waters extended into one or more States. Such a definition would include the main watercourse and any tributaries, and would be in agreement with the Commission's 1980 tentative understanding of what was meant by the term as being formed of hydrographical components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole, so that any use affecting waters in one part of the system might affect uses in another part. Moreover, no reasons were seen for abandoning the "international drainage basin" expression which, together with the principle of equitable utilization, was embodied in the Helsinki Rules, and which the Special Rapporteur had avoided since it was not accepted by all States. It was wondered whether a State which had not approved the Helsinki Rules would adopt the future convention simply because it did not contain the expression "drainage basin". While the choice of an appropriate term might be less important than the adequate definition of the rights and duties of system States, it should be noted that the two concepts in question covered different areas.

385. Other representatives found the use of the term "international watercourse system" and the text of article 1 unaccetable and objectionable. The term should be reconsidered, as the legal content of the concept was still in dispute. It seemed as imprecise as the concept of "drainage basin", which the Commission had rightly rejected. Neither concept seemed "justified" in either theory or practice, and both would have unacceptable consequences, since they would considerably restrict the sovereign right of each State to take decisions concerning use of watercourses in its own territory. Those difficulties were compounded, it was stressed, by the fact that, according to the draft, groundwater and purely national tributaries of an international watercourse would form part of the system. It was asked whether, in trying to avoid certain problems such as the use of the controversial "drainage basin" concept, the Commission had not created others. It was not clear that a definition was necessary at that stage of the work, nor was it believed that the notion of "system" as contained in article 1 was any clearer or more elucidating than a possible definition of an international watercourse.

386. Moreover, no positive practical advantage was seen arising from the use of the system concept. Since the Special Rapporteur made it clear that the explanation

contained in article 1 was of a purely descriptive nature and that no legal principle could be deduced from it, one could ask whether use of the system concept was necessary for the definition of the obligations and rights of States contained in the subsequent articles. The lack of such an internationally recognized concept had not so far prevented States from concluding agreements relating to international watercourses. The best evidence of that was the simple fact that so many international river organizations had been established on the basis of multilateral and bilateral legal instruments. On the other hand, the system concept might well be a source of confusion.

387. In that connection, several questions were posed by one representative: What would be the status of existing agreements at the time the convention entered into effect as compared to the "system agreements" concluded on the basis of article 4? What would be the status of agreements concluded, after the entry into force of the convention, between States parties to the convention and States which were not parties to the convention? Would they be system agreements or simply ordinary international agreements? Might not the introduction of controversial concepts, such as "system States" and "system agreements" make it more difficult to negotiate international legal instruments on the use of international watercourses?

388. It was noted that in his explanation of article 1 the Special Rapporteur had recognized that the international drainage basin concept, as contained in the Helsinki Rules, had met with opposition both in the Commission and in the Sixth Committee because it might imply a certain rigid conceptual approach embracing all watercourses regardless of their special characteristics and regardless of the wide variety of issues and special circumstances of each case. The problem of the conceptual approach was not solved, however, by the adoption of the concept of international watercourse system.

389. One representative stressed that another difficulty lay in the fact that although the latter concept was more limited in scope than the idea of a drainage basin - and article 1, paragraph 2, sought to provide some clarification as to the meaning of the expression "international watercourse system" - it still implied a unitary conception of the physical nature of watercourses, concerning which several States had misgivings. Although the concepts of basin and system were different, in that the first contained a territorial component whereas the second stressed the hydrological aspect, they could hardly be differentiated in legal terms for the purpose of defining rules for the conduct of States. The problem was not whether land activities should be excluded from coverage by the new international instrument but whether the effects of the definition of the legal obligations for States were not to a large extent prejudged by the decision to adopt the unitary approach contained both in the drainage basin concept and in the system notion. The reason why the unitary approach raised difficulties was that it presupposed on all occasions a community of interests preceding the interests of an individual State. That might be true in some cases as, for example, in the case of contiguous rivers, but it was not true in others as, for example, where the use of an international watercourse by one State did not significantly affect any other State, even when both States could be characterized as "system States" in accordance with article 3.

390. Reference was made by a representative to the fact that the term "system", in the context of international rivers, derived from the 1921 Paris Convention instituting the Definitive Statute of the Danube. Apart from the fact that implementation of the Convention had created tremendous practical difficulties, it had remained an isolated case and the kind of rules it had sought to establish had not been followed where other rivers similar to the Danube were concerned. In any event, it was no longer in force, the Danubian States having decided to terminate it in the Protocol annexed to the 1948 Belgrade Convention regarding the Régime of Navigation on the Danube. However attractive those concepts might be from the standpoint of orderliness or methodology, they were not, it was said, in conformity with institutions which had been accepted in State practice or in international law. He therefore considered it impossible to derive legal consequences and rights or obligations for the States concerned from the notions of "international watercourse system", "system State" and "system agreement", on which the preliminary draft articles were based. They had no legal foundation in contemporary international law or State practice.

391. Reservations were also expressed concerning the term "international watercourse system" vis-à-vis its use and implications for the permanent sovereignty of States over their natural resources.

392. Some of those representatives who found the definition contained in article 1 unacceptable suggested that the term "international watercourses" should be defined as rivers crossing the territories of two or more States and referred in that connection to the first report submitted by the previous Special Rapporteur. It was furthermore suggested that the clearer term "international watercourse" be used, while adding whatever clarification was necessary regarding groundwater.

393. Concerning paragraph 2 of article 1 in particular, it was maintained that that paragraph was a useful clarification and introduced an important corrective element to paragraph 1, in that it limited the application of the articles to cases in which the use of the waters of an international watercourse system was affected by the use of those same waters in another State. The paragraph also emphasized the importance of strengthening the fact-finding machinery envisaged in the draft.

394. Certain doubts, however, were expressed with regard to paragraph 2. One representative remarked that it had its roots in earlier drafts concerning shared natural resources and made a distinction between those parts of a watercourse system that were international and those which were not. If the provision was read a contrario, it seemed to correspond to the definition of shared natural resources contained in paragraph 1 of the draft article 6. Although that distinction was in keeping with the principle of coherence that was the basic idea behind the rule of equitable utilization, it remained somewhat ambiguous and might cause difficulties in interpretation, which was all the more awkward in that it referred to certain areas within the watercourse system that were subject to the transfrontier effects of uses and not to the uses themselves. It was therefore important that the criteria for delimitating the areas concerned should not leave too much room for interpretation and, the wording of paragraph 2 of article 1 was not fully satisfactory in that respect, in particular in so far as it did not explain what was meant by the expression "affect the uses of the watercourse system". The

question arose whether it would be sufficient merely to prove that there was an abstract possibility of such effects or whether the applicability of the provision should be determined on a case-by-case basis. In addition the conditions prevailing within a certain watercourse area and its uses might change, which could have an effect on the application of the said provision.

395. Similarly, another representative noted that in defining the notion of international watercourse system a limitation had been set out in article 1, paragraph 2, but that that limitation did not clear up the doubts. It provided that to the extend that parts of a watercourse system in one State were not affected by, or did not affect, uses of the watercourse in another State, such parts were not to be treated as part of the system as defined in the preceding paragraph. In other words, only some parts of the system were to be regulated by the provisions of the draft article but, in respect of those parts, the interests of the system States as a whole always took precedence over the interests of an individual State, even when the use of the watercourse by the individual State in question did not adversely affect other States.

396. It was suggested by some representatives that, in the existing circumstances, a precise definition of an "international watercouse system", which might limit or inhibit the development of the draft articles, should not be adopted. According to certain representatives, the working hypothesis developed in 1980 seemed to be a particularly objective and valuable approach which should not be lightly abandoned. While it was true that, at some point, the 1980 note of tentative understanding would probably have to be converted into a definition properly so called, for the time being it should continue to be accepted for the purpose of elaborating the draft.

Article 2. Scope of the present articles

397. One representative stated that clarification was required of the scope of article 2, paragraph 1, and of the term "uses of international watercourse systems".

Article 3. System States

398. One representative remarked that paragraph (2) of the commentary to the former article 2 had stated that the draft article laid down a requirement which was geographic. He wondered whether, in the light of article 4 - particularly paragraph 3 - article 3 meant that a system State contributing no more than groundwater was being put on an equal footing with another which might have hundreds of miles of the river flowing within its territory. That was not a spurious problem, he said.

Article 4. System agreements

399. Certain representatives raised drafting questions or points of clarification with regard to the article. It was observed by one representative that while

article 2 referred to "measures of administration, management and conservation related" to the uses of international watercourse systems, article 4 referred only to uses and failed to mention measures. Another representative considered that in draft article 4, paragraph 3, the introductory phrase "In so far as the uses of an international watercourse system may require" should be deleted because of its vagueness, as should the expression "in good faith", which was a universal concept governing the conduct of all States.

400. With regard also to paragraph 3, another representative reiterated that it was not always politically feasible or legally sound to impose an obligation on States to conclude system agreements. In any case, it might be useful to insert the words "or arrangements" after "agreements", as had been done in other articles.

401. Finally, one representative believed that the use of the term "appreciable extent" in article 4, paragraph 2, could cause some problems in interpretation; a better wording would be "substantial extent". His delegation was prepared to consider with some sympathy the duty to negotiate prescribed in article 4, paragraph 3, on the understanding that it did not include an obligation to reach an agreement, and that the duty to negotiate was itself limited to the requirement of the uses of waters of an international watercourse system.

Article 5. Parties to the negotiation and conclusion of system agreements

402. Doubts or questions were raised by certain representatives. While one representative supported article 5, paragraph 1, in so far as it emphasized the right of every system State to participate in the negotiation of and to become a party to the agreement that applied to the international watercourse system, another representative doubted whether every riparian State of an international watercourse system should be entitled to participate in negotiations on, and become a party to, any "system agreement". Apart from the consideration that the matter might concern particular interests of only some of the States, it was questionable whether it was advisable for a framework instrument to provide that a third party - even though a party to the convention - might be imposed on negotiating sovereign States as a contracting partner.

403. Concerning paragraph 2, the view was expressed that it might require a closer look and some drafting improvements might be necessary in order to promote harmony and co-operation and avoid conflicts among all system States. There again, the words "substantial extent" might be more acceptable than "appreciable extent".

404. Another view held that the notion in paragraph 2 that a system State was entitled to participate in the negotiation of a system agreement "to the extent that its use is thereby affected", required further elaboration as to its effects on the principles of the law of treaties, such as the equality of negotiating States, as well as the notion of "negotiating State" provided for in the Vienna Convention.

405. One representative, with respect to article 5, paragraph 2, wondered what would be the legal situation with regard to the problem of non-recognition. The article introduced the standard of "appreciable extent" in relation to the entitlement of a system State, whose use of the waters was affected adversely up to that standard, to participate in the negotiation of a proposed system agreement. That raised the significant issue of whether the rule should include qualification of the degree to which State interests must be affected in order to support their right to negotiate and become a party to a system agreement. It was noteworthy that the Commission had thought it far more useful to quantify any such effect, but had gone on to state that such quantification was not practical in the absence of technical advice. Because of the importance of the standard in question, and particularly in view of the criticisms raised in connection with it, such technical advice should be sought in order to introduce, at an appropriate place in the text, the necessary quantitative elements which eliminated any possible ambiguity surrounding the standard itself. Moreover, the Commission had envisaged in 1980 that the standard of "appreciable extent" was one which could be established by objective evidence, provided that such evidence could be secured, and that there must be a real impairment of use. There again, one was bound to ask at what point in time the criterion of impairment to an appreciable extent became operational. Could it be substantiated on the basis of objective scientific data at the stage of planning of a particular project, its execution, or only definitively after its operation? If it was to be at the latter stage, was it realistic to assume the possibility of amendment of the project, its readjustment or its abandonment?

CHAPTER II. GENERAL PRINCIPLES. RIGHTS AND DUTIES OF STATES

406. Several representatives highlighted the importance of the provisions of chapter II which, it was said, represented the heart of the draft. One representative, however, expressed surprise that there was a total omission in that chapter of the generally recognized principle that States had the right to utilize their water resources within the limits of their respective territories to their own benefit, pursuant to their own policies, provided, of course, that they did not thereby cause damage to other States. That principle, incorporated in numerous international instruments and legal texts concerning the use of natural resources in general (principle 21 of the Stockholm Conference) and of water resources in particular, had been totally ignored, and the Special Rapporteur, considering that the interests of other system States should prevail over the rights of an individual State, preferred to introduce the concept of shared natural resources.

407. Another representative suggested that, when revising the general principles in chapter II of the draft, the Special Rapporteur should take greater account of the legal concepts laid down in the new Convention on the Law of the Sea, in particular, the legal principles embodied in the concept of the exclusive economic zone. The issue of the utilization of the living resources of the exclusive economic zone and that of the non-navigational uses of international watercourses had many common features. Both were of fundamental importance for the economies of many countries, particularly developing countries. Both involved resources that were renewable but were only available in limited quantity. Conservation was therefore necessary for their optimal utilization. One further common feature lay

in the fact that they both involved natural resources exploited by several States of the same geographical region and occurred within the areas of national jurisdiction of several States. In view of the numerous features which those two questions had in common, he said that it was logical that the law of non-navigational uses of international watercourses should be codified and developed on the basis of the principles laid down in part V of the Convention on the Law of the Sea and that the rights of the riparian States of an international watercourse with regard to the exploitation, conservation and management of the water resources of that part of the international watercourse which lay within their national territory should be codified in the same way as the sovereign rights of coastal States with regard to the exploitation, conservation and management of the natural resources of their exclusive economic zones. Just as article 62 of the Convention on the Law of the Sea recognized the right of a coastal State to determine its capacity to harvest the living resources of the exclusive economic zone, so should the sovereign right of the riparian State of an international watercourse to exploit, according to its requirements, the water resources of that watercourse within its national territory be codified. Articles 62, 69 and 70 of the Convention on the Law of the Sea, which took into account all relevant factors, including the particular interests of developing countries, together with article 297, concerning the peaceful settlement of disputes, might be taken as guidelines for such codification if it was accepted that the sovereign rights of a coastal State in the economic zone, as formulated in the Convention on the Law of the Sea, were in compliance with the principles of good-neighbourliness and peaceful international co-operation; then one had to recognize, in conformity with those same principles, the rights of the riparian States of international watercourses.

408. On the other hand, one representative said that absolute notions of territorial sovereignty to the exclusion of the rights and needs of neighbouring States were attempted regressions to the long-discredited Harmon doctrine. Such views were inconsistent with the notions of shared resources and good-neighbourliness and were a flagrant denial of any idea of interdependence. Facile analogies to the law of the sea régime should not lead to disregard for the rights and needs of other States and would not contribute to the solution of problems relating to non-navigational uses of international watercourses. It was furthermore noted by certain representatives that the notion of the common heritage of mankind was entirely outside the scope of the topic.

Article 6. The international watercourse system - a shared national resource. The use of such resource

409. Some representatives supported the inclusion of article 6 in the draft, particularly in the light of the emphasis placed by the Special Rapporteur on the fact that the use of the term "shared" did not mean that the sharing must be equal, which was impossible, and that only distributive, not commutative, justice was possible.

410. It was said that article 6 as the core of the draft articles; the modern notion of a shared natural resource was both flexible and sound. It emphasized the necessary interrelationship between the right of co-riparian States and constituted

the basis for certain essential obligations, such as the obligation of co-riparian States to co-operate in their mutual interest. The consequence or the existence of a shared natural resource was that each system State was entitled to use it reasonably and equitably. In that context, equity was not a concept extraneous to the law but an eminently juridical rule imposed by customary international law. The word "participation" was meant to convey the dual aspect - namely, the right to use and the duty to contribute - of a system State's sharing in "the necessary management and conservation of a watercourse system for the optimal distribution in a reasonable and equitable manner of the benefits to be dervied therefrom". In a world of interdependence, the concept of "shared natural resource" was a fundamental one. It was important that the waters of an international river should be equitably apportioned among riparian States, with due regard to special circumstances such as heavy dependence on the water by a particular riparian State and the traditional uses of such water.

411. The characterization, in draft article 6, of an international watercourse system as a "shared natural resource" was deemed to deserve support in the light of the fact that the notion of a shared natural resource, which had been found in status nascendi in the 1929 decision in the River Oder case, had been crystallized in article 3 of the Charter of Economic Rights and Duties of States. The Mar del Plata Action Plan, in its recommendations 84 and 94, had referred to other aspects showing that the international community recognized water as a shared natural resource and that there existed generally accepted principles of international law governing its use and management. Thee principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States were also relevant; in its resolution 34/186, the General Assembly had requested all States to use those principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States. The Special Rapporteur had been correct, it as said, in his analysis that the principle set forth in article 6 was a codification of recognized principles of international law dervied from international customary law. The same rules of customary law constituted the basis for various obligations in the matter, particularly that of co-operation among States. In addition, it was stressed that the notion as not in the final analysis doctrinaire, as it was anchored in the unity of the hydrological cycle.

412. One representative referred to the criticism that the concept of a shared natural resource lacked clarity. It was obvious that, in the drafting of general principles on the topic, the existing rules of general customary international law applicable to the subject-matter must be borne in mind. The subject under study clearly involved limitations on the territorial sovereignty of States. Upstream riparian States had a right to use the waters in their territory, but they must not use them in such a way as to deny the rights of the downstream States to use the waters in their territory in a meaningful way. That was the raison d'être for the articulation of a concept to regulate the use of international watercourses for the benefit of all in an equitable manner. What was at stake was the achievement of distributive, not commutative, justice. Analysis of the criticism voiced in that connection seemed to show, according to that representative, that it stemmed from a rejection of the basic idea to which he had alluded. It should be remembered, however, that the criticism could also be criticized. For example, the term "riparian" had a geographical connotation, in that it referred to States situated

on the banks of a river. In that sense, States along a frontier river shared the waters of the river as riparians, in which case the focal point was not the position of the frontier but the waters of the river as a resource. Consequently, and looking at the same resource, upstream and downstream States could just as well be riparian States for legal purposes in so far as the use of the resource was concerned. Again the idea of sharing emerged. It was one thing to advise the Commission to exercise caution and consider very carefully the terminological problem, but it was quite another to reject the basic substance of the concept. In that connection, he continued, good faith required that attention should be concentrated on the central issues. There should be a clear understanding that when the Commission talked about a shared natural resource it did so in the absolute sense that, without water, life could not be maintained, as well as in the relative sense that had it not been for the transboundary character of the natural resource the Commission would not have encountered the type of problems it was setting out to regulate. Waters of an international watercourse system were evidently strongly connected with the sovereign territories of States, but they were not static natural resources. It was therefore absolutely necessary to acknowledge that, as a result of modern scientific knowledge and technology, the principle of the territorial sovereignty of States could not in that field be stretched to its ultimate limits. Particularly in the case of water, the international system of dividing the whole human environment into territories of separate sovereign States must be complemented by a system of co-operation among States.

413. As for the objection that the consequences of such an ill-defined concept of sharing could have an adverse impact on the right of permanent sovereignty over natural resources and on the new international economic order, one representative was more inclined to believe that a new international economic order would profit by the establishment of legal standards which made States exercise their right to permanent sovereignty over natural resources in a spirit of co-operation and sharing.

414. Other representatives noted that the contents of article 6 might be acceptable provided further clarifications, refinements or adjustments were made. The concept of "shared natural resource" might be useful, provided that it was based on an objective and dynamic conception of the principle of fairness and was directed towards achieving distributive justice. Also, the consequences fusing that concept with regard to the concept of equitable sharing still required precision. Representatives welcomed the Special Rapporteur's intention to redraft the wording of article 6 in order to clarify the position of riparian States with regard to their sovereign rights. It was to be hoped that such clarifications would make it possible to obtain broader support for the concept.

415. In that connection, the view was expressed that the Special Rapporteur should take care to avoid using any terms that might create difficulties for many States. In fact, he might consider the possibility of using a different term in place of the word "shared" in article 6. It was also suggested that, in the last sentence of paragraph 1, the word "participation" could give rise to different interpretations and should be deleted. The sentence should be amended to read: "Each system State is entitled within its territory to a reasonable and equitable use of the waters of an international watercourse system". Paragraph 2 should be redrafted in that light and would be better placed in chapter III of the draft.

416. According to one view put forward, the new concept of a shared natural resource was in keeping with current development trends, but it could not be applied unless account was also taken of the need to reconcile the rights and interests of all system States, whose inherent sovereignty over the parts of the waters belonging to them must in no way be called in question. Consequently, the formulation of rules concerning the mechanisms for co-operation and the rights and duties of the States concerned must be preceded by a precise indication of the respective sovereign rights of the riparian States.

417. Another view maintained was that the phrase "shared natural resource" seemed to have acquired overtones not necessarily conveyed by its ordinary meaning. Prima facie, there was no difficulty with the phrase when it was used to designate a resource which by its very nature could not be made subject to the sole sovereignty and control of a single State. Such must be the case with the waters of an international watercourse system, where the use of the waters in one system State affected the use of the waters in another system State. There was no derogation from the principle of permanent sovereignty over natural resources involved in recognition of the notion that the waters of an international watercourse system might, in certain carefully circumscribed conditions, constitute a shared natural resource.

418. Other representatives opposed the inclusion of article 6 in the draft. The concept of shared natural resource as applied to international watercourses was considered ill-defined, unhelpful or totally unacceptable. The article did not appear to be particularly useful, since the draft contained no specific application of the concept of a shared natural resource which might differentiate it from the concept of an international watercourse system. In other words, no consequence was drawn from the qualification of an international watercourse system as a "shared natural resource". The Special Rapporteur might have meant to recall pre-existing general principles on shared natural resources, but it was quite doubtful whether such principles did at present exist, as seemed to be borne out by the difficulties encountered by UNEP in dealing with that matter. It would therefore be wise to drop article 6 altogether. What was required for the purposes of the draft could be achieved more easily without such a clause and without pre-empting the future development of international law on more general problems which might be viewed from a different perspective, according to the field involved.

419. It was seen as no accident that the world's most shared natural resource, the sea, was nowhere mentioned as such in the United Nations Convention on the Law of the Sea, doubtless because the term was not precise enough for inclusion in an international treaty. In the case of rivers, perhaps the only type which could be a shared natural resource was a frontier river where the frontier between two States ran down the middle of the river; only the States sharing the river in that way were truly riparian States, on the analogy of "coastal States" in the law of the sea. That would in all probability give the river the character of a shared natural resource, subject to agreed arrangements between the two States. But the Commission must examine very carefully the question whether a river running through the sovereign territory of more than one State was really a shared natural resource and whether such States were riparian States. The Conference on the Law of the Sea had overcome that kind of problem by very carefully delineating the rights of different States and different kinds of States in relation to specific parts of the

ocean spaces. The Committee should consider very carefully that ostensibly terminological problem, keeping in mind that unforeseen consequences might follow from too free a use of the undefined and probably undefinable expression "shared natural resource".

420. Misgivings about the expression were also voiced since it had connotations or property rights which sensitive States might see as prejudicing their individual property rights in the areas of the international watercourse system within their territory. It might be argued that the sovereignty of a riparian State over its waters in an international watercourse system would be qualified to the extent that it was obliged to co-operate with other States in the management and use of those waters, but the term "shared natural resource" still carried the suggestion of a division of property. It did not appear that elimination of the term would be fatal to an understanding of the draft articles as a whole, and it might allay the fears of some States that the articles would affect the integrity of the principle of permanent sovereignty over natural resources.

421. It was furthermore pointed out that the attempts of the international community to define the expression "shared natural resources" had all failed. Accordingly, the General Assembly had decided in 1982 to take note of, but not to endorse, the results of the most celebrated legal exercise concerning the use of shared natural resources, namely the draft principles of conduct in the field of the environment drawn up by a group of experts convened by UNEP. It was hard to believe that, having found itself unable to agree on principles relating to shared natural resources two years earlier, the international community would now be prepared to accept the incorporation of those principles in the draft articles.

422. Concerning the concept of "reasonable and equitable participation", one representative stressed that even though, reluctantly, one might concede the idea of a reasonable and equitable participation of different States in the use of an international watercourse within the context of the principle that a State that utilised the waters of an international watercourse must not cause damage to other States or to the waters of the watercourse, there was the danger that the idea could be interpreted in the sense that, although States might have different "shares" of the watercourse, they all nevertheless had the right to enjoy equal benefits from the use of the watercourse as a whole. It was true that the Special Rapporteur himself excluded such an interpretation by mentioning certain factors in article 8 that should be taken into account in determining whether the use of a watercourse was reasonable and equitable. Nevertheless, if so many comparative factors had to be considered and, moreover, if in fact some States could enjoy "extra benefits" because they had special needs or, conversely, were penalized because they were more developed or had access to another watercourse, one could question whether the idea of equitable and reasonable participation had any precise meaning and should be retained in the draft articles. Other norms which the Special Rapporteur sought to derive from the use of the "shared natural resource" concept also invited controversy, he added.

423. The article was considered unacceptable in particular because the consequences of the ill-defined concept contained therein could have an adverse impact on the rights of permanent sovereignty over natural resources and on the new international economic order. International law did not seem to provide any grounds for

supporting the "shared natural resources" principle. On the other hand, the draft articles should indicate even more clearly that watercourses were an integral part of the territory of a State and that the State exercised its sovereignty over those watercourses although, in its use of them, it was obliged to respect its international obligations.

424. Certain representatives recalled that the Commission had already, in 1980, provisionally adopted article 5, which embodied a reference to the notion of shared natural resource. According to that view, it would be highly damaging to future progress on the topic as a whole if the Commission were at the current stage to engage in lengthy semantic argument about the appropriateness or otherwise of including a reference to that phrase in the draft. It would be helpful to a resolution of that disputed point if the Commission were to examine the corollaries to the notion of shared natural resource in the particular context of the law relating to the non-navigational uses of international watercourses. Those corollaries were set out in articles 7 and 8 and, to a lesser extent, article 16 of the Special Rapporteur's draft. It would be useful for the Commission to have a thorough examination of the extent to which those corollaries were acceptable before reaching a final conclusion on the text of article 6 of the Special Rapporteur's draft, corresponding to article 5 of the draft provisionally adopted by the Commission in 1980.

Article 7. Equitable sharing in the uses of an international watercourse system and its waters

425. Some representatives supported article 7 as a logical and necessary corollary to article 6. The fundamental principle of "equitable sharing" in the use of the waters of an international watercourse was a principle found in State practice, it was said. Application of principles of equity was not something extraneous to legal norms but was precisely a legal norm, as had been stated by the International Court of Justice.

426. Certain representatives, however, called for further precision and clarification of the concepts embodied in the text. In addition, amendments might be necessary if the text of article 6 was altered. Further study was required of the full implications of the reference to the development of the system and its waters. One representative observed that the commentary to the article did not fully explain why the article differed from the corresponding text found in the Helsinki Rules.

427. In addition, certain other representatives questioned the appropriateness of introducing the vague concepts of "reasonable and equitable" use and "optimum utilization". Such concepts could be a source of confusion, it was said. The Special Rapporteur had stated that the concept of optimum utilization encompassed the concrete administration and management of watercourses and the necessary protection and control. Did that mean that States with different capacities and different interests concerning the use of the water must apply the best available technology to manage or utilize the parts of international watercourses situated in their territories? It was hoped not. Moreover, the main limitation that should be applied in chapter II of the draft articles to the exercise by States of their

sovereign rights to utilize watercourses in their territories according to their national plans and programmes was that no State might substantially impair the natural use of an international river by its neighbour.

428. Also as far as the concept of reasonable and equitable use was concerned, it was thought that its use was leading the Special Rapporteur to favour the institutionalization of organs and procedures to settle international disputes which might arise from the interpretation of that concept, because the criteria proposed in article 8 to determine whether a use was reasonable and equitable were not exhaustive.

Article 8. Determination of reasonable and equitable use

429. The article was supported by some representatives as a constructive corollary to article 6 and as a complement to article 7. The approach of article 8 was seen as a sensible one that would ensure that all the interests of system States were properly taken into account. It was furthermore remarked that the list of factors to be taken into account in determining whether a use of the watercourse system by a system State was exercised in a reasonable and equitable manner, which was contained in draft article 8, was more in keeping with modern legal thought than the earlier list given in article V of the Helsinki Rules, in so far as it dealt with aspects of the question relating to environmental protection.

430. Certain representatives suggested additional factors to be included in the article. Thus, it was proposed that the costs of alternative projects should be specifically mentioned. It was acknowledged that they were implicitly alluded to in factors (e) and (f), which spoke of "the efficiency of such uses" and "optimum utilisation", but it was felt that such a central idea as cost-effectiveness merited an explicit reference. It was also stressed that the distance of proposed works from the sources of the watercourse was another relevant factor. It was obvious that, the greater the distance of a project site from the source, the more difficult it became to find a reasonable and equitable solution, since the regenerating potential of the water of large systems diminished in inverse proportion to that distance.

431. Further clarity was urged regarding the criterion governing the existing situation with respect to the sharing and use of waters. The observation was also made tht the wording of article 8, paragraph 1 (b), might imply that the use of a watercourse system could be restricted as a function of the particular needs of a downstream riparian State, for instance with regard to its economic development. The Commission must strive to find a balance between those two approaches consistent with the needs and reasonable expectations of both upper and lower riparian States.

432. Finally, one representative believed that it might be possible to redraft article 8 without listing the factors to be taken into account; indeed, the Special Rapporteur might consider merging draft articles 8 and 9, which contained ideas that were similar in material respects.

Article 9. Prohibition against activities with regard to an international watercourse system causing appreciable harm to other system States

433. Certain representatives considered the text of article 9 and the "appreciable harm" standard contained therein as acceptable and as a necessary corollary to article 7. The inclusion in article 9 of the principle that appreciable harm must not be caused to the rights or interests of States was one of the main achievements of the draft. The hope was expressed that the concept of "appreciable harm" also covered future harm. The article, which omitted any exception to the duty not to cause serious harm save in cases where there was prior agreement to the contract, was more in keeping with the letter and spirit of the maxim sic utere tuo ut alienum non laedas. The use of the word "appreciable" was considered useful for describing types of damage and could not be regarded as lacking in objectivity. Nor could it be argued that "appreciable" damage could be measured only in relation to the extent to which prohibited activities caused an impairment in the use of waters: certain activities could cause appreciable harm in areas other than water use; agricultural utilization and development would be a prime example. Due regard should be given to whether the effects of the activity in question would alter irreversibly the watercourse system and the environment thereof. If they did, the degree of damage would be most serious and should give the State whose interests were injured a suspensive right with regard to such activities. Note was taken of the undoubted link between article 9, with its prohibition of harmful activities, and the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

434. However, to certain other representatives the expression "appreciable harm" was too vague and required further precision. Difficulty was felt with such value-judgement expressions as "appreciable harm". One suggestion made was to define the expression in detail so as to ensure the effectiveness of flexible machinery for the peaceful settlement of disputes. Another suggestion was that that expression could be replaced by the term "material harm". It was also suggested that the words "or interests" should be deleted, since the term "interests" could not be precisely defined and the words "cause material harm to the rights" would be sufficient. One representative considered that in the Spanish text the words "perjuicio appreciable" should be replaced by "perjuicio sensible".

435. To meet the concerns of those who had criticized article 9 for vagueness, it was proposed that an enumeration of factors determining appreciable harm could be made along the lines followed in draft article 8 for determining reasonable and equitable use, and it might very well be that the factors in the two cases would be similar or even identical. Such a list of factors indicative of the contents of the notion of "appreciable harm" would be helpful in appraising its usefulness. The distance of project sites from the source of the watercourse could certainly be taken into consideration, because the farther the site the more serious the effects were likely to be, especially in densely populated deltaic flood plains.

436. It was also suggested that the article expressly prohibit the diversion of international watercourses and provide that any re-routing or diversion of the waters of an international watercourse system outside that system would

automatically constitute harm prohibited under article 9. Such a provision would be justified by the exceptional gravity of acts affecting the very integrity of international watercourses. It should also be expressly provided that any harm within the meaning of article 9 would be assessed not in isolation but on a cumulative, global basis which would take account of harm done earlier. It must also be expressly stated in the draft articles that the exercise of rights by a riparian State within its territory should not affect the flow of waters since that might result in ecological and physical change, thereby causing damage in the territory of other riparian States.

437. Other representatives maintained that article 9 went too far and that the concept of appreciable harm could not be accepted as the standard to be applied. According to that view, it was unthinkable that the limit of responsibility should be that of "appreciable harm". Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment spoke of damage to the environment with no qualifying adjective, and the 1978 Nairobi draft principles of conduct in the field of the enviroment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States used the term "affect significantly" and explained that the term referred to any appreciable effects on a shared natural resource and excluded "de minimis" effects. Thus, it could be said that existing international law accepted restricted or minimal harm. If it was necessary to use an adjective in article 9, the French word should be "sensible", which appeared in articles 4 and 5 of the draft already considered by the Commission.

438. It was moreover stated by certain representatives that, with the application of article 9, the Special Rapporteur had departed from the concept of "equitable sharing" and introduced notions that no longer represented State practice and were inconsistent with the fundamental principles in draft articles 6, 7 and 8. The sic utere principle embodied in draft article 9 was supported but there was difficulty with the application of that principle to the problem of prior use. The article protected the State that was already using the resources of an international watercourse from appreciable harm, whether or not other system States had obtained an equitable share of the resource. That seemed incompatible with the objective of draft article 8, which made it clear that an "equitable share" for each of the system States was to be determined by a process that balanced interests. Prior established use and the harm that would result from a reduction in that use, while very important, were not the exclusive factor.

439. Moreover, article 9 could not only frustrate, indeed impede the application of the principle of equitable utilization, but might also preclude the rational balancing of rights and interests in the apportionment of benefits to be derived from the use of an international watercourse system and its waters. It could, for example, favour those States which were most developed and which, as a result, might be the first to have utilized the benefits of the watercourse. The application of the principle of equitable utilization would probably lead, in most instances, to the conclusion that an activity causing or likely to cause appreciable harm would be legally impermissible; yet, that would not have to be the case in all circumstances. The previous Special Rapporteur had obviously allowed for that in preparing the draft of article 8 that appeared in his third report (A/CN.4/348). His draft stipulated that the infliction of appreciable harm was

prohibited except as might be allowable under a determination for equitable participation for the international watercourse system involved. In other words, the former Special Rapporteur had managed to reconcile the two rather contradictory legal notions, the rule of appreciable harm and the principle of equitable utilization, and that was the approach that should be followed. The new Special Rapporteur and the Commission were urged to consider including in draft article 9 words of qualification that would make the obligation to refrain from causing appreciable harm subject to the overriding obligation to share the resource equitably, bearing in mind the need to balance all relevant factors, including any applicable principles of international law. That would re-establish the balancing approach that the principle of "equitable sharing" required and would not give what in effect was veto power to the prior or more intensive user.

CHAPTER III. CO-OPERATION AND MANAGEMENT IN REGARD TO INTERNATIONAL WATERCOURSE SYSTEMS

440. Several representatives welcomed chapter III of the draft of the Special Rapporteur in which he had sought to define the obligations of system States with regard to co-operation and management in order to avoid conflict and to achieve optimum utilization, protection and control within international watercourse systems. Those obligations stemmed from the somewhat elusive principle of good-neighbourly relations and State practice in that field, and from the principles laid down in Articles 1 and 2 and Chapters VI and IX of the Charter of the United Nations. Chapter III was considered an extremely useful codification which specified the general duty to co-operate laid down in the Charter of the United Nations and confirmed as an existing legal principle in 1970, when the General Assembly adopted by consensus the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Another useful aspect of the codification undertaken related to the obligation of States to engage in negotiations to solve issues outstanding between them. The Special Rapporteur had also introduced a number of "legal standards" which seemed to reflect a progressive development of international law in matters regarding the use, management and administration of international watercourse systems.

441. Moreover, the general framework of the articles in chapter III of the draft, which was based on the equality, sovereignty and territorial integrity of all system States, was endorsed. In that case, as in all similar cases, it was the political will of States rather than the provisions of international instruments, even if they were mandatory, which compelled States to co-operate in such matters. It was nevertheless important that a system be framed to guide or govern the conduct of system States with regard to co-operation and the management of international watercourses.

442. One representative remarked that chapters III and IV represented two parallel systems of co-operation, one on the management of watercourse systems and the other on protection against pollution. He wondered whether there should not be a single comprehensive system, with different mechanisms only to deal, where appropriate, with the specific characteristics of different areas of co-operation. He also

suggested that it might be useful to formulate a provision that the undertaking by a State or States of activities that could cause a serious threat to an international watercourse system was subject to the elaboration by those concerned of an adequate contingency plan.

443. Certain representatives, however, expressed doubts regarding the general trend reflected in the provisions of chapter III. To some, the procedure envisaged in the chapter were too rigid, since the convention was supposed to be a framework agreement and exhibited a tendency to limit the freedom of States to use natural resources within their territories. Chapter III should not, it was stressed, contain provisions which would enable downstream States to veto development projects of upstream States. In that connection, one representative stated that African States based their approach to the question of co-operation and management in regard to international watercourse systems on paragraph 85 of the Mar del Plata Action Plan adopted at the 1977 United Nations Water Conference. I that connection, he drew attention to the spirit of co-operation prevailing among the Nile River basin States. Only two States were parties to the 1959 Agreement for the full utilization of the Nile waters, yet the lack of an all-embracing agreement had not prevented the establishment of informal committees which performed useful work in all Nile River riparian States.

444. According to one representative the main sources of reference for chapter III were the results of the United Nations Water Conference and the conclusions of the United Nations Interregional Meeting of International River Organizations, held in Dakar in 1981, but the Special Rapporteur had sought to establish a parallel between some of the draft articles and the Helsinki rules. Perhaps because of those sources of reference, some of the draft articles could not but be drafted in a very flexible manner. But the basic difficulty of chapter III lay in the fact that co-operation among States was not an obligation in the strict sense of the term and could not be imposed. Co-operation with regard to international watercourses did not escape that general rule. Therefore, the approach taken by the Special Rapporteur with regard to the obligation to co-operate was highly questionable, if not totally unacceptable.

445. Another representative stressed that a complete set of rules for co-operation in respect of international watercourses should be devised and formulated with the necessary precision, in conformity with the fundamental principles of international law concerning friendly relations and co-operation among States enunciated in General Assembly resolution 2625 (XXV). According to those principles, States should conduct their international relations in all fields in conformity with the principles of sovereign equality and non-intervention. By virtue of the former principle, "each State enjoys the rights inherent in full sovereignty". The sovereignty of States was also exercised over their watercourses, whether they consisted of the natural affluents or canals connected to watercourses which crossed or separated the territories of two or more States or of the parts of those watercourses situated entirely in the territory of a State. Even in the case of watercourses which formed or crossed the frontier between States, the régime of such watercourses, with the exception of general rules of navigation, was established in each specific case by the States concerned, according to their interests and their will, by agreements governing the relations and the

co-operation between them. His delegation therefore considered that the Commission should base its work on the law of the non-navigational uses of international watercourses mainly on the norms governing good-neighbourly relations between States.

446. Reference was made by a number of representatives to articles 11 to 14 contained in chapter III, dealing with the question of notification. According to one view, it could be questioned whether it would be necessary to draft general provisions on notification at all, if one took as the point of departure the principle that the question of rights and duties of States should be approached on the basis of the generally recognized principle that States had the right to utilize the waters of an international watercourse within their territories provided they did not cause significant damage to other States. In the case of contiguous watercourses a notification would not suffice, and in the case of successive watercourses a notification system along the lines of the one envisaged in the draft articles would impose excessive limits on the unquestionable right of States to take initiatives concerning the watercourses within their boundaries. It was probably in order to circumvent those two problems that articles 11 to 14 provided that the notification procedure would apply only to projects which might "cause appreciable harm" to other States. They admitted that activities that might cause harm were not illegal in themselves, provided that the State which planned to engage in them followed certain procedures. Even if that was accepted as a valid approach - an idea that his delegation seriously questioned - the formulations proposed nevertheless raised a number of questions.

447. Another view held that the notification provisions were too rigid and limited the freedom of States. Thus, it was said, article 11, paragraph 1, provided for notification to other system States before a project was undertaken; article 12, paragraph 3, prohibited the notifying State from undertaking the project without the consent of the system States concerned; and article 13, paragraph 3, provided for suspension of the project pending the settlement of outstanding issues; finally, under article 14, paragraph 2, a system State would incur liability for harm if it proceeded with the execution of a project without notifying the other system States concerned. All those provisions, which were aimed at subjecting the use by a State of its natural resources to the consent or veto of other States, had little chance of being accepted by the majority of States because they seriously limited their freedom of action with regard to vital natural resources. Articles 11 to 14 seemed too to be rigid and to go too far in providing for the suspension or blockage by one system State of programmes planned by another system State. Serious consideration should therefore be given to the possibility of supplementing chapter III by a clause preventing the State which ran the risk of being harmed from vetoing the execution of a project or programme by another State, so that delays might be avoided and the assessment of appreciable harm was not left to the sole discretion of either the notifying State or the State receiving the notification.

448. Some elements of flexibility should be inserted, according to some representatives, in the mechanism suggested by the Special Rapporteur; that would facilitate the acceptance of important development projects which could be obstructed by rigid rules. With respect to the concern that had been expressed

about the draft articles on notification, attention was drawn to the differences between notification, consultation and an obligation to obtain permission. Perhaps the specificity of article 12 in what was otherwise a general approach had contributed to that concern.

449. On the other hand, certain representatives specifically indicated agreement with the rationale behind the draft articles in question, which was the equality, sovereignty and territorial integrity of all system States, and the general approach suggested by the Special Rapporteur regarding notification.

450. Certain representatives pointed out that articles 11 to 14 actually dealt with the rights and duties of system States and should thus be moved from chapter III and placed in chapter II of the Special Rapporteur's draft. Chapter III should, it was said, be reserved for provisions relating to co-operation aimed at achieving the optimum utilisation of international watercourses.

Article 10. General principles of co-operation and management

451. Several representatives who referred to article 10 for the most part found the provision broadly acceptable and in conformity with existing practice. Reference was made by representatives to their national experiences in fostering co-operation and management concerning international watercourses.

452. One representative suggested that the phrase "to the extent practicable" be deleted and the article, together with articles 11 and 16, placed in chapter II concerning the rights and duties of States, since prior consultation and exchange of information were legal obligations.

453. Certain representatives referred to paragraph 3 of the article, concerning the establishment of joint commissions or similar agencies or arrangements. It was recalled that various joint commissions had been established to govern the use of shared watercourse systems, on the basis of the principle of good-neighbourliness, but not because of any legal obligation. As far as practicable, all the provisions of draft article 10 which tended to impose a legal obligation on States to co-operate should be redrafted so that system States could continue to co-operate freely in a spirit of good-neighbourliness. The creation and strengthening of organisations dealing with international watercourses could not constitute an obligation and should therefore not be referred to in an instrument such as the one under consideration. For a number of reasons, including financial reasons, States might not be prepared to recognize that obligation. The question was political, not legal, and could not be ruled by legal provisions, even if those provisions were purely recommendatory.

Article 11. Notification to other system States. Contents of notification (see also comments made with regard to chapter III as a whole, above)

454. One representative stated that article 11, which imposed on an upstream State the obligation to notify the other system State of any project which might cause

appreciable harm to the interests of the other State, was generally acceptable. Another representative who viewed article 11 as a legal obligation suggested that it be placed in chapter II concerning rights and duties of States.

455. On the other hand, one representative believed that paragraph 1 raised the problem of determining in advance whether a project might cause appreciable harm. That problem was particularly acute for developing countries, where the relevant technology was not readily available. Another representative observed that the use of the word "interests" seemed to be in contradiction with some previous articles, particularly article 4, where the emphasis had been placed on possible harm to the use of waters and not the interests of States. That distinction between harm to the interests of States and harm to the use of waters was of the utmost importance. The concept of interests was vague and subjective, while the concept of harm to use was objective and measurable. Since article 11 dealt with potential harm, it could at least be expected that the extent of the harm in real terms, whether appreciable or not, would have to be assessed jointly by the State planning the project and the State liable to be adversely affected.

Article 12. Time-limits for reply to notification (see also comments made with regard to chapter III as a whole, above)

456. One representative observed that although articles 11 and 12 were, juridically, the logical consequence of articles 6, 9 and 10, the period of six months provided in article 12 was too short for the translation and study of complicated documents. Provision should be made for a period of at least one year. Otherwise, because they lacked time to make a proper assessment of possible damage, States would tend to oppose any projects notified to them. Another representative said that draft article 12 did not address the situation which would arise if the parties failed to agree on a reasonable time-limit and, in particular, the possibility that the State receiving the notification would use the time factor in order to hinder the commencement of work on the project. His delegation did not agree with the stipulation in paragraph 3 that the notifying State might not initiate the project; in its view, that State could do so, provided that it accepted international liability for any material damage that might result to the State receiving the notification, taking into account the comparison between the profit accruing to the notifying State from the project and the damage caused to the other State.

457. Finally, it was said that there appeared to be some overlapping between the provisions of draft articles 12 and 13.

Article 13. Procedures in case of protest (see also comments made with regard to chapter III as a whole, above)

458. Some representatives made critical remarks concerning the article, in particular with regard to paragraph 3. It was maintained that although article 13 referred to the interests of States, it recognised that the determination of the

harm which might result from a planned project or programme had to be subject to consultations and negotiations. However, to a large extent it prejudged the result of those consultations in favour of the notified State, since it provided that States should arrive at an agreement with regard to adjustments and modifications of the project or programme concerned, or agree to other solutions which would either eliminate the possible causes of harm or otherwise give the State which considered itself to be harmed reasonable satisfaction. The question of the evaluation of the extent of the possible harm was immediately treated as a dispute subject to the settlement procedures established in the draft articles (art. 13, para. 2) and as having a suspensive effect on the execution of the project (art. 13, para. 3), unless that project was of the utmost urgency, and further delay in its implementation might cause unnesessary harm to the State which envisaged it.

459. With regard to paragraph 1 of article 13, which indicated the duty to give the injured State reasonable satisfaction, one representative noted that where irrreversible alteration occurred, it might be impossible to give satisfaction. The duty of the injured States to enter into negotiations should therefore be re-evaluated, because when a particular activity caused irreversible damage, the reason for negotiations was negated.

460. On the subject of blocking a project or programme that might cause appreciable harm, it was questioned whether a State proposing to carry out such a project or programme was required, in the event of a protest, to suspend it until the problem was settled by agreement or by any other method. Under article 13, paragraph 3, the notifying State would not proceed with the planned project or programme without an agreement of judicial settlement unless it deemed that the project or programme was of the utmost urgency and that a further delay might cause unnecessary damage or harm to the notifying State or other system States. The rule that a project should be suspended for a reasonable period to allow the States likely to be affected an opportunity to study the matter and negotiate with the proposing State did not seem to cause difficulties, but it was doubtful whether customary law would extend much further for the moment. As it now stood, draft article 13 allowed a system State that had been notified of a project involving the use of the waters of an international watercourse to cause the indefinite suspension of the project by objecting to it and refusing to adjudicate the dispute. To provide a veto power over the utilisation of the waters of an international watercourse, in the absence of any prior agreement, was to revive the obsolete rule which required the consent of co-basin States before any work was undertaken. Such an approach was not consistent with State practice, and there again his delegation urged the Special Rapporteur and the Commission to reconsider the question. The saving clause in article 13, paragraph 3, was considered to be totally inadequate; it was suggested that it be revised or eliminated, as it covered a situation that ran counter to the purpose of the mechanism the Commission was attempting to institutionalize.

461. One representative believed that the provision in paragraph 3, which allowed the notifying State to act unilaterally in cases of the utmost urgency, upset the balance of the draft and irreparably undermined the safeguard system, which was based on articles 11 and 12. Legally and logically, that prargraph was acceptable only where the State notified refused to settle its dispute with the notifying

State by a binding procedure, in which case the notifying State would have no other means at its disposal than unilateral action. That provision, which merely envisaged ex post facto responsibility, should be very carefully reconsidered.

462. Finally, another representative believed that draft article 13 should be included in chapter V on the settlement of disputes and that the term "consultations" in paragraph 2 should be deleted (see also comments made with regard to art. 32, below).

Article 14. Failure of system States to comply with the provisions of articles 11 to 13 (see also comments made with regard to chapter III as a whole, above)

463. One representative felt that article 14, paragraph 2, stipulating that a State which did not comply with the provisions of articles 11 to 13 would incur liability not only for appreciable harm but for any harm resulting from its action, should also be very carefully reviewed. That provision, which seemed to constitute a deterrent, was far from sufficient to ensure respect for the treaty. In his opinion, it encouraged non-respect of the treaty. In such cases also, there should be binding procedures for the settlement of disputes and provision should perhaps be made for repair in case of appreciable harm. Another representative suggested that paragraph 2 of article 14 be deleted, as it covered a situation that ran counter to the purpose of the mechanism the Commission was attempting to institutionalize.

Article 15. Management of international watercourse systems. Establishment of commissions (see also comments made with regard to article 10, above)

464. While one representative welcomed article 15 and indicated his country had acted in accordance with the principles embodied therein, another representative suggested that the obligation to join in managing and administering international watercourses should be formulated more subtly, taking into account international situations in which States might refuse to accept an obligation to co-operate in a joint management that they did not want.

Article 16. Collection, processing and dissemination of information and data

465. One representative suggested the deletion of the phrase "to the extent possible" in paragraph 1 of article 16 and suggested that, since article 16 was a legal obligation, it should be placed in chapter II on rights and duties of States.

466. Another representative stressed that the exchange of information and data outside the context of specific agreements had a political connotation. The establishment of a general obligation in that sense would certainly create problems, he said, for States were very far from sharing a common opinion on that subject.

CHAPTER IV. ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH HAZARDS, REGULATION AND SAFETY, USE PREFERENCES, NATIONAL OR REGIONAL SITES

467. The draft articles included in chapter IV were generally welcomed by representatives; the chapter was deemed a most felicitous one. The provisions included in chapter IV were important, forming a part of the law of the non-navigational uses of international watercourses. The draft articles on environmental protection and on the prevention and reduction of hazards were particularly noteworthy, because they sought to promote co-operation among riparian States in an extremely important area.

468. It was stressed by one representative that it was important to co-ordinate the provisions of chapter IV with those in chapters II and III, while another stressed that it was necessary to make a distinction, within chapter IV, between mere guidelines and binding rules, the imposition of which on States was necessitated by the need to protect the environment. In addition, one representative suggested that the draft might specify that States should make an assessment of the environmental impact of any activity that implied a significant risk of pollution.

469. However, one representative cautioned that care should be exercised in formulating the rules on environmental protection to avoid the creation of unnecessary obstacles to the exploitation of international watercourses, particularly by developing countries.

Article 23. Obligation to prevent pollution

470. One representative believed that paragraph 1 of article 23 should be co-ordinated with article 9, concerning prohibition against activities with regard to an international watercourse system causing appreciable harm to other system States.

471. According to another representative, paragraph 3 of article 23, under which system States had no obligation to abate pollution emanating from another system State in order to prevent such pollution from causing appreciable harm to a third system State, appeared to run counter to the generally accepted principles of controlling pollution from land-based sources both upstream and downstream to protect particularly vulnerable semi-closed seas, principles which were set forth in the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources, of which his country had been one of the first signatories.

Article 26. Control and prevention of water-related hazards

472. A number of representatives stressed the importance of controlling and preventing water-related hazards.

Article 27. Regulation of international watercourse systems

473. One representative noted that chapter IV contained provisions dealing primarily with protection, for example protection of the environment, preservation of international water resources and abatement of pollution, whereas the regulation of the flow of waters in watercourses, although it could serve protective purposes, was in most cases aimed at improving the conditions of water use. Article 27, which dealt with regulation in terms of a joint undertaking by two or more system States, could therefore be included in chapter III, and its provisions could be combined with provisions concerning different types of uses of the waters of international watercourse systems if it was decided to expand the draft to include such provisions.

474. Another representative was of the view that the reference to the requirement of good faith in article 27 seemed somewhat superfluous, while the reference in that article to the concept of good-neighbourly relations was not as vague as had been alleged.

Article 28. Safety of international watercourse systems, installations and constructions

475. Representatives noted the importance of including a provision on the safety of international watercourse systems, installations and constructions. The Special Rapporteur's view was noted that the draft should not include provisions to protect international watercourse systems from the consequences of modern warfare because such provisions might be regarded as an attempt to amend or modify the two Additional Protocols to the Geneva Conventions (which were the result of long and difficult negotiations and were viewed as delicate compromise agreements) and as an attempt to reopen the debate on the principles and rules pertaining to armed conflict. That position was supported by some representatives. The Geneva Conventions on international humanitarian law and the Protocols thereto included provisions for the protection of public utilities. The draft articles should therefore deal with the law relating to co-operation and peaceful coexistence.

476. One representative was of the view that the greatest caution must be exercised with regard to the question; any argument based on the course of negotiations on the relevant provisions of the 1977 Protocols would be unconvincing and it was significant that the new Convention on the Law of the Sea made no direct reference to those Protocols. Moreover, the latter were clearly of no high standing in the international law community, and making any specific reference to them in the draft would serve no useful purpose. He wondered whether the question should in any event have been put in terms of a specific reference to the 1977 Protocols; it might be better not to try to specify circumstances in which rules might or might not be applicable.

477. Certain representatives, while not necessarily favouring a reference to the law of armed conflict, thought the possibility of treating that subject should not be foreclosed. It was stressed that, while it would not be appropriate to envisage provisions which might alter humanitarian law, as codified in the 1949 Geneva

Conventions and the two 1977 Protocols, that conclusion should not discourage members of the Commission in that regard. The peaceful uses of watercourses required the elaboration of guidelines for the States concerned, because international watercourses must not become a theatre for military operations.

478. It was, moreover, felt by certain representatives that there should be adequate legal rules governing special protection of watercourse systems in case of hostilities.

479. One such representative referred to the question posed by the Special Rapporteur whether it would be useful to add in article 28 a general reference to the Additional Protocols to the Geneva Convention of 1949. He said that Additional Protocol I of 1977 offered only a general protection of civilian objects, i.e. all objects which were not military objectives. But the definition of objects to be considered as military objectives contained in article 52, paragraph 2, of the Protocol did not, in the case of civilian installations, constructions and works of international watercourse systems, exclude the possibility of subjective assessments on the part of military commanders, who could consider them to be military objectives. In order to reduce the risks inherent in subjective evaluations, Protocol I contained a few rules on specific protection for certain objects: for example, article 54 protected objects indispensable to the survival of the civilian population (including irrigation works) and article 56 protected works and installations controlling dangerous forces (including dams and dykes). Civilian installations of international watercourse systems were not therefore specifically protected except in so far as they could be said to fall under one of those articles.

480. In his view the framework agreement could usefully include specific references to Additional Protocol I which would make it possible to ensure better protection, and increase the possibility of protection, for installations of international watercourse systems, which was extremely important because the consequences of an armed attack on those installations could extend to the territories of non-belligerent or neutral States.

481. He recalled that the Special Rapporteur had indicated that it would not perhaps be desirable to attempt to supplement Additional Protocol I, because to do so would risk disturbing the delicate balance between military necessities and humanitarian considerations attained at the end of long and laborious negotiations. He did not share that point of view in so far as it was not a revision of the Protocol itself that was being sought, but specific additions and clarifications which should not arouse major objections and which could be attained within the framework of other negotiations. His country had already adopted that approach in the current negotiations on radiological weapons in the Committee on Disarmament.

Article 29. Use preferences

482. One representative was of the view that since article 29 actually dealt with the rights and duties of States, it should be placed in chapter II of the Special Rapporteur's draft.

CHAPTER V. SETTLEMENT OF DISPUTES

483. A number of representatives stressed the importance of providing mechanisms for the peaceful settlement of disputes. Appropriate provisions for dispute settlement were a necessary part of the draft articles, because of the nature of the subject-matter, the inherent generality of approach of an umbrella arrangement and the use of concepts which could not be precisely defined. The Special Rapporteur had shown great ingenuity in dealing with such questions as fact-finding machinery and other modes of dispute settlement. It was desirable that States should be given some freedom of choice of means of settlement in an umbrella agreement which must be compatible with subsequent particular régimes.

484. The detailed provisions proposed by the Special Rapporteur in chapter V were welcomed and considered useful. One representative observed that chapter V of the draft contained eight articles on the settlement of disputes which differed but little from the respective provisions of the Helsinki Rules: both texts contained provisions for the use of technical experts, and the means of settlement were the same with the exception of compulsory jurisdiction. The machinery for settling disputes was not dissimilar to the solutions adopted in the United Nations Convention on the Law of the Sea. Another representative noted that the provisions regarding the settlement of disputes included many ideas such as consultations and negotiations, inquiry and mediation, conciliation, and judicial settlement. There was general agreement that riparian States should be under a legal obligation to settle their disputes peacefully and that if bilateral efforts were unsuccessful, an international forum might be approached. The articles in the Commission's report, however, required reshaping and refining.

485. One view expressed was that it would be premature to discuss the settlement of disputes until the character and the basic foundations of the draft articles were agreed.

486. It was recalled that the Special Rapporteur had questioned whether, in the light of the experiences drawn from the Third United Nations Conference on the Law of the Sea, provision should be made for compulsory conciliation procedures, compulsory resort to fact-finding or expert bodies procedures, and compulsory procedures entailing binding decisions. In that connection, certain representatives were not fully convinced of the merit of using as a model the mechanism for the settlement of disputes adopted in the United Nations Convention on the Law of the Sea. A note of caution was sounded. That Convention was very new and had not yet stood the test of time. In any event, whatever form of settlement procedure was adopted would have to be sufficiently broad and flexible to accommodate the various physical characteristics of international watercourses and the diverse human needs which they served.

487. Several representatives urged that chapter V be strengthened by including procedures of a compulsory character; to not do so would be unsatisfactory. It was stressed that there must be an obligation on all States to accept third-party dispute settlement or, in other words, a right for all States to resort to third-party dispute settlement for a binding decision. The structure of articles 31 to 38 was defective in that there was no such obligation or right, even

with regard to conciliation. What was needed was a residual mechanism for the settlement of disputes in the event that there was no system agreement or that the system agreement made insufficient provision for the matter. At the very least, it seemed that a system State, or any other State party to the eventual convention that might be able to demonstrate that its interests were adversely affected by a proposed development, should be able to invoke unilaterally the proposed conciliation machinery. The term "residual mechanism" was used since certain types of disputes arising on the interpretation or application of the draft articles might be wholly technical in nature, requiring the assessment of a single neutral technical expert. But that in no way detracted from the need to have a fall-back mechanism which could be activated by a State that considered itself to be adversely affected by a new project. Some questions relating to the interpretation and application of articles of the convention might be made subject to at least a compulsory conciliation procedure, which could be set in motion by a State party affected by the decisions of other States parties relating to such interpretation and application. There were several provisions of the draft which might be strengthened by compulsory conciliation procedures. Such procedures might well promote the conclusion of system agreements and more effective co-operation in the management of the shared resource. Judging from the preparatory work on the topic, it seemed that the Special Rapporteur had intended to provide for compulsory procedures, at least with regard to conciliation, and that, consequently, the defect could be cured when the Commission resumed consideration of the draft articles.

488. According to one representative, a flexible machinery for the peaceful settlement of disputes should be provided but it should not exceed the framework of organized negotiations and mandatory conciliation.

489. A number of representatives, however, favoured the inclusion of mandatory procedures leading to binding decisions, such as arbitration and judicial settlement. That approach had already been adopted under some treaty régimes governing the use of international watercourses. In the absence of such special régimes, it was particularly important to go further than compulsory conciliation and to include mandatory provisions concerning the settlement of disputes, for the framework agreement operated through legal standards which might not always provide for decisions in concrete cases. In particular, the preliminary questions whether and to what extent a given watercourse system was an international watercourse system within the meaning of the framework convention and whether and to what extent a particular State was a system State in respect of that international watercourse system could very well be settled, with binding force, through a third-party settlement procedure provided for in the convention itself. The procedures for the settlement of disputes found in articles 31 to 38, a system based exclusively on negotiation, was not effective; it was necessary to provide for a system which included the contribution of an impartial third entity with a decision-making capacity. Given the current international situation, it might be difficult to set up such a system, but that was the only way to assure the effective implementation of legal instruments by the States parties. In that connection, one representative pointed out that a considerable portion of the draft articles, especially in chapters III and IV, were of a rather general, programmatic and policy-oriented nature and less of a strictly regulatory one. Third-party

settlement of disputes could be confronted with many difficult problems in such cases. That evident difficulty should not prejudice either the framework of a convention or the importance of third-party settlement. He was confident that eventually a viable balance of the two elements would be found.

Article 31. Obligation to settle disputes by peaceful means

490. One representative said that article 31, paragraph 2, was not necessary, since the means of peaceful settlement of disputes for which it provided were already contained in Article 33, paragraph 1, of the Charter. Those were not mere comments, it was stressed, but affected the substance of the draft agreement.

Article 32. Settlement of disputes by consultations and negotiations

491. One representative believed that the reference to "consultations" in article 32 should be deleted. The means for the peaceful settlement of disputes were set forth in Article 33 of the Charter of the United Nations and they did not include that term, which was in any case included in the term "negotiations".

CHAPTER VI. FINAL PROVISIONS

Article 39. Relationship to other conventions and international agreements

492. It was stressed that the framework instrument, besides being residual to existing rules, must clearly respect and reflect existing régimes. One representative observed that an analysis of the work done thus far by ILC seemed to indicate that the draft articles should strive to define a general framework of reference on the basis of which States should conduct their activities. The essential idea was that certain activities relating to the use of a specific watercourse would, whenever appropriate, be the subject of specific agreements between the States directly concerned. Any other approach would run the risk of hindering understanding among States and jeopardizing a significant number of bilateral or multilateral agreements now in effect, including the ones governing international river organizations. It was, in fact, in order to lessen that difficulty that the draft articles now before the Committee contained, in article 39, a specific provision, according to which the provisions of the draft articles would not affect international agreements in force relating to a particular watercourse. He doubted, however, that that provision was sufficient.

493. Another representative suggested that, in article 39, the introductory phrase "Without prejudice to article 4, paragraph 3" should be deleted because the existence of such conventions and international agreements would in itself be considered an implementation of article 4, paragraph 3, which urged system States to negotiate for the purpose of concluding one or more system agreements. He did not believe the Special Rapporteur intended that phrase to mean that parties to a convention in force relating to an international watercourse system would

necessarily have to conclude a new system agreement in implementation of article 4, paragraph 3. Moreover, the article in question should be included in chapter I and not among the final provisions, so as to highlight the residual nature of the text of the draft articles.

G. RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

494. That topic was only briefly commented upon inasmuch as, in the words of one representative, it was still in its infancy and since the Commission had not yet submitted substantive proposals thereon.

495. Representatives generally welcomed the resumption of the work on the topic after an interruption of several years. It was noted in particular that research and study on the status, privileges and immunities to be extended to international organizations and their personnel as well as their property and assets would supplement the work previously done in this area, which had culminated in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. While supporting the continuation of the Commission's work in that area, some representatives pointed out that the questions at stake were covered by the various general conventions on the privileges and immunities of international organizations and headquarters agreements. One representative expressed the view that the topic did not easily lend itself to unification of law, which explained the slow progress made so far in relation thereto and another representative suggested that the Commission consider seriously whether the topic warranted further study, given the actual prospects for the formulation of draft articles in this field.

496. Representatives noted with satisfaction that the Commission had, on the basis of the preliminary report submitted by the Special Rapporteur, Mr. Díaz González, reaffirmed the conclusions it had previously reached regarding the orientation of its work on the topic. The intention of the Commission to proceed with great prudence was generally approved in view of the complexity of the issues at stake. Some representatives advocated a pragmatic approach leading to the formulation of concrete draft articles and warned against engaging in protracted discussions of a theoretical nature.

497. As to the basis of the study, attention was drawn to the constitutional rules of intergovernmental organizations, to the 1975 Vienna Convention, to the headquarters agreements and to the internal law of international organizations as well as to new developments in the practice of codification. One representative urged that particular attention be paid by the Special Rapporteur and the Commission to the practice followed by host countries in their relations with international organizations for those countries were - besides the organizations themselves - the ones most immediately concerned with the legal status, privileges and immunities of international organizations.

498. Another representative said that the exercise, while drawing heavily from international treaty practice in relation to host country agreements, should go

beyond codification and seek to develop the law on a broadly acceptable basis in certain areas of difficulty.

499. Also commenting on the approach to the topic one representative placed emphasis on the criterion of functional necessity as an essential guarantee for the independent and effective implementation of the principles and purposes of intergovernmental organizations, and on the need to establish a system of rights and duties for all parties involved, including concrete obligations to be borne by the host country for guaranteeing the independent and unimpeded activity of international organizations.

500. The decision of the Commission to adopt a broad outlook and to include regional organizations in its study was favourably received. It was pointed out in that connection that there was in the headquarters agreement of some regional organizations a wealth of material which the Commission could take advantage of in its consideration of the topic.

501. As to the decision of the Commission to request the Secretariat to revise and update the 1967 study on "the practice of the United Nations, the specialized agencies and the IAEA concerning their status, privileges and immunities", it was also well received. One representative insisted on the need for a descriptive rather than interpretational approach.

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

502. Further work and progress by the Commission on this topic had a wide support among the representatives. Many attached great importance to it and found the topic to have substantial practical value for the present and future relations among States. Some suggested that international law should attempt to meet the present conditions of life as well as the future needs of inter-State relationships. They thought that, although sovereign authority of States over their territories is indisputable, it was unrealistic to deny the right of other States to be free from harm caused in their territories from outside sources. Consequently they found it difficult to go along with the view that so long as certain activities are not prohibited by international law a State has no obligation to repair harm arising from them. There were good reasons of justice and equity, many representatives thought, which called for a State engaging in activities that caused harm to a neighbouring State to assume responsibility for their consequences. They thought that there was a body of conventions and of awards and other forms of State practice pointing to a duty, however vaguely delineated, to avoid, minimize and repair injury resulting from hazardous activities and that the said practice was sufficient to establish a basis for the further development on that topic. Some pointed out that, in working on the topic, the Commission would be more engaged in progressive development than in codification of international law. A few representatives, on the other hand, expressed the opinion that there were not enough legal foundations in the present state of international law to provide a sound basis for the codification of that topic. One representative found no possibility of forming a basis for a successful codification exercise on the topic.

503. Many representatives welcomed the limitation of the scope of the topic to physical transboundary harm resulting from physical activities within the territory or control of a State. This did not exclude, in the opinion of some, the consideration of economic consequences of physical harm, but it rightly excluded economic and political activities which essentially belong to the domestic jurisdiction of each State. It was further stated that another potential limitation could perhaps be derived from the nature of the activities. For example, it was suggested to include in the topic only those activities that, by their nature, bear an inherent substantial risk of causing harm. Other representatives, who supported the limitation of the scope of the topic, warned against too much limitation. It was, for example, stated that the Commission should not attempt to draw an exhaustive list of all possible situations relevant to the topic. One representative thought, for example, that the topic should not exclude injuries occasioned on beaches by extraterritorial spillage of oil from tankers. He thought that protection of beaches from pollution was essential for tourism in some developing countries. By contrast, a few representatives were disappointed at the suggestion to limit the scope of the topic. They though such limitation would exclude many injuries to a State, resulting from causes other than activities related to the physical use of the environment of another State.

504. One representative pointed out that the Commission, in finalizing the scope of the topic, should bear in mind also the need for the protection against injuries to areas beyond the limits of national jurisdictions. The finite character of the planet, in his view, required that the protection of the earth environment be assured to the fullest possible extent and cover every area. It was further stated that the whole thrust of the topic should be to reduce the need for reliance upon general rules of prohibition, which are in nature a restriction upon the free exercise of national sovereignty. It was stated that the emphasis of that topic should be placed upon encouraging, but not obligating, States to set up conventional régimes to prevent and, if need be, repair transboundary harm, when the possibility of such harm was foreseen. Nothing within the compass of the current topic, it was stated, should engage the responsibility of the source State except an ultimate failure in the legal duty of co-operation. It was, however, emphasized that the State's adequate response to situations of contingent or actual transboundary harm was a matter of duty, not merely of grace and favour.

505. The "schematic outline" as a basis for further development of the topic was supported by many speakers. The outline was considered cautious and practical. Most representatives stated that since they had already made statements, at the thirty-seventh session, regarding the "schematic outline", they found no reason to repeat them at the current session. They, however, supported modifications suggested by the Special Rapporteur.

506. The order in which the topic was approached within the framework of the "schematic outline" was supported by many representatives. They thought that the topic should rightly be approached first from the standpoint of the duty to "avoid" and then from that of the duty to "minimize" and "repair" physical transboundary harm. Hence, in their view, the topic should first deal with a system for prevention of harm, followed by a sytem for its minimization and finally by a system of reparation for injuries.

507. It was also stated that, in approaching the topic in detail, the Commission should carefully balance the interest of States to act freely within their territorial jurisdiction and control on the one hand, and their duty to avoid injuries to other States, on the other hand. In that respect, it was stated by some representatives that emphasis should be placed on the principles of good-neighbourliness and of co-operation.

508. As to the overall approach to the topic, one representative favoured a "framework treaty" which would encourage the conclusion of other treaties. He realized that such a "framework treaty" could not cover all relevant cases, but, he thought, it could at least set forth a number of general norma.

509. The importance of that topic to developing countries was also underlined. It was stated that many serious injuries resulting from industrial activities were suffered by developing countries. In the view of one representative, the developed countries' strict requirements in their territories for the establishment and operation of industrial plants with proper safeguards regarding toxic waste, for example, did not have extraterritorial effects. That, in the view of that representative, encouraged the export of hazardous industries to foreign countries where neither the Governments nor the people were sufficiently aware of the potential danger of their activities. Focusing on a similar issue, another representative was concerned about how the Commission intended to resolve the question of attributability of private activities to the State. That question, it was suggested, might raise practical problems in many countries and would require further examination in future discussions.

510. It was observed by one representative that, while there was already a scheme within which individual States might bring a claim in respect of injuries to their own territory, no means had, so far, been developed to protect the common areas beyond national jurisdiction of State. That representative realized that the existence in international law of an institutional equivalent of actio popularis, to be used in cases of injuries to areas beyond the limits of national jurisdiction, was still controversial. Nevertheless, he thought that the Commission should pay some attention to it.

511. While a number of representatives were of the opinion that some principles of domestic law, such as strict liability, might be helpful in clarifying the concept of liability in that topic, one representative thought that no useful analogy could be drawn from municipal laws. He thought that many national systems practically ignored the concept of strict liability or liability without fault and tended to resolve the important problems created by new technology and ultra-hazardous activities by recourse to other categories which focused on the idea of what may be called "enrichissement sans cause". A similar approach, he thought, might be useful in international law. For example, he suggested, the principle of "sic suo jure utere ut alienum non laedas" could be the basis for constructing a series of legal régimes. Some of those régimes, he thought, already existed in the field of peaceful uses of outer space and in the régime regulating telecommunications. Another representative enumerated a number of principles which might form a basis for the development of the topic. Those were the principles of good-neighbourliness, the sovereign equality of States, the duty of States to

co-operate in accordance with the Charter of the United Nations, permanent sovereignty over their natural resources and the principle of sic utere tuo ut alienum non laedas. The latter principle, he stated, was upheld in the Trail Smelter arbitration, affirmed in principle 21 of the Stockholm Declaration and firmly set in article 30 of the Charter of Economic Rights and Duties of States (resolution 3281 (XXIX)). It was stated that the importance of those documents could not be underestimated in developing international law in that area.

512. It was also suggested that the task of the Special Rapporteur was to prepare a draft focusing mostly on procedures. Substantive rules, one representative thought, should be limited to what was strictly needed, and they should be tailored strictly to the scope of the topic without attempting to state broad and general principles which might be inapplicable to other fields.

513. A number of representatives stated that they attached great importance to the further development of that topic. They thought that, in view of a broad agreement on the scope and the structure of the topic, the Commission should be in a position to proceed more rapidly with that topic. They expressed hope that the Commission, at its next session, would allocate more time to that topic in order to consider it more thoroughly. A few representatives suggested that the Commission should give priority to that topic. One called that topic the most challenging topic on the Commission's agenda.

514. Many representatives supported further development of the topic in detailed provisions. They expressed interest in the recent Secretariat study and thought that the study would assist the Commission, its Special Rapporteurs and the Sixth Committee in examining the topic in the light of State practice. The usefulness of receiving that study at the earliest opportunity was mentioned.

515. The relationship between that topic and the topics on "State responsibility" and "Law of non-navigational uses of international watercourses" was stressed by many representatives. A few, however, thought that the major purposes of that topic should not be confused with those of the other two topics.

I. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

1. Programme and methods of work of the Commission

516. Representatives again welcomed the establishment of the Planning Group of the Enlarged Bureau of the International Law Commission at its last session. That was considered to have been essential, as the increasing number and complexity of the topics considered made it necessary to find rational methods of work and constantly improve them. The interrelationship between questions related to the Commission's programme of work and those concerning its methods of work was stressed. Effective working methods could help to produce results in a timely fashion and in a manner which would allow States to comment effectively as the work progressed. Satisfaction was expressed with the way in which the Commission had been organising its programme and methods of work; with the establishment of the Planning Group, it should be able to plan and execute its programmes as speedily as possible. In

particular, it was noted that at the last Commission session the Planning Group had attempted to pinpoint various problems related to programme and methods of work and to identify some specific remedies; such efforts would enhance the work of the Commission in the progressive development of international law and its codification. Certain representatives specifically endorsed the Commission's decisions and recommendations as reflected in paragraphs 305 to 307 and 310 to 314 of its report on the work of its thirty-fifth session.

517. It was stressed that, as the Commission moved towards the regulation of new areas of human activities in which a progressive development aspect would prevail, greater flexibility and variety in the techniques available within the framework of its statute might be needed. The various constructive suggestions indicated in the Commission's report on how the methods of work could be improved should be fully examined at its thirty-sixth session; although no radical changes in the existing methods were called for, some changes would facilitate its work and meet the concerns of Governments. The Commission and the Planning Group were congratulated for having endeavoured to be responsive to various suggestions for injecting fresh thinking and new perspectives into the Commission's role, objectives and methods of work, in the light of technological and scientific developments and dramatic changes in the composition of the community of nations. The right attitude would be to have the courage to change things that could be changed, the serenity to accept things that could not be changed and the wisdom to know the difference between the two. It was said that while all constructive suggestions from interested and concerned individuals and learned bodies were welcome, no one was better qualified to decide on those matters than the Commission itself; greater confidence should be placed in the Commission and its members.

518. Certain other representatives, however, expressed dismay at the extremely slow pace of the Commission's work in general or in relation to particular topics. Serious thought must therefore, it was said, be given to rationalizing its procedures and methods of work so that they would be equal to the tasks set by the General Assembly. The codification and progressive development of international law was indeed a laborious and time-consuming process, but the problems posed by contemporary international life made it necessary to increase the effectiveness of the Commission's activities. The question must be analysed carefully and comprehensively, generally recognized international legal norms which might be codified should be identified, State practice and doctrine relating to international law should be studied and the general way in which they were developing should be determined, taking into account the main principles of contemporary international law. The past experience of the Commission showed that it could not successfully fulfil its functions without such an analysis, and the need for it had been further demonstrated by its recent session, during which some members had unfortunately adopted a tendentious approach towards the consideration of certain topics and the evaluation of existing State practice and the ways in which it was developing. The harmful effects of that attitude must be overcome, especially as the Commission had before it a number of issues of crucial importance for strengthening and enhancing the effectiveness of international law as an important means of preserving world peace, reducing international tension and strengthening good-neighbourly relations and co-operation.

519. Moreover, it was said, there was a certain tendency to depoliticize the work of the Commission: while it was composed of experts who served in their individual capacity and while it was not their task to conduct endless political debates, no useful work could be done in a vacuum marked by insensitivity to the major challenges of the times. It was therefore hoped that the Commission would spare no effort to study all the items on its agenda with a keen sensitivity to the political aspects and to their close interdependence with the major challenges confronting mankind and that it would accelerate its work.

520. Other representatives, while expressing regret that the results of the Commission's work at its last session were not more tangible and that work on certain topics seemed to be languishing, stressed that the reasons for that state of affairs were complex and not easily surmounted. Reference was made to various factors and suggestions mentioned in the Commission's report relating to its programme and methods of work, as well as to other suggestions which were made in the course of the debate held in the Sixth Committee.

521. An analysis of the situation offered by one representative and supported by other representatives highlighted the interrelation between the role of the Commission in the codification process and methodological questions. According to that analysis, it was questionable whether, as was sometimes claimed, the Commission had in recent years failed to occupy the central place originally assigned to it in the development of public international law. First, the Commission's most resounding successes had been in areas in which the common interest plainly outweighed any separate, conflicting interests. Secondly, there were some phases of legal development in which the Commission could not play a useful role, in particular when progress depended upon a trading of advantages to produce a package deal, since members of the Commission served in their personal capacities and could not act as surrogates for bargaining Governments. In certain areas of law, the Commission's possibilities of success depended upon developing a context in which the common interest could be reconciled with separate, potentially conflicting interests. Thirdly, the older States sometimes found security in the ambiguities and imprecisions of customary law and felt less need for progressive development and codification of international law than did the new States and, while they had the experience and skills to play an indispensable part in every field of legal development, they had first to be persuaded that any development was a step in the right direction. That explained to a large extent, according to that analysis, the Commission's long and still indecisive work on State responsibility, a topic which loomed above the Commission's other work and to which other topics were linked by historical and logical linkages. As far as the Commission's recent achievements were concerned, aside from the completion on first reading of part one of the draft articles on State responsibility, no peaks had as yet been scaled; those concerned with the particularly difficult topics currently on the Commission's agenda were having difficulty in establishing their base camps. It was not enough to look for improvements in organization, there was also need for a common will.

522. According to that analysis, there were two possible ways of pursuing a dialogue where there was a deep divergence of attitudes about the policy of legal development. One was by asserting conflicting positions of principle in a

political forum until the problem was solved by attrition or changed its form; the other was by a methodical search, beneath the turmoil, for a prospective area of common ground. The latter method was the only one open to the International Law Commission. It was emphasized that that distinction was essential in any assessment of the Commission's role, and might be the first step in breaking the log-jam which seemed to affect progress on a number of topics. In that connection the danger was that a confusion of objectives and of political and legal methodologies would paralyse the Commission's handling of topics. If such risks could be avoided, the outlook would be much improved.

523. It was, moreover, stressed that the Commission must not be allowed to be seized by the spasms of paralysis that affected ad hoc committees of the General Assembly. It was neither an academic ivory tower nor a forum for diplomatic negotiation at the plenipotentiary level. It should remain a body for discussion and practical drafting to develop international co-operation and encourage the progressive development and codification of international law in accordance with Article 13 of the Charter. Its members must remain detached and must separate legal doctrine from the immediate interests of States, seeking the highest common factor, or, failing that, bringing the alternatives closer together.

524. Turning to the various factors and suggestions relating to the Commission's programme and methods of work, several representatives favoured the Commission concentrating its attention on only a few topics at any one given session, and expressed support in particular for the idea of staggering from year to year the major consideration of topics on the current programme of work. It was said that it was becoming increasingly apparent that the seven topics currently on the Commission's agenda could not be dealt with all at once. It was, moreover, pointed out that in the past, when the Commission's reports had been confined to one large topic and one small one, with brief progress reports on certain others, there had been some value in a sustained debate in the Sixth Committee, concentrated on the two main topics. Such debates had shown where the obstacles had lain, thus facilitating the work at the second reading and diplomatic conference levels. The Commission's report now covered many more topics than had once been the case, but the debates in the Sixth Committee had not kept pace with that change, and the statements made by the representatives of Governments did not always furnish adequate political or diplomatic guidance, either to the Commission or to other Governments. Confining in-depth consideration to only a few topics each year would facilitate the task of the Special Rapporteurs and the Secretariat, allowing the focus of each session to be less diffuse and providing more time for all concerned.

525. It was said that the fact that the Commission had made rather limited progress over the past since it had proved difficult to pick up the threads of a number of topics that had lain relatively fallow for some two or three years lent added weight to the proposal for staggering the consideration of items. Concentrating attention on a smaller number of topics at any one session would, apart from easing the Commission's task, allow representatives in the Sixth Committee to comment in greater depth on the Commission's work. Furthermore, if the Commission concentrated its work on one or two priority topics, its reports could then present draft articles and commentaries, rather than the views of Special Rapporteurs, thus enabling the Sixth Committee to follow the work of the Commission as a whole on a

topic, there being no need for the Committee to comment on the views of individual Special Rapporteurs.

526. A few representatives, however, urged caution concerning the suggestion to stagger the major consideration of topics. According to one view, taking up an item at intervals of two years did not seem a particularly sound idea for practical reasons, especially for delegations to the Sixth Committee. According to another view, if the arrangement was applied systematically, it would unduly expand the timetable for implementing the programme of work and would create inopportune intervals between the contributions of Governments to the consideration of the different reports. It was, therefore, urged that if the suggestion were adopted, it must be applied flexibly.

527. In addition, a number of representatives stressed that it was important to establish priorities within the work programme of the Commission. It was stated that priority should be given to topics which were of major importance and urgency and on which there had been considerable progress in recent years, with the aim of ensuring that the Commission could complete projects on its agenda at fairly regular intervals. It was recalled that a useful debate had taken place in the Sixth Committee at the last two sessions on various matters related to the Commission's programme and methods of work, which indicated that priorities had changed and new topics had come to the surface which called for new, revised rules of international law. Constructive criticism should be examined objectively and with an open mind. The goal should be the setting of realistic but imaginative targets, the careful programming of work to be achieved in each five-year cycle, the re-examining of working methods and, possibly, new improved techniques as ways in which the Commission could prove to be more responsive to the needs of the contemporary international community. The Planning Group was urged to convene during the first week of the Commission's thirty-sixth session, not only to implement the idea of staggering the major consideration of items, but also to set the priorities for consideration of items in a plan extending over the three remaining years in the Commission's present term of office.

528. In that connection, one representative noted that, in paragraphs 313 and 314 of the report, the Commission did not present a specific programme of work for its next session. That was a departure from a long-standing practice which had symbolized the links between the Commission and the Sixth Committee in connection with the codification and progressive development of international law and the links between the experts serving on the Commission and Member States; isolating the Commission could adversely affect the performance of its work. The former practice of reporting more specifically to the Assembly on its future programme of work should, he stressed, be resumed at the next session of the Commission.

529. Reference was made by a number of representatives to the important role played by the Drafting Committee in the work of the Commission and to the need to reduce the backlog of draft articles referred to that Committee but not yet considered or referred back to the Commission. It was urged that more time must be given to the Drafting Committee for it to carry out its tasks, since it worked to achieve agreement not only on texts, but also on substantive questions. It was noted that the Commission had indicated in its report (para. 313) that priority should be

given to the work of the Drafting Committee at the Commission's thirty-sixth session; confidence was expressed that, accordingly, such priority would contribute to a further consolidation of the work carried out so far.

530. It was, however, also maintained by certain representatives that drastic action must be taken to relieve the Drafting Committee of some of its backlog of work. That backlog raised serious questions concerning the equilibrium between the work of the Commission and that of its Drafting Committee. According to an analysis shared by several representatives, the origins of the problems were simple enough - the backlog had started in the previous quinquennium and a large number of draft articles were being referred to it on a number of subjects during the present quinquennium. The Drafting Committee had always had a mandate to deal not only with drafting but also with unsettled questions of substance. Its members were dedicated and able and it occupied a central position in the Commission. However, given the importance of the responsibilities assigned to it, it was essential that the Drafting Committee should give an annual accounting to the Commission of matters referred to it so that the Commission could consider them at the same session. If there was no accounting, the Drafting Committee might become a court of final appeal, which could hold on its agenda indefinitely a draft article about which its members had not agreed or, alternatively, it might confer with the Special Rapporteur, to the exclusion of the Commission, about progressive changes in the character and development of the scheme originally laid before the Commission. It might also return to the Commission, too late in the session for substantive reconsideration, the drafts of articles which had not been before other Commission members during that session. The warning contained in paragraph 313 of the report should not be taken lightly: the work of the Drafting Committee must be kept in step with that of the Commission itself, otherwise power and authority would pass from the recently enlarged Commission to a much smaller and technically subordinate body. The solution was not for the Commission to mark time until the Drafting Committee caught up.

531. The real question, it was said, was how to increase work output. It was unfortunate that no provision had been made for the servicing of more than one meeting at a time. Noting that the Commission's new source of strength was its enlarged membership, it was pointed out that that resource should be used to the best advantage: negotiations in the Drafting Committee could be expedited if the Commission's debates provided clear guidance in relation to the texts referred to it. Equally, the Committee should be more willing to report back to the Commission when it discovered particularly thorny problems in those texts. Debates in the Commission and debates in the Drafting Committee each had their part to play. In some cases, however, it might be advantageous to restore a better balance between the two bodies.

532. Concerning the possibilities of re-establishing that equilibrium, one representative examined the backlog topic by topic. Referring to the topic of jurisdictional immunities, he said that the Commission had that year referred three draft articles to the Drafting Committee, one of which had been adopted. The remaining two would call for painstaking study by the Drafting Committee but, in view of the Committee's success in dealing with other articles in that series, that was of no special concern. The topic of State responsibility, part two, presented

a different picture because of the cumulative delays. The situation had improved in 1983 to the extent that four introductory articles had been adopted on first reading; however, matters had become so complex and obscure that it was no longer easy to determine which of the texts referred to the Drafting Committee several years earlier still required its consideration. Matters pending raised fundamental questions of substance and principle and the Commission's early appraisals had been overtaken by subsequent developments. That would seem a clear case for relieving the Drafting Committee of further responsibility until it received a new mandate from the Commission, which could hopefully be given early in the 1984 session.

533. Turning to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, that representative said that it would be to the Commission's advantage to follow the procedure it had followed in 1972 in respect of the Convention on the Prevention and Punishment of Crimes against Diplomatic Agents and Other Internationally Protected Persons, in other words, to refer the draft articles, which it was expected would soon be ready for a first reading, to a working group, thereby relieving the Drafting Committee of a tremendous responsibility and accelerating progress on other more complex and broader topics which the Commission had started to codify. Any chance of progress on those topics was subordinate to the decision the Commission took concerning the manner it wished to deal with the topic of the diplomatic courier.

534. The above-mentioned suggestion to establish a working group which would consider articles referred to it by the Commission on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was supported by certain representatives, one of whom laid stress, however, on the need to safeguard the principle of the equality of Commission members; all work should be prepared for by a plenary Commission debate and ratified by discussion and adoption in plenary meeting.

535. Regarding the preparation of draft articles intended to form the basis for the conclusion of international conventions, one representative queried whether the Commission's task of codification and progressive development should be constrained within a single modus operandi. The process from initial reports through draft articles to a multilateral conference and the conclusion of a treaty was a valuable one, but its value was diminished if the treaty remained unratified and was unacceptable to a large number of States. While the Commission's work certainly was not completely wasted if it did not lead to a widely accepted treaty, formulating draft rules too early could rigidify practice that was still in the process of development. It might well be, therefore, that in some cases the drawing up of normative statements not in the form of treaties would perform a more valuable function than the drafting of articles. That was not to deny, he said, that the Commission's objective at the outset should be to prepare draft articles. However, it might become clear during that process that the production of draft articles would not perform a useful function. At such a time, the Commission should have the flexibility to revise its objectives. Like all institutions, it should respond to particular needs, rather than adopt a uniform approach to all the topics before it. That would enhance its stature in the field of the codification and progressive development of international law.

536. Another representative pointed out that the main failures with respect to conventions elaborated by the Commission often occurred at the ratification stage, when the ratifications on which the final success of such undertakings depended might be slow in coming or never materialize at all. The Commission's efforts should not end with the adoption of its draft convention by a conference but should continue with a view to obtaining the ratifications required, both numerically and from the standpoint of political representativeness, to ensure the success of the convention. Yet another representative, however, said that with regard to the view expressed that steps should be taken to prevent an increase in the number of international conventions which might not receive the support needed for their entry into force and that recourse should be had instead to other means of expressing the international will, particularly resolutions and declarations, he felt that such a course was not in keeping with Article 13 of the Charter, which encouraged the progressive development of international law and its codification. Furthermore, he stressed, the number of States prepared to ratify or accede to a convention might increase in the long run.

537. Several representatives believed that the Commission should examine simplified ways of obtaining the reactions of Governments to items on its agenda. Governments could help the Commission in its work by being more prompt in their replies to requests from the Commission for written comments, without which it could not produce material that would be readily acceptable to them. One representative noted that there was an increasing tendency for the debates in the Sixth Committee to take the place of the written observations of Governments called for by the Commission's statute, which, as diplomatic papers, performed an essentially diplomatic function. Perhaps that practice was one of the root causes of the political differences that now seemed to emerge at far too late a stage in the plenipotentiary conference itself. Very few delegations were able at the beginning of November to present the fully considered views of their Governments on a document of the weight of the Commission's report, which had appeared only towards the end of September.

538. Another suggestion put forward for consideration by certain representatives in the context of the Commission improving its methods of work was that it should look beyond the traditional analytical sources and develop links with other bodies whose work was closely related to topics before it, such as UNEP. A regular report from UNEP on its relevant activities would facilitate the work of the Commission, it was said. Another example cited as work being carried out by specialized bodies in the United Nations system which could be of use to the Commission was the ad hoc meeting of senior government officials expert in environmental law, held at Montevideo in 1981, which had adopted a programme for the development and periodic review of environmental law, covering such topics as the protection of rivers and other inland waters against pollution and legal and administrative measures to prevent and redress pollution damage.

539. With regard to the organization of the Commission's yearly sessions, certain representatives saw some advantage in the proposal discussed in the Planning Group that the Commission might consider holding a four-week session in New York early in the year, followed by an eight-week session in Geneva in the early summer, since that might enable more members of the enlarged Commission to contribute more

actively to its work. The hope was expressed that the Commission would give serious consideration to the suggestion, taking due account of its financial and other implications. The possibility was also noted of a slight shortening of the Commission's session as a whole, combined with an extra session of a couple of weeks for the Drafting Committee. Doubts or reservations were, however, expressed by certain other representatives concerning the holding of two Commission sessions a year. It was stressed that the principle of equality of Commission members must be safeguarded and it was questioned whether such a change would in fact make the Commission more effective.

540. As to the institution of the Special Rapporteur, the hope was expressed by one representative that the Commission would consider the idea of full-time Special Rapporteurs or Special Rapporteurs who would be willing to devote one year full-time early in their tenure. Another representative said it was a cause of concern that the equitable representation in the Commission of the various juridical systems had been affected by the fact that some members were unable to attend the whole session or to assume special responsibilities because they occupied important government posts; as a result, Special Rapporteurs had traditionally come mainly from certain groups of countries.

541. Another representative drew attention to the fact that in establishing the International Law Commission and giving it an autonomous statute, the General Assembly had wanted to distance itself from the highly technical professional consideration of topics and to receive from the Commission its collective views reflecting trends in the principal legal systems of the world. Although the Commission was usually represented in the General Assembly by its Chairman, in recent years there had been a growing tendency for its Special Rapporteurs to make explanatory comments on their reports or even to reintroduce them in the Sixth Committee. If that practice became too prevalent, the whole purpose of establishing the Commission might become blurred. It was difficult to understand why distinguised jurists who, in their personal capacity, were members of the Commission should appear in the Committee in the capacity of representatives of their Governments to reiterate what they had been proposing in the Commission. The Committee was not the place for Commission members to expound their views, because frankly it was difficult to tell whether some statements made by representatives who were also members of the Commission reflected their Governments' political position or the speaker's personal views. That confusion struck at the very foundation of the debate in the Committee, which should be a debate on a professional legal topic in a political organ, and at the very concept of the autonomy and independence of the Commission itself, subject only to the customary directives of the General Assembly. It might even be responsible for some of the diplomatic misconceptions which had recently occurred.

542. With regard to the question of documentation, it was said that the current practice concerning the Commission's documentation should remain unchanged, since the documents in question not only served the Commission but also represented a valuable source of information. The General Assembly should provide the Commission with the necessary means, in terms of staff, documentation and summary records, to discharge its important responsibilities to the international community. Support was expressed for the Commission's request that basic documentation should reach its members well in advance of its sessions.

543. Attention was drawn to the fact that the members of the Commission must make an accommodation between their professional responsibilities and the demands of a body which was in session for a quarter of each year and gave rise to duties which they took very seriously. it was thus essential that the Commission should receive the best possible services and that documents should reach its members in ample time, which necessarily involved some pressure and constraints for the Secretariat and for Special Rapporteurs.

544. It was hoped that the necessary improvements could be made with respect to the question of documentation, including the timely submission of Special Rapporteurs' reports. It was, moreover, remarked that, in fact, some of the difficulties experienced by the Commission regarding documentation also applied mutatis mutandis to Governments. It would therefore be helpful if the Commission's report could be transmitted to Member States a little earlier in the year, although the technical problems involved were readily apparent. In that regard, even with good planning and teamwork, problems were bound to arise for Special Rapporteurs and the Secretariat services concerned at both Geneva and New York, particularly in respect of meeting deadlines for the editing, translation and reproduction of reports and documents in general.

545. In introducing the report of the Commission to the Sixth Committee, the Chairman of the Commission drew attention to the need to broaden the research and studies undertaken by the Codification Division of the Office of Legal Affairs, to the view that senior experts should be added to the staff of the Codification Division to that end, and to the need to maintain the Division's strength and continuity. He said that the Commission appreciated the assistance provided to it by the Codification Division and knew that the Secretary-General would assist with respect to additional personnel whenever it was proven necessary. He was aware that a situation existed that might be a threat to the Commission's efficiency, owing to the presence of a freak wind. If that wind was not taken into account, it might develop into a hurricane. That situation was relatively new, and it was to be hoped that the members of the Sixth Committee, who had always supported the Commission when it made representations regarding the strengthening of the Codification Division with a view to improving the Commission's efficiency, would be alert at all times to any situation that threatened, owing to action from any quarter, to undermine the efficiency of the Commission or of any of its officers, or any member of the staff of the Codification Division on the smooth working relationship between that Division and the Commission.

546. Support was generally expressed for a further expansion and intensification of the research work and studies undertaken by the Codification Division of the Office of Legal Affairs. It was noted that the Commission's work, like that of the United Nations Commission on International Trade Law, was in part dependent on the quality of support it received from the members of the Secretariat. The great achievements of the past reflected in no small measure the excellence of the career international civil servants of the Office of Legal Affairs in general and the Codification Division in particular. Whatever strengthened their ability to carry out their research and other work for the Commission also enhanced the capacity of the United Nations to fulfil the goals of Article 13, paragraph 1 (a), of the Charter. Certain representatives supported the suggestion made in the Planning

Group that senior experts, preferably at the Principal Officer level, should be added to the staff of the Codification Division with a view to assisting Special Rapporteurs in the form of research and studies, analysis and assistance in compiling and classifying relevant State practice, doctrine and judicial decisions.

547. In that regard, it was noted by one representative that Special Rapporteurs benefited in their research and the preparation of their reports not only from the assistance of the Codification Division, but also from assistance from their own countries. However, if the logic of the recent increase in the membership of the Commission was to be followed through and the principle of the geographical distribution of Special Rapporteurs was to be maintained, a Special Rapporteur should feel able to accept appointment without having to provide all his own research assistance. That consideration justified the request for a modest increase in the staffing of the Codification Division. On the other hand, it was just as important that the reports of Special Rapporteurs should be their own, and that factor limited the extent of help which could be provided by the Secretariat (compilations, analytical studies), which could assist only within the context established by the Special Rapporteur himself as his work progressed. Moreover, in most cases the work carried out by research officers in the Codification Division should not be for the benefit of the Special Rapporteur alone but also for other members of the Commission and of the Sixth Committee by providing them with an independent source of reference to help them form their own opinions about the solutions offered by the Special Rapporteur and, if need be, to propound alternative solutions.

548. Reference was also made to paragraph 309 of the Commission's report regarding the assistance provided by the Secretariat to the Commission and its Special Rapporteurs.

2. Co-operation with other bodies

549. Representatives welcomed the maintenance and strengthening of the links of co-operation between the International Law Commission and other bodies active in the field of international law, namely, the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Arab Commission for International Law. Co-operation with such bodies could, it was said, greatly contribute to the work of the Commission and provide an impetus to the codification and development of international law. Such contacts were mutually beneficial as a means of exchanging information on regional perspectives, thus acquainting the Commission with the priorities and matters of particular legal concern in different regions. Representatives reaffirmed their wish that the Commission continue to enhance its co-operation with intergovernmental legal bodies whose work is of interest for the progressive development of international law and its codification.

3. Gilberto Amado Memorial Lecture

550. It was noted with satisfaction that the Gilberto Amado Memorial Lecture had again taken place, providing the International Law Commission another opportunity

both to enrich its experience and to honour the memory of one of its illustrious members. The hope was expressed that the commemoration of the eminent Brazilian jurist would be continued.

4. International Law Seminar

551. Representatives welcomed the holding of the nineteenth session of the International Law Seminar, organized during the thirty-fifth session of the International Law Commission, which had provided an occasion for learning and a source of inspiration for lawyers and junior government officials from developing countries. Appreciation was extended to those Governments and institutions which had made fellowships available to participants from developing countries. It was hoped that the organizers would consider increasing substantially the number of participants.

552. In order to ensure the continuance and growth of the Seminar, and in particular to enable the award of a sizeable number of fellowships to developing countries, support was voiced for the appeal of the Commission that as many States as possible should make contributions for travel and living expenses. The Chairman of the Commission appealed to the smaller States, particularly the developing countries, in connection with the question of funding the International Law Seminar. It was not, he said, too late to make a substantial contribution, and it was understandable that some States would contemplate doing so at the appropriate time. However, for developing countries, budgetary constraints and priorities could indefinitely postpone or even defeat the objective of making such contributions. With that in mind, the representatives of the developing countries might consider urging their Governments to make token contributions on a regular basis. Over a period of years, such contributions would represent a considerable sum that could otherwise not be contributed.

553. Representatives expressed their wish that seminars continue to be held in conjunction with sessions of the International Law Commission and that an increasing number of participants from developing countries will be given the opportunity to attend those seminars.

Notes

1/ Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10).

2/ Ibid., Thirty-eighth Session, Sixth Committee, 34th, 36th to 50th, 54th and 70th meetings.

3/ Ibid., 43rd, 49th to 54th and 70th meetings.

4/ Materials on Jurisdictional Immunities of States and their Property, United Nations Legislative Series (ST/LEG/SER.B/20), (United Nations publication, Sales No. E/F.81.V.10).

Notes (continued)

5/ Article 6 was provisionally adopted at the thirty-second session of the International Law Commission. It was further discussed by the Commission at its thirty-fourth session and still gave rise to divergent views. The Drafting Committee also re-examined draft article 6 as provisionally adopted. While no new formulation of the article was proposed by the Drafting Committee at the thirty-fourth session, the Commission agreed to re-examine draft article 6 at its subsequent session. Owing to lack of time, however, the Drafting Committee was not in a position to consider the question during the thirty-fifth session.
